

# Attorneys Guide Congressional Redistricting Commission Through ‘Uncharted Waters’

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Last week, the Colorado Supreme Court [unanimously approved](#) the state’s new congressional map, which adds an eighth congressional district. It was the first time the congressional lines were drawn by an independent commission of ordinary citizens representing a mix of political affiliations. Previously, congressional redistricting was carried out by the state legislature.

While the commission was meant to remove partisan politics from the redistricting process, it still faced court challenges from several groups who objected to the final plan. The Colorado Independent Congressional Redistricting Commission hired Wheeler Trigg O’Donnell partner Fred Yarger and Jerome DeHerrera of Achieve Law Group to represent it and defend its chosen map to the Colorado Supreme Court.

Yarger and DeHerrera submitted separate applications in response to the commission’s search for legal representation. The commission decided to hire both firms in May with DeHerrera to serve as general counsel and Yarger to handle litigation. They knew they would

make a good team, according to DeHerrera, having worked together before when Yarger was Colorado’s Solicitor General and DeHerrera was general counsel for Denver Public Schools.

DeHerrera’s role included helping the commission understand and meet its constitutional requirements during its day-to-day work. The commission consists of 12 commissioners from around the state. To adopt a final plan, a supermajority of the commissioners had to approve it. “Part of my task was being able to advise each one of those commissioners,” DeHerrera said. “And when you’re trying to be an effective adviser to a client, you have to be a good listener.”

Once the commission made decisions or took positions, Yarger said, “my job really was communicating those positions to the court in the way that I thought — and we thought as a team — was most persuasive.”

“We’re the first commission ever to do this,” DeHerrera said. “So there were a lot of unknowns and uncharted waters that we were going through.”

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– Fred Yarger, Wheeler Trigg O’Donnell Partner

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## TIME CRUNCH

According to Yarger, one thing that crystallized the commission's need for outside counsel was when the state legislature filed an interrogatory in May asking the Colorado Supreme Court to clear up questions about [who should dictate the details](#) of the commission's work.

According to the attorneys, they were hired on a Monday in May and had to file a brief to the Supreme Court by Thursday of the same week, though they were allowed a short extension. Yarger then appeared in front of the justices for oral arguments about the interrogatory on May 17 — a week after they were hired.

The attorneys faced a similar time crunch last month when they defended the commission's final plan against constitutional challenges. The state constitution requires the commission to create districts of equal population, comply with the Voting Rights Act of 1965, preserve communities of interest, create districts that are as compact as possible and maximize the number of politically competitive districts. The constitution also bans plans that protect an incumbent, candidate or party and maps that deny or abridge the right of any citizen to vote due to race or language minority status, including by diluting a group's electoral influence.

The commission submitted its final map to the high court for review on Oct. 1. The attorneys had a week to prepare a brief defending the map and explaining why it met the requirements spelled out in the Colorado Constitution. The legal team then had three days to respond to 13 different briefs filed by interested parties and advocacy groups, most of which took issue with the final plan.

Some groups [argued the final map](#) dilutes the influence of Latino voters. Others objected to how the newly drawn congressional lines divide certain counties or group disparate communities together. Still others said the redistricting process was "procedurally irregular" or rushed, largely due to pandemic-related delays.

"We took every argument seriously because we had to," Yarger said, adding that they knew everything the commission did would be tested in court and would set a precedent for future commissions operating under Amendment Y, which Colorado voters passed in 2018 to create the independent commission. "We all wanted to make sure that, whatever the commission decided, it was consistent with [the] best approach to interpreting that amendment and would stand the test of the court and stand the test of time."

## UNANIMOUS DECISION

The justices unanimously approved the map on Nov. 1. In an opinion penned by Justice Monica Márquez, the court said this year marked a watershed for congressional redistricting in the state.

"For the first time, the state's congressional district map is not the product of politics or litigation; it is instead the product of public input, transparent deliberation, and compromise among twelve ordinary voters representing the diversity of our state," said the opinion, adding that while the map "surely will not please everyone," it met all the constitutional requirements.

"There is no map that is going to please every person, and I don't think it's possible to draw that map," Yarger said, echoing the court's conclusion.

"But ultimately, this process is about 12 ordinary voters coming together from all over the state and from different political perspectives, different geographies, different professional backgrounds ... and doing their best," Yarger said. "And the fact that they did that,

and then the court upheld it unanimously, is a really good sign for this commission going forward."

Much like the commission and its legal team, the justices were forced to work on a compressed timeline due to the pandemic. Yarger commended the court for tackling a big task on a tight timeline. "There were dozens of meetings with hours of testimony and there were thousands of public comments," he said. "The court really had to assure itself that what the commission ultimately decided was supported by that huge body of deliberations and public comment."

The attorneys said it was personally rewarding to work for the commission because they believe in its mission. DeHerrera noted that an "overwhelming majority" of Colorado voters supported Amendment Y and Amendment Z, which created the state's independent redistricting commissions. Both ballot measures passed with the approval of about 71% of voters.

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"Because of that overwhelming support for the amendment, our clients were fully on board with carrying out that mission," DeHerrera said. "And as Coloradans [and] lawyers who care about public policy and who care about our society, it was really rewarding to be able to work on and represent a commission that is committed to something so important to the future of our state."

DeHerrera said he gives a lot of credit to the commissioners, who "took their jobs very seriously. They cared a lot about doing right for the people of Colorado and doing right by the constitution." The attorneys also praised the non-partisan staff at the state capitol who supported the commission and have a strong grasp of the technical aspects of the redistricting process.

The approved map will be used for the next decade. The attorneys said that future commissions will face their own unique challenges. "It's hard to predict what interesting or novel legal questions will confront the next commission," DeHerrera said.

Yarger added that COVID-19 was one challenge that defined this redistricting cycle. The pandemic delayed the commission's receipt of census data by four months, leading to legal questions that "sound mundane, but end up being very important." For example, how much leeway does the commission have to modify its schedule? "The next time around, I hope it won't be quite as challenging as this year," he said.