

SUPREME COURT, STATE OF COLORADO

101 W. Colfax Avenue, Suite 800
Denver, Colorado 80202

Original Proceeding Pursuant to the Colorado
Rules for Reapportionment Proceedings

**IN RE REAPPORTIONMENT OF THE
COLORADO GENERAL ASSEMBLY**

Attorneys for Opponents Town of Superior,
Colorado, Andrew Muckle, Elia Gourgouris, Joe
Cirelli, Chris Hanson, Sandy Pennington, Lisa
Skumatz, and Debra Williams:

Kendra L. Carberry, #25457
Christine C. Stretesky, #31749
Hayes, Phillips, Hoffmann & Carberry, P.C.
1530 Sixteenth St., Ste 200
Denver, CO 80202
Phone No.: (303) 825-6444
Fax No.: (303) 825-1269
E-mail: klcarberry@hphclaw.com
ccstretesky@hphclaw.com

▲ COURT USE ONLY ▲

Case Number: 2011SA282

**STATEMENT OF OPPOSITION AND COMPREHENSIVE
EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM**

TABLE OF CONTENTS

Table of Authorities ii

Certificate of Compliance 1

I. INTRODUCTION AND BACKGROUND 2

II. STATEMENT OF OPPOSITION TO THE FINAL PLAN 4

III. COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND
LEGAL SUPPORT OF OPPOSITION 4

 A. Standard of Review 4

 B. The Final Plan Violates Longstanding Legal Preference
for Keeping Counties Intact 7

 1. *Senate District 16* 7

 2. *House District 33* 9

 C. The Final Plan is not Compact..... 9

 1. *Senate District 16* 11

 2. *House District 33* 12

 D. The Final Plan Fails to Account for Communities of Interest..... 12

 E. The Final Plan Is Based on Improper Political
Considerations 14

V. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

<i>Acker v. Love</i> , 496 P. 2d 75 (Colo. 1972)	10
<i>Carstens v. Lamm</i> , 543 F. Supp. 68 (U.S. Dist. Colo. 1982)	8, 9, 10, 13
<i>In re Reapportionment 02</i> , 45 P. 3d 1237 (Colo. 2002)	4, 5, 6, 7, 8
<i>In re Reapportionment 82</i> , 647 P. 2d 191 (Colo. 1982)	6, 7
<i>In re Reapportionment 92</i> , 828 P.2d 185 (Colo. 1992)	14
<i>Reynolds v. Sims</i> , 377 U.S. 533, 84 S. Ct. 1362, 12 L. ed. 2d 506 (1964)	6

Constitution

Colorado Constitution, art. V, § 46	3, 5, 6, 8, 16
Colorado Constitution, art. V, § 47(1)	5, 9, 16
Colorado Constitution, art. V, § 47(2)	5, 7, 8
Colorado Constitution, art. V, § 47(3)	5, 13
Colorado Constitution, art. V, § 48(1)(e).....	4

CERTIFICATE OF COMPLIANCE

I hereby certify that this STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM 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 STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM complies with C.A.R. 28(g) in that it contains 3,181 words. The STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM complies with C.A.R. 28(k), because it contains under a separate heading: (1) a concise statement of any disagreement with statements of standard of appellate review and preservation for appeal and, as applicable, a correct statement of standard of appellate review and preservation issues with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on (where applicable).

Kendra L. Carberry

I. INTRODUCTION AND BACKGROUND

Opponents the Town of Superior, Colorado ("Superior") and Andrew Muckle, Elia Gourgouris, Joe Cirelli, Chris Hanson, Sandy Pennington, Lisa Skumatz and Debra Williams (collectively the "Individual Opponents"), by and through their attorneys, Hayes, Phillips, Hoffmann & Carberry, P.C., state the following as their Statement of Opposition and Comprehensive Explanatory, Descriptive and Legal Memorandum.

Superior is a Colorado statutory municipal corporation located primarily in Boulder County, Colorado, with a small portion located in Jefferson County, Colorado. The Individual Opponents are each residents of Superior, elected Trustees of Superior, and registered electors in Superior.

Superior's land mass equals approximately 2,700 acres, of which approximately 2,600 acres are located in Boulder County and approximately 100 acres are located in Jefferson County. Superior is bounded by the City of Boulder and Boulder County Open Space to the West, U.S. Highway 36 to the East and Northeast, the City of Louisville to the North and vacant land in Jefferson County to the South. Because all of the acreage lying within Jefferson County is vacant land, there are no Superior residents in Jefferson County. Instead all of Superior's citizenry resides within Boulder County.

Of Superior's 12,483 citizens, 80.4% are White, 13.8% are Asian, 6.6% are Hispanic or Latino, and 0.9% are African American. Additionally, 8,487 of Superior's residents are of voting age. Of those voters registered to vote, 2,774 are registered Democrats, 2,303 are registered Republicans and the remaining 3,550 are unaffiliated.

The Final Plan submitted by the Reapportionment Commission (the "Commission") places Superior in Senate District 16 and House District 33. In addition to Superior, Senate District 16 is comprised of Jefferson, Gilpin and Clear Creek Counties, and includes the mountain communities of Georgetown, Empire, Silver Plume, Central City and Black Hawk, as well as the southern communities of Morrison, Lakewood and Applewood. In addition to Superior, House District 33 is comprised of the City and County of Broomfield, a small portion of Coal Creek, and portions of Weld County.

Opponents file this Statement of Opposition, because the Final Plan does not meet the requirements set forth in federal and state law. The inclusion of Superior in Senate District 16 and House District 33 violates the requirements of Sections 46 and 47 of Article V of the Colorado Constitution. Thus, Superior and the Individual Opponents request that the Final Plan submitted to the Court on October 3, 2011, be disapproved and this matter remanded to the Commission for reconsideration.

II. STATEMENT OF OPPOSITION TO THE FINAL PLAN

Superior and the Individual Opponents oppose the Final Plan, and more specifically, the inclusion of Superior within Senate District 16 and House District 33. The reason for the opposition is because both placements violate the requirements set forth in federal and state law regarding county preference, compactness of districts, preservation of communities of interest, and improper political considerations.

III. COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL SUPPORT OF OPPOSITION

A. Standard of Review

This is an original proceeding under Article V, Section 48(1)(e) of the Colorado Constitution, which requires the Court to review the Final Plan submitted by the Commission. The Court's role in reviewing the Final Plan is limited. The Court "must 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." *In re Reapportionment 02*, 45 P.3d 1237, 1247 (Colo. 2002). The Court does not redraw reapportionment maps nor does it choose among alternative plans meeting the constitutional requirements. *Id.* Moreover, the Court will "uphold the adopted plan if it meets the applicable federal and Colorado standards." *Id.* (citations omitted).

In order of priority, the federal and state criteria to be used by the Commission in the reapportionment of Colorado 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, Colo. Const. (equality of population of districts of each house);
- (4) Article V, section 47(2), Colo. Const. (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), Colo. Const. (each district to be as compact as possible and to consist of contiguous whole general election precincts); and
- (6) Article V, section 47(3), Colo. Const. (preservation of communities of interest within a district).

In re Reapportionment 02, 45 P.3d at 1247 (citation omitted). In adopting a final plan, "substantively, the Commission is to apply all six of the criteria; procedurally, the Commission is to apply the criteria in order of their stated preference." *Id.* Stated another way, "[t]he Commission may not apply the lesser criteria over the greater criteria, but it may use the lesser criteria after satisfying the greater criteria." *Id.* Finally, the Commission must resolve conflicts by applying the criteria in preferential order, and then articulate to the Court how those conflicts were resolved. *Id.*

Equality of population (often referred to as "one person, one vote") is the most important consideration in any reapportionment proceeding. "Obtaining *substantial* equality of population among districts ... is the 'paramount criterion for testing the constitutional sufficiency of a reapportionment plan.'" *In re Reapportionment 02*, 45 P.3d at 1247-1248 (emphasis added), *citing In re Reapportionment 82*, 647 P.2d 191, 193 (Colo. 1982); *see Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964). Article V, Section 46 of the Colorado Constitution provides:

The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

Thus, perfection is not expected nor is it required. Article V, Section 46 specifically allows for a 5% deviation between district populations. That is, there is allowed a 5% difference between the district with the largest population and the district with smallest population.

In this case, to achieve equality of population, the Commission divided the population of Colorado by the number of senate seats and the number of house of representative seats. Commission Memorandum in Support of Adopted Plan, p.

15. As a result, the Commission calculated the ideal Senate District to include 143,691 people and the ideal House District to include 77,372 people. *Id.*

From the perspective of Superior and the Individual Opponents, the Final Plan submitted by the Commission fails to comply with criteria 4, 5, and 6, because it splits Boulder County, because it does not achieve compactness for Senate District 16 or House District 33, and because it does not preserve communities of interest.

B. The Final Plan Violates Longstanding Legal Preference for Keeping Counties Intact.

1. Senate District 16

Rather than create two senate districts wholly within Boulder County, the Commission ignored the longstanding Colorado legal preference for keeping counties intact and split Superior off from Boulder County and into a senate district with Jefferson County, Gilpin County and Clear Creek County.

"Article V, Section 47(2) of the Colorado Constitution favors matching districts to county boundaries and not crossing county boundaries unless necessary to comply with Section 46." *In re Reapportionment 02*, 45 P.3d at 1248. "The constitution allows the Commission to divide a county *only if necessary* to meet the equal population requirement." *In re Reapportionment 82*, 647 P.2d 191, 197 (Colo. 1982) (emphasis added). Indeed, as found by this Court:

The five percent deviation allowance of Section 46 between the most populous district and the least populous district in each house *allows the commission to work towards keeping counties intact*, if possible, in shaping a final reapportionment plan through application of the Section 47 criteria.

In re Reapportionment 02, 45 P.3d at 1248 (emphasis added). Article V, Section 47(2) provides:

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. 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. When county, city, or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law.

(emphasis added). County boundaries should "remain undivided whenever possible because of the sense of community derived from established governmental units tends to foster effective representation." *Carstens v. Lamm*, 543 F. Supp. at 88.

As identified in its Memorandum of Support of the Adopted Plan, Boulder County's total population is 2.05% of the ideal senate district. Thus, the equality of population criterion would be met by drawing two senate districts for Boulder County without splitting any portion of Boulder County off into another district. Stated another way, with a population that equals 2.05% of the ideal senate district population, Boulder County qualifies for two senate districts comprised wholly and solely of its own residents. The Commission has not made any showing as to why

splitting Superior from Boulder County was necessary, which is required by controlling precedent of this Court.

Simply put, splitting Superior from the rest of Boulder County with no justification whatsoever is inconsistent with constitutional requirements and controlling case law, and as such, the Final Plan should be disapproved on this basis alone.

2. *House District 33*

While Opponents acknowledge the difficult task faced by the Commission in creating both the senate and house districts, the Commission has provided no factual basis to support the inclusion of Superior into House District 33, or that less drastic alternatives could not have satisfied the equal population requirement. "Any split in city and county boundaries should be made in a rational manner which attempts to minimize divisions in these local governmental units." *Carstens v. Lamm*, 543 F. Supp. at 88. As such, it is appropriate for the Court to disapprove that part of the Commission's Final Plan that separates Superior from other Boulder County communities. *See In re Apportionment 92*, 828 P.2d 185, 195-196 (Colo. 1992).

C. In the Final Plan, Neither Senate District 16 or House District 33 is Compact.

Article V, Section 47(1) of the Colorado Constitution provides:

Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible.

Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap.

Id. Stated another way:

Compactness as used in the constitutional sense relating to apportionment ... concerns a geographic area whose boundaries are as nearly equidistant as possible from the geographic center of the area being considered, allowing for variances caused by population density and distribution, census enumeration districts, and reasonable variations necessitated by natural boundaries and by county lines.

Acker v. Love, 496 P.2d 75, 76 (Colo. 1972). Further, as acknowledged by the U.S. District Court for the District of Colorado, "the distribution of the state's population over Colorado's broad and varied geographic spectrum is truly unique."

Carstens v. Lamm, 543 F. Supp. at 84. Indeed, the compactness of any district will "be directly affected by the density and distribution of a state's population." *Id.* at 87.

The original purpose of the requirement for district compactness was to restrain partisan gerrymandering. *Carstens v. Lamm*, 543 F. Supp. 68, 87 (Dist. Colo. 1982). "Compact districts do, however, reduce electoral costs (in both time and money) and increase the opportunities for more effective representation by concentrating a [elected official's] constituency in an easily accessible area." *Id.*

In this instance, the Commission applied two "commonly used" compactness tests: the Roeck test and the Schwartzberg test. While not providing any guidance as to the meaning of the tests, the Commission seems to insist that the

Court rely on them as definitive proof of district compactness. However, because of Colorado's expansive rural counties, comparing urban districts' compactness to those of the rural districts is fundamentally unfair and contrary to the intended purpose of the compactness requirement.

1. Senate District 16

Senate District 16 received a compactness score of 0.25 under the Roeck test where a 0.10 was the minimum compactness (which is present in Senate District 27) and 0.41 was maximum compactness (which was achieved in Senate District 19). The Roeck test reveals that Senate District 16 falls below the median standard for compactness. Under the Schwartzberg test, Senate District 16 received a score of 0.75 where a score of 0.55 was the maximum compactness (which was achieved in Senate District 20) and 0.93 was the minimum compactness (which is present in Senate District 15). Again, under the Schwartzberg test, Senate District 16 fails to meet the median compactness standard.

The Commission provided no explanation as to why Senate District 16 was considered compact, despite falling below the median compactness standard in both tests. Moreover, a simple study of the boundaries of Senate District 16 reveals its flaws – the eastern-most point of the district (Superior) is approximately 75 miles from the western-most point, and the northern-most point of the district (Superior) is approximately 30 miles from the southern-most point of the district.

2. *House District 33*

The house district in which Superior is placed does not fare any better under the compactness tests relied on by the Commission. House District 33 received a compactness score of 0.17 under the Roeck test, where a 0.10 indicates the minimum compactness (which is present in two house districts, House District 37 and House District 55) and 0.57 indicates the maximum compactness (which was achieved in House District 14). By the Roeck standard, House District 33 is not compact. Under the Schwartzberg test, House District 33 received a score of 0.63 where a score of 0.55 indicates maximum compactness (which was achieved in House District 38) and 0.95 indicates minimum compactness (which was achieved in House District 19).

Again, the Commission provided no explanation regarding the failure of House District 33 under the Roeck test. More importantly, compactness is not achieved with a district such as House District 33, where the western-most tip of the district (Superior) is two entire counties away from the eastern-most tip, which is located in Weld County.

D. The Final Plan Fails to Account for Communities of Interest.

The last constitutional criterion for reapportionment requires the preservation of communities of interest wherever possible. "Communities of interest represent distinctive units which share common concerns with respect to

one or more identifiable feature." *Carstens v. Lamm*, 543 F. Supp. at 91. Communities of interest include, "ethnic, cultural, economic, trade area, geographic, and demographic factors..." Art. V, Section 47(3), Colo. Const.

The Commission heard testimony at its hearings that Superior's communities of interest include Louisville, Lafayette, Boulder, Broomfield and Erie. There was no evidence that Superior has any connection with Weld County, Gilpin County, Clear Creek County or the southern, suburban communities of Jefferson County such as Morrison and Lakewood.

Senate District 16 consists the following mountain communities: Georgetown, Silver Plume, Empire, Idaho Springs, Black Hawk and Central City. Superior, a northern Denver-Metro area town, shares no geographic, economic or trade areas with any of these communities. In fact, the mountain gaming communities of Black Hawk and Central City may have very different goals and interests in electing a state senator than a suburban, non-gaming community like Superior.

Also included within Senate District 16 are portions of Lakewood, Golden, Arvada, Fairmont and Applewood. These municipalities and communities, located in southern Jefferson County, share no geographic, economic or trade areas with Superior.

Regarding House District 33, the Commission heard testimony that Broomfield and Superior are communities of interest. However, House District 33 also contains a portion of Weld County. The Commission heard no testimony that Superior and Weld County share geographic, economic or trade areas.

Moreover, how can Superior have a community of interest with the City and County of Broomfield and Weld County in House District 33 and Gilpin County, Clear Creek County and Jefferson County in Senate District 16? The Commission should be required to provide some consistency in this regard. At a minimum, the Commission should be required to explain the glaring inconsistency.

E. The Final Plan Is Based on Improper Political Considerations.

In its Legal Memoranda, the Commission states that increasing the number of competitive districts was important to the Chair and most of the members. This type of activity falls outside the six criteria provided by federal and state law and should not be allowed. "Political considerations are not per se improper, however. It is only when partisan factors are allowed an importance equal to or greater than the proper constitutional criteria that a plan is defective." *In re Reapportionment* 92, 828 P. 2d at 199.

Senate District 16, by the Commission's standards, is considered a "highly competitive" district. For example, in the 2010 State Treasurer's race, the candidates were separated by 5% or less. Similarly, House District 33 is

considered "competitive" under the Commission's standards. In the 2010 State Treasurer's race, the candidates were separated by 10% or less.

Based on the demographic information available to Superior, the proposed House District 33 will serve to disenfranchise Superior's Asian voters by diluting their voting strength. As stated above, 13.8% of Superior's residents are Asian and 6.6% of Superior's residents are Hispanic or Latino. The following Table provides the percent of Asian population for each, Boulder, Clear Creek, Gilpin, Jefferson and Weld Counties.

County	Percent of Population Asian
Boulder	4.1%
Clear Creek	0.6%
Gilpin	1.4%
Jefferson	2.6%
Weld	1.2%

As demonstrated in the Table, the redistricting as proposed by the Commission would separate Superior's Asian voters from a county in which they enjoy a strong membership. The counties in which the Commission proposes Superior, and its Asian electors, to be placed will have the effect of disenfranchising Superior's Asian voters.

While creating "highly competitive districts" may be an admirable goal, it may not be accomplished with disregard to the clearly established constitutional requirements for reapportionment. The desire to achieve competitiveness should not result in Superior being thrown into a district to create competitiveness while

ignoring the constitutional requirements. As such, the Final Plan should be disapproved.

V. CONCLUSION

The Court should disapprove the Final Plan for violations of Article V, Section 46 and Article V, Sections 46 and 47(1)-(3) of the Colorado Constitution. Further, both Senate District 16 and House District 33 appear to have been created for the improper political purpose of creating competitive districts.

WHEREFORE, Opponents request that the Court disapprove the Final Plan and remand the matter back to the Commission for the creation of a new reapportionment plan that keeps Superior in congressional districts with other Boulder County municipalities. Opponents further request that, if the Court allows for oral argument, that Opponents' counsel be permitted to appear before the Court to make such an argument.

DATED this 24th day of October, 2011.

HAYES, PHILLIPS, HOFFMANN &
CARBERRY, P.C.

By: _____

Kendra L. Carberry
Christine C. Stretesky
ATTORNEYS FOR TOWN OF
SUPERIOR, ANDREW MUCKLE, ELIA
GOUGOURIS, JOE CIRELLI, CHRIS
HANSON, SANDY PENNINGTON, LISA
SKUMATZ, AND DEBRA WILLIAMS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of October, 2011, a true and correct copy of the within STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE, AND LEGAL MEMORANDUM was filed and served upon the following via US mail:

David R. Fine
Richard C. Kaufman
Jennette C. Roberts
Joseph G. Martinez
McKenna Long & Aldridge, LLP
1400 Wewatta St., Suite 700
Denver, Colorado 80202

Jeremiah B. Barry
Legislative Legal Services
091 State Capitol
Denver, CO 80203

Jeremiah Barry
Colorado Reapportionment Commission
1313 Sherman Street, Room 122
Denver, Colorado 80203

Kate Meyer
Colorado Reapportionment Commission
1313 Sherman Street, Room 122
Denver, Colorado 80203

Katherine A. Meyer
Office of Legislative Legal Services
State Capital
Room 091
Denver, Colorado 80203

Troy C. Bratton
Office of Legislative Legal Service
State Capitol Bldg., Room 091
1200 E. Colfax Ave.
Denver, Colorado 80203

Troy C. Bratton
Colorado Reapportionment Commission
1313 Sherman Street, Room 122
Denver, Colorado 80203