ADVANCE SHEET HEADNOTE
November 1, 2021

2021 CO 73

No. 21SA208, *In re Colo. Indep. Cong. Redistricting Comm'n*—Congressional Redistricting—Constitutional Interpretation—Voting Rights Act—Dilution of Electoral Influence.

The supreme court reviews the final congressional redistricting plan adopted by the Colorado Independent Congressional Redistricting Commission, pursuant to the court's obligation under article V, section 44.5 of the Colorado Constitution. The court concludes that article V, section 44.3(4)(b) of the Colorado Constitution, which prohibits the Commission from adopting a plan that dilutes the impact of a racial or language minority group's electoral influence, does no more than incorporate into state law existing protections against minority vote dilution provided by section 2 of the Voting Rights Act, 52 U.S.C. § 10301, as expressed in U.S. Supreme Court case law at the time article V, section 44.3(4)(b) of the Colorado Constitution was enacted.

The court ultimately holds that the Commission did not abuse its direction in applying the substantive criteria set forth in article V, section 44.3 of the

Colorado Constitution in adopting the plan. The court therefore approves the plan and orders the Commission to file the plan with the Colorado Secretary of State no later than December 15, 2021, as required by article V, section 44.5(5) of the Colorado Constitution.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2021 CO 73

Supreme Court Case No. 21SA208
Original Proceeding Pursuant to Article V, Section 44.5 of the Constitution of the State of Colorado

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In Re
Petitioner:

Colorado Independent Congressional Redistricting Commission.

Plan Approved
en banc
November 1, 2021

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JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 In this original proceeding, we review the final congressional redistricting plan (the "Plan") adopted by the Colorado Independent Congressional Redistricting Commission (the "Commission"), pursuant to our obligation under article V, section 44.5 of the Colorado Constitution. We conclude that the Commission did not abuse its discretion in applying the criteria in article V, section 44.3 in adopting the Plan on the record before it. We therefore approve the Plan for Colorado's congressional districts for the ensuing decade, and we order the Commission to file the Plan with the Colorado Secretary of State no later than December 15, 2021, as required by article V, section 44.5(5).

I. Background

A. Previous Redistricting in Colorado

¶2 The congressional redistricting process in Colorado "has had a checkered history," *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1225 (Colo. 2003), and in recent decades has resulted in a "tumultuous, politically fraught, and notoriously litigious affair," *In re Interrogatories on Senate Bill 21-247 Submitted by Colo. Gen. Assembly*, 2021 CO 37, ¶ 1, 488 P.3d 1008, 1010; *see also id.* at ¶ 1 n.1, 488 P.3d at 1010 n.1 (listing cases). Historically, the state constitution vested the General Assembly with the authority to draw the boundaries of Colorado's congressional districts. *See* Colo. Const. art. V, § 44 (1876) ("When a new apportionment shall be made by Congress the General Assembly shall divide the State into Congressional

Districts accordingly."); *id.* § 44 (2017) (directing the General Assembly to "divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district"). However, during three of the last four congressional redistricting cycles, the General Assembly was unable to agree on a map, forcing our courts to assume the "unwelcome obligation" of judicial redistricting. *Hall v. Moreno*, 2012 CO 14, ¶ 2, 270 P.3d 961, 963 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). Such litigation required "the apolitical judiciary to engage in an inherently political undertaking." *Id.* at ¶ 5, 270 P.3d at 964.

B. Amendment Y

¶3 This state of affairs changed in 2018 with the passage of Amendment Y. Passed by a unanimous General Assembly and approved by voters by an overwhelming margin, this referred measure amended the state constitution to overhaul Colorado's congressional redistricting process. *In re Interrogatories on Senate Bill 21-247*, ¶ 13, 488 P.3d at 1013. Now codified as article V, sections 44 to 44.6 of the Colorado Constitution, Amendment Y removed congressional redistricting authority from the General Assembly and placed it, instead, in the hands of a new Colorado Independent Congressional Redistricting Commission.

¶4 The Commission is composed of twelve ordinary voters, Colo. Const. art. V, § 44.1(2), who are appointed by a three-member panel of retired judges or justices, *id.* § 44.1(5)(a). The Commission must include four Democrats, four Republicans, and four voters who are unaffiliated with any political party, *id.* § 44.1(10), and should, to the extent possible, "reflect[] Colorado's racial, ethnic, gender, and geographic diversity," *id.* § 44.1(10)(a). The Commission receives assistance from appointed nonpartisan staff from the Legislative Council Staff or the Office of Legislative Legal Services—nonpartisan offices of the General Assembly. *Id.* § 44.2(1)(b).

¶5 Amendment Y establishes a series of cascading deadlines for the redistricting process. Once the commissioners have been selected under the procedures set forth in section 44.1, the redistricting process begins on March 15 of the redistricting year, when the Governor convenes the Commission. *Id.* § 44.2(1)(a). Nonpartisan staff begin by creating a "preliminary plan," which must be presented to the Commission and published "no earlier than thirty days and no later than forty-five days after the commission has convened or the necessary census data are available, whichever is later." *Id.* § 44.4(1). The nonpartisan staff then must prepare and publish at least three staff plans, with each plan presented at least ten days after presentation of the previous plan. *Id.* § 44.4(3). The Commission may adopt a final plan at any time, *id.* § 44.4(5)(a), and it may request

that its nonpartisan staff prepare additional plans or amend one of its staff plans, *id.* § 44.4(4).

¶6 The Commission may retain legal counsel in connection with the performance of its duties, *id.* § 44.2(1)(c), and must adopt rules governing its administration and operation, *id.* § 44.2(1)(e). To ensure transparency in the redistricting process, the Commission is subject to open meetings and open records requirements under state law. *Id.* § 44.2(4)(b)(I)(A), (II).

¶7 Throughout the redistricting process, "[t]he commission must, to the maximum extent practicable, provide opportunities for Colorado residents to present testimony at hearings held throughout the state." *Id.* § 44.2(3)(b). The Commission must hold at least three public hearings in each existing district to receive public comments, including one west of the continental divide and one "east of the continental divide and either south of El Paso county's southern boundary or east of Arapahoe county's eastern boundary." *Id.* § 44.2(3)(b). The Commission must also maintain a website through which it can communicate with the public, including through the public's submission of proposed plans or written comments. *Id.* § 44.2(3)(c).

¶8 By no later than September 1, the Commission must adopt a final plan and submit it to this court for review. *Id.* § 44.4(5)(b). Adoption of a final plan requires the affirmative vote of at least eight commissioners, including at least two

commissioners who are unaffiliated with any political party. *Id.* § 44.2(2). If the Commission fails to adopt a plan by September 1, the nonpartisan staff must submit the unamended third staff plan to this court instead. *Id.* § 44.4(6). By November 1, this court must determine whether the submitted plan satisfies the applicable substantive criteria and must approve or reject the plan. *Id.* § 44.5(1), (4)(a). If this court rejects the plan, the Commission receives an additional twelve days to hold a hearing, receive public testimony, and adopt a new plan that resolves the defects in the original plan. *Id.* § 44.5(4)(b). By no later than December 15, this court must approve a redistricting plan and order that the approved plan be filed with the Secretary of State. *Id.* § 44.5(5).

¶9 Importantly, Amendment Y requires the Commission to affirmatively comply with certain substantive criteria when drawing congressional districts. *See id.* § 44.3. Specifically, in adopting a final plan, the Commission must:

- "[m]ake a good-faith effort to achieve precise mathematical population equality between districts";
- comply with the Voting Rights Act of 1965, 52 U.S.C. § 10301 (the "VRA");
- "[a]s much as is reasonably possible, . . . preserve whole communities of interest and whole political subdivisions";
- create districts as "compact as is reasonably possible"; and
- "[t]hereafter, . . . to the extent possible, maximize the number of politically competitive districts."

Id. § 44.3(1)–(3). To assist with these affirmative obligations, Amendment Y defines key terms like "community of interest," *id.* § 44(3)(b), "competitive," *id.* § 44.3(3)(d), and "race" or "racial," *id.* § 44(3)(c).

¶10 Finally, Amendment Y expressly prohibits the Commission (and this court) from approving a plan if it (a) was drawn to protect any incumbent, candidate, or political party; or (b) was "drawn for the purpose of or results in 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, including diluting the impact of that . . . group's electoral influence." *Id.* § 44.3(4).

C. The 2021 Redistricting Cycle

¶11 As the first redistricting cycle since the passage of Amendment Y, this year marked a new era for redistricting in Colorado. And because Colorado gained an additional seat in the U.S. House of Representatives based on population growth over the last decade, *see* Caitlyn Kim, *It's Official: Colorado Will Get Another Congressional District*, Colo. Pub. Radio (Apr. 26, 2021), https://www.cpr.org/2021/04/26/colorado-new-congressional-district/ [https://perma.cc/8XLS-6TSZ], the Commission was required to overhaul the map to create a new, eighth congressional district.

¶12 The Commission convened, as required, on March 15, 2021. Under normal circumstances, final U.S. Census data would have been released to the states on

April 1, giving nonpartisan staff and the Commission ample time to craft plans based on that final census data, receive public feedback, and adopt a final plan for submission to this court by September 1. But "[a]s with many things, the ongoing COVID-19 pandemic threw a wrench in this process, delaying data collection and processing for the 2020 census." *In re Interrogatories on Senate Bill 21-247*, ¶ 20, 488 P.3d at 1015. While it waited for the final census data, the Commission was forced to rely on less precise population data sources to develop its preliminary plan, which it released on June 23. *See Preliminary Congressional Maps*, Colo. Indep. Redistricting Comm'ns, https://redistricting.colorado.gov/content/prelim-congressional-maps [https://perma.cc/5LHD-9JBC].

¶13 Throughout July and August, the Commission held thirty-six public hearings on the preliminary plan and received testimony from various interest groups and individuals from across the state. *See Speak to the Commissions*, Colo. Indep. Redistricting Comm'ns, https://redistricting.colorado.gov/content/meeting-comment/ [https://perma.cc/KB33-N6A2].[1]

¶14 Meanwhile, the Commission filed a petition with this court on July 13, outlining the timing challenges posed by the delay in receiving final census data

[1] Thirty-two of these public hearings were held jointly with the Colorado Independent Legislative Redistricting Commission. *Id.*

and asking this court to establish a revised schedule for the approval and submission of a final redistricting plan. After soliciting briefing from interested parties, we issued an order on July 26, pursuant to our authority under article V, section 44.5(1), that: (1) directed interested parties to submit simultaneous briefs within seven days after the Commission or nonpartisan staff submitted a final plan, but no later than October 8; (2) set oral argument for October 12; and (3) announced that this court would issue an opinion no later than November 1, the deadline established by article V, section 44.5(4)(a).

¶15 The Commission eventually received final census data on August 12—four months later than expected under the series of deadlines established under Amendment Y. With this data in hand, the Commission published its first staff plan on September 3 and proceeded to hold four virtual public hearings on the plan between September 7 and 10, each focusing on two districts. *See Colorado Independent Congressional Redistricting Commission Announces This Week's Public Hearings on First Staff Plan*, Colo. Indep. Redistricting Comm'ns (Sept. 7, 2021), https://us17.campaign-archive.com/?u=93dc7990963ed622141e6aa51&id=c42ae9a8a0 [https://perma.cc/4F7P-NE4R]. After receiving additional public input, the Commission published its second and third staff plans on September 15 and September 23, respectively.

¶16 The Commission ultimately held a total of forty public hearings across the state (more than the number required by Amendment Y). It also received and considered over 5,000 written comments and 170 proposed maps. Finally, on September 28, following lengthy debate, the Commission voted 11–1 to adopt an amended version of its third staff plan as its Final Plan.

¶17 The Plan divides Colorado into eight congressional districts.[2]

¶18 **Congressional District ("CD") 1** is composed of the area within the City and County of Denver. It includes the Arapahoe County enclaves of Glendale and Holly Hills and several uninhabited blocks of Jefferson County in southwest Denver. To maintain precise population equality, the population from the neighborhoods of Virginia Village and Indian Creek in far-eastern Denver were placed in CD 6, which includes areas on the border between eastern Denver and Arapahoe County, rather than in CD 1. Testimony before the Commission identified Denver as its own community of interest as the headquarters for many of Colorado's largest companies; the site of many of the state's prominent cultural attractions and sports and entertainment facilities; and the location of the Denver

[2] We reproduce the Plan, including a statewide map and a map of each district, in the attached appendix.

International Airport. CD 1 also contains historic Hispanic[3] and Black Denver neighborhoods and cultural areas. The district has a total population of 721,714.

¶19 **CD 2** is in the north central part of Colorado. It includes the whole mountainous counties of Clear Creek, Gilpin, Grand, Jackson, Routt, and Summit, as well as the portion of Eagle County not in CD 3. It includes all of the population of Boulder County and extends into Weld County to keep the populations of Erie, Longmont, and Timnath whole. CD 2 also contains a small portion of Jefferson County to keep the community of Coal Creek whole. Finally, it encompasses almost all of Larimer County, including all of the population of Fort Collins, but

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[3] Although some opposers use the term "Latino," we use the term "Hispanic" for purposes of this opinion because that term is used by the Commission. The 2020 U.S. Census ethnicity question asked, "Is this person of Hispanic, Latino, or Spanish origin?" *United States Census 2020*, U.S. Census Bureau 1, 2 (2020), https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire-english_DI-Q1.pdf [https://perma.cc/RPQ6-SN2E]. We recognize that "Hispanic" and "Latino" are often used interchangeably to refer to "heritage, nationality, lineage, or country of birth of the person or the person's parents or ancestors before arriving in the United States." *Hispanic Origin*, U.S. Census Bureau, https://www.census.gov/topics/population/hispanic-origin.html [https://perma.cc/DT8R-ZXXW]; *see generally* Erica L. Olmsted-Hawala & Elizabeth M. Nichols, *Usability Testing Results Evaluating the Decennial Census Race and Hispanic Origin Questions Throughout the Decade: 2012–2020*, U.S. Census Bureau (June 26, 2020), https://www.census.gov/library/working-papers/2020/adrm/rsm2020-02.html [https://perma.cc/V4CB-S8LT]. We also recognize that some members of this community prefer "Latino" or "Latinx."

excludes the cities of Loveland and Wellington, which were placed in CD 4. CD 2 includes eleven of Colorado's ski resorts. Testimony before the Commission revealed the counties in CD 2 to have shared legislative interests regarding the use and preservation of federally owned lands, the use and conservation of water resources governed by an interstate compact (the upper Colorado headwaters), and outdoor recreation. Collectively, these communities have a shared interest in environmental protection and protecting public lands from forest fires and other threats. CD 2 also keeps together the cities of Boulder and Fort Collins, which share a common interest in public higher education and are each home to a major research university (the University of Colorado at Boulder and Colorado State University) that is reliant on federal funding. The district has a total population of 721,714.

¶20 **CD 3** is an L-shaped district that encompasses western and southern Colorado. It includes twenty-six whole counties: Alamosa, Archuleta, Conejos, Costilla, Delta, Dolores, Garfield, Gunnison, Hinsdale, Huerfano, La Plata, Las Animas, Mesa, Mineral, Moffat, Montezuma, Montrose, Otero, Ouray, Pitkin, Pueblo, Rio Blanco, Rio Grande, Saguache, San Juan, and San Miguel. To keep the Roaring Fork Valley whole, the district also includes a portion of Eagle County, including the towns of Basalt and El Jebel. To ensure precise population equality, CD 3 includes a portion of Eagle County up to Interstate 70 and east, excluding the

towns of Gypsum and Eagle. Testimony before the Commission identified the communities in CD 3 as having shared legislative interests regarding the use and preservation of federally owned land; the use and conservation of water governed by interstate compacts (the Colorado River, the San Juan River, the Rio Grande River, and the Arkansas River); the fostering of outdoor recreation and tourism on federally owned lands; farming and agricultural production; and the preservation and promotion of natural resources and mining industries. CD 3 keeps together the counties that make up the San Luis Valley as well as neighboring southern Colorado counties, a region with cultural and Spanish-language traditions shared by families whose ancestors settled in this area prior to the Mexican-American War and the Treaty of Guadalupe Hidalgo, either as part of the Spanish Empire or Mexico. Finally, CD 3 keeps together the Ute Mountain Ute Reservation and Southern Ute Reservation in the southwest corner of the state; both sovereign indigenous nations have a direct relationship with the U.S. Government that is the subject of treaties and federal legislative action. Public comments shared with the Commission also reflected that these nations share policy interests and common cultural traditions with the Hispanic community in the San Luis Valley. The district has a total population of 721,714.

¶21 **CD 4** is largely an eastern plains district that includes fifteen whole counties: Baca, Bent, Cheyenne, Crowley, Elbert, Kiowa, Kit Carson, Lincoln, Logan,

Morgan, Phillips, Prowers, Sedgwick, Washington, and Yuma. It also includes most of the population of Douglas County, except for the portion of Aurora that extends into that county. CD 4 encompasses the eastern portions of El Paso, Arapahoe, and Adams counties. It includes much of Weld County not contained in CD 8, and extends into Larimer County to include Loveland, Wellington, and a portion of Windsor. Testimony before the Commission reflected that the eastern plains communities in CD 4 have shared agricultural policy interests as well as other policy interests related to rural communities and oil and gas development. Testimony also reflected that the rural residential and south metro suburban areas included in CD 4 have shared legislative interests in transportation, education, public health, and the environment, and the Commission concluded that the common interests in preserving rural communities could be effectively represented in one district. The district has a total population of 721,715.

¶22 **CD 5** is composed of nearly all of El Paso County, including all of Colorado Springs. It excludes Green Mountain Falls, which was placed in CD 7 to keep that town whole. To maintain precise population equality, the eastern portion of El Paso County was placed with CD 4, rather than CD 5. The Commission considered Colorado Springs and nearby military institutions to share common interests, including transportation, employment, public health, the environment, and the military and national defense. CD 5 has a total population of 721,714.

¶23 **CD 6** consists of western Arapahoe County, including Centennial, Littleton, and Sheridan. It contains parts of Jefferson County, including the Columbine and Ken Caryl census-designated areas and the portions of Bow Mar and Littleton situated in that county. It also contains nearly all of Aurora, including the portions in Adams and Arapahoe counties, and the far-eastern Denver neighborhoods of Virginia Village and Indian Creek. Testimony before the Commission identified these mature suburbs with distinctive neighborhoods, ethnic communities, and developing commercial centers to have shared legislative interests in transportation, education, employment, public health, and the environment. The district has a total population of 721,715.

¶24 **CD 7** is a Front Range district that includes the whole mountainous counties of Chaffee, Custer, Fremont, Lake, Park, and Teller. It also includes nearly all of Jefferson County except for the portion near Coal Creek in CD 2, and except for Bow Mar and portions of Columbine, Littleton, and Ken Caryl in CD 6. CD 7 includes the Front Range metropolitan cities in Jefferson County (Lakewood, Wheatridge, Golden, and the portions of Arvada and Westminster located in Jefferson County) plus the City and County of Broomfield. Testimony before the Commission indicated that the mountainous communities in CD 7 have shared policy interests related to outdoor recreation and the preservation of mountain communities and public lands. Additionally, these mountainous areas are linked

with the Front Range metropolitan areas where many day-trip tourists reside, and where the mountain community residents go to work and to shop for goods and services. Given the significant travel between these areas, testimony indicated that these communities have shared legislative interests, including transportation infrastructure. The Front Range metro areas of CD 7 are mature suburbs along the western edge of Denver that have common legislative interests in several policy areas, including transportation, education, employment, public health, and the environment. Finally, the suburbs of Jefferson County share common interests concerning the Denver Federal Center in Lakewood; the National Renewable Energy Labs in Golden; and Lockheed Martin's facility in that area, which serves as a contractor to the U.S. Department of Defense, NASA, and the U.S. Department of Energy. The district has a total population of 721,714.

¶25 Finally, **CD 8** is a new district that consists of the western portion of Adams County, including all of the northern metro-Denver cities of Brighton, Commerce City, Northglenn, and Thornton. The district also includes most of the portions of Arvada and Westminster in Adams County. It encompasses portions of Weld County, including all of Greeley and Windsor, as well as cities in southern Weld County, including all of Firestone, Frederick, and Mead. CD 8 also contains cities that straddle the border between Boulder, Larimer, and Weld counties, including all of Berthoud and Johnstown. Testimony before the Commission indicated that

these areas share common policy concerns related to their rapid growth driven by families looking for more affordable options outside of Denver; their conversion of former agricultural and open lands to residential, commercial, and industrial uses; and their connections to the metro area (where their residents commute to work). Public comments also highlighted the diverse racial and ethnic makeup of these areas, due to both the large and growing Hispanic population and the presence of other immigrant and minority communities, and suggested keeping these communities in a single district. CD 8 has a total population of 721,714.

¶26 Notably, the Plan creates four districts with a Hispanic population that is equal to or exceeds the Hispanic population of the state as a whole (21.8%). CD 1 is 27.8% Hispanic, CD 3 is 25.7% Hispanic, CD 6 is 22.1% Hispanic, and CD 8 is 38.5% Hispanic. The Plan also creates, based on data from eight recent statewide elections, one competitive district (the new CD 8) and two semi-competitive districts (CD 3 and CD 7).

¶27 The Commission submitted the Plan to this court on October 1. A week later, we received over a dozen briefs either supporting the Plan or objecting to

one or more aspects of the Plan.[4] We held oral argument on October 12 and now issue our opinion in compliance with article V, section 44.5(4)(a).

II. Analysis

¶28 We begin our analysis by setting forth the standard of review established in article V, section 44.5 and general principles regarding our review of a voter-approved constitutional amendment. We then address procedural issues, including the Commission's deviation from its constitutionally mandated September 1 deadline and challenges to the Plan premised on alleged deficiencies in the Commission's process. Next, we turn to the core question before us today: whether the Plan complies with the substantive criteria set forth in article V, section 44.3 of the Colorado Constitution. Finally, we address a technical issue raised by the Denver Clerk and Recorder that does not directly concern the section 44.3 criteria, but is nonetheless related to the boundaries of the

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[4] The Commission, as well as Proponents the Colorado Multi-Ethnic Coalition and the Hispanic Churches of the Central District/Distrito Central of the Assemblies of God in Northern Colorado, the Douglas County Board of County Commissioners, and Summit County and the Town of Breckenridge all filed briefs in support of the Plan. Opposers All on the Line—Colorado; Colorado Common Cause; the Colorado Latino Leadership, Advocacy and Research Organization; the Democratic Congressional Campaign Committee; the Clerk and Recorder for the City and County of Denver; Eagle County; Fair Lines Colorado; the League of United Latin American Citizens and the Colorado League of United Latin American Citizens; Jerry Natividad; and William Thiebaut filed briefs objecting to one or more aspects of the Plan.

congressional districts under the Plan and their impact on local elections. After reviewing the arguments raised by the opposers, we ultimately conclude that the Commission did not abuse its discretion in applying the substantive criteria of article V, section 44.3 and adopting the Plan. We therefore approve the Plan and direct the Commission to file the Plan with the Secretary of State no later than December 15, 2021, as required by article V, section 44.5(5).

A. Standard of Review

¶29 Our role in the redistricting process is narrow: We must "review the submitted plan and determine whether the plan complies with the criteria listed in section 44.3 of this article V." Colo. Const. art. V, § 44.5(1). We must approve the Plan "unless [we] find[] that the commission . . . abused its direction in applying or failing to apply the criteria" in section 44.3, "in light of the record before the commission." *Id.* § 44.5(2). Under this standard, the Commission abuses its discretion if it "applies an erroneous legal standard" or if "no competent evidence in the record supports its ultimate decision," *Langer v. Bd. of Comm'rs*, 2020 CO 31, ¶ 13, 462 P.3d 59, 62, such that its decision "can only be explained as an arbitrary and capricious exercise of authority," *id.* (quoting *Freedom Colo. Info., Inc. v. El Paso Cnty. Sherriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008)). In conducting our review, we consider the record before the Commission, including any alternative maps submitted to the Commission. Colo. Const. art. V, § 44.5(2). The

ultimate question for this court is not whether the Commission adopted a perfect redistricting plan, or even the "best" plan among the options presented to it; rather, we examine whether the final adopted plan "fell within the range of reasonable options" the Commission could have selected consistent with section 44.3 and in light of the record before it. *Hall*, ¶ 54, 270 P.3d at 973 (quoting *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 231 (Colo. App. 2006)); *see also In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 191, 194 (Colo. 1982) ("The choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the Court.").

¶30 The interpretation of Amendment Y is, of course, a question of law that this court decides de novo. "Interpreting the constitution . . . 'is, and always has been, a judicial function.'" *In re Interrogatories on Senate Bill 21-247*, ¶ 52, 488 P.3d at 1022 (quoting *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 316 (Colo. 1975)). In construing a voter-approved constitutional amendment such as Amendment Y, we read the amendment as a whole, *Lobato v. State*, 2013 CO 30, ¶ 17, 304 P.3d 1132, 1138, and attempt "to determine and effectuate the will of the voters in adopting the measure," *In re Interrogatories on Senate Bill 21-247*, ¶ 30, 488 P.3d at 1018. We look first to the plain language of the constitutional provisions, giving terms their ordinary meanings. *Id.* "We endeavor to avoid a narrow or technical reading of the language contained in [a

voter-approved constitutional] amendment if to do so would defeat the intent of the people." *Id.* (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)). We also "seek to avoid interpretations that would produce absurd or unreasonable results." *Id.* Finally, to discern the voters' intent, we may also "consider other relevant materials such as the 'Blue Book,' an analysis of ballot proposals prepared by the Legislative Council." *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009); *see also Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004).

B. Procedural Issues

1. Commission's Deviation from the Constitutionally Mandated September 1 Deadline to Submit a Final Plan

¶31 As an initial matter, we discuss an issue raised in the Commission's July 13 petition filed with this court, which sought a revised schedule for the submission and approval of a final redistricting plan. Our July 26 order established a schedule for briefing and oral arguments but did not address the legal effect of the Commission's potential failure to meet the September 1 deadline under article V, section 44.4(5)(b). We address that issue now.

¶32 The detailed timeline for the redistricting process set forth in Amendment Y was "designed to align with the release of data from the federal decennial census." *In re Interrogatories on Senate Bill 21-247*, ¶ 21, 488 P.3d at 1015. The Commission may adjust its interim deadlines for the preparation of the preliminary and staff plans when "conditions outside of the commission's control require such an

adjustment to ensure adopting a final plan" by the September 1 deadline. Colo. Const. art. V, § 44.4(5)(c); *see also In re Interrogatories on Senate Bill 21-247*, ¶ 17 n.7, 488 P.3d at 1014 n.7. This court may also establish a schedule for legal arguments concerning the submitted plan to facilitate review of that plan. Colo. Const. art. V, § 44.5(1). But these provisions shed no light on whether the September 1 deadline for the submission of a plan to this court may be adjusted.

¶33 We conclude that, given the unique challenges and delays presented by the ongoing COVID-19 pandemic, the Commission's deviation from the September 1 deadline was permissible—indeed, necessary—to effectuate the will of the voters and allow the Commission to fulfill its substantive obligations under Amendment Y.

¶34 The new redistricting process was intended to serve three key purposes. First, it attempted to "limit[] the role of partisan politics" by vesting redistricting authority in the Commission, rather than the General Assembly. Legis. Council, Colo. Gen. Assembly, Rsch. Pub. No. 702-2, *2018 State Ballot Information Booklet* 10 (2018) (the "Blue Book"). Second, it sought to "make[] the redistricting process more transparent and provide[] greater opportunity for public participation." *Id.* Finally, it attempted to "bring[] structure to the redistricting process by using clear, ordered, and fair criteria in the drawing of districts." *Id.*

¶35 Given the pandemic-driven delays in the release of final census data, forcing the Commission to comply with the September 1 deadline for submitting a final plan to this court would have precluded the Commission from performing its substantive obligations and thus thwarted important purposes served by the new redistricting process. Given that final census data was not released until August 12, it would have been virtually impossible for the Commission to devise a plan consistent with the criteria in section 44.3 and still hold enough hearings to "provide[] the public with the ability to be heard," Colo. Const. art. V, § 44(1)(f), in time to meet the September 1 final plan deadline. Rigid adherence to that deadline would have required the Commission to forgo meaningful public input and possibly create congressional district boundaries based on incomplete or inaccurate population data. Thus, given the unprecedented constraints caused by the pandemic, we construe the deadline in section 44.4(5)(b) to yield in this instance to the overarching goal of permitting the Commission adequate time to meet its substantive obligations in adopting a final plan. Permitting the Commission's late submission under these circumstances both avoids an absurd result and furthers the voters' intent in passing Amendment Y.

¶36 We emphasize that our acceptance of the Plan after the September 1 deadline has resulted only in compressing the time allotted under Amendment Y for this court's review. Within that period, section 44.5(1) permits this court to

establish the schedule of arguments for our review of the submitted plan, which we did in our July 26 order. The Commission's necessary delay, however, has not interfered with the ultimate deadlines under section 44.5(4) and (5) for this court's approval of the Plan or the filing of the Plan with the Secretary of State. The November 1 and December 15 final deadlines are critical because the Secretary of State and local election officials are bound by cascading and interrelated election deadlines and must translate the Plan into county-level precincts, assign individual voters to precincts within the voter database, and prepare the Plan for use during future elections, including the 2022 primaries. Thus, despite the timing constraints caused by the ongoing pandemic, Amendment Y's ultimate goal of timely approval of a redistricting plan has been met, ensuring that future elections can proceed as scheduled.

2. Objections Based on Alleged Deficiencies in the Commission's Process

¶37 We next address challenges to the Plan based on the Commission's internal procedures and voting processes. We reject each of these challenges in turn.

¶38 First, the Democratic Congressional Campaign Committee ("DCCC") argues that the adoption of the Plan was "procedurally irregular and infused with last-minute confusion." As evidence, it points to the Commission's compressed schedule and the fact that the Commission approved the Plan on the last possible day to do so, and only after changing its procedures and voting processes several

times during deliberations. But as discussed above, the Commission's compressed schedule was necessary given pandemic-related delays in the release of census data. Moreover, we attach no significance to the fact that the Commission approved the Plan on the last possible day to do so. Our July 26 order effectively gave the Commission until October 1 to submit the Plan, and its deliberation up to September 28 did not inhibit the Commission from meeting that deadline. As for the Commission's amendment of its internal procedures and voting processes, article V, sections 44 to 44.6 place few limitations on the Commission's ability to do so. Indeed, the Commission is required to "adopt rules to govern its administration and operation." Colo. Const. art. V, § 44.2(1)(e). And while the Commission generally must provide advance public notice of proposed rules, the Commission may amend its rules during deliberations without such notice. *Id.*

¶39 Next, the League of United Latin American Citizens and the Colorado League of United Latin American Citizens (collectively, "LULAC") argue that the Commission disregarded transparency and public access requirements by discussing in executive session whether the Plan would result in the dilution of any minority group's electoral influence. But the Commission satisfied the applicable requirements. Throughout the redistricting process, the Commission held numerous public hearings and received thousands of public comments. And while the Commission also held executive sessions, it was permitted to do so "for

purposes of receiving legal advice on specific legal questions." § 24-6-402(3)(a)(II), C.R.S. (2021). Moreover, nonpartisan staff included written explanations of its analysis of section 44.3(4)(b)'s prohibition on the dilution of a racial or language minority group's electoral influence in justifying its draft plans.

¶40 In short, the Commission's procedures complied with the requirements of Amendment Y. We now consider whether the Plan complies with the substantive criteria of article V, section 44.3.

C. Compliance with the Substantive Criteria of Article V, Section 44.3

1. Overview of Applicable Criteria

¶41 Article V, section 44.3 requires the Commission to comply with a clear hierarchy of federal and state criteria in adopting a congressional redistricting plan. First, under section 44.3(1), the Commission must comply with federal constitutional and statutory law by (a) making a "good-faith effort to achieve precise mathematical population equality between districts," and (b) complying with section 2 of the VRA, 52 U.S.C. § 10301.[5] Second, under section 44.3(2), the Commission must comply with traditional, neutral state redistricting criteria by

[5] Section 44.3(1)(b) cites to the "'Voting Rights Act of 1965', 52 U.S.C. sec. 50301, as amended." This appears to be a typographical error, as the full VRA is codified in 52 U.S.C. §§ 10301–10314.

(a) "preserv[ing] whole communities of interest and whole political subdivisions, such as counties, cities, and towns," as much as is reasonably possible; and (b) ensuring that districts are "as compact as is reasonably possible." Third, under section 44.3(3)(a), the Commission must thereafter, "to the extent possible, maximize the number of politically competitive districts."

¶42 Article V, section 44.3(4) prohibits the Commission and this court from approving a redistricting plan if (a) "[i]t has been drawn for the purpose of protecting one or more incumbent members, or one or more declared candidates, of the United States house of representatives or any political party," or (b) "[i]t has been drawn for the purpose of or results in 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, including diluting the impact of that racial or language minority group's electoral influence."

¶43 We now review the Commission's compliance with these requirements.

2. Compliance with Precise Mathematical Population Equality Requirement Under Article I, Section 2 of the U.S. Constitution

¶44 In adopting a congressional redistricting plan, the Commission first must "[m]ake a good-faith effort to achieve precise mathematical population equality between districts." Colo. Const. art. V, § 44.3(1)(a). This language is derived from Article 1, Section 2, Clause 3 of the U.S. Constitution, which requires congressional

representatives to be apportioned "according to their respective Numbers," and has been interpreted by the U.S. Supreme Court to require population equality between congressional districts "as nearly as is practicable." *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964)). No party challenged the Plan for failure to meet this requirement, and for good reason. Based on 2020 census data, the Commission determined that the ideal district size is 721,714. As described above, six of the Plan's districts meet that number exactly, and the remaining two districts exceed that number by only one person. Therefore, the Commission complied with its obligation to achieve precise mathematical equality here.

3. Compliance with Section 2 of the Voting Rights Act and Section 44.3(4)(b)'s Prohibition on Dilution of Minority Group Electoral Influence

¶45 Section 44.3(1)(b) requires the Commission to comply with section 2 of the VRA. Section 44.3(4)(b) separately prohibits the Commission from adopting a Plan that "has been drawn for the purpose of or results in 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, *including diluting the impact of that racial or language minority group's electoral influence*." (Emphasis added.) The parties agree that the first part of this quoted provision simply tracks language in

section 2(a) of the VRA.[6] However, several opposers argue that the italicized additional language in section 44.3(4)(b) imposes separate obligations to protect against minority vote dilution, beyond what the VRA demands. These opposers contend that the Commission's Plan impermissibly dilutes Hispanic voters' electoral influence in violation of this language. The Commission responds that the Plan complies with section 2 of the VRA and that section 44.3(4)(b) merely incorporates into state law existing protections against minority vote dilution, as expressed in U.S. Supreme Court case law at the time Amendment Y was adopted. For reasons detailed below, we agree with the Commission.

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[6] The original language of section 2 of the VRA provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965). That section is now codified in 52 U.S.C. § 10301(a). Although that section has since been amended to include additional language and a new subsection, U.S. Supreme Court case law continues to reference the provision generally as section 2 of the VRA. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) ("Section 2 prohibits any 'standard, practice, or procedure' that 'results in a denial or abridgement of the right . . . to vote on account of race.'" (omission in original) (citing 52 U.S.C. § 10301(a)). For clarity, we use subsections 2(a) and 2(b) of the VRA to refer to 52 U.S.C. § 10301(a) and (b), respectively.

a. Compliance with Section 2 of the Voting Rights Act Under Section 44.3(1)(b)

¶46 We first consider whether the Plan complies with section 2 of the VRA as required by article V, section 44.3(1)(b). Section 2(a) of the VRA provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

52 U.S.C. § 10301(a). A State violates section 2(a)

> if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. § 10301(b).

¶47 Section 2 prohibits voter "apportionment scheme[s] [that have] the effect of denying a protected class the equal opportunity to elect its candidate of choice," *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) (emphasis omitted), and extends to "'vote dilution'—brought about . . . by the 'dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters,'" *Cooper v.*

Harris, 137 S. Ct. 1455, 1464 (2017) (alteration in original) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)).

¶48 In *Gingles*, the U.S. Supreme Court identified three threshold requirements for proving vote dilution under section 2. First, the minority group must be "sufficiently large and geographically compact to constitute a majority" in a district. *Gingles*, 478 U.S. at 50. In establishing this first requirement, the Court explained that "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17. Second, the minority group must be "politically cohesive." *Id.* at 51. Third, the district's white majority must "vote[] sufficiently as a bloc" to usually defeat the minority group's preferred candidate. *Id.* Collectively, "the *Gingles* requirements are preconditions, consistent with the text and purpose of § 2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation." *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). When these showings are met, the VRA allows states to provide certain protections for minority voters, such as the creation of majority-minority districts, to ensure fair access to the electoral process. But the Court has also stated that "[u]nless these points are established, there neither has been a wrong nor can [there] be a remedy." *Growe v. Emison*, 507 U.S. 25, 40–41 (1993).

¶49 In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 445 (2006) ("*LULAC*") (plurality opinion), the Court's controlling opinion, authored by Justice Kennedy, held that section 2 of the VRA does not require a state to draw "influence" districts—that is, districts that allow minority voters, who cannot form a reasonably compact majority-minority district, to have the "ability to influence the outcome between some candidates."

¶50 Three years later, in *Bartlett*, Justice Kennedy (again writing the controlling opinion for a fractured Court) concluded that section 2 likewise does not require a state to draw "crossover" districts. 556 U.S. at 23. These are districts in which the minority population, although less than 50% of the voting-age population, is at least potentially large enough to elect the candidate of its choice with help from majority-population voters who cross over to support the minority's preferred candidate. *Id.* at 6, 12–17. The petitioners in *Bartlett* theorized that although crossover districts do not include a numerical majority of minority voters, they nonetheless satisfy the first *Gingles* requirement because they amount to "effective minority districts." *Id.* at 14. Writing for the plurality, Justice Kennedy rejected the petitioners' theory as contrary to the mandate of section 2, reasoning that to recognize a section 2 claim under such circumstances would grant minority voters "a right to preserve their strength for the purposes of forging an advantageous political alliance." *Id.* at 14–15 (quoting *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir.

2004)). But "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions." *Id.* at 15. In short, "[s]ection 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." *Id.*

¶51 Justice Kennedy made clear that states that wish to draw crossover districts are free to do so where no other prohibition exists; *Bartlett*'s holding recognized only that section 2 of the VRA does not *require* the creation of crossover districts. *Id.* at 24.

¶52 Here, Colorado Common Cause ("Common Cause") and William Thiebaut contend that the Plan fails to comply with the VRA. Common Cause argues that, to comply with the VRA, the Commission should have hired an outside expert to conduct a racial polarization analysis and created an influence district in CD 1 that enabled Hispanic voters to elect their preferred candidate by splitting Denver in ways to combine Hispanic voters in west and northeast Denver into a single district. Thiebaut argues that the Commission essentially ignored the VRA after concluding that the *Gingles* requirements were not met, and that instead, the Commission should have considered whether and to what extent the Plan resulted in race-based vote dilution. We disagree with both opposers.

¶53 The record reflects that the Commission appropriately considered race, including in its VRA compliance evaluation, throughout the redistricting process.

First, given the large size of congressional districts, nonpartisan staff determined that Colorado does not have a sufficiently large and geographically compact voting-age minority population to meet the first *Gingles* requirement. The Commission therefore did not have reason to draw a majority-minority district to comply with the VRA. The Commission also received and properly considered public testimony and comments regarding race in connection with its assessment of communities of interest. *See* Colo. Const. art. V, § 44(3)(b)(III) (defining "community of interest" to include "racial, ethnic, and language minority groups"). According to the Commission, none of these comments suggested that the creation of a majority-minority district was feasible or required under a *Gingles* analysis. While the Commission certainly could have hired an outside expert to conduct further analysis, it was not required to do so under these circumstances. The Commission was free to choose its own methodology for creating a constitutionally compliant redistricting plan. *See, e.g.*, Colo. Const. art. V, § 44.4(3) ("The commission may provide direction . . . for the development of staff plans through the adoption of standards, guidelines, or methodologies to which nonpartisan staff shall adhere, including standards, guidelines, or methodologies to be used to evaluate a plan's competitiveness . . . ."). The Commission's choice not to hire an outside voting rights expert, however, does not mean that the

Commission overlooked or dismissed its duty to comply with the VRA.[7] Ultimately, the Commission reasonably opted not to pursue a majority-minority district. And although it could have considered the creation of crossover districts or other race-focused alternatives, compliance with section 2 of the VRA did not *require* the Commission to do so. In sum, we conclude that the Commission's Plan complies with the VRA.

b. Dilution of Electoral Influence Under Article V, Section 44.3(4)(b)

¶54 We now turn to the meaning of article V, section 44.3(4)(b), which prohibits the Commission from adopting a plan that

> has been drawn for the purpose of or results in 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, *including diluting the impact of that racial or language minority group's electoral influence.*

(Emphasis added.) As noted above, the parties agree that the first half of this provision tracks language from section 2(a) of the VRA. *See* 52 U.S.C. § 10301(a) (prohibiting voting practices or procedures that "result[] in a denial or

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[7] Indeed, the Commission's Population Summary Report, Report Regarding Assigned District County Splits, and Report Regarding Assigned District City Splits all include racial and ethnic breakdowns. These reports demonstrate that nonpartisan staff and the Commission both were aware of and properly considered these figures as one of multiple factors in drawing district boundaries.

abridgement of the right of any citizen . . . to vote on account of race or color"). The core dispute before us is whether the clause "including diluting the impact of that racial or language minority group's electoral influence," Colo. Const. art. V, § 44.3(4)(b), creates additional protections above and beyond those provided by the VRA.

¶55 Several opposers highlight that this clause uses terms such as "dilution" and "electoral influence" that do not appear in section 2 of the VRA. Thus, they contend, this language must be intended to provide additional protection to minority voters. They submit that it would be redundant to affirmatively require VRA compliance and to prohibit the dilution of electoral influence unless the latter imposes additional protection. Notably, however, the opposers disagree on what this additional protection entails or what the Commission is required to do to avoid violating this prohibition.

¶56 For example, All on the Line—Colorado ("All on the Line") argues that this language "is a broad and powerful proscription that requires the Commission to assess how a minority group's electoral power will be affected by the formation of congressional districts." In its view, while the Commission is not required to "undertake a strict, formulaic inquiry when measuring influence dilution," it still must "employ a holistic assessment" to assess a minority group's ability to exercise electoral influence in a district. All on the Line alleges that the Commission

violated the prohibition in section 44.3(4)(b) by diluting Hispanic voters' electoral influence in CD 8 when it grouped Hispanic voters with white voters who are more likely to bloc vote in a way that prevents election of the Hispanic voters' preferred candidate. All on the Line contends that, to avoid diluting the electoral influence of Hispanic voters, the Commission should have instead placed these Hispanic voters in a crossover district where "there would be sufficient white crossover support" to elect the Hispanic voters' preferred candidate.

¶57 The Colorado Latino Leadership, Advocacy and Research Organization ("CLLARO") argues that the language in subsection (4)(b) is intended to ensure that a minority group can "secur[e] the attention of a winning candidate—to help ensure that an elected representative will be attentive and responsive to a minority group's needs and concerns." (Emphasis omitted.) CLLARO argues that the Commission should use citizen voting-age population ("CVAP") data to create these influence districts because (unlike general population data) CVAP measures the percentage of people in a district who are actually eligible to vote. Similar to All on the Line, CLLARO asserts, based on CVAP data, that the Commission impermissibly diluted the electoral influence of Hispanic voters in CD 3 and CD 8 by combining Hispanic voters with white voters who bloc vote against Hispanic voters' preferred candidates. CLLARO's proposed map thus reconfigures CD 3 and CD 8 into essentially crossover districts by grouping Hispanic voters with

white voters who cross over to support minority-preferred candidates, thereby enabling Hispanic voters to elect their candidate of choice.

¶58 Common Cause argues that section 44.3(4)(b) provides additional protection to minority voters who "make up a significant portion of a district's voters" by requiring the Commission to draw district boundaries to allow such voters to exert "effective electoral influence." Common Cause would reconfigure CD 1 to group Hispanic voters in west Denver with Hispanic voters and voters of other racial minorities in northeast Denver to create what appears to be a coalition district—that is, a district in which multiple minority groups form a majority coalition to elect the candidate of the coalition's choice. *See Bartlett*, 556 U.S. at 13.

¶59 LULAC argues that the language in section 44.3(4)(b) requires the Commission to draw districts that protect minority voters' ability to influence electoral outcomes, even if they are not the voting majority. Thus, it contends, the Commission should have created crossover districts by grouping Hispanic voters with white crossover voters who support Hispanic voters' preferred candidates. According to LULAC, because the Plan groups Hispanic voters with rural white voters in CD 3 and CD 8, the Plan dilutes the electoral influence of those Hispanic voters by preventing them from forming an effective majority in combination with white crossover voters.

¶60 Collectively, these opposers' interpretations of the prohibition in section 44.3(4)(b) effectively would require the Commission to choose the plan that maximizes minority voters' electoral influence. Under their arguments, the Commission's choice of a plan that provided minority voters with a lesser degree of influence than another proposed plan would amount to impermissible dilution of minority electoral influence.

¶61 Finally, Fair Lines Colorado ("Fair Lines") likewise argues that the language in section 44.3(4)(b) authorizes more expansive protection for minority voting rights than exists under federal law by permitting the creation of influence districts—districts "in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Bartlett*, 556 U.S. at 13. Unlike other opposers, however, Fair Lines credits the Commission with having created (intentionally or unintentionally) four influence districts in the Plan, given the percentage of Hispanic persons in those districts: CD 1 (27.8%); CD 3 (25.7%); CD 6 (22.1%); and CD 8 (38.5%).[8]

[8] Even using voting-age population data, as some opposers suggest, Fair Lines credits the Commission with having created three influence districts, given the percentage of voting-age Hispanic persons in those districts: CD 1 (24.45%); CD 3 (22.78%); and CD 8 (34.50%).

¶62 In response to these contentions, the Commission argues that section 44.3(4)(b) does no more than incorporate the protections of the VRA into the Colorado Constitution as those protections existed in federal statute and case law at the time of Amendment Y's enactment. The Commission contends that the dilution of electoral influence is a concept that the U.S. Supreme Court has used when interpreting the VRA and that section 44.3(4)(b) merely incorporates that jurisprudence into Colorado law. In its view, the language of section 44.3(4)(b) is not idle; by expressly incorporating those section 2 protections into the state constitution, the provision ensures that such protections cannot be eroded by further federal legislative or judicial developments. For the following reasons, we agree with the Commission.

¶63 We acknowledge that the disputed language in section 44.3(4)(b)—"including diluting the impact of that racial or language minority group's electoral influence"—is not found in the text of the VRA. The question is: What does this phrase mean or require?

¶64 In this context, the word "including" could be read to indicate an expansion of the VRA protection expressed earlier in the provision. On the other hand, the word "including" could be read to refer to existing protections against dilution of electoral influence already encompassed (or "included") in the VRA. For several reasons, we adopt the second reading.

¶65 First, "dilution" of "electoral influence" is nowhere defined in Amendment Y, which is curious if this language was intended to establish new protections beyond those existing in federal law, particularly given that the amendment carefully defines other criteria the Commission must follow in crafting a districting plan. *See* Colo. Const. art. V, §§ 44(3)(b) (defining "community of interest"), 44(3)(c) (defining "race" or "racial"), 44.3(3)(d) (defining "competitive"). Second, looking to the definitions that do appear in Amendment Y, the definition of "community of interest" suggests that the disputed language in section 44.3(4)(b) does *not* create additional protections for minority voters, but instead simply incorporates existing VRA protections:

> Groups that may comprise a community of interest include racial, ethnic, and language minority groups, subject to compliance with *subsections (1)(b) and (4)(b) of section 44.3* of this article V, *which subsections protect against the denial or abridgement of the right to vote due to a person's race or language minority group*.

Id. § 44(3)(b)(III) (emphases added). This definition essentially equates the protections provided by section 44.3(1)(b) with those provided by section 44.3(4)(b) and, notably, defines that protection using language that tracks section 2 of the VRA and no more. This textual clue indicates that the protections embodied in subsections (1)(b) and (4)(b) are coextensive and that the disputed clause in section 44.3(4)(b) therefore merely refers to existing VRA protections.

¶66 The 2018 Blue Book description of Amendment Y presented to voters supports this interpretation of section 44.3(4)(b). The Blue Book explained that under the VRA,

> the state cannot change voting standards, practices, or procedures in a way that denies or limits the right to vote based on race or color or membership in a language minority group. In particular, the act requires that a minority group's voting strength not be diluted under a redistricting map. Amendment Y *incorporates principles of the Voting Rights Act into state law* and prohibits the approval of a map that violates *these principles*.

Blue Book at 9 (emphases added). In stating that Amendment Y prohibits dilution of a minority group's voting strength, the Blue Book explained to voters that "Amendment Y incorporates principles of the Voting Rights Act into state law"—no more, no less—to reach that goal. The Blue Book then explained that Amendment Y prohibits approval of a map "that violates these principles." *Id*. The only "principles" identified are "principles of the Voting Rights Act." Had the disputed language in section 44.3(4)(b) been intended to create new protections, the Blue Book presumably would have noted and elaborated upon those additional protections.

¶67 In addition to the Blue Book, the legislative history of the referred measure that became Amendment Y likewise supports our reading of section 44.3(4)(b). The original resolution summary for SCR 18-004 (which included the disputed

language ultimately adopted by the voters in Amendment Y) described the measure as merely incorporating existing federal law by:

> [e]stablish[ing] prioritized factors for the commission to use in drawing districts, *including federal requirements*, the preservation of communities of interest and political subdivisions, and maximizing the number of competitive districts; [and]
>
> [p]rohibit[ing] the commission from approving a map if it has been drawn for the purpose of protecting one or more members of or candidates for congress or a political party, *and codif[ying] current federal law and related existing federal requirements prohibiting maps drawn for the purpose of or that result[] in the denial or abridgement of a person's right to vote or electoral influence on account of a person's race, ethnic origin, or membership in a protected language group.*

S. Con. Res. 18-004, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018) (emphases added). The summary accompanying the final version of the referred measure contained almost identical language stating that it simply codified "current federal law and related existing federal requirements":

> The commission is prohibited from approving a map if it has been drawn for the purpose of protecting one or more members of or candidates for congress or a political party, and *current federal law and related existing federal requirements that prohibit maps either drawn for the purpose of or that result in the denial or abridgement of a person's right to vote or electoral influence on account of a person's race, ethnic origin, or membership in a protected language group are codified . . . .*

Congressional Redistricting, Colo. Gen. Assembly, https://leg.colorado.gov/bills/scr18-004 [https://perma.cc/4UWM-UERU] (emphasis added).[9]

¶68 Our textual interpretation of Amendment Y as a whole, as supported by the Blue Book and the legislative history of the referred measure, lead us to conclude that article V, section 44.3(4)(b) is coextensive with the VRA provisions as they existed in 2018 and creates no further requirements for the Commission. Thus, we reject the opposers' arguments that section 44.3(4)(b) required the Commission to create additional protections for Hispanic voters in the form of influence, crossover, or coalition districts.

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[9] Although not part of our analysis, we note that contemporaneous media coverage reflected a similar understanding of Amendment Y. *See, e.g.*, Steve Fenberg and Peggy Leech, *Steve Fenberg and Peggy Le[e]ch: Amendments Y, Z Put the Interests of Colorado, Not Parties, First*, Boulder Daily Camera, (Oct. 9, 2018, 4:15 p.m.), https://www.dailycamera.com/2018/10/09/steve-fenberg-and-peggy-leach-amendments-y-z-put-the-interests-of-colorado-not-parties-first/ [https://perma.cc/CE8W-S4K2] ("These measures protect minority groups by enshrining the federal Voting Rights Act language in the state constitution, which is an important check if they are rolled back at the federal level."); Corey Hutchins, *The High Court Punted on Partisan Gerrymandering. Colorado's New Redistricting Laws Could Offer a Model for the Nation*, Colo. Indep. Blog (July 5, 2019), https://www.coloradoindependent.com/2019/07/05/colorado-redistricting-gerrymandering/ [https://perma.cc/CJ65-S62R] ("As the U.S. Supreme Court has chipped away at the Voting Rights Act[,] . . . Colorado's new laws protect Colorado's minorities by enshrining language from the federal [VRA] in the Colorado Constitution, said lawyer Mark Grueskin, who worked on the measure . . . .").

¶69 Finally, we do not agree with CLLARO's suggestion at oral argument that the Commission's interpretation of section 44.3(4)(b) renders race a "forbidden topic" in Colorado. Federal case law grants states a level of discretion in supplementing the VRA with additional voting protections. But the Commission is not required—by article V, section 44.3(4)(b) or otherwise—to engage in maximally race-influenced redistricting or to create supplemental voting protections. We simply hold that the Commission had the discretion to determine how to comply with the VRA, that it was not required to use race-focused redistricting boundaries, and that its decision not to take such an approach was not an abuse of discretion. Our decision should not be read to mean that the Commission may not consider race or minority voter electoral influence to draw constitutionally permissible districts in future redistricting cycles.

4. Preservation of Communities of Interest and Political Subdivisions

¶70 As explained above, the Commission is required to preserve communities of interest as much as is reasonably possible. Colo. Const. art. V, § 44.3(2)(a). Amendment Y defines "community of interest" to mean any group—including a racial, ethnic, or language minority group, *id.* § 44(3)(b)(III)—"that shares one or more substantial interests that may be the subject of federal legislative action, is composed of a reasonably proximate population, and thus should be considered for inclusion within a single district for purposes of ensuring its fair and effective

representation," *id.* § 44(3)(b)(I). Such shared interests may include, but are not limited to, "public policy concerns of urban, rural, agricultural, industrial, or trade areas," *id.* § 44(3)(b)(II)(A); and "public policy concerns such as education, employment, environment, public health, transportation, water needs and supplies, and issues of demonstrable regional significance," *id.* § 44(3)(b)(II)(B).

¶71 Several opposers raise challenges relating to the preservation of communities of interest under article V, section 44.3(2)(a). Common Cause argues that CD 1 should be configured to unite the Hispanic populations of northeast and west Denver, rather than to keep the City and County of Denver whole.

¶72 Eagle County argues that the Commission abused its discretion by dividing Eagle County (a community of interest) between CD 2 and CD 3 solely to achieve exact population equality. Moreover, it argues that the Plan divides smaller, discrete communities of interest within Eagle County.

¶73 Both Fair Lines and Jerry Natividad challenge CD 7 on grounds of failure to adequately preserve communities of interest. Fair Lines contends that the record regarding the communities of interest in CD 7 is inadequate and that there is no discernible reason for including Fremont County and Custer County in a district otherwise made up of Front Range and mountainous counties. According to Fair Lines, while a district need not form a single community of interest, that district's sub-communities should have some "cogent relationship" to one another.

Natividad, by contrast, argues that the Commission abused its discretion by splitting Jefferson County into multiple districts given its need for consistency with regard to its transportation infrastructure and its single school district.

¶74 All on the Line argues that the Commission should have included Longmont in CD 8 because of its shared interests with the Denver-Greeley corridor, and that the Commission failed to do so only to maximize the competitiveness of the district.

¶75 Finally, Thiebaut generally objects to the Commission's consideration of communities of interest (or lack thereof), arguing that the Commission all but ignored this criterion, making conclusory statements that it considered communities of interest in drawing district boundaries without actually having done so.

¶76 Upon reviewing each of these arguments, we conclude that the Commission did not abuse its discretion in attending to its obligation under section 44.3(2)(a) to preserve communities of interest and political subdivisions. The Commission specifically identified relevant communities of interest in each district based on this court's precedent and public comments and testimony. In CD 1, the Commission determined that both the City and County of Denver itself, as the state's commercial epicenter, and the Denver International Airport are

communities of interest that should remain whole and be included together in a single district.

¶77 The Commission split Eagle County, placing some portions in CD 2 and others in CD 3. With respect to those portions in CD 2, the Commission identified a shared interest in, among other things, the fostering of outdoor recreation, including skiing. It therefore grouped many of Colorado's major ski resorts, including Vail and Beaver Creek, together in CD 2. Regarding the portions of Eagle County in CD 3, the Commission identified numerous shared interests between the remainder of Eagle County and the Western Slope. The Commission found it especially important to keep the Roaring Fork Valley—which extends into Eagle County—whole.

¶78 In CD 7, the Commission combined multiple communities of interest together. It determined that the six mountainous counties form a community of interest and that those counties have significant connections with the Front Range, given the amount of travel between the areas. It also determined that Jefferson County and the City and County of Broomfield are themselves a community of interest, as they are mature suburbs characterized by continued growth and increasing density. Within Jefferson County, the Commission found that there is a community of interest centered around the large number of federal employees and contractors in the area, due to the presence of the Denver Federal Center, the

National Renewable Energy Laboratory, and the Lockheed Martin facility. And the Commission determined that Jefferson, Chaffee, and Fremont counties share significant policy interests relating to both state and federal correctional facilities.

¶79 Finally, in CD 8, the Commission identified a new community of interest that includes several north Denver suburbs (Brighton, Commerce City, Northglenn, and Thornton) and Greeley. The Commission recognized that these areas have experienced rapid growth and developed sizeable Hispanic populations. Much of this growth, the Commission determined, has been caused by rising housing costs in Denver, which have pushed many families to search for more affordable housing options in the metro area. The Commission highlighted that this area shares an interest in energy and natural resource development and in the conversion from predominantly agricultural use to residential, commercial, and industrial uses.

¶80 The Commission's identification of these communities of interest was supported by the record before it, and its decisions whether and how to preserve these communities or political subdivisions reflect a reasonable choice among multiple alternatives. As the various opposers' arguments demonstrate, tradeoffs are inevitable in this process, and efforts to preserve different communities of interest will often conflict. Indeed, "[i]f the Commission satisfies the desires of one county, city or community of interest to remain whole and undivided, it often

must necessarily split another county, city, or community of interest." *In re Reapportionment of Colo. Gen. Assembly*, 45 P.3d 1237, 1265 (Colo. 2002). This challenge is especially acute given that concerns regarding communities of interest must be considered simultaneously with multiple other criteria that must be satisfied. We are highly cognizant that

> every alteration that is made to one boundary for the sake of one factor will require alteration to another part of the map to balance population, which might then trigger even further alterations. In turn, this so-called "ripple effect" might split political subdivisions, divide communities of interest, or result in less compact districts.

Hall, ¶ 53, 270 P.3d at 973. Although the Commission could have made some different decisions, we cannot say that the Commission abused its discretion in applying the communities of interest criterion in section 44.3(2)(a) in light of the record before it.

5. Compactness of Districts

¶81 The Commission must also ensure that districts are "as compact as is reasonably possible." Colo. Const. art. V, § 44.3(2)(b). This criterion "seeks to promote 'fair and effective representation' by implicitly recognizing that the more densely located a representative's constituents, the easier it is to travel across and to physically engage with the district." *Hall*, ¶ 51, 270 P.3d at 972 (quoting *Carstens v. Lamm*, 543 F. Supp. 68, 87 (D. Colo. 1982)). However, because of the equal population requirement between districts and the population distribution

throughout the state, Colorado's congressional districts "will never be of comparable physical size." *Id.*

¶82 We believe the compactness criterion is satisfied here, and no party argues otherwise. Based on the compactness scores calculated by nonpartisan staff, four districts are slightly less compact than under the previous congressional map. But three districts have become significantly more compact, and the average district in the Plan is more compact than the average district in the 2011 congressional plan. We therefore conclude that the Commission did not abuse its discretion in ensuring that the districts are as compact as is reasonably possible in light of the other substantive redistricting criteria.

6. Maximization of Politically Competitive Districts

¶83 Several opposers raise conflicting objections regarding the Commission's duty to maximize politically competitive districts after it has considered other redistricting criteria. All on the Line, for example, argues that the Commission prioritized competitiveness over other criteria. Natividad, by contrast, argues that the Commission did not prioritize competitiveness enough—that is, it prioritized other criteria above competitiveness and failed to create an adequately competitive CD 7. And both argue that the Commission failed to adopt a measure of "competitiveness."

¶84 Under article V, section 44.3(3)(d), a district is competitive when it has "a reasonable potential for the party affiliation of the district's representative to change at least once between federal decennial censuses." The Commission may measure competitiveness using "factors such as a proposed district's past election results, a proposed district's political party registration data, and evidence-based analyses of proposed districts." *Id*. The Commission is required to solicit evidence regarding competitiveness at its hearings throughout the state, *id*. § 44.3(3)(b), and once the Commission approves a plan, its nonpartisan staff must prepare a report to demonstrate how the approved plan reflects the evidence presented and the Commission's findings regarding competitiveness, *id*. § 44.3(3)(c). Notably, while the Commission must, "to the extent possible, maximize the number of politically competitive districts," it may do so only after satisfying the other substantive criteria. *Id*. § 44.3(3)(a).

¶85 The Commission correctly applied the competitiveness criterion here. It discussed and assessed evidence of competitiveness throughout the redistricting process, as it was required to do when evaluating proposed maps. *See id*. § 44.3(3)(b). Though the Commission did not formally define when a district has a "reasonable potential" to change party affiliation, it adopted a measure of competitiveness based on an average of partisan outcomes from eight statewide elections between 2016 and 2020. Such a measure of competitiveness is specifically

permitted by section 44.3(3)(d). Based on this measure, the Plan creates a single competitive district (CD 8) and two semi-competitive districts (CD 3 and CD 7). True, the Commission had before it maps that were more competitive overall. But the Commission was required to prioritize other criteria, including the preservation of communities of interest and political subdivisions, over competitiveness. Once it did so, it was free to choose between its multiple options. Given its duty to maximize competitiveness to the extent possible, it was not an abuse of discretion for the Commission to choose, as between proposals that equally achieved the other substantive criteria, the more competitive option.

7. Prohibition on Protection of Incumbents, Declared Candidates, or Political Parties

¶86 Article V, section 44.3(4)(a) prohibits the Commission from adopting a map "drawn for the purpose of protecting [any] incumbent members, or [any] declared candidates . . . or any political party." The Commission asserts that the Plan "was not drawn for these purposes" and that nonpartisan staff did not consider incumbency or party in preparing any of the staff plans. Moreover, Commission members affirmed in their final statements that they did not take into account incumbency or political party in adopting the Plan. No opposer argued otherwise. We therefore conclude that the Commission's Plan complies with section 44.3(4)(a).

D. Miscellaneous Technical Objection

¶87 Finally, the Denver Clerk and Recorder objects to the Plan, based not on the criteria of article V, section 44.3, but rather on a technical issue: When overlapping the congressional and legislative maps, the boundaries of CD 1 require the creation of an election precinct that will consist of a single census block with only nineteen active registered voters.[10] According to the Denver Clerk, the creation of such a uniquely small precinct risks revealing voters' identities in violation of article VII, section 8 of the Colorado Constitution, especially in light of the breadth of information regarding voter registration and participation available on the internet.

¶88 Our constitution requires that "secrecy in voting" be preserved. *See* Colo. Const. art. VII, § 8. This requirement "protects from public disclosure the identity of an individual voter and any content of the voter's ballot that could identify the voter." *Marks v. Koch*, 284 P.3d 118, 122 (Colo. App. 2011). The failure to ensure secrecy in voting compromises "the fundamental integrity of an election" and may require the voiding of that election. *Jones v. Samora*, 2014 CO 4, ¶ 38, 318 P.3d 462,

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[10] The Clerk communicated with the Commission throughout the redistricting process to resolve other local election-related matters. Unfortunately, however, the Commission submitted the Plan to this court before the Clerk could raise this particular issue, prompting the Clerk to participate in this court's review process instead.

471; *see also Taylor v. Pile*, 391 P.2d 670, 673 (Colo. 1964) ("[W]hen the undisputed fact was made to appear that all the ballots cast were not secret ballots, it was the duty of the court to declare the election void.").

¶89 We therefore recognize the sensitive and serious nature of the Clerk's objection. Nonetheless, we cannot say that the Commission abused its discretion in drawing the boundaries of CD 1. As discussed above, in performing its redistricting obligations, the Commission was required to (and did) apply the criteria outlined in article V, section 44.3.

¶90 To the extent the boundaries of CD 1 require the creation of a uniquely small precinct, we conclude this is a practical problem that requires a practical solution. We assume that the Clerk and the Secretary of State can work together to fashion a remedy. The Commission, for instance, suggests that the Clerk may choose to report election results from a small-population precinct together with the results from a large-population precinct. And counsel for the Clerk acknowledged at oral argument that the Secretary of State suggested drawing a noncontiguous precinct. We trust that the Commission, local election officials, and the Secretary of State will proceed so as to best preserve secrecy in voting as required by article VII, section 8.

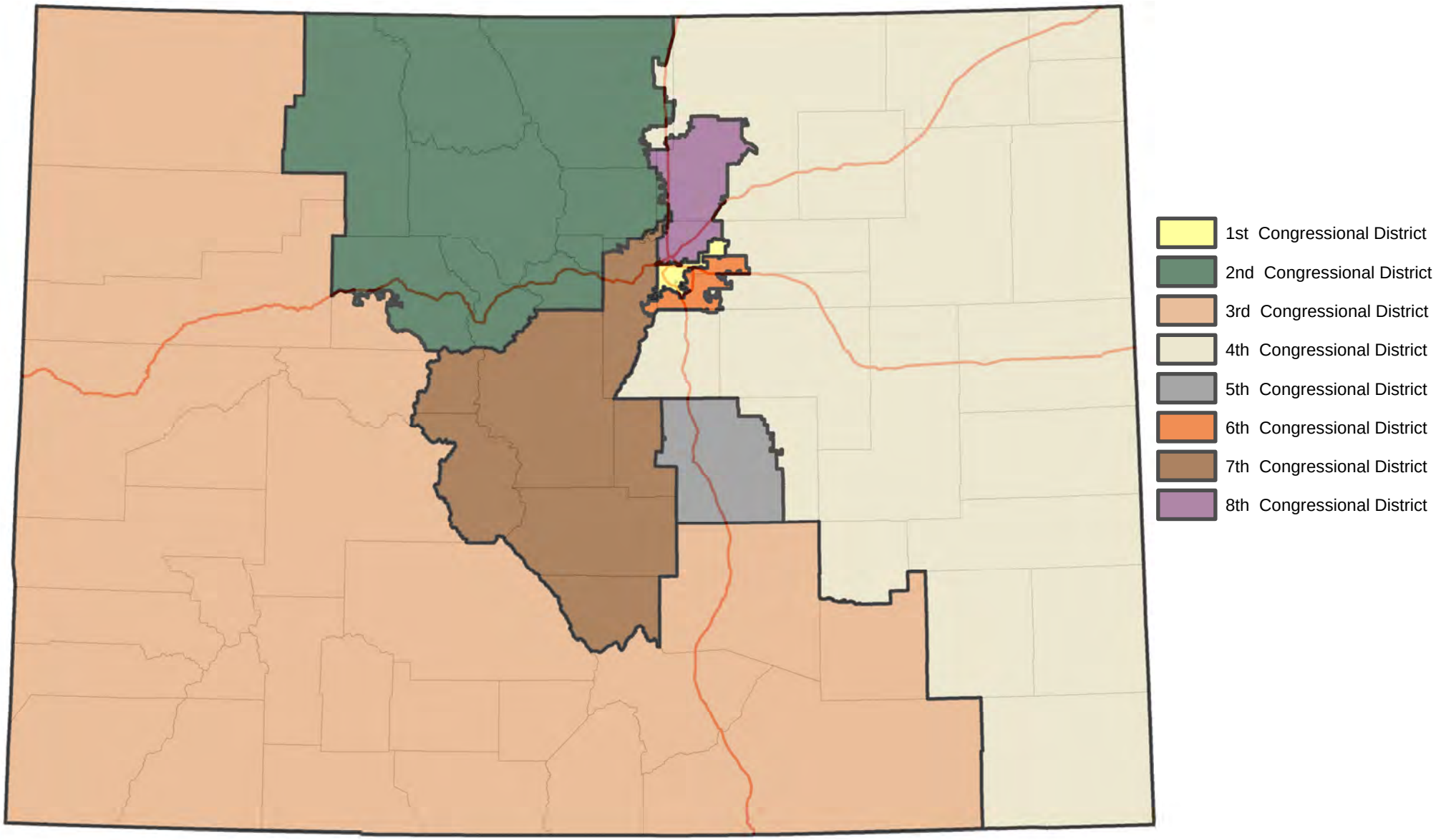
III. Conclusion

¶91 As this cycle has once again confirmed, redistricting is an "incredibly complex and difficult process that is fraught with political ramifications and high emotions." *Hall*, ¶ 1, 270 P.3d at 963. Yet this year has marked a watershed for congressional redistricting in Colorado. For the first time, the state's congressional district map is not the product of politics or litigation; it is instead the product of public input, transparent deliberation, and compromise among twelve ordinary voters representing the diversity of our state. The Plan surely will not please everyone, but again, the question before us is not whether the Commission adopted a perfect redistricting plan or even the "best" of the proposed alternatives. The question is whether the Plan meets the requirements of article V, section 44.3. Based on our review, we conclude that the Commission did not abuse its discretion in applying the criteria in article V, section 44.3. We therefore approve the Plan and direct the Commission to file the Plan with the Secretary of State by December 15, 2021.

APPENDIX

Colorado Independent Redistricting Commissions

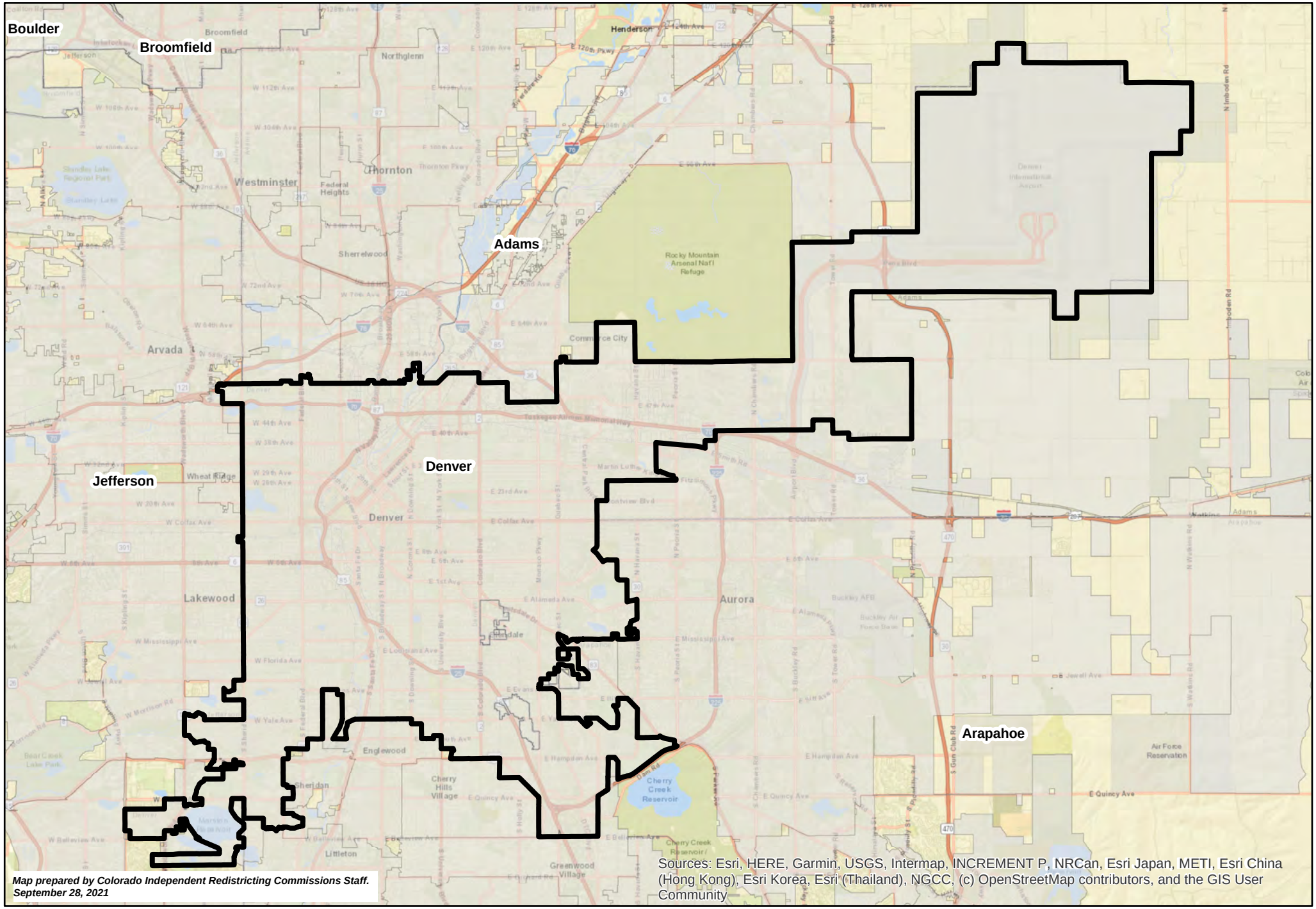
Colorado Congressional Districts (Final Approved Plan)



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

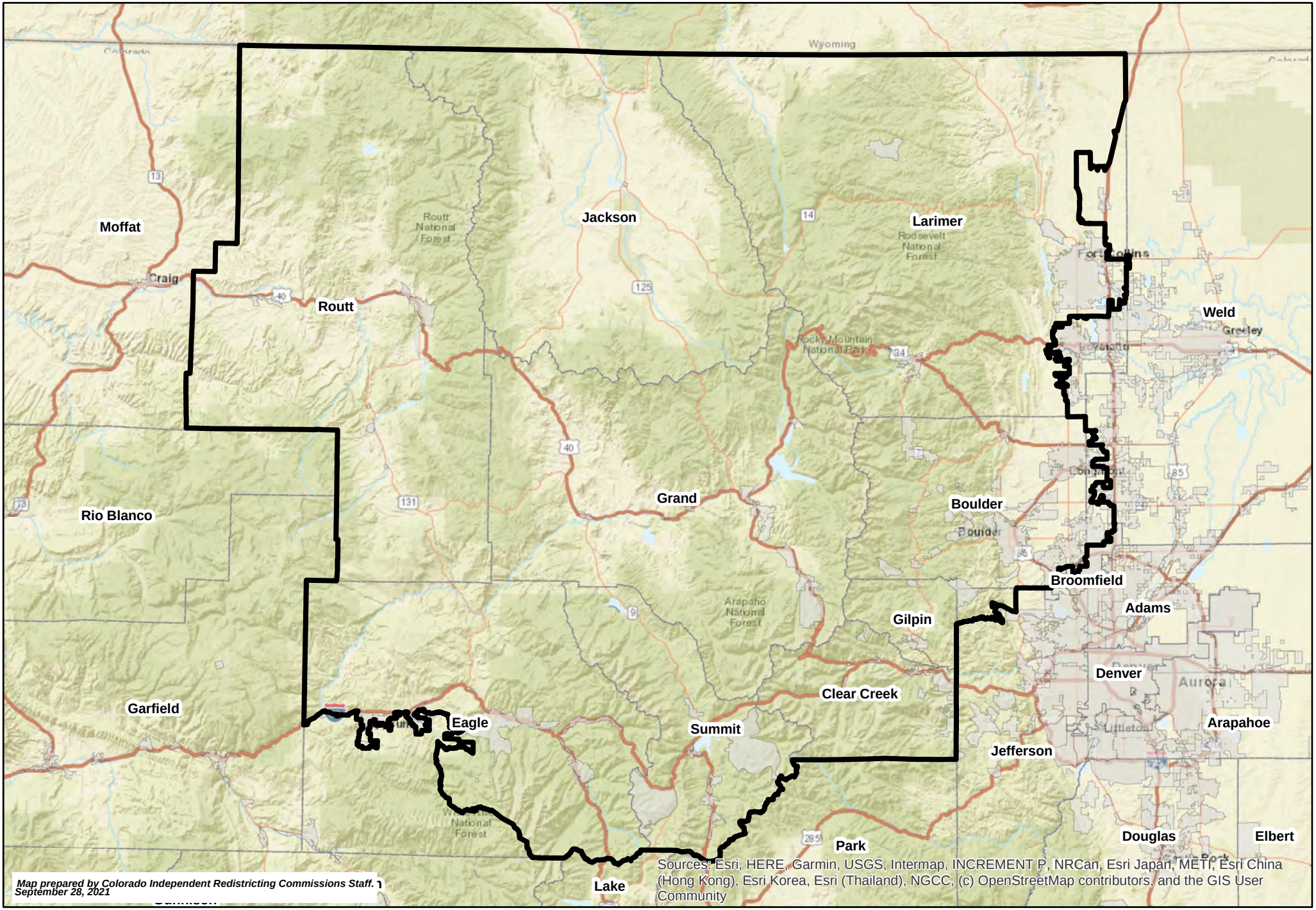
Colorado Independent Redistricting Commissions

Colorado Congressional District 1 (Final Approved Plan)



Colorado Independent Redistricting Commissions

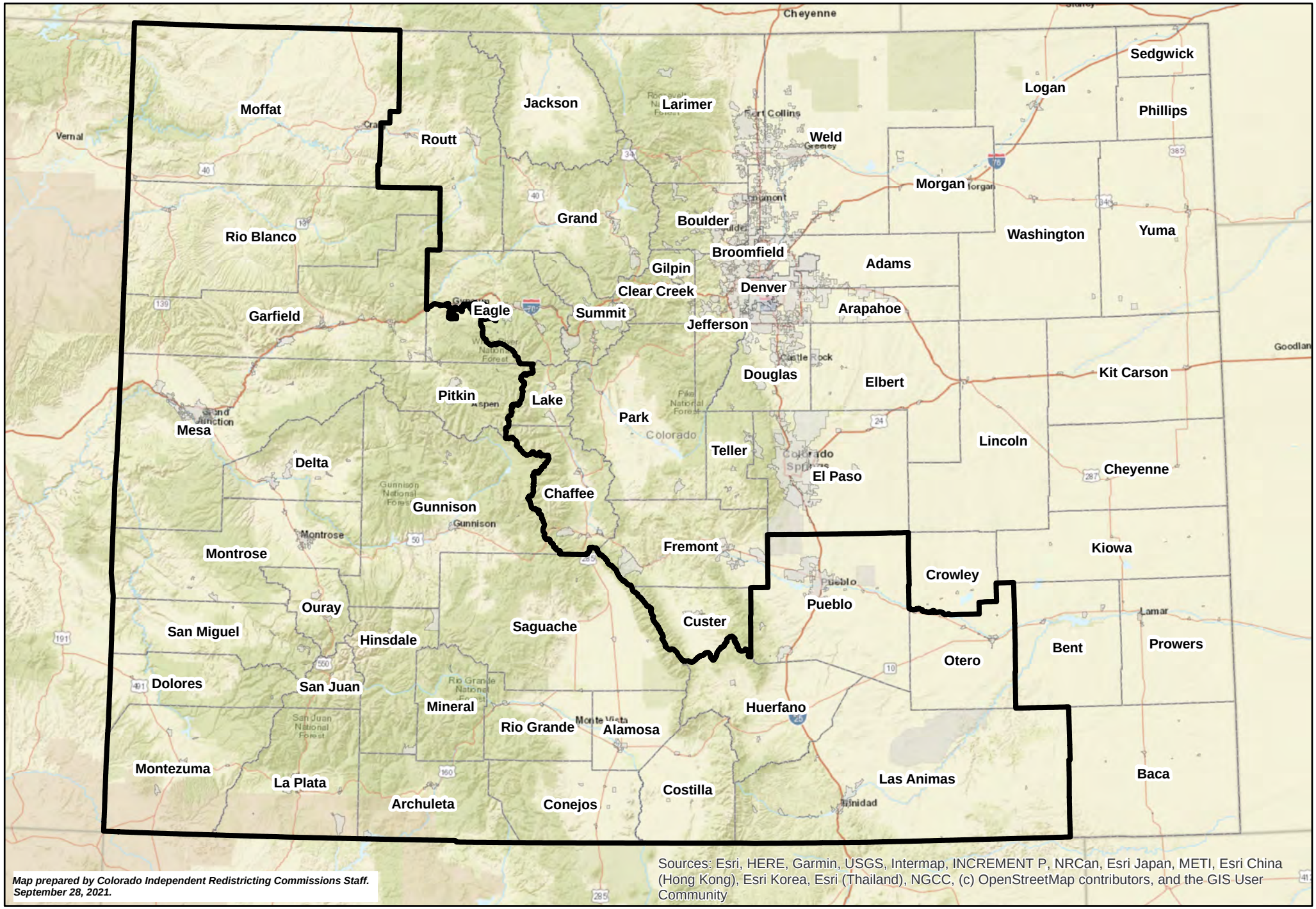
Colorado Congressional District 2 (Final Approved Plan)



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

Colorado Independent Redistricting Commissions

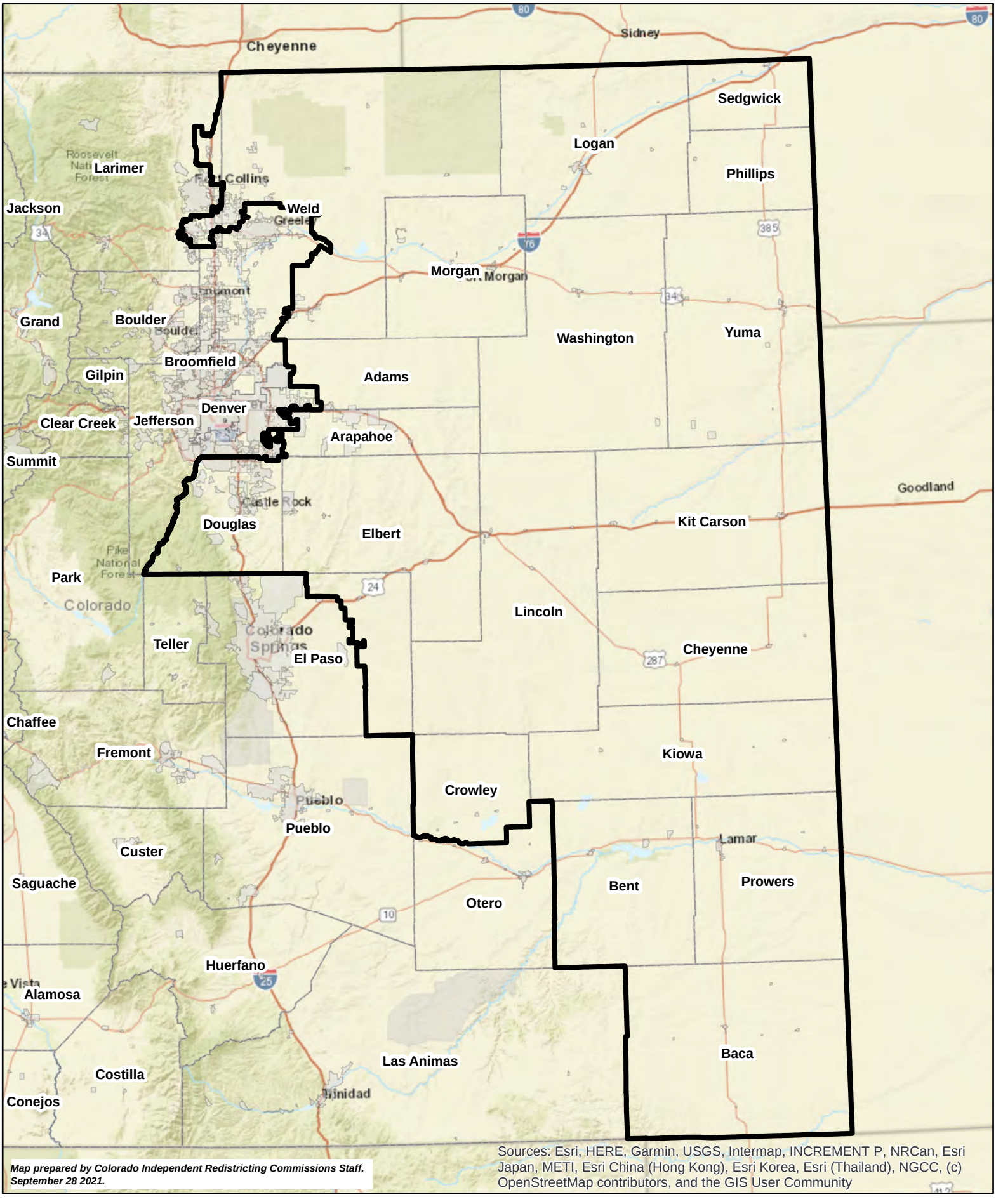
Colorado Congressional District 3 (Third Staff Plan)



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

Colorado Independent Redistricting Commissions

Colorado Congressional District 4 (Final Approved Plan)

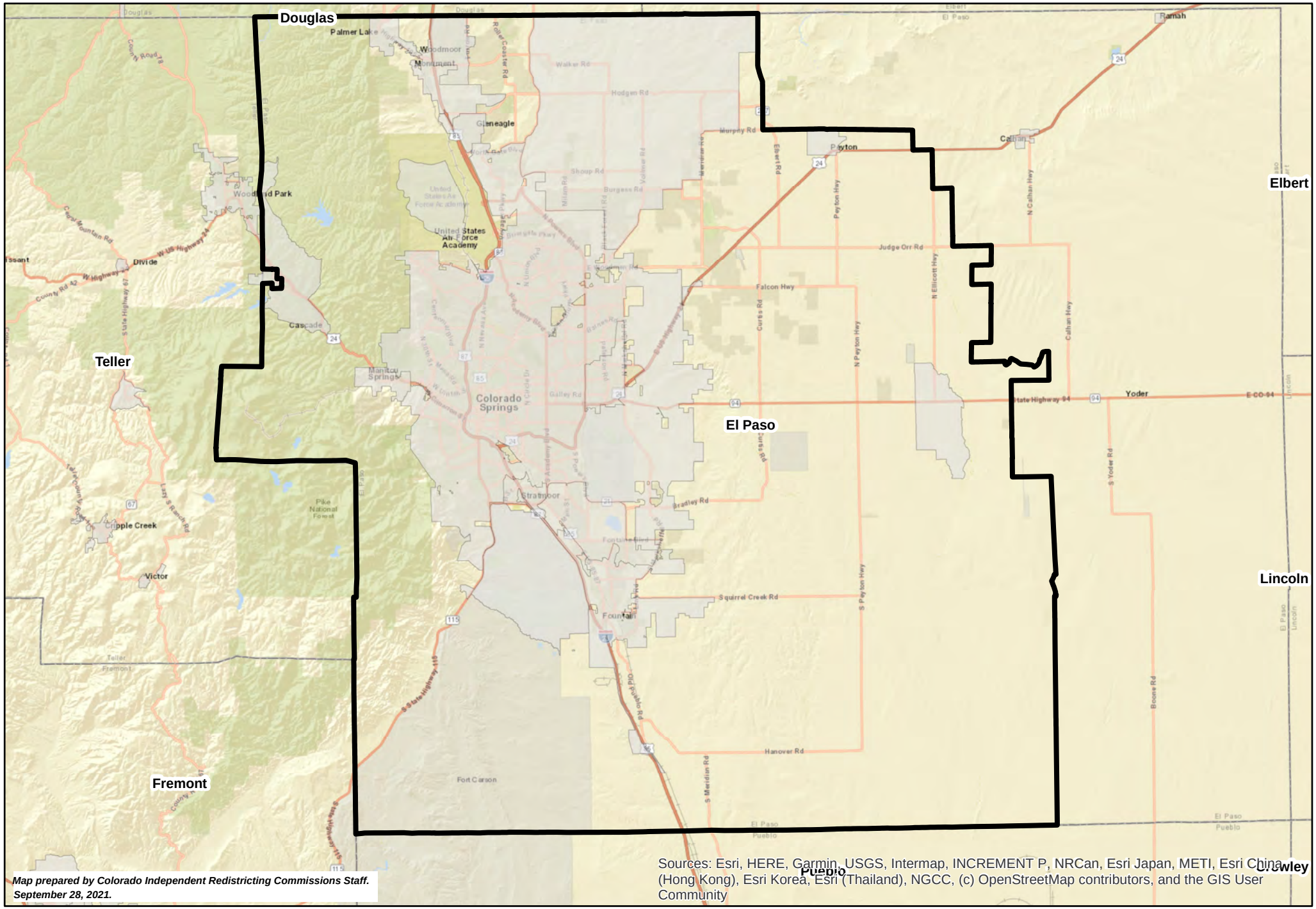


Map prepared by Colorado Independent Redistricting Commissions Staff. September 28 2021.

Sources: Esri, HERE, Garmin, USGS, Intermap, INCREMENT P, NRCan, Esri Japan, METI, Esri China (Hong Kong), Esri Korea, Esri (Thailand), NGCC, (c) OpenStreetMap contributors, and the GIS User Community

Colorado Independent Redistricting Commissions

Colorado Congressional District 5 (Final Approved Plan)



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

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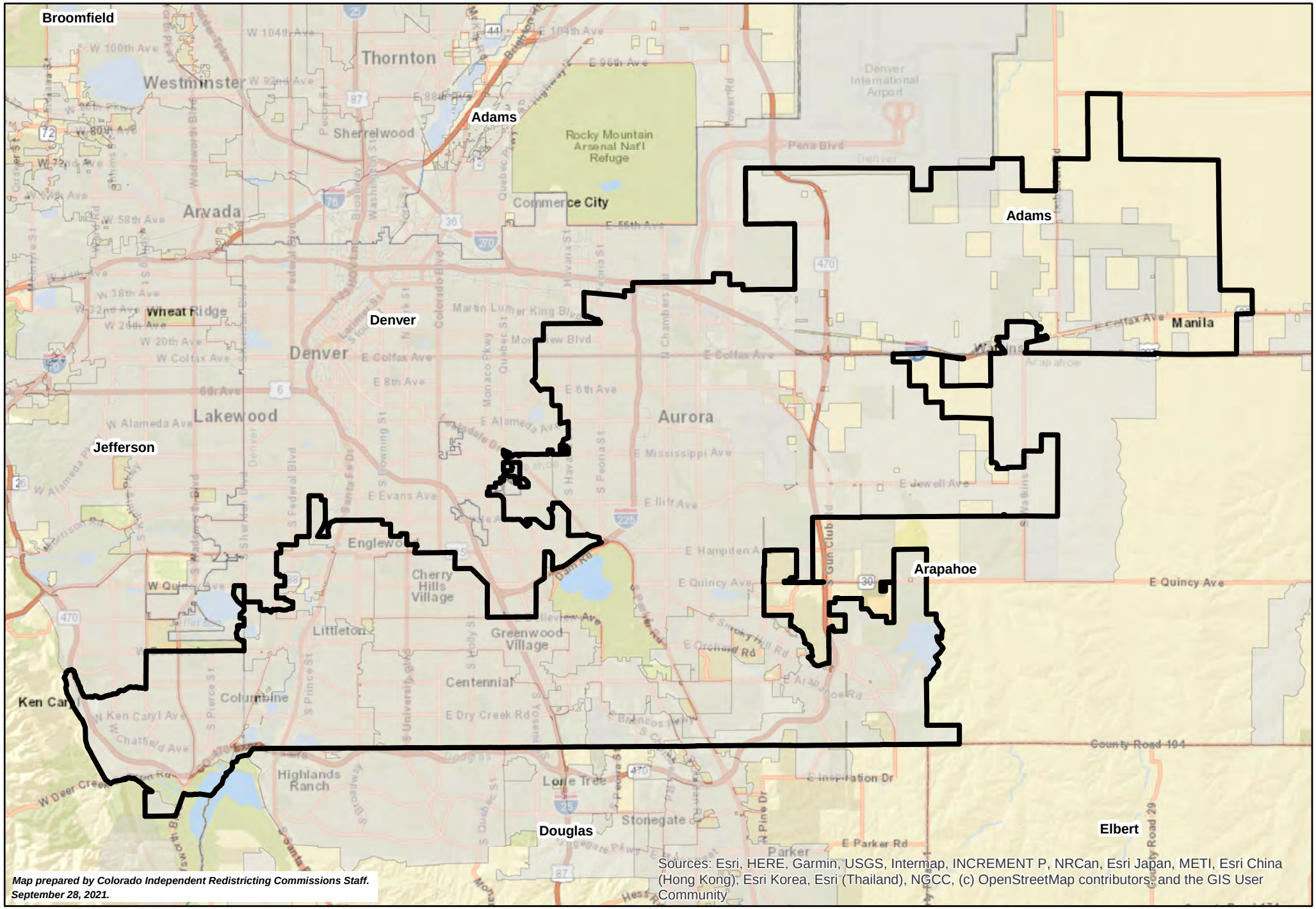
Colorado Independent Redistricting Commissions

Colorado Congressional District 6 (Final Approved Plan)



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

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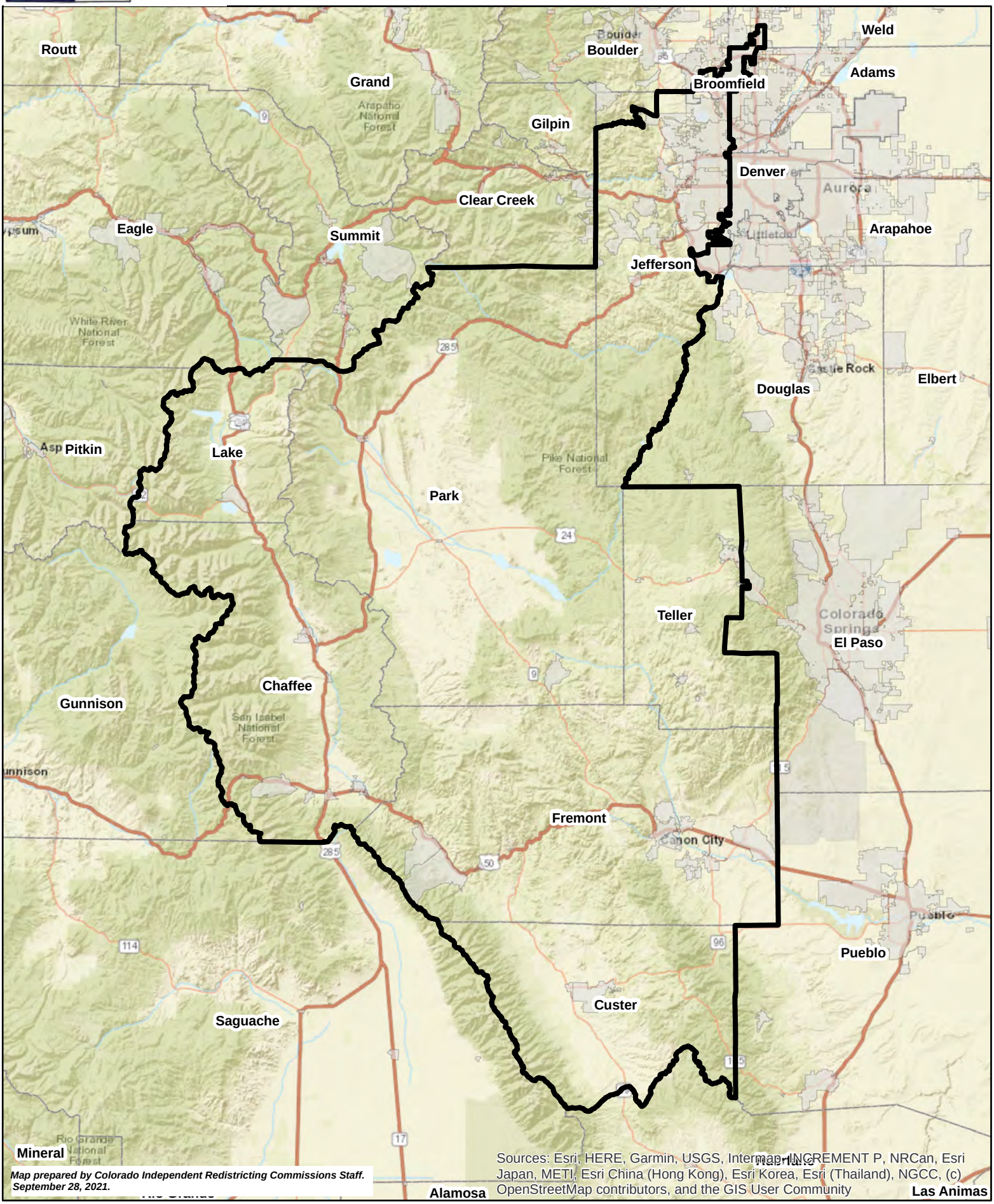
Colorado Independent Redistricting Commissions

Colorado Congressional District 7 (Final Approved Plan)



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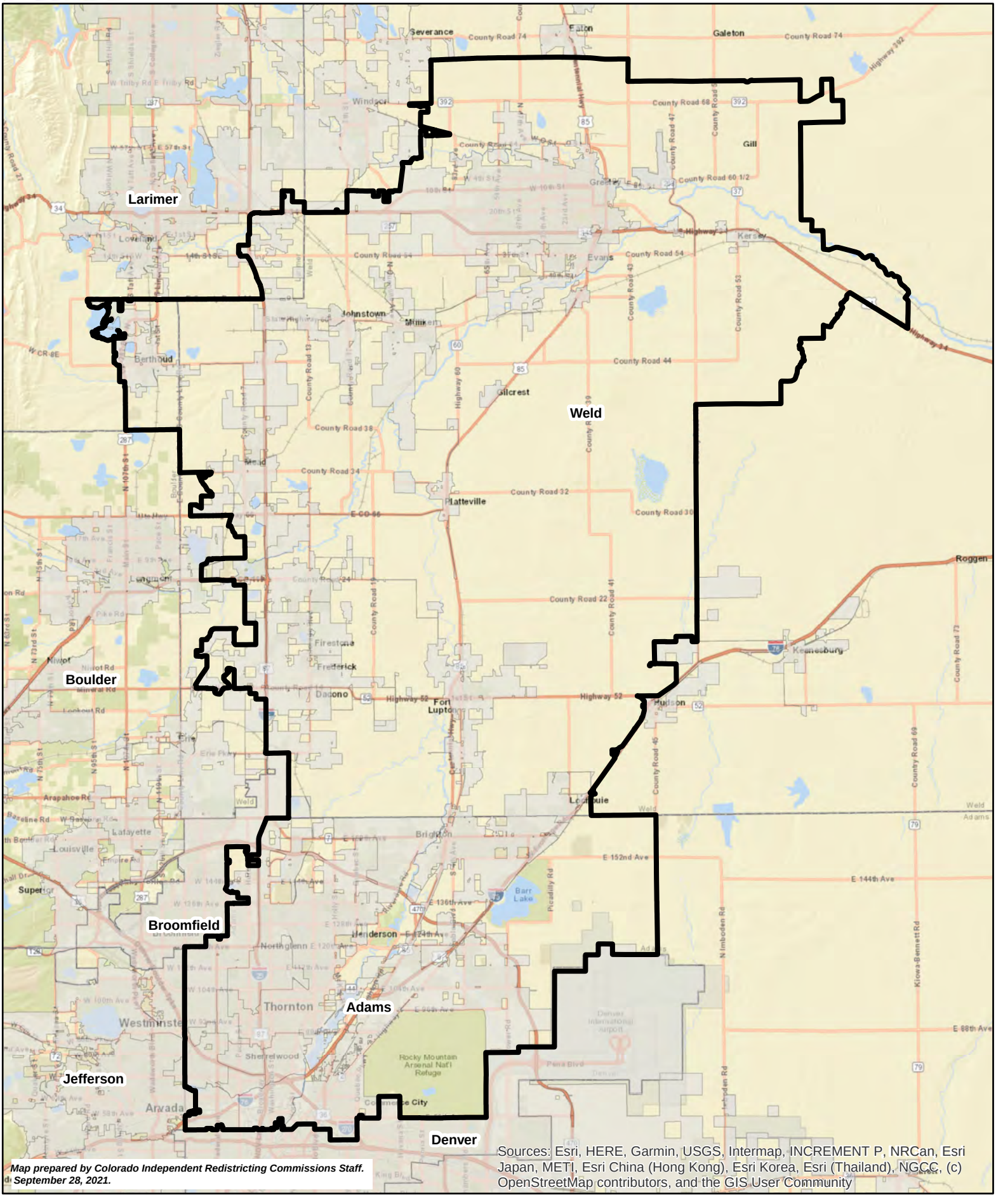
Colorado Independent Redistricting Commissions

Colorado Congressional District 8 (Final Approved Plan)



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