SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, 4th Floor Denver, Colorado 80203	DATE FILED: October 21, 2021 9:32 PM
Original Proceeding Pursuant to Article V, Section 44.5 of the Colorado Constitution	
In re Colorado Independent Legislative Redistricting Commission	
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BRIEF OF LEAGUE OF UNITED LATIN AMERICAN CITIZENS AND COLORADO LEAGUE OF UNITED LATIN AMERICAN CITIZENS

—Oral Argument Not Requested—

CERTIFICATE OF COMPLIANCE

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

Specifically, the undersigned certifies that the brief complies with the applicable word limits in C.A.R. 28(g) and the Court's July 26, 2021 Order because it contains 9,466 words (not exceeding 9,500 words).

Moreover, the brief complies with C.A.R. 28(k) because it contains a concise statement of the applicable standard of appellate review with citation to authority and a citation to the precise location in the record, not to an entire document, where the pertinent issues were raised and ruled on below.

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.

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INTRODUCTION

The Legislative Commission followed its constitutional mandate to draw state house and senate districts that avoid diluting minority voters' electoral influence. The Legislative Commission's process and result stand in stark contrast to the Congressional Commission: it transparently discussed the Colorado Constitution's minority vote dilution protections in public meetings; it hired a vote dilution expert to study conditions of racially polarized voting in Colorado and recommend areas in which vote dilution could be avoided; and it considered election results data and crossover voting patterns to devise effective minority electoral influence districts.

Importantly, the Legislative Commission did all of this only after ensuring that it complied with traditional redistricting criteria and pursued all of the important policy objectives Colorado voters adopted in 2018 in Amendment Z. Among the range of alternatives that satisfied the Colorado Constitution's other criteria, the Commission selected state house and senate maps that would both "comply with the federal Voting Rights Act" *and* prevent the needless "dilut[ion of] the impact of [a] racial or language minority group's electoral influence." Colo. Const. art. V, §§ 48.1(1)(b), (4)(b). In following the Constitution, the Legislative Commission ensured that Latino voters' electoral influence in choosing the State's legislators will in part reflect their large and growing political strength. Nothing in that choice

violates the Equal Protection Clause, and the Court should approve the Commission's maps that appropriately avoid needless vote dilution.

ISSUE PRESENTED

1. Did the Legislative Commission abuse its discretion by drawing state house and state senate districts that comply with the Colorado Constitution's requirement to avoid needless dilution of minority voters' electoral influence by drawing crossover districts?

FACTS

The League of United Latin American Citizens and the Colorado League of United Latin American Citizens (together, "LULAC") have long advocated for the voting rights of Colorado's Latinos. LULAC is the nation's oldest and largest nonpartisan Latino civil rights nonprofit, with approximately 132,000 members. LULAC advocates for fair maps that safeguard the electoral influence of Latino communities across the country, and it submitted numerous comments and proposed district configurations to the Legislative Commission to further this goal.[1]

LULAC's constituency represents a large and expanding portion of the Colorado electorate, with Latinos comprising 21.9% of the State's total population.[2]

[1] Brief of League of United Latin American Citizens at Apps. A & B, *In re Colorado Independent Congressional Redistricting Commission*, Case No. 2021SA208 (Colo. Oct. 7, 2021) (hereafter "LULAC Congressional Br.").

[2] *See* U.S. Census Bureau, Race and Ethnicity in the United States: 2010 Census and 2020 Census (Aug. 12, 2021), www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html (last accessed Oct. 21, 2021).

This includes an increase of nearly 225,000 people who identify as Latino over the last decade. Much of this population resides in southern Colorado, which includes the three counties where Latinos have long represented at least a plurality of residents: Alamosa (47%), Conejos (50.7%), and Costilla (56.8%). Other areas with large and growing Latino communities include Pueblo County (41.6%), the north Denver suburbs in Adams County (41.7%), and Greeley (29.9% in Weld County overall). Latinos are also over 15.6% of Colorado's citizen voting age population ("CVAP")—close to one sixth of its total CVAP. But because of the lasting effects of discrimination against Latinos and the dilutive systemic barriers embedded in Colorado's prior redistricting plans, Latino voters have struggled to attain fair representation and often must do so through corrective court action. *See, e.g.*, *Sanchez v. Colo*., 97 F.3d 1303, 1306 (10th Cir. 1996).[3]

In 2018, Colorado sought to correct this course by enacting strong protections for the State's minority voters—protections that exceed the federal Voting Rights Act ("VRA"). A bipartisan consensus in the General Assembly referred Amendments Y and Z to the ballot to counteract undemocratic influences in redistricting. *In re Interrogatories on Senate Bill 21-247 Submitted by Colorado*

[3] This Court has likewise "acknowledged that Hispanics in Colorado have experienced discrimination and explicitly recognized the importance of the Latino community in the redistricting process." *Hall v. Moreno*, 270 P.3d 961, 968 (Colo. 2012); *accord Moreno v. Gessler*, No. 11-cv-3461, 2011 WL 8614878, at *17 (Colo. Dist. Ct. Nov. 10, 2011) (summarizing trial testimony).

Gen. Assembly, 488 P.3d 1008, 1013 (Colo. 2021). Voters overwhelmingly approved the measures, *id*., including the ballot question language that the Amendments would "prohibit[] maps from being drawn to dilute the electoral influence of any racial or ethnic group[.]" S.C.R. 18-004, § 2 (2018). Coloradans voted to empower the large but geographically dispersed Latino community to achieve representation commensurate with its electoral influence.

In stark contrast with the Congressional Commission, the Legislative Commission took this obligation seriously by giving meaning to Colorado voters' concerted policy decision to protect minority electoral influence. Indeed, even the legislative commissioners themselves acknowledged that their commitment to engaging the Constitution's vote dilution protections diverged from the Congressional Commission's superficial consideration. For example, as Commissioner Buckley, Republican from Colorado Springs, stated: "After reviewing what happened with [the] Congressional" Commission "and the critiques" of their process concerning minority vote dilution, he was "just really grateful for the [legislative] commissioners who have pushed for the" staff and expert analyses of minority vote dilution. Comm'n Mtg. Oct. 1, 2021 at 2:55-2:57pm.[4] Commissioner Buckley recognized that the Legislative Commission was "doing it

[4] Audio recordings of Commission meetings available at https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210401/154/12366 (last accessed Oct. 21, 2021).

differently" because it "tried to be very thoughtful" about avoiding needless vote dilution by utilizing "commissioners who are very smart in that area," and "hir[ing a] brilliant expert" to "try[] and make sure that men and women of color have their opportunity to be heard and to be elected." *Id.* at 2:57-2:58pm. Commissioner Buckley underscored to Colorado's minority voters engaged in the redistricting process that the legislative "commissioners have focused very hard on trying to do the right thing to make sure that we are listening to *all* of our citizens in the state of Colorado." *Id.*

The Legislative Commission not just listened to but acted upon the calls of the Latino community. It adopted a vote dilution policy that recognized protecting minority voters requires a probing analysis of voting patterns and geographic distributions rather than shortcutting to arbitrary numerical baselines. *See* Comm'n Ex. 8 at 2-3. It hired an expert in preventing vote dilution, who conducted a "district-specific, functional analysis" to conclude that "[v]oting in most of the areas of the state [are] racially/ethnically polarized," but it is possible to reduce those dilutive conditions "even in districts that are less than majority" Latino by adding white "crossover voting [to] compensate." Comm'n Ex. 9 at 1-9. The commissioners openly discussed their vote dilution obligations and transparently presented how that requirement appropriately affected their choices among the many other redistricting

criteria at play. *See, e.g.*, Comm'n Mtgs. Oct. 6, 2021 at 6:27-6:41pm; Oct. 11, 2021 at 9:56-10:39pm, 11:18-11:21pm; Oct. 12, 2021 at 7:50-8:21pm.

In its final deliberations, the Commission worked collaboratively, with live editing of maps through the assistance of nonpartisan staff, to devise its final maps. The Commission struck compromises, properly weighed the hierarchy of constitutional criteria, and worked together to ensure that its maps constructed reasonable crossover districts that complied with its obligation to avoid needlessly diluting the electoral influence of Colorado's minority voters. The Commission achieved that goal and did not abuse its discretion in doing so.

LEGAL STANDARD

I. Legislative Redistricting Criteria

The Commission must apply a hierarchy of criteria in drawing Colorado's legislative map. *In re Interrog.*, 488 P.3d at 1013-14. These criteria are first divided into seven affirmative considerations with varying degrees of exigency. *See* Colo. Const. art. V, § 48.1. The Commission "shall" heed federal law by (1) "mak[ing] a good-faith effort to achieve precise mathematical population equality between districts, justifying each variance, no matter how small;" (2) "compos[ing]" districts to be "of contiguous geographic areas;" and (3) "[c]omply[ing] with the federal Voting Rights Act of 1965." *Id.* § 48.1(1). In addition, the Commission should "[a]s much as is reasonably possible" draw maps that (4) "preserve whole communities of interest" and (5) preserve "whole political subdivisions, such as counties cities,

and towns." *Id.* § 48.1(2)(a).[5] The Commission must also (6) draw districts that are "as compact as is reasonably possible." *Id.* § 48.1(2)(b). Only "[t]hereafter" should the Commission (7) "to the extent possible, maximize the number of politically competitive districts." *Id.* § 48.1(3)(a).

The Commission is also subject to four negative prohibitions. Amendment Z provides that "[n]o map may be approved by the commission or given effect by the supreme court if" it has been drawn: (1) for "the purpose of protecting one or more incumbent[s];" or (2) for the purpose of protecting "any political party;" nor if it is drawn for the purpose of or results in (3) "the denial or abridgement of the right of any citizen to vote on account of that person's race or membership in a language minority group," copied from Section 2 of the VRA; or (4) "diluting the impact of that racial or language minority group's electoral influence." *Id.* § 48.1(4). Thus, in complying with Amendment Z's affirmative criteria, the Commission must choose legislative maps among the range of alternative compatible options that prevent the avoidable dilution of minority voters' electoral influence.

II. Abuse of Discretion

Amendment Z directs the Court to "review the [Commission's] submitted plan and determine whether the plans comply with the criteria listed in section 48.1

[5] The Legislative Commission rules differ from the Congressional Commission concerning whole political subdivisions because legislative districts must pay special attention to keeping small municipalities in the same district. *See id.* § 48.1(2)(a).

of this article V." *Id.* § 48.3(1). A Commission map should be rejected if the Commission "abused its discretion in applying or failing to apply the criteria ... in light of the record before the commission." *Id.* § 48.3(2). Applying the abuse of discretion standard, the Court "looks to see if the [Commission] has misconstrued or misapplied applicable law, or whether the decision under review is not reasonably supported by competent evidence in the record." *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 899-900 (Colo. 2008) (citations omitted). The Commission does not abuse its discretion when it properly interprets its governing criteria and is "sufficiently attentive" to apply those standards with the appropriate weight. *In re Colorado Gen. Assembly*, 332 P.3d 108, 109, 112 (Colo. 2011).

SUMMARY OF ARGUMENT

The Legislative Commission complied with the Colorado Constitution's vote dilution protections under both the federal VRA and the electoral influence provision. The Commission fulfilled these obligations by drawing effective crossover districts, as Amendment Z's plain text requires. This provision requires more than just setting an arbitrary population threshold, contrary to the dicta discussion of vote dilution in *Beauprez v. Avalos*. Colorado voters' decision to require crossover districts was explicitly endorsed in U.S. Supreme Court precedent and follows other states that have enacted vote dilution protections beyond the federal VRA.

The Commission's compliance with the VRA and the electoral influence provision is evident in the North Denver suburbs in Adams County (SD 21 and SD 24), southern Colorado in Pueblo and the San Luis Valley (HD 46 and HD 62), Greeley (HD 50), and southern Colorado Springs (HD 17). The Commission identified that these regions contain large and politically cohesive minority populations that, due to racially polarized voting conditions in the affected area, must be joined with white crossover voters to avoid needless vote dilution.

The Commission's adherence to Colorado voters' directive to avoid diluting minority voters' electoral influence does not violate the Equal Protection Clause. The Commission's measured approach to avoiding vote dilution as one factor among all other traditional redistricting criteria did not make race the dominant and controlling consideration in its process. And even if the Commission drawing effective crossover districts were somehow subject to strict scrutiny, the Commission had a strong reason to believe that doing so was necessary to comply with Amendment Z's constitutional electoral influence provision—a provision Colorado had a compelling interest in enacting. The Commission did not abuse its discretion and its submitted maps should be approved.

ARGUMENT

I. The Commission fulfilled its constitutional obligation to avoid the needless dilution of minority voters' electoral influence.

The Legislative Commission fulfilled its obligations under the Colorado Constitution's electoral influence provision by preventing the needless dilution of minority voters. This Court has long observed that, "[a]s a general rule, minority voting strength is impermissibly diluted when large concentrations of minority population are unnecessarily fragmented and dispersed." *In re Reapportionment of Colorado Gen. Assembly*, 647 P.2d 209, 212 n.7 (Colo. 1982) (quoting *Carstens v. Lamm*, 543 F. Supp. 68, 85-86 (D. Colo. 1982)) (alterations omitted). The Commission avoided that unnecessary dispersal of minority voters and preserved their electoral influence by, for example, drawing effective crossover districts in Adams County, southern Colorado, Greeley, and southern Colorado Springs.

A. The electoral influence provision requires crossover districts.

For the reasons LULAC described in its congressional brief and incorporates here,[6] the Colorado Constitution's electoral influence provision's vote dilution protections exceed the federal VRA by requiring *effective* minority districts instead of numerical majority-minority districts. This compels drawing crossover districts.

This Court has "the power to define the standard applicable to a constitutional claim" concerning Colorado redistricting, *see In re Interrog.*, 488 P.3d at 1022, and

[6] *See* LULAC Congressional Br. at 11-20.

it should reject the Congressional Commission's erasure of the electoral influence provision that violates its plain text and Coloradan's manifest intent to prevent the needless dilution of minority voters' electoral influence. The provision instead requires a functional analysis of the political process to determine where vote dilution can be avoided. It does not follow the inapplicable standards this Court discussed in dicta in *Beauprez v. Avalos.* Rather, the provision accepts the U.S. Supreme Court's invitation to adopt a policy favoring crossover districts to prevent needless vote dilution.

1. The electoral influence provision uses a functional analysis.

While the U.S. Supreme Court has interpreted VRA Section 2's "opportunity to elect" text to compel drawing districts with a numerical majority of minority voters, *see Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) (plurality opinion for the Court), the electoral influence provision requires only an *effective* majority in which minority voters "are numerous enough and their candidate attracts sufficient cross-over votes from white voters," *see Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). The protection is triggered when (1) an identified district could be drawn with "a sufficiently large minority [group] to elect their candidate of choice with the assistance of [white] crossover votes," (2) the substantial minority group is politically cohesive, and (3) the district as currently drawn has "sufficient white

majority bloc voting to frustrate the election of the minority group's candidate of choice." *See id.* at 158; *accord Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017).

This standard first considers whether a proposed district with a large minority voter population exhibits conditions of racially polarized voting. Racially polarized voting "exists where there is a consistent relationship between the race of the voter and the way in which the voter votes ... or to put it differently, where [voters of different races] vote differently." *Sanchez*, 97 F.3d at 1312 (quoting *Gingles*, 478 U.S. at 53 n.21). The level of racially polarized voting implicates the electoral influence provision when the white majority in the affected area "votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Id.* at 1310; *see also id.* at 1313 (applying *Uno v. City of Holyoke*, 72 F.3d 973, 980 (1st Cir. 1995)). This "usually to defeat" standard contemplates "not total submergence, but partial submergence" in a bloc-voting district, and requires safeguarding not only "the chance for some electoral success in place of none, but [also] the chance for more success in place of some." *Johnson v. De Grandy*, 512 U.S. 997, 1012-13 (1994).

The Commission's analyses of historical election returns and time-tested statistical modeling show that these conditions exist in several parts of Colorado. *See* Comm'n Exs. 8, 9, 10. The analyses reveal that Colorado's Latino voters form a cohesive community that "ha[s] expressed clear political preferences" for

Democratic candidates in general elections and specifically Latino Democrats in primaries, but they often live in areas where white voters bloc vote in favor of opposing candidates that normally defeat the Latino-preferred candidates. *See Sanchez*, 97 F.3d at 1315 (citation omitted).

With these conditions met, the electoral influence provision then asks whether a crossover district could be drawn to avoid the dilutive effects on a substantial minority group's electoral influence. Crossover districts are districts in which white crossover voters join a large and cohesive minority voter population to elect minority-preferred candidates. *Bartlett*, 556 U.S. at 13.[7] While still observing the Constitution's other mandatory and permissive redistricting criteria, the Commission must determine whether it can configure district lines in racially polarized areas that combine the large minority voter group with majority voters who crossover to support minority-preferred candidates.

The size of a minority voter population needed to draw crossover districts is not susceptible to arbitrary arithmetic baselines. *See* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1390 (2001); *see also id.* at

[7] The crossover district concept is familiar both to the Legislative Commission, which received numerous comments about crossover districts, and to the Court, which has endorsed "alternative [legislative] plans that" satisfy traditional criteria "while still preserving … minority-influence districts" of large minority voter populations and additional crossover supporters. *In re Colorado Gen. Assembly*, 332 P.3d at 112; *accord Carstens*, 543 F. Supp. at 85-87.

1407 (summarizing crossover districts model). The requirement instead calls for a "case-specific functional analysis" that "takes into account such factors as the relative participation rates of whites and minorities, and the degree of cohesion and crossover voting that can be expected," as well as "the type of election … , and the multi-stage election process" including primary elections. *Id.* at 1423. In conducting this functional analysis, the minority population must be "large enough," *Cooper*, 137 S. Ct. at 1470 (quoting *Bartlett*, 556 U.S. at 13), such that reasonably adding white crossover voters will have "a meaningful impact on minority voting strength," *Carstens*, 543 F. Supp. at 86. This means that the "lessons of practical politics" in election results data "must reveal that minority voters in the district" are "in fact [able to] join[] with other voters to elect representatives of their choice." *Uno*, 72 F.3d at 991 & n.13.

In sum, if the Commission can draw a crossover district that will avoid the needless dilution of a sufficiently large minority voter population without subordinating traditional redistricting criteria, Amendments Y and Z instruct that it must engage in a functional analysis of the political environment to draw the district.

The Commission's voting rights expert conducted precisely this type of inquiry by performing "[a] district-specific, functional analysis … to determine whether a district is likely to provide minority voters with" their electoral influence

that will in part depend on "the level of non-Hispanics 'crossing over' to vote for the Hispanic-preferred candidates." Comm'n Ex. 9 at 7-8.

2. *Beauprez v. Avalos* does not inform the analysis.

This functional analysis that seeks to prospectively eliminate vote dilution does not follow from this Court's dicta analysis in *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). The *Beauprez* Court's vote dilution discussion is nonprecedential dicta because that issue was not pressed in the trial court, there accordingly was an "inadequate" factual record to evaluate the claim, and the claimant lacked standing. *Id.* at 650. Because this passage "was not necessary to the disposition of the issues presented," it "should be recognized as dictum without precedential effect." *People in Int. of Clinton*, 762 P.2d 1381, 1385 (Colo. 1988).

In any event, the *Beauprez* Court's analysis is not relevant here. The Court purported to analyze a Fourteenth Amendment *intentional* discrimination claim, *see Beauprez*, 42 P.3d at 645, a wholly distinct standard compared to the Colorado Constitution's results-oriented electoral influence provision. Colo. Const. art. V, § 48.1(4)(b). How mapdrawers alter—or not—the districts' Latino populations is surely relevant to whether they have engaged in intentional race discrimination, but on its own it says little about whether a plan dilutes Latinos' *electoral* influence—only election results can do that. Moreover, the *Beauprez* Court's 20% assumption for measuring electoral influence is inconsistent with the "searching practical

evaluation" and "functional view of the political process" that vote dilution inquiries entail. *See Sanchez*, 97 F.3d at 1310. And to the extent *Beauprez* supports an anti-retrogression standard, as the Congressional Commission stretches the decision to hold,[8] such an approach is at odds with the plain text of the electoral influence provision that, unlike Section 5 of the VRA, does not contain any "diminish[ment]" language that measures dilution from the status quo. *Compare* 52 U.S.C. § 10304(b) *with* Colo. Const. art. V, § 48.1(4)(b). Coloradans enacted the electoral influence provision to prevent avoidable minority vote dilution; allowing the existing dilution embedded in past maps to dictate whether the problem must be corrected going forward contradicts Amendments Y and Z's clear text and purposes.

3. The U.S. Supreme Court endorses crossover districts.

The U.S. Supreme Court has endorsed crossover districts as an appropriate method for avoiding minority vote dilution. While the Court held that federal law permits, but does not require, drawing crossover districts to prevent vote dilution, it explicitly invited jurisdictions to adopt policies favoring crossover districts. *Bartlett*, 556 U.S. at 23-24; *see also Cooper*, 137 S. Ct. at 1471-72; *De Grandy*, 512 U.S. at 1020. Because that is precisely what Coloradans did in Amendments Y and Z, the redistricting commissions must effectuate the voters' policy decision.

[8] *See* CICRC Reply Br. at 19-21; CICRC Opening Br. at 51-52 (stating purported *Beauprez* rule with no citation to its source).

Contrary to the Congressional Commission's arguments,[9] the U.S. Supreme Court did not leave the crossover districts question unresolved. The *Bartlett* Court expressly stated that "States that wish to draw crossover districts are free to do so where no other prohibition exists." 556 U.S. at 24. And it did not limit its permission to situations in which the federal VRA would otherwise require at least one majority-minority district, ruling instead that in areas where there is not white-bloc voting, "majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deem appropriate." *Id*. Thus, between the three Justice controlling plurality opinion holding that crossover districts are a permissible legislative choice even with no VRA obligations, and the four Justice dissent concluding the VRA mandates the benefits of crossover districts, *Bartlett* stands for a seven-Justice majority affirming states' policy decision to draw crossover districts. *See id.* at 23-24 (plurality); *id.* at 27 (Souter, J., dissenting).

The Court's more recent *Cooper v. Harris* decision supports the same conclusion. There, the North Carolina legislature packed more minority voters into a district to change it from a performing crossover district to a majority-minority district. *Cooper*, 137 S. Ct. at 1470. The Court unanimously held that the legislature violated the Equal Protection Clause by disregarding "the significance of a longtime

[9] *See* CICRC Opening Br. at 49; CICRC Reply Br. at 16-17.

pattern of white crossover voting in the area" that comprised an effective minority district to artificially create a majority-minority district. *Id.* at 1470-72; *id*. at 1487 n.1 (Alito, J., concurring in the judgment in part and dissenting in part). On remand, the crossover district was restored.

Contorting these cases and others, the Congressional Commission contended in oral argument that the electoral influence provision cannot be read to require crossover districts because doing so raises poorly defined administrability and proportionality concerns. These additional arguments are without merit.

First, the Congressional Commission argued that requiring crossover districts would be difficult to apply, whereas the *Bartlett* Court's 50%+1 majority-minority threshold for Section 2 claims is an "objective, administrable rule." *See* 556 U.S. at 22. But the Congressional Commission severs that passage from its relevant context: the *Bartlett* plurality was concerned with Section 2's nationwide scope—including municipal districting—and the risks of imbuing the federal courts in policing "crossover districts throughout the Nation." *Id.* at 21. That administrability consideration channels a federalism-based unease with interpreting Section 2 too broadly such that it interferes with "each State's sovereign interest in implementing its redistricting plan." *Bush v. Vera*, 517 U.S. 952, 978 (1996) (citation omitted). But the federalism underpinnings for why federal courts have restrained the broad reach of Section 2 has no bearing on this Court's interpretation of *Colorado's* expansive

electoral influence provision. As discussed above, the *Bartlett* Court itself suggests that states seeking to draw crossover districts in a localized way would be constitutionally permissible. 556 U.S. at 23-24.[10]

Second, the Congressional Commission argued that interpreting the electoral influence provision to mean what it says would trigger constitutional difficulties because it increases the likelihood of proportionality in redistricting. The Commission's reliance on *Johnson v. De Grandy* for this proposition is unfounded. Although the *De Grandy* Court ruled that Section 2, as a matter of statutory interpretation, did not require maximizing minority opportunity districts that would *exceed* the group's proportional share of the jurisdiction's population, the majority nowhere suggests that *pursuing* proportionality is unconstitutional. *See* 512 U.S. at 1018. Indeed, the Court rejected that proportionality would be a safe harbor from Section 2 liability, *see id.* at 1019, and Justice O'Connor's concurrence emphasized that the "[l]ack of proportionality is probative evidence of vote dilution." *Id.* at 1025. Thus, although the "lack of proportional representation does not by itself establish a" minority vote dilution violation, *see In re Colorado Gen. Assembly*, 828 P.2d 185,

[10] Moreover, as the *Bartlett* dissent emphasizes, other potential administrability concerns with crossover districts are no different than for majority-minority districts. *See* 556 U.S. at 39-40 (Souter, J., dissenting).

192 (Colo. 1992), that reality is probative evidence of dilution and drawing districts to achieve greater proportionality is far from a constitutional infraction.

In sum, the U.S. Supreme Court has made clear that "States that wish to draw crossover districts" to avoid minority vote dilution "are free to do so" as a valid policy decision that "lead[s] to less racial isolation, not more." *Bartlett*, 556 U.S. at 23-24; *accord Cooper*, 137 S. Ct. at 1470-71; *De Grandy*, 512 U.S. at 1019-20. Colorado voters made this policy decision by enacting the provisions in Amendments Y and Z that go beyond the VRA to avoid needlessly diluting "minority group's electoral influence." Colo. Const. art. V, §§ 44.3(4)(b), 48.1(4)(b). While the Congressional Commission rebuked its electoral influence obligations, the Legislation Commission was able to meet them while also achieving other redistricting goals.

B. The Commission's maps avoid needless vote dilution.

The Legislative Commission's submitted state house districts ("HD") and state senate districts ("SD") maps that successfully create "crossover districts" to comply with the VRA and the electoral influence provision. The Commission's state house map meets these obligations by, for example, drawing crossover districts in Pueblo and the San Luis Valley (HD 46 and HD 62), southern Colorado Springs (HD

17), and in Greeley (HD 50). The Commission's state senate map most notably draws crossover districts in Adams County in SD 21 and SD 24.[11]

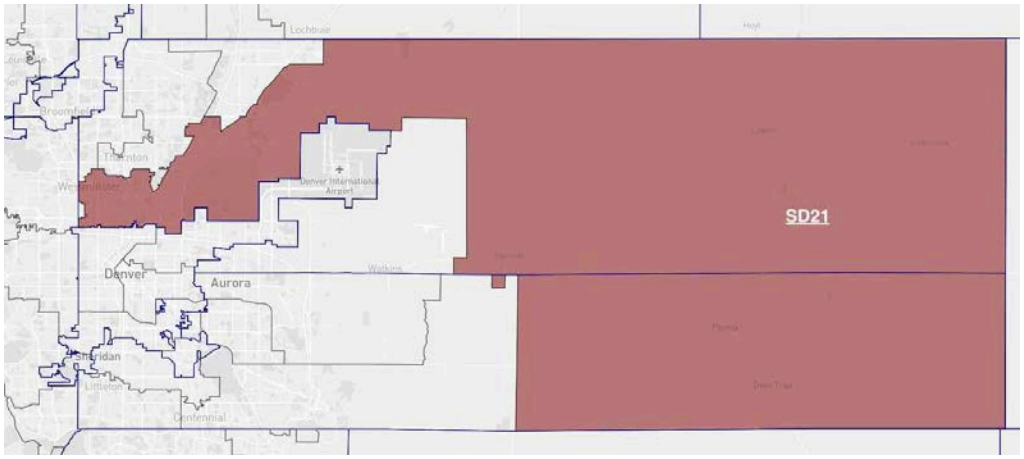
Although the Commission set out to draw these districts as part of its compliance with the VRA, it did so in a way that also draws crossover districts where necessary to avoid the needless dilution of minority voters electoral influence under Amendment Z. Indeed, much of the Commission's choices were not necessary to comply with the VRA because minority voters could not represent a numerical majority of the identified district, but were necessary to comply with the electoral influence provision's requirement to facilitate *effective* majorities through crossover districts. *See, e.g.*, Comm'n Exs. 9 at 7-10; 10 at 1, 6. Thus, the Commission's stated efforts to comply with the VRA has also resulted in its compliance with the separate requirements in the electoral influence provision.

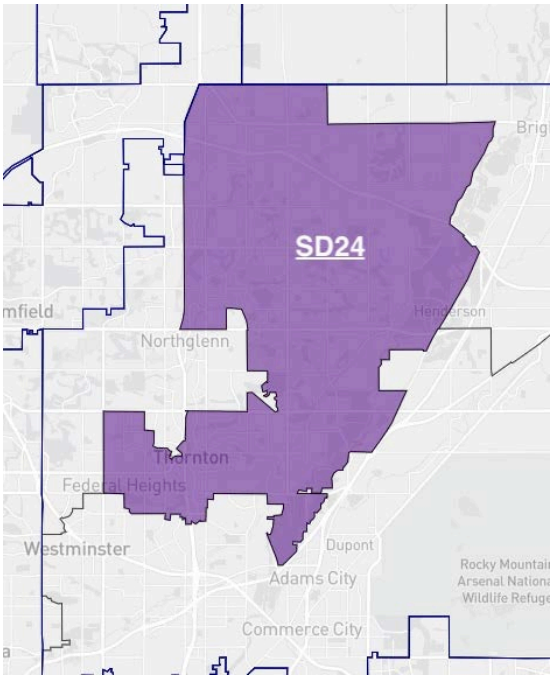
1. The Commission drew crossover state senate districts.

SD 21 and SD 24 (pictured below) illustrate that the Commission drew effective crossover districts in the north Denver portions of Adams County to prevent the avoidable dilution of Latino voters' electoral influence:[12]

[11] The Legislative Commission's state house and senate maps include other instances of drawing effective crossover or coalition districts to avoid the needless dilution of minority voters' electoral influence. LULAC identifies HD 17, HD 46, HD 50, HD 62, SD 21, and SD 24 as illustrative examples.

[12] Notably, the Legislative Commission's use of crossover districts in this area resembles the crossover LULAC District 7 proposed in LULAC's submitted congressional maps. *See* LULAC Congressional Br. at 40-42.





While deliberating the final details of its state senate plan, the Commission focused its collaborative attention on SD 21 and SD 24 in part to ensure the districts did not dilute Latino voters' electoral influence. Comm'n Mtgs. Oct. 11, 2021 at 9:56-10:39pm, 11:18-11:21pm; Oct. 12, 2021 at 7:50-8:21pm.[13] The Commission

[13] For example, on October 11, 2021, Commissioner Barnett presented a proposed map and discussed senate district configurations in Adams County in North Denver (what became SD 24

understood that it could draw crossover districts in that area by retaining the large core of Latino voters (around Commerce City, Adams City, Thornton, and Federal Heights) while adding white crossover voters in Westminster who would support Latino-preferred candidates and removing white bloc voters in north Adams County along highway 85 who would overwhelmingly vote against them.

Applying the electoral influence provision analysis, the effective crossover districts in SD 21 and SD 24 satisfy the Colorado Constitution's requirements. First, there is a large Latino population in the core of SD 21 and SD 24. As the Commission's data shows, the Latino CVAP in final SD 21 is 37.99% of the district and in final SD 24 is 26.10%. Comm'n Ex. 10 at 2. Second, the Commission's expert analysis concludes that the area in western Adams County exhibits racially polarized voting, with Latinos and other non-white voters strongly preferring Democratic candidates. *See* Comm'n Ex. 9 at 4-5, 16; Ex. 10 at 1. Because of these conditions, the districts must be drawn to exclude the white bloc voters living in the

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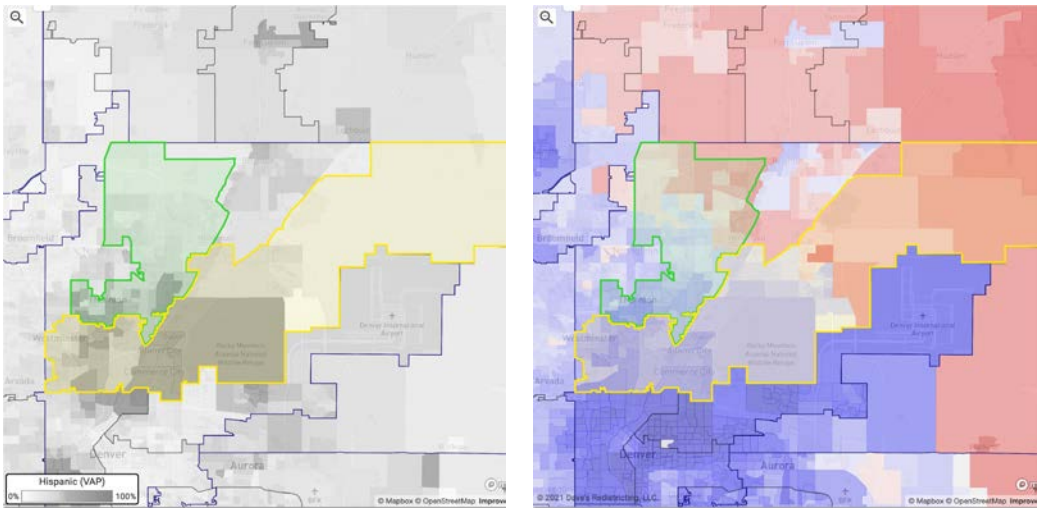
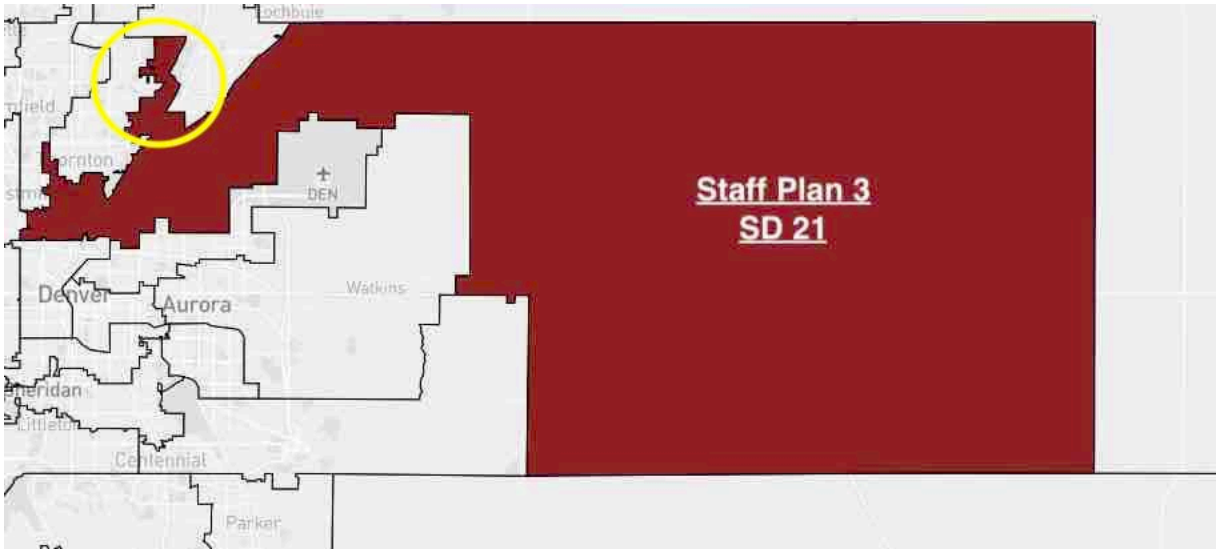
and SD 21) with high minority voter population using election outcomes data and CVAP numbers. But certain commissioners (notably Barry, Greenidge, McReynolds, and Uzeta O'Leary) were concerned about dilutive conditions in the district. Comm'n Mtg. Oct. 11, 2021 at 9:56-10:25pm. During that exchange, Commissioner McReynolds emphasized that, due to an overfocus on competitiveness, a proposal had improperly eliminated effective Latino electoral influence districts in North Denver compared to other comparable map options before the Commission. *Id.* at 10:34-10:35pm. Commissioner Barry likewise was concerned that the proposed senate district around Thornton, where there is "very heavy Latino population," raised "concerns … around voter dilution" of Latino residents. *Id.* at 10:37-10:39pm. The next day, the Commission worked together to correct these issues, while still taking care to observe traditional redistricting criteria. *See* Comm'n Mtg. Oct. 12, 2021 at 7:50-8:21pm.

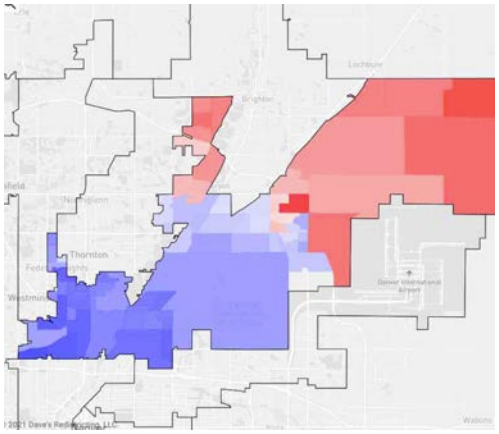
northwestern part of Adams County to avoid diluting Thornton and Commerce City Latino voters' electoral influence. The demographic and election data shading maps below, showing a zoomed in SD 21 outlined in yellow and all of SD 24 outlined in green, demonstrate how the Commission drew the districts to comply with traditional redistricting criteria while avoiding vote dilution:

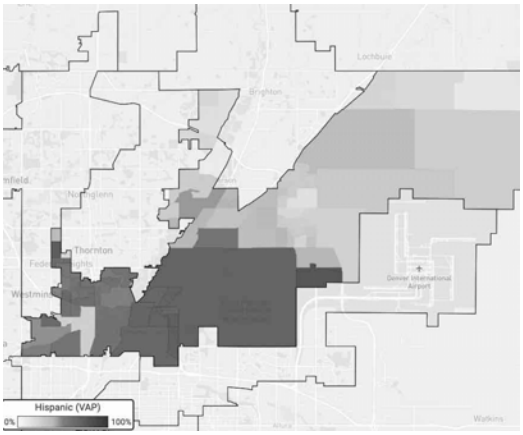


Comparing the changes made to SD 21 from the version of the district in the Commission's Staff Plan 3 provides a clear illustration of how drawing crossover districts can avoid needless vote dilution. The Staff Plan 3 version of SD 21, pictured below, was configured to include most of Adams County with the main population drawn from the Commerce City area, but it also reached north along highway 85 toward Brighton and the Todd Creek Golf Course residential housing development area circled in yellow:



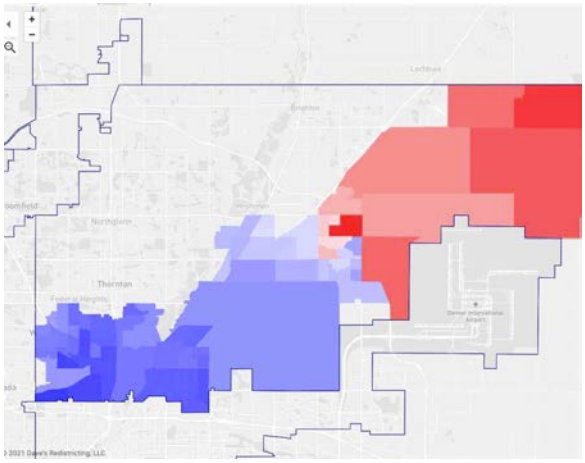
Notably, the Staff Plan 3 version of SD 21 also did not include much of Westminster. Below are demographic and election data shaded maps of Staff Plan 3's SD 21 (zoomed into the north Denver portion), with darker black shading for higher Latino VAP concentration in the demographics map, and red signifying Republican support and blue signifying Democratic support in the election data map:[14]

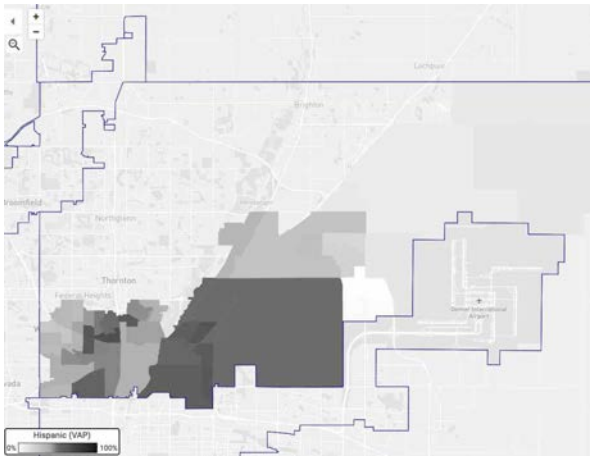




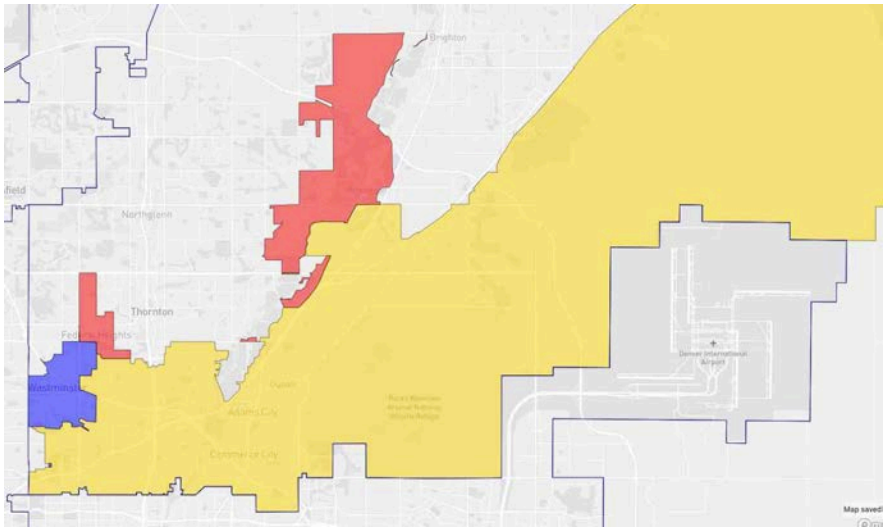
[14] Map images are taken from Dave's Redistricting App. *See Final Senate Staff Plan Three*, Dave's Redistricting App 2020, available at https://davesredistricting.org/join/e04ae175-b360-4430-b31d-706003453a84 (last accessed Oct. 21, 2021); *Final Approved Senate Plan 2021*, Dave's Redistricting App 2020, available at https://davesredistricting.org/join/3ab003b8-918d-4381-9cba-06c33d7f8751 (last accessed Oct. 21, 2021).

The Commission's final versions of SD 21 and SD 24 depart from the configuration of Staff Plan 3 SD 21 so that the final SD 21 will be an effective Latino electoral influence district by including white crossover voters instead of white bloc voters. The final SD 21 maps showing demographic and election data shading are below:





The key differences between the two SD 21 configurations are represented in the below image, with the red shaded portions being only in the Staff Plan 3 version, the blue shaded portions being only in the final submitted version, and the yellow shaded portions common to both:



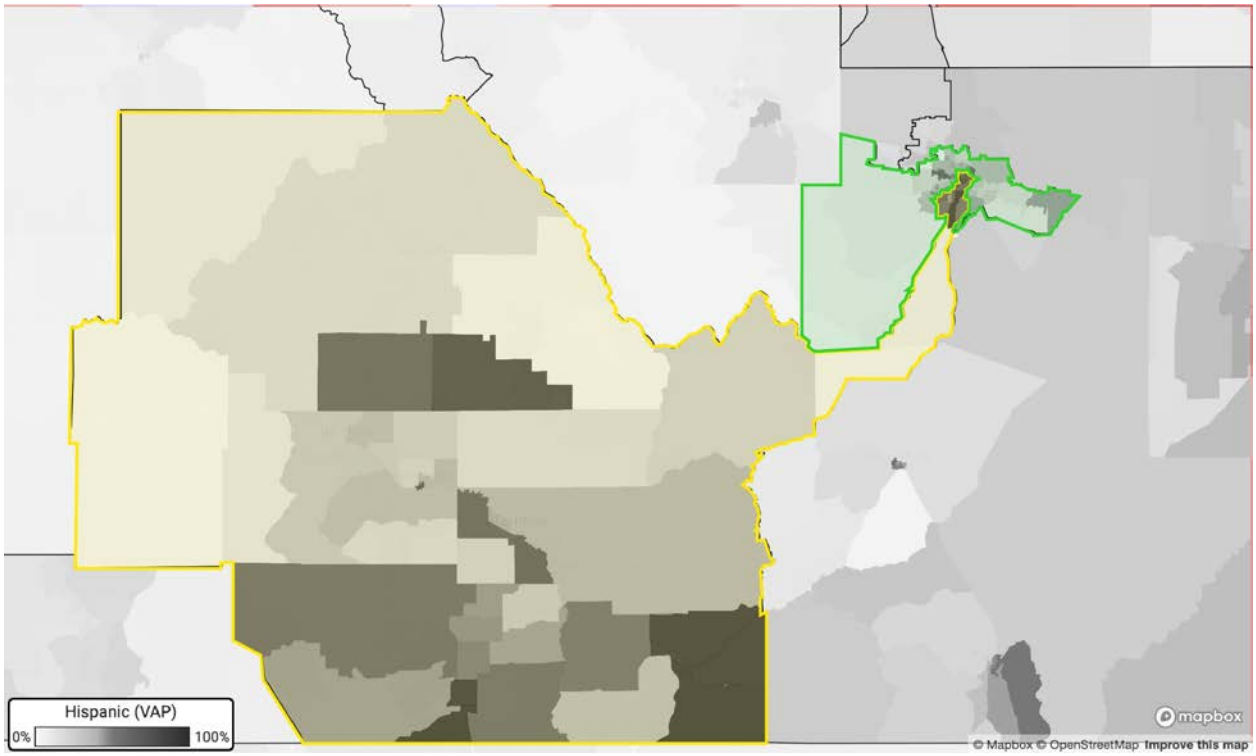
By adding the blue Westminster portions in western Adams County to the final SD 21, the Commission combined the large Latino population in the district with white crossover voters supporting Latino-preferred candidates. At the same time, the Commission removed the red portion in northern Adams County that comprised white voters living near the Todd Creek Golf Course residential development who bloc vote overwhelmingly against Latino-preferred candidates. These alterations made SD 21 an effective crossover district instead of a district that risked having racially polarized voting conditions dilute the electoral influence of Latinos in Commerce City. In doing so, the Commission also applied traditional redistricting criteria by, for example, adhering to communities of interest testimony the Commission received concerning southwest Westminster; and avoiding unnecessarily cutting into Jefferson County by crossing Sheridan Boulevard or into Weld County by extending past Brighton. *See, e.g.*, Comm'n Mtg. Oct. 12, 2021 at 7:50-8:21pm (discussing changes to SD 21 and SD 24).

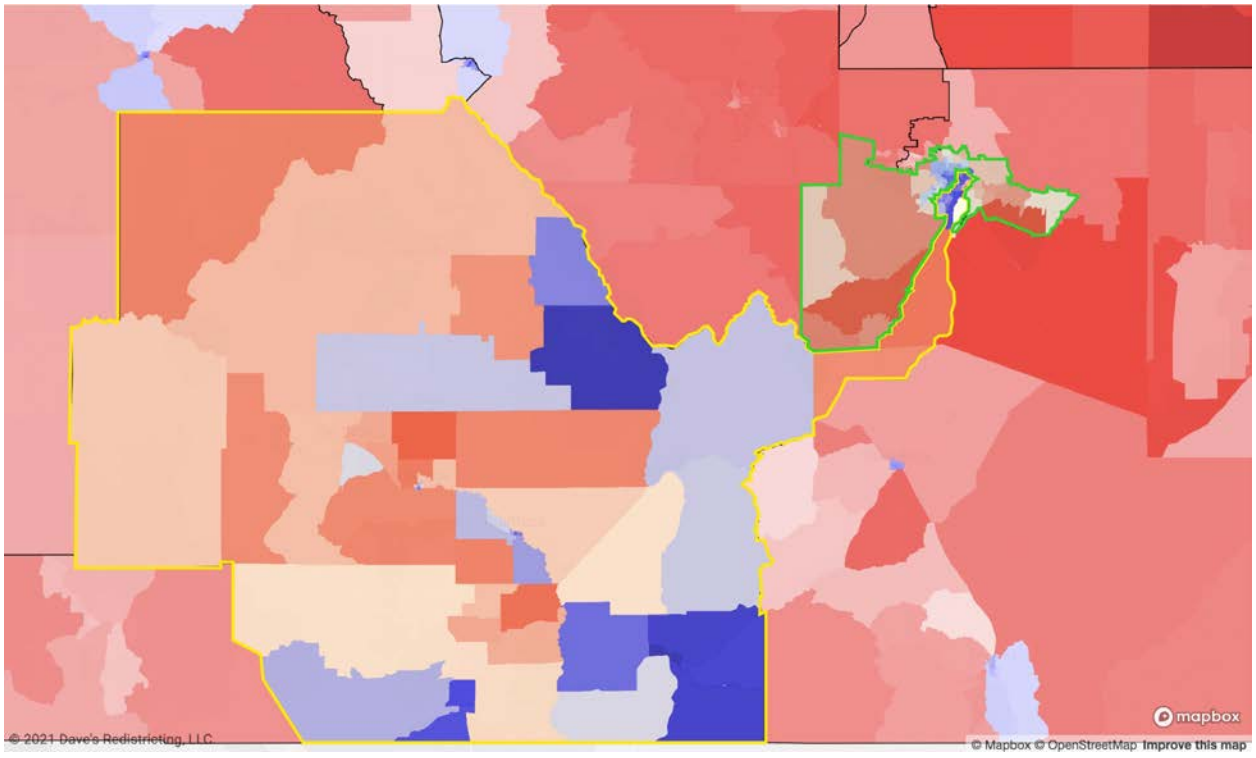
2. The Commission drew crossover state house districts.

Several of the proposed house districts also illustrate the use of crossover districts to prevent minority vote dilution. HD 46 and HD 62 covering Pueblo and San Luis Valley are examples in southern Colorado. Courts have long recognized that a substantial and politically cohesive Latino population resides in southern Colorado in the San Luis Valley and Pueblo areas, but racially polarized conditions

can block their preferred candidates. *See, e.g.*, *Sanchez*, 97 F.3d at 1306; *Carstens*, 543 F. Supp. at 87. The Commission's vote dilution reports reinforce that these conditions remain in southern Colorado, and that crossover districts are needed to avoid the dilutive effects of the racially polarized white bloc voters in the surrounding areas.

First, the Commission's data reveals that a substantial Latino voter population lives in Pueblo and the San Luis Valley, such that a crossover district could be drawn to preserve their electoral influence. *See* Comm'n Ex. 9 at 5-6, 11. The final Latino CVAP in HD 46 is 37.21% of the district and in HD 62 is 47.99%. Comm'n Ex. 10 at 7. Second, the Commission's vote dilution expert concluded that racially polarized voting conditions exist in the region such that Latino voters vote cohesively but surrounding rural white residents bloc vote against Latino-preferred candidates. Comm'n Ex. 9 at 13, 18. Thus, the Commission must attempt to draw crossover districts to avoid diluting the electoral influence of the large and cohesive Latino population in Southern Colorado. The below demographic and election data maps show that the Commission successfully drew HD 46 (shaded in green) and HD 62 (shaded in yellow) to add white crossover voters and avoid white bloc voters:





These maps reveal—along with the Commission's data and conclusions, *see* Comm'n Ex. 9 at 11-13; Comm'n Ex. 10 at 6-10—that the Commission created

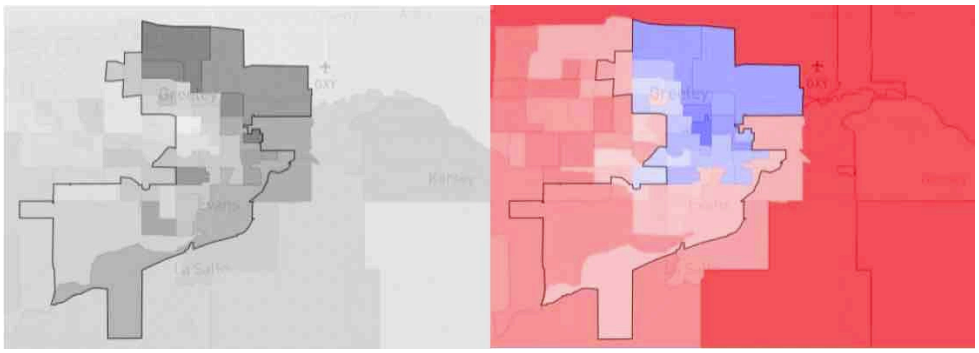
crossover districts in HD 46 and HD 62. HD 46 retains the core Latino populations in metro Pueblo while adding white crossover voters in west Pueblo county instead of the white bloc voters in east Pueblo county. And HD 62 retains the Latino population in the San Luis Valley while adding white crossover voters in Saguache and Huerfano Counties and avoiding the white bloc voters in Custer and Fremont Counties. In drawing these crossover districts, the Commission also complied with traditional redistricting criteria by minimizing county and precinct splits, ensuring that the Southern Ute and Ute Mountain reservations stayed in one district in neighboring HD 59, and providing transportation corridors to connect the districts through Pueblo and around the Sangre de Cristo mountains. *See, e.g.*, Comm'n Mtgs. Oct. 9, 2021 at 9:12-9:15am; Oct. 11, 2021 at 8:30-8:32pm.

The Commission also drew the HD 50 crossover district in the Greeley area. First, the Commission determined that Greeley had a substantial Latino population that could be joined with white crossover voters to avoid vote dilution. In the final HD 50, the Latino total VAP is 44.10% and total CVAP is 34.07% (with 40.04% totality minority CVAP). Comm'n Ex. 10 at 10.[15] Second, the Commission's expert concluded that voting in the Greeley area in Weld County is racially polarized, with Latino voters cohesively favoring Democratic candidates and the surrounding rural

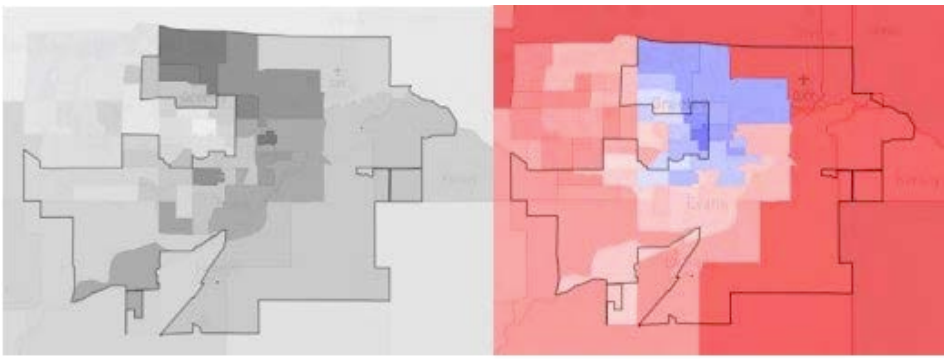
[15] *2021 Final Approved House Plan*, Dave's Redistricting App 2020, available at https://davesredistricting.org/join/a7679680-5c15-4556-88ac-330ba61176b9 (last accessed Oct. 21, 2021).

white-bloc voters opposing Latino-preferred candidates. Comm'n Ex. 9 at 5, 11. The Commission's HD 50 avoids this needless dilution of Latino voters in Greeley by drawing a compact district around the city that excludes the rural Weld County precincts. The Commission made this correction after LULAC submitted comments explaining how the preliminary staff plan's Greeley district had unconstitutionally eliminated a preexisting effective crossover district. *See* LULAC Congressional Br. App. A at 18-22. As the below demographic and election data maps demonstrate, the Commission's final HD 50 reverted back to a configuration that improved upon the existing crossover district:

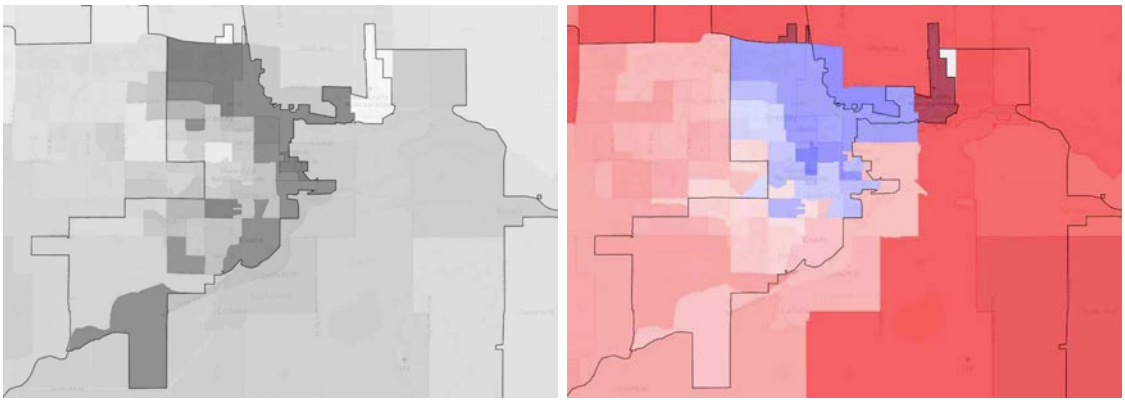
2010 HD 50



Preliminary Plan HD 64

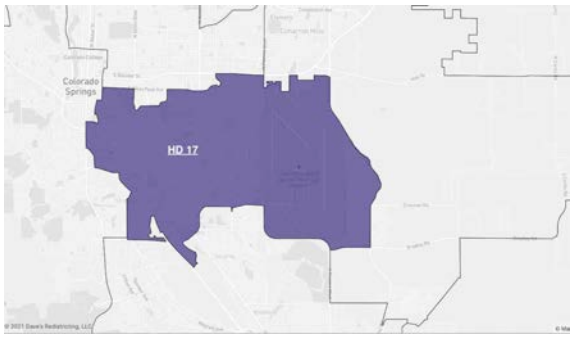


Final HD 50

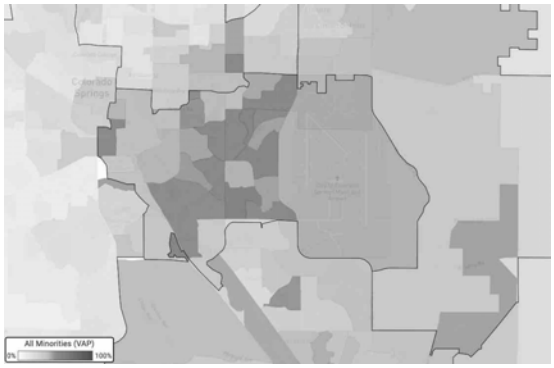


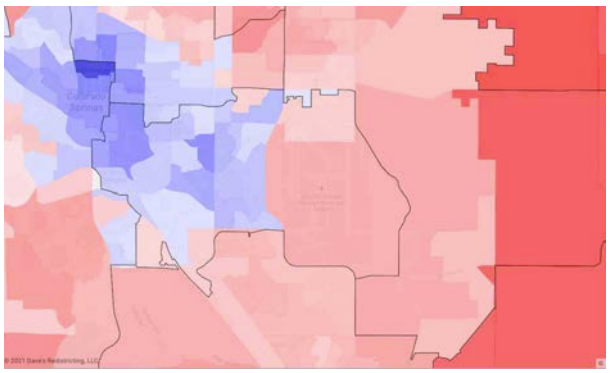
Instead of drawing HD 50 to cover the areas in the Staff Preliminary Plan's HD 64, the Commission retained the core of the crossover district currently in place. It ensured the district would avoid diluting Latino voters' electoral influence by including white crossover voters residing in the Weld County areas immediately surrounding Greeley (e.g., precincts 113, 110, 317, 247, 220, 217, 109), instead of combining the City's Latino voters with white voters in rural areas to the east (e.g., Weld County precincts 120, 152, 316, 320, 326, 331, and 333) who bloc-vote in opposition to Latino-preferred candidates. This choice—trading bloc-voting white residents in one nearby area for white crossover voters in another—was a non-racial political classification that created an effective crossover district. The Commission avoided preventable vote dilution while also achieving other redistricting criteria such as drawing a compact district, retaining communities of interest, and ensuring that the number of competitive districts are comparable with other map configurations. *See, e.g.*, Comm'n Mtg. Oct. 10, 2021 at 1:40-1:47pm.

Finally, the Commission drew crossover HD 17 in southern Colorado Springs:



HD 17 has a substantial coalition of minority voters, with 30.46% Latino VAP (24.49% CVAP) and 13.20% Black CVAP. Comm'n Ex. 10 at 10. The Commission's expert report concluded that minority voters in southern Colorado Springs vote cohesively for the same minority-preferred candidates. *See* Comm'n Ex. 9 at 6, 13. However, the area exhibits racially polarized voting patterns such that white voters normally bloc vote to defeat minority-preferred candidates (with the exception of the minority-preferred candidate winning the district over the past four years). *Id.* at 13. To ensure the large population of cohesive minority voters in southern Colorado Springs do not have their electoral influence needlessly diluted in the future, the Commission drew a crossover district:





The HD 17 crossover district protects against minority vote dilution while still respecting traditional redistricting criteria.[16] For example, the district is compact, it retains cohesive communities of interest the Commission identified in southern Colorado Springs, and it avoids including Fort Carson to ensure that it is included with Fountain and other parts of southern El Paso County. *See, e.g.*, Comm'n Mtg. Oct. 10, 2021 at 7:42-7:45pm.

II. The Commission's compliance with the electoral influence provision implicates no constitutional avoidance concerns.

The Legislative Commission's appropriate attention to preventing the avoidable dilution of Latino voters' electoral influence is well within the bounds of the Equal Protection Clause. Contrary to the Congressional Commission's counsels' arguments, the Equal Protection Clause does not render considering race to counteract the lasting effects of discrimination a constitutional anathema. It merely prohibits narrow circumstances in which "race was the predominant factor motivating the [redistricting] decision" such that the mapmaker "subordinated other factors." *Cooper*, 137 S. Ct. at 1463-64 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Thus, a map implicates the Equal Protection Clause only if it was drawn

[16] The areas in which the Commission added white crossover voters in southern Colorado Springs—and other areas in downtown Colorado Springs—are the same areas LULAC added to its congressional maps to create its southern Colorado crossover district. LULAC Congressional Br. at 36-40; App. A at 13-15, App. B at 6-9, App. C at 4-9. Counsel for the Congressional Commission baselessly contended in rebuttal oral argument that this was solely race-based. Not so. Adding white Democrats from downtown Colorado Springs instead of white Republicans from the Utah border is about political coalitions; a choice between two sets of voters of the same race cannot plausibly be cast as a racial classification.

"without regard for traditional districting principles and without sufficiently compelling justification." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("*Shaw I*").

Strict scrutiny is not triggered here because race did not predominate the Commission's process—it observed all redistricting criteria and drew electoral influence crossover districts not based on race but on *political* cohesion among voters. The Commission's process has no resemblance to those in which the Supreme Court ruled a map was an unconstitutional racial gerrymander. But even accepting the Congressional Commission's argument that applying the electoral influence requirement amounts to predomination and subordination to warrant strict scrutiny, the Legislative Commission had a compelling interest in fulfilling its constitutional obligations under Amendment Z and drawing a tailored map to avoid vote dilution. Through crossover districts, the Commission sought to address the lasting effects of discrimination without "produc[ing] boundaries [that] amplify[] divisions between" voting groups. *See Cooper*, 137 S. Ct. at 1469. Indeed, using this method to address vote dilution will "lead to less racial isolation, not more." *Bartlett*, 556 U.S. at 23. The Commission's maps followed the Colorado Constitution to effectively "balance[] the many competing interests at stake" without sacrificing the electoral influence of minority voters. *Hall*, 270 P.3d at 974.

A. Strict scrutiny is inapplicable because race did not predominate.

The Commission's compliance with the electoral influence provision is not subject to strict scrutiny because race did not predominate the Commission's process. Applying the Equal Protection Clause to "electoral districting is a most delicate task" in which courts must "exercise extraordinary caution." *Miller*, 515 U.S. at 905, 916. Here, it calls for court intervention only in the narrow circumstances where a party establishes in evidence that the Commission erroneously applied the electoral influence provision in a way that predominantly "relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 928 (O'Connor, J., concurring). The Legislative Commission has not committed this constitutional error; it properly considered race to comply with the electoral influence provision and did so in harmony with other traditional redistricting criteria.

The Congressional Commission, on the other hand, exaggerates that applying the electoral influence provision to mean what it says would "place[] Colorado law on a collision course with the Equal Protection Clause." CICRC Opening Br. at 47.[17] That contention relies on two flawed assumptions arising from a misapprehension of the Supreme Court's racial gerrymandering decisions: it misapprehends when

[17] Given the simultaneous briefing, LULAC had no prior opportunity to refute the Congressional Commission's misapplication of the Equal Protection Clause as an excuse to disregard the electoral influence provisions.

race predominates and how crossover districts fit in that analysis, as well as when traditional redistricting criteria have been subordinated.

First, the Congressional Commission suggests that *any* attention to race apart from strict VRA compliance makes race predominate and triggers strict scrutiny. Setting aside the established predominance and subordination standards, the Congressional Commission asks the Court to cherry-pick language in *Miller* to adopt its counsels' preferred rule that any non-VRA consideration of race in redistricting must treat minority voters as another community of interest and establish the "'actual shared interests,' such as 'political, social, and economic' ties, rather than 'racial considerations'" of minority voters who vote cohesively. CICRC Reply Br. at 19 (quoting *Miller*, 515 U.S. at 916, 919-20).

Tellingly, the Congressional Commission references no subsequent cases that have taken those plucked words as the lesson from *Miller*. The Court would be strained to find any case that even cites this language, much less relies on it as the governing rule for racial gerrymandering cases. Instead, over three decades of precedent have reinforced that the scrutiny is on whether "race predominates in the redistricting process." *Miller*, 515 U.S. at 916; *see also Bush*, 517 U.S. at 959; *Cooper*, 137 S. Ct. at 1469. Race did not predominate here, and the Legislative Commission was not required to also establish findings that minority voters who vote cohesively additionally share the qualities of other communities of interests.

Under the Court's cases, race predominates if "race for its own sake" was "the [mapmaker's] dominant and controlling rationale." *Miller*, 515 U.S. at 913. The Supreme Court has made clear that the mapmaker "*always* is aware of race when it draws district lines, just as it is aware of ... a variety of other demographic factors." *Shaw I*, 509 U.S. at 646 (emphasis added); *accord Miller*, 515 U.S. at 916. So when state law such as Amendment Z compels drawing districts that avoid needless vote dilution, "it does not follow that race predominates in the redistricting process," *see Miller*, 515 U.S. at 916, and "[s]trict scrutiny does not apply merely because" the "redistricting is performed with consciousness of race." *Bush*, 517 U.S. at 958; *see also Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring) (race does not predominate "even though race may well have been considered in the redistricting process"). Race must be the "predominant, overriding desire." *Miller*, 515 U.S. at 917 (majority), and the Congressional Commission's argument that any attention to race triggers strict scrutiny should be rejected.[18]

Moreover, drawing crossover districts calls for *less* race consciousness than other methods of preventing vote dilution, including majority-minority districts. The Commission drew the crossover districts described *infra* I.B. not by adding minority

[18] Moreover, accepting the Congressional Commission's argument would put in doubt a range of state laws that, like Colorado's electoral influence provision, seek to provide additional vote dilution protections above the VRA. *See* LULAC Congressional Br. at 16 n.4 (collecting state laws and cases upholding constitutionality).

voters at a block-by-block level but by exchanging bloc-voting *white* voters for crossover *white* voters. In this situation, "the 'predominance' question concerns *which* voters the [commission] decides to choose, and specifically whether the [commission] predominately uses race" or some other legitimate consideration to achieve equal population targets. *See Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 273 (2015) ("*ALBC*"). In southern Colorado, Greeley, Colorado Springs, and Adams County districts comprising large and cohesive minority voter populations, the Commission answered this question by adding politically cohesive voters instead of politically divergent voters from surrounding areas, regardless of their race. In other words, the Commission made their voter addition decisions in the potential crossover districts not "on the basis of race," *Miller*, 515 U.S. at 911, but for a "legitimate political explanation" that adding socially and politically cohesive voters would avoid the dilution of the minority voters already in the core of the district. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Fostering these multi-racial coalitions, with voters added on the margins for reasons entirely apart from race, amounts to less focus on race than in Section 2 majority-minority cases, not more.

Second, part of the predominance analysis is examining whether the Commission "has relied on race in substantial disregard of customary and traditional districting practices." *Miller*, 515 U.S. at 928 (O'Connor, J., concurring) (collecting

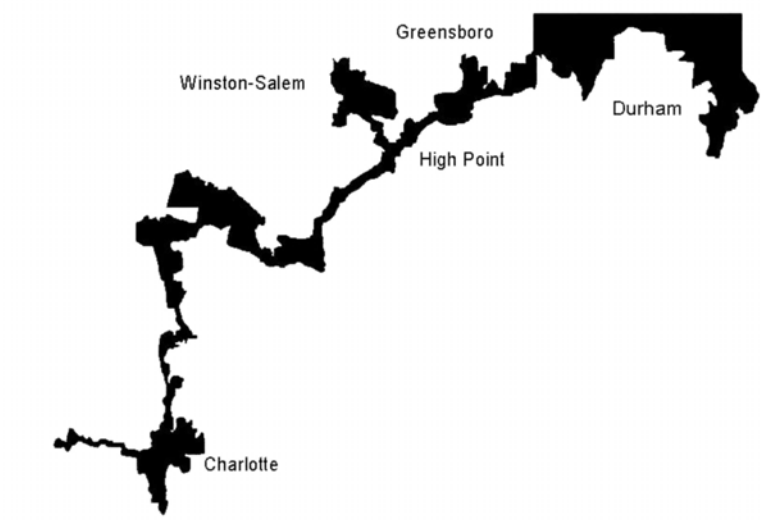
cases). Providing evidence that the mapmaker at times "neglect[ed] … traditional districting criteria is merely necessary, not sufficient" because "[f]or strict scrutiny to apply, traditional districting criteria must be *subordinated to race.*" *Bush*, 517 U.S. at 962 (emphasis in original). Strict scrutiny is simply "not … appropriate if race-neutral, traditional districting considerations predominated over racial ones," *id.* at 964, and in "most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *see also Miller*, 515 U.S. at 919 ("[C]ompliance with traditional districting principles … may well suffice to refute a claim of racial gerrymandering" (citations and quotations omitted)).

The Legislative Commission's process did not "subordinate[] other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations" in a way that "produced boundaries amplifying divisions between" voters based on race. *Cooper*, 137 S. Ct. at 1463-64, 69 (citations and quotations omitted). The submitted maps and recordings of the Commission's meetings reflect that the Commission only considered its vote dilution obligations as one factor among other traditional redistricting criteria and utilized crossover districts to reduce rather than amplify racial barriers in redistricting.

The Commission's deliberations throughout the process and the data it employed show its focus was on drawing compact districts, respecting communities of interest, boosting competitiveness where appropriate, among other considerations. *See, e.g.*, Comm'n Mtg. Oct. 11, 2021 at 10:05-10:59pm (deliberating aspects of proposed maps ranging from communities of interest to traversable roadways through districts to retaining political subdivisions); Comm'n Exs. 6-7, 11-14. The Commission worked together to openly broker compromises on a range of considerations, including where and how to avoid vote dilution in a way that maintained compactness, minimizing municipality splits, and emphasizing community ties within districts. The Commission effectively did so to garner the approval of all commissioners for the senate map and all but one for the house map.

In this respect, the core difference between the Congressional Commission and the Legislative Commission is that the latter understood there are many permissible map configurations to achieve traditional redistricting criteria, and the electoral influence provision simply requires choosing a map among the alternatives that will also avoid needless vote dilution. The Legislative Commission achieved that goal using a process that cannot be described as one in which race-neutral considerations impermissibly "came into play only after the race-based decision had been made." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("*Shaw II*").

The Legislative Commission's maps—and LULAC's proposed congressional plans—sharply depart from instances in which the Supreme Court has found predominance and subordination. The *Shaw I* Court rejected North Carolina District 12 on this basis, describing it as "160 miles long and, for much of its length, no wider than the [interstate] corridor" that "winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods." 509 U.S. at 635-36.



The Court in *Cooper* rejected a modern iteration of the same district, depicted below, because it similarly went block-by-block adding black voters and subtracting white voters in a way that was only explainable by race. *See* 137 S. Ct. at 1474-76.

Congressional District 12 (Enacted 2011)

The "monstrosity" district in *Miller* that was centered in "lightly populated, but heavily black" central Georgia and extended "links by narrow corridors [to] the black neighborhoods in Augusta, Savannah and southern DeKalb County" in Atlanta likewise had the hallmarks of a racial gerrymander. 515 U.S. at 909.

And the *Bush v. Vera* Court ruled unconstitutional a Texas district, pasted below, that "deliberately exclude[d]" white voters by "extend[ing] fingers" into "outermost" areas to "pick [] up" minority voters and appeared "like a jigsaw puzzle ... in which it might be impossible to get the pieces apart." 517 U.S. at 965, 973.

Although preventing vote dilution has "no aesthetic ideal in mind," *Sanchez*, 97 F.3d at 1314, none of the Legislative Commission's districts bear any resemblance to the districts the Supreme Court has invalidated as being predominantly race-based and subordinating traditional criteria to race. Its maps instead accomplished traditional redistricting criteria *and* avoided needless vote dilution. That is what the Colorado Constitution requires, and the Supreme Court's Equal Protection Clause precedent do not warrant subjecting that decision to strict scrutiny.

B. The Commission's compliance with the electoral influence provision satisfies even strict scrutiny.

Even if the Commission's adherence to the electoral influence provision triggered strict scrutiny, the submitted maps are constitutional. To satisfy strict scrutiny in this context, there must be a "strong basis in evidence" that a perceived race-conscious districting decision was done "to achieve a compelling interest." *ALBC*, 575 U.S. at 278-79 (citations omitted). A "strong basis in evidence exists when the [mapmaker] has *good reasons* to believe it must use race in order to" avoid

vote dilution, "even if a court does not find that the actions were necessary" in reality. *Bethune-Hill*, 137 S. Ct. at 801 (emphasis in original) (citation and quotations omitted).

Complying with Amendment Z's protections against minority vote dilution, particularly the electoral influence provision, is a compelling state interest. "No one will deny that the enhancement of minority voting strength is a worthy goal," *Carstens*, 543 F. Supp. at 85, and the Commission's efforts to effectuate the electoral influence provision are in step with that goal. The Congressional Commission's suggestion that *only* VRA compliance can represent a compelling interest is again not supported in precedent. As the Supreme Court stated in *Miller* and in *Shaw*: "There is a significant state interest in eradicating the effects of past racial discrimination." *Miller*, 515 U.S. at 920 (citation omitted); *see also Shaw II*, 517 U.S. at 909 (considering justifications apart from the VRA). The electoral influence provision is precisely that type of protection, and the Supreme Court's focus on VRA compliance is a result of prevalence, not of exclusivity.

Moreover, the fact that the electoral influence provision requires drawing effective minority districts rather than majority-minority districts does not reduce the Commission's compelling interest in addressing the lasting effects of discrimination. Nothing in the Constitution demarcates a 50%+1 majority-district

limit—the product of a *statutory interpretation* of Section 2 rather than a constitutional floor—to pursuing the State's compelling anti-discrimination interest.

The Commission had good reasons to believe that its decisions to draw effective crossover districts were necessary to comply with Amendment Z's vote dilution protections. The Commission engaged in a "careful assessment of local conditions and structures" to decide where crossover districts could be reasonably drawn to avoid needless vote dilution. *Bethune-Hill*, 137 S. Ct. at 801. It did so by enlisting expert reports on conditions of racially polarized voting, cohesive minority voter concentrations, and the crossover voting patterns of nearby majority voters. *See* Comm'n Exs. 8-10. The Commission's conclusions to draw crossover districts to pursue its antidiscrimination goal were grounded in a strong basis in evidence.

Moreover, crossover districts are preferable to majority-minority districts to accomplish Colorado's compelling state interest because crossover districts better "diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal." *Bartlett*, 556 U.S. at 23. Remedying vote dilution with crossover districts enables the Commission to hew more closely to non-racial criteria, construct districts with a more diverse electorate, and devise stronger incentives for candidates to appeal to multi-racial coalitions. *See, e.g.*, *De Grandy*, 512 U.S. at 1020. A majority of Justices in *Bartlett*—three in the controlling plurality and four in the dissent—had no concerns that states using

crossover districts to prevent vote dilution would violate the Equal Protection Clause. 556 U.S. at 23-24 (plurality); *id.* at 41-44 (Souter, J., dissenting). To the contrary, the Court observed that crossover districts "give[] [states] a choice that can lead to less racial isolation, not more." *Id.* at 23 (plurality). And it likewise reinforced that *eliminating* effective crossover districts is where equal protection problems can arise. *See, e.g.*, *id.* at 24; *Cooper*, 137 S. Ct. at 1470-72. Thus, the electoral influence provision's effective crossover district requirement is even more narrowly tailored than Section 2's majority-district requirement as a means to bring us closer to "the goal of a political system in which race no longer matters." *Shaw I*, 509 U.S. at 657.

CONCLUSION

For the foregoing reasons, the Court should approve the Commission's maps because it complied with the electoral influence provision and did not abuse its discretion.

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Respectfully submitted,

/s/ Eric Maxfield

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing upon all parties herein via the Colorado Court's E-filing service on the 21st day of October, 2021.

Respectfully submitted,

/s/ Eric Maxfield
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