

DATE FILED: July 22, 2021 11:55 AM

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Article V, Section 44.5 of the Colorado Constitution</p> <hr/> <p>In re Colorado Independent Congressional Redistricting Commission</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Fair Lines Colorado: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com</p>	<p>Case No. 2021SA208</p>
<p>AMICUS CURIAE BRIEF OF FAIR LINES COLORADO</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29 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).

Choose one:

It contains 1,677 words.

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review 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.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Mark G. Grueskin

Mark G. Grueskin
Attorney for Fair Lines Colorado

TABLE OF CONTENTS

Statement of the Identity of the Amicus Curiae and its Interest in the Case.....1

Issues Presented1

Summary of Argument1

Legal Argument2

 I. The dates in the Constitution for Commission filing of maps with this Court
 and for the Court’s review of such maps are not binding or material elements of
 Amendments Y & Z.....2

 II. The Court’s textual authority is limited to ensuring that the maps it receives
 follow the constitutional criteria.....5

CONCLUSION7

TABLE OF AUTHORITIES

Cases

<i>Hall v. Moreno</i> , 2012 CO 14, ¶46, 270 P.3d 961, 971 (Colo. 2012).....	5
<i>In re Interrogatories of Colorado Senate of Fifty-First General Assembly</i> , 578 P.2d 216, 219 (Colo. 1978)	4
<i>Loonan v. Woodley</i> , 882 P.2d 1380, 1383 (Colo. 1994).....	5

Other Authorities

Audio File of July 19, 2021 Commission Meeting, https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210401/154/12094	7
---	---

Constitutional Provisions

Colo. Const., art. IV, § 11	3
Colo. Const., art. V, § 44	2, 4, 6, 8
Colo. Const., art. V, § 44.2(3).....	4
Colo. Const., art. V, § 44.3	4, 6
Colo. Const., art. V, § 44.5	2, 6, 8

Statement of the Identity of the Amicus Curiae and its Interest in the Case

Fair Lines Colorado is a non-profit organization that was formed to ensure that the carefully ordered and balanced criteria for drawing new districts are followed to provide “fair and effective representation” of Coloradans by legislators elected at the federal and state levels.

Fair Lines’ interest in this matter, given its representatives’ roles in drafting and promoting Amendments Y & Z, is to provide an added perspective about mapping and judicial timelines so that: (1) the ability of the public to participate in redistricting is not artificially and unduly limited; and (2) the Commissions undertake a process that uses only final census data, notwithstanding suggestions that it might use other, non-final data, so that there is full constitutional compliance with the criteria provided for redistricting in the Constitution.

Issues Presented

Whether the Colorado Supreme Court may modify constitutional deadlines for its review of a Congressional redistricting plan.

Summary of Argument

The purpose of Amendments Y and Z was to establish a citizen-driven method for congressional and legislative redistricting, first by using a citizen commission and then by allowing for substantial, meaningful public comment by requiring at

least three public meetings in each congressional district. It is this purpose, not a series of directory dates, that voters supported in 2018.

These changes to redistricting processes are guided – but not bound – by certain dates specified for Commission action and this Court’s review of a map’s legal adequacy. Therefore, without regard to the specific dates identified by the Commission in its Petition for Judicial Review and Request for this Court to Establish a Schedule Under Colo. Const., Art. V, § 44.5(1) (hereafter “Petition for Judicial Review”), this Court may act later than November 1 on whatever plan is submitted by the Commission.

Legal Argument

I. The dates in the Constitution for Commission filing of maps with this Court and for the Court’s review of such maps are not binding or material elements of Amendments Y & Z.

The Constitution specifies a date (September 1 of a redistricting year) for the Congressional Redistricting Commission to file a redistricting plan with the Court. Colo. Const., art. V, §§ 44.4(5)(b). This is a date the Commission can alter if conditions outside of its control “require such an adjustment” so a final plan can be adopted. *Id.*, § 44.4(5)(c).

At issue here is whether the date specified for this Court’s completion of its judicial review (November 1 of a redistricting year), *Id.*, § 44.5(4)(a), may also be

moved. The critical inquiry for this Court is whether any change in this date undermines the **purpose** of the redistricting amendments to the Constitution. On this issue, there is precedent that allows for alteration of the Court's deadline if it is necessary.

For example, the Governor of Colorado must return a vetoed bill to the General Assembly within ten (10) days of its delivery by the legislature. Colo. Const., art. IV, § 11. If the Governor fails to do so, the bill becomes law. *Id.*

A number of years ago, the Governor returned several vetoed bills out of compliance with this provision. Nevertheless, the General Assembly was able to and did consider said vetoes, none of which were overridden. This Court evaluated whether those vetoes were effective, given the timeliness issue. It found that they were in light of the purpose of that ten-day deadline. The Court held that the constitutional provision's purpose was fulfilled, and thus any noncompliance was deemed to be irrelevant.

[T]he purpose of the 10-day provision in the Colorado Constitution is to insure that the legislative branch has a suitable opportunity to consider the Governor's objections and take appropriate action with respect thereto. It is apparent that the house of the General Assembly which sustained vetoes or declared the bills "lost" had the time, and took the time, to consider the Governor's vetoes. The constitutional purpose was satisfied, and we rule that the bills enumerated... did not become law.

In re Interrogatories of Colorado Senate of Fifty-First General Assembly, 578 P.2d 216, 219 (Colo. 1978) (citations omitted). The Court thus focused on “the constitutional purpose” of this provision and whether it “was satisfied,” not whether the clock ran out on the Governor.

In the same vein, the Redistricting Commissions’ inability to meet the arbitrarily chosen dates for map submission and the Court’s inability to meet the arbitrarily chosen dates assigned for map approval do not affect the substantive redistricting process. The core purposes of Amendments Y & Z are unaffected by these dates. Those purposes include: (1) providing for fair and effective representation of Coloradans by their legislative officials by means of the redistricting process; (2) allowing for public comment on proposed redistricting maps and related issues such as what qualifies as a “community of interest” which provide the foundation for federal and state districts; (3) applying mandatory mapping criteria (one person/one vote, protections for the influence of minority groups, contiguity and compactness of districts, and preservation of communities of interest as well as jurisdictional boundaries); and (4) authorizing the use of competitiveness as a final redistricting factor, if possible and after all other mapping criteria are met. Colo. Const., art. V, §§ 44(1)(c), 44.2(3), 44.3(1)-(3). These were the substantive, underlying purposes of Amendment Y, none of which are

undermined by a modest slippage of the specified dates for Commission action and judicial review so long as the election schedule for 2022 is given effect.

This Court liberally construes voter access to electoral rights. For example, the fundamental rights to vote and to propose initiatives “have in common the guarantee of participation in the political process.” *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994). It is “the nature and the seriousness of these rights” that require constitutional and statutory provisions that govern them to be “liberally construed.” *Id.* at 1384. The rights of Colorado voters to fair and effective representation through a balanced redistricting process, *Hall v. Moreno*, 2012 CO 14, ¶46, 270 P.3d 961, 971 (Colo. 2012), and to participate in the Commission’s consideration of district maps also requires liberal construction of technical requirements such as the timing of filing and review of the redistricting plan.

Therefore, a certain flexibility about the dates by which the Commissions and this Court are to act does not affect the core issue of those bodies’ constitutional compliance.

II. The Court’s textual authority is limited to ensuring that the maps it receives follow the constitutional criteria.

The redistricting amendments are quite specific. This Court has sole appellate jurisdiction over the work of the Commission or, if they are unable to meet the supermajority requirement for map approval, the nonpartisan staff.

Nothing in Amendment Y or Amendment Z authorizes the Court to reject a map because, due to exigent circumstances, the Commissions file their maps late or the Court acts on those maps after the dates set forth in the Constitution. The Constitution is clear about the matters to be reviewed by this Court and does not allow for a finding of invalidity of a redistricting map based on timeliness.

The Court is authorized to “review the submitted [redistricting] plan and determine whether the plan complies with the criteria listed in section 44.3 of this article V.” Colo. Const., art. V, § 44.5(1). The Court may either “approve the plan submitted or return the plan to the commission” so that the commission may “hold a... hearing that includes public testimony and [] return an adopted plan that resolves the court’s reasons for disapproval.” *Id.*, § 44.5(4)(b), (c).

If the Commission were to fail to apply a mandatory redistricting factor (such as mapping in a way that denies or abridges racial minority voting rights), *id.*, § 44.3(1)(b), (4)(b), a plan could be challenged as being invalid. Similarly, if the Commission applies one of the carefully tiered factors out of order (for example, elevating political competitiveness over communities of interest despite the fact that competitiveness of districts can only be considered after all other factors are met), *id.*, § 44.3(4)(b), the map and the mapping process would both be flawed. Finally, if the Commissions were to use non-final population data in approving a staff draft

plan that is forwarded to this Court for review,¹ the map would be appropriately before this Court as being invalid for failing to comply with one person/one vote and federal Voting Rights Act requirements.

But these challenges are substantive. An untimeliness of map submission and judicial review is not. Thus, the Court can modify the timing for its judicial review in light of the extraordinary conditions that affected the taking of the U.S. Census in 2020 and delayed the practical timeline for these interim phases of redistricting.

CONCLUSION

This Court may adjust the timeline for its decision on a filed redistricting plan in order to fulfill the purpose for which the Constitution was amended to provide for a Congressional redistricting commission. That purpose is unrelated to the arbitrary dates chosen for map submission and judicial decision.

Any change to the judicial review calendar will compress the required review if the Court finds an approved map to be constitutionally non-compliant. Colo.

¹¹ In its Petition, the Commission raises but does not advocate the use of preliminary population data in final mapping which would result in a plan submission to this Court. *See* Petition for Judicial Review at 2, 10-11. In a recent public session, the Commission entertained but deferred acting upon a motion to use this non-final data if the Court does not extend its filing deadline as a result of this proceeding. Audio File of July 19, 2021 Commission Meeting, <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210401/154/12094> (4:19:45-5:05:15).

Const., art. V, § 44.5(4). But redistricting proceedings are inevitably expedited, and the Commission, the Court, and interested parties should still be able to tee up any dispute over a second, filed plan so that the Court may issue its decision by the end of December, 2021, whether that occurs on December 15 or sometime later in that month. *Id.*, § 44.5(5) (specifying December 15 for the Court’s decision).

Respectfully submitted this 22nd day of July, 2021.

/s/ Mark Grueskin

Mark G. Grueskin, #14621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
Email: mark@rklawpc.com
**ATTORNEY FOR FAIR LINES
COLORADO**

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **AMICUS CURIAE BRIEF OF FAIR LINES COLORADO** was sent electronically this day, July 22, 2021, via Colorado Courts E-Filing, to Counsel for the Colorado Independent Congressional Redistricting Commission at:

Frederick R. Yarger
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street
Suite 4500
Denver, CO 80202
yarger@wtotrial.com

Megan Frei Berglind
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street
Suite 4500
Denver, CO 80202
Berglind@wtotrial.com

Jerome DeHerrera
Achieve Law Group
146 West 11th Avenue
Denver, CO 80204
jdh@achievelawgroup.com

/s Erin Holweger _____