NEBRASKA

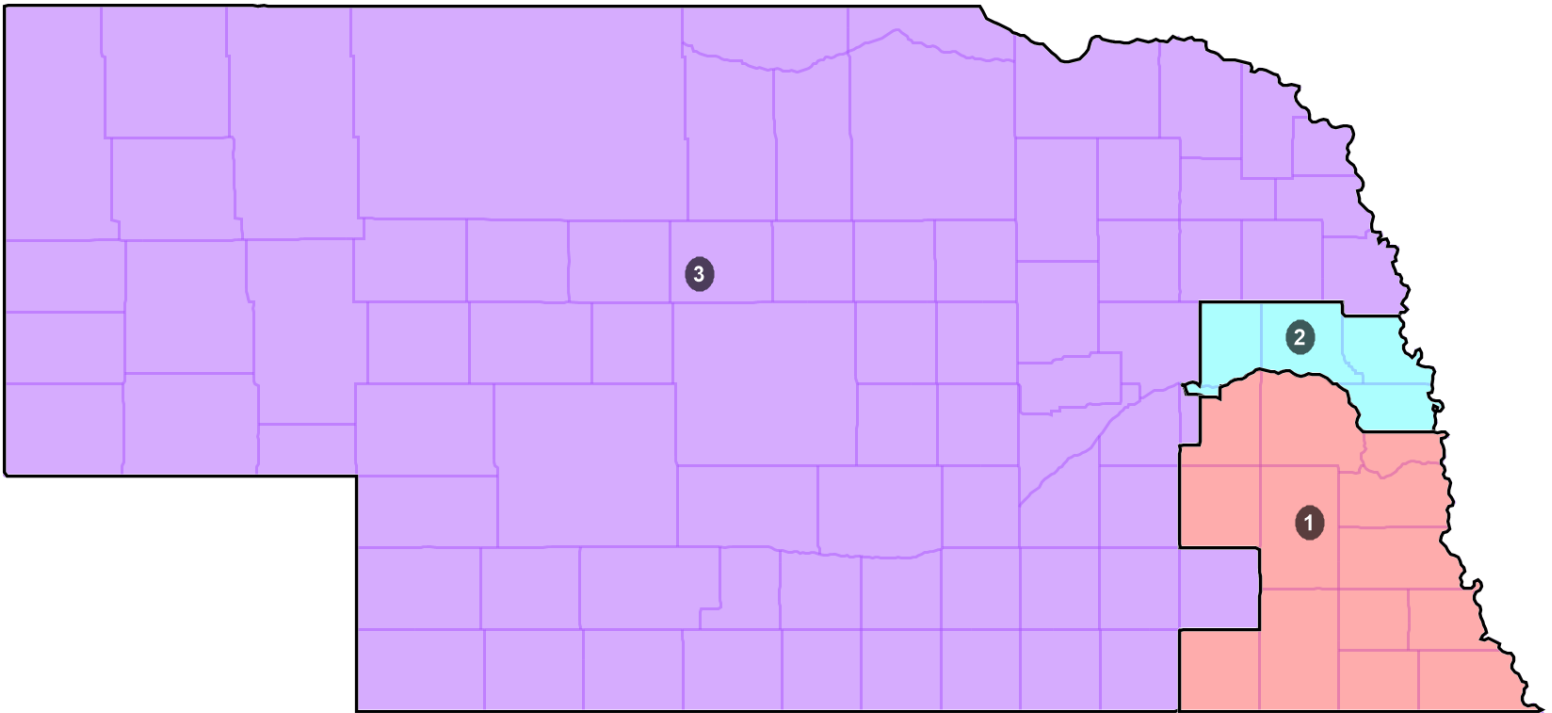## PROPOSED CONGRESSIONAL REDISTRICTING PLAN

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Introduction

Nebraska's Congressional Redistricting Process

Nebraska's unicameral state legislature draws the state's congressional lines and passes the proposed redistricting plan as a statute subject to a gubernational veto. According to the rules of Nebraska's unicameral legislature, a special committee is tasked with drafting both the state legislative and congressional district lines.[1] *The Redistricting Committee of the Legislature* is comprised of three legislators from each congressional district with no more than five members affiliated with the same political party.[2] Nebraska does not have a statutorily imposed deadline for enacting its maps. The state legislature is free to redraw its lines mid-decade, at any moment before the federal decennial census.[3] However, incumbent, and non-incumbent candidates must file for the congressional primary election by February 15, 2022, and March 1, 2022, respectively.[4] This presumably imposes a de facto deadline that the state legislature must meet to ensure that primary elections are able to proceed.

Nebraska's Congressional Redistricting History

Unlike a large proportion of other states, Nebraska's congressional redistricting process has been free from controversy and has faced minimal legal challenges. Due in part to Nebraskan voters' relatively homogenous partisan makeup, this trend has continued into the current redistricting cycle.

2000 Redistricting Cycle

On May 30, 2001, Governor Mike Johanns signed Nebraska's congressional redistricting plan, LB 851, into law. This plan faced no legal challenges and remained Nebraska's congressional map until 2011.
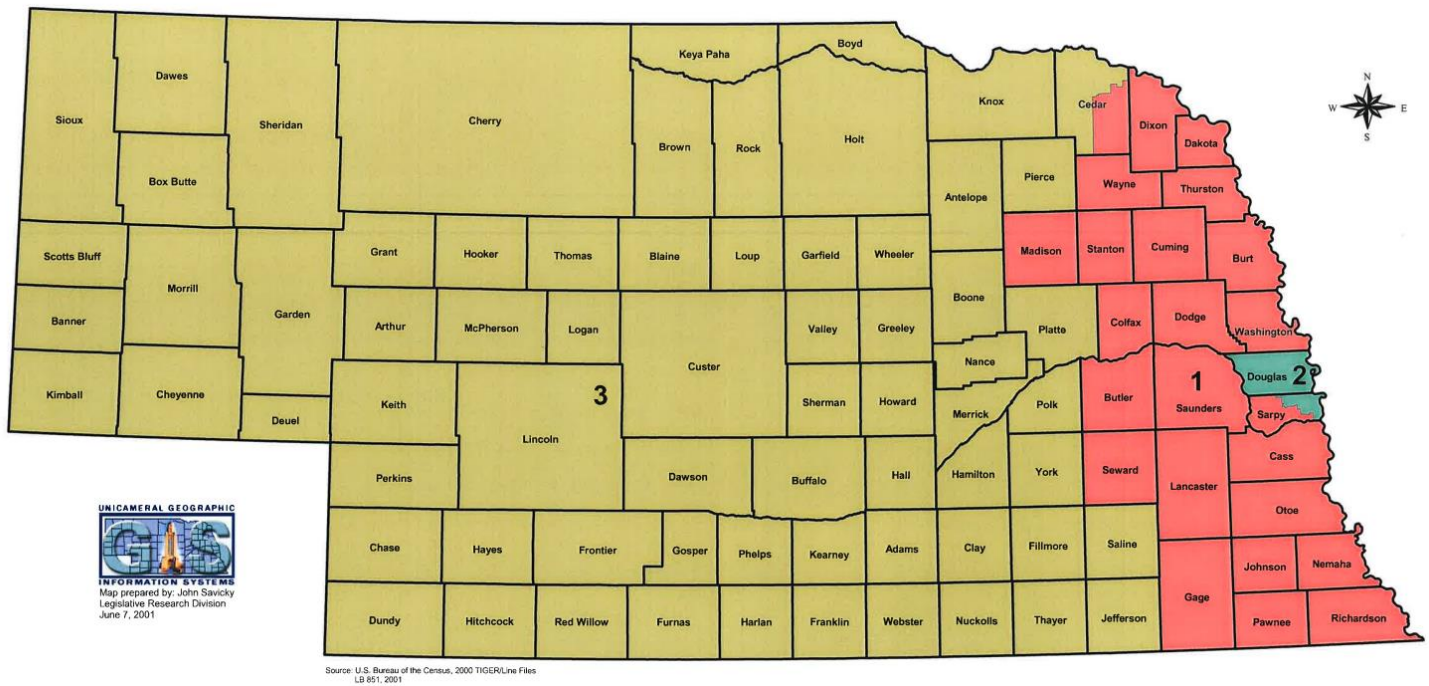
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[1] Rules of the Neb. Unicameral Legis., Rule 3, § 6
[2] *Id.*
[3] 2002 Op. Neb. Att'y Gen. No. 02003; *Exon v. Tiemann*, 279 F.Supp. 603 (D. Neb. 1967).
[4] Neb. Rev. Stat. § 32-606(1)

Nebraska Congressional Districts 2001-2011[5]

Source: U.S. Bureau of the Census, 2000 TIGER/Line Files
LB 851, 2001

2010 Redistricting Cycle

The state legislature passed, and Governor Heineman signed Nebraska's congressional redistricting plan, LB 704, on May 26, 2011. This plan faced no legal challenges and remained Nebraska's congressional map until 2021.

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[5] "Historical Maps," Nebraska Legislature (available at http://news.legislature.ne.gov/lrd/redistricting/history/)

United States House of Representatives - LB 704 (2011)
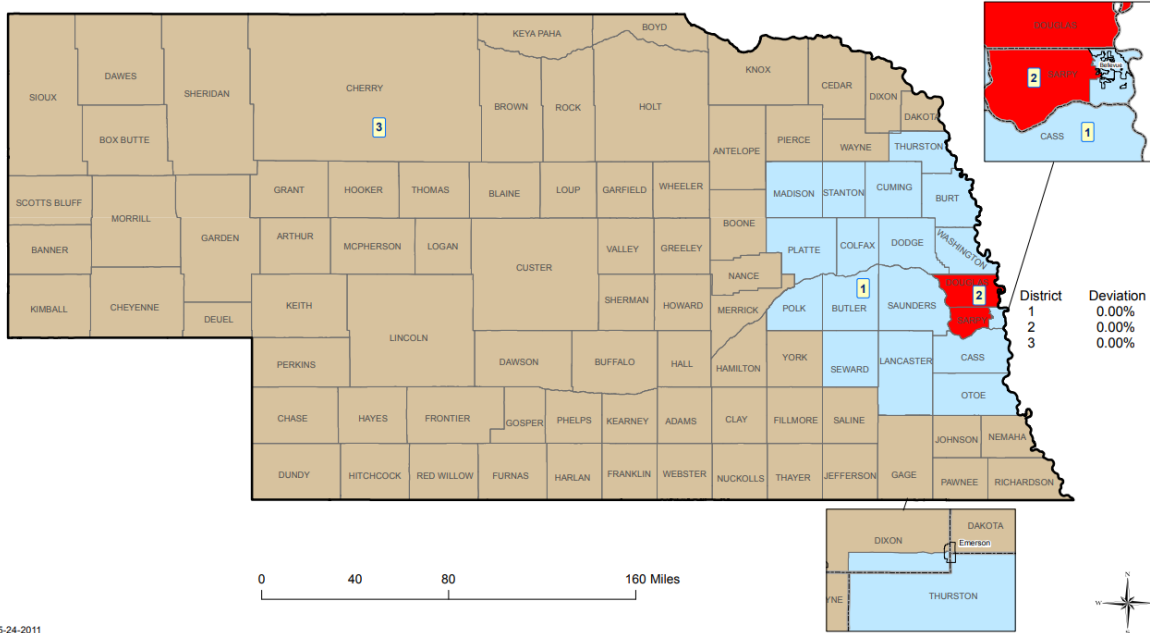
CON11- 30001

2020 Redistricting Cycle

In the current redistricting cycle, there was a dispute over the initial plan approved by Nebraska's redistricting committee. The disagreement was caused by the Republican drawn congressional map's decision to split Douglas County. This split is significant because Douglas County is home to the Omaha metropolitan area which has a large share of Democratic voters. By splitting Douglas County, the congressional map would have effectively "cracked" the Democratic vote into sperate districts and diluted their voting power. On September 17, 2021, the proposed plan failed to overcome a filibuster in Nebraska's Unicameral legislature. The state legislature subsequently passed LB1 which kept Douglas County intact. This plan was signed into law by Governor Ricketts on September 30, 2021.

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[6] "2011 Redistricting," Nebraska Legislature (available at http://news.legislature.ne.gov/red/archive/)

Nebraska Congressional Districts 2021-Present[7]

United States House of Representatives - LB1 - Final Reading (2021)
CONG21-39002
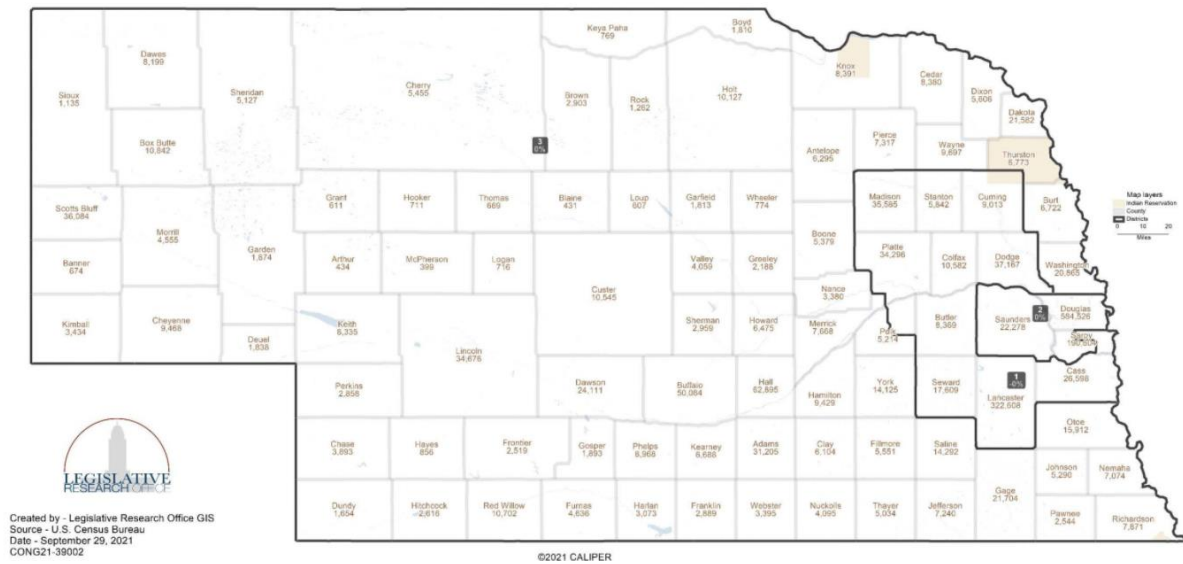
Plan Summary

Redistricting Principles

This proposed Nebraska Congressional map attempts to minimize the number of political subdivisions split while maintaining respect for traditional redistricting principles such as compactness and keeping communities of interest intact. Nebraska has 93 Counties and 1,402 voting districts. This "Good Government" plan splits only one county — Butler County — and one voting district. Additionally, the proposed plan splits no towns. Districts 1 and 3 are safe Republican districts while District 2 slightly leans Democratic.

Map Explanation

I started by constructing District 2, which contains Nebraska's largest city. I decided to start there because there was some controversy during this current redistricting cycle about whether to split Douglas County which contains the city of Omaha. District 2 contains the entirety of

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[7] "Adopted Plan," Nebraska Legislature (available at http://news.legislature.ne.gov/red/adopted-plan/)

Douglas County, Washington County, Dodge County, and Colfax County. This put District 2 very close to the ideal population required by one person-one vote.

I then moved to the Southeast portion of Nebraska since this area is home to the next biggest population concentration in the state. It was fairly easy to get close to the equal population requirements by including all of the counties directly beneath District 2. The remaining area formed District 3 which encapsulates the entire middle and western portion of the state.

The Omaha Metropolitan Area
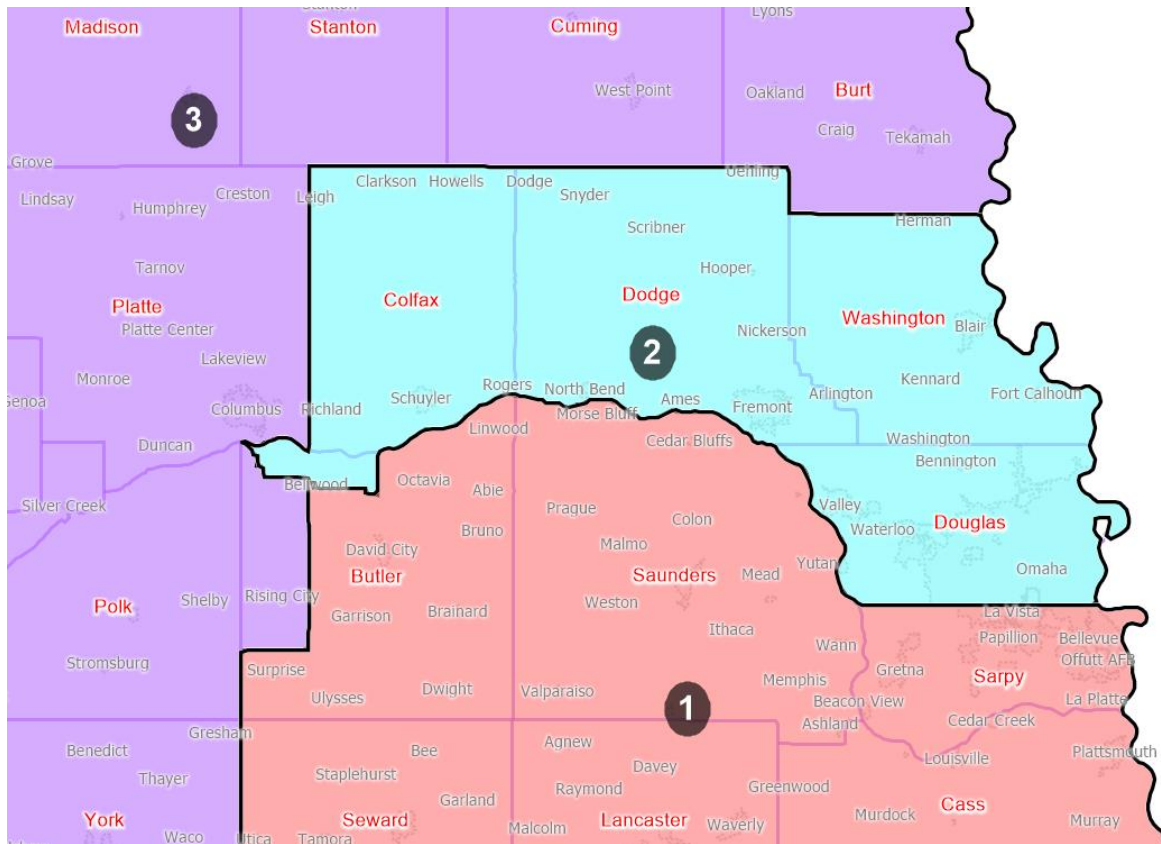
Since my goal was to minimize political subdivision splits, I needed to decide which County to split. Looking at the boundary that simultaneously separates the three districts and the initial population deviations, it became clear that Butler County would be the best County to split. District 2 could cut into the northern portion of Butler County while District 3 could take the western portion. The remaining population would go to District 1. This allowed me to concentrate the pain and adhere to Constitutional requirements.

Butler County Split
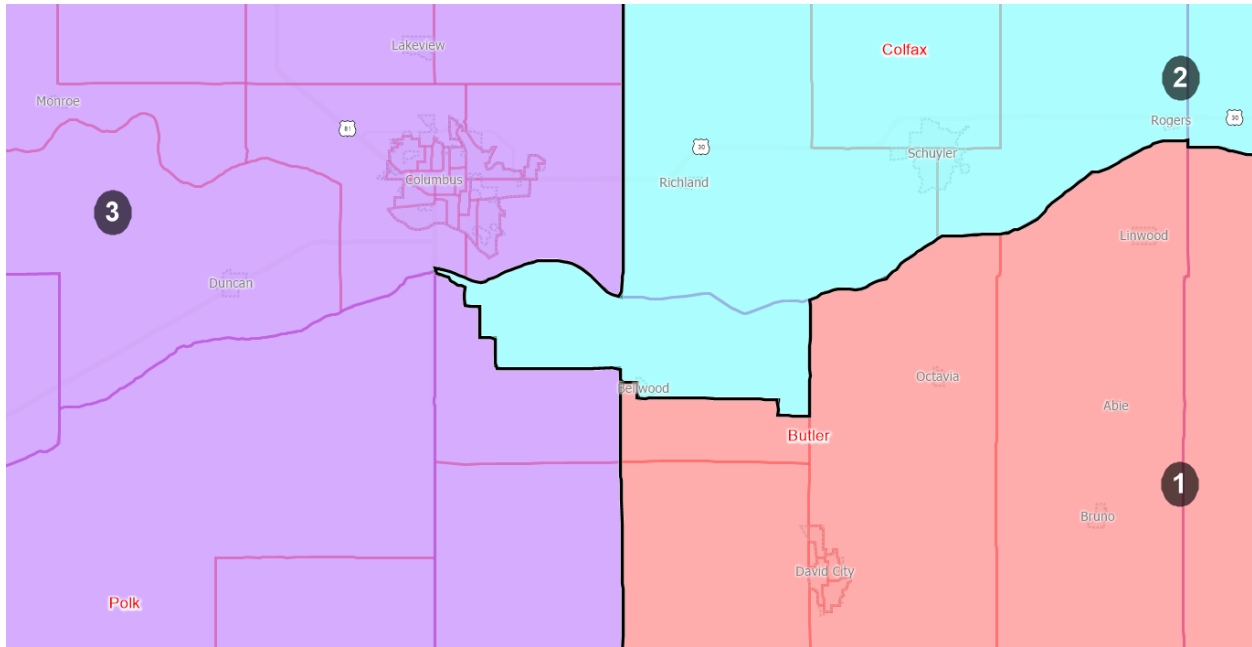
Evaluation of the Proposed Plan on Relevant Criteria

A. Compactness

This proposed plan is more compact than Nebraska's previous congressional plan by a number of different compactness measurements. Its Schwartzberg, Alternate Schwartzberg, Polsby-popper, Population Polygon, Population Circle, Perimeter, and Length-Width indicate that this map is on average more compact than the previous plan. Even in the few measurements that score lower, this plan is only marginally less compact than the 2011 plan. For example, the average Reock score for this map is 0.44—only 0.02 points lower than the 2011 map. This is in spite of the fact that Nebraska's urban population grew at a higher rate than the rural areas of the state forcing District 2 to sprawl out to pick up the population growth in the Omaha Municipal area. In addition to respecting political subdivisions, this map prioritized compactness when drawing lines since compactness is a traditional redistricting principle. As can be seen in the table below, this proposed plan is extremely compact.

Measures of Compactness for the Proposed Map

	Reock	Schwartzberg	Alternate Schwartzberg	Polsby-Popper	Population Polygon	Area/Convex Hull	Population Circle	Ehrenburg	Perimeter	Length-Width
Sum	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	2,039.23	N/A
Min	0.35	1.39	1.42	0.34	0.66	0.74	0.49	0.24	N/A	7.68
Max	0.48	1.60	1.72	0.50	0.97	0.89	0.75	0.49	N/A	207.26
Mean	0.44	1.49	1.57	0.42	0.77	0.82	0.60	0.38	N/A	84.83
Std. Dev.	0.08	0.11	0.15	0.08	0.17	0.08	0.13	0.13	N/A	107.22

District	Reock	Schwartzberg	Alternate Schwartzberg	Polsby-Popper	Population Polygon	Area/Convex Hull	Population Circle	Ehrenburg	Perimeter	Length-Width
1	0.48	1.49	1.56	0.41	0.69	0.84	0.49	0.40	473.15	7.68
2	0.35	1.60	1.72	0.34	0.97	0.74	0.75	0.24	252.58	39.54
3	0.48	1.39	1.42	0.50	0.66	0.89	0.57	0.49	1,313.50	207.26

Measures of Compactness for Nebraska's 2011 Map

	Reock	Schwartzberg	Alternate Schwartzberg	Polsby-Popper	Population Polygon	Area/Convex Hull	Population Circle	Ehrenburg	Perimeter	Length-Width
Sum	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	2,211.42	N/A
Min	0.34	1.43	1.50	0.33	0.31	0.82	0.31	0.38	N/A	3.72
Max	0.55	1.64	1.75	0.44	0.96	0.86	0.89	0.52	N/A	246.36
Mean	0.46	1.56	1.63	0.38	0.58	0.84	0.55	0.47	N/A	87.00
Std. Dev.	0.11	0.11	0.13	0.06	0.34	0.02	0.30	0.08	N/A	138.06

District	Reock	Schwartzberg	Alternate Schwartzberg	Polsby-Popper	Population Polygon	Area/Convex Hull	Population Circle	Ehrenburg	Perimeter	Length-Width
1	0.48	1.64	1.75	0.33	0.47	0.83	0.45	0.38	588.30	10.91
2	0.55	1.43	1.50	0.44	0.96	0.86	0.89	0.52	121.90	3.72
3	0.34	1.60	1.63	0.38	0.31	0.82	0.31	0.50	1,501.22	246.36

B. Respect for Political Subdivisions

The predominant principle for this proposed congressional redistricting plan was minimizing the amount of political subdivision splits. In achieving that goal, this map splits the minimum number of counties and voting districts mathematically possible while maintaining legal compliance. In other words, only 1 out of 93 counties and 1 out of 1,402 voting districts were split. Although there is no legal requirement for congressional lines, minimizing political subdivision splits remains a high priority for map drawers. The disagreement over whether to split Douglas County led to a filibuster in the state legislature and ultimately to an entirely new map in this current redistricting cycle. In the last iteration of Nebraska's congressional map, 2 counties and 7 voting districts were split. This map improves upon this traditional redistricting principle by splitting one less county and 6 less voting districts than the plan enacted in 2011.

Splitting Butler County three ways was necessary to comply with equal population among districts as required by the U.S. Constitution.

C. Partisan Fairness

Overall, this plan distributes voters across the three districts in a way that reflects the state's partisan preference. Although Nebraska's congressional redistricting process has historically been free from partisan gerrymandering, the increase in Democratic voters in the state's urban areas and the increasing importance of the 2022 midterm elections provides state legislators with a strong incentive to engage in partisan manipulation in the current redistricting cycle. Also, the fact that Nebraska, unlike almost every other state, apportions its Electoral College votes according to congressional districts, makes the partisan bias in each district even more important for each political party.

According to PlanScore's prediction, the two major parties' statewide vote shares are 39.7% Democratic and 60.3% Republican based on previous election results and U.S. Census data.[8] This plan would create two safe Republican districts and one Democratic leaning district. As can be seen below, Districts 1 and 3 are the Republican districts while District 2 leans Democratic. PlanScore gives District 2 a 64% chance of a Democratic win which could easily be classified as a competitive district. Since a little over 60% of Nebraskan votes are cast for Republican candidates, a 2 to 1 partisan split in favor of the Republican party is a relatively fair result.

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[8] "NE Districts 2022-04-03, GeoJSON.json," PlanScore, Apr. 3, 2022 (available at https://planscore.campaignlegal.org/plan.html?20220404T035940.348018107Z)

PlanScore Partisan Breakdown[9]

District Map
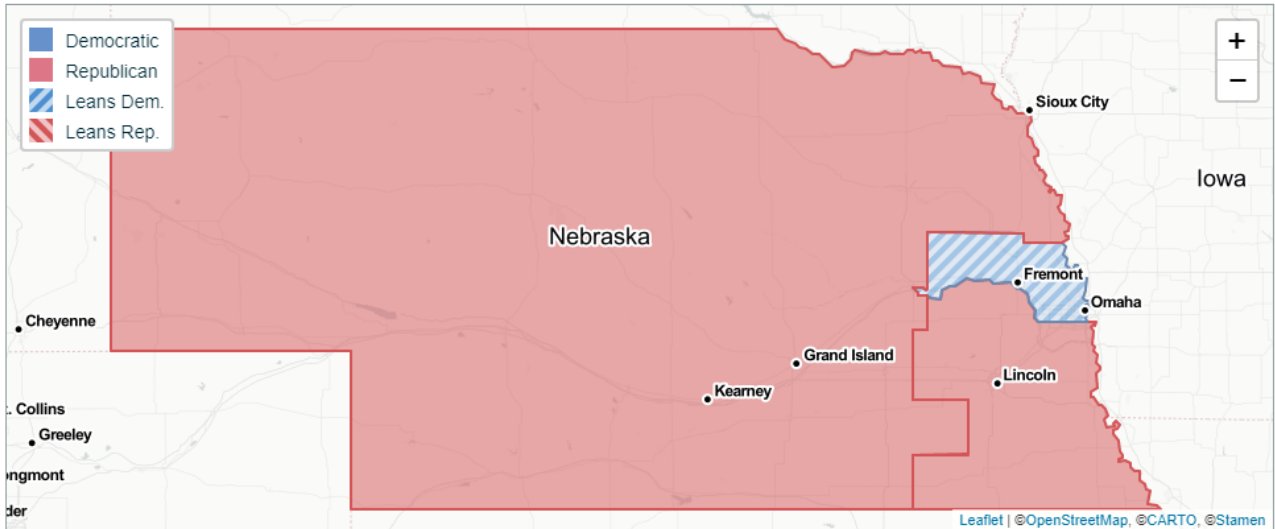
District Data

District	Candidate Scenario	Pop. 2020	Hispanic CVAP 2019	Non-Hisp. Black CVAP 2019	Non-Hisp. Asian CVAP 2019	Non-Hisp. Native CVAP 2019	Chance of 1+ Flips[†]	Chance of Democratic Win	Predicted Vote Shares	Biden (D) 2020	Trump (R) 2020
1	Open Seat	653,835	4.5%	3.2%	2.3%	0.9%	No	11%	44% D / 56% R	144,461	174,312
2	Open Seat	653,835	6.3%	9.8%	1.9%	0.8%	Yes	64%	52% D / 48% R	160,546	141,675
3	Open Seat	653,834	7.1%	1.1%	0.7%	1.6%	No	<1%	23% D / 77% R	69,580	240,860

Federal and State Legal Compliance

US Constitution

    a) One Person-One Vote

Congressional districts must be drawn so that "as nearly as is practicable one man's vote in a congressional election is worth as much as another's."[10] In other words, Nebraska's

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[9] *Id.*
[10] *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

Congressional districts must be equally apportioned by population as required by Article I, Section II of the Constitution.[11] The Supreme Court further clarified in *Karcher v. Daggett* that Congressional districts must not deviate in population unless necessary to achieve a legitimate state objective such as compactness, respecting political subdivisions, and preserving communities of interest.[12]

Historically, map drawers in Nebraska have strictly applied this equal population requirement. Although there have been no legal challenges to equal population requirements, the state legislature has refused to deviate from the ideal population during the last two redistricting cycles. According to the 2020 Census, the population of Nebraska is 1,961,504.[13] Thus, with 3 congressional districts, the required population for each district is 653,835. With a total population that is indivisible by 3, it is mathematically impossible to get exact equal population across the three districts. This plan, however, complies with the one person-one vote as close as mathematically possible. Districts 1 and 2 each contain 653,835 people while District 3 only deviates by 1 person and contains 653,834 people.

b) The 14th Amendment

Under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, a congressional district is subject to strict scrutiny if race is the "predominant factor" in the drawing of its lines.[14] Proof that race is the predominant factor can be established through various methods. For example, a district that is so strangely shaped that it could only be understood as an effort to separate the population based on racial classifications would establish race as the predominant factor.[15] Legislative history might also establish an intent to racially gerrymander.[16] Evidence for predominance is always judged against whether the legislature adhered to traditional redistricting principles such as "compactness, contiguity, or respect for political subdivisions."[17] In order to withstand strict scrutiny of a racial gerrymandering claim, the state must demonstrate that its use of race was narrowly tailored to achieve a compelling state

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[11] *Id.*
[12] *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983).
[13] "Nebraska: 2020 Census," U.S. Census Bureau, Aug. 25, 2021 (available at https://www.census.gov/quickfacts/NE)
[14] *Miller v. Johnson*, 515 U.S. 900, 920 (1995).
[15] *Shaw v. Reno*, 509 U.S. 630, 642 (1993).
[16] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[17] *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

interest. Courts have routinely held that compliance with the Voting Rights Act is a compelling state interest.[18]

Racial data was not used when drawing any of the three districts. Thus, this congressional plan lacks the requisite intent to discriminate for an equal protection claim. Additionally, any potential racial gerrymandering claim would fail under *Shaw* since race was clearly not the predominant factor in drawing any of the districts. In fact, race wasn't a factor at all. This plan thus complies with the 14th Amendment.

The Voting Rights Act

This congressional redistricting plan complies with Section 2 of the Voting Rights Act. The plain text of the statute states that, "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[19] More generally, Section 2 of the VRA "prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups identified in Section 4(f)(2) of the Act."[20]

For plaintiffs to prevail on a Section 2 VRA claim, three preconditions must be met in the redistricting context—known as *Gingles* prongs.[21] First, the minority group must be "sufficiently numerous and compact to form a majority in a single-member district."[22] Second, the minority group must be "politically cohesive" meaning its members share similar voting preferences.[23] Third, the majority must vote "sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate."[24] If these conditions are present, the court must determine based on the totality of the circumstances whether members of the minority group have less of opportunity to elect representatives of their choice than other members of the electorate. This analysis takes into

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[18] *Bush v. Vera*, 517 U.S. 952, 976 (1996).
[19] 42 U.S.C. § 1973(a).
[20] The Voting Rights Act of 1965 (codified as amended at 52 U.S.C. §10301(1982)); "Section 2 of the Voting Rights Act," U.S. Department of Justice, Nov. 8, 2021 (available at https://www.justice.gov/crt/section-2-voting-rights-act).
[21] *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986).
[22] *Id.*
[23] *Id.*
[24] *Id.*

account the social and political context in the challenged jurisdiction and is guided by the factors enumerated in the Senate Report that was a part of the 1982 VRA Amendments.

No minority group is entitled to a majority minority congressional district in Nebraska. Any potential lawsuit under the VRA would fail the three *Gingles* preconditions. The most numerous minority group in Nebraska are Hispanics who make up 11.4% of the state's population.[25] With only 3 congressional districts, it is mathematically impossible for this group to constitute a majority even if the entire Hispanic population of Nebraska was put into a single district. Thus, plaintiffs would fail the first precondition of being "sufficiently numerous and compact to form a majority" in a congressional district.[26] VRA compliance is further evidenced by the fact that in the last two congressional redistricting cycles, there has been an absence of any legal challenges based on the Voting Rights Act in Nebraska.

Nebraska State Law

Unlike state legislative districts, which are required to be contiguous, compact, and maintain respect for county boundaries "whenever practicable", congressional districts face no state requirements under Nebraska statutory and constitutional law.[27] Thus, this plan complies with Nebraska state law by default.

Conclusion

This proposed plan started with the goal of creating a "Good Government" map that minimizes the number of political subdivisions split. In achieving this goal, this proposed congressional plan split only 1 out of 93 counties and 1 out of 1,402 voting districts while maintaining compactness, partisan fairness, and legal compliance. To the best of my knowledge, this map complies with the U.S. Constitution, the Voting Rights Act, and Nebraska's Constitution. I hope this plan can be used as a point of comparison as Nebraska finalizes their congressional map.

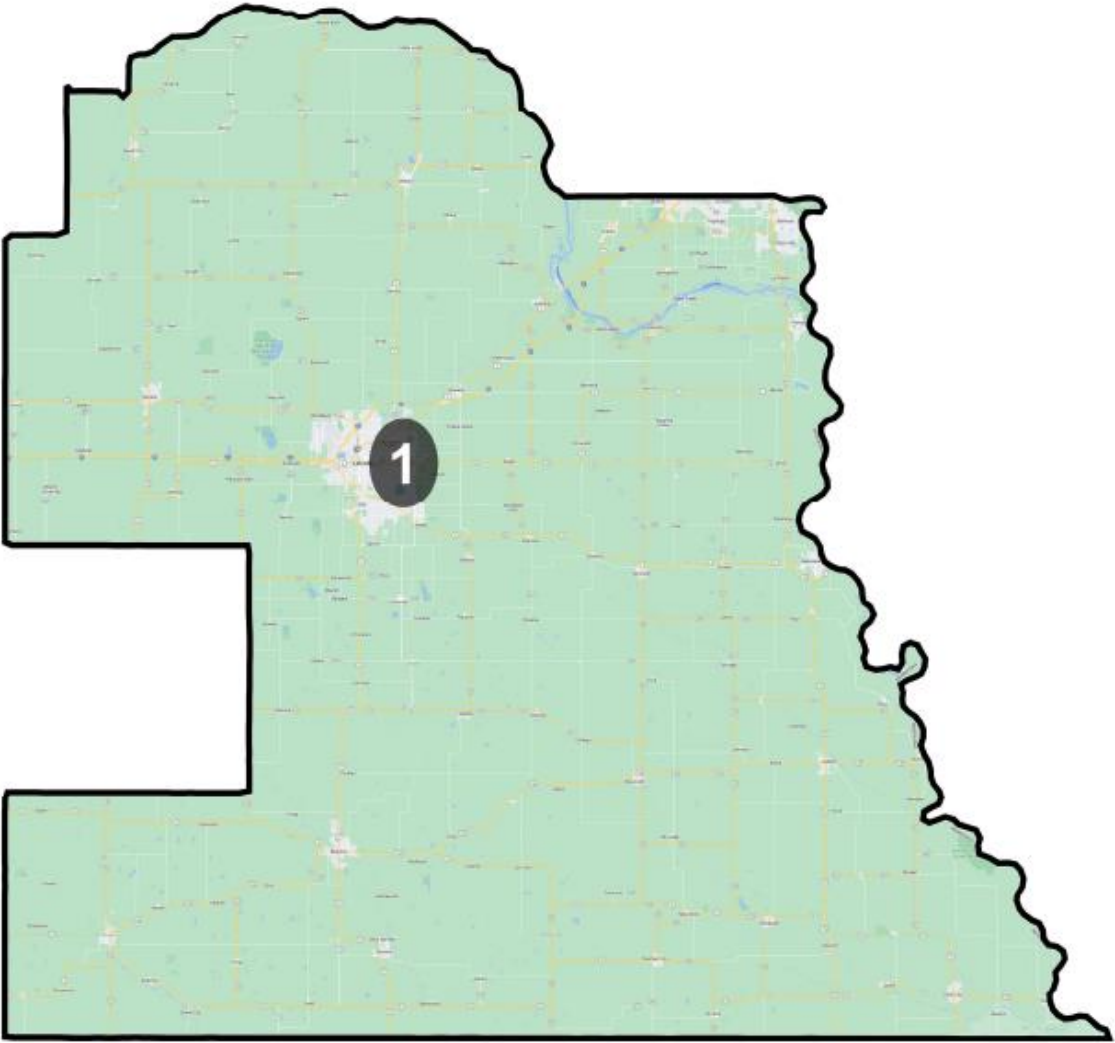[25] "Nebraska: 2020 Census," U.S. Census Bureau, Aug. 25, 2021 (available at https://www.census.gov/quickfacts/NE)
[26] *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986).
[27] Neb. Const. art. III, § 5

Comparison with 2018 Boundaries
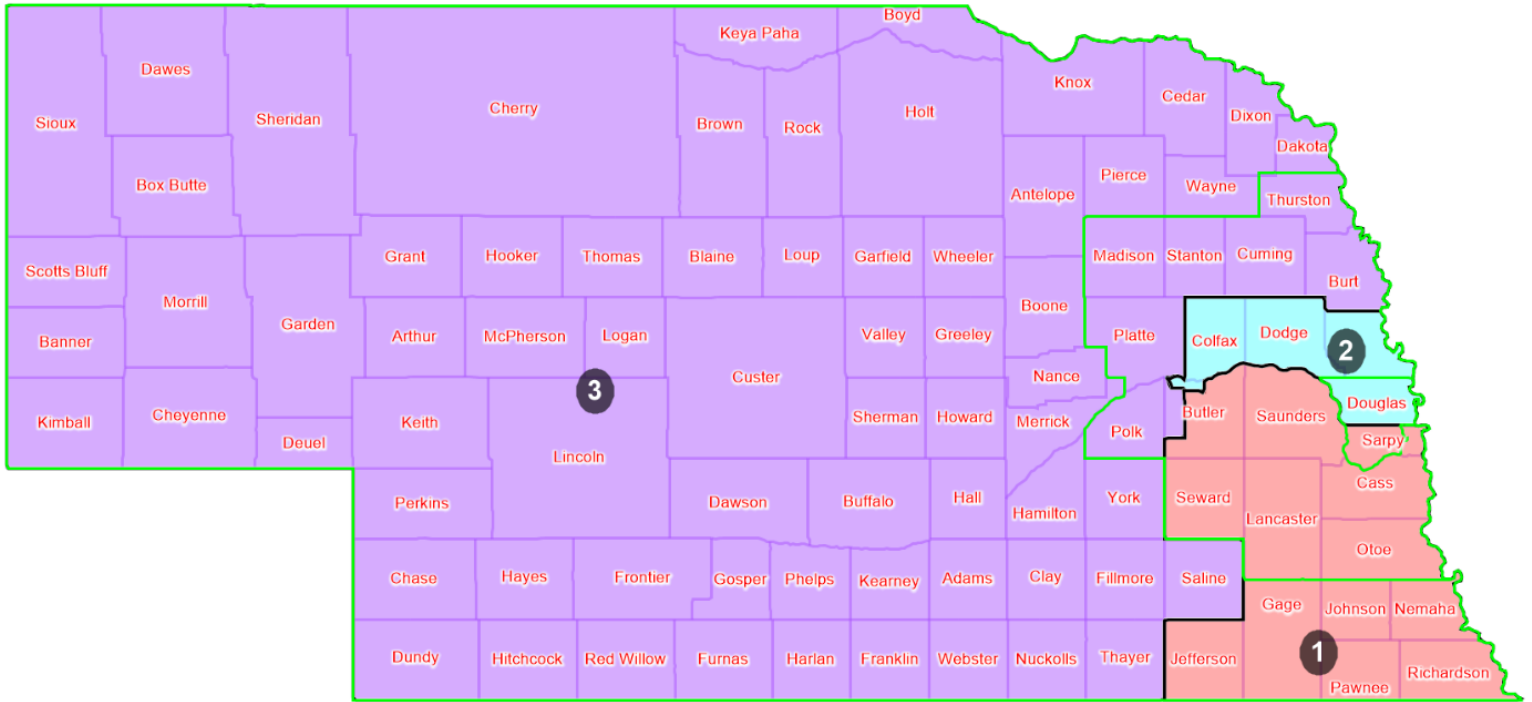
District 1

District 2

District 3