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In re Proposed Changes to Borders Between Congressional Districts	Supreme Court Case No. 2022SA27

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COLORADO INDEPENDENT CONGRESSIONAL REDISTRICTING COMMISSION'S RESPONSE TO THE SECRETARY OF STATE'S PETITION TO ADJUST BORDERS BETWEEN CONGRESSIONAL DISTRICTS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

> The brief complies with the word limit set by the Court in its February 3, 2022 Order because it contains 6,233 words.

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

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INTRODUCTION

Last year's congressional redistricting process succeeded despite significant challenges. In the view of the Colorado Independent Congressional Redistricting Commission, the key to that success was the Commission's constitutional independence and its respect for the detailed procedural and substantive requirements set forth in Amendment Y.

The Petition filed by the Secretary of State seeks to alter the result of last year's redistricting process without adhering to Amendment Y's procedures or substantive criteria. Circumventing the Commission's exclusive redistricting authority, the Petition would change district borders and reapportion district populations to create a population deviation of 134 people between the smallest and largest districts. No statute authorizes what the Secretary proposes here, and if a statute did so, it would violate Amendment Y. Nonetheless, if the Court is inclined to reopen the Final Plan, it should continue to recognize the Commission's exclusive authority over redistricting and order only those changes approved by the Commissioners themselves.

FACTUAL AND LEGAL BACKGROUND

A. Amendment Y created a self-contained process, empowering the Commission alone to carry out redistricting subject to this Court's review.

When Colorado voters approved Amendment Y, they sought to "remove the General Assembly from the redistricting process" and "vest[ ] all authority to draw district maps with [an] independent commission[ ]." *In re Interrogs. on Senate Bill 21-247* ("*In re Interrogs.*"), 2021 CO 37, ¶ 6. Amendment Y, which became law "by an overwhelming margin," replaced a failed system under which the General Assembly was responsible for congressional redistricting but, more often than not, was unable to carry out its duties, leaving litigants and courts to draw congressional district boundaries. *In re Colo. Indep. Congressional Redistricting Comm'n* ("*In re Congressional Redistricting*"), 2021 CO 73, ¶¶ 2–3. To ensure those failures would not be repeated, Amendment Y gave the Commission "independent constitutional authority" and, equally important, "carved out" only a "limited role … for the legislature." *In re Interrogs.*, 2021 CO 37, ¶ 34.

Amendment Y is both self executing and self contained. It "lay[s] out admirably detailed guidelines for the operation of the commission[ ] as well as criteria related to the substantive requirements that the final redistricting plan[ ] must meet." *Id.* ¶ 36. For that reason, the General Assembly's ability to legislate on the subject of redistricting is, in the wake of Amendment Y, significantly limited. *Id.* ¶ 43. The General Assembly must provide funding for the Commission's work; otherwise, however, the redistricting process is now "beyond the power of the legislature." *Id.* ¶ 43–44 (citation omitted). Amendment Y gives the Commission, and the Commission alone, "sole constitutional authority to conduct all of the key tasks in the redistricting process." *Id.* ¶ 43. The Commission is empowered to "interpret and enforce the Amendment['s] provisions," and that power is "separate and distinct from the General Assembly." *Id.* ¶ 44 (citation omitted).

Amendment Y's self-contained redistricting process prioritizes public input and transparency from the inception of the Commission's work in a given redistricting year through the final stage, judicial review. Amendment Y requires the Commission to hold public hearings

across the state and provides other avenues for public comment, including submission of proposed maps for the Commissioners' consideration. Colo. Const. art. V, § 44.2(3). The Commission's own proposed maps are also public, as are its deliberations concerning those maps. *Id.* § 44.4(1). Anyone may participate in this public process, including state and local election officials, and the Commission must consider this public input in its decision making. *Id.*

At the final stage of the redistricting process, Amendment Y requires the Commission to submit its final plan to this Court for review. *Id.* § 44.4(5)(b). The public is, again, able to participate and may submit legal arguments and other information to the Court, including alternate proposed redistricting plans. The Court then reviews the Commission's final plan, in light of both Amendment Y's detailed constitutional criteria and the arguments of interested parties. *Id.* § 44.5(1). If the Commission has not abused its discretion in applying (or failing to apply) the constitutional criteria, Amendment Y directs the Court to approve the plan. *Id.* § 44.5(2) & (5). If the Court finds the Commission abused its discretion, the Court returns the plan to the

Commission, and the Commission must make adjustments and submit a revised plan. *Id.* § 44.5(3)–(4). Once the judicial review process is complete, the self-contained redistricting process prescribed by Amendment Y concludes, and the final plan is filed with the Secretary of State for implementation. *Id.* § 44.5(5).

B. During the 2021 redistricting year, the Commission engaged in a robust and transparent redistricting process, resulting in a Final Plan that satisfies all legal requirements, including equal population.

This past redistricting year demonstrated that the detailed, self-contained process prescribed by Amendment Y is both workable and effective, even under unusual and challenging circumstances. For the first time in Colorado, congressional district maps are "the product of public input, transparent deliberation, and compromise among twelve ordinary voters representing the diversity of our state." *In re Congressional Redistricting*, 2021 CO 73 ¶ 91. Despite a nearly five-month delay in receiving final census data, the Commission complied with, and indeed exceeded, Amendment Y's requirements. The Commission held 40 hearings, more than the number required by

Amendment Y, and considered over 5,000 comments and 170 maps submitted by members of the public. *Id.* ¶ 16.

Informed by this record, the Commission applied state and federal redistricting requirements in arriving at its decision to adopt a Final Congressional Redistricting Plan. First among those requirements was the mandate of equal population among districts, which derives not only from Amendment Y but from the United States Constitution as well. Amendment Y instructs the Commission to "[m]ake 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." Colo. Const. art. V, § 44.3(1)(a). As this text makes clear, the Commission is the body that must "interpret and enforce" the equal-population requirement, *In re Interrogs.*, 2021 CO 37, ¶ 44 (citation omitted), and the Commission is the body that must decide whether any variance in population, "no matter how small," can be "justif[ied]." Colo. Const. art. V, § 44.3(1)(a).

During its work to develop and approve the plan, the Commission never found sufficient justification to depart from the equal-population

requirement. Additionally, every one of the plans the Commissioners or its Staff proposed achieved population equality, with a deviation among districts of only one person. The Commissioners ultimately voted 11 to 1 to approve the Final Plan. *In re Congressional Redistricting,* 2021 CO 73, ¶ 16.

The Commission filed its Final Plan with the Court on October 1. A week later, the Commission and a dozen interested parties filed briefs, some in support of and some opposed to the plan. *In re Congressional Redistricting*, 2021 CO 73, ¶ 27 n.4. Among those interested parties was the Clerk and Recorder of the City and County of Denver, who objected to the Final Plan because it created a precinct with a small census block, which the Clerk and Recorder feared would jeopardize voter secrecy. *Id.* ¶¶ 87–90.

Because the Denver Clerk and Recorder raised this issue before the conclusion of Amendment Y's redistricting process, the Commission and its Staff could carefully consider the objection, confer with staff at the Secretary of State's Office, confirm that the Denver Clerk and Recorder's privacy concerns could be addressed after the Final Plan's

approval without upsetting the Final Plan itself, and address the Denver Clerk and Recorder's concerns in briefing and at oral argument. *Id*. This Court, in turn, could analyze the Denver Clerk and Recorder's privacy concerns, which it did, ultimately concluding that those concerns did not justify alterations to the Final Plan. *Id.* ¶ 90. No other party made other objections concerning voter secrecy.

Likewise, no party challenged the Commission's compliance with the equal-population requirement. *Id.* ¶ 44. No party suggested that the Final Plan should be altered to address parcel-splitting, and no party suggested that altering the Final Plan to address parcel-splitting would satisfy the Commission's obligation to comply with the equal-population mandate of Amendment Y and the U.S. Constitution.

This Court unanimously approved the plan on November 1, 2021. *Id.* ¶ 91. The Court ordered the Commission to file the plan with the Secretary of State by December 15, 2021. *Id.* The Commission did so, concluding the redistricting process set forth by Amendment Y.

C. The Secretary's Petition seeks to reopen the Final Plan, redraw district boundaries, and create significant population disparities among districts.

Three months after this Court approved the Commission's Final Plan, the Secretary filed the Petition. In it, the Secretary asks the Court to reopen the Final Plan and approve alterations to the Final Plan's district boundaries and population apportionments. Sec'y of State's Pet. to Adjust Borders Between Cong. Dists. at 38 ("Pet."). Under the Secretary's proposed changes, only two districts would remain at the ideal population size of 721,714. The remaining six districts would become larger or smaller, with a population deviation of 134 between the largest district (721,796) and the smallest (721,662).

Specifically, the Secretary seeks to move 17 people (including two active voters) in Boulder County from CD7 to CD2. Pet. at 33–38. The Secretary asserts that this change to the Final Plan is necessary to preserve voter secrecy, but the Petition cites no statute or other law authorizing the change. *Id.*

In addition, the Secretary seeks to:

1. Make multiple adjustments to the border of CD7 and CD8 between Adams and Broomfield Counties, with no change in population, *id*. at 13–16;

2. Adjust the border of CD7 and CD8 in Adams County with no change in population, *id*. at 16–18;

3. Adjust the border of CD4 and CD6 in Arapahoe County, moving 34 people from CD6 into CD4, *id*. at 18–20;

4. Adjust the border of CD2 and CD3 in Eagle County, moving 16 people from CD2 into CD3, *id*. at 20–22;

5. Make multiple adjustments the border between CD 8 and CD4 in Weld County, moving 47 people from CD8 to CD4, *id*. at 23–26, 30–33;

6. Make multiple adjustments to the border between CD8 and CD2 in Weld County, moving five people from CD8 to CD2, *id*. at 26–30.

The Secretary proposes these six changes to address residential parcel splits, relying on C.R.S. § 2-1-106(3), a statutory provision enacted in 2020, after Amendment Y became law.

Section 2-1-106(3) purports to allow the Secretary to propose adjustments to a Final Plan after it has been approved by both the Commission and this Court and after completion of the redistricting process set forth in Amendment Y. Under the statute, "[i]f a county clerk and recorder discovers that a border between two congressional

districts divides a residential parcel" and "the clerk and recorder wishes to have the border moved," the clerk and recorder "shall submit to the secretary of state documentation, satisfactory to the secretary of state, evidencing such division." C.R.S. § 2-1-106(3)(a). If the Secretary "believes that the border should be moved," she may "propose moving the border." *Id*. The Secretary cannot, however, propose any change that would "result in a violation of section 44.3(1)(a) of article V of the state constitution [the equal-population mandate] based upon the latest national census." C.R.S. § 2-1-106(3)(a)(III).

The Secretary's proposed changes must be submitted to this Court, along with a description of "any potential changes in populations of affected congressional districts, based on the latest national census." C.R.S. § 2-1-106(3)(b). This Court "may approve" the Secretary's proposed alterations only if it determines that those alterations satisfy statutory criteria, including the equal-population mandate. *Id*.

The provisions of C.R.S. § 2-1-106(3) are new. Before Amendment Y, when the General Assembly was responsible for congressional redistricting, no statute granted authority to local

officials or the Secretary of State to propose changes to congressional district boundaries to address parcel splits. *See* C.R.S. §§ 2-1-100.5 *et seq*. (2012).[1] Although the Secretary sought changes to the 2011 congressional district plan to address parcel-splitting, that request was made in the original proceeding before the court that drew the original maps. *See* Pet. at 6.

SUMMARY OF ARGUMENT

I. The Secretary's Petition seeks relief that is not authorized by any statute or other legal provision and should be denied for that narrow reason.

As authority to alter district boundaries to address parcel splits, the Secretary invokes C.R.S. § 2-1-106(3). But that statute expressly prohibits the Secretary from proposing border alterations that violate the equal-population requirement of Amendment Y and the U.S. Constitution. C.R.S. § 2-1-106(3)(a)(III). The Secretary's proposed changes create a population deviation of 134; the Final Plan approved

[1] A previous statute allowed boundary adjustments for state legislative districts, but no analogous statute existed for congressional districts. *See* C.R.S. § 2-2-106 (2012).

by the Commission and this Court, in contrast, drew boundaries that achieved a population deviation of only one, the smallest deviation possible. Nothing in C.R.S. § 2-1-106(3) allows the Secretary to propose changes to a Final Plan that create a 134-person disparity, and nothing in the statute empowers the Secretary determine whether those changes, and their resulting population deviations, are constitutionally justified. To the contrary, Amendment Y grants that power to the Commission alone. Separately, C.R.S. § 2-1-106(3) makes clear that equal population is a higher priority than avoiding parcel splits. The statute requires this Court to deny a request by the Secretary that creates population disparities such as those at issue here.

With regard to proposed changes that address ballot secrecy concerns, the Secretary cites no authorizing statute at all. While solutions may be available, reopening a Final Plan in this Court does not appear to be among them.

II. If the Court declines to deny the Petition based on a lack of statutory authorization, it must determine whether the Petition and the

statute on which it is based impermissibly circumvent Amendment Y's self-contained redistricting process.

After a Final Plan is approved by the Commission and this Court, Amendment Y neither contemplates nor authorizes further redistricting activity. Yet C.R.S. § 2-1-106(3) and the Petition seek to permit the Secretary to engage in core redistricting activities—redrawing boundaries and reapportioning district populations—without complying with Amendment Y's procedural and substantive provisions. Additionally, C.R.S. § 2-1-106(3) and the Petition are unnecessary. Parcel splits are not uncommon after a redistricting cycle, and local officials have tools to address parcel splits without moving district boundaries or reapportioning populations.

Amendment Y gives the Commission exclusive authority over redistricting in Colorado and explicitly limits the role of the General Assembly and the Secretary. Section 2-1-106(3) and the Secretary's Petition stray beyond those limits and intrude on the Commission's "sole constitutional authority to conduct all of the key tasks in the

redistricting process." *In re Interrogs.*, 2021 CO 37, ¶¶ 43–44. For that reason, C.R.S. § 2-1-106(3) and the Petition violate Amendment Y.

III. Finally, if this Court determines that a Final Plan may be reopened, it should respect the Commission's exclusive constitutional authority by adopting the Commission's official position on the Secretary's proposed changes. Specifically, the Commission would approve only those border changes necessary to address voter secrecy and those that would not cause population deviations among districts.

STANDARD OF REVIEW

This Court's standard of review under C.R.S. § 2-1-106(3) is de novo. The Court must independently "determine" whether the Secretary's proposed changes to the Final Plan "satisfy the criteria established in subsection (3)(a)," including the equal-population requirement. C.R.S. § 2-1-106(3)(b). If the Court "determines that the [Secretary's proposed changes] do[ ] not satisfy the criteria," the Court "shall deny" the proposed changes. *Id.*

In construing Amendment Y, the Court "must ascertain and give effect to the intent of the electorate adopting the amendment." *Zaner v.*

City of Brighton, 917 P.2d 280, 283 (Colo. 1996). Thus, if "the language of [Amendment Y] is plain, its meaning clear, and no absurdity involved," it must "be declared and enforced as written." *In re Interrogs. relating to Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo. 1996). The Court must consider "the objective sought to be achieved and the mischief to be avoided" by the provision at issue, and "may consider … relevant materials" bearing on voter intent "such as the 'Blue Book' … prepared by the Legislative Council." *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009). While voters are deemed to incorporate into an initiated amendment background principles of law as they existed at the time of approval (unless the amendment changed the law), voters are not deemed to incorporate statutory changes, like C.R.S. § 2-1-106, that post-date the amendment. "A court's interpretation of a constitutional amendment is constrained by consideration of the state of things existing at the time the provision was … adopted." *Great Outdoors Colo.*, 913 P.2d at 540.

Enacted statutes are presumed constitutional. *Washington Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 149 (Colo. 2005).

To overcome this presumption, the challenging party must prove their unconstitutionality beyond a reasonable doubt. *In re Interrog. on House Joint Resol. 20-1006*, 2020 CO 23, ¶ 34.

ARGUMENT

I. The Secretary lacks authority under C.R.S. § 2-1-106(3) or any other statute to reopen the Final Plan and make the adjustments proposed by the Petition.

In Part II below, the Commission explains that the Secretary's Petition contravenes Amendment Y and is therefore constitutionally invalid. But putting the constitutional infirmity aside, the Petition can be disposed of on narrower grounds: the relief sought by the Petition is unavailable under C.R.S. § 2-1-106(3), the only authorizing statute the Petition cites, and is otherwise unsupported by statute or other law.

A. C.R.S. § 2-1-106(3) does not permit the Secretary to reopen a Final Plan and alter district boundaries when the alterations violate the equal-population requirement.

Section 2-1-106(3) specifies that the Secretary of State may propose changes to district boundaries only if the changes "[w]ould not result in a violation of [the equal-population requirement of] section 44.3(1)(a) of article V of the state constitution based on the latest

national census." C.R.S. § 2-1-106(3)(a)(III). The Secretary interprets C.R.S. § 2-1-106(3) to permit her to both propose a deviation among district populations of 134 people and to determine that this deviation in population is justified by a sufficient state interest. Pet. at 9. This interpretation is incorrect for two separate reasons.

First, neither Amendment Y nor C.R.S. § 2-1-106(3) grants the Secretary authority to determine what justifications, if any, would permit a deviation from population equality to address parcel splits. The statute is silent on the subject. Amendment Y, meanwhile, expressly empowers the Commission—not any other body or official—to make this determination. Colo. Const. art. V, § 44.3(1)(a). As this Court held, only the Commission is empowered to "interpret and enforce the Amendment['s] provisions," *In re Interrogs.*, 2021 CO 37, ¶ 44 (citation omitted), including the equal-population requirement.

The equal-population requirement, which arises from the U.S. Constitution, "permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." *Karcher v. Daggett*, 462 U.S. 725, 730

(1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). Put another way, "[s]tates must draw congressional districts with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). Absent a sufficient justification, anything short of population equality "would subtly erode the Constitution's ideal of equal representation." *Karcher*, 462 U.S. at 731. Not every justification is sufficient to support a deviation from equal population. *Id*. at 740. Unless the deviation is in fact necessary to achieve a sufficiently important state interest, the equal-population requirement is violated. *Cf. Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 676–78 (M.D. Penn. 2002) (explaining that even "*de minimis*" population deviations must be justified, and invalidating a congressional map creating a population difference of only "nineteen persons" because "it is possible to draw a congressional district map with zero population deviation amongst districts" while still meeting the state interest that allegedly justified the deviation).

Here, the Commission made a good-faith effort to achieve—and in fact did achieve—population equality by drawing districts whose

populations differ by only one person. The Final Plan distributes the state's population among eight districts as evenly as possible, and the Commission "complied with its obligation to achieve precise mathematical equality." *In re Congressional Redistricting*, 2021 CO 73, ¶ 44. Additionally, the Commission never identified a state interest sufficient to "justify" any population deviation.[2] Because the Commission did not find any justification to deviate from the equal-population requirement, and because the Commission alone has authority to consider such deviations, C.R.S. § 2-1-106(3) expressly prohibits the proposals in the Secretary's Petition that contravene the equal-population requirement.

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[2] Throughout the redistricting process, the Commission strictly adhered to the equal-population requirement. The preliminary plan and all three staff plans had populations deviations of no more than one person. *See* https://tinyurl.com/2p8pt866 (collection of all plans with supporting materials). Likewise, the seven Commissioner-requested maps and eleven amendments all met the equal-population requirement. *Id*. In this Court, the Commission also strictly adhered to population equality. For example, in its Reply Brief supporting the Plan, the Commission responded to an objection from Eagle County by explaining that in congressional districts, unlike state legislative districts, "population must be equalized precisely." Reply Brief in Supp. of Approval of Final Redistricting Plan at 26, *In re Colo. Indep. Cong. Redistricting Comm'n*, 2021 CO 73.

Second, the Secretary's interpretation of C.R.S. § 2-1-106(3) is circular and conflicts with the statute's text. Section 2-1-106(3)(a)(III) expressly ***prohibits*** the Secretary from adjusting district borders to address parcel splits if the adjustment violates Amendment Y's equal-population requirement. That is, the statute itself makes clear that equal population is a higher priority than avoiding parcel splits. Accordingly, avoiding parcel splits alone, under the plain language of the statute, cannot justify a violation of the equal-population requirement. Yet for each deviation in population created by her proposed boundary changes, the Secretary provides only one perfunctory justification: "The state's interest in keeping residential parcels intact justifies the de minimus deviation." Pet. at 20, 22, 25, 29, 33.

This perfunctory justification, in addition to being insufficient under C.R.S. § 2-1-106(3), may also be insufficient under the U.S. Constitution. Deviations in population must be "***necessary*** to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740 (emphasis added). Yet the Secretary never explains whether alternative maps

could be drawn that would both keep residential parcels intact and maintain equal population. *Cf. Vieth*, 195 F. Supp. 2d at 678 (rejecting a map with a 19-person deviation because "it is possible to draw a congressional district map with zero population deviation amongst districts" that satisfied the state interest used to justify the deviation).

The Secretary's application of the statute therefore improperly reads language out of C.R.S. § 2-1-106(3). *See Goodman v. Heritage Builders, Inc.*, 2017 CO 13, ¶ 7 (explaining that courts must "reject interpretations that render words or phrases superfluous" (quoting *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006))). Rather than heeding the equal-population requirement—and the statute's instruction to prioritize equal population above keeping parcels whole—the Secretary assumes a Final Plan can be reopened, and a 134-person deviation created, merely because the Final Plan splits parcels. That is not what the statute says.

Indeed, the statute as a whole confirms that equal population is given higher priority than avoiding parcel splits. Specifically, the statute makes clear that this Court must ***deny*** the Secretary's proposal

to change district boundaries to address parcel splits, if the proposal violates the equal-population requirement. C.R.S. § 2-1-106(3)(b) ("If the supreme court determines that the [Secretary's proposal] does not satisfy the criteria established in subsection (3)(a) of this section the supreme court shall ***deny*** the proposed assignment." (emphasis added)). Denial is the only option, even if parcels will remain split. In contrast, the Court ***must revise*** a proposal by the Secretary that addresses areas "omitted from the redistricting plan" or "included in two or more congressional districts," even if the proposal violates the equal-population mandate. C.R.S. §§ 2-1-106(1), (2), (4). In that situation, denial is not an option, and the Court cannot leave those particular issues unaddressed—it must "certify ***a revised reapportionment plan*** to the secretary of state." C.R.S. § 2-1-106(4) (emphasis added).

Thus, the statute makes clear that parcel splits are less important than equal population, and are indeed permissible if, as here, addressing parcel splits would cause unequal populations among districts. Here, the Secretary's proposed changes result in unequal

district populations. The Court must therefore deny the Secretary's petition under C.R.S. § 2-1-106(3)(b).

B. The Secretary identifies no statute or other authority allowing a Final Plan to be reopened in this Court based on voter secrecy concerns.

The Secretary also proposes changes that would move 17 people, including two active voters, from CD7 into CD2 to preserve ballot secrecy. Pet. at 33–38. The Commission agrees that preserving ballot secrecy is important. Had this issue been raised during the course of last year's redistricting, the Commission and its Staff would have addressed the concern, as they addressed the ballot-secrecy concerns raised by the Denver Clerk and Recorder during this Court's review of the Final Plan. *In re Congressional Redistricting*, 2021 CO 73, ¶¶ 87–90. Additionally, if this Court determines that the Final Plan can be reopened for the Commission's reconsideration, the Commission would approve proposed changes to the Final Plan to address voter secrecy concerns, as explained in Part III below.

But while the Secretary points to the Colorado constitutional protection of ballot secrecy in support of her proposed changes, *see* Colo.

Const. art. VII, § 8, she identifies no statutory or constitutional authority that allows her to petition this Court directly to propose adjustments to a Final Plan months after the Commission's and this Court's approval of it. Pet. at 33–38. Accordingly, it appears to the Commission that the Secretary lacks authority for her proposed changes to the border between CD7 and CD2.

Although there is no mechanism to reopen the Final Plan in this Court, other avenues may exist to address the Secretary's concern. As this Court observed in *In re Congressional Redistricting*, the Secretary's secrecy concern may be "a practical problem that requires a practical solution." 2021 CO 73, ¶ 90. The Petition acknowledges that "Boulder officials [could] confidentially share the votes cast by those two Boulder voters with officials in Broomfield," and although the Petition asserts that this solution would "create[ ] an unacceptable risk of public disclosure," it never explains why. Pet. at 37 n.6.

Alternatively, the right to ballot secrecy is personal, and "it is for the voter to determine whether to invoke its protection." *Mahaffey v. Barnhill*, 855 P.2d 847, 851 (Colo. 1993). Affected voters could, if they

desired, bring an action in an appropriate trial court to enforce their right to a secret ballot. *Cf. Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) ("[A] self-executing constitutional provision *ipso facto* affords the means of protecting the right given and of enforcing the duty imposed." (quoting *Colo. State Civil Serv. Emps. Ass'n v. Love*, 448 P.2d 624, 627 (1968))). Finally, it may be possible for a county or local election official, or perhaps the Secretary herself, to bring a separate action to address the concern. *Cf. In re Congressional Redistricting*, 2021 CO 73, ¶ 88 (quoting *Jones v. Samora*, 2014 CO 4, ¶ 38).[3] The district court hearing such an action could then fashion an appropriate, narrowly tailored remedy.

[3] In *In re Congressional Redistricting*, this Court expressed concern that "failure to ensure secrecy in voting compromises 'the fundamental integrity of an election.'" 2021 CO 73, ¶ 88 (quoting *Jones*, 2014 CO 4, ¶ 38). This is true only if the "secrecy or integrity of [an] ***entire election*** was put in jeopardy," so that there essentially was "lack of a secret ballot." *Jones*, 2014 CO 4, ¶ 38 (emphasis added). The situation here, involving just two voters in one particular district, is far different, and would not call into question the validity of any election. *Id.*

II. The Secretary's Petition, and the statute on which it is based, unconstitutionally circumvents Amendment Y.

As explained immediately above, the Secretary's Petition is not authorized by C.R.S. § 2-1-106(3) and no statute authorizes the Secretary to petition this Court to reopen a Final Plan based on voter secrecy concerns. This Court must deny the Petition for those narrow reasons alone. But if the Court disagrees, it must address a separate issue: whether the Petition and C.R.S. § 2-1-106(3) impermissibly circumvent the redistricting process that Amendment Y entrusted solely to the Commission.

A. Amendment Y's self-contained redistricting process provides no mechanism to reopen a Final Plan after this Court's approval, and, in any event, reopening a Final Plan to address parcel splits is unnecessary.

Amendment Y creates a self-contained redistricting process, "lay[ing] out admirably detailed guidelines for the operation of the commission[ ] as well as criteria related to the substantive requirements that the final redistricting plan[ ] must meet." *In re Interrogs.*, 2021 CO 37, ¶ 36. Under Amendment Y, the redistricting process ends when the Court approves a Final Plan and the

Commission submits the plan to the Secretary. Colo. Const. art. V, § 44.5(5). Amendment Y neither contemplates nor authorizes any further redistricting activity until a subsequent decennial census. Additionally, all steps of the redistricting process must take place during the "redistricting year," defined as "the year following the year in which the federal decennial census is taken." *Id.* § 44(3)(d). Nothing in Amendment Y indicates that the General Assembly may authorize state or local officials to reopen a Final Plan in a subsequent year, after the redistricting process has concluded, to alter the Final Plan's district boundaries. *Cf. People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1238 (Colo. 2003) ("[W]hen the constitution specifies a timeframe for redistricting, then, by implication, it forbids performing that task at other times.").

Yet C.R.S. § 2-1-106(3) attempts to do just that, purporting to empower the Secretary to engage in redistricting activities outside of Amendment Y's detailed process and after a redistricting year has concluded. Here, the Petition, invoking C.R.S. § 2-1-106(3), seeks to engage in the most fundamental aspect of redistricting: drawing district

boundaries. The Petition, however, complies with none of Amendment Y's requirements. Its proposed changes to the Final Plan's district borders were not subject to public comment or public hearings. Colo. Const. art. V, § 44.2(3). The changes were not publicly debated by a politically balanced Commission composed of 12 ordinary voters. *Id.* § 44.2(4). The changes were not subject to all of the substantive criteria in Section 44.3 of Amendment Y. And the changes were not subject to the supermajority voting requirements that ensure broad support among Commissioners. *Id.* § 44.2(2).

Because it is not authorized by Amendment Y—and because it contravenes numerous provisions in Amendment Y—the process contemplated by C.R.S. § 2-1-106(3) is unconstitutional. "[W]hen the voters establish an independent constitutional body via initiative with the intent of divesting the General Assembly of authority, the General Assembly's power with regard to that independent body 'derives exclusively from [the] Amendment ... itself.'" *In re Interrogs.*, 2021 CO 37, ¶ 41 (quoting *Colo. Ethics Watch v. Indep. Ethics Comm'n*, 2016 CO

21, ¶ 11). Section 2-1-106(3) does not "derive exclusively from" Amendment Y; the statute instead violates Amendment Y.

Additionally, C.R.S. § 2-1-106 is unnecessary. Parcel splits are a common issue that exist across the country and are amenable to practical solutions. Because congressional district borders must follow census block lines, and because census block lines do not necessarily correspond to roads and streets, *see generally* C.R.S. § 1-5-101(1) & (5), it is to be expected that some district borders may split residential parcels. These splits need not lead to changes in district boundaries; local election officials simply need to assign split-parcel residents to the correct district. If local officials have access to a Geographic Information System (GIS)—a digital framework for collecting, managing, visualizing, and analyzing data as a series of digital map layers—the GIS can assign a specific point to each address and automatically include that point in the correct district. *See* Nat'l Conf. of State Legislatures, *After Redistricting Is Done: Election Processes and Implementation*, "Assigning Voters to the Correct Districts," available at https://tinyurl.com/mr46b3sb. For officials that do not have a GIS,

the process can be done by hand, either using street segment files or by evaluating physical maps. *Id.* Essentially, the same work that local officials used to identify split parcels for purposes of the Secretary's Petition can be used to determine which district voters located on any particular split parcel should be placed in. Reopening a Final Plan and altering district borders is unnecessary.

B. Amendment Y empowers the Commission alone to determine whether a deviation from population equality is justified, and neither the General Assembly nor the Secretary may override the Commission's determination.

Amendment Y "transferr[ed] the legislature's role to an independent commission. … and put the redistricting process beyond the power of the legislature." *In re Interrogs.*, 2021 CO 37, ¶ 44 (quotation marks and citations omitted). Thus, Amendment Y authorized the Commission alone to apply constitutional redistricting criteria in arriving at a final redistricting plan. Colo. Const. art. V, §§ 44.3, 44.4(5). This includes the first constitutional criterion, which explicitly requires the Commission to "[m]ake 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." *Id.* § 44.3(1)(a).

No other official or body may enforce or implement this criterion. "[T]he General Assembly is assigned only three discrete tasks pertinent to the redistricting process: setting compensation for panelists who assist in selecting commissioners, appropriating 'sufficient funds' for commission expenses, and providing a per diem allowance for members of the commission[ ]." *In re Interrogs.*, 2021 CO 37, ¶ 43 (citations omitted). It has no "broader, continued role … in the redistricting process." *Id.* ¶ 45 (quotation marks omitted). The Secretary's role is similarly constrained; it is limited to assisting in determining whether Commission applicants meet eligibility criteria, Colo. Const. art. V, § 44.1(6); receiving and publishing lobbying disclosures for individuals contracted or compensated for advocating to the Commission, *id.* § 44.2(4)(b)(III); and receiving the Final Plan for filing and implementation, *id.* § 44.5(5). Local election officials, meanwhile, are not included in Amendment Y's redistricting process, although they

may, of course, testify at public hearings, provide written comments, or propose alternate maps to the Commission.

Although Amendment Y vests the Commission with exclusive authority over redistricting, and although Amendment Y explicitly limits the role of the General Assembly and the Secretary, both C.R.S. § 2-1-106(3) and the Secretary's Petition seek to not only redraw district boundaries but also to determine whether to deviate from the equal-population requirement. Under *In re Interrogatories*, the General Assembly and Secretary cannot perform these functions. The Commission has "sole constitutional authority to conduct all of the key tasks in the redistricting process," and this authority is "separate and distinct from the General Assembly." *In re Interrogs.*, 2021 CO 37, ¶¶ 43–44 (citation omitted). Just as the General Assembly may not "direct the actions" of the Commission, it may not empower the Secretary to override those actions after the Commission has completed its work. *Id.* ¶ 40.

III. Assuming a Final Plan may be reopened, only the Commission and this Court may consider changes to district borders; here, the Commission would approve only changes necessary to address voter secrecy and those that would not cause population deviations.

As explained above, Amendment Y provides no mechanism for reopening a congressional redistricting plan once it has been approved by the Commission and this Court. Nonetheless, if any entity has power to alter district boundaries after the fact, that entity is the Commission. The Commission is vested with "***sole*** constitutional authority to conduct all of the key tasks in the redistricting process," including "adopting a final plan to submit to this court for review." *In re Interrogs.*, 2021 CO 37, ¶ 43 (emphasis added).

Accordingly, if the Court is inclined to reopen the Final Plan for the Commission's reconsideration, the Commission would address the Secretary's Petition as follows:

- First, to the extent the Secretary's proposed changes address voter secrecy, the Commission would accept those changes and adjust district boundaries to reassign the Boulder County census blocks located in CD7 to CD2. The Commission has determined that protecting voter secrecy provides sufficient justification under section 44.3(1)(a) of article V to deviate from population equality.

- Second, with respect to changes that are proposed to resolve parcel splits, the Commission would accept only changes that do not alter district populations. The Commission would reject any changes that cause population deviations, and would otherwise preserve the district borders as set forth in the Final Plan approved by both the Commission and this Court.

CONCLUSION

The Court should deny the Petition. Alternatively, if the Court finds that the Final Plan may be reopened and altered outside the procedures set forth in Amendment Y, the Court should follow the recommendations of the Commission, approving changes that protect voter secrecy and that address parcel splits without creating population deviations but declining to make other changes to the Final Plan.

Dated: February 24, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 24, 2022, a true and correct copy of **COLORADO INDEPENDENT CONGRESSIONAL REDISTRICTING COMMISSION'S RESPONSE TO THE SECRETARY OF STATE'S PETITION TO ADJUST BORDERS BETWEEN CONGRESSIONAL DISTRICTS** was filed with the Court via Colorado Courts E-Filing System, with e-service to the following:

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