

<p>SUPREME COURT, STATE OF COLORADO</p> <p>101 W. Colfax Ave., Suite 800 Denver, Colorado 80202</p>	
<p>Original Proceeding Pursuant to the Rules for Reapportionment Commission Proceedings</p>	
<p>IN RE REAPPORTIONMENT OF THE COLORADO GENERAL ASSEMBLY</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>STATEMENT OF OPPOSITION TO COLORADO REAPPORTIONMENT COMMISSION'S FINAL PLAN FOR HOUSE AND SENATE DISTRICTS</p>	

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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). It contains **6,447** words in sections that count toward word limits under C.A.R. 28(g).

The brief complies with C.A.R. 28(k). Because this is an original proceeding under the Rules for Reapportionment Commission Proceedings as set forth in Chapter 34 of the Colorado Court Rules adopted by this Court on June 2, 2011, rather than an appeal, the requirements of C.A.R. 28(k) do not apply to this brief .

By:



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CONCERNING AMENDMENT NO. 9, LEGISLATIVE COUNCIL OF THE
COLORADO GENERAL ASSEMBLY, AN ANALYSIS OF 1974 BALLOT
PROPOSALS, RESEARCH PUBLICATION NO. 206 (1974)19

Opposers Elbert County Board of Commissioners, El Paso County Clerk & Recorder Wayne Williams, El Paso County Treasurer Bob Balink, El Paso County Commissioner Sallie Clark, Yuma County Commissioner Trent Bushner, Bill Jerke, Al Kolwicz, Marty Neilson, Dick R. Murphy, Valarie Murphy and Jim Paine, by and through undersigned counsel, Robert A. McGuire, Attorney at Law, LLC, hereby submit this Statement of Opposition to Colorado Reapportionment Commission's Final Plan for House and Senate Districts pursuant to Rule 4 of the Rules for Reapportionment Commission Proceedings as set forth in Chapter 34 of the Colorado Court Rules adopted by this Court on June 2, 2011, and pursuant to paragraph number 2 of the Order of Court in this matter dated October 3, 2011.

I. STATEMENT OF ISSUES

A. Do the Colorado Reapportionment Commission's final adopted House and Senate maps violate Article V, Section 47(2) of the Colorado Constitution by unnecessarily splitting Elbert and Boulder Counties, respectively, in forming districts?

B. Does the Colorado Reapportionment Commission's final adopted House map violate Article V, Section 47(2) of the Colorado Constitution by failing to minimize the number of house districts within El Paso County that contain territory of the City of Colorado Springs?

C. Does the Colorado Reapportionment Commission’s final adopted Senate map violate Article V, Section 47(2) of the Colorado Constitution by failing to maximize the number of senate districts drawn wholly within the City of Colorado Springs?

II. STATEMENT OF THE CASE

Pursuant to Colorado Constitution, Article V, Section 48, the Colorado Reapportionment Commission (the “Commission”) has submitted its finalized plan for reapportionment of the State into legislative districts, *see* COLORADO REAPPORTIONMENT COMM’N, FINAL PLAN DIST. S. & H.R. (Oct. 3, 2011) (the “Adopted Plan”), to this Court for review and approval. The Adopted Plan is subject to this Court’s review for compliance with federal law and with Sections 46 and 47 of Article V of the Colorado Constitution.

Opposer the Elbert County Board of County Commissioners is the three-person elected governing body of Elbert County. Opposer Wayne Williams is El Paso County’s Clerk & Recorder, a resident of Colorado Springs and a Colorado taxpayer. Opposer Sallie Clark is a County Commissioner in District 3 of El Paso County, a resident of Colorado Springs and a Colorado taxpayer. Opposer Bob Balink is El Paso County’s current Treasurer and former Clerk & Recorder (2003-2010), a resident of Colorado Springs and a Colorado taxpayer. Opposer Trent

Bushner is a Yuma County Commissioner and a Colorado taxpayer. Opposer Bill Jerke is a former Weld County Commissioner, a resident of Weld County and a Colorado taxpayer. Opposers Al Kolwicz, Marty Neilson, Dick R. Murphy and Valarie Murphy are residents of Boulder County and are Colorado taxpayers. Opposer Jim Paine is a resident of Boulder County and the Town of Superior and is a Colorado taxpayer.

This statement of opposition is presented by the foregoing Opposers pursuant to the Colorado Appellate Rules, the Rules for Reapportionment Commission Proceedings as set forth in Chapter 34 of the Colorado Court Rules adopted by this Court on June 2, 2011, and paragraph number 2 of the Order of Court in this matter dated October 3, 2011.

III. ARGUMENT

The Adopted Plan contains final maps that split Elbert County in the House, Boulder County in the Senate and the City of Colorado Springs in both the House and the Senate. The Commission had before it two less drastic alternative maps that kept Elbert and Boulder Counties whole in the House and Senate, respectively, while also reducing the number of house and senate districts within El Paso County containing territory of the City of Colorado Springs in both the House and Senate. Despite the existence of these less drastic alternatives, the Commission chose to

split these counties and the City of Colorado Springs anyway. Moreover, the Commission did so without including any kind of factual showing in its final submission to this Court illustrating either that these two county splits were necessary to achieve equal population or that there were as few city splits of Colorado Springs as possible. The Adopted Plan is thus unconstitutional.

A. Standard of review and constitutional requirements

The Colorado Constitution requires this Court to review the finalized reapportionment plan submitted by the Colorado Reapportionment Commission to determine the plan's compliance with Article V, Sections 46 and 47. *See* COLO. CONST. art. V, § 48(e). This Court's role in conducting such review and determination is "narrow." *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d 1237, 1247 (Colo. 2002) (hereafter *In re Reapportionment 2002-I*). The Court does not redraw the map for the Commission, but merely measures the adopted plan against the constitutional standards to "determine whether the Commission followed the procedures and applied the criteria of federal and Colorado law in adopting its reapportionment plan for Colorado General Assembly house and senate districts." *Id.*

In order of priority of their application, from most to least important, the federal and state criteria against which this Court measures the Commission's adopted plan for house and senate districts are as follows:

- (1) the Fourteenth Amendment Equal Protection Clause and the Fifteenth Amendment;
- (2) section 2 of the Voting Rights Act;
- (3) article V, section 46 (equality of population of districts in each house);
- (4) article V, section 47(2) (districts not to cross county lines except to meet section 46 requirements and the number of cities and towns contained in more than one district minimized);
- (5) article V, section 47(1) (each district to be as compact as possible and to consist of contiguous whole general election precincts); and
- (6) article V, section 47(3) (preservation of communities of interest within a district).

Id. (citing *In re Reapportionment of the Colo. Gen. Assembly*, 828 P.2d 185, 190 (Colo. 1992)). This set of criteria has been recognized and applied by this Court as a ranked hierarchy of requirements to use in measuring the adequacy of a reapportionment plan for almost thirty years. *See In re Reapportionment of the Colo. Gen. Assembly*, 647 P.2d 191, 200 n.1 (Colo. 1982) (hereafter *In re Reapportionment 1982-I*) (Lohr, J., concurring in part and dissenting in part); *In re*

Reapportionment of the Colo. Gen. Assembly, 647 P.2d 209, 210 (Colo. 1982) (hereafter *In re Reapportionment 1982-II*).

The third criterion in this hierarchy is the equal-population requirement of Article V, Section 46, which provides that, “in no event shall there be more than five percent deviation from the most populous to the least populous district in each house.” Colo. Const., art. V, § 46 (emphasis added). “The five percent deviation test means that the sum of the percent by which the largest district’s population exceeds that of the ideal district and the percent by which the smallest district population falls short of the population of the ideal district must be less than five percent.” *In re Reapportionment 1982-I*, 647 P.2d at 193 n.4. The equal population requirement is the paramount constraint directly imposed by the Colorado Constitution on the process of legislative reapportionment. This Court has interpreted the five-percent tolerance imposed by Section 46 as allowing the most populous district of one house to have more than 102.5% of the population of an ideal district to the same extent that the least populous district in that same house has more than 97.5% of the ideal district. *See In re Reapportionment 1992-I*, 828 P.2d at 190 n.5 (Colo. 1992).

At issue in this Statement of Opposition is the next criterion in the hierarchy, which involves the twin requirements, first, that districts not cross county lines

except to meet equal-population requirements and, second, that the number of cities and towns whose territory is contained in more than one district within multidistrict counties must be minimized. Ensuring compliance with both of these requirements during the reapportionment process is the most important purpose of Section 47. *See id.* at 1248 (“The most important concern under section 47 is whether the Final Plan unnecessarily divides counties or cities within counties.”). These requirements reflect a state constitutional concern with maximizing the integrity of counties and cities within legislative districts – in both the House and Senate alike – that is second only to the Colorado Constitution’s highest imperative of ensuring effectively equal population for all districts in each house.

B. The Commission’s final adopted House and Senate maps violate Article V, Section 47(2) of the Colorado Constitution by unnecessarily splitting Elbert and Boulder Counties, respectively, in forming districts

Maintaining the integrity of counties and cities in forming legislative districts is “the most important concern under section 47” of Article V of the Colorado Constitution. *See In re Reapportionment 2002-I*, 45 P.3d at 1248. The Adopted Plan violates this requirement by unnecessarily splitting Elbert County in the House and Boulder County in the Senate.

The Commission’s attentiveness to county boundaries is not optional. Colorado Constitution Article V, Section 47(2) provides that, “Except when necessary to meet the equal population requirements of Section 46, no part of one county shall be added to all or part of another county in forming districts.” COLO. CONST., art. V, § 47(2) (emphasis added). In other words, “The constitution allows the Commission to divide a county only if necessary to meet the equal population requirement.” *In re Reapportionment 2002-I*, 45 P.3d at 1248 (emphasis in original).

A division is “necessary” if there exists no alternative without the division that satisfies the requirements of Section 46. *See In re Reapportionment 2002-I*, 45 P.3d at 1249 (“The ‘if necessary’ exception of Section 47(2) permits the Commission to add a portion of a county to another county or portion of another county to form a district upon ‘an adequate factual showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution.’”) An alternative is properly considered less drastic if it illustrates “how these counties can be divided in a constitutionally preferred manner” – i.e., with fewer county splits – relative to the county divisions that were made in the Commission’s submitted plan. *Id.* at 1252.

To protect against the creation of “unnecessary county divisions,” this Court thus requires the Commission to justify the necessity of each county division in its final adopted plan by making, along with its submission to this Court, “an adequate factual showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution.” *Id.* at 1249 (internal quotation marks omitted). Alternatives that are relevant to this Court’s review of the Commission’s adopted plan are those alternatives “that the Commission had before it.” *Id.* at 1250.

Where such alternative plans demonstrate “the availability of less drastic alternatives to the Adopted Plan in regard to county divisions,” they bear directly on this Court’s determination of the constitutionality of the Commission’s final adopted plan. *Id.* at 1252; *see also id.* (“That the Final Plan – yet to be established – can more certainly conform to the constitutional criteria than the Adopted Plan is demonstrated by the Rodriguez 5 senate alternative and the Wells 37 senate alternative.”).

Where a less drastic alternative to the Commission’s adopted plan in regard to county divisions is before the Commission and the Commission nonetheless fails to include with its submission an “adequate factual showing that less drastic

alternatives could not have satisfied the equal population requirement of the Colorado Constitution,” the Adopted Plan is unconstitutional. *Id.* at 1241, 1246.

1. The Adopted Plan unnecessarily splits Elbert County to form House District 65

The Commission did not respect county boundaries of Elbert County when it finalized its reapportionment plan in the House.

a. The Adopted Plan adds part of Elbert County to all or part of another county in forming District 65 in the House

The Adopted Plan creates House District 64 in the southeastern corner of Colorado with a population of 75,463 by combining nine whole counties (Baca, Bent, Cheyenne, Crowley, Kiowa, Kit Carson Lincoln, Otero, Prowers) with parts of two counties (Las Animas and Elbert). *See* COLORADO REAPPORTIONMENT COMM’N, HOUSE FINAL PLAN, FINAL PLAN DIST. S. & H.R. bind.2, at 1, 5, 41 (October 3, 2011)

<http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CGA-ReDistrict%2FCBONLayout&cid=1251599804133&pagename=CBONWrapper> (hereafter H. FINAL PLAN). Elbert County’s population placed in this district totals 10,566 people, or 45.77% of the total county population. (*Id.* at 40.)

The Adopted Plan also creates House District 65 in the northeastern corner of Colorado with a population of 75,556 by combining five whole counties (Logan, Phillips, Sedgwick, Washington and Yuma) with parts of three counties (Adams, Arapahoe and Elbert). (H. FINAL PLAN at 1, 5, 41.) Elbert County’s population placed in this district totals 12,520 people, or 54.23% of the total county population. (Id. at 41.)

The Commission’s treatment of Elbert County is ultimately the result of its decision to deny Weld County its full entitlement, by population, to three house districts drawn entirely within Weld County. When part of Weld County was pushed out into Morgan County to form House District 63 in the Adopted Plan, the Counties in the northeastern corner of the State, including Yuma County, were required to take population from Adams and Arapahoe Counties and approximately half of Elbert County to complete a full house district. The result is a nominally Plains-oriented House District 65 whose heavy metro-area population will dilute the influence of rural voters such as those in Yuma County.

As one of the two counties that are split between House Districts 64 and 65 under the Adopted Plan, Elbert County is an example of “part of one county” being “added to all or part of another county in forming districts.” COLO. CONST. art. V, § 47(2). Crossing county lines to form districts in this manner is only

constitutionally permissible “when necessary to meet the equal population requirements of section 46.” *Id.* (emphasis added).

b. An Alternative House Plan (Final Plan House 002v2) reveals the availability of a less drastic county division alternative

An alternative plan was before the Commission that did not split Elbert County. *See* COLORADO REAPPORTIONMENT COMM’N, FINAL PLAN HOUSE 002V2 (Sept. 15, 2011) <<http://www.colorado.gov/cs/Satellite/CGA-ReDistrict/CBON/1251599364628>> (the “Alternative House Plan”). The Alternative House Plan, consisting of maps and associated data, was placed before the Commission on September 19, 2011. (Mem. Supp. Adopted Plan, Ex. 11, Tab N at 5 (summ. mtg. 09/19/2011).) The smallest district in this Alternative House Plan is 2.47% below the ideal house district population, while the largest district in the Alternative House Plan is 2.49% above the ideal house district population, for a total deviation of only 4.96%, (Alt. H. Plan at 39/66), which satisfies the constitutional equal-population requirement, *see* COLO. CONST. art. V, § 46.

The Alternative House Plan not only keeps Elbert County whole in Alternative House District 64, but it does so without creating any compensating county splits elsewhere on the alternative map as a ripple effect. *Compare* Alt. H. Plan at 1, 15, 38 *with* H. FINAL PLAN at 1, 7, 40-41.

c. The Commission has failed to show that the Adopted Plan's split of Elbert County was necessary in view of the less drastic alternative that was available

The Commission provides no explanation whatsoever for why it chose a map that splits Elbert County over a less drastic alternative that was before the Commission and which did not split Elbert County at all. Indeed, in its Memorandum in Support of Adopted Plan, the Commission only mentions Elbert County twice in the context of describing the Adopted Plan's map of the House:

House District 64 includes the whole counties of Lincoln, Kit Carson, Cheyenne, Kiowa, Crowley, Bent, Prowers, and Baca and the portion of Las Animas County not in House District 47; its population is completed with a portion of Elbert County.

(Mem. Supp. Adopted Plan at 20 (emphasis added).)

House District 65 remains an agricultural district, as requested in public hearings. It comprises the whole counties of Sedgwick, Logan, Phillips, Washington, and Yuma, the rural portions of Adams and Arapahoe Counties and the portion of Elbert County not in House District 64.

(Mem. Supp. Adopted Plan at 24 (emphasis added).)

These statements are purely descriptive, not explanatory, and as such they certainly cannot be read to satisfy the Commission's obligation to "make an adequate factual demonstration that less drastic alternatives could not have

satisfied the equal population requirement of the Colorado Constitution.” *In re Reapportionment 2002-I*, 45 P.3d. at 1252.

Because the Commission has failed to make any showing, much less an adequate one, explaining why its split of Elbert County was necessary despite the availability of a less drastic alternative that does not split Elbert County at all while still satisfying the equal population requirement of Article V, Section 46, the Adopted Plan violates Article V, Section 47(2) of the Colorado Constitution.

2. The Adopted Plan unnecessarily splits Boulder County to form Senate District 16

The Commission did not respect county boundaries of Boulder County when it finalized its reapportionment plan in the Senate.

a. The Adopted Plan adds part of Boulder County to all or part of another county in forming District 16 in the Senate

The Adopted Plan creates Senate Districts 17 and 18 entirely within Boulder County, but also adds 13,305 Boulder County residents (including the entire Town of Superior) to Senate District 16, which is drawn to include population from Clear Creek, Gilpin and Jefferson Counties as well. Boulder County thus joins Elbert County as another case in which the Commission has added “part of one county... to all or part of another county in forming districts,” which is only constitutionally

permissible “when necessary to meet the equal population requirements of section 46.” COLO. CONST. art. V, § 47(2) (emphasis added).

b. An Alternative Senate Plan (Final Plan Senate 001v2) reveals the availability of a less drastic county division alternative

An alternative plan was before the Commission that did not split Boulder County. *See* COLORADO REAPPORTIONMENT COMM’N, FINAL PLAN SENATE 001v2, at 6 (Sept. 15, 2011) <<http://www.colorado.gov/cs/Satellite/CGA-ReDistrict/CBON/1251599364628>> (the “Alternative Senate Plan”). The Alternative Senate Plan, consisting of maps and associated data, was placed before the Commission on September 19, 2011. (Mem. Supp. Adopted Plan, Ex. 11, Tab N at 1-3 (summ. mtg. 09/19/2011).)

The Alternative Senate Plan recognizes that Boulder County, with a population of 294,567, can be divided into two senate districts, one having a population of 147,284 and a deviation from the ideal senate-district population of +2.500505%, and the other having a population of 147,283 and a deviation from the ideal of +2.499809%. When the deviation of the larger of these two alternative Boulder-based senate districts is combined with the -2.490761% bottom-end deviation from ideal of Senate District 3 (the smallest senate district in both the Adopted and the Alternative Senate Plan), *see* COLORADO REAPPORTIONMENT

COMM’N, SENATE FINAL PLAN, FINAL PLAN DIST. S. & H.R. bind.1, at 17 (October 3, 2011) <<http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CGA-ReDistrict%2FCBONLayout&cid=1251599804133&pagename=CBONWrapper>> (hereafter S. FINAL PLAN), the total deviation between the largest and smallest senate districts under the Alternative Senate Plan is 4.991266%, which is within the maximum allowable range of 5% and thus permissible under the constitutional equal-population requirement, *see* COLO. CONST. art. V, § 46.

The Alternative Senate Plan is a less drastic alternative to the Adopted Plan’s map for the Senate for at least two reasons. First, by keeping Boulder County whole with two (and only two) senate districts, a county split is eliminated for Boulder County itself. Second, as the Alternative Senate Map clearly shows, keeping Boulder County whole not only avoids a county split in Boulder County, but also has the further beneficial effect of facilitating the removal of unnecessary county splits in Denver and Arapahoe Counties, as well. (Alt. S. Plan at 6, 10, 12.) And the Alternative Senate Plan accomplishes all of this without creating any new county splits anywhere else on the map as a ripple effect. *Compare* Alt. S. Plan at 1, 6 *with* S. FINAL PLAN at 1, 12, 14.

- c. **The Commission has failed to show that the Adopted Plan’s split of Boulder County was necessary in view of the less drastic alternative that was available**

The Commission devotes four brief sentences to explaining why it split Boulder County to create Senate District 16.

The population of Jefferson County is 3.72% of the ideal senate district. The Commission drew three districts wholly within Jefferson County: Senate Districts 19, 20 and 22. When the excess population of Jefferson County was added to the populations of Clear Creek and Gilpin Counties, there was still not enough population to form a senate district. Therefore, the Commission added population from Boulder County, including the town of Superior and the portion of Coal Creek Canyon in Boulder County to complete Senate District 16.

(Mem. Supp. Adopted Plan at 19.)

While this sparse discussion does offer a reason why the Commission chose to split part of Boulder County off into a third senate district, it says nothing about why the Commission chose the Adopted Plan over the less drastic alternative that the Commission had before it in the form of the Alternative Senate Plan. Because the Commission has made no showing that the Alternative Senate Plan fails to satisfy the equal population requirement of Article V, Section 46, and because the Alternative Senate Plan is a less drastic alternative to the Commission's split of Boulder County, the Commission has failed to show that its split of Boulder County was necessary, and the Adopted Plan therefore violates Article V, Section 47(2) of the Colorado Constitution.

C. The Commission’s final adopted House map violates Article V, Section 47(2) of the Colorado Constitution by failing to minimize the number of house districts within El Paso County that contain territory of the City of Colorado Springs

Maintaining the integrity of cities and towns in forming legislative districts within multidistrict counties stands alongside maintaining the integrity of counties themselves as “the most important concern under section 47” of Article V of the Colorado Constitution. *See In re Reapportionment 2002-I*, 45 P.3d at 1248 (“The most important concern under section 47 is whether the Final Plan unnecessarily divides counties or cities within counties.”) (emphasis added).

Colorado Constitution Article V, Section 47(2) provides that, “Within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible.” COLO. CONST., art. V, § 47(2).

While this language may appear on its face to restrict only the number of total cities or towns that are split within a multidistrict county, rather than the number of total times that any particular city or town is split within a multidistrict county, the Opposers respectfully urge this Court that legislative intent and this Court’s precedents both favor an interpretation of Section 47(2) that requires the

Commission to minimize the total number of city splits, not simply the total number of split cities, within multidistrict counties. Such an interpretation is most faithful to the arguments that the People of Colorado had before them when they adopted today's Section 47, and Opposers respectfully request this Court to apply such an interpretation to the Adopted Plan now.

The 1974 Legislative Council Analysis of Amendment 9, which created today's Article V, Section 47, argued that the amendment would “discourage the splitting of cities and towns between districts.” *See* CONCERNING AMENDMENT NO. 9, LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, AN ANALYSIS OF 1974 BALLOT PROPOSALS, RESEARCH PUBLICATION NO. 206 (1974) at 27 ¶ 4 (the “Blue Book”). The Blue Book's arguments in favor of the constitutional amendment specifically referred to the “more stringent requirements ... for minimization of the splitting of cities and towns” as an important feature of the proposed constitutional amendment that “would tend to reduce the gerrymandering of legislative districts.” *Id.* at 29-30.

These purposes, which informed the voters' choice to pass Amendment 9, are very poorly served by any understanding of Section 47(2) that treats the single division of a city or a town into two necessary districts as constitutionally

equivalent to a wholesale dismemberment of that same city or town into the maximum number of districts that the containing county's population will support.

This Court has permitted cities to be dissected within multidistrict counties before, but the only stated basis for doing so has been deference to a showing of necessity by the Commission. *See In re Reapportionment 1992-I*, 828 P.2d at 196-97 (upholding the division of Westminster based on necessity); *see also In re Reapportionment 1992-I*, 647 P.2d 191, 197 (upholding the divisions of Westminster and Denver without elaborating why).

In 1992, this Court approved the division of the City of Westminster into seven house districts on grounds of necessity, despite Westminster's only being populous enough to require division into two districts. *See In re Reapportionment 1992-I*, 828 P.2d at 202.

Two separately written partial dissents questioned the necessity of such an egregious division of Westminster, particularly in view of the language of Section 47(2) pertaining to the division of cities and towns:

Arguably, the language of article V, § 47(2), applies specifically only to the situation where a county must be split and directs the Commission in that situation to ensure that no cities are split in the process of dividing the county. Considered more broadly, however, this constitutional criterion expresses a general intent to maintain the integrity of cities and towns and should be

read to disfavor dividing cities and towns under any circumstances except where necessary to satisfy criteria that are assigned greater constitutional significance.

In re Reapportionment 1992-I, 828 P.2d at 202 n.4 (Lohr, J., concurring in part and dissenting in part and dissenting here from the Court’s approval of the Commission’s division of Westminster into 7 house districts) (emphasis added); And, “If the number of ‘split cities’ within a ‘split county’ is to be minimized, it is axiomatic that a city within a ‘split county’ must not be unnecessarily split among different districts.” *Id.* at 207 (Quinn, J., concurring in part and dissenting in part and dissenting here from the Court’s approval of the Commission’s “dismemberment” of Westminster).

Acknowledging that “the question is close,” the majority acceded to the seven-way splitting of Westminster as the inevitable consequence of a necessity created by “the Commission’s choices of where to begin drawing house districts.” *Id.* at 197. As the majority also noted, “Although not absolutely dispositive, we deem it significant that the Westminster objectors have failed to come forward with a concrete alternative plan for house districts in Westminster.” *In re Reapportionment 1992-I*, 828 P.2d at 197.

For several reasons, the dismemberment of Westminster that this Court allowed to occur twenty years ago need not be understood as precedent that

prevents this Court from prohibiting such gerrymandering today. First, in 2002, this Court rejected the necessity rationale for county divisions altogether where the alleged “necessity” was nothing more than a byproduct of the Commission’s discretionary choice of cartographic starting points for the reapportionment process. *See In re Reapportionment 2002-I*, 45 P.3d at 1251. Rather than allow the Commission’s discretion to indirectly trump the requirements of the Colorado Constitution, this Court instead prescribed a methodology for the Commission to employ that involved “the Commission taking an overview of Colorado’s population by county, then generating a map that respects the state’s legal preference for county integrity, then applying the minimization of city divisions [and other criteria] to add portions of counties to other counties in forming districts, when necessary.” *Id.* (emphasis added). By rejecting the primacy of “necessity” artificially created by the Commission in the exercise of discretion in the context of county divisions, this Court at the same time discarded the entire necessity rationale that had justified the City of Westminster’s dismemberment in 1992.

Second, this Court has continued to note how Section 47 requires the Commission to “keep[] divisions of cities and towns between districts to a minimum.” *In re Reapportionment 2002-I*, 45 P.3d at 1249. This Court’s

observations that the constitutional preference for avoiding city splits stems from the same considerations that prohibit unnecessary county splits now properly command the attention of the Commission. As this Court stated in 2002, “Counties and the cities within their boundaries are already established as communities of interest in their own right, with a functioning legal and physical local government identity on behalf of citizens that is ongoing.” *Id.* at 1248 (emphasis added).

Third, where this Court has upheld city splits within multidistrict counties, it has increasingly made clear that the Commission must produce the same kind of adequate factual showing of necessity that is required for county splits. *See In re Reapportionment of the Colo. Gen. Assembly*, 46 P.3d 1083, 1089-90 (Colo. 2002) (hereafter *In re Reapportionment 2002-II*) (accepting the Commission’s factual showing of necessity with respect to a 3-way split of the City of Boulder into house districts); *see also In re Reapportionment 2002-I*, 45 P.3d at 1252-1253 (“It is apparent from the alternative plans that less drastic alternatives exist that would keep the cities intact, as illustrated by the Rodriguez 5 and Rodriguez 6 senate alternatives and the Commission’s Preliminary Plan it took to public hearing.”) (emphasis added); *see also id.* at 1254 (“When necessary to meet equal population requirements, the Commission may make county and city divisions.”) (emphasis

added). Each of these developments suggests that it is entirely appropriate, and would be consistent with past decisions, for this Court to require the Commission to take the same care in splitting cities that it must use in splitting counties.

The cities-and-towns provision of Section 47(2) should not be read as a “Piranha Rule” that bizarrely and incongruously exposes cities and towns to a reapportionment feeding frenzy – and possibly total dismemberment – whenever blood is first drawn by as few as one necessary division. Opposers respectfully request this Court to foreclose this and future Commissions from operating on the basis of such an interpretation by affirming now that the cities-and-towns language in Article V, Section 47(2) means that the total number of legislative districts within a multidistrict county that contain territory of the same city or town must be kept as small as possible.

As the following sections explain, the Adopted Plan’s unnecessary division of the City of Colorado Springs into an excessive number of house districts stems from the Commission’s reading of the cities-and-towns provision of Section 47(2) as just such a “Piranha Rule.” The Adopted Plan thus urgently invites this Court’s clarification that this constitutional provision – consistent with the 1974 legislative intent to reduce the gerrymandering of legislative district – instead requires the Commission not only to minimize the number of total cities that are split in

multidistrict counties, but also to minimize the number of total splits made to each city within such counties.

1. The Adopted Plan splits the City of Colorado Springs into eight districts in the House

The ideal house district has a population of 77,372. (H. FINAL PLAN 28-29.) With a Census population of 416,427, the City of Colorado Springs “qualifies” for 5.38 house districts.¹ (Id. at 47.) Despite the City’s qualification by population for five full house seats and a remainder of 0.38 house seats, the Adopted Plan splits Colorado Springs into eight house districts that are contained wholly within El Paso County: House Districts 14, 15, 16, 17, 18, 19, 20 and 21. (Id.) The City of Colorado Springs has thus been parceled out into every single house district that the Commission formed within El Paso County. (Id. at 22.) Only three of these districts are fully contained within the outer boundary of the City’s municipal limits. The rest of the City is split between five seats that extend beyond the municipal limits of the City itself. Surrounding communities and municipalities may be expected to be disadvantaged by this arrangement.

¹ The number of ideal house districts the City of Colorado Springs is entitled to is determined by dividing its total population (416,427), H. FINAL PLAN 47, by the ideal house district size (77,372), *id.* at 28-29, to produce a result of 5.38 ideal districts.

2. The Alternative House Plan (Final Plan House 002v2) reveals the availability of a less drastic alternative that only splits Colorado Springs into six house districts

The Alternative House Plan, *see supra* § III.B.1.b, only divides Colorado Springs into six house districts that are contained wholly within El Paso County: House Districts 14, 15, 16, 18, 19 and 21. Each of these house districts is within the maximum allowable deviation of 5% from the ideal house district population and thus permissible under the constitutional equal-population requirement. *See* COLO. CONST. art. V, § 46. Moreover, there are no ripple effects outside of El Paso County as a result of the Alternative House Plan’s consolidation of the City of Colorado Springs into fewer house districts. On the contrary, this consolidation is likely to be beneficial to surrounding cities, towns and communities that might have a better chance under this less drastic alternative to achieve legislative representation in the House that is relatively freer from domination by the influence of Colorado Springs.

3. The Commission has failed to show that the Adopted Plan’s split of the City of Colorado Springs into eight house districts was necessary in view of the less drastic alternative that was available

The phrase, “Colorado Springs,” does not even appear in the Commission’s Memorandum in Support of Adopted Plan. (*See generally* Mem. Supp. Adopted

Plan.) The Commission failed to make any showing whatsoever, much less an adequate factual showing, that the Alternative House Plan is not a less drastic alternative to the Adopted Plan that satisfies equal population requirements. If the Opposers are correct that Colorado Constitution Article V, Section 47(2) requires the total number of legislative districts within a multidistrict county that contain territory of the same city or town to be kept as small as possible, then the Adopted Plan's splitting of the City of Colorado Springs into more districts than the Alternative House Plan shows to be necessary violates Article V, Section 47(2) of the Colorado Constitution.

D. The Commission's final adopted Senate map violates Article V, Section 47(2) of the Colorado Constitution by failing to maximize the number of senate districts drawn wholly within the City of Colorado Springs

This Court's (and the Colorado Constitution's) command that the Colorado Reapportionment Commission must give each county its full allotment of legislative districts drawn wholly within county boundaries should be expressly extended to require the Commission also to draw the maximum number of whole legislative districts fully within the boundaries of cities and towns. As this Court noted in 2002, "Counties and the cities within their boundaries are already established as communities of interest in their own right, with a functioning legal

and physical local government identity on behalf of citizens that is ongoing.” *In re Reapportionment 2002-I*, 45 P.3d at 1248 (emphasis added). Just as the preservation of communities of interest embodied as counties is served by maximizing the number of single county districts, so too is the constitutional interest that is safeguarded by Article V, Section 47(2), furthered by maximizing the number of single-city districts. The Commission’s treatment of the City of Colorado Springs in the Senate affords this Court an opportunity to direct the Commission to take a more constitutionally favorable approach to the drawing of districts within cities and towns.

1. The Adopted Plan splits the City of Colorado Springs into four districts in the Senate, none of which are wholly contained within the City itself

The Adopted Plan splits the City of Colorado Springs into Senate Districts 9, 10, 11 and 12, all of which are wholly within El Paso County. (S. FINAL PLAN 3-4.) But, significantly, none of these senate districts is fully contained within the outer boundary of the City’s municipal limits. As in the Adopted Plan’s map for the House, *see generally* H. FINAL PLAN, surrounding communities and municipalities are likely to be disadvantaged by this arrangement.

2. The Alternative Senate Plan (Final Plan Senate 001v2) reveals the availability of a less drastic alternative that

includes two senate districts drawn entirely within the City of Colorado Springs

The Alternative Senate Plan, *see supra* § III.B.2.b, also divides the City of Colorado Springs into four senate districts within El Paso County. (Alt. S. Plan 3, 26-27.) But unlike the Adopted Plan, the Alternative Senate Plan draws two of these four senate districts, Senate Districts 9 and 11, entirely within the municipal boundaries of the City of Colorado Springs. (*Id.* at 3.) Moreover, there are no ripple effects outside of El Paso County due to the Alternative Senate Plan's approach to drawing these four senate districts, and the Commission was thus free to choose the Alternative Senate Plan's map without causing undesirable consequences elsewhere.

By drawing two senate districts entirely within the municipal boundaries of the City of Colorado Springs, the Alternative Senate Plan offered the Commission a less drastic alternative that would have maximized the number of single-city districts in El Paso County and thereby benefitted surrounding cities, towns and communities by affording them a greater chance to achieve legislative representation in the Senate without being overwhelmed by the influence of Colorado Springs.

- 3. The Commission has failed to show that the Adopted Plan's decision to draw zero senate districts wholly within the City**

of Colorado Springs was necessary in view of the less drastic alternative that was available

As previously noted, *see supra* § III.C.3, the phrase, “Colorado Springs,” does not even appear in the Commission’s Memorandum in Support of Adopted Plan. (*See generally* Mem. Supp. Adopted Plan.) Because the Commission made no showing that the Alternative Senate Plan does not satisfy the equal-population requirement of Colorado Constitution Article V, Section 46, the Commission has failed to show that its decision to avoid drawing even a single El Paso County senate district wholly within the municipal boundaries of the City of Colorado Springs was necessary. The Commission’s failure to adopt a map of senate districts in El Paso County that maximizes single-city senate districts within the boundaries of the City of Colorado Springs therefore violates Article V, Section 47(2) of the Colorado Constitution.

IV. CONCLUSION

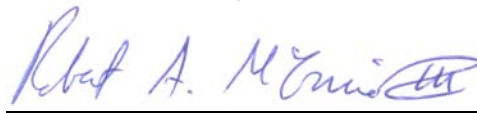
For the foregoing reasons, Opposers Elbert County Board of Commissioners, El Paso County Clerk & Recorder Wayne Williams, El Paso County Treasurer Bob Balink, El Paso County Commissioner Sallie Clark, Yuma County Commissioner Trent Bushner, Bill Jerke, Al Kolwicz, Marty Neilson, Dick R. Murphy, Valarie Murphy and Jim Paine request this Court to set aside the

Commission's action, disapprove the Adopted Plan and return the Adopted Plan to the Commission with instructions to formulate and resubmit a revised Adopted Plan that remedies the constitutional violations identified herein and otherwise complies with the procedural and substantive requirements of federal law and the Colorado Constitution.

Respectfully submitted this 24th day of October, 2011.

ROBERT A. MCGUIRE, ATTORNEY AT LAW, LLC

By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2011, I served a true and correct copy of the foregoing **STATEMENT OF OPPOSITION TO COLORADO REAPPORTIONMENT COMMISSION'S FINAL PLAN FOR HOUSE AND SENATE DISTRICTS**, with all attachments, by first-class mail, postage paid, to each of the following:

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