

SUPREME COURT OF COLORADO

2 East 14th Avenue, Denver, Colorado, 80203

Original Proceeding Pursuant to § 2-2-507(2.5)(b),
C.R.S.

**In re Proposed Changes to Borders Between
State Legislative Districts**

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Case No.: **2022 SA 28**

**COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING
COMMISSION'S BRIEF IN RESPONSE TO
MARCH 4, 2022 ORDER**

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 32, including all formatting requirements set forth therein. I further certify that this brief complies with the Court’s March 4, 2022 briefing order, as it contains 2,346 words.

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

Dated: March 11, 2022.

s/ Richard C. Kaufman

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INTRODUCTION

On February 3, 2022, the Colorado Attorney General filed a Petition (the “Petition”) on behalf of the Colorado Secretary of State (the “Secretary”) with the Colorado Supreme Court requesting that the Court approve minor adjustments to the boundaries of the state senate and state house districts originally approved by the Colorado Independent Legislative Redistricting Commission (the “Commission”). The Commission’s approved plan was submitted to this Court on October 15, 2021, and subsequently approved by this Court on November 15, 2021.

The Petition states the legal basis for the adjustments is found in section 2-2-507, C.R.S. (2021). For three adjustments to state senate districts and thirteen to state house districts, the Secretary stated “the proposed adjustments to the border comply with the spirit, but not the plain language, of the statute (§ 2-2-507(2.5)).”

This Court ordered the Commission to file a brief in response to the Petition by February 17, 2022 (the “Commission Brief”). As stated in the Commission Brief, first the Commission’s nonpartisan staff reviewed the proposed adjustments to determine whether each one complied with the requirements of the Colorado Constitution found in article V, section 48.1, *et seq.* See Commission Brief at 9-11. The Commission held a public meeting on February 11, 2022 to review the adjustments in the Petition and to receive public comment. The Commission analyzed the adjustments to determine whether they complied with the Colorado

Constitution. *Id.* The Commission voted to approve and endorse all the adjustments in the Petition, except the one contained in Exhibit N, which, as proposed, violated the Commission’s constitutional mandate to preserve whole political subdivisions. Colo. Const. art. V, § 48.1; Commission Brief at 10-12. It is important to note the Commission did not approve or disapprove the adjustments based on section 2-2-507, C.R.S., but instead applied the same constitutional factors that the Commission considered in its original work in preparing the house and senate districts. As the Commission stated in its brief, “[t]he Commission believes that any requested adjustment must be **approved by the Commission** based on a determination that such adjustment satisfies the constitutional criteria.” *Id.* at 11 (emphasis added). Before a proposed change can be considered for approval by the Court, the Commission must first consider, approve, and endorse the change, as it has done here.

The Secretary filed her Reply Brief (“Reply”) on February 24, 2022. In the Reply, the Secretary offered an amended Exhibit N-2 to meet the Commission’s objections, and identified additional adjustments to district boundaries which were not identified in the Petition, which the Secretary proposed as Exhibits V-2 and W-2.

On March 4, 2022, this Court ordered the parties to file simultaneous briefs on two issues. March 4, 2022 Order.

The Commission's nonpartisan staff reviewed the amended Exhibit N-2, as well as the additional adjustments proposed by the Secretary, to determine if they complied with the Colorado Constitution, art. V, Section 48.1, *et seq.* The Commission met again on Thursday, March 10, 2022, to review amended Exhibit N-2 and the additional adjustments set forth in Exhibits V-2 and W-2, to determine if they complied with the Colorado Constitution. *Id.* The Commission voted to approve and endorse the adjustments.

ISSUES FOR REVIEW

1. Whether section 2-2-507(2.5) is applicable to the Supreme Court's authority to approve adjustments to district borders.
2. Whether the Colorado Supreme Court may approve district border adjustments that comply with the spirit but not the plain language of section 2-2-507(2.5).

SUMMARY OF THE ARGUMENT

Article V, section 48.1, sets forth the criteria for the Commission and the Colorado Supreme Court to apply in determining whether legislative redistricting plans are constitutional, and the same criteria necessarily apply to any proposed adjustments such as those the Secretary has proposed here. Section 2-2-507(2.5)(II) purports to change or limit the constitutional criteria for evaluating district boundaries, and accordingly, the statute unconstitutionally infringes on the sole

authority of the Commission and the Colorado Supreme Court by adding a requirement that the remaining portion of split residential parcels be moved to the least populous district, and omitting reference to any other constitutional requirements. The only population requirement governing legislative redistricting is found in Article V, section 48.1(1)(a), which requires the Commission to draw districts that have “no more than five percent deviation between the most populous and the least populous district in each house.” As stated in the Commission Brief, “[t]he Commission believes that any requested adjustment must be approved by the Commission based on a determination that such adjustment satisfies the constitutional criteria.” *Id.* at 11. Proposed changes must be approved by the Commission and approved by the Colorado Supreme Court. Section 2-2-507(2.5), C.R.S., is therefore unconstitutional and the Court should not apply it. Instead, the Court must apply Article V, section 48.1.

The Supreme Court may exercise its authority found in the Colorado Constitution in article V, section 48.3, to approve or disapprove the adjustments found in the Secretary’s Petition, Reply, and approved by the Commission.

STANDARD OF REVIEW

Art. V, sec. 48.3, sets forth the standard of review for the adjustments set forth in the Secretary’s Petition and Reply. That section states “the Supreme Court will approve the plans submitted unless it finds that the Commission . . . abused its

discretion in applying or failing to apply the criteria in section 48.1 of this Article V, in light of the record before the Commission.” The Court’s role in redistricting is *sui generis* which is to judge the submitted plans against the constitutional standards found in sec. 48.1. *In re Reapportionment of the Colorado General Assembly*, 828 P.2d 185, 189 (Colo. 1992). This review includes ensuring the Commission applied the constitutional standards in the hierarchy found in sec. 48.1. *In re Colo. Indep. Legis. Redistricting Comm’n*, 2021 CO 76, ¶¶ 10-11; *In re Reapportionment of the Colorado General Assembly*, 332 P.2d 108, 110 (Colo. 2011). Where, as here, the Commission “purports to follow the proper constitutional criteria,” the Court “accords the Final Plan a presumption of validity” and will not “substitute our judgment for that of the Commission’s unless we are convinced the Commission departed from constitutional criteria.” *Id.*; *see also In re Reapportionment of the Colorado General Assembly*, 828 P.2d at 197 (*citing In re Reapportionment of the Colorado General Assembly*, 647 P.2d 191, 197 (Colo. 1982)). This presumption is appropriate where twelve citizen commissioners have undertaken the process of redistricting the General Assembly by applying the criteria found in sec. 48.1. The process is necessarily a factually complex task requiring consideration of thousands of comments, perspectives, compromises, and judgments. The Commission has discretion to choose among various constitutional plans. *In re Colo. Indep. Legis. Redistricting Comm’n*, 2021 CO 76, ¶ 11.

ARGUMENT

The Court should assess the Secretary's proposed adjustments based on the criteria set forth in Art. V, sec. 48.1 and in the order therein. The initial step looks at whether the final plans comply with the federal constitution and statutes, including one-person-one-vote, the Equal Protection Clause of the 14th Amendment, and section 2 of the Voting Rights Act. The second part of the review focuses on compliance with the state constitutional criteria found in sec. 48.1. The Court should find that § 2-2-507 does not apply because it is an unconstitutional infringement on the Commission's authority to draw legislative districts, but that because the Commission has considered and voted to approve and endorse the Secretary's proposed changes based upon the constitutional criteria, the Court has authority to approve them.

I. THE COMMISSION APPROVES OF AND ENDORSES THE SECRETARY'S REQUESTED ADJUSTMENTS TO THE FINAL HOUSE AND SENATE PLANS.

The Commission met a second time on March 10, 2022 to consider the Secretary's Reply, including the amended Exhibit N-2 and the additional adjustments the Secretary identified after the Petition was filed, proposed as Exhibits V-2 and W-2. The Commission's determination was based on the application of the constitutional criteria found in article V, section 48.1. The assessment was independent of the factors found in § 2-2-507, C.R.S. The Commission voted to

approve and endorse the proposed adjustments. The Commission noted in its deliberations at the March 10, 2022 meeting that the changes proposed by the Secretary occurred due to technical issues with the census block data received from the United States Census Bureau, and are minor corrections. The Commissioners noted that there are often minor problems with census boundaries within counties and municipalities such as those identified in the Petition, and that the Commission has great respect for the work of Colorado’s local officials tasked with implementing the plans prepared by the Commission and approved by this Court, who proposed the changes at issue here.

II. SECTION 2-2-507, C.R.S., DOES NOT APPLY BECAUSE IT IS AN UNCONSTITUTIONAL INFRINGEMENT ON THE COMMISSION’S SOLE AUTHORITY TO DRAFT AND APPROVE REDISTRICTING PLANS.

This Court held in 2021 that nothing in the Constitution forbids the Commission from implementing the provisions of statutes like § 2-2-507(2.5), but neither the legislative or executive branch has the authority to direct the proceedings or decisions of the Commission. *In re Interrog. on Senate Bill 21-247*, 2021 CO 37, ¶¶ 6, 43. Amendment Z was passed by the voters to remove the authority of both the legislative and executive branches over redistricting except for very limited functions. *Id.* The Commission has sole authority to “conduct all of the key tasks in the redistricting process,” including drawing the district maps. *Id.*, ¶¶ 6, 41, 43. This

Court held that “[t]he voters clearly intended to put the redistricting process beyond the power of the legislature.” *Id.*, ¶ 44. This Court held that legislative “attempts to direct the actions of the commissions and their nonpartisan staff” are unconstitutional. *Id.* This Court held that:

[T]he General Assembly does not have the power to compel the independent commissions or their nonpartisan staff to consider a particular source of population data or take any action beyond what Amendments Y and Z already require. The Amendments were expressly intended to remove the General Assembly from the redistricting process, instead vesting all authority to draw district maps with independent commissions. Under this new scheme, the General Assembly has a discrete and limited role in appropriating funds for the commissions and nominating a limited number of applicants for consideration as commission members. *See* Colo. Const. art. V, §§ 44.1, 44.2, 47, 48. But nothing in the Amendments authorizes the General Assembly to enact implementing legislation or take actions that would otherwise curtail the commissions’ constitutionally mandated independence. Accordingly, insofar as SB 21-247 attempts to direct the actions of the commissions and their nonpartisan staff, it would be unconstitutional if enacted.

Id., ¶ 6.

These principles apply equally to § 2-2-507(2.5) where the legislature has directed the Secretary to infringe the Commission’s constitutional authority. While the proposed adjustments are minor, the Secretary lacks the constitutional authority to modify the Commission’s Final Plan. A version of § 2-2-507 existed prior to the enactment of Amendment Z in 2018. In 2020, the legislature amended the statute,

purporting to give the Secretary authority to modify the Final Plan adopted by the independent Commission by directing the Secretary to move the remaining portion of split residential parcels into the least populous district. There is nothing in article V, section 48.1, that directs the Commission to move the remaining portion of split residential parcels into the least populous district. Section 48.1(1)(a) directs the Commission to draw districts that do not exceed a five percent deviation between the most populous and least populous district in each house. If the Commission draws districts that comply with that constitutional provision, it is within the sole discretion of the Commission whether to move the remaining portion of split residential parcels into the more populous or less populous district. While nothing precludes the Commission from adopting a policy that would comply with § 2-2-507(2.5), neither the legislature nor the Secretary has the constitutional authority to impose such a requirement on the Commission.

III. THE COURT HAS THE CONSTITUTIONAL AUTHORITY TO REVIEW THE ADJUSTMENTS ENDORSED BY THE COMMISSION.

As set forth in section I above, the Commission reviewed the adjustments suggested by the Secretary and approved and endorsed all of them. Amendment Z is silent as to whether a Final Plan may be modified after the Court has approved it. Amendment Z neither precludes nor expressly authorizes the Commission or the Court to amend or reopen and modify the Final Plan once approved. However, the

Colorado Constitution provides inherent authority for the Commission to amend the Final Plan and for this Court to consider it.

Under article V, section 48(e), the Commission is directed to adopt rules governing the review of maps submitted for consideration and the adoption of a Final Plan. Further article V, section 48.2(5)(c), allows the Commission to reset the deadlines specified in that section when conditions outside its control require such change to ensure a Final Plan may be adopted. The fact that the county clerks and the Secretary required time to review the Final Plan in detail to determine whether there were split residential parcels was outside the control of the Commission.

Similarly, Article V, section 48.3(1), requires Colorado Supreme Court to review and approve any plans adopted by the Commission. That same subsection provides that any legal arguments regarding a plan will be submitted to the Court “pursuant to the schedule established by the court.” This is a broad grant of authority that provides this Court with inherent authority to modify its schedule, and likewise provides inherent authority for this Court to consider the Secretary’s adjustments endorsed by the Commission at its February 11, 2022 and March 10, 2022 public meetings.

CONCLUSION

While the Secretary’s adjustments were submitted directly to this Court via the Petition, the Commission has met in two public meetings, and has considered,

approved, and endorsed each adjustment pursuant to the constitutional criteria. The Commission therefore respectfully requests this Court approve the adjustments as amendments to the Final Plan, and confirm that the authority rests with the Colorado Independent Legislative Redistricting Commission to approve proposed changes to the redistricting plans, subject to approval of the Colorado Supreme Court.

Respectfully submitted this 11th day of March, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of March, 2022, a true and correct copy of the foregoing **COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION'S BRIEF IN RESPONSE TO MARCH 4, 2022 ORDER** was served via the Court Electronic Filing System, upon the following, as well as any other counsel appearing of record at the time of filing:

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