

COLORADO SUPREME COURT

2 East 14th Avenue
Denver, Colorado 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 ▲

Case Number: 2021SA208

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**BRIEF OF INTERVENOR PAUL D. LOPEZ, CLERK AND RECORDER,
CITY AND COUNTY OF DENVER**

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 certified that:

- The brief complies with C.A.R. 28(g) and contains 2101 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/ Troy Bratton

Troy Bratton

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ISSUES PRESENTED FOR REVIEW

- 1. Whether the Plan for congressional redistricting as submitted in respect of a new precinct made of a single census block contravenes the Colorado Constitutional criteria at Article VII, Section 8, of preserving secrecy in voting?**
- 2. Whether the Plan as submitted in respect of a new precinct made of a single census block contravenes the U.S. Constitutional criteria of “one person, one vote” balance for congressional redistricting?**
- 3. Whether the Plan for congressional redistricting as submitted in respect of a new precinct made of a single census block contravenes the non-constitutional criteria of contiguity?**

I. ARGUMENT

Statement of Facts

The Hon. Paul D. Lopez, Clerk and Recorder (Clerk) for the City and County of Denver (Denver) is present before this Court in respect of a single precinct, but the Clerk anticipates the issue presented in this precinct is of a repetitive nature in this Plan for other jurisdictions across the State of Colorado and therefore requires review and decision by this Court. When overlapping the Commissions’ Congressional and Legislative boundaries using GIS software, there is an area

created that negatively impacts the Denver Elections Division's ability to create new election precincts. The Congressional district assignment of a particular census block in the City and County of Denver forces the creation of an election precinct that will consist of a single census block GEOID20:080310070131000 with an active registered voter population of nineteen (19) total voters and a total census population on that block of twenty eight (28) people. This specific precinct will create a risk of loss of anonymity when reporting the votes and is reasonably anticipated to have a possible outcome of reducing voter participation due to the potential loss of secrecy.

Attached as Exhibit A hereto and incorporated herein by reference, is a Denver Elections Division document that details the identified area of concern using a map with the description of the challenge created and the requested change showing the individual census block affected by this request. Exhibit A is based on active registered voter counts found within 2020 census block geography.

This concern generally was raised to the Commission by letter from the Clerk to the Commission dated July 26, 2021 although the 2020 Census numbers were not yet available. When the final 2020 Census numbers were applied, the new precinct made of a single census block GEOID20:080310070131000, as shown on Exhibit A, was the sole precinct that was subject to the anomaly of having only nineteen (19)

voters and the Clerk again expressed concern as to this specific issue by letter sent September 29, 2021. The response from the Commission was that the Plan had been filed with this Court and the Clerk and Recorder would need to address it in the Court because it was too late for the Commission to address the anomaly.

Argument

1. Standard of Review

The voters of the State of Colorado adopted a new redistricting process revising Article V of the Colorado Constitution in 2018 creating an independent commission charged with drawing and apportioning the new districts. Under that process, the current Congressional Map and Redistricting Plan (“Plan”) has been filed with this Court. This Court has jurisdiction over the instant matter in accordance with Section 44.5 of Article V of the Colorado Constitution. The process for the review is also set forth in Article V Section 44.5(2) and requires this Court to “approve the plan submitted unless it finds that the commission or nonpartisan staff, in the case of a staff plan submitted in the absence of a commission-approved plan, 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. The supreme court may consider any maps submitted to the commission in assessing whether the commission or nonpartisan staff, in the case of a staff plan submitted in the absence

of a commission-approved plan, abused its discretion.”

2. The Plan must meet Colorado Constitutional criteria at Article VII, Section 8, of preserving secrecy in voting.

From the earliest days of statehood, the purity of elections has been embedded in the operation of the government and those who serve in government have been continuously charged under Article VII, Section 11 as adopted on August 1, 1876 to “guard against abuses of the elective franchise.” As part of the overarching principal of protecting the fairness or “purity” of elections, Article VII, Section 8 adopts the principal of a secret ballot. As discussed in *People ex rel. Barton v. Londoner*, 13 Colo. 303, 22 P. 764, 6 L.R.A. 444 (1889). “The leading object of said section 8 was to preserve the purity of the ballot by insuring its secrecy. . . .” It has been fundamental to the conduct of elections in Colorado that secrecy of the ballot be protected in order to preserve free and fair elections. See also, *Marks v. Koch*, 284 P.3d 118 (2011) which noted in reference to balancing Article VII secrecy with protection from fraudulent voting:

Hence, we conclude that the phrase “secrecy in voting,” when read in conjunction with the clauses described above, protects from public disclosure the identity of an individual voter and any content of the voter’s ballot that could identify the voter. See *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo.2006).

In the instant matter, the identity of the voter is at risk not because of the ballot but because of the creation of a uniquely small precinct of a lone census block

numbered as GEOID20:080310070131000 as shown on Exhibit A. Pursuant to C.R.S, 1-5-101, the precinct size for counties like Denver that use electronic voting systems requires the establishment of a precinct for every 1500-2000 active eligible voters; however, counties using paper ballot systems reduce this requirement to between 600-750 voters. The standard used by Denver Elections Division is that a precinct should ideally contain between 1000 and 2000 registered voters in order to protect anonymity of the vote. When a new precinct has been forced to be created in such a fashion as to have only nineteen (19) voters and a total census count of twenty-eight (28) people in the precinct, the secrecy of the ballot is threatened. It is an abuse of discretion to have a plan that threatens this fundamental right to a secret ballot.

The Plan should be revised by moving the census block GEOID20:080310070131000 from Congressional District 6 into the surrounding Congressional District 1 and, if the Court determines it appropriate, to offset that move, to move the twenty-eight (28) registered voters on census block GEOID: 080310052003013, which has a census population of forty nine (49) from Congressional District 1 into the surrounding Congressional District 6 which would provide for the creation of precincts which permits anonymous voting and protects the secrecy of the ballots cast.

3. The Plan must meet U.S. Constitutional criteria of “one person, one vote” balance.

While the process has changed, requirements for fair and balanced election redistricting has not. As Judge Hyatt noted in *Moreno v. Gessler*, 2011 WL 8614878 (2011) “Any redrawing of district lines must meet the constitutional criteria of numerical equality of population among Colorado’s seven districts in compliance with the one person/one vote precept and must further comply with Section 2 of the federal Voting Rights Act to prevent invidious racial discrimination. C.R.S. § 2-1-201(1)(a).”

To arrive at a fair and balanced districting map, Judge Finesilver articulated a set of seven federal redistricting criteria. These criteria should still govern the adoption of a redistricting plan by satisfying the following seven requirements: (1) population equality; (2) absence of racial discrimination and non-dilution of minority votes; (3) compactness; (4) contiguity; (5) preservation of county lines; (6) preservation of municipal boundaries; and (7) preservation of communities of interest. *Carstens v. Lamm*, 543 F.Supp. 68, 75 (1982).

While addressing the sixth criteria for preservation of municipal boundaries, Judge Finesilver in *Carstens* 543 F.Supp. at 88 held:

The next category focuses on the preservation of county and municipal boundaries. These political subdivisions should remain undivided whenever possible because the sense of community derived from

established governmental units tends to foster effective representation. 53 See *Dunnell v. Austin*, 344 F.Supp. 210 (E.D.Mich.1972); *Skolnick v. State Electoral Board of Illinois*, 336 F.Supp. 839 (1971); *Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F.Supp. 731, aff'd. sub nom., *Alton v. Tawes*, 384 U.S. 315, 86 S.Ct. 1590, 16 L.Ed.2d 586 (1966). Unnecessary fragmentation of these units not only “undermines the ability of constituencies to organize effectively but also ... increases the likelihood of voter confusion regarding other elections based on political subdivision geographics.” *Quote in original.*

The priority given to population equality makes the division of some county and municipal lines unavoidable. It is less certain, however, when faced with the choice of preserving county or municipal boundaries, which of these boundaries should prevail. As a general rule, county lines are more meaningful in sparsely populated areas because the residents rely on the county government to provide all necessary services. Municipal boundaries, on the other hand, take precedence in densely populated areas. These local units of government represent logical centers of community interest for urban residents who identify more closely with municipal rather than county services. See *David v. Cahill*, 342 F.Supp. 463, 469 (D.C.N.J.1972).

In the instant matter, rather than municipal boundaries, we address the same concerns to this new precinct boundary. The Plan as proposed determines a municipal precinct boundary in a manner that creates one precinct with only nineteen (19) registered voters, an effect which impermissibly leaves that precinct artificially small and imbalanced.

The Plan should be revised by moving the census block GEOID20:080310070131000 from Congressional District 6 into the surrounding Congressional District 1 and, if the Court determines it appropriate, to offset that

move, to move the 28 registered voters on census block GEOID: 080310052003013 from Congressional District 1 into the surrounding Congressional District 6 which creates the ability of the Denver Elections Division to balance the precincts and provide for equal voting strength as between the precincts.

4. The Plan must meet the non-constitutional criteria of contiguity.

As Judge Finesilver pointed out in *Carstens*, the third and fourth criteria of fair redistricting, compactness and contiguity are often conflated.

The courts which have utilized the compactness criteria have almost always considered contiguity as well. See e.g., *Dunnell v. Austin*, 344 F.Supp. 210 (E.D.Mich.1972); *Preisler v. Secretary of State of Missouri*, 341 F.Supp. 1158 (W.D.Mo.1972). This factor specifies that “no part of one district be completely separated from any other part of the same district.” Dixon, Fair Criteria and Procedures for Establishing Legislative Districts, 9 Policy Studies Journal 839, 847 (Special Issue # 3, 1980-81) (hereinafter referred to as “Criteria and Procedures”). The universal acceptance of the need for contiguous congressional districts indicates the pragmatic character of this requirement. *Carstens v. Lamm*, 543 F.Supp. 68, 87-88.

For the purpose of the potential new precinct at issue, the Plan creates a non-contiguous overlapping of Congressional District 6 with House District 9 and Senate

District 32 which creates a unique identifiable precinct on a single census block. The Denver Elections Division cannot meet the pragmatic requirement of contiguity with the outlier census block of only nineteen (19) registered voters in the precinct unconnected to the remainder of voters assigned to Congressional District 6 with House District 9 and Senate District 32.

In order to achieve contiguity, the Plan should be revised by moving the census block GEOID20:080310070131000_ from Congressional District 6 into the surrounding Congressional District 1 and, if the Court determines it appropriate, to offset that move, to move the 28 registered voters on census block GEOID: 080310052003013 from Congressional District 1 into the surrounding Congressional District 6, which creates the ability of the Denver Elections Division align these voters into a contiguous precinct.

II. REQUEST FOR ORAL ARGUMENT

The City and County of Denver Clerk and Recorder respectfully requests to participate in oral argument.

III. CONCLUSION

In order to achieve the goals of fair elections, where voter anonymity of the ballot is protected and the goals of contiguity and balance are achieved in redistricting, the City and County of Denver respectfully requests this Court order

that the Plan places the census block GEOID20:080310070131000, from Congressional District 6 into the surrounding Congressional District 1 and, if the Court determines it appropriate, to offset that move, to move the twenty eight (28) registered voters in census block GEOID: 080310052003013 from Congressional District 1 into the surrounding Congressional District 6 and for such other and further relief as this Court deems just.

Respectfully submitted this 8th day of October, 2021.

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/s/ Troy Bratton

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF INTERVENOR PAUL D. LOPEZ, CLERK AND RECORDER, CITY AND COUNTY OF DENVER** was filed this 8th day of October, 2021, and served on all parties of record via Colorado Courts E-Filing.

/s/ Shannon Egan
Shannon Egan, Paralegal
Denver City Attorney's Office

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2021 Reprecincting - City and County of Denver – Area of Concern

- The following documents highlight the geographic area of concern related to the ability to create new precincts that are contiguous, compact, and have a balanced population that guarantees and protects voter anonymity.
 - Our “balanced population” goal is to create election precincts with a count of around 1,000 to 2,000 Active Registered Voters when possible. DATE FILED: October 8, 2021 11:54 AM
 - The issue identified in this document is a single census block, isolated by its Congressional District assignment that forces it to become its own entire precinct. This census block/precinct has an Active Registered Voter population of only nineteen (19) people, with a total population of twenty-eight (28) per the 2020 Census data.
- “Unique Districts” shown on these maps were created by overlapping the Final Approved Congressional Plan (9/29/21), Second Senate Staff Plan Final (9/23/2021), and the Second House Staff Plan Final (9/23/2021) boundaries, created by the Colorado Independent Redistricting Commissions.
- A Critical issue is one that forces precincts to be so small that legal limitations to reporting election results could come into play, due to voter anonymity being at risk.
- The first map is a citywide overview showing the area of concern, with the following map showing a detailed level of information. The detailed map includes census block level data and is labeled with the active voter count within each block. There is a description of the problem created by the current Congressional district assignments, and the requested changes that would eliminate the issue.
- District labeling is formatted as follows: “**CD6, HD9, SD 32 (2/3) – Active: 19**”, represents the overlapping of Congressional District 6, House District 9, Senate District 32, and is the second of three geographic areas with the same designation, but are not contiguous, so they require the unique identifier of “(2/3)”, and this “unique district” contains 19 active registered voters.
- There is an additional spreadsheet listing each of the individual 2020 census blocks that are contained within the areas of concern and include the problem and requested change as well.

C-1, H-9, S-32 (2/2)
Active: 27,375

C-6, H-9, S-32 (2/3)
Active: 19

C-6, H-9, S-32 (3/3)
Active: 501

C-6, H-9, S-32 (1/3)
Active: 337

C-1, H-9, S-32 (1/2)
Active: 3,510

Issue 1 - Critical: Voter anonymity at risk.

Problem: Congressional District assignment creates a census block that would have to be its own individual precinct. The active voter population in this area is too small to report safely while maintaining voter anonymity. (GEOID: 080310070131000 - 19 active registered voters, 28 total population per 2020 Census)

Request: Switch Congressional assignment to District 1. Additionally, the block highlighted in purple (GEOID20: 080310052003013 - 28 active registered voters, 48 total population per 2020 Census) could be adjusted from Congressional District 1 to 6 to achieve the smallest net change in total population for Congressional District balancing.

