

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>▲ COURT USE ONLY ▲</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>	
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<p><b>BRIEF OF <i>AMICUS CURIAE</i> DCCC IN SUPPORT OF INTERESTED PARTY</b></p>	

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

The brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3045 words.

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

*Jessica J. Smith*

Signature of attorney or party

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**Table of Contents**

IDENTITY AND INTEREST OF AMICUS CURIAE.....1

SUMMARY OF THE ARGUMENT .....1

ARGUMENT .....2

    I. Colorado has a long history of troubled redistricting.....2

    II. The newly-amended Colorado Constitution creates two new commissions to  
        resolve the State’s past redistricting troubles. ....5

    III. The 2021 congressional redistricting process was procedurally irregular and  
        infused with last-minute confusion.....8

CONCLUSION .....12

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## Table of Authorities

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re Colorado General Assembly</i> , 332 P.3d 108 (Colo. 2011).....	3, 4
<i>Hall v. Moreno</i> , 270 P.3d 961 (Colo. 2012).....	2, 4
<i>In re Interrogatories on Senate Bill 21-247</i> , 488 P.3d 1008 (Colo. 2021).....	<i>passim</i>
<i>Lucas v. Forty-Fourth General Assembly of State of Colorado</i> , 377 U.S. 713 (1964).....	3
<i>In re Reapportionment of Colo. Gen. Assembly</i> , 45 P.3d 1237 (Colo. 2002).....	4
<i>People ex rel. Salazar v. Davidson</i> , 79 P.3d 1221 (Colo. 2003).....	2, 11
<b>Other Authorities</b>	
Colo. Const. art. V, § 44.1 .....	5
Colo. Const. art. V, § 44.2(2).....	6
Colo. Const. art. V, § 44.2(3).....	6
Colo. Const. art. V, § 44.2(3)(b) .....	5
Colo. Const. art. V, § 44.2(4)(b) .....	6
Colo. Const. art. V, § 44.3(1)(a) .....	6
Colo. Const. art. V, § 44.3(1)(b) .....	6
Colo. Const. art. V, § 44.3(2)(a) .....	7

Colo. Const. art. V, § 44.3(2)(b) .....	7
Colo. Const. art. V, § 44.3(3)(a) .....	7
Colo. Const. art. V, § 44.3(3)(b) .....	7
Colo. Const. art. V, § 44.3(4)(a) .....	7
Colo. Const. art. V, § 44.3(4)(b) .....	7
Colo. Const. art. V, § 44.4(1) .....	5
Colo. Const. art. V, § 44.4(3) .....	5
Colo. Const. art. V, § 44.4(5)(a) .....	5
Colo. Const. art. V, § 44.4(5)(b) .....	8

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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

Amicus Curiae DCCC (d/b/a “Democratic Congressional Campaign Committee”) is the national congressional campaign committee of the Democratic Party, as defined by 52 U.S.C. § 30101(14). Its mission is to elect Democratic candidates to the U.S. House of Representatives from across the United States, including from Colorado’s now eight congressional districts. As a result, DCCC has an interest in ensuring that Colorado adopts a fair and constitutional 2020 congressional redistricting plan.

## **SUMMARY OF THE ARGUMENT**

“For the last several decades, Colorado’s decennial redistricting process has been a tumultuous, politically fraught, and notoriously litigious affair.” *In re Interrogatories on Senate Bill 21-247*, 488 P.3d 1008, 1010 (Colo. 2021). Unfortunately, the 2020 redistricting process was not dramatically different. On September 28, 2021, after a harried and compressed schedule of public hearings, the state’s newly constituted Independent Congressional Redistricting Commission (the “Congressional Commission”) voted 11 to 1 to approve the map now before this Court. Lest this Court mistake the 11 to 1 vote for considered consensus on the best map for the state, the Congressional Commission took this vote in the last hour of the last possible day to approve a map, and only after significant procedural

confusion in the Congressional Commission’s voting process. As a backdrop for this Court’s evaluation of the Congressional Commission’s proposed congressional plan, this brief describes the myriad procedural flaws that afflicted the Commission in the final moments leading up to the approval of that plan.

## ARGUMENT

### I. Colorado has a long history of troubled redistricting.

Colorado has a “decades-long history of protracted redistricting battles,” borne of the “depth and variety of Colorado’s local and regional interests,” *Hall v. Moreno*, 270 P.3d 961, 963, 970 (Colo. 2012), and the failure of its General Assembly and past redistricting commissions to draw maps attendant to those interests and the requirements of the Colorado and United States Constitutions.

Colorado’s original 1876 constitution granted the General Assembly the authority to draw anew the State’s congressional and legislative districts after each decennial census. *In re Interrogatories*, 488 P.3d at 1012. But for “long periods” the General Assembly simply neglected this responsibility. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1225 (Colo. 2003). The General Assembly’s inaction “meant that urban areas were systematically underrepresented, and congressional districts were grossly disproportionate.” *Id.* at 1225–26. The votes of many Coloradans were outrageously diluted as a result. It took the United States Supreme

Court's pronouncement of the one-person, one-vote principle in *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713 (1964), to remedy the widespread vote dilution that afflicted the state.

A few years after *Lucas*, Coloradans passed a ballot initiative to wrest legislative redistricting authority from the General Assembly in favor of a legislative reapportionment commission "made up of members of the legislative, executive, and judicial departments" of the state. *In re Interrogatories*, 488 P.3d at 1012 (internal citations omitted). The authority to redistrict the State's congressional districts, however, remained with the General Assembly. *Id.* This proved to be a daunting task for the General Assembly; it failed to produce a constitutional congressional plan in three of the last four redistricting cycles. *Id.* (citing *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002); *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982)).

While the General Assembly struggled to draw congressional maps, the state's legislative reapportionment commission struggled to draw constitutional ones. During both the 2000 and 2010 cycles, the commission-drafted plans were rejected by this Court for failure to comply with the State's constitutional mandates, even after three of the four maps this Court considered received near-unanimous support from the commission. *See In re Colo. Gen. Assemb.*, 332 P.3d 108, 111 (Colo. 2011);

*In re Reapportionment of Colo. Gen. Assemb.*, 45 P.3d 1237, 1241 (Colo. 2002). Thus, when the General Assembly and the commission failed to meet their duties, this Court was forced to intervene repeatedly to ensure the State’s voters could participate in the political process under constitutional and well-apportioned maps. *See, e.g., Hall*, 270 P.3d at 964; *In re Colo. Gen. Assemb.*, 332 P.3d at 111.

In the wake of this history of misstarts and missteps, the General Assembly unanimously voted in 2018 to submit two ballot initiatives to the voters. Known as Amendments Y and Z, these initiatives “propos[ed] constitutional amendments that would remove the redistricting authority from the General Assembly and the tri-branch commission and place it, instead, in the hands of the new Independent Congressional Redistricting Commission and the Independent Legislative Redistricting Commission.” *In re Interrogatories*, 488 P.3d at 1013. The General Assembly’s goal was to promote transparency in redistricting, transfer redistricting authority to the voters, and establish redistricting criteria. Legis. Council, Colo. Gen. Assembly, Rsch. Pub. No. 702-2, *2018 State Ballot Information Booklet*, 8 (2018). The Amendments sought to imbue Colorado’s redistricting process with the careful and open deliberation and orderly procedure its past attempts lacked. *See, e.g., id.* at 10.

Coloradans overwhelmingly agreed that this change was needed: Amendments Y and Z passed with over 70 percent of the vote.

**II. The newly amended Colorado Constitution creates two new commissions to resolve the State’s past redistricting troubles.**

Amendments Y and Z amended the Colorado Constitution to create two independent redistricting commissions—each comprised of twelve registered voters, at least four of whom cannot be affiliated with a political party—to draft the state’s congressional and legislative maps. COLO. CONST. art. V, § 44.1. To ensure public participation and transparency in the commissions’ map-drawing process, as well as guarantee that the chosen map is given careful thought, the Amendments set forth several procedural prerequisites to the adoption of a map.

The Congressional Commission’s first order of business, for example, is to publish a preliminary redistricting plan. *Id.* § 44.4(1). Thereafter, it must hold at least three public hearings in each of the State’s congressional districts. *Id.* § 44.2(3)(b). The Congressional Commission’s nonpartisan staff must then produce “no fewer than three” proposed congressional maps, *id.* § 44.4(3), however, the Commission may adopt a final plan any time after the presentation of the first staff plan, *id.* § 44.4(5)(a). Notably, the plan that the Commission adopts need not be a staff-drawn plan. In addition to the staff-drawn maps, the Congressional Commission must also

consider map proposals submitted by Colorado residents, including maps submitted by the Commissioners themselves. *Id.* § 44.2(3).

The Amendments also include several requirements that mandate further transparency and public participation in the redistricting process. For example, the Congressional Commission's interactions with its nonpartisan staff are subject to the state's Open Meetings Law, meaning that the Commission cannot communicate with map drawers unless that communication occurs during a public meeting or hearing. *Id.* § 44.2(4)(b). Finally, while "[a] simple majority of the appointed Commissioners may approve rules and procedural decisions," the adoption of a final redistricting plan requires the vote of at least eight Commissioners, including the vote of at least two of the Commissioners who are unaffiliated with a political party. *Id.* § 44.2(2).

Aside from promoting good governance and transparency, Amendments Y and Z bolster the state's substantive redistricting requirements. As amended, the Colorado Constitution now instructs its Congressional Commission to:

1. "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" and to draw districts "of contiguous geographic areas." *Id.* § 44.3(1)(a).
2. Comply with the federal "Voting Rights Act of 1965." *Id.* § 44.3(1)(b).

3. “As much as is reasonably possible, the [C]ommission’s plan must preserve whole communities of interest and whole political subdivisions, such as counties, cities, and towns.” *Id.* § 44.3(2)(a). And “[d]istricts must be as compact as is reasonably possible.” *Id.* § 44.3(2)(b).
4. “Thereafter, the [C]ommission shall, to the extent possible, maximize the number of politically competitive districts,” *id.* § 44.3(3)(a), and “[i]n its hearings in various locations in the state, the [C]ommission shall solicit evidence relevant to competitiveness of elections in Colorado and shall assess such evidence in evaluating proposed maps,” *id.* § 44.3(3)(b).

Finally, the Colorado Constitution bars the Congressional Commission from adopting a map if “[i]t has been drawn for the purpose of protecting one or more incumbent members,” *id.* § 44.3(4)(a), or if “[i]t has been drawn for the purpose of or results in the denial or abridgment 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,” *id.* § 44.3(4)(b).

All plans approved by the Congressional Commission must be submitted to this Court for a determination of “whether the plan complies with the criteria set out in” the amended Constitution. *In re Interrogatories*, 488 P.3d at 1015. The Court must then either approve the plan by November 1 or, upon a finding that the plan is defective, send the plan back to the Commission, which must then resolve any

defects within twelve days. *Id.* By December 15, however, the Court must approve some plan and “order that the plan be filed with the Secretary of State.” *Id.*

### **III. The 2021 congressional redistricting process was procedurally irregular and infused with last-minute confusion.**

With this history as prologue, the members of the state’s 2020 Congressional Commission were charged with not only passing a map but doing so deliberately and transparently. They got off to a rocky start.

Under the Colorado Constitution, the Congressional Commission was expected to submit a final proposal by September 1, 2021. *Id.* § 44.4(5)(b). But because of delays in the federal census caused by the COVID-19 pandemic, apportionment data that the Congressional Commission was supposed to receive on December 31, 2020 were not released until April 26, 2021, and the more-detailed population data the Commission needed to redistrict was not reported until August 12, 2021. Pursuant to its discretion, the Congressional Commission revised its schedule to give it more time to draw a map, delaying the deadline to approve a final plan to September 28, 2021, and delaying the deadline to transmit that plan to this Court to October 1, 2021. *See* Press Release, Colo. Indep. Redistricting Comm’n, Colo. Indep. Redistricting Comm’n Adopts Updated Timeline (Aug. 2, 2021), <https://us17.campaign-archive.com/?u=93dc7990963ed622141e6aa51&id=73152b4e9e>.

The Congressional Commission’s compressed schedule set off a harried effort by the Commission to fulfill its constitutional obligations. During the month of September, the Commission drew and considered fourteen separate redistricting plans, all while appearing at multiple public hearings across the state to consider additional issues raised by Colorado voters regarding the composition of congressional districts. As the Commissioners met on Tuesday, September 28, 2021—the last possible day to approve a map pursuant to an already revised schedule—they were under substantial pressure to select one of the plans before them by midnight. The Congressional Commission’s down-to-the-wire approval of the plan now before this Court was the end result of irregular, *ad hoc* procedures the Commission adopted mid-process amid the Commissioners’ clear recognition of their looming deadline that forced a final decision.

Ahead of the final hearing, the Congressional Commission agreed to a process by which each Commissioner would email a private ballot to a member of the Commission staff. Each Commissioner’s ballot was to identify a first-choice plan as well as three alternative plans that the Commissioner would consider supporting. Sept. 28, 2021, Commission Hearing (“Hearing”) at 0:44.<sup>1</sup> After all votes were in, a

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<sup>1</sup> The Commission’s September 28, 2021 hearing can be found here: <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210401/154/12372>

Congressional Commission staff member would read the votes aloud, at which point each Commissioner's vote would become public. But when the Congressional Commission failed to coalesce around a single map after three rounds of voting, this agreed-upon procedure was thrown out the window. Further changes to the Congressional Commission's procedure came rapidly and roughly thereafter.

By the fourth round of voting, the Congressional Commission was no longer voting on alternative maps. *Id.* at 4:04. By the sixth, it threw out ballots altogether, and instead started voting by email, after the Congressional Commission's lawyer altered the voting procedure. *Id.* at 6:04. Originally, the Commissioners agreed to discuss map proposals between rounds of voting. After the sixth round of voting, the Commission dispensed with discussion completely, *id.* at 6:19, and then adopted roll call voting on a specific map, rather than continue with the preference voting system it had used before, *id.* at 6:21.

Approaching midnight—the Congressional Commission's deadline to pass a map—the confusion these rapid procedural changes wrought was clear. Leading up to what became the Congressional Commission's final vote, two Commissioners expressed confusion as to what they were actually voting on. *See id.* at 6:22 (“What are we voting on?”); *id.* at 6:33 (“Is this a vote either for or against Coleman staff

plan 3?”).<sup>2</sup> Moments afterward, the Congressional Commission voted in favor of the map now before this Court.

Aside from procedural confusion, as the night wore on Commissioners expressed deep concern about approving a map before midnight. During the hearing, one Commissioner offered that “if we had another month . . . we could have used it and had the time to” come up with a better map. *Id.* at 4:02. And Commissioners made plain their belief that they had no choice but to pass some map that evening, stating “we all have a desire to vote a map in rather than have it default” so as to “put[] a map forward and fulfill[] [the Commission’s] charge.” *Id.* at 5:30, 5:32. In discussions leading up to the final vote, one Commissioner noted that the Congressional Commission had “only . . . eight minutes” left to adopt a map. *Id.* at 6:21. The final map was approved with just five minutes to spare, at 11:55 p.m.

In short, if Amendments Y and Z were meant to bring reliability and confidence to the State’s “checkered history” of congressional redistricting, *Salazar*, 79 P.3d at 1225, the final selection of the 2020 congressional map fell short of the mark. Rather than reflect reasoned and deliberate decision making, the Congressional Commission’s 11–1 vote reflects instead a confused process under

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<sup>2</sup> The “Coleman staff plan 3” is another name for the final approved plan before this Court.

which Commissioners were unsure of their ability to debate and discuss the merits of competing maps and uncertain as to the very maps upon which they were voting. Combined with the Congressional Commission's principal goal of adhering to its midnight deadline, these factors leave irreducible doubt as to whether the map now before this Court reflects the Commission's view of the best map for the state of Colorado.

### **CONCLUSION**

Based on the foregoing procedural background, this Court should rigorously review the Congressional Commission's proposed plan and carefully consider the various alternative configurations advanced by other amici that, with the benefit of thorough and thoughtful analysis unmarred by procedural shortcuts and confusion, better adhere to constitutional principles.

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## CERTIFICATE OF SERVICE

I certify that on October 8, 2021, I served a copy of the foregoing brief upon the following parties through the Colorado courts' e-filing system:

Independent Congressional Redistricting Commission

/s/ Wendy McCann

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