

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**

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Case Number: 2011SA282

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

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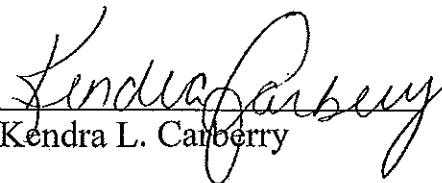
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CERTIFICATE OF COMPLIANCE

I hereby certify that this SECOND 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 SECOND STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL MEMORANDUM complies with C.A.R. 28(g) in that it contains **2835** 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 municipality located primarily in Boulder County, Colorado, with a small uninhabited 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.

On October 24, 2011, Superior and the Individual Opponents filed their Statement of Opposition and Comprehensive Explanatory, Descriptive and Legal Memorandum regarding the Adopted Plan submitted to this Court by the Colorado Reapportionment Commission (the "Commission"). Superior and the Individual Opponents contested the Adopted Plan because it placed Superior in Senate District 16 and House District 33 in contradiction to constitutional mandates. In its Opinion dated November 15, 2011, this Court held that the Adopted Plan was not sufficiently attentive to county boundaries to meet the requirements of Article V, Section 47(2) of the Colorado Constitution, and remanded the Adopted Plan to the Commission with a specific instruction to the Commission to be mindful of unnecessary county splits.

Superior and the Individual Opponents object to the Resubmitted Plan filed by the Commission on December 5, 2011 (the "Resubmitted Adopted Plan"), because it again splits Boulder County unnecessarily. The Resubmitted Adopted Plan places Superior in Senate District 16 and House District 33. In addition to Superior, Senate District 16 is comprised of Jefferson and Gilpin Counties, and includes the mountain gaming communities of Central City and Black Hawk, as well as the Jefferson County communities of Morrison, Evergreen and Aspen Park. In fact, the southern boundary of Senate District 16 extends south into the Pike National Forest. Additionally, the Commission added the Boulder County

community of Eldora to Senate District 16. House District 33 is comprised of the City and County of Broomfield and portions of Weld County, plus Superior.

Simply put, the Resubmitted Adopted Plan has left Superior's Senate and House Districts virtually unchanged from the Adopted Plan that this Court already rejected.

II. STATEMENT OF OPPOSITION TO THE RESUBMITTED ADOPTED PLAN

Like the Adopted Plan, the Resubmitted Adopted Plan ignores the requirements set forth in federal and state law and fails to comply with this Court's order to minimize the number of county splits. Specifically, 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 Resubmitted Adopted Plan submitted to the Court on December 5, 2011, be disapproved, and request that the Court instead adopt proposed Resubmitted Senate Plan Cv2 and proposed Resubmitted House Plan Gv1.

III. COMPREHENSIVE EXPLANATORY, DESCRIPTIVE AND LEGAL SUPPORT OF OPPOSITION

A. Standard of Review

Superior and the Individual Opponents incorporate, as though fully stated herein, the Standard of Review provided in their Comprehensive Explanatory, Descriptive and Legal Support of Opposition filed with this Court on October 24,

2011. Nonetheless, Superior and the Individual Opponents reiterate that 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 2002, 45 P.3d 1237, 1247 (Colo. 2002) (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.*

Article V, Section 46 of the Colorado Constitution allows for a 5% deviation between the district with the largest population and the district with smallest population. Indeed, as this Court acknowledges in its November 15, 2011 Opinion, "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 ideal district must be less than five percent." *In re Reapportionment of the Colorado General Assembly (2011)*, n. 3, quoting *In re Reapportionment 1982*, 647 P.2d at 193, n. 4.

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.*

The Resubmitted Adopted Plan fails to comply with criteria 4, 5 and 6, because it unnecessarily 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 Resubmitted Adopted Plan Continues to Violate Article V, Section 47 (2).

1. Senate District 16

The Court's November 15, 2011 Opinion was clear: the Adopted Plan violated Article V, Section 47(2), and the Commission was instructed to re-draw districts to minimize county splits. However, contrary to the Opinion, the Commission again unnecessarily split Boulder County into three senate districts. By splitting Boulder County into three senate districts, the Commission again ignored the longstanding Colorado legal preference for keeping counties intact.

Like the Adopted Plan, the Resubmitted Adopted Plan ignores the requirements set forth in federal and state law and fails to comply with this Court's order to minimize the number of county splits. Specifically, 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.

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). As reaffirmed by this Court, "The constitution allows the Commission to divide a county *only if necessary* to meet the equal population requirement." *In re Reapportionment 1982*, 647 P.2d 191, 197 (Colo. 1982) (emphasis added).

"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 2002*, 45 P.3d at 1248. 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. 68, 88 (D. Colo. 1982).

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 2002, 45 P.3d at 1248 (emphasis added).

As identified in the Commission's 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 Boulder County community into another district. Boulder County qualifies for two senate districts comprised wholly and

inclusively of its own residents. Indeed, proposed Resubmitted Senate Plans Bv1, Cv1, Cv2, and Dv1 provide proof that not only is splitting Boulder County into three senate districts unnecessary to achieve population equality, but also that numerous less drastic alternatives to the Resubmitted Adopted Plan exist.

The Commission has not made any showing as to why splitting Superior from Boulder County was necessary. Rather, the Commission justifies its disregard for the Court's Opinion and state law by claiming "[t]he court remanded and not mentioned (sic) that Boulder is an issue to be addressed." Transcript, November 29, 2011 Commission Meeting, p. 26, ll. 20-21. However, the Commission's reliance on this omission is without merit, because the Court made no mention of any county which the Commission should avoid splitting. In fact, the only counties mentioned in the Opinion at all are Jefferson and Arapahoe Counties, and only in relation to the Voting Rights Act.

Following the Commission's logic, because this Court did not specifically name any particular county that the Commission should avoid splitting, all counties can be unnecessarily and unconstitutionally split. Such a result is absurd. This Court found that the Adopted Plan was "not sufficiently attentive to county boundaries to meet the requirements of article V, section 47(2)." *In re Reapportionment Colorado General Assembly (2011)*. This Court further found that the Commission did not make an adequate showing that a less drastic

alternative could not have satisfied the equal population requirement given that "the Commission was presented with alternative plans that avoided many of the boundary splits challenged here." *Id.* The Court can and should make the same findings with regard to the Resubmitted Adopted Plan.

Proposed Resubmitted Senate Plans Bv1, Cv1, Cv2, and Dv1 do split Superior, but the split occurs at the county lines of Jefferson and Boulder Counties. Again, the portion of Superior located within Jefferson County contains no citizens. Thus, the split amounts to a zero population split. Placing this small uninhabited portion of Superior in another district has no effect on Superior or its citizens.

Simply put, removing Superior from Boulder County with no justification whatsoever is inconsistent with constitutional requirements and controlling case law, and as such, the Resubmitted Adopted Plan should be disapproved on that basis alone.

2. House District 33

The Commission provides no factual basis to support the inclusion of Superior into House District 33. The Commission was presented with several less drastic alternatives to the Resubmitted Adopted Plan. For example, proposed Resubmitted House Plan Gv1 includes Superior in a district with other Boulder County communities such as Louisville, Lafayette and Erie. Again, while

Resubmitted House Plan Gv1 splits Superior, this split will have little effect on the citizens of Superior and will not violate the constitutional requirements for redistricting.

"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 Resubmitted Adopted Plan that separates Superior from other Boulder County communities. *See In re Apportionment 1992*, 828 P.2d 185, 195-196 (Colo. 1992).

C. Senate District 16 is Not Compact.

As this Court is aware, Article V, Section 47(1) of the Colorado Constitution requires that each district be compact. 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) (emphasis added). 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. *Id.* "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.*

Senate District 16 received a compactness score of 0.21 under the Roeck test where a 0.11 was the minimum compactness (which is achieved in Senate Districts 29 and 33) 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. The Commission provides no explanation as to why Senate District 16 was considered compact, despite failing to achieve the compactness standard in the Roeck test.

More importantly, the Resubmitted Adopted Plan is contrary to the case law regarding compactness because it fails to take into consideration "reasonable variations necessitated by natural boundaries and by county lines." *Acker v. Love*, 496 P.2d at 76. In the Resubmitted Adopted Plan, Senate District 16 completely ignores the Rocky Flats National Wildlife Refuge, a natural boundary between Superior and Jefferson County.

D. The Resubmitted Adopted 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 initial hearings that Superior shares communities of interest with Louisville, Lafayette, Boulder, Broomfield and Erie. There was no evidence that Superior has any connection with Weld County, Gilpin County, or the southern, mountain communities of Jefferson County such as Morrison, Evergreen, and Aspen Park. In fact, Superior's citizens receive numerous services from Boulder County.

In the Resubmitted Adopted Plan, Senate District 16 consists of the following mountain communities: Evergreen, Genesee, Indian Hills, 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.

Regarding House District 33, the Commission heard testimony that Broomfield and Superior share communities of interest. However, Resubmitted 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.

Again, the question must be asked: how can Superior share a community of interest with the City and County of Broomfield and Weld County in House District 33 and Gilpin County and Jefferson County in Senate District 16? The Commission should be required to provide some consistency in this regard.

IV. CONCLUSION

In the Resubmitted Adopted Plan, both Senate District 16 and House District 33 appear to have been created without regard to this Court's November 15, 2011 Opinion. The Resubmitted Adopted Plan is unconstitutional because it unnecessarily splits Boulder County in violation of Article V, Section 47(2). Further, the Resubmitted Adopted Plan violates Article V, Sections 47(1) and (3) by creating districts that are not compact and do not respect communities of interest.

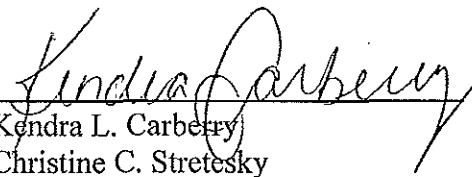
WHEREFORE, Superior and the Individual Opponents request that the Court disapprove the Resubmitted Adopted Plan and adopt proposed Resubmitted Senate Plan Cv2 and proposed Resubmitted House Plan Gv1, plans that keep

Superior in congressional districts with other Boulder County municipalities. Superior and the Individual Opponents further request that, if the Court allows for oral argument, that their counsel be permitted to appear before the Court to make such an argument.

DATED this 8th day of December, 2011.

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

By:


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of December, 2011, a true and correct copy of the within SECOND STATEMENT OF OPPOSITION AND COMPREHENSIVE EXPLANATORY, DESCRIPTIVE, AND LEGAL MEMORANDUM was filed and served upon the following via US mail:

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