

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to Art. V, § 48.3 of the Colorado Constitution</p>	
<p>In re Colorado Independent Legislative Redistricting Commission</p>	<p>Case No. 2021SA305</p>
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<p style="text-align: center;">AMICUS CURIAE BRIEF OF LYNN GERBER</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Court's July 26, 2021 Order and all requirements of C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the brief complies with the Court's Order because it contains no more than 9,500 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of the Court's July 26, 2021 Order and C.A.R. 32.

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**STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND
INTEREST IN THE CASE**

Amicus Curiae is Lynn Gerber, a resident and registered voter in Colorado. She is a small business owner, community volunteer, and an active member of the Republican party in Colorado. In November 2020, Gerber ran for election to the Colorado State Senate to represent District 19, located in Jefferson County. She lost the election. Gerber continues to be involved in Colorado politics and she has an interest in ensuring that Colorado adopts fair, competitive, and constitutional 2020 redistricting plans for the General Assembly.

ISSUES PRESENTED

Whether the submitted House and Senate district plans comply with constitutional criteria provided in Colo. Const. art. V, § 48.1.

SUMMARY OF ARGUMENT

The Colorado Independent Legislative Redistricting Commission (the “Commission”) developed and submitted final redistricting plans for the Colorado House of Representatives (the “House Plan”) and Senate (the “Senate Plan”), pursuant to Colo. Const. art. V, §§ 46-48.4.

The Commission is required to consider different constitutional criteria in developing its plans. Due to the impact of this process on future elections, this

Court should ensure that each of the constitutional criteria are properly considered. The Commission had a constitutional duty to approve plans that maximize competitiveness; it should have approved plans that better maximized competitiveness and could have done so without infringing on the other constitutional criteria.

The Commission abused its discretion by failing to properly apply the competitiveness criteria, and, furthermore, its discretion should be limited with respect to maximizing competitiveness because it is a quantifiable criterion. The submitted final House and Senate Plans should not be approved by this Court and should be returned to the Commission, stating disapproval of the Commission's conclusions regarding competitiveness.

STANDARD OF REVIEW

This Court must review the Commission's plans to "determine whether [they] comply with the criteria listed in section 48.1 of this article V." Colo. Const. art. V, Section 48.3(1). Specifically, "[t]he supreme court shall approve the plans submitted unless it finds that the commission . . . abused its discretion in applying or failing to apply the criteria . . . , in light of the record before the commission." *Id.* art. V, § 48.3(2). This Court is permitted to consider the record before the Commission, as well as "any maps submitted to the commission." Colo. Const. art. V, § 48.3(2).

LEGAL ARGUMENT

1. The redistricting plans must maximize competitiveness to the extent possible.

Competitive elections play a vital role in our American democracy. A redistricting plan that increases competition benefits Colorado voters and citizens, promoting free and fair elections and effective representation.

“Competitive elections for members of the general assembly provide voters with a meaningful choice among candidates, promote a healthy democracy, help ensure that constituents receive fair and effective representation, and contribute to the political well-being of key communities of interest and political subdivisions.” Colo. Const. art. V, § 46(1)(d).

With the intent of definitively ending the practice of political gerrymandering, the General Assembly and Colorado voters approved Amendment Z in 2018, created the Commission, and set forth its mission and requirements for developing and submitting a redistricting plan for each house of the Colorado General Assembly. Colo. Const. Art. V, §§ 46-48.4. Increasing competitiveness was a major theme in the redistricting process overhaul accomplished through Amendment Z.

Although competitiveness was not previously a statutory requirement for redistricting, the importance of competitive districts in the redistricting process

was recognized before Amendment Z came about. *Hall v. Moreno*, 270 P.3d 961, 973 (Colo. 2012); *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 113 (Colo. 2011) (“competitive legislative districts are the antithesis of gerrymandered ones”). Despite this, “[f]or years certain political interests opposed competitive districts in Colorado because they are primarily concerned about maintaining their own political power at the expense of fair and effective representation.” Colo. Const. art. V, § 46(1)(e). Amendment Z sought to remedy this issue generally through the establishment of an independent commission to accomplish “the public's interest in creating fair and competitive districts.” *Johnson v. Curry (In re Title, Ballot Title, & Submission Clause for for 2015-2016 #132)*, 374 P.3d 460, 462 (Colo. 2016). More explicitly, Amendment Z made competition a constitutionally required factor in developing redistricting plans, providing that the Commission must, “to the extent possible, maximize the number of politically competitive districts.” Colo. Const. art. V, § 48.1(3)(a).

2. Competitiveness must be maximized to the extent possible, and this can be accomplished without minimizing other constitutionally required criteria.

Amendment Z imposed multiple constitutional criteria for the development of legislative redistricting plans: a) “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.* § 48.1(1)(a); b) compliance with the federal “Voting Rights Act of 1965,” *id.* § 48.1(1)(b); c) “[a]s much as is reasonably possible, [to] preserve whole communities of interest and whole political subdivisions, such as counties, cities, and towns,” *id.* § 48.1(2)(a); d) to make districts “as compact as is reasonably possible,” *id.* § 48.1(2)(b); and e) “[t]hereafter, ... to the extent possible, maximize the number of politically competitive districts,” *id.* § 48.1(3)(a).

The enumeration of these factors provides a process for the Commission’s deliberations in adopting plans. After ensuring compliance with federal law, the Commission addresses communities of interest, political subdivisions, and compactness, involving competing interests that often offset each other. The Commission received and reviewed a significant number of proposed maps and comments submitted to promote preservation of different communities of interest, indicating the wide divergence of viewpoints regarding this constitutional requirement. Compromise is required to create districts that address these issues for all interested parties; but most community of interest cannot be kept fully intact without choosing winners and losers. Likewise, this Court has recognized the unlikelihood of maintaining all political subdivision intact. *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d 1237, 1254

(Colo. 2002). Different geographical configurations can provide similar resolutions to concerns about maintaining communities of interest, political subdivisions, and compactness.

In considering adoption of a redistricting plan, once the other factors have been addressed, the commission must determine whether the proposed plan maximizes the number of politically competitive districts to the extent possible. *Id.* §48.1(3)(a). “[C]ompetitive” means having a reasonable potential for the party affiliation of the district’s representative to change at least once between federal decennial censuses.” *Id.* § 48.1(3)(d). This is a measurable factor, unlike preserving communities of interest, political subdivisions, and compactness; “[c]ompetitiveness may be measured by factors such as a proposed district’s past election results, a proposed district’s political party registration data, and evidence-based analyses of proposed districts.” *Id.*

The constitutional language does not indicate that competitiveness is less important than any other criteria. In fact, the constitutional requirements emphasize the importance of the competitiveness criterion, requiring the Commission to “solicit evidence relevant to competitiveness of elections” and staff to provide a report to demonstrate “how the plan reflects the evidence presented to, and the findings concerning, the extent to which competitiveness in district elections is fostered consistent with the other criteria set forth in this

section.” 48.1(3)(b) and (c). There is no analogous requirement for the Commission to specifically solicit evidence or provide a report regarding communities of interest, political subdivisions, or compactness.

In addition, competitiveness is the easiest of these criteria to objectively quantify and to safeguard without risking unfair treatment of any particular community of interest.

Furthermore, ensuring maximized political competitiveness serves to further protect communities of interest. Competitiveness makes it “more difficult for a representative to ignore the needs and preferences of an entire voter bloc... [a] competitive district requires candidates running for [and serving in] office to work very hard, listen to all views, and to reach out and engage as many people as possible.” *Hall*, 270 P.3d at 973. Competitiveness ultimately provides additional protection for all communities of interest; for example, this Court previously recognized that “competitive districts empower[ed] the Hispanic community by allowing its voting bloc to carry significant weight in elections.” *Id.* at 981.

This quantifiable mandatory requirement of competitiveness is not maximized in the House and Senate Plans, and the Commission should have used different district configurations that sufficiently address the other factors but provide for more competitiveness. The Commission “considered other plans

that may have had more districts with lower differentials between the Democratic and Republican candidates.” Final Legislative Redistricting Plans Submission (Ex. 13 Reports Regarding Competitiveness Analysis). For example, at least one proposed map, identified as HP.008, provided more competitive districts based on quantifiable evidence while sufficiently maintaining communities of interest, political subdivisions, and compactness. Available at: <https://redistricting.colorado.gov/content/2021-redistricting-maps>. In comparing this proposed map HP.008 with the House Plan, HP.008 provided 20 competitive districts and the House Plan provided 16 competitive districts. Both divided five counties that mathematically could have been kept whole (Eagle, Delta, Montezuma, Huerfano, and Chaffee Counties), and in addition the House Plan divided Teller County. Map HP.008 divided large counties into more districts than the House Plan.

3. The Commission abused its discretion in misapplying the criterion of competitiveness, and discretion should be limited when a constitutionally required factor is quantifiable.

The House and Senate Plans have been submitted to this Court for a determination of “whether the plans comply with the criteria listed in” the amended Constitution. Colo. Const., art. V, § 48.3(1). The court “shall approve the plans submitted unless it finds that the commission ... abused its discretion

in applying or failing to apply the criteria listed in section 48.1 of this article V, in light of the record before the commission.” Colo. Const. art. V, § 48.3(2).

The Court had previously applied a “strong” “presumption of good faith and validity” standard to legislative maps. *In re Colorado Gen. Assembly*, 828 P.2d 185, 189 & n.4 (Colo. 1992) (citation omitted). Still, the Court repeatedly remanded maps when redistricting criteria was misapplied. See, e.g., *In re Colorado Gen. Assembly*, 332 P.3d at 112; *In re Colorado Gen. Assembly*, 45 P.3d 1237, 1241 (Colo. 2002); *In re Colorado Gen. Assembly*, 828 P.2d 185, 195-96 (Colo. 1992); *In re Colorado Gen. Assembly*, 647 P.2d 209, 213 (Colo. 1982). Abuse of discretion is a less deferential review than the previous standard, and this Court’s disapproval of noncompliant plans is clearly appropriate.

The Commission abused its authority by misapplying the factor of competitiveness and should have sought to create more competitive districts. Furthermore, discretion should be limited with respect to competitiveness because it is a quantifiable constitutional requirement. The Commission can ensure maximized political competitiveness using quantifiable evidence without sacrificing the interests of communities.

Politically competitive districts are essential to achieving an end to gerrymandering intended with the passage of Amendment Z. By affirming the

importance of competitiveness as a required criterion, without allowing the Commission to devalue its significance, this Court will ensure that the House and Senate Plans best adhere to the constitutional requirement for competitiveness.

This Court should reject the House and Senate Plans and require the Commission to consider the alternative district configurations that respect communities of interest and political subdivisions demonstrated in the record, and better maximize political competitiveness.

CONCLUSION

For all the reasons stated above, *Amicus* respectfully requests that the Court reject the Commission's House and Senate Plans and order the Commission to adopt plans with more competitive districts.

Respectfully submitted this 22nd day of October, 2021.

/s/ Douglas Benevento

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CERTIFICATE OF SERVICE

This is to certify that on October 22, 2021, I electronically filed the foregoing AMICUS CURIAE BRIEF OF LYNN GERBER with the Clerk via the Colorado Courts E-Filing E-Service, which will send notification of such filing and service upon all counsel of record.

s/ Tari Rader

Legal Administrative Assistant