DATE FILED: October 8, 2021 11:06 AM

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to Article V, Section 44.5 of the Colorado Constitution	
In Re: **Petitioner:** Colorado Independent Congressional Redistricting Commission.	▲ **COURT USE ONLY** ▲
Attorney for Interested Party–Proponent Douglas County Board of County Commissioners: Robert A. McGuire, III ROBERT MCGUIRE LAW FIRM 1624 Market Street, Suite 226 #86685 Denver, Colorado 80202-2523 Telephone: (720) 420-1395 Fax: (720) 420-1395 E-mail: ram@lawram.com Atty Reg. #: 37134	Supreme Court Case No.: 2021 SA 208

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

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g)and the Order of Court in this matter dated July 26, 2021.

> It contains **5,023** words in sections that count toward word limits under C.A.R. 28(g).

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

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

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

s/ Robert A. McGuire
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Interested Party–Proponent Douglas County Board of County Commissioners, by and through undersigned counsel, hereby submits this Statement Of Interested Party–Proponent Douglas County Board Of County Commissioners In Support Of The Colorado Independent Congressional Redistricting Commission's Final Plan, pursuant to article V, section 44.5(1) of the Colorado Constitution and pursuant to the schedule established by the first bullet point of the Order of Court in this matter dated July 26, 2021.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

Interested Party–Proponent Douglas County Board of County Commissioners wish to participate in the oral argument on this matter that is set for October 12th at 2:00 p.m., and hereby respectfully request leave to do so.

I. INTRODUCTION

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

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

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

The record before the Commission in this redistricting cycle contains significant input from the Douglas County Board and from others in Douglas County. Douglas County's input was not completely accepted by the Commission or fully implemented in the formulation of the final map, but enough of Douglas County's key concerns were fairly accommodated to warrant the Douglas County Board's support of the final plan.

On August 18, 2021, the Douglas County Board sent the Commission a letter providing input on the Commission's preliminary congressional map that was released on June 23.[1] The Douglas County Board's letter made two key

[1] Letter from Douglas County Board to Commission (Aug. 18, 2021), *available at*, https://coleg.app.box.com/s/ypsqn7f0hzna76qkr41kqegd8oa1n6gi/file/848655814978 (last visited Oct. 7, 2021).

points: First, the Town of Parker should not be split, but should be kept whole. Second, Parker should be kept in a district with all the rest of Douglas County, including Castle Rock, Castle Pines, Lone Tree, Larkspur, and the unincorporated areas of Highlands Ranch, Sterling Ranch, and Roxborough, among other unincorporated subdivisions.

To support these recommendations, the letter identified "numerous communities of interest" that were common to Douglas County, the Town of Parker, and other Douglas County municipalities and communities. Among these common communities of interest were populations sharing common transportation concerns; municipalities and communities sharing water and water policy interests; county-wide residents sharing common economic and employment connections to the Denver area; the County and municipalities sharing a common reliance on the USDA and the EPA for federal infrastructure and project funding; and all municipalities sharing a common flood district, conservation district, shared open space taxes and land purchases, a common rural urban interface, and a single school district. The letter noted that Douglas County's past pairing with Eastern Plains communities based on their perceived sharing of oil and gas interests was not valid. Thus the Douglas County Board urged the Commission to keep Parker whole and keep it with the rest of Douglas County.

Also on August 18, 2021, the Commission held a public hearing in Highlands Ranch jointly with the Colorado Independent Legislative Redistricting Commission.[2] At the Highlands Ranch meeting, all three members of the Douglas County Board—George Teal, Lora Thomas, and Abe Laydon—testified. Board member Teal discussed how Castle Rock and Parker were part of a single community of interest and should be legislatively districted together. Board member Thomas urged the Commission to keep Douglas County paired with southern Jefferson County on similar grounds. Board member Laydon urged the Commission to keep the Town of Parker whole in a congressional district and offered into the record two proposed maps that would have done so, while including Douglas County in a new Congressional District 7.[3]

In the final map approved by the Commission on September 28, 2021, the Town of Parker is not split, but is kept whole. Parker is also kept together with most of the rest of Douglas County in the same congressional district. Douglas County itself is kept whole, except for the portion of the City of Aurora that

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[2] *See* Staff Summary of Meeting, Other Committee, Committee On Joint Independent Redistricting Commissions (Aug. 18, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBdFlDIiwiZXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19--cf35357b7fcaf5da085b386ec0fa3d2b6b3a3f83/Highlands%20Ranch%2008182021.pdf (last visited Oct. 7, 2021).

[3] *See id.* at 2.

extends into Douglas County, which the final map keeps together with the rest of Aurora in a different congressional district. The non-Aurora bulk of Douglas County is made a part of Congressional District 4, which consist largely of counties in the Eastern Plains. Thus the Douglas County Board's concern about Parker being split was addressed. The concern about keeping Douglas County itself from being divided was mostly accommodated. Only the Board's preference that Douglas County not to be paired with the Eastern Plains communities on the basis of the outdated perception of a common interest in oil and gas issues was not accommodated. Despite this imperfect result, the Douglas County Board is satisfied that the final map fairly accommodates most, if not all, of Douglas County's concerns. Thus the Douglas County Board, as Interested Party–Proponent, supports the final map submitted by the Commission and urges this Court to approve that map.

II. STATEMENT OF ISSUES

A. Does the final plan comply with the substantive criteria listed in article V, section 44.3 of the Colorado Constitution?

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

III. STATEMENT OF THE CASE

The Commission's final plan must satisfy certain substantive criteria that are set out in the Colorado Constitution. Colo. Const. art. V, § 44.3. These criteria require, "among other things, that":

> the final maps represent "a good-faith effort" to achieve "population equality between districts," *id.* § 44.3(1)(a); preserve "communities of interest" as much as is reasonably possible, *id.* § 44.3(2)(a); maximize politically competitive districts, *id.* § 44.3(3)(a); not be drawn for the purpose of protecting any political party or candidate, *id.* § 44.3(4)(a); and not "dilut[e] the impact of [any] racial or language minority group's electoral influence," *id.* § 44.3(4)(b).

In re Interrogatories on Senate Bill 21-247 Submitted by the Colo. Gen. Assembly, 2021 CO 37, ¶ 14 (internal citations pertinent only to legislative redistricting omitted). The final plan submitted to this Court on October 1, 2021, represents the Commission's effort to produce a redistricting plan that satisfies these substantive criteria.

This Court is now charged with reviewing the Commission's submitted final plan to determine whether the final plan complies with the criteria. Colo. Const. art. V, § 44.5(1). Even if the Commission did not perfectly apply all the criteria, this Court still must approve the Commission's submitted final plan unless the Court finds that the Commission "abused its discretion in applying or failing to

apply the criteria, . . . in light of the record before the commission." *Id.* § 44.5(2); *see also In re Interrogatories on Senate Bill 21-247*, 2021 CO 37, ¶ 18.

IV. SUMMARY OF ARGUMENT

The final plan submitted to this Court by the Commission complies with the substantive criteria listed in article V, section 44.3, for the reasons that are set out herein. But even if this Court finds that the Commission's compliance with the criteria was imperfect, this Court still must approve the final plan because the Commission did not abuse its discretion in applying or failing to apply the criteria, in light of the record before the Commission.

V. ARGUMENT

A. Standards of Review

Three standards govern the analysis that the Court must conduct to perform its review of the Commission's final map.

1. Standard For Determining What The Criteria Listed In Article V, Section 44.3 Substantively Require

First, this Court must determine whether the Commission's final plan complies with the criteria set out in article V, section 44.3. Colo. Const. art. V, § 44.5(1). To do this, the Court must engage in statutory construction to ascertain exactly what it is that the substantive criteria actually require.

> When construing a constitutional amendment, we seek to determine and effectuate the will of the voters in adopting

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

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

2. Standard For Determining Whether The Final Plan Complies With The Criteria

Second, in evaluating whether the final plan "complies" with the criteria, the Court must compare the final plan against the criteria to ascertain whether the final plan applies or fails to apply the criteria. In the past, i.e., prior to Amendments Y and Z, this determination has entailed a "narrow" review of the plan before the Court to determine whether the plan satisfied a ranked list of constitutional criteria. *In re Reapportionment*, 332 P.3d at 110 ("Our role in this proceeding is a narrow one: we measure the Adopted Plan against the constitutional standards, according to the hierarchy of federal and state criteria we have previously identified."); *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d 1237,

1247 (Colo. 2002) ("Our role in reviewing the Commission's reapportionment action is narrow. . . . We must determine whether the Commission followed the procedures and applied the criteria of federal and Colorado law in adopting its reapportionment plan.").

In making its compliance determination, the Court in older decisions expressly required only "substantial compliance" with constitutional criteria, rather than absolute compliance. *See In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 191, 197 (Colo. 1982) (approving county splits because "the Commission substantially complied with the constitutional requirements"); *In re Interrogatories by Gen. Assembly, etc.*, 178 Colo. 311, 313, 497 P.2d 1024, 1025 (1972) ("Thus, with regard to the districting accomplished under Senate Bill No. 22, we determine that substantial compliance was achieved with the constitutional benchmarks noted above.").

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

state constitutional standards."); *In re Reapportionment*, 45 P.3d at 1255 (Bender, Mullarkey, and Martinez, JJ., dissenting) ("I would approve the Proposed Plan because it substantially complies with the state constitutional requirements . . . .")

Nevertheless, the Court's more recent reapportionment rulings have given the appearance of utilizing a "substantial compliance" standard because they recognized that a reapportionment plan's compliance with state constitutional criteria involves "policy choices" that should be deferred to "if accompanied by an articulated reasonable rationale" accompanied by "an adequate factual demonstration." *In re Reapportionment*, 45 P.3d at 1254 (providing guidance for drawing districts that comply with constitutional criteria on remand); *see also In re Reapportionment*, 332 P.3d at 112 ("The Commission shall determine how to formulate a plan that complies with article V, sections 46 and 47, in accordance with the guidance offered on remand in our 2002 opinion.").

The Court's recent preference for applying a standard for measuring compliance that appears to be "substantial compliance," even if it is not expressly described as such, is consistent with the Court's consistent recognition that redistricting commissions necessarily must have discretion to choose among lawful alternatives: "The choice among alternative plans, each consistent with

constitutional requirements, is for the Commission and not the Court." *In re Reapportionment*, 45 P.3d at 1247.

During this redistricting cycle, in the first case involving the new constitutional text, the Court contraposed the possibility of applying a "substantial compliance" standard to the Commission's compliance with non-substantive provisions of Amendments Y and Z against the express recognition that "an 'abuse of discretion' standard applies in our review as to whether the commission complied with the specified substantive criteria." *In re Interrogatories on Senate Bill 21-247*, 2021 CO 37, ¶ 54. The contraposition of the "substantial compliance" standard against the "abuse of discretion" standard suggests that the proper standard for this Court to now apply to determining whether the final plan complies with the constitutional criteria should ask only whether the Commission's application of the criteria amounted to an abuse of discretion. Thus the determination of whether the plan complies is really the same inquiry as the determination whether the Commission abused its discretion in applying or failing to apply the criteria, which is discussed next.

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

Third, the Constitution requires that the Court must approve the Commission's plan unless the Commission "abused its discretion in applying or failing to apply" the specified criteria, "in light of the record before the commission." *Id.* § 44.5(2).

As was just noted, this Court recently acknowledged that this new constitutional provision means that the Court must apply an "abuse of discretion" standard (as opposed to a "substantial compliance" or some other standard) "in our review as to whether the commission complied with the specified substantive criteria." *In re Interrogatories on Senate Bill 21-247*, 2021 CO 37, ¶ 18 (citing Colo. Const. art. V, § 44.5(2)–(3)).

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

382 (Colo. 2005); *see also Colo. Nat'l Bank v. Friedman*, 846 P.2d 159, 167 (Colo. 1993).

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

B. The Plan Should Be Approved Because The Commission's Final Plan Complies With The Substantive Criteria Of Article V, Section 44.3

The substantive criteria that the Commission must apply in adopting a congressional redistricting plan are set out in article V, section 44.3 of the Colorado Constitution. The Commission properly applied these criteria, as will be shown next. Accordingly, this Court should determine that the final plan complies with the criteria, and the Court should approve the Commission's final plan pursuant to article V, section 44.5(1) of the Colorado Constitution.

1. Section 44.3(1)(a)—Population Equality

Section 44.3(1)(a) of article V requires the Commission to:

> Make a good-faith effort to achieve precise mathematical population equality between districts, justifying each variance, no matter how small, as required by the constitution of the United States. Districts must be composed of contiguous geographic areas[.]

This constitutional provision does not require the actual achievement of precise mathematical equality between districts, but only a "good-faith effort" to obtain such equality. The Final Congressional Redistricting Plan filed with this Court by the Commission (the "Final Plan Submission") explains how the boundaries of the eight congressional districts were adjusted by the Commission with this purpose in mind, (Final Plan Submission at 5–10),[4] with the result that, "The populations of the districts in the Final Plan are as mathematically equal as possible, with a difference among districts of only one person," (Id. at 10.) The Commission's final plan plainly complies with Section 44.3(1)(a).

2. Section 44.3(1)(b)—Voting Rights Act Compliance

Section 44.3(1)(b) requires the Commission to "Comply with the federal 'Voting Rights Act of 1965', 52 U.S.C. [§ 10301 et seq.], as amended." As the

[4] Throughout this Brief, page citations to the Final Plan Submission refer to the PDF page in the 100-page PDF filed with the Court, not to the varying footer page numbers shown in document's internal pagination.

Final Plan Submission correctly explains, "there is not a sufficiently large and geographically compact voting-age minority population to create a majority-minority congressional district that complies with the other requirements of Section 2" of the Voting Rights Act. (Final Plan Submission at 10–11.) Given that there were also no comments in the record before the Commission that suggested otherwise, the Commission's final plan complies with Section 44.3(1)(b).

3. Section 44.3(2)(a)—Whole Communities of Interest

Section 44.3(2)(a) of article V requires the Commission to, "As much as is reasonably possible, . . . preserve whole communities of interest and whole political subdivisions, such as counties, cities, and towns." The introductory phrase to this particular criterion—"as much as reasonably possible"—concedes what the Commission itself notes in its Final Plan Submission, namely that, "public input described many different communities of interest around the state" and it was therefore "impossible to keep all of those communities intact." (Final Plan Submission at 11.) The impossibility of keeping all communities of interest whole and intact has been repeatedly recognized by this Court in its previous reapportionment decisions. *See, e.g.*, *In re Reapportionment*, 45 P.3d at 1254 ("We are aware that, in designing the Denver metropolitan area districts and complying with the constitutional criteria as set forth in this opinion, the Commission must

make additional adjustments and determinations that most probably will involve some county and city splits."). Given the task before it, and given that the Commission's choices are "accompanied by an articulated reasonable rationale" and by "an adequate factual demonstration," *id.*, in the Final Plan Submission at 11–12, it is clear that the Commission's final plan minimized splits as much "as is reasonably possible" and thus complies with Section 44.3(2)(a).

4. Section 44.3(2)(b)—Compactness

Section 44.3(2)(b) of article V requires the Commission to ensure that "Districts must be as compact as is reasonably possible." The Commission's report on compactness shows that the Commission employed multiple quantitative measures of compactness in its effort to satisfy this criterion. (Final Plan Submission at 93–94 (Plan Ex. H, District Compactness Report).) What is more, the final map submitted by the Commission appears reasonably compact to the human eye, and is in any event a far cry from the kinds of bizarre, inexplicable maps that gave rise to the term "gerrymandering" in the first place. (Id. at 21 (Plan Ex. A, Final Approved Plans).) Accordingly, the Commission's final plan complies with Section 44.3(2)(b).

5. Section 44.3(3)(a)—Competitive Districts

Section 44.3(3)(a) of article V requires that the Commission "Thereafter . . . shall, to the extent possible, maximize the number of politically competitive districts." The Constitution's use of the term "thereafter" connotes that political competitiveness is a criterion that is subordinated to the criteria that came before. Thus, what is "possible," in terms of maximizing competitiveness, is required to take a back seat to the considerations that have already been discussed.

The Commission's six-page report on political competitiveness shows that the Commission solicited evidence relevant to the competitiveness of elections in Colorado and ultimately decided to use actual election results, rather than party registration, for analyzing competitiveness. The Commission then determined how competitive its proposed districts would be based on actual voting in eight identified historical races. The result of this process showed that the final plan produced Congressional District 8 as a highly competitive district, and this is perhaps the best result possible given the Commission's constraint of first having to satisfy the criterion related to preserving communities of interest, which the Constitution prioritizes above competitiveness. (Final Plan Submission at 95–100 (Ex. I, Report Pursuant to Article V, Section 44.3(3)(c) Re Non-Partisan District Composition).) Based on the Commission's "adequate factual demonstration" of

the competitiveness evidence, together with the Commission's "articulated reasonable rationale" for making the choices that it did, *In re Reapportionment*, 45 P.3d at 1254, the Commission's final plan complies with Section 44.3(3)(a).

6. Section 44.3(3)(b)—Solicitation of Competitiveness Evidence

Section 44.3(3)(b) of article V requires the Commission to, "In its hearings in various locations in the state, . . . solicit evidence relevant to competitiveness of elections in Colorado and . . . assess such evidence in evaluating proposed maps." The standard for measuring competitiveness is provided in article V, section 44.3(3)(d). As explained in the previous section, the Commission solicited and assessed evidence on competitiveness, which satisfies this criterion. Thus the Commission's final plan complies with Section 44.3(3)(b).

7. Section 44.3(3)(c)—Explanation of Competitiveness

Section 44.3(3)(c) of article V requires the Commission, upon submission of a final plan, to prepare and make publicly available "a report to demonstrate how the plan reflects the evidence presented to, and the findings concerning, the extent to which competitiveness in district elections is fostered consistent with the other criteria." As explained in the previous section IV.A.5, the Commission satisfied this criterion by including the required report as Exhibit H to its Final Plan

Submission. (Final Plan Submission at 95–100.) Thus the Commission's final plan complies with Section 44.3(3)(c).

8. Section 44.3(4)(a)—No Purpose of Incumbency Protection

Section 44.3(4)(a) of article V prohibits the Commission from approving, and this Court from giving effect to, any map if the map "has been drawn for the purpose of protecting one or more incumbent members, or one or more declared candidates, of the United States house of representatives or any political party." The Commission and its non-partisan staff has affirmed that the final plan "was not drawn for the purpose of protecting any incumbent members of the House of Representatives, any declared candidates, or any political parties," (Final Plan Submission at 14–15), and there is no reason apparent from the record to believe otherwise. Thus the Commission's final plan complies with Section 44.3(4)(a), and nothing in Section 44.3(4)(a) bars this Court from approving the final plan.

9. Section 44.3(4)(b)—No Racial or Language Group Dilution

Section 44.3(4)(b) of article V likewise prohibits the Commission from approving, and this Court from giving effect to, any map if the map "has been drawn for the purpose of or results in the denial or abridgement of the right of any citizen to vote on account of that person's race or membership in a language minority group, including diluting the impact of that racial or language minority

group's electoral influence." Again, the Commission has stated that the final plan was not drawn for this prohibited purpose and does not have the prohibited result, and there is no reason apparent from the record to believe otherwise. Thus the Commission's final plan complies with Section 44.3(4)(b), and nothing in Section 44.3(4)(b) bars this Court from approving the final plan.

10. The Plan Should Be Approved Because It Complies With The Substantive Criteria Of Article V, Section 44.3

Article V, section 44.5(1) provides that this Court must review the submitted plan "and determine whether the plan complies with the criteria listed in section 44.3 of this article V." The next subsection, article V, section 44.5(2), provides that "The supreme court shall approve the plan submitted unless it finds that the commission . . . abused its discretion in applying or failing to apply the criteria listed in section 44.3 of this article V, in light of the record before the commission."

For the reasons set out above, the Commission properly applied all the constitutional criteria that it was required to apply in the course of performing its task of devising a redistricting plan. If the Court agrees, as it should, then nothing further is required for the Court to do, other than to approve the final plan pursuant to article V, section 44.5(1) of the Colorado Constitution.

C. In Any Event, The Final Plan Should Be Approved Because The Commission Did Not Abuse Its Discretion In Applying Or Failing To Apply The Criteria, In Light Of The Record Before It

However, even if this Court disagrees with the foregoing arguments and concludes for some reason that the Commission improperly applied, or failed to apply, any of the substantive criteria, the Court must still "approve the plan submitted unless [the Court] finds that the commission . . . abused its discretion in applying or failing to apply the criteria . . . in light of the record before the commission." Colo. Const. art. V, § 44.5(2). Applying the "abuse of discretion" standard to the Commission's actions, this Court should not find that the Commission abused its discretion because the Commission neither committed an error of law nor applied the criteria in an arbitrary, unreasonable, or unfair manner, in light of the record before it. Accordingly, this Court should approve the Commission's final plan pursuant to article V, section 44.5(2) of the Colorado Constitution.

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

Nothing in the record suggests that the Commission erred as a matter of law in applying or failing to apply any of the constitutional criteria. The work of the Commission, as summarized in the Final Plan Submission, clearly shows that the

Commission was *aware* of all the constitutional criteria that it was required to apply pursuant to article V, section 44.3. The Commission's Final Plan Submission explains how the Commission worked in good faith to apply each of these criteria. (Final Plan Submission at 11–15.) The discussion in the previous section of this brief shows that the Commission succeeded in crafting a redistricting plan that complies with all the criteria. Thus any suggestion of legal error by the Commission is simply not sustainable. The Commission did not abuse its discretion by virtue of committing an error of law.

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

Nor does anything in the record suggest that the Commission applied or failed to apply any of the criteria in an arbitrary, unreasonable, or unfair manner. "[A]n agency action **is** arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999). A choice by the Commission can only justifiably be called "unreasonable" if there is nothing that supports that choice in the record. The Commission's otherwise lawful choices made in the course of applying any of the constitutional criteria can only be characterized as "unfair" if the Commission unduly and consistently favored some interests over others. But there is no

evidence of this in the record. As this Court has long recognized outside the context of legislative reapportionment, discretion means that any decisionmaker that "has the power to choose between two or more courses of action" that are both lawful is "not bound in all cases to select one over the other." *Friedman*, 846 P.2d at 166. As a result, "The choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the Court." *In re Reapportionment*, 45 P.3d at 1247.

The Commission's Final Plan Submission is careful to explain the choices that the Commission made in the course of working to simultaneously satisfy the several criteria set out in article V, section 44.3 to the greatest extent possible. The reasons for the Commission's choices are given, and in all cases the Final Plan Submission, and its supporting materials, makes clear that the Commission did not act in an arbitrary, unreasonable, or unfair manner. Thus the Commission did not abuse its discretion.

3. The Plan Should Be Approved Because The Commission Did Not Abuse Its Discretion

For the foregoing reasons, the Commission should not be found to have abused its discretion in applying or failing to apply the constitutional criteria set out in article V, section 44.3. Accordingly, the Court is required to approve the final plan pursuant to article V, section 44.5(2).

VI. CONCLUSION

This Court should determine that the final plan submitted by the Colorado Independent Congressional Redistricting Commission complies with the substantive criteria listed in section 44.3 of article V of the Colorado Constitution, pursuant to article V, section 44.5(1) of the Colorado Constitution. The Court should APPROVE the final plan accordingly.

In the alternative, even if this Court finds that the Commission improperly applied or failed to apply any of the substantive criteria, the Court should nonetheless find that the Commission did not abuse its discretion in applying or failing to apply the criteria, in light of the record before the Commission. The Court should therefore APPROVE the final plan of the Commission, pursuant to article V, section 44.5(2) of the Colorado Constitution for this reason, as well.

Dated this 8th day of October, 2021.

THE ROBERT MCGUIRE LAW FIRM

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

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

Attorney for Interested Party–Proponent Douglas County Board of County Commissioners

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2021, I served a true and correct copy of the foregoing, together with all exhibits and attachments referenced therein, to all counsel of record who have active appearances by ICCES.

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

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