

<p><b>SUPREME COURT OF COLORADO</b> 2 East 14<sup>th</sup> Avenue, Denver, Colorado, 80203</p>	
<p>Original Proceeding Pursuant to Article V, Section 44.5 of the Constitution of the State of Colorado</p>	
<p>In re Colorado Independent Congressional Redistricting Commission</p>	<p>▲ <b>COURT USE ONLY</b> ▲</p>
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<p><b>COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION'S RESPONSE REGARDING THE COLORADO SUPREME COURT'S ORDER DATED JULY 15, 2021</b></p>	

## I. CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 32, including all formatting requirements set forth in this rule. I certify that the brief complies with the Court's July 15, 2021 Order since it contains 2,234 words.

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

Dated: July 22, 2021

*s/ Richard C. Kaufman*

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#### **IV. ISSUES PRESENTED**

In its July 15, 2021 Order, the Court requested the Colorado Independent Legislative Redistricting Commission and others address two issues:

1. The Colorado Supreme Court's authority to modify the constitutional deadlines for submission and review of final redistricting plans; and
2. The practical impact of delaying final review of such plans on the conduct of the 2022 elections.

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## V. STATEMENT OF THE CASE

The Petition filed by the Colorado Independent Congressional Redistricting Commission (“Congressional Commission”) seeks this Court’s clarification and guidance regarding the schedule for submission of the final congressional redistricting plan to this Court. Essentially, the Congressional Commission asks this Court to adopt one of the three schedules proposed in its petition. The Congressional Commission proposes October 28, 2021<sup>1</sup> as its preferred date, but if the Court determines the commission must approve a plan by September 1, 2021, then the commission will do so by compressing its hearing schedule and draft a plan utilizing census data other than the final census data. Its final alternative is a request for the Court to set a schedule.

The COVID-19 pandemic has caused significant delays for the Congressional Commission and the Legislative Commission due to the delay in receiving final census data pursuant to 13 U.S.C. § 141(c). Normally, the census data is received on or around April 1st of the year after the decennial census.

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<sup>1</sup> This would be the last day that a Congressional Plan might be approved by the Congressional Commission, the Congressional Commission may approve a plan earlier than this if it approves a plan prior to the presentation of the Third Staff Plan.

Pursuant to that normality, both Amendments Y and Z were drafted with schedules that assume the final census data will be delivered to the states by April 1. *See* Colo. Const. Art. V, Sections 46-48.4. Section 48.2(1) requires the nonpartisan staff to create and publish the “preliminary senate plan” and “preliminary house plan” no earlier than “thirty days and no later than forty-five days after the commission has convened or the necessary census data are available whichever is later.”

The same section requires the Legislative Commission to complete public hearings on both preliminary plans “by July 21 of the redistricting year.”

*Id.* § 48.2(2).

After completion of the public hearings, the nonpartisan staff is tasked with drafting and publishing up to three house and three senate plans unless the Commission approves a plan prior to the presentation of the second or third staff plan. These are known as the “staff plans.” *Id.* § 48.2(3). The Legislative Commission may adopt and submit to the Colorado Supreme Court for review any of the plans that are prepared and published pursuant to Section 48.2(5)(a).

Amendment Z directs the Legislative Commission adopt final plans for both the house and the senate by September 15<sup>th</sup> of the redistricting year and submit those plans to this Court for review. *Id.* § 48.2(5)(b). If the Legislative

Commission does not adopt a plan for either house or for one house and not the other by that date, the nonpartisan staff is required to submit the unamended third staff plan to this Court for review. *See id.* § 48.2(6). Amendment Z only sets a deadline for adoption of final plans but does not set a deadline for submitting the final plans to this Court.

However, the drafters of Amendment Z provided an “escape hatch” when conditions beyond the control of the Legislative Commission make it impossible to meet the schedule contained in the Constitution. *See* §48.2(5)(c). That section allows the Legislative Commission to “adjust the deadlines specified in this section if conditions outside of the commission’s control require such an adjustment *to ensure adopting a final plan as required by subsection (5).*” *Id.* (emphasis added). There are two key concepts in this subsection. First, a situation or circumstances out of the Legislative Commission’s control must be present, and, second, when that is the case, the Commission is authorized to revise the constitutional schedule contained in Section 48.2. Although this is the first time this issue has arisen, it is apparent the drafters’ intent was to ensure the Commission could fulfill its substantive constitutional duties of drafting and presenting plans to this Court. The precise schedule is secondary to fulfilling that duty.

As this Court is aware, the pandemic made it impossible for the U.S. Census Bureau to complete the census and forward the data to the fifty states by April 1, 2021. That circumstance was outside of the control of the Legislative Commission. Accordingly, the Legislative Commission decided to begin their constitutional duties by amending the schedule and authorizing the nonpartisan staff to utilize available census data and data from the Colorado State Demographer to prepare the “preliminary plans.” The Legislative Commission, in tandem with the Congressional Commission, amended the schedule for public hearings on the preliminary plans. The final hearing will be August 28, 2021, instead of July 21, 2021.

The U.S. Census Bureau announced several months ago it will provide the states with “legacy” census data by August 16, 2021. This is the final census data, but it is not formatted for redistricting purposes. As late as July 14, 2021, at a redistricting conference hosted by the National Conference of State Legislatures, Mr. James Whitehorne, Chief of the Redistricting & Voting Rights Data Office – U.S. Bureau of the Census stated the Bureau is on track to provide the states with the “legacy” data by August 16, 2021.<sup>2</sup> The Bureau will not make the reformatted

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<sup>2</sup> [https://www.facebook.com/NCSLorg/videos/ncsl-town-hall-redistricting-seminar-series/353726099521283/?\\_\\_so\\_\\_=permalink&\\_\\_rv\\_\\_=related\\_videos](https://www.facebook.com/NCSLorg/videos/ncsl-town-hall-redistricting-seminar-series/353726099521283/?__so__=permalink&__rv__=related_videos) (at 6:55 minutes)

data available until the end of September 2021. Fortunately, the Colorado commissions do not need to wait until the end of September. The IT team working with the commissions will reformat the data so both commissions can begin using final census data for staff plans by the end of August 2021.

Although, the Legislative Commission has not prepared a timeline for the presentation of staff plans and the adoption of final plans, the Commission intends to follow the same or similar timeline suggested by the Congressional Commission in its Petition. *See* Congressional Commission’s July 13, 2021 Petition at 15-16.

## VI. ARGUMENT

### **A. The Legislative Commission Has the Authority To Adjust the September 15, 2021, Deadline for the Commission To Approve Redistricting Plans for the State Senate and State House of Representatives, but if it Does Not, This Court Has the Authority To Adjust That Deadline.**

Art. V, Sec. 48.2(5)(c) authorizes the Legislative Commission to “adjust the deadlines specified in this section if conditions outside of the commission’s control require such an adjustment to ensure adopting a final plan.” Section 48.2(5)(b) specifies a deadline for the Commission to approve redistricting plans for the Colorado General Assembly. The Legislative Commission believes that since Section 48.2(5)(b) is within the same section as Section 48.2(5)(c), it has the authority to adjust that date due to the delay in the receipt of the census data. If the

Court believes that the Commission lacks the authority to modify the September 15 date, the under the authority cited below concerning the Court's authority to modify the November 15 date, the Court has the authority to adjust the September 15 date as well.

**B. This Court Has the Authority to Modify the November 15, 2021 Deadline to Approve or Return Plan(s) to the Legislative Commission.**

Art. V, Section 48.3(4)(a) states “By November 15 of the redistricting year, the Supreme Court shall approve or return to the commission the submitted state senate plan and the submitted state house of representatives plan.” Section 48.3(5) goes on to set a final deadline of December 29<sup>th</sup> of the redistricting year for the Court to approve a final plan for the house and the senate. Taken together, these subsections provide a window of time between November 15<sup>th</sup> and December 29<sup>th</sup> of the redistricting year for the Court to fulfill its constitutional duties provided for in Amendment Z. Counsel for the Congressional Commission cited other state courts which have extended the redistricting deadlines in several states, including both constitutional and statutory deadlines. *See* Congressional Commission’s July 13, 2021 Petition at 23-24. Those cases focus on the preeminent importance of preserving and ensuring the constitutional process and duties may be fulfilled as provided for by the constitutions and statutes in each state.

The solemn responsibility placed upon this Court is to ensure the Legislative Commission and the Congressional Commission have submitted redistricting plans that comply with the respective constitutional provisions governing each commission. That responsibility is not tied to a specific date. In other circumstances, that may seem far removed from redistricting, this Court has allowed a “reasonable delay . . . to protect fundamental constitutional rights.” *Delacruz v. People*, 393 P.2d 480, 486 (Colo. 2017) (allowing a delay in trial beyond the circumstances allowed in speedy trial statute where necessary to protect fundamental constitutional right of defendant). Redistricting is a process established by the electorate and placed in the Colorado Constitution for the purpose of establishing for the next decade the legislative districts for those individuals who will be elected to represent the citizens of Colorado in the General Assembly and the United States House of Representatives. Ensuring that constitutional process is fulfilled should not be tied to a specific date.

The unusual, unforeseen, and uncontrollable circumstances caused by the pandemic has upset the timetable found in sections 48.2 And 48.3. While the Legislative Commission has constitutional authority to modify its deadlines, this Court has inherent authority to do so, as in *Delacruz*, to protect and ensure the constitutional redistricting process is performed and reviewed as set forth in

Amendments Y and Z. The only absolute deadline is December 29<sup>th</sup> of the redistricting year and Legislative Commission believes it can submit final plans by late October in time for this Court to review, approve, or remand the plans for additional commission action and review by this Court.

**C. This Court Will Be Able To Review and Approve Final Plans Before December 29, 2021.**

The Legislative Commission is cognizant of the compressed schedule the pandemic has caused not only for its schedule but also for this Court, the Secretary of State, and the sixty-four county clerks. The Commission has consulted with the Secretary of State and many of the county clerks. Based on those discussions, the Legislative Commission believes it can submit a Final Plan by late October 2021.<sup>3</sup> The Commission believes that this will allow the Court sufficient time to conduct a meaningful review of the plans; if necessary, return one or both plans to the Commission for resubmission of plans responding to the order of the Court; and for the Court to give final approval to plans prior to the December 29, 2021, deadline in section 48.3(5). Thus, even with adjustments of earlier dates, the Court should meet the existing deadline for final approval of redistricting plans. That

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<sup>3</sup> Again, this would be the latest date by which the plans might be submitted to the Court. If the Commission approves plans prior to the presentation of the Second or Third Staff Plans, the plans would be submitted to the court well in advance of this date.

will ensure the preparations for the 2022 election and the actual election process, including the precinct caucuses, assemblies, primary election, and general election can be held as scheduled. Therefore, there should not be an adverse impact on the 2022 elections.

Respectfully submitted this 22<sup>nd</sup> day of July, 2021.

*s/ Richard C. Kaufman*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 22nd day of July, 2021, a true and correct copy of the foregoing **COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION'S RESPONSE REGARDING THE COLORADO SUPREME COURT'S ORDER DATED JULY 15, 2021** was served via the Court Electronic Filing System, upon any counsel who appeared as counsel of record in this matter at the time of filing, including, without limitation:

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