

SUPREME COURT OF THE STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: October 08, 2021
Original Proceeding Pursuant to Art. V, § 44.5 of the Colorado Constitution	
In re Colorado Independent Congressional Redistricting Commission	▲ COURT USE ONLY ▲
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BRIEF OF AMICUS CURIAE OBJECTING TO THE FINAL PLAN SUBMITTED BY THE CONGRESSIONAL REDISTRICTING COMMISSION ON OCTOBER 1, 2021	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28(a)(2) and 28(a)(3), C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 2,268 words (does not exceed 4,750 words).

This amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Stanley T. Matsunaka

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INTRODUCTION

William “Bill” Thiebaut, as Amicus Curiae, submits this Amicus Brief (the “Amicus Brief”) objecting to the plan that was submitted by the congressional redistricting commission (the “Commission”) on October 1, 2021 (the “Commission’s Plan”). The Commission abused its discretion in formulating the Commission’s Plan because it failed to adequately consider (1) compliance with the federal Voting Rights Act of 1965 (the “VRA”) and (2) the preservation of communities of interest. Previously, on September 9, 2021, Bill Thiebaut submitted an online comment to the Commission, proposing an alternative redistricting plan and map. Exhibit 1, September 9, 2021 Comment. The alternative redistricting plan and map submitted by Thiebaut (the “Thiebaut Plan/Map”),¹ which is attached hereto as Exhibit 2, provides for superior compliance with two of the key factors the Commission failed to consider. Accordingly, pursuant to Colo. Const. art. V, § 44.5, the Court should return the Commission’s Plan to the Commission with instructions to adopt the Thiebaut Plan/Map.

¹ In the September 9, 2021 comment, the Thiebaut Plan/Map was referred to as Thiebaut3.

INTEREST OF AMICUS CURIAE

Bill Thiebaut was an active member of the Democratic party in Colorado from 1971 to 2015. He served in the Colorado House of Representatives from Pueblo as a Democrat from 1987 to 1993. He then served as a state senator from Pueblo as a Democrat from 1993 to 2001. Since then he has held other offices and appointed positions as a Democrat, including the Colorado Legislative Reapportionment Commission of 2001. In 2017, Thiebaut was re-appointed to the Colorado Transportation Commission as an unaffiliated voter. Having dedicated his entire career to public service, Thiebaut has a paramount interest in the balance and constitutional compliance of Colorado's congressional districts.

SUMMARY OF THE ARGUMENT

The Commission abused its discretion because it failed to adequately consider two factors it was required to consider: (1) compliance with the VRA; and (2) preservation of communities of interest. The Thiebaut Plan/Map is an alternative to the Commission's Plan and is superior to the Commission's Plan in general, and specifically with regard to the two aforementioned factors the Commission failed to consider. For these reasons, this Court should return the Commission's Plan to the Commission with instructions to adopt the Thiebaut Plan/Map.

ARGUMENT

I. The Commission Abused its Discretion.

In 2018, Colorado voters passed Amendment Y to Colorado's Constitution, which established procedural and substantive rules for the Commission to set congressional district lines. Article V, Section 44.3 establishes the following criteria with which the Commission must comply when making determinations of congressional districts:

(1) In adopting a congressional redistricting plan, the commission shall:

(a) Make a good-faith effort to achieve precise mathematical population equality between districts, justifying each variance, no matter how small, as required by the constitution of the United States. Districts must be composed of contiguous geographic areas;

(b) Comply with the federal "Voting Rights Act of 1965", 52 U.S.C. sec. 50301, as amended.

(2)(a) As 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.

(b) Districts must be as compact as is reasonably possible.

(3)(a) Thereafter, the commission shall, to the extent possible, maximize the number of politically competitive districts.

(b) In its hearings in various locations in the state, the commission shall solicit evidence relevant to competitiveness of elections in Colorado and shall assess such evidence in evaluating proposed maps.

(c) When the commission approves a plan, or when nonpartisan staff submits a plan in the absence of the commission's approval of a plan as provided in section 44.4 of this article V, the nonpartisan staff shall, within seventy-two hours of such action, make publicly available, and include in the commission's record, a report to demonstrate how the plan reflects the evidence presented to, and the findings concerning, the extent to which competitiveness in district elections is fostered consistent with the other criteria set forth in this section.

(d) For purposes of this subsection (3), “competitive” means having a reasonable potential for the party affiliation of the district's representative to change at least once between federal decennial censuses. Competitiveness may be measured by 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.

(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, Section 44.3.

Pursuant to Colo. Const. art. V, § 44.5(2), the Supreme Court can reject the Commission's plan if it finds the Commission or nonpartisan staff "abused its discretion in applying or failing to apply the criteria listed in section 44.3 of [] article V, in light of the record before the commission." This subsection further states that "[t]he supreme court may consider any maps submitted to the commission in assessing whether the commission or nonpartisan staff, in the case of a staff plan submitted in the absence of a commission-approved plan, abused its discretion." *Id.* Finally, subsection (3) provides that "[i]f the supreme court determines that the submitted plan constitutes an abuse of discretion in applying or failing to apply the criteria listed in section 44.3 of this article V, in light of the record before the commission, the supreme court shall return the plan to the commission with the court's reasons for disapproval." Colo. Const. art. V, § 44.5(3).

Here, the Commission abused its discretion by failing to adequately consider (1) compliance with the VRA and (2) preservation of communities of interest.

A. The Commission Failed to Adequately Consider the VRA.

This Court has on prior occasions explained how a redistricting scheme should comply with the VRA. *See Hall v. Moreno*, 270 P.3d 961, 969 (Colo. 2012); *In re Colorado Gen. Assembly*, 828 P.2d 185 (Colo. 1992). The Court has explained that a “redistricting scheme must comply with the federal Voting Rights Act of 1965,” which “prohibits any and all race-based discrimination, including the adoption of districts that result in race-based voter dilution.” *Id.* at 969. Accordingly, to comply with the VRA, the Commission was required to consider whether and to what extent the Commission’s Plan would result in race-based voter dilution.

Ignoring this requirement, the Commission gave short shrift to the VRA. The Commission merely stated that “there is not a sufficiently large and geographically compact voting-age minority population to create a majority-minority congressional district that complies with the other requirements of Section 2 of the VRA, as interpreted by the United States Supreme Court.” *See* Final Congressional Redistricting Plan, pp. 10-11. The Commission further stated that it “did not receive any public comments that suggested otherwise.” *Id.* The Commission’s approach constitutes an abuse of discretion because the Commission simply threw up its hands and ignored the VRA after it decided that the creation of

a majority-minority district was impossible, rather than considering how minority votes may be diluted by the Commission's Plan.

B. The Commission Failed to Adequately Consider the Factor of Preservation of Communities of Interest.

This Court has explained that “the preservation of communities of interest[] stems directly from the underlying purpose of maximizing fair and effective representation.” *Hall*, 270 P.3d at 971 (quoting *Carstens v. Lamm*, 543 F. Supp. 68, 91 (D. Colo. 1982) (“We are convinced that a plan which provides fair and effective representation for the people of Colorado must identify and respect the most important communities of interest within the state.”)). This Court has further explained 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” and that “formulating a plan without any such consideration would constitute a wholly arbitrary and capricious exercise.” *Id.* at 971 (internal quotations omitted).

Similar to its treatment of the VRA, the Commission all but ignored the factor of preservation of communities of interest. Indeed, the Commission specifically determined that it was impossible to explain how it considered this factor, instead offering the following cop-out:

The Commissioners gathered information about communities of interest at over 40 public hearings and from more than 5,000 public comments. That public input described many different communities of interest around the state. ***While it was impossible to keep all of those communities intact, this public input informed the Commissioner's decisions and played a central role in the creation and approval of the final plan.***

Final Congressional Redistricting Plan, pp. 11-12 (emphasis added). Thus, instead of carefully considering this factor and explaining how it played into the Commission's Plan, the Commission apparently expects Colorado's voters and this Court to simply accept the Commission's conclusory statement that it did, in fact, consider the preservation of communities of interest.

The Commission abused its discretion by failing to explain how the preservation of communities of interest factored into the Commission's Plan. This Court has previously explained that a conclusory finding without adequate consideration and/or explanation constitutes an abuse of discretion. *See Pedlow v. Stamp*, 776 P.2d 382, 386 (Colo. 1989) ("The district court's conclusory award of attorney fees . . . constituted an abuse of discretion."). While the Commission was not required to specifically reference each and every comment and/or hearing on this factor, it should have articulated the key communities of interest it evaluated and sought to preserve. While compliance with Colorado's Constitution may, at

times, be inconvenient, inconvenience is no excuse for the Commission's abject failure to articulate any explanation regarding how the Commission's Plan accounts for the preservation of communities of interest.

II. The Thiebaut Plan/Map Offers the Best Redistricting Plan for Compliance with Colo. Const. art. V, § 44.3.

Contrary to the Commission's Plan, the Thiebaut Plan/Map closely follows all of the constitutional criteria set forth in Colo. Const. art. V, § 44.3. The Thiebaut Plan/Map has precise mathematical population equality, contiguity, compliance with the Voting Rights Act, identification and preservation of communities of interest, respect for political subdivisions, compactness, and competitiveness. While the Thiebaut Plan/Map strictly complies with certain clear cut factors, such as population equality and contiguity, the Thiebaut Plan/Map—unlike the Commission's Plan—provides the ideal divisions when considering the factors of compliance with the VRA and the conservation of communities of interest.

A. Compliance with the VRA.

The Thiebaut Plan/Map prevents dilution of minority voters in certain districts in compliance with Colo. Const. art. V, § 44.3(1)(b) and the VRA. In particular, with the Thiebaut Plan/Map, the opportunity minority districts include at least three districts: 1, 6 and 8. Furthermore, Hispanic voters would have large

concentrations in districts 1, 3, and 8. The preservation of minority voter concentration is critically important to ensure that minority voters have voices that are heard in the State of Colorado, and—contrary to the Commission’s Plan that fails to consider minority voter dilution—the Thiebaut Plan/Map provides the best organization of the districts to properly protect minority voice in compliance with the VRA.

B. Preservation of Communities of Interest.

Unlike the Commission’s Plan, the Thiebaut Plan/Map excels in its preservation of communities of interest in compliance with Colo Const. art. V, § 44.3(2)(a). Under the Thiebaut Plan/Map, Congressional District 2 includes Fort Collins, Boulder, Longmont, and Broomfield, preserving their community of interest related to higher education. The Thiebaut Plan/Map recognizes the agricultural economy that is distinct from the Eastern Plains. It keeps the idea of a southern district, to the extent possible, from Utah toward the Kansas border. Congressional District 4 includes Loveland and Windsor. And while it includes the eastern, rural area of Pueblo County, it also includes Crowley, Otero and Las Animas Counties. These areas link the Lower Arkansas Valley counties, which have considerable shared interests such as agriculture and water.

Congressional District 7 keeps Eagle and Summit Counties whole, representing a community of interest around the ski and tourism industries and—coupled with Jeffco and Clear Creek Counties—the heavily trafficked stretch of I-70 through the mountains. Notably, Park and Teller Counties are together as a South Park community of interest. Lake and Chaffee Counties link to the Upper Arkansas Valley as well as with other mountain resort communities, especially providing affordable housing for their workforce. Congressional District 8 includes Greeley, accounting for the fact that Hispanics represent more and more of the population with common interests.

In summary, the Thiebaut Plan/Map maximizes the preservation of communities of interest. It preserves communities with various white collar and blue collar interests, from higher education, to tourism, to agriculture and water. Given the importance of preserving communities of interest, this factor strongly supports the superiority of the Thiebaut Plan/Map.

CONCLUSION

The Court should reject the Commission's Plan because the Commission abused its discretion by failing to consider the VRA and the preservation of communities of interest. It would set a dangerous precedent if the Commission's Plan were accepted despite its perfunctory recitation of the factors in Section 44.3.

Moreover, the Thiebaut Plan/Map provides a superior alternative that excels in the two categories where the Commission's Plan fails. Accordingly, the Commission's Plan should be returned to the Commission with instructions to adopt the Thiebaut Plan/Map.

Respectfully submitted this 8th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2021, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE OBJECTING TO THE FINAL PLAN SUBMITTED BY THE CONGRESSIONAL REDISTRICTING COMMISSION ON OCTOBER 1, 2021** was served via ICCES on the following:

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/s/Margaret A. Book

Margaret A. Book

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Bill Thiebaut

Commission: congressional

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Submitted: September 09, 2021

Comment:

Commissioner Coleman and Commission members, I was pleased to hear that Thiebaut2 was discussed during your earlier proceedings. I am trying to keep abreast of your discussions today. I am offering modifications to the "Coleman Map" by way of the newest Thiebaut map entitled "Thiebaut3," which is linked below. Of course, Thiebaut3, as all my map submissions, follow constitutional criteria. In Thiebaut3 there is precise mathematical population equality; contiguity; compliance with the Voting Rights Act; an identification of communities of interest; respect for political subdivisions; compactness; and competitiveness. Let me take a moment to touch on two of these criteria. The Voting Rights Act: The potential opportunity minority districts include at least three districts: CD 1, 6 and 8; while Hispanic opportunity occurs in CD 1, 3, and 8. Communities of Interest (all but CD 1, 5, & 6): CD 2 includes Fort Collins and Boulder given their community of interest around higher education, as well as Longmont and Broomfield. CD 3 includes Moffat, Rio Blanco and Garfield Counties. The map recognizes the agricultural economy that is distinct from the Eastern Plains. It keeps the idea of a southern district, to the extent possible, from Utah toward the Kansas border. CD 4 includes Loveland and Windsor. And while it includes the eastern, rural area of Pueblo County, it also includes Crowley, Otero and Las Animas Counties. These areas link the Lower Arkansas Valley counties, which have considerable shared interests such as agriculture and water. CD 7 keeps Eagle and Summit Counties whole representing a community of interest around the ski and tourism industries and, coupled with Jeffco and Clear Creek Counties, the heavily trafficked stretch of I-70 through the mountains. Notably, Park and Teller Counties are together as a South Park community of interest. Lake and Chaffee Counties link to the Upper Arkansas Valley as well as with other mountain resort communities, especially providing affordable housing for their workforce. CD 8 includes Greeley. It accounts for the fact that Hispanics represent more and more of the population with common interests. Thiebaut3: <https://davesredistricting.org/join/8c4c9ea6-41d3-48ff-b0ea-3bd43ed80dca>

Bill Thiebaut

Commission: congressional

Zip: 81005

Submitted: August 27, 2021

Comment:

<https://davesredistricting.org/join/b7545193-0740-4cdf-a79e-c5cf418a54a7>

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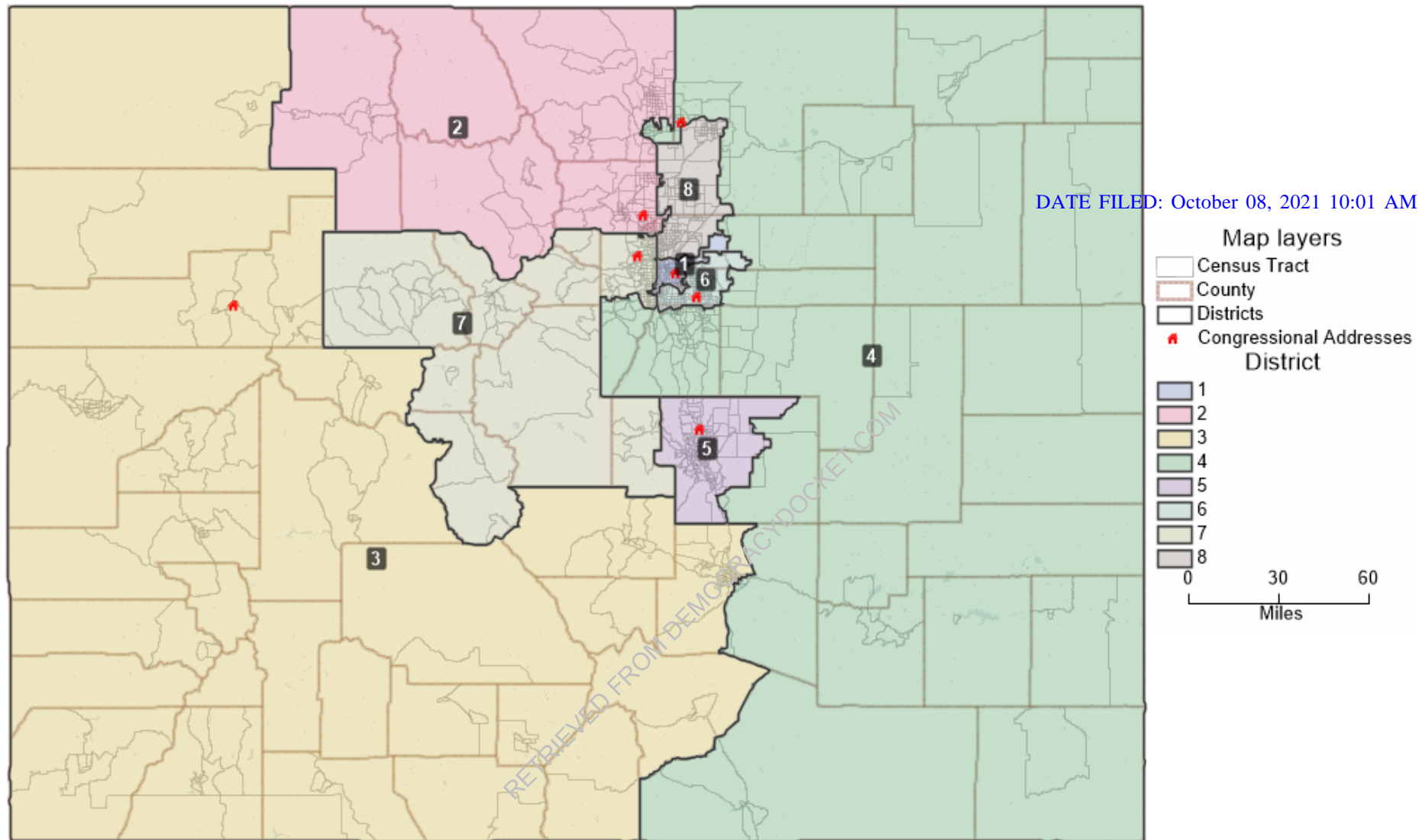
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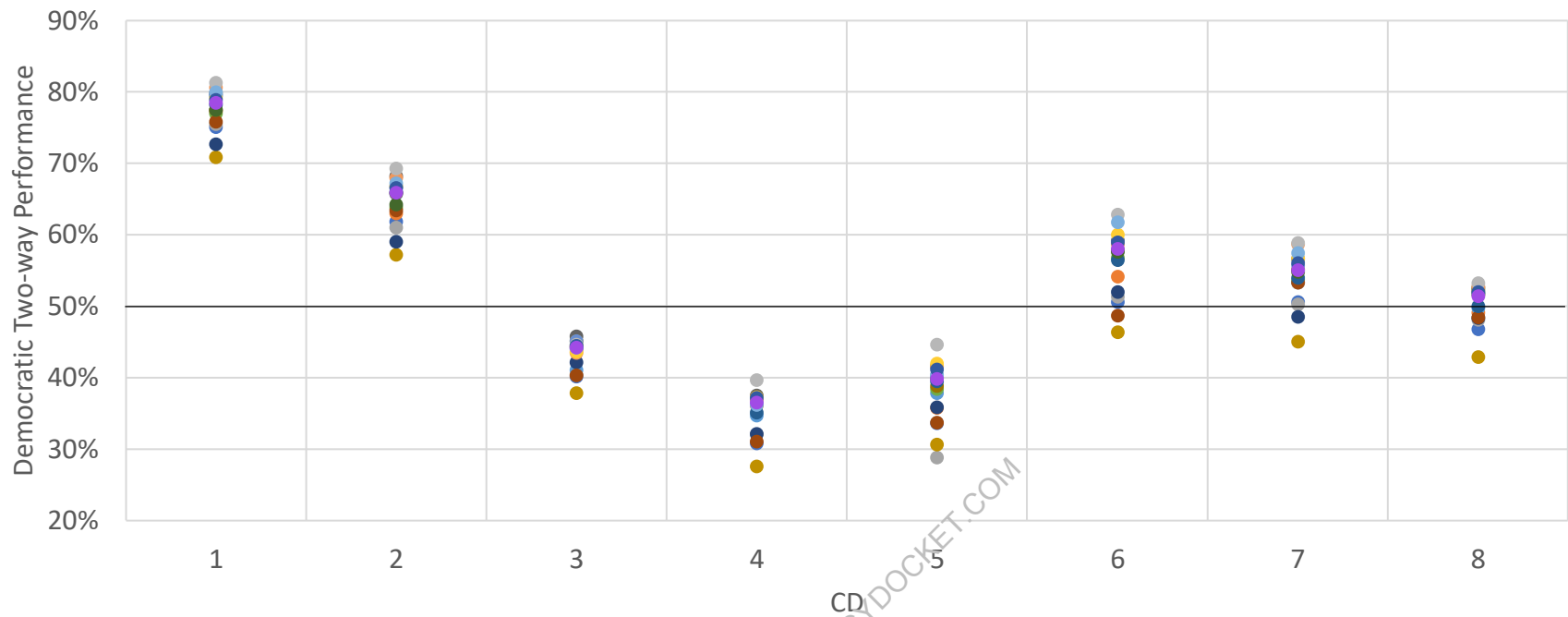
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1	721,715	1	0.09	58.8%	9.7%	24.4%	41.2%	76.1%	77.0%	78.5%	79.0%			
2	721,693	-21	0.41	78.8%	1.7%	11.4%	21.2%	62.8%	63.9%	65.9%	66.6%			
3	721,713	-1	0.40	71.5%	1.7%	21.0%	28.5%	41.6%	42.6%	44.2%	44.5%			
4	721,723	9	0.31	78.4%	2.0%	13.0%	21.6%	32.6%	34.2%	36.5%	37.2%			
5	721,714	0	0.36	69.2%	7.7%	15.4%	30.8%	34.4%	37.6%	39.8%	41.2%			
6	721,715	1	0.16	58.7%	11.9%	19.6%	41.4%	51.2%	55.0%	58.1%	59.0%			
7	721,727	13	0.25	77.1%	1.7%	14.6%	22.9%	52.4%	53.2%	55.0%	56.0%			
8	721,714	0	0.25	55.9%	2.6%	34.6%	44.1%	48.1%	50.2%	51.5%	52.1%			

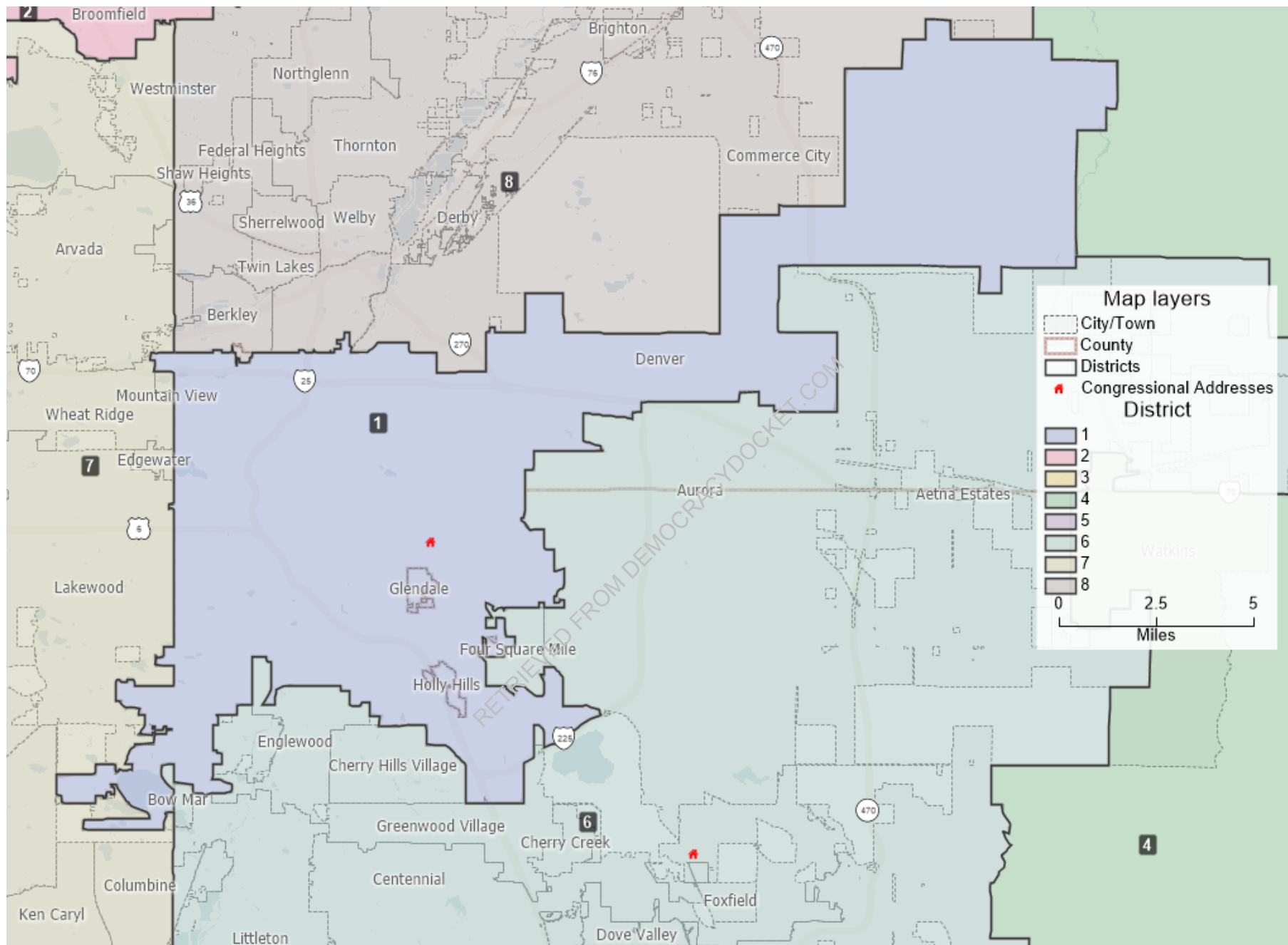
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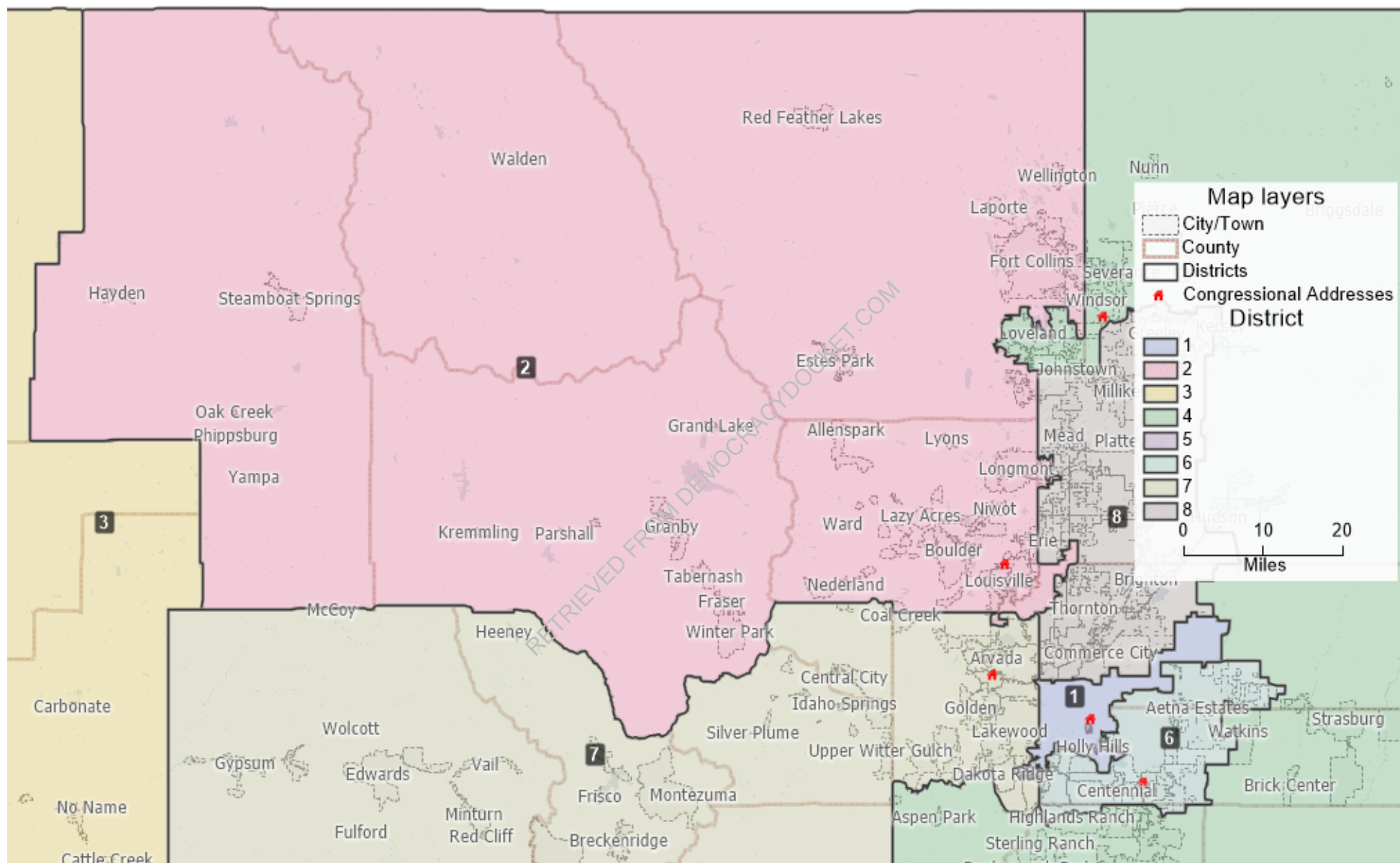
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 US SEN '16 REG '16 CONG '16 GOV '18 SOS '18
 AG '18 TRE '18 REG '18 CONG '18 PRES '20
 US SEN '20 CONG '20 DPI '22 Commission Average

CD	US SEN '14	GOV '14	SOS '14	AG '14	PRES '16	US SEN '16	REG '16	CONG '16	GOV '18	SOS '18	AG '18	TRE '18	REG '18	CONG '18	PRES '20	US SEN '20	CONG '20	DPI '22	Commission Average
1	75.1%	77.3%	75.5%	70.9%	79.5%	77.0%	72.7%	75.8%	79.8%	77.5%	78.2%	77.5%	79.6%	80.6%	81.4%	79.2%	80.0%	79.0%	78.5%
2	61.8%	63.1%	61.0%	57.2%	65.7%	63.9%	59.1%	63.4%	68.2%	65.8%	66.0%	64.3%	66.8%	68.0%	69.4%	66.8%	67.2%	66.6%	65.9%
3	40.2%	44.4%	40.4%	37.9%	41.1%	44.6%	42.2%	40.3%	45.8%	45.1%	44.1%	44.3%	45.1%	43.5%	44.7%	43.6%	44.3%	44.5%	44.2%
4	30.8%	36.1%	32.1%	27.6%	34.7%	37.2%	32.2%	31.0%	37.5%	37.3%	35.1%	36.4%	36.6%	37.0%	39.7%	37.3%	36.2%	37.2%	36.5%
5	33.6%	35.8%	28.9%	30.6%	37.9%	38.4%	35.9%	33.7%	41.6%	38.8%	39.5%	40.1%	40.4%	41.7%	44.7%	42.0%	40.4%	41.2%	39.8%
6	50.6%	54.2%	51.4%	46.4%	57.8%	56.8%	52.1%	48.7%	59.2%	57.9%	56.5%	57.7%	58.9%	58.7%	62.9%	60.1%	61.8%	59.0%	58.1%
7	50.6%	53.3%	50.3%	45.1%	53.3%	53.8%	48.5%	53.3%	56.7%	55.2%	54.0%	54.8%	55.8%	58.7%	58.9%	56.7%	57.5%	56.0%	55.0%
8	46.8%	49.1%	48.1%	43.0%	49.8%	51.7%	48.4%	48.5%	51.9%	52.3%	50.0%	52.6%	51.7%	52.8%	53.3%	51.7%	51.7%	52.1%	51.5%
Statewide	49.0%	51.8%	48.7%	45.2%	52.7%	53.0%	48.9%	49.5%	55.5%	54.1%	53.3%	53.8%	54.7%	55.4%	56.9%	54.8%	54.9%	54.2%	54.0%
Dem Seats	4	4	4	2	4	5	3	3	5	5	5	5	5	5	5	5	5	5	5
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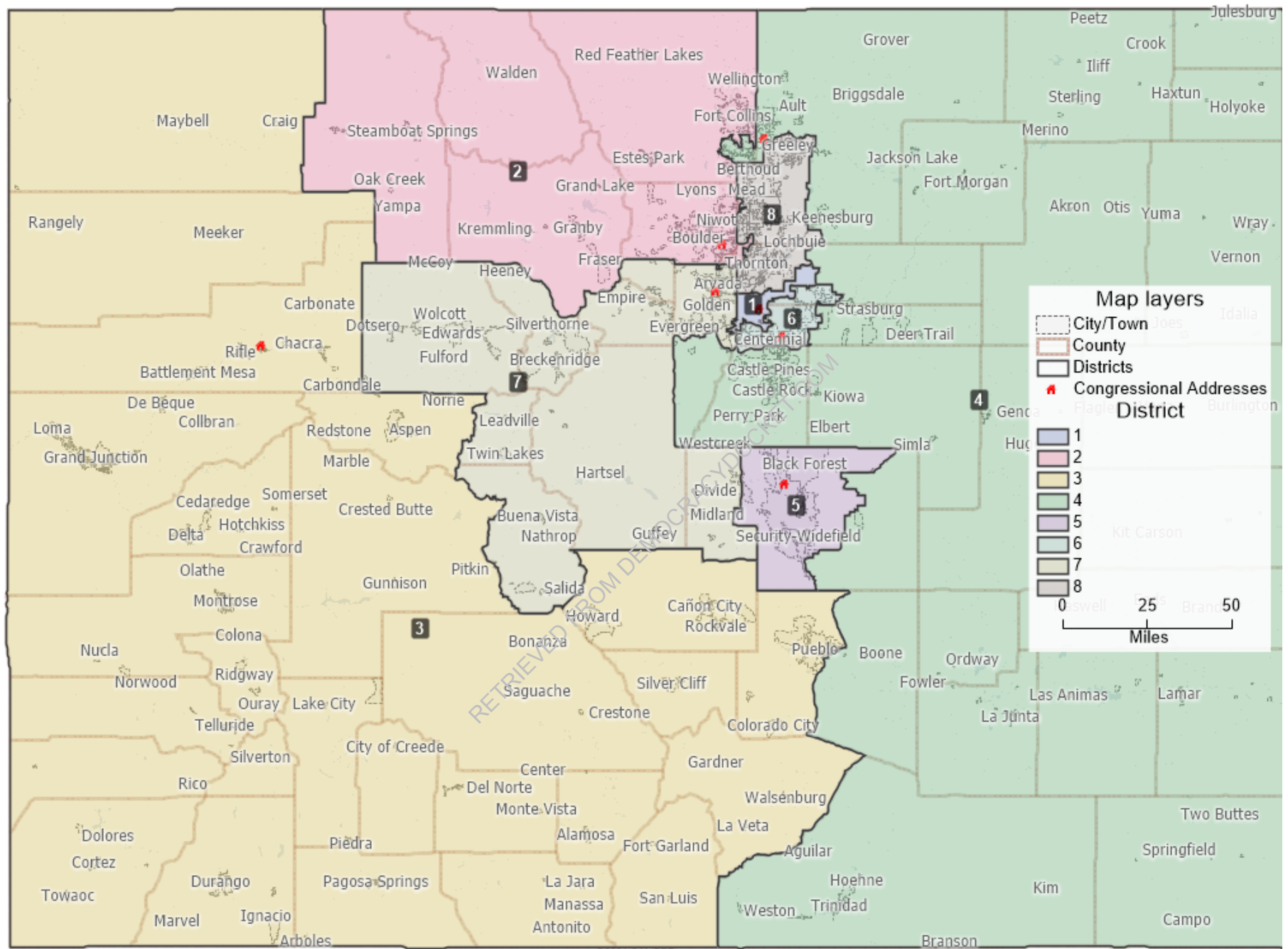
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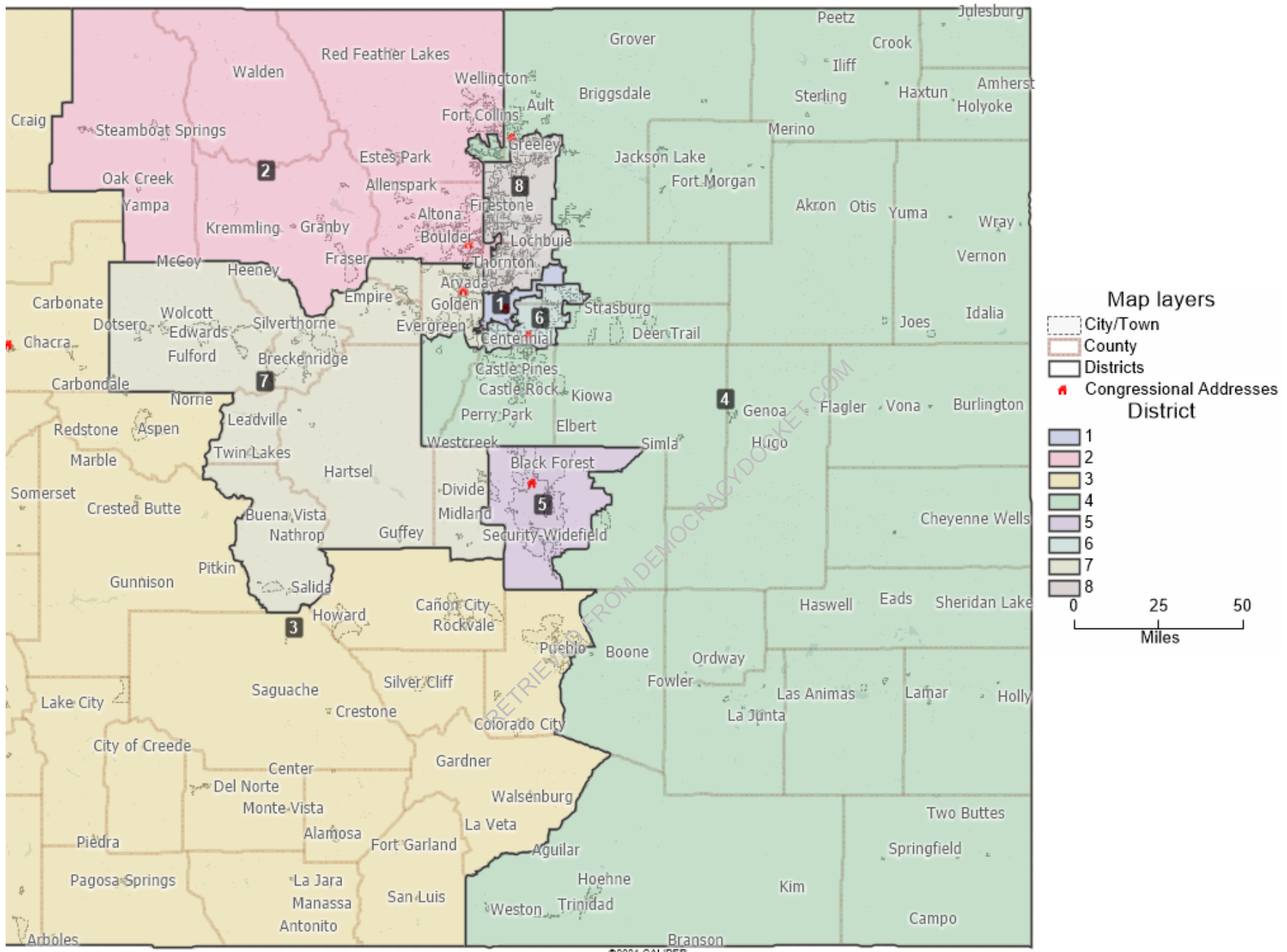
CD	Population	Deviation	Polsby Popper	% White VAP	% Black VAP	% Hispanic VAP	% Minority VAP	Gov14 + Sen14 + Cong16 Two-way	Reg16 + Pres16 + Cong16 + Reg18 + Tre18 Two-way	Commission Average	NCEC 2022 DPI	% Reg Dem	% Reg Rep	% Reg Unaff
1	721,715	1	0.09	58.8%	9.7%	24.4%	41.2%	76.1%	77.0%	78.5%	79.0%			



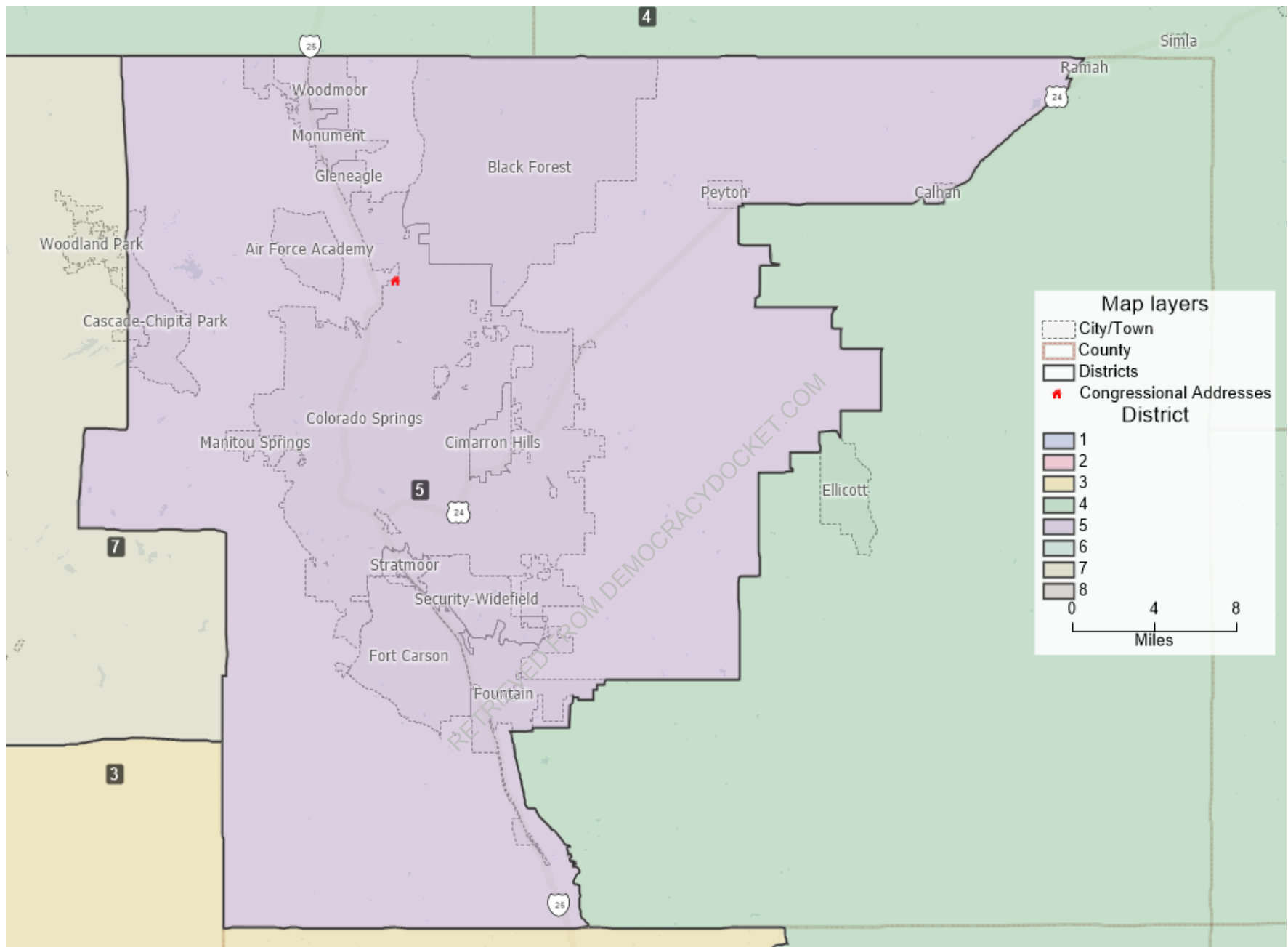
CD	Population	Deviation	Polsby Popper	% White VAP	% Black VAP	% Hispanic VAP	% Minority VAP	Gov14 + Sen14 + Cong16 Two-way	Reg16 + Pres16 + Cong16 + Reg18 + Tre18 Two-way	Commission Average	NCEC 2022 DPI	% Reg Dem	% Reg Rep	% Reg Unaff
2	721,693	-21	0.41	78.8%	1.7%	11.4%	21.2%	62.8%	63.9%	65.9%	66.6%			



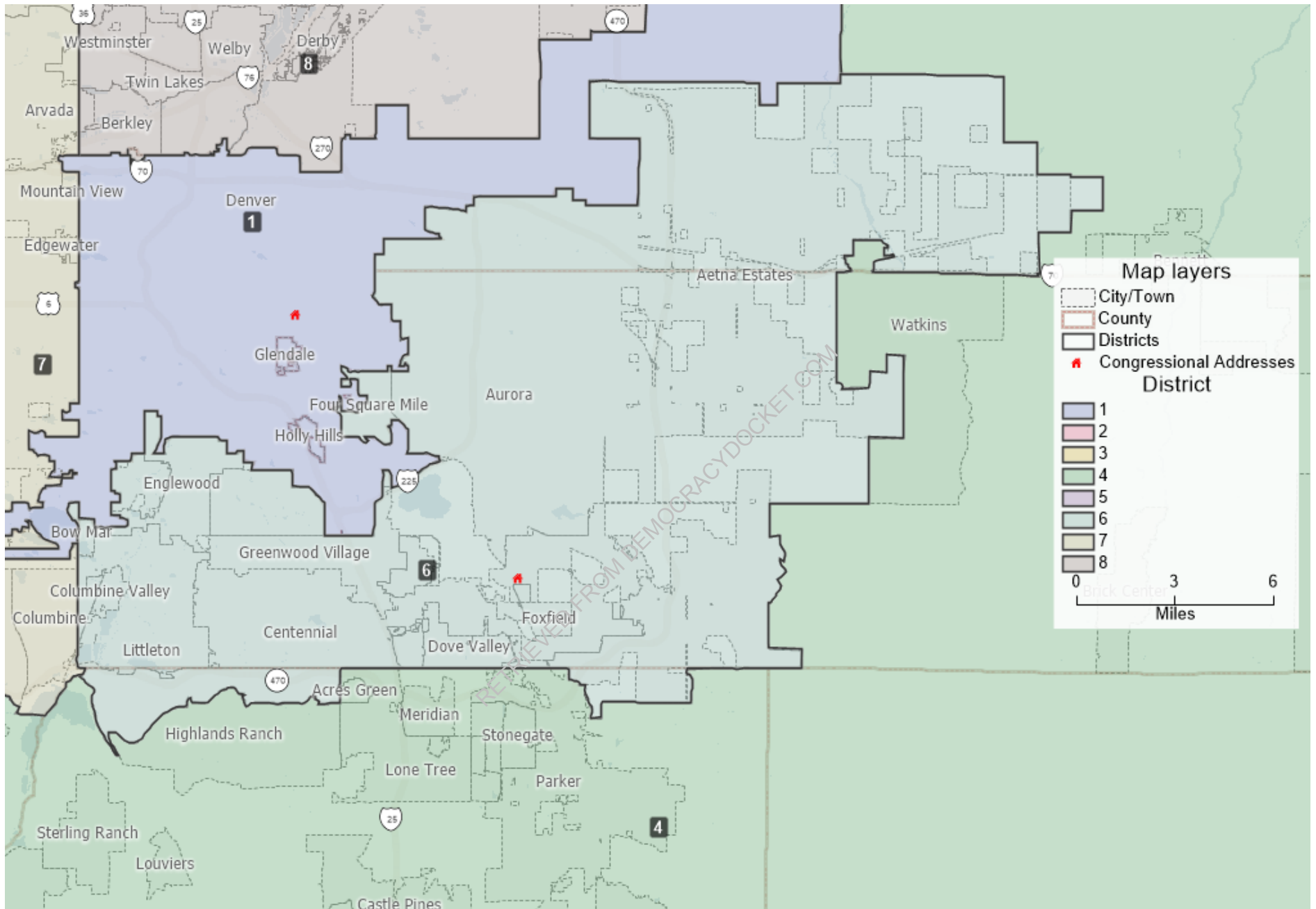
CD	Population	Deviation	Polsby Popper	% White VAP	% Black VAP	% Hispanic VAP	% Minority VAP	Gov14 + Sen14 + Cong16 Two-way	Reg16 + Pres16 + Cong16 + Reg18 + Tre18 Two-way	Commission Average	NCEC 2022 DPI	% Reg Dem	% Reg Rep	% Reg Unaff
3	721,713	-1	0.40	71.5%	1.7%	21.0%	28.5%	41.6%	42.6%	44.2%	44.5%			



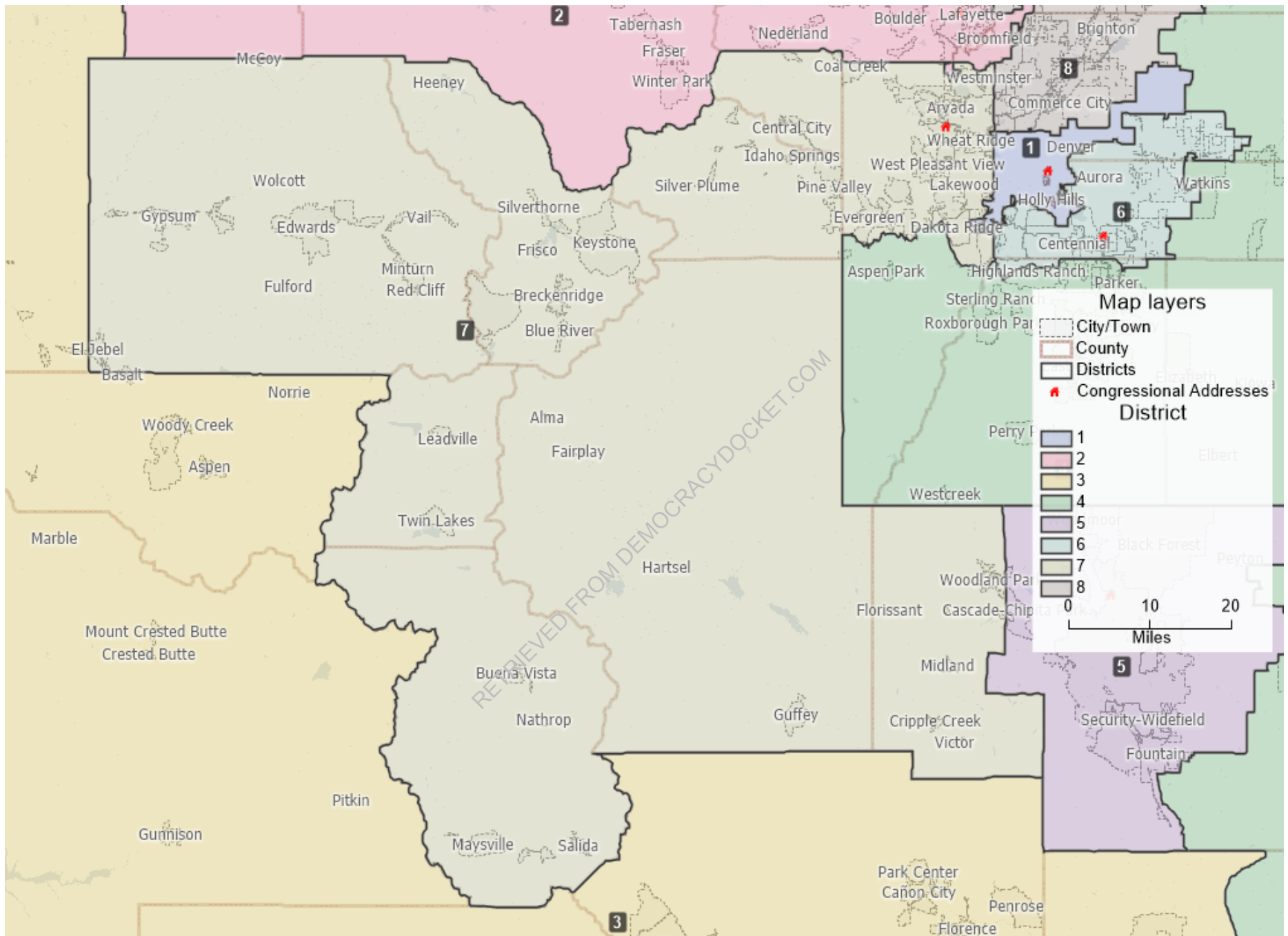
CD	Population	Deviation	Polsby Popper	% White VAP	% Black VAP	% Hispanic VAP	% Minority VAP	Gov14 + Sen14 + Cong16 Two-way	Reg16 + Pres16 + Cong16 + Reg18 + Tre18 Two-way	Commission Average	NCEC 2022 DPI	% Reg Dem	% Reg Rep	% Reg Unaff
4	721,723	9	0.31	78.4%	2.0%	13.0%	21.6%	32.6%	34.2%	36.5%	37.2%			



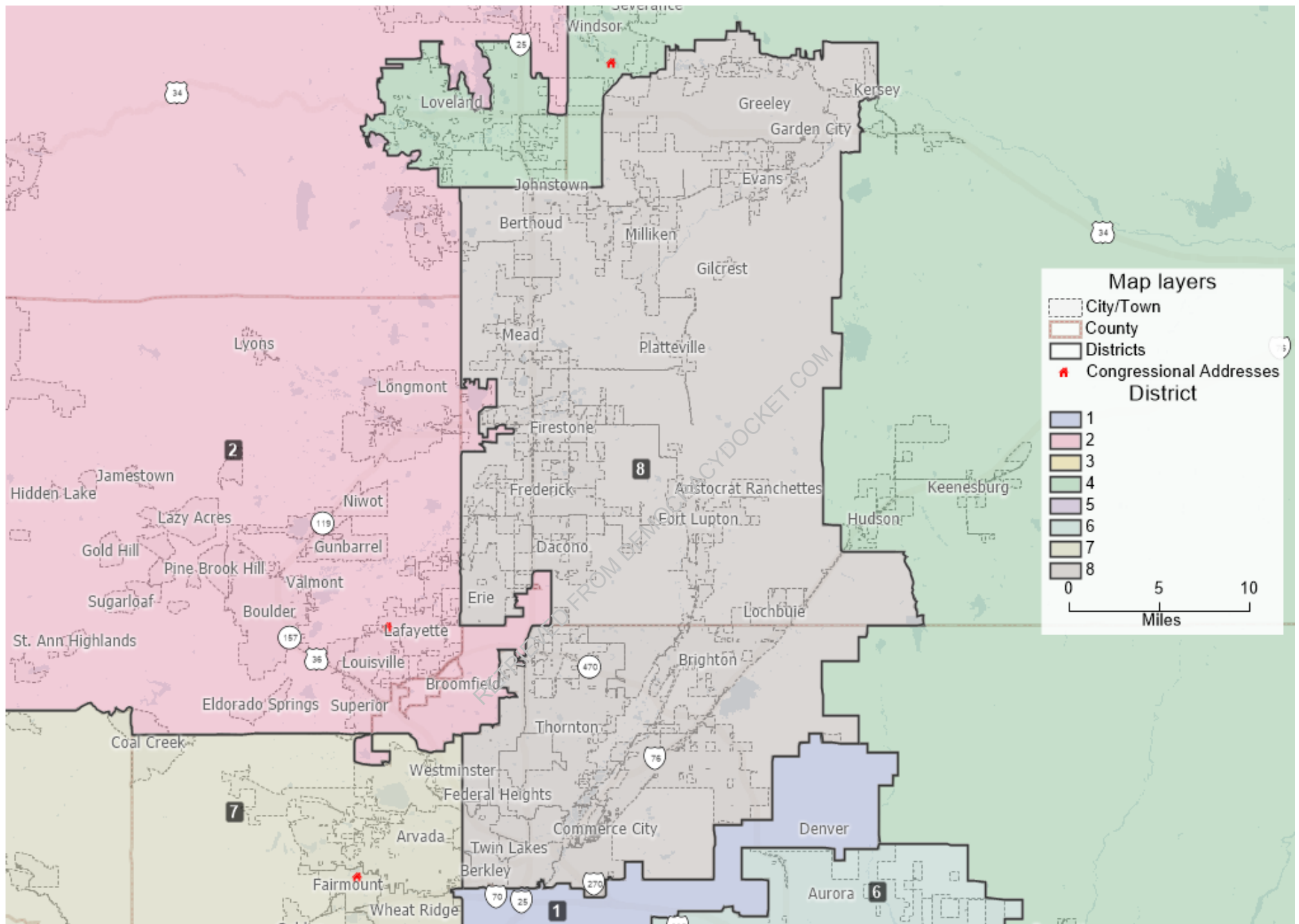
CD	Population	Deviation	Polsby Popper	% White VAP	% Black VAP	% Hispanic VAP	% Minority VAP	Gov14 + Sen14 + Cong16 Two-way	Reg16 + Pres16 + Cong16 + Reg18 + Tre18 Two-way	Commission Average	NCEC 2022 DPI	% Reg Dem	% Reg Rep	% Reg Unaff
5	721,714	0	0.36	69.2%	7.7%	15.4%	30.8%	34.4%	37.6%	39.8%	41.2%			



CD	Population	Deviation	Polsby Popper	% White VAP	% Black VAP	% Hispanic VAP	% Minority VAP	Gov14 + Sen14 + Cong16 Two-way	Reg16 + Pres16 + Cong16 + Reg18 + Tre18 Two-way	Commission Average	NCEC 2022 DPI	% Reg Dem	% Reg Rep	% Reg Unaff
6	721,715	1	0.16	58.7%	11.9%	19.6%	41.4%	51.2%	55.0%	58.1%	59.0%			



CD	Population	Deviation	Polsby Popper	% White VAP	% Black VAP	% Hispanic VAP	% Minority VAP	Gov14 + Sen14 + Cong16 Two-way	Reg16 + Pres16 + Cong16 + Reg18 + Tre18 Two-way	Commission Average	NCEC 2022 DPI	% Reg Dem	% Reg Rep	% Reg Unaff
7	721,727	13	0.25	77.1%	1.7%	14.6%	22.9%	52.4%	53.2%	55.0%	56.0%			



CD	Population	Deviation	Polsby Popper	% White VAP	% Black VAP	% Hispanic VAP	% Minority VAP	Gov14 + Sen14 + Cong16 Two-way	Reg16 + Pres16 + Cong16 + Reg18 + Tre18 Two-way	Commission Average	NCEC 2022 DPI	% Reg Dem	% Reg Rep	% Reg Unaff
8	721,714	0	0.25	55.9%	2.6%	34.6%	44.1%	48.1%	50.2%	51.5%	52.1%			