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Original Proceeding Pursuant to Article V, Section 44.5 of the Constitution of the State of Colorado	
In re Colorado Independent Congressional Redistricting Commission	
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AMICUS CURIAE BRIEF OF ALL ON THE LINE – COLORADO

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, I certify that:

> The brief complies with the applicable word limit set forth in C.A.R. 28(g).
>
> It contains 9,471 words.
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I acknowledge that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Shankar Duraiswamy

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IDENTITY AND INTEREST OF AMICUS CURIAE

All On The Line – Colorado is the state chapter of All On The Line ("AOTL"), a national project that seeks to restore fairness to democracy and ensure that every American has an equal voice in government, through the promotion of a fair reapportionment process. AOTL – Colorado, in particular, is dedicated to protecting the independent redistricting process approved by Colorado voters in 2018 and ensuring that the resulting redistricting maps fairly and accurately represent the State of Colorado.

ISSUE PRESENTED FOR REVIEW

Whether the final redistricting map submitted to this Court by the Colorado Independent Congressional Redistricting Commission ("CICRC" or the "Commission") on October 1, 2021 "constitutes an abuse of discretion in applying or failing to apply the criteria listed in [article V,] section 44.3" of the Colorado Constitution. Colo. Const. art. V, § 44.5(3).

STATEMENT OF THE CASE

The Commission's adoption of the final plan constituted an abuse of discretion in drawing the boundaries of District 8 in three critical ways. First, the Commission failed to comply with—or even attempt to apply—

the constitutional bar against the dilution of minority electoral influence, approving a map that renders it impossible for the large Latino community in District 8 to reliably elect a candidate of their choice. Second, while the Commission correctly considered the preservation of communities of interest in its decision to place the new District 8 along the Denver-to-Greeley corridor, it abused its discretion in applying the "communities of interest" criterion by inexplicably excluding the City of Longmont, despite its significant shared interests with the rest of District 8. Third, the Commission abused its discretion in applying the criterion of competitiveness by (i) prioritizing it over both preventing the dilution of Latino electoral influence and the preservation of communities of interest when drawing the boundaries of District 8, and (ii) failing to adopt or apply a measure of "competitiveness" that complied with the constitutional standard.

I. Legal Framework

A. Constitutional Procedures for Congressional Redistricting

In 2018, Colorado voters overwhelmingly approved Amendment Y, a ballot initiative to amend the Colorado Constitution and establish an

independent commission responsible for the state's congressional redistricting process.[1]

Under Amendment Y, the Commission is charged with "divid[ing] the state into as many congressional districts as there are representatives in congress apportioned to this state" in accordance with the criteria set forth in Section 44.3. Colo. Const. art. V, § 44(2). Following each federal decennial census, twelve members are appointed to serve on the Commission—four from the State's largest political party (currently the Democrats); four from the State's second largest political party (currently the Republicans); and four who are *not* affiliated with any political party. *Id.* § 44.1(8)(b).[2]

To assist the Commission, nonpartisan staff from the general assembly's legislative council and office of legislative legal services (or their successor offices) are appointed. *Id.* § 44.2(1)(b). Staff are required to prepare, publish, and present no fewer than three staff plans (unless

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[1] Colo. Sec'y of State, 2018 General Election Results, https://perma.cc/X42M-B8NW (last visited Oct. 8, 2021); Colo. Const. art. V, § 44(2).

[2] *See also* Colo. Indep. Redistricting Comm'ns, *Commissioner Selection Process*, https://perma.cc/LR2J-7LGV (last visited Oct. 8, 2021).

the Commission approves the first or second staff plan).[3] Staff are also required to prepare additional plans or amendments to plans requested by any commissioner or group of commissioners in a public hearing.[4] Members of the public may also present proposed redistricting maps and written comments for the Commission's consideration. *Id.* § 44.2(3).[5]

Ultimately, the Commission must vote to adopt a final redistricting plan, which is then submitted to the Colorado Supreme Court. *Id.* § 44.2(3). The adopted final plan requires "the affirmative vote of at least eight commissioners, including the affirmative vote of at least two commissioners who are unaffiliated with any political party." *Id.* § 44.2(2).

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[3] CICRC, *Rules of Proc.* at 8 (modified on Aug. 2, 2021), https://redistricting.colorado.gov/content/commission-rules (last visited Oct. 8, 2021).

[4] *Id.*; *see also* Colo. Const. art. V, §§ 44.4(4), 48.2(4). Commissioners are prohibited from communicating with staff about the mapping of any district except during a public meeting or hearing of the Commission. *See* Colo. Indep. Redistricting Comm'ns, *supra* note 2. Thus, any direction or suggestion on how staff should draw a map or factors to consider in drawing a map should only be given during a public meeting of the whole Commission. *Id.*

[5] *See also* CICRC, *Rules of Proc.*, *supra* note 3 at 13; Colo. Indep. Redistricting Comm'ns, *Congressional Redistricting Overview*, https://perma.cc/9QPR-UMKZ (last visited Oct. 8, 2021).

The Colorado Supreme Court must review the final congressional redistricting plan adopted by the Commission to ensure that it complies with the procedures and criteria mandated by article V, Section 44.3 of the Colorado Constitution. *Id.* § 44.5(1). If the Court determines that the plan "constitutes an abuse of discretion in applying or failing to apply the [constitutional] criteria" of Section 44.3, *id.* § 44.5(3), the Court must return the plan to the Commission with its reasons for disapproval, *see id.* § 44.5(3).

B. Constitutional Standards for Congressional Redistricting

Amendment Y includes two absolute prohibitions: it bars the approval of any congressional map that either dilutes a minority group's electoral impact or is drawn for the purpose of favoring an incumbent, a declared candidate, or a political party—regardless of the application of any other criteria:

> (4) No map may be approved by the commission or given effect by the supreme court if:
>
> > (a) It 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) It 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.

Colo. Const. art. V, § 44.3(4).

Section 44.3(4)(b), the prohibition against minority vote dilution, borrows some of its language from Section 2 of the federal Voting Rights Act ("VRA"), but provides even greater protection for minority communities. Like Section 2, the Colorado Constitution disallows any map that "results in the denial or abridgement" of any citizen's right to vote. *Id.* § 44.3(4)(b). But Colorado's version goes further, providing that "denial or abridgement" includes "diluting the impact of [the protected group's] *electoral influence*"—a phrase that does not appear in Section 2. *Id.* (emphasis added).

Apart from these overarching prohibitions, Amendment Y established a set of ranked criteria for the Commission to apply when adopting a congressional redistricting plan. First, the Commission must follow federal law to ensure population equality between districts and compliance with the VRA. *Id.* § 44.3(1). Second, "[a]s much as is reasonably possible, the commission's plan must preserve whole communities of interest and whole political subdivisions, such as

counties, cities, and towns," and ensure that districts are "as compact as reasonably possible." *Id.* § 44.3(2). Third, the Commission should attempt to maximize the number of politically competitive districts—but only *after* prioritizing the foregoing criteria: "*Thereafter*, the commission shall, *to the extent possible*, maximize the number of politically competitive districts." *Id.* § 44.3(4) (emphases added). Amendment Y includes a very specific definition of "competitive" for purposes of this provision: a district is "competitive" if it has "a reasonable potential for the party affiliation of the district's representative to change at least once between federal decennial censuses." *Id.* § 44.3(3)(d).

II. Factual and Procedural Background

A. The Addition of a Congressional Seat

Following the 2020 census, Colorado was apportioned eight congressional seats, adding a seat to its seven-member delegation. The apportionment of an additional congressional seat was the result of Colorado's growth in population over the past decade—14.8%.[6] Much of

[6] America Counts Staff, *Colorado: 2020 Census, Colorado Among Fastest-Growing States Last Decade*, U.S. Census Bureau (Aug. 25, 2021), https://perma.cc/ST44-KHL5.

this population growth was concentrated in the area stretching from Denver north through Weld County; indeed, five of the seven highest growth counties were in or north of Denver.[7] In Weld County, the population grew by more than 30%—the second-largest increase of any county in Colorado.[8]

This population growth was fueled by substantial growth in the Latino population, which increased by 20.6%.[9] Much of the population growth was concentrated in the suburbs north of Denver. For example, in Weld County the Latino population grew by an astounding 37.4% and now comprises 29.4% of the county's total population.[10] In Adams County, the Latino population grew by 29.1% and now comprises 41.7% of the county's total population.[11]

B. Commission-Nominated Maps for Final Balloting

Throughout September, the Commission generated and received from the public various proposed maps. On September 27, 2021, the

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

Commission convened to nominate a subset of these maps to consider for final adoption. During the eight-hour meeting, each commissioner nominated three to four maps.[12] In total, 13 maps were nominated.[13] Of the 13 maps, two maps were tied for the most nominations, with eight votes apiece: (i) the Third Staff Plan Tafoya Workshop Adjusted Map (Amendment 2) ("Tafoya Amendment 2"); and (ii) the Third Staff Plan with the Coleman Amendment (the "Coleman Amendment"), which was subsequently adopted as the final plan.[14] Both maps were amended versions of the Third Staff Plan that had been created by Commission staff.

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[12] *See* Ex. 1, Hr'g Tr. 3:20–4:19, 242–245 (Sept. 27, 2021).

[13] *See* Ex. 2, Congressional Commission Polling Nominations (Sept. 27, 2021). The 13 maps nominated included the following: Third Staff Plan with Coleman Amendment ("Staff Plan 3 Coleman Amendment"), Third Staff Plan Tafoya Workshop Adjusted Map (Amendment 2) ("Tafoya Amendment 2"), P.007.Tafoya ("Headwaters Amended"), Moore Workshop Adjusted Amendment ("Moore Amendment 2"), Schell Workshop Adjusted Amendment ("Schell Moore Kelly Coleman"), the Third Staff Plan, the Preliminary Staff Plan, Staff Plan 3 Shepherd Macklin Amendment, Second Staff Plan, P.002.Moore02, Staff Plan 2 Shepherd Macklin Amendment, P.008.Shepherd Macklin ("Schuster Amended"), and Staff Plan 3 Kelly Amendment.

[14] *See id.* During the course of the meeting, four maps were removed from consideration, leaving nine maps for the final ballot. *See* Ex. 1, Hr'g Tr. 244:4–18 (Sept. 27, 2021).

Both Tafoya Amendment 2 and the Coleman Amendment situated the new District 8 in an area running from the north Denver suburbs up through Greeley, including the western part of Weld County and the borders between Weld County and Boulder and Larimer Counties.[15] However, the two maps had key differences with respect to the boundaries of District 8. Most notably, District 8 in Tafoya Amendment 2 included Longmont—a community that straddles the Weld/Boulder border and shares several interests with the other communities in District 8. The Coleman Amendment excluded Longmont from District 8 and instead included Brighton—a community in Adams County that shares significant agricultural interests with the eastern part of Adams—and a larger share of the municipality of Westminster.

During the nomination meeting, each commissioner was allotted three minutes to comment on each of the nominated maps.[16] Notably, it does not appear that there was *any* discussion of Section 44.3(4)(b) (the

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[15] *See Staff Plan 3 Tafoya Amendment 2 Interactive Map*, https://perma.cc/JRJ2-AHUF (last visited Oct. 8, 2021); *Staff Plan 3 Coleman Amendment*, https://perma.cc/445U-HXJX (last visited Oct. 8, 2021).

[16] Ex. 1, Hr'g Tr. 2:15–21 (Sept. 27, 2021).

"Minority Vote Dilution provision"). Instead, the commissioners largely focused their comments on communities of interest and competitiveness issues. For example, a number of commissioners praised Tafoya Amendment 2 for focusing on the preservation of communities of interest,[17] but several commissioners were preoccupied with its purported lack of competitiveness.[18] And no one discussed how Tafoya Amendment 2 and the Coleman Amendment—the two maps with the most nominations—compared with respect to diluting the Latino vote, despite the sizable Latino population in District 8 in each map.

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[17] *See, e.g., id.* at 41:10–15 ("What I do like about it is when we talk about being really mindful of the group and addressing communities of interest, the amendments to this map were made specifically with people in mind. So where the changes were made were deliberately made for communities of interest.").

[18] *See, e.g.*, *id.* at 24:5–11 (Schell: "[W]e're creating a new district that . . . [should be] competitive."); *id.* at 27:4–6 (Moore: "[T]his is the least competitive map that we've seen since the preliminary plans."); *id.* at 28:17–20 (Shepherd Macklin: "[L]ack of competitiveness in this map is notable for me . . . again the eighth congressional district as the new district, I would like to see more competitive as the new district."); *id.* at 31:17–19 (Leone complaining of relative reduction in competitiveness in Tafoya Amendment 2); *id.* at 32:3–5 (Kelly: adopting views of Commissioners Shepherd Macklin and Leone).

C. The Commission's Adoption of the Final Plan

Following the nominations and discussions on September 27, the Commission convened again on September 28, 2021 to vote on a final plan. Nine nominated maps, including Tafoya Amendment 2 and the Coleman Amendment, were included on the final plan ballot.[19]

Minutes before the midnight deadline, the Commission adopted the Coleman Amendment as the final plan after seven rounds of voting—six rounds by written tally, with the final, seventh round by voice vote.[20] For the first three rounds of voting, the Commission used ranked-choice voting, but abandoned that procedure in the later rounds of voting.[21] During Rounds 4–6, the following nominated maps received the most votes: the Coleman Amendment, Tafoya Amendment 2, and Schuster Amendment.[22] Following the breakdown in ranked-choice voting, arguments for and against the competing plans intensified. After Rounds

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[19] *See* CICRC, *Map Adoption Ballot* (last modified Sept. 28, 2021), https://perma.cc/Y2HU-BPUJ.

[20] *See* Ex. 3, Sept. 28, 2021 Tally Sheets; Ex. 4, Hr'g Tr. 200:1–201:5 (Sept. 28, 2021).

[21] *See* Ex. 3, Sept. 28, 2021 Tally Sheets, 1–3.

[22] *See id.* at 4–6.

3 and 4, certain commissioners again emphasized competitiveness concerns in arguing against Tafoya Amendment 2. For example, when Commissioner Coleman noted that Tafoya Amendment 2 improved community of interest considerations,[23] Commissioner Schell countered that though she otherwise "generally like[d]" Tafoya Amendment 2, it was "significantly less competitive."[24] After the fourth round of voting, when Tafoya Amendment 2 received the most votes (six), Commissioner Leone emphatically stated that he would "never" vote for Tafoya Amendment 2, because, when comparing that plan to the Coleman Amendment, he believed that Tafoya Amendment 2 would "destroy any semblance of competition in a congressional district."[25] Commissioner Leone explicitly stated that he would even vote for the non-amended Third Staff Plan—which had not received *any* nominations—before he would vote for Tafoya Amendment 2, because of his competitiveness

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[23] Ex. 4, Hr'g Tr. 100:12–14 (Sept. 28, 2021) (noting that her comments pertained to Tafoya Amendment 2); *id.* at 100:22–101:4 (explaining that portions of the communities identified "really do . . . belong together"); *id.* at 101:10–13 (noting that changes were made to Tafoya Amendment 2 as part of "our workshop for communities of interest").

[24] *Id.* at 102:12–19.

[25] *Id.* at 132:6–20.

concerns.[26] In response, Commissioner Espinoza, a supporter of Tafoya Amendment 2, noted that that map preserved communities of interest.[27] Commissioner Espinoza's response was met with a familiar refrain: Tafoya Amendment 2 should be rejected because of the "importance of competitiveness."[28]

Following this discussion, the Commission considered whether it could secure eight votes for another plan (Schuster Amended), but was unable to do so in either Round 5 or Round 6.[29] Facing an imminent midnight deadline, several commissioners acquiesced, without any further substantive discussion, and agreed to switch their votes to adopt the Coleman Amendment as the final plan.[30]

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[26] *Id.* at 132:14–20.

[27] *See id.* at 135:6–11 (explaining that Brighton, like Greeley, is a community in transition and that Brighton could be included in District 8 (the "growth district"), or District 4 ("the agricultural district")).

[28] *Id.* at 137:2–16; *see also id.* at 137:17–138:1 (noting Tafoya Amendment 2 has "not one competitive district" and that because "every single public hearing" included discussions regarding the importance of competitiveness, it was the "deciding factor").

[29] *Id.* at 160:3–161:21; *see also* Ex. 3, Sept. 28, 2021 Tally Sheets.

[30] Ex. 4, Hr'g Tr. 195:15–201:4 (Sept. 28, 2021).

Once again, throughout the six-hour discussion leading to the adoption of the Coleman Amendment as the final plan, there appears to have been *no* discussion of the Minority Vote Dilution provision. Only *after* the adoption of the Coleman Amendment did five different commissioners recite a conclusory statement that the map "was not drawn to dilute the electoral influence or the voting rights of any languages or racial minority groups" or something similar.[31]

ARGUMENT

The Commission abused its discretion in adopting the Coleman Amendment as the final plan in three ways.

First, the Commission failed to apply the constitutional bar on adopting a map that "results in . . . diluting the impact of [a] racial or language minority group's electoral influence." Had the Commission applied this provision, it would not have approved the Coleman Amendment's version of District 8, which paired a large Latino population (38% of the district) with a white majority that would be able to consistently defeat the Latino community's candidate of choice.

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[31] *Id.* at 204:6–8; *see also id.* at 205:12–14, 213:15–17, 224:22–225:2, and 226:20–22.

Second, while the Commission's decision to place the new District 8 in the fast-growing corridor between Denver and Greeley was faithful to concerns about communities of interest, the Commission abused its discretion in choosing a map that excluded Longmont, which has several shared interests with the other communities in the Denver-Greeley corridor, from District 8.

Third, the Commission abused its discretion in applying the competitiveness criteria, both by elevating it above higher priority requirements—including the absolute bar on diluting the electoral influence of a minority group—and by failing to adopt or apply a measure of competitiveness that adhered to the constitutional standard.

All three of these failures were exemplified by the Commission's adoption of the Coleman Amendment over Tafoya Amendment 2, the other heavily-supported proposal. Driven by purported competitiveness concerns—which were not actually anchored in the constitutional definition of "competitiveness"—the Commission rejected Tafoya Amendment 2 for a map that diluted the votes of Latinos and did less to preserve communities of interest in District 8.

I. The Commission Abused Its Discretion By Failing to Apply the Minority Vote Dilution Provision and By Adopting a

Map That Had the Effect of Diluting Latino Electoral Influence.

The Commission abused its discretion by (i) failing to apply the Minority Vote Dilution provision in any way, other than erroneously suggesting that the provision may be a mere restatement of the federal VRA, and (ii) failing to consider whether or how the boundaries that it chose for District 8 would dilute the electoral influence of the Latino community.

A. The Commission Did Not Attempt to Apply Section 44.3(4)(b).

The report required to be submitted with the Commission's final map, entitled Final Congressional Redistricting Plan ("the Report"), addresses the Minority Vote Dilution provision in a single, conclusory sentence that merely recites the language of the Colorado Constitution:

> The Final Plan was not drawn for the purpose of, and does not result 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.[32]

However, the Report does not provide any rationale or analysis to support that statement.

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[32] *Final Cong. Redistricting Plan* at 14 (Oct. 1, 2021), https://perma.cc/E4CP-7PGL (last visited Oct. 8, 2021).

The Commission record likewise suggests that the Commission did not perform any meaningful analysis of whether its adoption of the Coleman Amendment would dilute the electoral influence of any minority group—including the Latino community that comprises 21.9% of the state's population.[33]

After nearly three months of Commission meetings and a mere two weeks before the final vote, Commission staff stated that it had not received "direction from the [C]ommission on how to interpret[, or] how the [C]ommission would like [staff] to interpret" the Minority Vote Dilution provision.[34] Staff also conceded that it was "actually not certain exactly what the meaning of that provision is going to be" and suggested that "[i]t may ultimately be up to the Colorado Supreme Court to tell us what the meaning of that provision is."[35]

And nothing in the Commission's deliberations on the final plan suggest that the uncertainty was ever addressed or clarified. As explained above, the issue was not discussed during the last two

[33] America Counts Staff, *supra* note 6.

[34] Ex. 5, Hr'g Tr. 4:14–17 (Sept. 16, 2021).

[35] *Id.* at 3:5–21.

meetings before the final vote, despite more than ten hours of Commission deliberations on the nominated maps. Only after the Coleman Amendment was approved, did several commissioners make conclusory statements about the Commission's purported compliance with the Minority Vote Dilution provision. None, however, provide any support or explanation for their boilerplate recitations.

Regardless of whether the Commission was uncertain about the meaning of the Minority Vote Dilution provision or simply unwilling to discuss it in its 10 hours of deliberation, the Commission clearly abused its discretion by failing to apply the provision.

B. To the Extent the Commission Interpreted the Minority Vote Dilution Provision as a Restatement of the VRA, It Abused Its Discretion.

Unsure of how to interpret the Minority Vote Dilution provision, the Commission and its staff appeared to address that issue only to the extent that the provision could be interpreted as a mere restatement of certain requirements under the federal VRA. Each of the staff memoranda accompanying the three staff plans includes, under the heading, "Diluting a racial or language minority group's electoral influence," the following statement:

> To the extent that section 44.4(4)(b) [sic] is a restatement of the federal Voting Rights Act, nonpartisan staff does not believe that there is an area in Colorado with sufficient citizen voting age minority population to form a majority-minority congressional district.[36]

Thus, the Commission and its staff only considered the possibility that the Minority Vote Dilution provision mirrored the federal VRA in requiring the drawing of a majority-minority district where there is a sufficient minority voting population to create such a district. But that interpretation is wrong in two respects.

First, it reads the requirements of the VRA too narrowly. It is true that the VRA requires the creation of majority-minority districts in which a minority group's members constitute a numerical majority of the voting population—*in certain circumstances*, where doing so is necessary to allow the minority group to elect their candidate of choice. But map-drawers may also comply with the VRA by creating districts in which minority groups have the ability to elect their preferred candidate districts even when they do not meet a strict 50 percent minority vote population threshold. *See Bartlett v. Strickland*, 556 U.S. 1, 23 (2009)

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[36] *See, e.g.*, Colo. Indep. Redistricting Comm'ns Staff, *Third Congressional Staff Plan Memorandum* at 3 (Sept. 23, 2021) https://perma.cc/H7SN-US93.

(Section 2 "allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts").

Second, even if the Commission's characterization of the VRA were accurate, the structure and text of Amendment Y make clear that the Colorado provision is not a mere "restatement" of that federal requirement. Its protection is broader, creating an affirmative obligation not to dilute the *electoral influence* of a minority group.

As an initial matter, the structure of Amendment Y demonstrates that the Minority Vote Dilution provision goes beyond the requirements of the VRA. The first subdivision of Section 44.3 addresses federal law and includes the requirement that the Commission's plan "[c]omply with the federal 'Voting Rights Act of 1965.'" Colo. Const. art. V, § 44.3(1)(b). The Minority Vote Dilution provision is contained in a separate subdivision—Section 44.3(4)(b)—that addresses both partisan gerrymandering and the "electoral influence" of minority groups. Colo. Const. art. V, §§ 44.3(4). Thus, Section 44.3(4)(b) is unequivocally intended to go beyond federal law: it would be rendered superfluous if it were read merely as a "restatement" of the VRA, which is already

contained in a different subdivision of Amendment Y. *See Dep't of Revenue v. Agilent Techs., Inc.*, 2019 CO 41, ¶ 16, 441 P.3d 1012, 1016 (2019) ("We must avoid constructions that would render any words or phrases superfluous or that would lead to illogical or absurd results.").

Moreover, the actual text of the Minority Vote Dilution provision confirms that it extends beyond the narrow VRA requirement that the staff referenced in its memoranda. Although Section 2 of the VRA bars voting procedures that deny a minority group an equal "opportunity" to "elect a candidate of their choice," *see* 52 U.S.C. § 10301, it does not include the broader prohibition against "diluting the influence of [a minority group's] electoral impact," Colo. Const. art. V, § 44.3(4)(b).

C. The Commission's Adoption of the Final Plan Violated the Minority Vote Dilution Provision By Diluting the Electoral Impact of the Latino Community.

The ban on dilution of electoral influence 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. Courts have recognized various ways in which a minority group may retain electoral influence. Some courts have defined influence districts as districts where minority voters have the ability to elect a

candidate of choice with the support of voters outside the protected group, including those in the majority.[37] Others have defined influence districts as districts where minority voters can affect the political positions of the person who is elected,[38] or exert some power over which candidate is elected, even if the candidate elected is not the protected group's top choice.[39]

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[37] *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (describing "influence-dilution claim" as one in which "[B]lack voters have been deprived of . . . the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority") (emphasis in original); *Rodriguez v. Harris Cnty., Tex.*, 964 F. Supp. 2d 686, 707 (S.D. Tex. 2013), *aff'd sub nom. Gonzalez v. Harris Cnty., Tex.*, 601 F. App'x 255 (5th Cir. 2015) ("[A]n influence district is a district in which members of a minority group (i.e. Latinos) are a minority of the voters, but the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority.") (quotation marks omitted); *Metts v. Almond*, 217 F. Supp. 2d 252, 260 (D.R.I. 2002) (vacated).

[38] *See Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) ("In assessing the comparative weight of these influence districts, it is important to consider the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account.") (quotation marks omitted); *Session v. Perry*, 298 F. Supp. 2d 451, 479 (E.D. Tex. 2004) (vacated) ("The elected representatives in influence districts, as a result of the influence of minority voting, take minority interests into account.").

[39] *See Barnett v. City of Chicago*, 141 F.3d 699, 703 (7th Cir. 1998) (recognizing an influence district as one "in which a minority group has

To be sure, the text of the Minority Vote Dilution provision does not command the Commission to undertake a strict, formulaic inquiry when measuring influence dilution. Rather, as with the VRA, the Commission must employ a holistic assessment, "mak[ing] a searching evaluation of the degree of influence exercisable by the minority, consistent with the political realities, past and present."[40] That evaluation requires an analysis of the totality of the circumstances regarding minority voting influence, including such critical factors as whether racially polarized voting in the proposed districts blunts the ability of a large minority group to exercise electoral influence.[41] However this vote dilution analysis may apply under various factual scenarios, at a minimum, it should bar the Commission from choosing a final plan that dilutes the electoral impact of the Latino community relative to the equally viable versions of District 8 that were before the Commission. Yet that is precisely what the Commission did.

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enough political heft to exert significant influence on the choice of candidate though not enough to determine that choice").

[40] *Uno v. City of Holyoke*, 72 F.3d 973, 991 (1st Cir. 1995).

[41] *See Thornburg v. Gingles*, 478 U.S. 30, 37 (1986).

The Commission correctly elected to place the new District 8 in the fast-growing corridor stretching from the northern Denver suburbs through the western portion of Weld County and up through Greeley. As the record reflects, a significant factor in this decision was a recognition of the shared interests among the heavily Latino and immigrant communities in this fast-growing area.[42] Indeed, in all of the nominated maps considered by the Commission, the Latino population in District 8 was somewhere between 30 and 40%—higher than in any other proposed congressional district in the state.[43]

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[42] *See* Section II(B), *infra*.

[43] *See* Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report, Headwaters Tafoya P.007*, https://perma.cc/DW4P-7MWN (Updated Sept. 24, 2021); Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report Staff Plan 3 Coleman Amendment* (Sept. 25,, 2021), https://perma.cc/A2SL-N6UJ; Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report, Staff Plan 3 Tafoya Amendment 2* (Sept. 26, 2021), https://perma.cc/8CCU-C7YN; Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report, Staff Plan 3 Moore Amendment 2*, https://perma.cc/3W4X-ZVLB (last visited Oct. 8, 2021); Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report, Schell amendment to Moore amendment - 092521* (Sept. 26, 2021),, https://perma.cc/842C-D2QR; Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report, Third Congressional Staff Plan* (Sept. 23, 2021),, https://perma.cc/Q36R-A7C4; Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report, Second Congressional Staff Plan* (Sept. 15, 2021), https://perma.cc/LU9H-W7Z2; Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report,*

But having decided to create the new District 8 on the strength of Latino population growth in the Denver-to-Greeley corridor, the Commission then drew the boundaries of District 8 without even considering how that would affect this substantial Latino population's "electoral influence," as Section 44.3(4)(b) requires. Had the Commission considered this constitutional requirement, it would have been clear that the Coleman Amendment, in comparison to other well-supported maps that were nominated—in particular, Tafoya Amendment 2, which received an equal number of nominations and substantial support in the voting process—diluted Latinos' electoral influence by placing them in a district with white voters who were more likely to vote against the Latino community's candidate of choice. This dilution of electoral influence is demonstrated in the attached analysis by voting rights expert, Professor Christian Grose.[44]

Staff Plan 2 Shepherd Macklin Amendments (Sept. 22, 2021), https://perma.cc/8G2K-EZR2; Colo. Indep. Redistricting Comm'ns Staff, *Population Summary Report, P.008 Shepherd Macklin – Schuster* (Sept. 25, 2021), https://perma.cc/E7RC-XB8T.

[44] *See* Ex. 6, Grose Report.

To analyze the potential for crossover white voters to support a Latino candidate of choice under both the Coleman Amendment's version of District 8 and the alternative versions that the Commission considered, Professor Grose reviewed how these potential districts voted when a Latino candidate was on the ballot in the 2014 lieutenant governor election.[45] His analysis shows that the white crossover vote (*i.e.*, white voters who cross over to support the minority group's candidate of choice) in the Coleman Amendment's District 8 would be insufficient to elect the Latino candidate of choice.[46] However, under alternative versions of District 8 considered by the Commission—including Tafoya Amendment 2, which received substantial support during final deliberations—there would be sufficient white crossover support to provide the Latino candidate of choice with a winning margin.[47]

[45] *Id.*, Part V.

[46] *Id.*

[47] *Id.*

Evaluation of District 8 for Latino ability to elect across proposed maps[48]

Map/Plan	**Percent Vote received by Hickenlooper-Garcia in 2014 in district**	**Latino ability to elect improvement over Staff Plan 3 Coleman Amendment**	**Latino candidate of choice >50 percent in district?**
Staff Plan 3 Coleman Amendment	48.53%	-----	No
Tafoya Workshop Adjusted Amendment (Tafoya Amend. 2)	*50.41%*	*+1.88*	*Yes*

The difference in white crossover support between the Coleman Amendment's District 8 and the other versions of District 8 is thus critical. The Commission's decision to adopt the Coleman Amendment's District 8 makes the difference between a victory for the Latino candidate of choice and a loss.

To make such a choice in the congressional district with the highest Latino population is, by any reasonable understanding of the term, a substantial "dilution" of the Latino community's "electoral influence." *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (dilution of a

[48] *Id.*

minority group's influence may occur "by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door").

II. While the Commission's General Placement of District 8 Was Appropriate, the District 8 Boundaries in the Final Plan Failed to Preserve Communities of Interest.

Tasked with creating a new congressional district after the 2020 census, the Commission appropriately situated District 8 along the corridor stretching from the northern Denver suburbs in Adams County and portions of Boulder County to the City of Greeley in Weld County.[49] In doing so, the Commission recognized communities of interest that had been identified through public testimony describing shared interests—including concerns related to population growth and infrastructure, the needs of a burgeoning Latino community, and threats to the environment and public health.

Yet despite this testimony, the Commission inexplicably excluded the City of Longmont from District 8. The record is clear that while the Commission was presented with at least one map that would have

[49] *See Final Cong. Redistricting Plan*, *supra* note 32 at 5, 9–10.

preserved the communities of interest that tie Longmont to District 8 (Tafoya Amendment 2), it ultimately rejected that map because of competitiveness concerns—despite the fact that Section 44.3 clearly prioritizes the preservation of communities of interest over maximizing the number of politically competitive districts. By excluding Longmont from the communities of interest that define District 8, the Commission abused its discretion in applying the criteria of Section 44.3. *Id.* § 44.5(3).

A. The Communities of Interest Criterion

Prior to 2018, communities of interest in Colorado were limited to "distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status, or trade." *Carstens v. Lamm*, 543 F. Supp. 68, 91 (D. Colo. 1982). However, in approving the 2018 ballot initiative, Colorado voters significantly elaborated on the definition of communities of interest.

Specifically, voters amended article V, Section 44 of the Colorado Constitution to further define "community of interest" and list what should be considered in evaluating this criterion, including "any group . . . that shares one or more substantial interests that may be the subject

of federal legislative action." Colo. Const. art. V, § 44(3)(b). These interests may include shared public concerns "such as education, employment, environment, public health, transportation, water needs and supplies, and issues of demonstrable regional significance." *Id.* In addition, "racial, ethnic, and language minority groups, subject to . . . protect[ions] against the denial or abridgement of the right to vote" may also comprise communities of interest. *Id.*

Even prior to the passage of Amendment Y in 2018, Colorado courts prioritized the preservation of communities of interest in the congressional redistricting context, with the Denver District Court declaring in 2011 that "[o]f the discretionary factors specifically listed in the statute, the Court finds that no factor is more important than a district's communities of interest." *Moreno v. Gessler*, No. 11-CV-3461, 2011 WL 8614878, at *21 (Colo. Dist. Ct. Nov. 10, 2011).[50] Moreover, in upholding the *Moreno* district court's plan, this Court confirmed the

[50] At the time of the *Moreno* decision, preservation of communities of interest was a discretionary factor for courts to consider in evaluating whether congressional districts were constitutional, with guidance set forth in C.R.S. § 2-1-102 (repealed 2020). Amendment Y established preservation of communities of interest as a mandatory criterion under the Colorado Constitution.

primary importance of communities of interest, commending the district court for "placing its concern for present communities of interest above a mechanistic attempt to minimize the disruption of existing district boundaries." *Hall v. Moreno*, 2012 CO 14, ¶ 112, 270 P.3d 961, 985(Colo. 2012). This Court explained that "the preservation of communities of interest[] stems directly from the underlying purpose of maximizing fair and effective representation," and that "[b]y grouping like-minded and similarly situated populations, this factor seeks to create cohesive districts that are organized around similar ethnic, cultural, economic, trade area, geographic, and demographic factors." *Id.* ¶ 46, 270 P.3d at 971 (citations omitted).[51]

B. The Commission's Decision to Place District 8 in the Corridor Stretching From the North Denver Suburbs to Greeley Was Sound.

The Commission's placement of District 8 in the Denver-to-Greeley corridor was an appropriate response to public comments identifying multiple communities of interest in this fast-growing and diverse region

[51] *See also* Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 465–67 (1997) (observing that the organization of districts around communities of interest is intended to ensure that "the diversity of interests among the population is reflected in the legislature").

of the state, with shared concerns related to infrastructure, transportation, the rights and needs of the Latino community, and energy and environmental policy.

When the Commission staff members presented their preliminary plan on June 23, 2021, they included a proposed District 8 encompassing the growing suburban cities north of Denver, explaining that they had received numerous public comments advocating for a congressional district along the I-25 corridor based on the preservation of communities of interest.[52] As the staff reported:

> These comments note shared services and resources, such as health care, fire districts, entertainment and shopping, and transportation. One comment discussed the need to address aging oil and gas facilities in this area. Others discussed the high growth in the area and the need to address regional concerns resulting from this growth, including water and air quality, infrastructure, and broadband connectivity.[53]

The staff also reported receiving numerous public comments expressing a desire to create a cross-county Latino-influence district in this region and noting that these fast-growing and diverse suburbs have

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[52] *See* Colo. Indep. Redistricting Comm'ns Staff, *Review of Communities of Interest in Submitted Public Comments Memorandum* 17 (June 23, 2021) https://perma.cc/5PUV-8QVB.

[53] *Id.*

more in common with each other than with the more rural, white parts of their own counties.[54] This proposal was also endorsed by the Colorado Hispanic Chamber of Commerce, which stated that the "north metro areas are home to a vibrant and growing Hispanic community with common interests who deserve representation at the federal level."[55]

Following the staff's Preliminary Plan, each of the three official staff plans and all nine of the proposed maps nominated for final consideration drew the new District 8 in this same corridor.

C. The Commission's Decision to Exclude Longmont From District 8 Was an Abuse of Discretion.

Although the general placement of District 8 helps to preserve communities of interest among the rapidly growing communities of Western Adams, Eastern Boulder and Western Weld Counties, the

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[54] *See id.* ("The commissions also received comments about Greeley's diverse ethnic makeup with many immigrants and refugees, as well as its rapid growth. . . . Some comments noted the growing Latino population in Greeley and suggested grouping it with cities in the northern Denver Metro . . . to create a district with a large Latino population.").

[55] *See* Colorado Hispanic Chamber of Commerce ("COHCC"), *A Great 8 for a Great State* (video comment) at 5:56, https://perma.cc/VUE3-LJXE. COHCC also identified additional communities of interest in the north metro area based on shared concerns regarding clean air, safe water supplies, and transportation along the I-25 corridor. *See id.* at 6:16.

exclusion of Longmont in the Coleman Amendment cannot be squared with the public testimony that explicitly included Longmont alongside those communities. Indeed, the shared interests and concerns that unite many of the District 8 communities apply just as strongly to Longmont, and even more so than to other communities within the district. These interests include shared concerns about infrastructure, transportation, and access to resources for a rapidly growing suburban population, *see* Colo. Const. art. V, § 44.3(b)(II)(A), concerns and needs of a large Latino community, *id.* § 44.3(b)(III), and public policy concerns regarding the environmental and public health impacts of oil and gas production, *id.* § 44.3(b)(II)(B).

Numerous members of the public described the similar challenges presented by rapid population growth and suburban development in Longmont, Greeley, and other cities within District 8. As one resident noted:

> [Longmont, Greeley and Commerce City] are going through similar growth expansions. Leadership in these areas are faced with many of the same issues. How do we grow in an inclusive and intentional way? One that is fiscally responsible

> and meets the needs of current and future residents. And how do we make this growth sustainable.[56]

Clearly, these communities' shared public policy concerns related to their status as rapidly growing and interconnected suburbs qualify them as a community of interest for purposes of Section 44.3. *See* Colo. Const. art. V, § 44(3)(b)(II)(A).

The similar growth patterns of Longmont and its fellow communities along the northern I-25 corridor have also given rise to related shared public policy concerns about transportation. *See id.* § 44(3)(b)(II)(B). This transportation corridor was repeatedly described as a community of interest by members of the public concerned about long-term planning and access to resources.[57] As one resident explained, the communities along this corridor "have similar transportation needs" in that many of their residents use I-25 to commute to jobs in other cities,

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[56] *See* Colo. Indep. Redistricting Comm'ns, *Public Comment, Cassie Ratliff Comment* (June 11, 2021), https://perma.cc/7JAA-CX7C.

[57] *See, e.g.*, *id.*, Colo. Indep. Redistricting Comm'ns, *Public Comment, Martin Spann Comment* (June 13, 2021), https://perma.cc/Z288-3XYC; Colo. Indep. Redistricting Comm'ns, *Public Comment, Kathy Partridge Comment* (Sept. 22, 2021), https://perma.cc/9H9S-ZK62; Colo. Indep. Redistricting Comm'ns, *Public Comment, Faith Halverson-Ramos Comment* (Aug. 24, 2021), https://perma.cc/QZ4L-MQEX.

and therefore it "would be valuable for these communities located in parts of Larimer and Weld counties to be grouped together with Longmont as a Congressional District."[58] As commentator Martin Spann stated, "The citizens of the Northern I-25 corridor are my community," and this community would benefit from more coordinated, long-term transportation planning to reduce traffic.[59]

Indeed, Colorado courts have found that the shared public policy concerns of communities centered around a transportation corridor can constitute a community of interest for purposes of redistricting. For example, in *Avalos v. Davidson*, the Colorado District Court found a "logical connection" between the Denver suburbs and Eagle, Summit and Grant Counties because of their shared concerns regarding "extreme" congestion on I-70. No. 01-CV-2897, 2002 WL 1895406, at *5 (Colo. Dist. Ct. Jan. 25, 2002), *aff'd sub nom. Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). The court explained: "Any improvements of this necessary highway in large part come from federal aid. For this reason, among

[58] *Faith Halverson-Ramos Comment*, *supra* note 57.

[59] *Martin Spann Comment*, *supra* note 57.

others, it appears wise to have the counties burdened by the heavy I-70 traffic to be in the same congressional district." *Id.*[60]

Similarly, several commentators identified shared concerns regarding affordable housing among residents of Longmont and other rapidly growing suburbs of the "Northern Range."[61] The population growth of these communities requires the development of new and affordable housing options for young families and first-time home buyers.[62] Otherwise, as one resident noted, the lack of affordable housing in the suburban centers will cause residents to look for more affordable options further east, thereby exacerbating the transportation problems of the surrounding communities.[63] As another resident explained, the housing development required by population growth in turn requires infrastructure development across surrounding communities, the costs of

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[60] The *Avalos* court rejected a map that joined Pueblo with Colorado Springs in part because of an asserted community of interest around the I-25 corridor, but that was because the court found that they did not have any other similarities or shared interests. *See Avalos*, 2002 WL 1895406, at *11. That is not the case with Longmont and the District 8 communities along the I-25 corridor, as explained above.

[61] *See Cassie Ratliff Comment*, *supra* note 56.

[62] *See id.*

[63] *See Faith Halverson-Ramos Comment*, *supra* note 57.

which ultimately must be borne by residents through higher property taxes.[64]

Relatedly, the rapid growth and transition from industrial-to-residential land use of Longmont and the communities of District 8 have given rise to shared public policy concerns regarding public health and the environment. *See* Colo. Const. art. V, § 44.3(b)(II)(B). Multiple commentators, including residents and community organizations, expressed concern about the potentially hazardous impacts of oil and gas development in Western Weld and Eastern Boulder Counties, including Longmont.[65] In fact, a coalition of community organizations from Adams and Weld Counties *and Longmont* submitted a joint letter to the Commission requesting that they be included together in District 8 "to ensure our communities have a voice at the Federal level that will understand the challenges and needs of those impacted by fracking and

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[64] *See Cassie Ratliff Comment*, *supra note* 56.

[65] *See, e.g.*, *Faith Halverson-Ramos Comment*, *supra* note 57 (noting that although Longmont voted to ban fracking, the air quality is still affected by wells in surrounding areas); *Kathy Partridge Comment*, *supra* note 57; Colo. Indep. Redistricting Comm'ns, *Public Comment, Tannis Bator Comment* (Aug. 18, 2021), https://perma.cc/F38Y-3PZ5 ("Gas and oil have dominated the landscape for too long [in these communities].").

oil and gas development in our region."[66] These community groups cited specific local organizing efforts to push for stronger regulations of fossil fuel development, including in Longmont, and strongly advocated for the Commission to consider "our community of interest around fracking and oil and gas development . . . during this redistricting process."[67]

As the community groups' letter correctly noted, the fact that these communities share substantial interests "that may be the subject of federal legislative action"—namely, environmental and energy regulations—qualifies them as a community of interest under Section 44.3(2)(a). And Colorado courts have repeatedly recognized communities of interest based in shared concerns about environmental and natural resources issues. *See, e.g.*, *Carstens*, 543 F. Supp. at 96–97 (noting the

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[66] Ex. 7, Letter from The League of Oil and Gas Impacted Coloradans, Statewide, et al. (June 14, 2021). *See also id.* at 3–4 (signed by The Longmont Climate Coalition, a resident of Longmont, and a former State House Representative from Longmont, among others).

[67] *Id.* at 2. *See also* COHCC, *A Great 8 for a Great State*, *supra* note 55 at 5:11 ("Cities like Greeley and Longmont aren't just the fastest-growing mid-sized cities in the state, they're some of the fastest growing cities in the country. This rapid, continuing growth in this region has galvanized communities of interest around potential legislation regarding the intersection of oil and gas development with neighborhoods and schools in these communities.").

shared water, energy and environmental concerns of communities on the Western Slope); *Avalos*, 2002 WL 1895406, at *4 (recognizing a community of interest in District 2 based on shared concerns about surface contamination and other environmental problems related to the Rocky Flats nuclear weapons manufacturing complex).

Finally, in excluding Longmont from District 8, the Commission failed to preserve the significant community of interest based on the shared concerns of the growing Latino community in this region. As commentators noted, this community has common public policy concerns that transcend county boundaries.[68] Among these are concerns about access to federal resources, including Title I funding for quality education[69] and resources for small businesses struggling to recover from the COVID-19 pandemic.[70] Relatedly, one commentator described

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[68] *See, e.g.*, *Tannis Bator Comment*, *supra* note 65 ("The interests of the Hispanic community have long been ignored in the 4th Congressional District. . . . These communities need to have representation, and Greeley has more in common with Longmont, Niwot, and Adams County than it does with eastern Colorado.").

[69] *See, e.g.*, *id.*; *Kathy Partridge Comment*, *supra* note 57.

[70] *See, e.g.*, Colo. Indep. Redistricting Comm'ns, *Public Comment, Cristobal Garcia Comment* (Sept. 27, 2021), https://perma.cc/TJ37-JVL;

extensive community organizing efforts across the Latino community in Longmont and other District 8 cities to inform the community about the COVID-19 vaccine and to advocate for resources to access it.[71] This coordinated effort is particularly notable as evidence of a community of interest, given the relatively low vaccination rates and disproportionate impact that COVID-19 has had on the Latino community in this region.[72] Likewise, commentators described the shared interests of the Latino community in Longmont and District 8 regarding the impact of existing

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Colo. Indep. Redistricting Comm'ns, *Public Comment, Nancy Madrigal* Comment (June 11, 2021), https://perma.cc/7EBZ-NMWU.

[71] *See Cristobal Garcia Comment*, *supra* note 70 (referring to efforts in Longmont, Evans, Greeley, Commerce City, and Thornton).

[72] *See, e.g.*, John Daley, *Futbol, Flags and Fun: Getting Creative to Reach Unvaccinated Latinos in Colorado*, NPR.org (July 10, 2021, 10:38 AM), https://perma.cc/GX3S-RDH5 (noting that "perhaps no group has been harder to get vaccinated than Coloradans who identify as Hispanic" and that Latino residents represent a disproportionate share of COVID-19 cases and hospitalizations); Meg Wingerter, *Colorado's Latinos, Asian Americans Saw Greatest Increase in Death Rates in 2020, Mostly from COVID-19*, Denver Post (May 30, 2021, 6:00 AM), https://perma.cc/2WHP-2VCU ("Latinos are more likely than white Coloradans to work frontline jobs, rely on public transit and live in crowded housing, which increases the odds a working-age person will pass the virus to more vulnerable relatives.").

and proposed federal legislation on subjects including immigration, transportation, and environmental justice.[73]

Thus, the record clearly shows that the Latino communities in Longmont and District 8 qualify as a single community of interest under Section 44(3)(b)(III) due to their status as a racial, ethnic and/or language minority group, and that they likewise qualify under Section 44(3)(b)(I) because they share "substantial interests that may be the subject of federal legislative action" pursuant to Section 44(3)(b)(I). Accordingly, the Commission was obligated to preserve this community (and the others identified above) "as much as is reasonably possible." Colo. Const. art. V, § 44.3(2)(a).

III. The Commission Abused Its Discretion in Elevating Competitiveness Over the Prevention of Minority Vote Dilution and the Preservation of Communities of Interest and Failing to Apply a Standard of Competitiveness That Complied with the Constitutional Definition.

Although the Coleman Amendment was inferior to other alternatives before the Commission—in particular, Tafoya Amendment

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[73] *See Nancy Madrigal Comment*, *supra* note 70 ("Immigration is another significant issue that we share in the Latino community, and we need a voice at the Federal level who can have substantial relationships and expertise with the agencies and policy areas that overlap and affect immigration issues."); *Cristobal Garcia Comment*, *supra* note 70.

2—with respect to both preventing minority vote dilution and preserving communities of interest, it was nonetheless adopted by the Commission because of purported concerns about competitiveness. This was an abuse of discretion for two reasons.

First, Amendment Y makes clear that political competitiveness is a lower-priority criterion, to be considered only *after* prioritizing communities of interest and without diluting the votes of minority communities. Section 44.3(2) provides that the Commission, after ensuring compliance with federal requirements, "must preserve whole communities of interest and whole political subdivisions" and ensure that districts "are as compact as possible." Colo. Const. art. V, § 44.3(2). Section 44.3(3) then states: "*Thereafter*, the commission shall, to the extent possible, maximize the number of politically competitive districts." *Id.* § 44.3(3) (emphasis added). Amendment Y thus explicitly subordinates competitiveness to the preservation of communities of interest. Likewise, the Minority Vote Dilution provision at Section 44.3(4)(b) is a general prohibition—providing that "*[n]o* map may be approved by the Commission" if it results in the dilution of minority electoral influence—that stands apart from the tiered criteria in the

remainder of Section 44.3 and constrains the application of those criteria. *See id.* § 44.3(4)(b).

Second, the commission did not actually adopt a standard for competitiveness that was consistent with the principles laid out in Amendment Y. Section 44.3(3)(a) instructs the Commission to "maximize the number of politically competitive districts"—without regard to the partisan balance among the non-competitive districts—and Section 44.3(3)(d) explicitly defines as "competitive" a district that has "a reasonable potential for the party affiliation of the district's representative to change at least once between federal decennial censuses." *Id.* § 44.3(3)(d).

However, the Commission did not adopt any particular standard or metric for analyzing whether a congressional seat had a "reasonable potential" to change parties over the course of the next decade. Instead, it simply produced reports that recounted the results of certain statewide elections from the last four years, leaving Commissioners to interpret those results however they chose in evaluating the map for "competitiveness."

Indeed, many Commissioners interpreted these results without regard for the constitutional standard. For example, Commissioner Wilkes identified two districts in the Coleman Amendment as competitive because the average electoral differential between the Republican and Democratic candidate in those districts (across the handful of elections that were considered) was less than 7%.[74] But that arbitrary numerical threshold does not actually indicate whether a seat has a reasonable potential to change parties over a 10-year period.[75] Indeed, "closeness to 50/50 isn't even a reliable indicator of the likelihood for the district to flip: one district might average a 55/45 partisan split and have mixed results across elections, while another might have the same average and yet favor the same party every time."[76] But instead of actually looking at 10 years' worth of election results to assess whether a

[74] Ex. 1, Hr'g Tr. 19:14–16 (Sept. 27, 2021).

[75] Ex. 8, Letter from Dr. Andrew Therriault to Colo. Indep. Redistricting Comm'ns at 2–3 (Aug. 3, 2021) ("[I]n practice, determining how close to 50/50 indicates a 'reasonable potential' to change parties requires the commission to decide on an arbitrary numeric cutoff, which opens the door to further complications and debate.").

[76] *Id.* at 3.

given district had switched between Democrats and Republicans, several commissioners chose arbitrary numerical averages to try.

Making things worse, the Commission did not even agree, during its final deliberations, on what numerical average should apply, sometimes choosing a number based on the map they were looking at. As Commissioner Espinoza conceded, "we never as a commission decided on a level that we would consider competitiveness."[77] While he went on to note that "generally speaking, we've been saying that if it's 10 points or less, that we would consider it within the competitive arena," there was no adherence to this threshold.[78] Indeed, Commissioner Schell suggested that "no districts less than 6.5 percent would be a concern."[79]

Several Commissioners adopted other arbitrary notions of competitiveness that were divorced from the constitutional standard. Commissioners Schell and Shepherd Macklin, in arguing against Tafoya Amendment 2, arbitrarily insisted that it was important for the new

[77] Ex. 1, Hr'g Tr. 35:6–10 (Sept. 27, 2021).

[78] *Id*. at 35:9–11.

[79] *Id*. at 24:6–9.

District 8 to be competitive.[80] Commissioner Kelly pointed to this as well, in defending the Coleman Amendment.[81] And at another point, Commissioner Schell embraced a standard of map-wide partisan balance, stating that she "cannot move forward with a map that favors one party over another by two districts."[82] But the Constitution says absolutely nothing about prioritizing the competitiveness of new district, nor does it demand specific conclusions about overall statewide partisan balance.

These are not merely abstract concerns. The Commission based its decision to adopt the Coleman Amendment over Tafoya Amendment 2 based almost entirely on competitiveness concerns. But because they did not establish or use a metric for measuring competitiveness *as defined in the constitution* the record does not actually reveal which map maximizes

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[80] *Id.* at 24:10–11 (Commissioner Schell asserting that "when we're creating a new district . . . I believe we should be able to make competitive."); *id.* at 28:18–20 (Commissioner Shepherd Mackling stating "the eighth congressional district as the new district, I would like to see more competitive as the new district.").

[81] Ex. 4, Hr'g Tr. 207:1–8 (Sept. 28, 2021) ("I think without [sic] getting a new district, and that being the most competitive district on . . . this map is a good step forward as we continue to grow in Colorado").

[82] *Id.* at 137:12–13.

the number of districts that have a reasonable potential to switch party affiliation over a 10-year period.

CONCLUSION

AOTL – Colorado respectfully requests that the Court declare that the Commission's adoption of the final plan constitutes "an abuse of discretion in applying or failing to apply the criteria listed in [article V,] section 44.3" of the Colorado Constitution, pursuant to Section 44.5(3), and return the plan to the Commission for the reasons set forth herein.

October 8, 2021

Respectfully submitted,

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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 this 8th day of October, 2021.

/s/ Marcela A. Mendoza
Marcela A. Mendoza

Counsel for All On The Line – Colorado