

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue, 4th Floor Denver, Colorado 80203</p>	<p>DATE FILED: October 8, 2021 11:59 AM</p> <p>▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to Art. V, § 44.5 of the Colorado Constitution</p>	
<p>In re Colorado Independent Congressional Redistricting Commission</p>	<p>Case Number: 2021SA208</p>
<p><i>Attorneys for Jerry M. Natividad</i></p> <p>Richard A. Westfall, No. 15295 Westfall Law, LLC 5842 W. Marquette Dr Denver, Colorado 80235 E-mail: rwestfall@westfall.law Tel: 720-904-6022</p>	
<p>BRIEF OF JERRY M. NATIVIDAD</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Appellate Rules 28, 29, and 32, including all formatting requirements set forth in these rules.

I further certify that this document complies with type-volume limits because, excluding the parts of the document exempted by Colorado Appellate Rule 28(g) (caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block), this document contains 2,561 words.

I acknowledge that this document may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 28 and 32.

Dated: October 8, 2021

/s/ Richard A. Westfall
Richard A. Westfall, No. 15295

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STATEMENT OF THE ISSUES

1. The Colorado Independent Congressional Redistricting Commission must, “[a]s much as is reasonably possible, . . . preserve . . . whole political subdivisions, such as counties.” COLO. CONST. art. V, § 44.3(2)(a). Its final plan splits Jefferson County, Colorado’s fourth largest, into three separate congressional districts. Did the Commission abuse its discretion by doing so?

2. The Colorado Independent Congressional Redistricting Commission must also, “to the extent possible, maximize the number of politically competitive districts,” which are defined as those “having a reasonable potential for the party affiliation of the district’s representative to change at least once between federal decennial censuses.” *Id.* art. V, §§ 44.3(3)(a), (3)(d). After conceding that it had before it maps with more competitive districts, the Commission submitted a Final Plan in which only one of the eight districts can be considered competitive. Did the Commission abuse its discretion by doing so?

STATEMENT OF INTEREST

Jerry M. Natividad is a resident of Jefferson County and resides in Congressional District 7 as it was configured by the Commission in the Final Plan. He has an interest in keeping Jefferson County whole and in being able to vote in a competitive congressional district.

STATEMENT REGARDING ORAL ARGUMENT

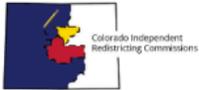
In accordance with this Court's order (entered on July 26, 2021), Mr. Natividad respectfully requests the opportunity, through the undersigned, to participate in the oral argument set for October 12, 2021.

STATEMENT OF THE CASE

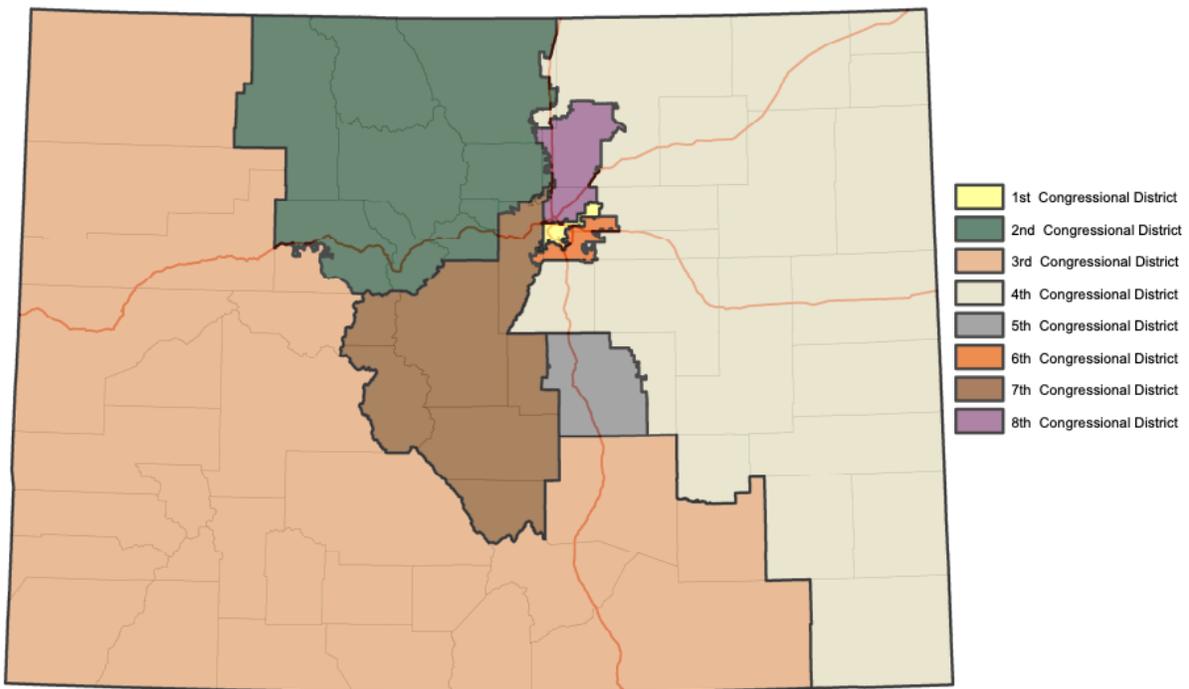
On March 15, 2021, Colorado's newly minted Independent Congressional Redistricting Commission (the "Commission") convened for the first time. Between then and now, the Commission held scores of meetings and public hearings. It also received thousands of comments from members of the public, along with hundreds of proposed congressional district maps.

After the final redistricting-level census data became available on August 12, 2021, the Commission's Non-Partisan Staff produced its First Staff Plan. It released its Second and Third Staff Plans shortly after. Based on Commissioner requests, the Non-Partisan Staff amended the Second Staff Plan three times, and the Third Staff Plan five times.

By a vote of eleven to one, the Commission approved the Coleman Amendment to the Third Staff Plan on September 28, 2021. Because Colorado received an eighth congressional seat, the plan it approved divides Colorado into eight congressional districts. The Final Plan appears as follows:



Colorado Congressional Districts (Final Approved Plan)



*Map prepared by Colorado Independent Redistricting Commissions Staff.
September 28, 2021.*

Pet. Exh. A.

The Commission transmitted its Final Plan to this Court on October 1, 2021. Doing so triggered the Court’s responsibility to “review the submitted plan and determine whether the plan complies with the” State constitutional criteria. COLO.

CONST. art. V, § 44.5. Previously, the Court issued an order inviting “all interested parties” to submit briefs responding to the Commission’s Final Plan. *See* 7/26/2021 Order.

SUMMARY OF THE ARGUMENT

While the Final Plan is commendable in its mathematical precision (indeed, the population of each District is remarkably homogenous), it falls short in two critical respects.

First, it divvies up Colorado’s fourth-largest county (Jefferson) into three separate Districts (Numbers 2, 6, and 7). This contravenes the requirement that the Commission “preserve,” “[a]s much as is reasonably possible,” “whole political subdivisions, such as counties.” COLO. CONST. art. V, § 44.3(2)(a). Because the record before the Commission (including other maps it considered) shows it was “reasonably possible” to keep Jefferson County intact, *id.*, the Commission abused its discretion by failing to do so.

Second, it creates only one competitive district (District 8). This contravenes the constitutional requirement that the Commission “*maximize* the number of politically competitive districts” “to the extent possible.” *Id.* § 44.3(3)(a) (emphasis added). Because the Commission acknowledged that it had before it maps that created *multiple* competitive districts, complying with this constitutional criterion

was abundantly “possible.” *Id.* Because it was, the Commission abused its discretion by failing to do so. *Id.* §§ 44.3(2)(a), (3)(a).

ARGUMENT

When the voters of Colorado revamped, via constitutional amendment, the way in which boundaries of their congressional districts are established, they “declare[d],” among other things, that “[c]ompetitive elections . . . 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.” *See* COLO. CONST. art. V, § 44. For that reason, the Constitution was amended to carefully calibrate the goals that the Commission must accomplish when it draws maps for congressional districts. In addition to achieving “mathematical population equality” and complying with the federal Voting Rights Act of 1965, 52 U.S.C. §§ 50301 *et seq.*, the Commission must also:

- “[a]s much as is reasonably possible, . . . preserve whole communities of interest and whole political subdivisions, such as counties, cities, and towns”; and
- “to the extent possible, maximize the number of politically competitive districts,” which are defined as those “having a reasonable potential for the party affiliation of the district’s representative to change at least once between federal decennial censuses.”

COLO. CONST. art. V, § 44.3(2)(a), (3)(a), (3)(d).

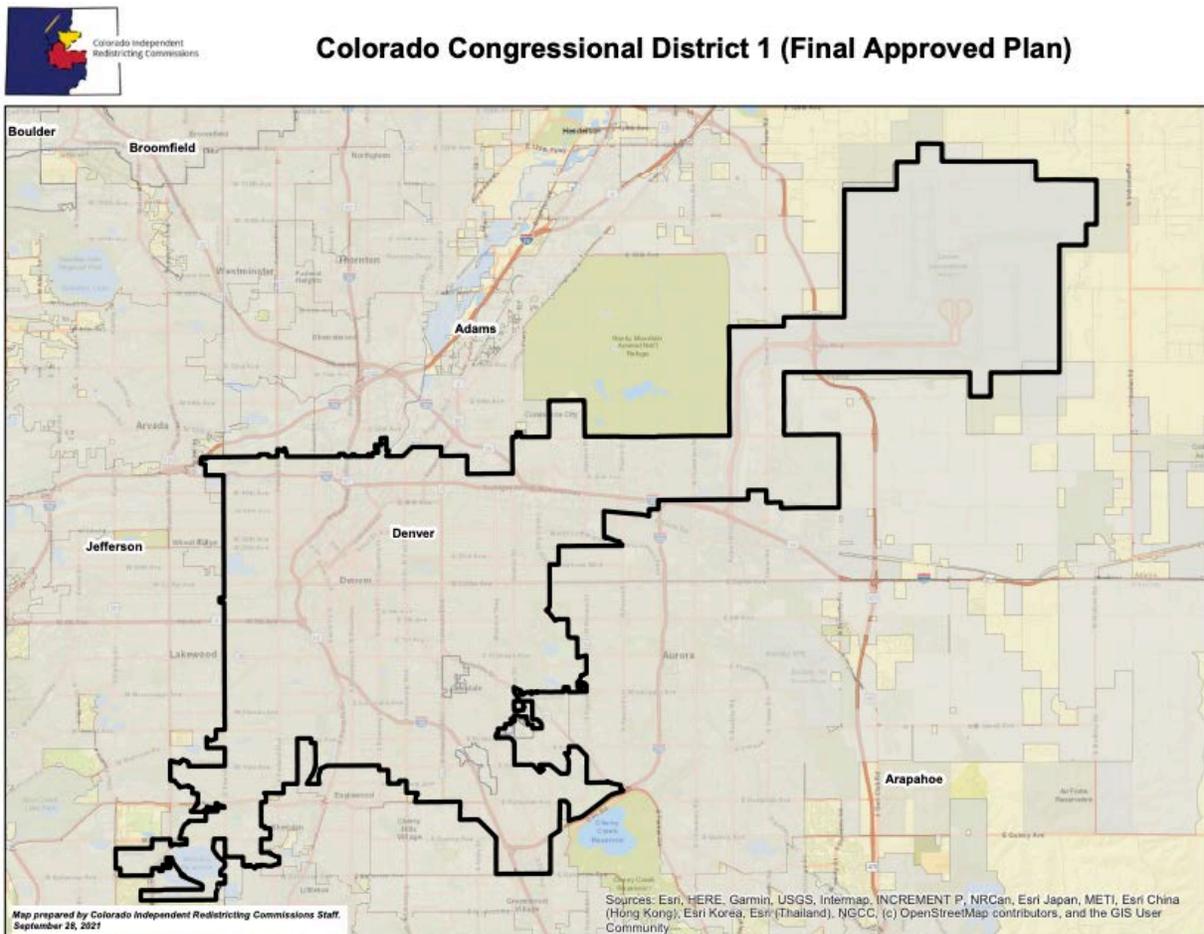
This Court has been tasked with the responsibility of reviewing the Commission’s plan to “determine whether [it] complies with” the aforementioned criteria. *Id.* art. V, § 44.5(1). Specifically, the Court must examine whether the Commission “abused its discretion in applying or failing to apply the” constitutional standards. *Id.* art. V, § 44.5(2). Though more deferential than *de novo* review, the Court’s prerogative is not toothless. An abuse of discretion occurs when “the decision under review is not reasonably supported by any competent evidence in the record.” *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 526 (Colo. 2004) (citing *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990)). And, of course, an abuse of discretion occurs when the law is misapplied. *People v. Jefferson*, 393 P.3d 493, 499 (Colo. 2017) (citing *Antero Res. Corp. v. Strudley*, 347 P.3d 149, 154 (Colo. 2015)).¹

I. THE COMMISSION ABUSED ITS DISCRETION BY UNNECESSARILY SPLITTING JEFFERSON COUNTY INTO MULTIPLE PARTS.

According to the Commission, it complied with its constitutional requirement to recommend districts that “preserve . . . whole political subdivisions, such as counties,” COLO. CONST. art. V, § 44.3(2)(a), because “[o]f the 64 counties in Colorado, only eleven are split, and these splits are necessary to comply with other redistricting criteria,” Pet. at 12. This conclusory assertion, however, fails to convey

¹ *Accord People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004) (“[T]he ‘abuse-of-discretion standard includes review to determine that the [trial court’s] discretion was not guided by erroneous legal conclusions.’” (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996) (alteration in original))).

the extent to which the Final Plan slices and dices Colorado’s fourth largest county— Jefferson.² Indeed, Jefferson County voters may find themselves casting ballots in one of three separate districts (Numbers 2, 6, and 7). The Final Plan even sticks “several blocks” of unpopulated Jefferson County in District 1, which means that Jefferson County territory finds itself in fifty percent of Colorado’s congressional districts.

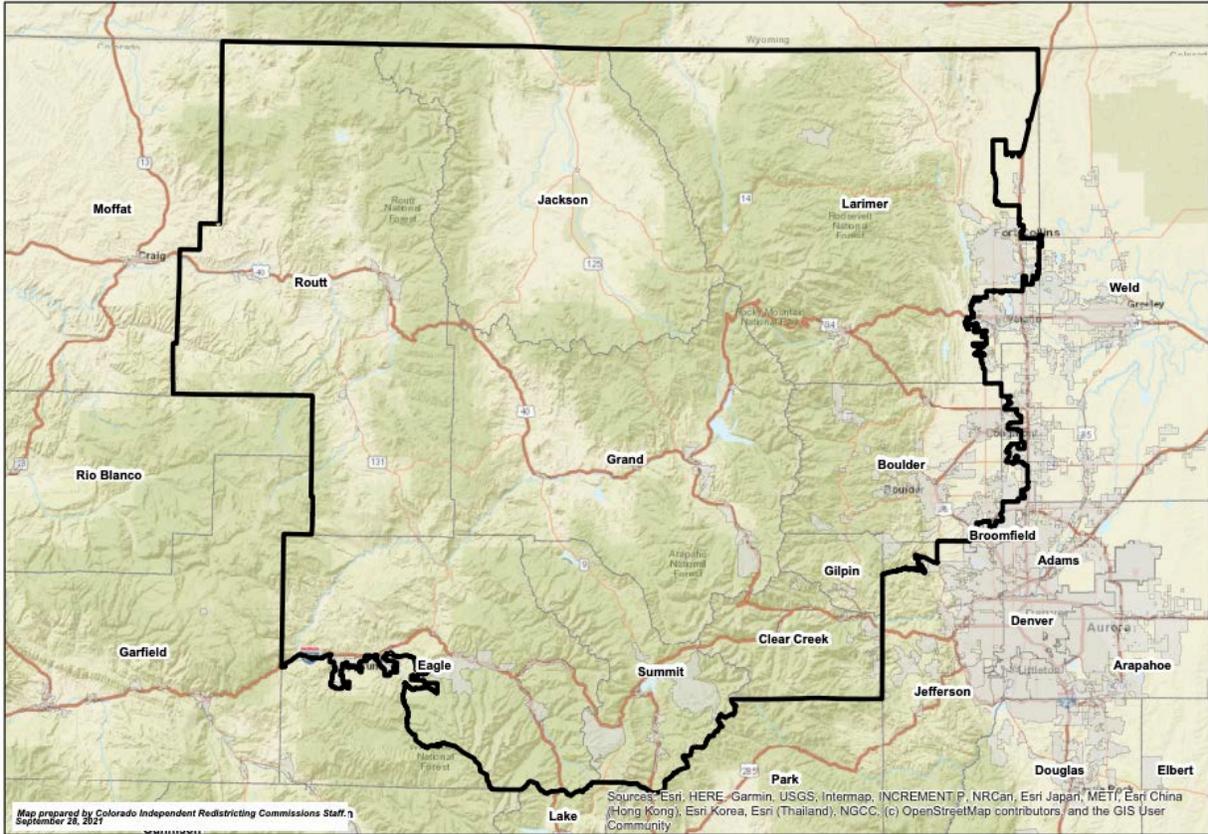


² “[S]everal blocks of Jefferson County” are also included in District 1, but this area has “no population.” See Pet. at 5.

Pet. Exh. A.



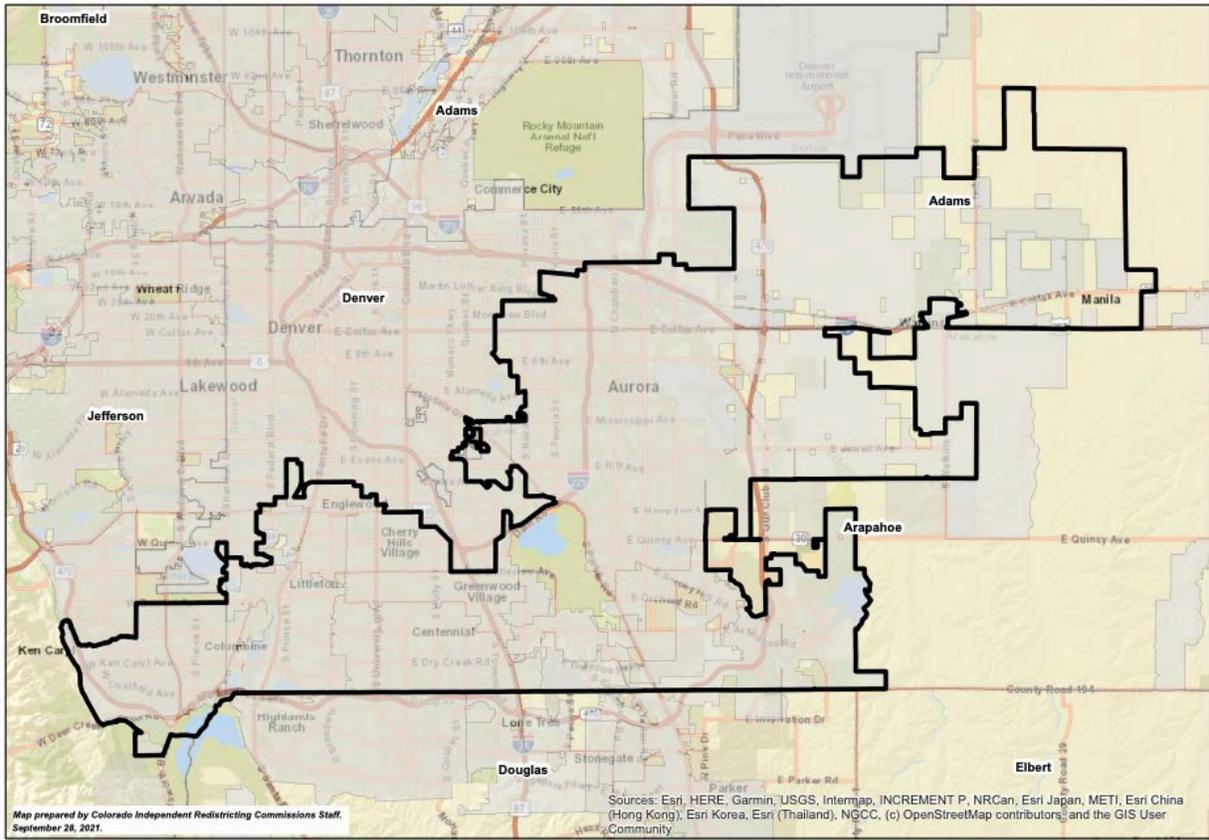
Colorado Congressional District 2 (Final Approved Plan)



Pet. Exh. A.



Colorado Congressional District 6 (Final Approved Plan)

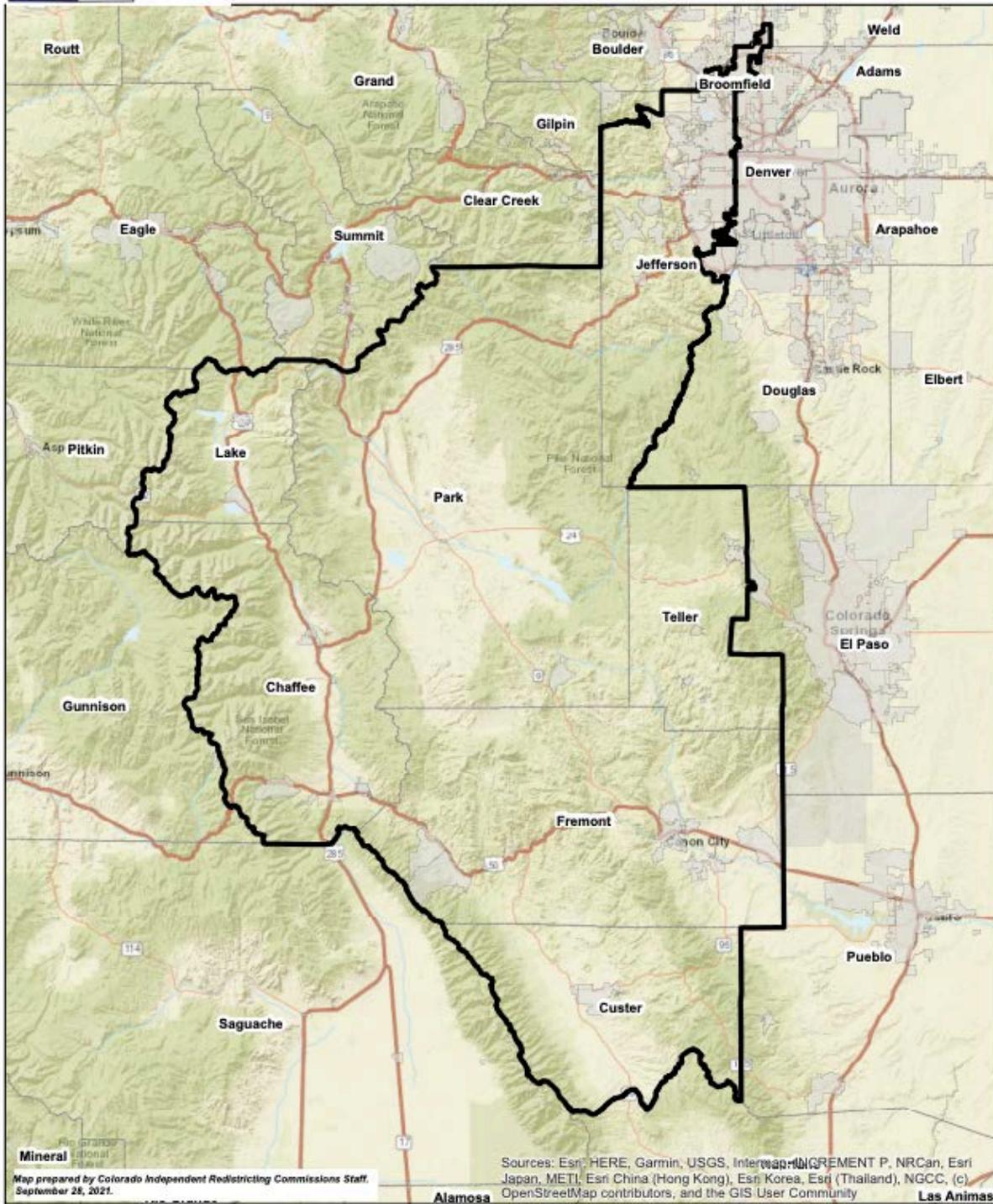


Pet. Exh. A.



Colorado Independent Redistricting Commissions

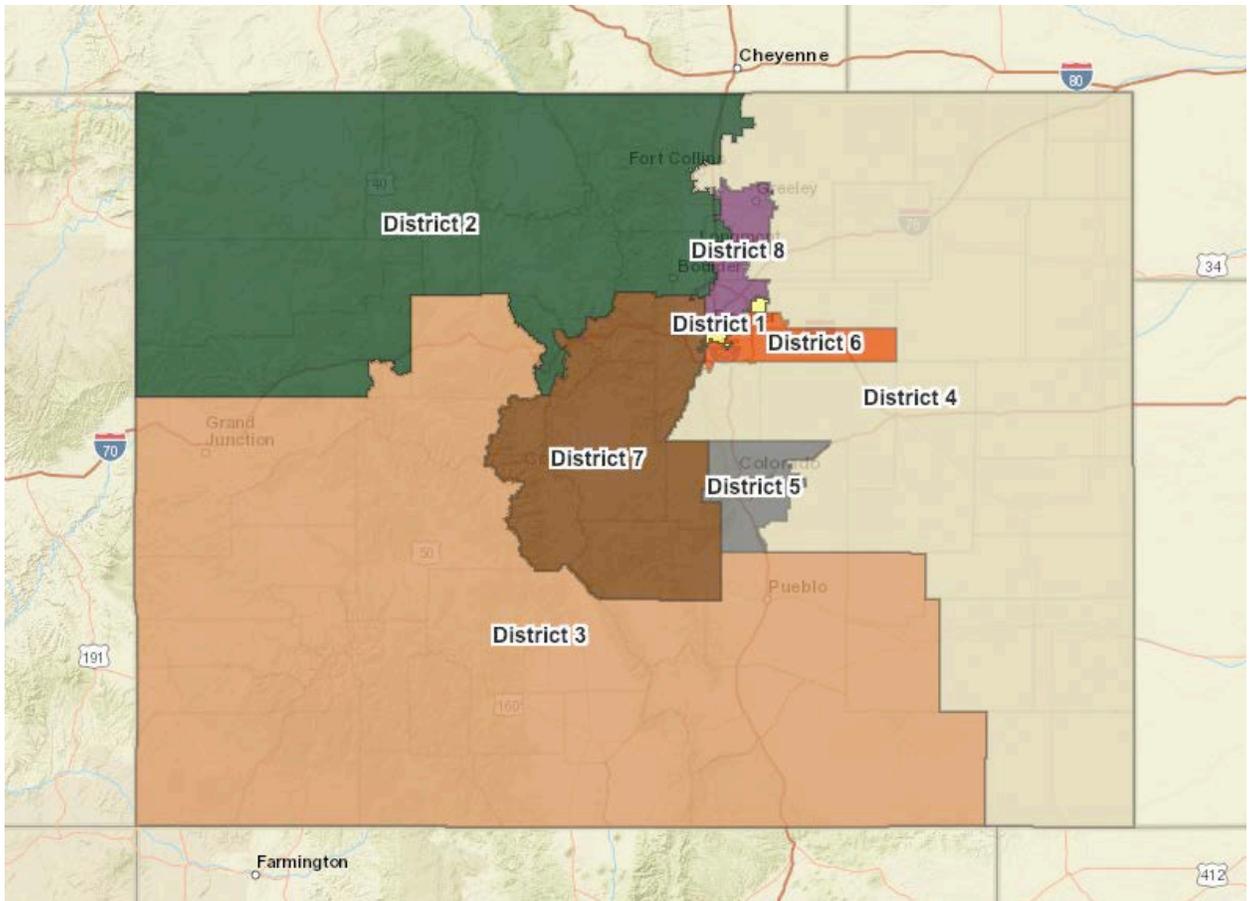
Colorado Congressional District 7 (Final Approved Plan)



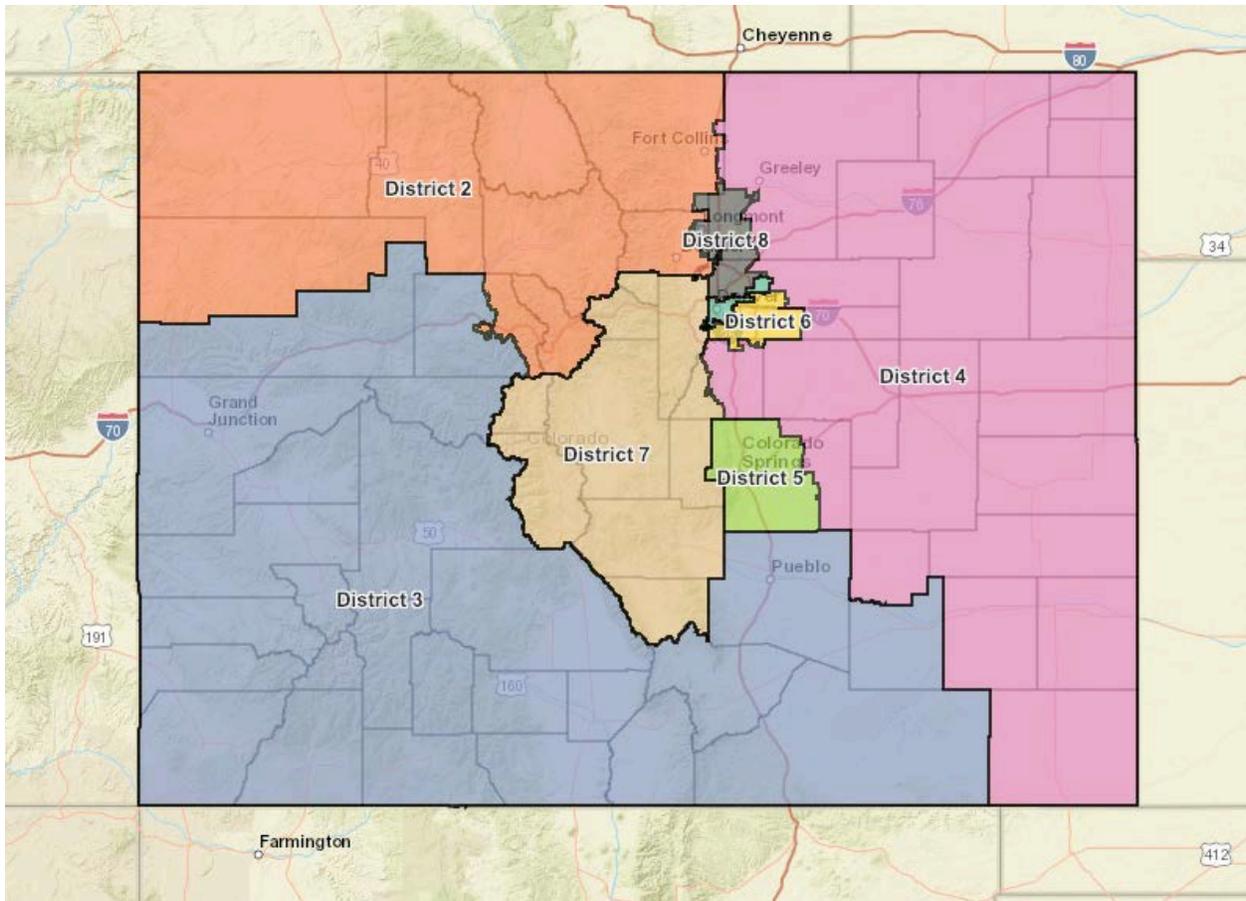
Pet. Exh. A.

Nor are the numbers of separated Jefferson County voters inconsequential. Of the 582,910 people in Jefferson County, 59,641 fall into District 6 and 1,853 fall into District 2. *See* Pet. Exh. F. The remainder fall into District 7. *See* Pet. Exh. F. Although the Commission asserts that it chose to include in District 2 “a small portion of northwestern Jefferson County to make the community of Coal Creek whole,” Pet. at 6, any further justification for the split is elusive.

The Commission did not need to rend Jefferson County apart in this manner. It had before it other maps that complied with the constitutional requirement that it “preserve,” “[a]s much as is reasonably possible,” “whole political subdivisions, such as counties.” COLO. CONST. art. V, § 44.3(2)(a). Although there are other aspects of these proposed maps that left something to be desired, they show that it was certainly “reasonably possible” to preserve Jefferson County. The First Proposed Staff Plan did so:



Colorado Congressional Districts—First Staff Plan, *available at* <https://coleg.maps.arcgis.com/apps/View/index.html?appid=3e1163c38a5b4511b83dab074786bdec>. So, too, did some of the additional maps requested by individual Commissions:



P003_V1_Coleman, available at <https://coleg.maps.arcgis.com/apps/View/index.html?appid=640bd981a44745648e34c4f6fb7b8ccf>.

And, during the hours of testimony and scores of hearings, the Commission was presented with plentiful record evidence demonstrating that Jefferson County residents did not want their voting population trisected among multiple congressional districts. For instance, Randy Morman, a volunteer with the Arvada Sustainability Advisory Committee, testified that:

We as a committee have been working on a number of issues over the past couple of years that impact Arvada, whether it's transportation, ways to recycle, water, air pollution, you name it. Any kind of environmental issue, we are working hard to get Arvada with the sustainability committee. We recognize that the solutions and challenges that we face in Arvada are very common with our neighbors in Jefferson County. And it's very important that as we move forward working on the solutions with our neighboring communities that we will continue to have one voice, a unified voice, and representation to help us address those challenges on sustainability. As far as keeping Jefferson County whole, that is really integral [inaudible] and as we look at how we can plan for our future.

7/13/2021 Joint Independent Redistricting Commissions Public Hearing (7:50), available at <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210401/154/12069>.

Comments like these permeated the hearings. Indeed, Former State Senator Norma Anderson, who has lived in Jefferson County since 1951 and participated in drawing districts during the 1990s, pointed out that splitting Jefferson County made little sense given the County's need for consistency with regard to, among other things, its transportation infrastructure and, in particular, its school district.

7/20/2021 Joint Independent Redistricting Commissions Public Hearing (7:41), available at <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210401/154/12070>. Regarding the latter, Ms. Anderson emphasized how critical it is that a school board have the ability to speak with a single congressional contact, rather than many. *Id.*

At bottom, the Commission had a responsibility to “preserve,” “[a]s much as is reasonably possible,” “whole political subdivisions, such as counties.” COLO. CONST. art. V, § 44.3(2)(a). Given the record before it, the alternative maps available to it, and the paltry justification offered by it, it cannot be said that it complied with this mandate. What can be said, in contrast, is that its decision to carve up Jefferson County “is not reasonably supported by any competent evidence in the record,” *see Widder*, 85 P.3d at 526, and that doing so constitutes a misapplication of its legal responsibility to keep Jefferson County intact if “reasonably possible,” *see Jefferson*, 393 P.3d at 499. For that reason, the Court should “determine[] that the submitted plan constitutes an abuse of discretion . . . in light of the record before the [C]ommission,” and, accordingly, it should “return the plan to the [C]ommission.” COLO. CONST. art. V, § 44.5(3).

II. THE COMMISSION ABUSED ITS DISCRETION BY FAILING TO CREATE AN ADEQUATELY COMPETITIVE DISTRICT 7.

According to the Commission, its Final Plan “maximized the number of politically competitive districts to the extent possible.” Pet. at 13. In support, it directs the Court to the analysis of political competitiveness drafted by its Non-Partisan Staff. *See* Pet. Exh. I. This document, in turn, noted that, “[w]hile the Commission engaged in discussions about what percentage difference between the votes cast for Democratic or Republican candidates evidenced a competitive district,” it “*did not* define a percentage or a range of percentages that demonstrated

this.” *Id.* at 2 (emphasis added). Moreover, the report conceded that “the Commission considered other plans that may have had more districts with lower percentages,” but rejected them because it believed “that the Final Approved Congressional Redistricting Plan did a better job of preserving whole communities of interest and political subdivisions, which have higher priority than competitiveness.” *Id.*

Stated more bluntly, the Commission (1) never bothered to determine how to ascertain whether a district is competitive, and (2) admitted that it gave this criterion short shrift. Regarding the former, it strains credulity to assert that the Commission’s decision *not* to quantify what constitutes a “competitive” district allowed it to ascertain whether any of the districts it proposed has “a reasonable potential for the party affiliation of the district’s representative to change at least once between federal decennial censuses.” COLO. CONST. art. V, § 44.3(3)(c). And regarding the latter, it is no answer to say that it did so to preserve “political subdivisions,” *id.*; as shown above, the Commission did a poor job of that, as well. *See supra* at 7-16.

Simply put, the milquetoast justification provided by the Commission has not demonstrated that it “*maximized . . . to the extent possible* the number of politically competitive districts.” COLO. CONST. art. V, § 44.3(3)(a) (emphasis added). And despite the Commission’s implicit suggestion to the contrary, this criterion matters. One of the findings “declare[d]” by “[t]he people of the State of Colorado” when

they constitutionally created this new way of drawing congressional districts is as follows: “Competitive elections for members of the United States house of representatives 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.” *Id.* art. V, § 44. Diminishing its responsibility to “maximize the number of politically competitive districts,” *id.* art. V, § 44.3(3)(a), constitutes an abuse of discretion, *see Widder*, 85 P.3d at 526; *Jefferson*, 393 P.3d at 499.

Lest there be any doubt, the Commission’s own findings show that the “districts” that are “politically competitive” have not been “maximized.” COLO. CONST. art. V, § 44.3(3)(a):

APPENDIX A

Statewide Election Results by District
Plan: 2021 Final Approved Congressional Plan



District	8 Elections Differential	2016 Senate Differential	2016 President Differential	2018 Attorney General Differential	2018 Governor Differential	2018 Treasurer Differential	2018 Secretary of State Differential	2018 CU Regent at Large Differential	2020 Senate Differential
1	-57.1%	-54.0%	-59.0%	-56.5%	-59.6%	-55.0%	-55.0%	-59.1%	-58.3%
2	-34.1%	-29.8%	-33.3%	-34.6%	-38.7%	-30.7%	-33.9%	-36.0%	-36.0%
3	9.3%	8.3%	15.3%	9.6%	6.1%	9.1%	7.5%	7.5%	10.5%
4	26.6%	25.9%	30.0%	29.4%	24.4%	26.9%	25.3%	26.4%	24.2%
5	20.2%	23.0%	24.2%	20.8%	16.8%	19.8%	22.2%	19.2%	15.8%
6	-15.1%	-12.8%	-14.4%	-11.9%	-17.4%	-14.4%	-14.7%	-16.6%	-19.0%
7	-6.9%	-4.3%	-3.2%	-4.9%	-10.2%	-6.7%	-7.5%	-8.4%	-10.0%
8	-1.3%	-2.3%	1.7%	1.7%	-1.9%	-3.6%	-2.9%	-1.6%	-1.7%

Results are reported as the difference between the percent of votes cast for the Republican candidate and the percent of votes cast for the Democratic candidate. A positive differential means the Republican won, and a negative differential means the Democrat won.
Source: Data provided by the Colorado Secretary of State’s Office. Calculations prepared by Colorado Independent Redistricting Commissions Staff.
September 28, 2021

Pet. Exh. I.

True, the Commission created a tremendously competitive District 8. But the constitutional mandate was to “maximize the *number* of politically competitive districts” “to the extent possible.” COLO. CONST. art. V, § 44.3(3)(a) (emphasis added). And the Commission missed its chance to do so when it failed to draw District 7 to be more competitive. It certainly could have; indeed, it appears that, had the Commission not sliced apart Jefferson County and instead included all Jefferson County residents in District 7, District 7’s competitiveness would likely have increased. The First Proposed Staff Plan, for instance, created three districts within plus or minus six percentage points for either party while (as discussed above) keeping Jefferson County intact:

Statewide Election Results by District

District	8 Elections Diff	2016 Senate Diff	2016 President Diff	AG18 Diff	2018 Gov Diff	2018 Treasurer Diff	2018 Secretary of State Diff	2018 CU Regent at Large Diff	2020 Senate Diff
1	-57.0%	-53.9%	-59.0%	-56.4%	-59.6%	-54.9%	-55.0%	-59.1%	-58.3%
2	-22.4%	-19.0%	-20.7%	-22.7%	-26.6%	-19.4%	-22.8%	-24.2%	-23.7%
3	5.5%	4.9%	11.3%	5.8%	2.2%	5.5%	3.9%	3.9%	6.7%
4	15.6%	16.1%	18.3%	17.9%	12.7%	16.0%	14.6%	15.1%	14.2%
5	20.3%	23.1%	24.3%	20.9%	16.9%	19.9%	22.3%	19.3%	15.9%
6	-15.6%	-13.2%	-14.9%	-12.4%	-17.8%	-14.8%	-15.3%	-17.2%	-19.4%
7	-5.2%	-3.0%	-1.4%	-3.0%	-8.4%	-5.1%	-5.8%	-6.7%	-8.3%
8	-1.5%	-2.3%	1.4%	1.6%	-2.1%	-3.8%	-2.9%	-1.7%	-1.9%

Results are reported as the difference between the percent of votes cast for the Republican candidate and the percent of votes cast for the Democratic candidate. A positive differential means the Republican won, and a negative differential means the Democrat won.
Source: Data provided by the Colorado Secretary of State's Office. Calculations prepared by Colorado Independent Redistricting Commissions Staff.
September 3, 2021

Colorado Independent Redistricting Commissions, First Staff Plan—Congressional, *available at* <https://redistricting.colorado.gov/content/staff-congressional-1>. And the Shepherd Macklin Amendments to the Second Plan had two districts within five percentage points, including District 7:

Statewide Election Results by District
Plan: Staff Plan 2 Shepherd Macklin Amendments

District	8 Elections Diff	2016 Senate Diff	2016 President Diff	AG18 Diff	2018 Gov Diff	2018 Treasurer Diff	2018 Secretary of State Diff	2018 CU Regent at Large Diff	2020 Senate Diff
1	-57.1%	-54.0%	-59.0%	-56.5%	-59.6%	-55.0%	-55.0%	-59.1%	-58.3%
2	-31.0%	-26.8%	-29.6%	-31.2%	-35.7%	-28.1%	-30.9%	-32.9%	-32.7%
3	9.7%	8.7%	15.8%	10.0%	6.6%	9.5%	7.9%	8.0%	11.0%
4	23.3%	23.0%	26.5%	25.7%	21.3%	24.0%	22.0%	23.2%	20.9%
5	20.2%	23.0%	24.2%	20.8%	16.8%	19.8%	22.2%	19.2%	15.8%
6	-15.3%	-12.8%	-14.4%	-12.0%	-17.5%	-14.5%	-14.8%	-16.8%	-19.1%
7	-4.3%	-2.0%	-0.8%	-2.0%	-7.5%	-4.0%	-4.9%	-5.7%	-7.4%
8	-4.4%	-4.6%	-1.1%	-1.6%	-5.4%	-6.7%	-5.9%	-5.1%	-5.2%

Results are reported as the difference between the percent of votes cast for the Republican candidate and the percent of votes cast for the Democratic candidate. A positive differential means the Republican won, and a negative differential means the Democrat won.

Source: Data provided by the Colorado Secretary of State's Office. Calculations prepared by Colorado Independent Redistricting Commissions Staff.
September 22, 2021

Reports—Staff Plan 2, Shepherd/Macklin Amendments, *available at* <https://coleg.app.box.com/s/k3ffz3lq3l7c7xqv8wm5lh4b6wfebh0x/file/863269231182>.

The Commission was tasked with “maximiz[ing] the number of politically competitive districts” “to the extent possible.” COLO. CONST. art. V, § 44.3(3)(a) But it first declined to decide how to interpret its data as indicating either a “competitive” or “non-competitive” district, and it then chose maps with less competitive districts than others available to it. The result—a map with one competitive district. For all these reasons, the Court should find that the Commission abused its discretion.

CONCLUSION

For the foregoing reasons, the Court should “determine[] that the submitted plan constitutes an abuse of discretion . . . in light of the record before the [C]ommission,” and, accordingly, it should “return the plan to the [C]ommission.” COLO. CONST. art. V, § 44.5(3).

By: /s/ Richard A. Westfall
Richard A. Westfall, No. 15295
Westfall Law, LLC
5842 W. Marquette Dr
Denver, Colorado 80235
Attorneys for Jerry M. Natividad

CERTIFICATE OF SERVICE

I certify that on October 8, 2021, the foregoing was served through this Court's electronic filing system to all counsel of record.

Dated: October 8, 2021

/s/ Richard A. Westfall
Richard A. Westfall