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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, 4th Floor Denver, Colorado 80203	
Original Proceeding Pursuant to Art. V, § 44.5 of the Colorado Constitution	
In re Colorado Independent Congressional Redistricting Commission	▲COURT USE ONLY▲
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COLORADO INDEPENDENT CONGRESSIONAL REDISTRICTING COMMISSION'S REPLY BRIEF IN SUPPORT OF APPROVAL OF FINAL CONGRESSIONAL REDISTRICTING PLAN

CERTIFICATE OF COMPLIANCE

I certify that this reply brief complies with the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Additionally, I certify that this brief complies with the applicable word limit in C.A.R. 28(g) because it contains 5,696 words.

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

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I. The Commission's process was transparent, resulting in an extensive record in support of the Final Plan.

According to some parties, the Commission's work was rushed and lacked transparency, the record is insufficient, and the Court should not defer to the Commission. *E.g.*, Democratic Congressional Campaign Comm. ("DCCC") Br. 8-12; Colorado Latino Leadership, Advocacy & Research Organization ("CLLARO") Br. 11-15. Other parties—even those who object to portions of the Final Plan—disagree, citing significant record evidence for portions of the Final Plan they support. *E.g.*, Fair Lines Colo. ("Fair Lines") Br. 22-29 (supporting districts 1-6 and 8), 48-51 (supporting district 8 as a "minority influence district"); Multi-Ethnic Coal. and Hispanic Churches ("Multi-Ethnic Coal.") Br. 16-17 ("[S]ubstantial public outreach of the Commission provided the public with the opportunity to influence its final product ....").

The Commission's work was transparent and complied with open meetings and records obligations. Out of 155 hours of meetings (not including hundreds more hours of subcommittee meetings and hearings), the Commission spent less than 10 hours in executive

session. *See* https://tinyurl.com/2ya6yd4f (meeting summaries). This was to "receiv[e] legal advice from legal counsel." *Id.* (e.g., 9/17/21 Meeting Summary). Some parties claim the Commission should not have received confidential advice on sensitive federal and state-law questions. *E.g.*, CLLARO Br. 13 n.9; League of United Latin American Citizens ("LULAC") Br. 1, 6. That is not a valid argument against the Final Plan. The Commission could enter executive session "for the purpose of receiving legal advice on specific legal questions." C.R.S. § 24-6-402(3)(a)(II). No person or group, of the thousands who appeared before the Commission, has alleged the Commission violated the Open Meetings Law.

It would set dangerous precedent to fault the Commission for receiving legal advice. This year illustrates the danger. Some parties urged the Commission to adopt positions on minority vote dilution that require extensive consideration of race in drawing districts. They did so without disclosing the constitutional risk these positions pose. Remarkably, many still fail to mention the Equal Protection Clause in

their briefs. *E.g.*, CLLARO Br.; Common Cause Br.; LULAC Br.[1] Redistricting is legally nuanced. Neither this Commission, nor any future Commission, could do its job without "candid and open discussion" with its attorneys in a confidential setting. *In re 2015-2016 Jefferson Cnty. Grand Jury*, 2018 CO 9, ¶ 23 (citation omitted).

Objections to the Commission's record are also misplaced. Summaries and recordings of meetings and hearings are publicly available. https://tinyurl.com/2ya6yd4f (summaries); https://tinyurl.com/3vzrjwe7 (audio archive). Documents considered at Commission and subcommittee meetings are also available. https://tinyurl.com/3phz8hat (Box page). The record before the Commission included over 5,000 written comments, 170 proposed maps, and 19 plans or amendments drawn by Staff—all publicly available. Final Plan at 2-3. The parties, even those who object to the Final Plan, rely on this record, citing or attaching transcripts or public comments. *E.g.*, Common Cause Br. 28-37; Eagle County Br. App. B; Fair Lines Br.

[1] One party, to its credit, acknowledges that drawing district lines based on race is "constitutionally suspect" under the Equal Protection Clause and "subject to strict scrutiny." Fair Lines Br. at 45.

App. 1; All On The Line Br. Ex. 1; Natividad Br. 13-15; DCCC Br. 8-11; LULAC Br. 5-6, 19 n.6, 43-44.

As explained by a number of parties, the Final Plan must be reviewed in light of this "entire record" and overturned only if unsupported after a "search [of] the record as a whole." Fair Lines Br. 23 (citing case law and Amendment Y); Douglas Cnty. Br. 22. The Court cannot credit only portions of the record that support a particular party's arguments.

Finally, some parties, including a partisan fundraising group, attack the Commission's process as "delay[ed]," "harried," and "confused." DCCC Br. 8-12. Certainly this was a challenging redistricting year. The Commission had to compress its consideration of maps drawn using final Census data from over four months to less than two, and it was determined to meet this Court's schedule for judicial review. Yet the Commission went above and beyond its obligations, holding nearly twice the number of required public hearings.

In other states with different redistricting laws, politicians can draw maps using paid consultants who hide their clients' political aims

through sanitized written reports based on computer modeling. Amendment Y adopts a different vision for Colorado. "Redistricting is fundamentally a human endeavor, and there are many important considerations that are difficult or impossible to fully incorporate into a computer-generated ensemble." Opening Br., Addendum 5 at 2. Building consensus among diverse viewpoints—as Amendment Y requires—is complex and, admittedly, messy.

Parties who object to the Commission's process because they support a different map, including for partisan reasons, ignore the achievement of this redistricting cycle. Twelve Coloradans, after months of work, transparently debated a range of viable plans and agreed 11-to-1 to adopt one. For the first time, Colorado's congressional map is the product of deliberation and compromise by a diverse group of ordinary voters, not partisan politics or litigation.

II. The Final Plan complies with Section 2 of the Voting Rights Act.

For a map to unlawfully dilute a minority group's influence under Section 2 of the VRA, three preconditions must exist: (1) a "minority group" numerous enough to form a majority "in some reasonably

configured legislative district"; (2) "political cohesive[ness]" of that group; and (3) a majority that "vote[s] sufficiently as a bloc to usually defeat the minority's preferred candidate." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017). Only when those preconditions are met, ***and*** the "totality of the circumstances" shows dilution of a minority group's influence, must a state create a district to prevent dilution. *Id*.

When the Commission's Non-Partisan Staff released the Preliminary Plan on June 23, they advised the Commission and the public that—based upon Staff's analysis—it was not possible to draw a district that complied with all three VRA thresholds. *See* Preliminary Plan Memo at 3-4, tinyurl.com/4c6k499m. No commenter ever suggested that conclusion was incorrect, and the Commission, naturally, heeded Staff's advice.

Three parties raise VRA-related objections, but they are meritless. Common Cause faults the Commission for not overruling the recommendation of Non-Partisan Staff and "hir[ing] an outside expert to conduct analyses" of various aspects of the VRA. Common Cause Br. 14-16. But given that Common Cause does not ultimately claim Staff's

VRA analysis was wrong, this was unnecessary. All On The Line and Mr. Thiebaut, meanwhile, claim the Commission should have disregarded the first VRA prerequisite. All On The Line Br. 15-16; Thiebaut Br. 6-7. But the Supreme Court rejected that very argument in *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 442-46 (2006), and *Bartlett v. Strickland*, 556 U.S. 1 (2009).[2]

III. The Final Plan complies with Section 44.3(4)(b) of Amendment Y.

When Coloradans voted overwhelmingly for Amendment Y, they wanted to ensure that, even if Congress or the Supreme Court weakened or eliminated Section 2 of the VRA, the protections embodied in that landmark legislation would still apply in Colorado. There is no indication from Amendment Y's text or any other source the voters wanted Colorado to become a federal-court test case for the constitutionality of maximally race-focused districting. Some parties argue for just that, suggesting the Court must adopt an interpretation of Amendment Y that has no parallel in any other state and presents

[2] The Commission refers to Justice Kennedy's controlling opinions in *LULAC* and *Bartlett*, as *LULAC* and *Bartlett*.

grave constitutional risk. But while they urge the Court to adopt a maximally race-focused interpretation of Section 44.3(4)(b), they disagree which approach this Court should adopt and which of the plan's districts—if any—violate Section 44.3(4)(b).

The Court should reject this interpretation for three reasons. First, the Commission's understanding of Section 44.3(4)(b) was correct. Second, the maximally race-focused approach creates severe risk of triggering the Equal Protection Clause, and no party urging this approach claims it would or could satisfy strict scrutiny. Third, the Commission's final plan complies with Section 44.3(4)(b) regardless of whether this Court adopts the Commission's understanding of that section or the approach from *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002).

A. The Commission's interpretation follows from Section 44.3(4)(b)'s text and the people's understanding of it.

Section 44.3(4)(b) codifies into state law the VRA's protection against diluting the influence of minority groups' votes, as those concepts were understood in 2018. Opening Br. 42. Section 44.3(4)(b)

draws its text from Section 2 of the VRA, as well as Supreme Court VRA jurisprudence on "vote dilution" of minority voter "influence." *LULAC*, 548 U.S. at 442-46. The Blue Book similarly sent voters the clear message that Section 44.3(4)(b) borrowed Section 2's protections, explaining that "Amendment Y ***incorporates*** principles of the Voting Rights Act ***into state law***." Opening Br. 44-46 (quoting Colo. Legislative Council, Research Pub. No. 702-2, *2018 State Ballot Information Booklet* ("Blue Book") at 9 (emphasis added)).

The Commission's interpretation does not render Section 44.3(4)(b) "superfluous" or redundant. *Contra* CLLARO Br. 26; LULAC Br. 12-16; All On The Line Br.at 21-22; Fair Lines Br. 39. The Blue Book explained that Section 44.3(4)(b) serves a crucial purpose: to ***preserve*** current VRA protections as a matter of judicially enforceable state law, regardless of whether federal law changes in the future. Opening Br. 44-46 (quoting Blue Book at 9).

Nothing in the text of Section 44.3(4)(b) requires the Commission to focus its redistricting decisions on race beyond how the Supreme Court's Section 2 case law understood the redistricting terms-of-art

"vote dilution" and minority voter "influence." *Contra* CLLARO Br. 26; LULAC Br. 12-16; Common Cause Br. 11; All On The Line Br. 15-22; Fair Lines Br. 41-43. When voters approved Amendment Y, the Supreme Court had explained when it was possible for a map to "dilute" minority voters' votes by reducing electoral "influence": when the group is large enough, compact enough, and politically cohesive enough to elect candidates of its choice, but the map's districts permit a majority to "usually" defeat such candidates. *See Bartlett*, 556 U.S. at 9 (Kennedy, J.). In *LULAC* and then again in *Bartlett*, the Supreme Court considered adopting a broader understanding of "dilution" of minority electoral "influence," but refused, because that "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 at 445-46 (Kennedy, J.); *accord Bartlett*, 556 U.S. at 11. Colorado voters would have looked to the Supreme Court's controlling opinions to understand "dilution" of minority "influence." *See Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1255-56 (Colo. 2012) (presuming voters are aware of the meaning of terms of art in Supreme Court opinions).

B. Adopting the approach urged by some parties would create serious equal protection risk.

Some parties ask this Court to conclude that over 70% of Colorado voters wanted the Commission to engage in an intensively race-focused redistricting process, used nowhere else in the country, that would put any map the Commission adopted, Section 44.3(4)(b), and perhaps even Amendment Y in grave constitutional doubt.

Voters are "presumed to know the existing law at the time" they approve a constitutional amendment. *Common Sense All. v. Davidson*, 995 P.2d 748, 754 (Colo. 2000). The existing law when the people adopted Amendment Y was that equal protection demanded strict scrutiny when racial considerations predominate over traditional redistricting criteria. *Cooper*, 137 S. Ct. at 1463-64. Colorado courts sent voters this same message. When evaluating maps in the last round of redistricting, the Denver District Court rejected a map "drawn primarily for the purpose of creating Hispanic influence districts." *Moreno v. Gessler*, Nos. 11CV3461 & 11CV3463, 2011 WL 8614878, at *25 (Colo. Dist. Ct. (Denver Cnty.) Nov. 10, 2011). This Court affirmed. *Hall v. Moreno*, 2012 CO 14, ¶¶ 25-29. The map in *Hall* targeted 30%

Hispanic representation in three districts—not unlike what some parties urge here—which the district court observed would be "constitutionally suspect" and subject to strict scrutiny. *Moreno*, 2011 WL 8614878, at *25.

The parties offer divergent approaches to Section 44.3(4)(b). Aside, perhaps, from Fair Lines' approach, each maximally focuses on and subordinates traditional redistricting criteria to race. This creates severe risk of an equal protection violation. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995).

For example, CLLARO argues that Section 44.3(4)(b) prohibits the Commission from drawing maps that fail to include as many districts as possible in which minorities can "effectively influence ... the election returns ***and*** … secure the attention of the winning candidate." CLLARO Br. 24, 28-29 (emphasis added). Focusing on Districts 3 and 8, CLLARO relies on complex social science, party affiliation, and voter turnout metrics, and says the Commission cannot adopt certain districts unless the minority-preferred candidate would have won ***every election over the last decade***. CLLARO Br. 31-48; *see id.* at 53

("Using CLLARO's map, the Latino-preferred candidate was never defeated, an improvement over the Commission's proposed district (in which the candidate was defeated twice)."). This race-forward approach pulls small sections of Jefferson County and Boulder into District 8 and arbitrarily splits the Western Slope in District 3 in order to meet racial targets. Drawing maps in this way subordinates many other districting criteria to race.

LULAC, in turn, says Section 44.3(4)(b) requires crossover districts whenever possible, although Section 44.3(4)(b) does not mention the term "crossover district." LULAC Br. 18-19 & n.5. LULAC then argues Section 44.3(4)(b) requires analysis of the racial composition of each district, voting history of minority voters and white voters, and various election results of the last decade, to determine whether districts could be drawn where minority-favored candidates would win ***more elections***, while attacking Districts 3 and 8. LULAC Br. 20-35; *see id.* at 26 (faulting District 8 because there is a "significant risk" the "Latino-preferred candidates" would not win every election). LULAC pays lip service to "traditional redistricting criteria," but its

map takes a sliver out Colorado Springs and El Paso County, based solely on considerations of race. LULAC Br. 36-40.

Common Cause takes a different approach, arguing Section 44.3(4)(b) requires "influence districts," Common Cause Br. 11-13, a concept that falls outside the U.S. Supreme Court's understanding of dilution of minority voters' influence, *see LULAC*, 548 U.S. at 442-46 (2006) (Kennedy, J.). Common Cause focuses on District 1, arguing the Commission should have reconfigured the district using a race-focused examination of a single primary for statewide office in 2018. Common Cause Br. 19-25. Common Cause proposes breaking up Denver, a political subdivision that has long been recognized as a community of interest, to create what Common Cause claims is a Hispanic influence district that pulls in a few suburbs and doglegs around central Denver for race-based reasons.[3] Common Cause Br. 24-25, 27-28.

[3] Common Cause's District 1 also includes neighborhoods with other minorities, including Hmong, Native Americans, and African Americans, assuming without evidence or analysis that those groups would vote in unison with the Hispanic plurality. Common Cause Br. 28.

All On The Line struggles to articulate a coherent approach to Section 44.3(4)(b), citing a variety of divergent cases. All On The Line Br. 22-24 & nn.37-39. Having articulated no meaningful test for Section 44.3(4)(b), All On The Line trains its fire on District 8, not condemning District 1 (as did Common Cause), or District 3 (as do CLLARO and LULAC). *Id.* at 26-29. Like other parties, All On The Line disregards traditional redistricting criteria, severing Longmont from Boulder County and splitting that important political subdivision. All On The Line Br. 41-43.

Fair Lines, for its part, adopts a more restrained position, urging an approach like the one this Court adopted in its pre-*LULAC*, pre-*Bartlett*, and pre-*Cooper* decision in *Beauprez*. Fair Lines Br. 43-45; *see also* Opening Br. 50-54. Somewhat confusingly, Fair Lines admits that "[o]f course, there must be, and is, a non-racial, policy-based reason for setting these district lines." Fair Lines Br.at 45. If this means the Commission can draw districts with a significant minority population where non-racial factors lead to that result, the Commission agrees. That approach does not raise equal protection concerns. However, if

Fair Lines is suggesting that race-focused "influence districts" must be drawn to ***override*** traditional redistricting criteria, that would trigger strict scrutiny. *Miller*, 515 U.S. at 916, 919-20. Notably, Fair Lines does not argue that any of the Commission's districts violate Section 44.3(4)(b), and even endorses as "influence districts" District 8 (which All On The Line, CLLARO, and LULAC attack), District 3 (which CLLARO and LULAC attack), and District 1 (which Common Cause attacks as ***not*** an influence district). *See* Fair Lines Br. 48-51.

Each of these approaches—except, ***maybe***, Fair Lines'—is highly likely to trigger strict scrutiny under Supreme Court equal protection jurisprudence: they subordinate race-neutral criteria to racial considerations. *Miller*, 515 U.S. at 916, 919-20. These interested parties ignore the equal protection problems raised by their approach by merely gesturing to the Supreme Court's *Bartlett* decision. LULAC Br. 14; Common Cause Br. 12; All On The Line Br. 20-21; CLLARO Br. 26; Fair Lines Br.at 37. But *Bartlett* did not adjudicate an equal protection challenge to anything like the interested parties' across-the-board, race-focused redistricting mandate, because it "[did] not consider" a situation

where a state drew a "crossover district," "based on proper factors." 556 U.S. at 23 (Kennedy, J.). Yet the interested parties ignore that the Supreme Court ***did*** adjudicate an across-the-board, race-focused redistricting regime in *Cooper*. There, ***every*** Justice concluded the race-focused scheme, which mandated majority-minority districts without considering other VRA thresholds, failed strict scrutiny. 137 S. Ct. at 1468-72. Notably here, no party claims its approach to Section 44.3(4)(b) would survive strict scrutiny.

The Commission respectfully submits it would be difficult for any court, including a federal court, to conclude that district lines drawn under the race-focused approaches some parties propose would satisfy strict scrutiny. *See Miller*, 515 U.S. at 903; *see also Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 (11th Cir. 2004) ("If 10% of the voters can 'swing' an election, perhaps so can 1% or 0.1%. A single voter is the logical limit." (citation omitted)). Even these parties cannot come close to agreeing as to how Section 44.3(4)(b) should operate, or even which of the Commission's districts (if any) violate their approaches. This calls into serious question whether their approaches are narrowly

tailored. *See Miller*, 515 U.S. at 903. Put another way, even if the Supreme Court held that a state could draw a less-than-minority-majority district based predominantly on race because of the circumstances or history of that specific district—an issue that, again, *Bartlett* specifically left open, 556 U.S. at 23—it is unlikely to uphold districts drawn with the across-the-board, race-focused approach some parties propose.

The parties cannot point to ***any*** state that conducts redistricting in the manner they urge, meaning that adopting their position would make Amendment Y a test case, despite a Supreme Court that has become more searching in this area. *E.g.*, *Cooper*, 137 S. Ct. at 1468-72. While LULAC cites in a footnote some state laws that use the word "influence," LULAC Br. 16 n.4, it cites no source suggesting those States use LULAC's approach to drawing districts. The cases LULAC cites in that footnote are inapposite. *Daunt v. Benson*, 999 F.3d 299 (6th Cir. 2021) (upholding Michigan's eligibility criteria for serving as a commissioner); *Adkins v. Va. Redistricting Comm'n*, Case No. 210770 (Va. Sept. 22, 2021) (dismissing a mandamus petition); *Radogno v. Ill.*

State Bd. of Elections, No. 1:11-cv-04884, 2011 WL 5025251, at *8 (N.D. Ill. Oct. 21, 2011) (holding a state statute was not facially unconstitutional because it prohibited "elevat[ing] race to be the predominant factor in the way a district is drawn"); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 669-70, 688 (2006) (rejecting facial challenge to California Voting Rights Act, while explaining, "In reviewing a district-based remedy, it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny.").

C. The Commission's Final Plan complies with Section 44.3(4)(b) under either the Commission's reading or *Beauprez*.

As the Commission has explained, Opening Br. 22, it drew districts in a manner that undisputedly complies with equal protection, by considering "actual shared interests," such as "political, social, and economic" ties, rather than "racial considerations." *Miller*, 515 U.S. at 916, 919-20. Having said that, the map the Commission adopted proved consistent with this Court's 2002 decision on minority vote dilution, *Beauprez*, 42 P.3d at 650-51, because in the final plan: (1) the Hispanic

population increases in Districts 1, 2, 3, and 5, and stays the same in District 6; and (2) while the Hispanic population declines in Districts 4 and 5, that is because Colorado added an eighth congressional seat, and the new District 8 has a 38.5% Hispanic population, significantly higher than any Hispanic population under the prior map. Opening Br. 22, 50-54.[4]

Fair Lines agrees with the Commission that the final plan complies with the concept of minority vote dilution as articulated by this Court in *Beauprez*. Fair Lines praises the Final Plan on this front, noting the plan includes multiple "influence districts." *See* Fair Lines Br. 48-49. Fair Lines cites District 8 in particular, which it calls "the state's most significant influence district and the most competitive

[4] CLLARO claims Section 44.3(4)(b) requires de novo review, ignoring that the abuse-of-discretion standard applies to all "criteria listed in section 44.3." Colo. Const. Art V, § 44.5(2). CLLARO bases its argument on a misreading of *Beauprez*. *Beauprez* held that the Court must "ensure" federal requirements, including equal protection and the VRA, are satisfied. 42 P.3d at 651. If so, the Court then reviews state law standards, including those in the Colorado Constitution, for abuse of discretion. *Id*. Section 44.3(4)(b) is a state constitutional requirement subject to abuse-of-discretion review. Of course, the legal question of how to interpret Section 44.3(4)(b), discussed above in Part III.A and III.B, is reviewed de novo.

district in the state," creating a "dual advantage of Hispanic political empowerment and a competitive election that translates into electoral influence." *Id.* at 50. The Multi-Ethic Coalition and Hispanic Churches also support the Final Plan, noting that District 8 contains the highest percentage of Hispanic voters in a district in Colorado history, while respecting the political diversity of Colorado Hispanics: "Hispanic voters are the swing block in the swing district, making their votes essential." Multi-Ethnic Coalition Br. 10. Indeed, that the Commission's final map satisfies these interested parties' concerns with regard to Section 44.3(4)(b) shows the wisdom of the Commission's decision, consistent with U.S. Supreme Court precedent, to focus on "actual shared interests," such as "political, social, and economic" ties, rather than race-qua-race. *Miller*, 515 U.S. at 916, 919-20.

Because it is undisputed the Final Plan complies with ***both*** the Commission's understanding of Section 44.3(4)(b) ***and*** the approach to diluting minority voter influence this Court articulated in *Beauprez*, this Court could hold the Commission's plan satisfies either approach, without deciding which is required.

IV. The various conflicting objections to the Final Plan do not demonstrate the Commission abused its discretion.

Various parties object to particular aspects of the Final Plan. Those objections often conflict, illustrating that "no matter how the lines are drawn," a redistricting plan will "necessarily … disappoint[ ] [some] citizens and interest groups." *Hall*, 2012 CO 14, ¶ 16. The conflicting objections also underscore the importance of Amendment Y's abuse-of-discretion standard. There are many possible answers to policy issues raised by redistricting. The question is not whether the Commission "adopted the perfect map," and it is not for this Court or other parties to decide whether the Final Plan is "the best of the proposed submissions." *Id.* ¶ 56. It was for the twelve ordinary voters of this year's Commission—a diverse group of Coloradans from across the state and the political spectrum—to make those decisions in light of the full record.

A. The Denver Clerk and Recorder's objection.

The Denver County Clerk and Recorder ("Denver Clerk") notes that the boundary of District 1 creates a local voting precinct with only 19 voters. He asserts this small precinct potentially violates ballot

secrecy and the one person, one vote requirement. His brief, however, cites no authority for these propositions, Denver Clerk Br. 4-8, and the Commission has found none.[5]

This issue has arisen in the past in Colorado, particularly in Jefferson and Adams Counties, and local election officials have found solutions. For example, county clerks have historically addressed the ballot-secrecy concern by reporting the election results from a small-population precinct together with the election results of a larger one. Alternatively, precinct boundaries can be redrawn after a redistricting year and before the following year's election. *See* C.R.S. § 1-5-101. Counsel to the Commission consulted staff of the Colorado Secretary of State's office, who explained they will address questions like these from local officials if they arise after this Court approves final congressional and legislative redistricting plans.

[5] The Denver Clerk also argues the Commission must keep existing local voting precincts together when drawing districts. The Commission is not aware of, and the Denver Clerk does not cite, any such existing legal requirement.

B. Objections about political subdivisions and communities of interest.

Some parties object to the Commission's consideration of communities of interest and political subdivisions. Amendment Y grants the Commission discretion to identify communities of interest and determine which to prioritize or combine in a single district. It likewise grants the Commission discretion regarding whether and where to split political subdivisions. Tradeoffs are inevitable. "If the Commission satisfies the desires of one county, city or community of interest to remain whole and undivided, it often must necessarily split another county, city, or community of interest." *In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d 1237, 1265 (Colo. 2002). Unless this Court defers to the Commission in making such decisions, redistricting would once again become a product of judicial decision-making, contrary to the purpose of Amendment Y. Because record support exists for each policy choice challenged by the various parties, the Court should approve the Final Plan. Opening Br. 13 (citing cases explaining that discretionary decisions must be upheld unless no supporting evidence exists in the record).

Eagle County Split. Eagle County objects that its southwest corner is placed in District 3, while the remainder is in District 2. *See generally* Eagle Cnty. Br. 8-16. This split was necessary to keep the Roaring Fork Valley whole as a community of interest and to equalize populations in Districts 2 and 3. Opening Br., Addendum 2 at 2; Eagle Cnty. Br. at 14 (citing e-mail from Non-Partisan Staff explaining the need to equalize population in Eagle County).

Eagle County agrees the Roaring Fork Valley is a community of interest that includes portions of Eagle County (El Jebel and Basalt) and portions of Pitkin and Garfield Counties in District 3. Eagle Cnty. Br. 8-10, 13. It nonetheless disputes the Commission's need to include other parts of Eagle County in District 3 to equalize population, despite record evidence supporting that need. *Id.* at 14-15. Eagle County fails to acknowledge that Amendment Y's equal population requirement (which is also a federal constitutional requirement) is mandatory, while defining communities of interest and keeping political subdivisions together is discretionary. *Compare* Colo. Const. Art. V, § 44.3(1)(a) *with id.* § 44.3(2)(a). Additionally, in congressional redistricting, unlike in

state legislative redistricting, population must be equalized precisely. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). Eagle County disregards this distinction, citing one of this Court's state legislative redistricting decisions. Eagle Cnty. Br. 15. Eagle County also declines to offer an alternative map, arguing only that "perhaps" another plan that Eagle County prefers "would be acceptable."[6]

Jefferson County Split. Mr. Natividad challenges the split of Jefferson County. Natividad Br. 6-15. But he has not explained "why Jefferson County should be unified at the expense of many other political subdivisions and communities of interest." *Hall*, 2012 CO 14, ¶ 23. The record supports the Commission's decision to divide Jefferson County, which was done for the following reasons: (1) an unoccupied portion is placed in District 1 to maintain contiguity; (2) the community of Coal Creek, which spans Jefferson, Boulder, and Gilpin Counties, is placed in District 2 to preserve that community of interest; (3) mature suburbs in south Denver are included in District 6 with Arapahoe

[6] Eagle County also objects to splitting some neighborhoods. Eagle County Br. 10-13. These are unincorporated areas, not "political subdivisions" contemplated by Amendment Y.

County suburbs, which are shared communities of interest; and (4) the rest of Jefferson County, including mountainous areas and still-growing mature suburbs to the west of Denver, are placed in District 7 to keep various communities of interest intact. Opening Br., Addendum 1 at 17-21; *id.*, Addendum 2 at 2.

Amendment Y directed the Commission to avoid county splits "as much as is ***reasonably*** possible," but did not—and could not—require the Commission to keep every county whole. Colo. Const. Art. V, § 44.3(2)(a) (emphasis added). If the Commission chose not to split Jefferson County, it would have had to split others. Given the balance of redistricting factors, and in light of the entire record, the Commission did not abuse its discretion by dividing Jefferson County.

Including Longmont in District 2. All On The Line argues the City of Longmont should have been in District 8 instead of District 2. All On The Line Br. 34-43. But its reasons are admittedly race-based and therefore raise serious constitutional problems discussed above. *Id.* at 25-29 (favoring a plan with a different version of District 8 for race-based reasons); *id.* at 41-43. The Commission's decision to place

Longmont in District 2 was within its discretion. Nearly 99% of Longmont is in Boulder County. Final Plan, Ex. G. The Commission placed Boulder County in District 2 and strove to keep it as whole as possible.[7] This was a discretionary decision supported by the record and was therefore a permissible policy choice.

Inclusion of Fremont and Custer Counties in District 7. Fair Lines objects to the inclusion of Fremont and Custer Counties in District 7, arguing there was "no thoughtful reason" for doing so. The record, however, demonstrates shared interests between those two mountainous counties and other mountainous counties and regions of District 7. Opening Br., Addendum 1 at 18. Additionally, this objection inverts Amendment Y's community-of-interest criterion. The Commission is required to avoid ***splitting*** communities of interest unless reasonably necessary, but it is not prohibited from combining different communities in a single district. Colo. Const. Art. V, § 44.3(2)(a). Compliance with that kind of prohibition would be impossible in a state as large and "diverse" as Colorado, *Hall*, 2012 CO

[7] The exception is an unincorporated parcel containing 17 people, placed in District 7 to equalize population. Opening Br., Addendum 2.

14, ¶ 55, when each district must encompass a population of over 720,000. Fair Lines cites no authority from any other source imposing such an obligation. Fair Line Br. 31-32. Indeed, Fair Lines admits "[t]here need not be a single community of interest that runs throughout an entire district." *Id.*

Even if, contrary to the record, Fair Lines was correct that the reason for including Fremont and Custer Counties in District 7 was to equalize population, Fair Lines Br. 36, that would be a valid exercise of Commission discretion. As explained, equalizing population between districts is mandatory, while balancing communities of interest and political subdivisions is discretionary. Thus, in light of the full record, it was within the Commission's discretion to include Fremont and Custer Counties in District 7.

C. Objections about use of total population instead of citizen voting-age population.

CLLARO argues the Commission was required to use citizen voting-age population ("CVAP") to analyze compliance with Section 44.3(4)(b). CLLARO Br. 29-31. As explained above in Part III, however, CLLARO's interpretation of Section 44.3(4)(b) represents a

maximalist approach to consideration of race in redistricting, and the Commission correctly concluded the provision cannot be interpreted in that manner and must be read as consistent with the Supreme Court's jurisprudence under Section 2 of the VRA. With that understanding, CVAP is most relevant to the second and third VRA preconditions: political cohesiveness of the minority group and existence of majority bloc voting. *Cooper*, 137 S. Ct. at 1464. But because not even CLLARO claims the first requirement to establish a Section 2 violation is met, it was not an abuse of discretion for the Commission to rely on total population numbers.[8]

D. Objections about competitiveness.

The parties raise two conflicting arguments about competitiveness. The first, raised by Mr. Natividad, is that the Commission erred because District 7 is not competitive enough. Natividad Br. 15-19. But as other parties emphasize, Amendment Y instructs the Commission to "maximize the number of competitive

[8] Despite claiming use of CVAP is mandated, CLLARO's preferred version of District 3 would increase the district's CVAP by a mere ***0.2%***, from 20.6% to 20.8%. CLARRO Br. at 38, 50.

districts" only after applying other criteria. Colo. Const. Art. V, § 44.3(3)(a). It could not prioritize the competitiveness of District 7 over other criteria. In any event, District 7 is competitive. It falls within the 8.5% vote band identified in the Ensemble Analysis discussed in the opening brief. Opening Br., Addendum 5 at 8.

Other parties, including LULAC, Common Cause, CLLARO, and All On the Line, make the opposite objection, claiming the Commission over-prioritized competitiveness. The focus of these arguments is Non-Partisan Staff's political competitiveness report. This, the parties claim, shows the Commission weighted competitiveness too heavily. *See, e.g.*, CLLARO Br. 12 n.7. But Amendment Y specifically required Staff to create the report, ***after*** the Final Plan was approved. Colo. Const. Art. V, § 44.3(3)(c). The existence of that after-the-fact report does not show overemphasis on competitiveness.

While the Commission discussed competitiveness, especially when deciding between maps in its final meeting, that is what Amendment Y contemplates. Once plans meet other constitutional criteria, the Commission must maximize the number of competitive districts. *Id.*

§ 44.3(3)(a). The fact the Commission chose a map that created some competitive districts, rather than a map that created none, supports, rather than undermines, the Final Plan.

CONCLUSION

The Court should approve the final plan and order that it be filed with the Secretary of State.

Dated: October 11, 2021

Respectfully submitted,

s/ Frederick R. Yarger

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CERTIFICATE OF SERVICE

I certify that on October 11, 2021, a true and correct copy of this **COLORADO INDEPENDENT CONGRESSIONAL REDISTRICTING COMMISSION'S REPLY BRIEF IN SUPPORT OF APPROVAL OF THE FINAL CONGRESSIONAL REDISTRICTING PLAN** was filed with the Court via the Colorado Courts E-Filing System, with e-service to all parties entered in the case.

s/ Trisha Miller