

DISTRICT COURT, WELD COUNTY,  
COLORADO  
901 Ninth Avenue  
P.O. Box 2038  
Greeley, Colorado 80631

V.

**▲ COURT USE ONLY ▲**

Division: 4

## MOTION FOR SUMMARY JUDGMENT

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## INTRODUCTION<sup>1</sup>

It is undisputed that Defendants (collectively, the Board) disregarded mandatory statutory procedures and requirements for redistricting county commissioner districts in Weld County. Those statutes require that a redistricting commission be designated to conduct the redistricting process. That commission must present “not less than three plans” for comment by the public and hold three public hearings with an option for remote attendance. §§ 30-10-306.1(a), 30-10-306.2(3)(b), 30-10-306.4(1)(d)–(e), C.R.S. None of those requirements were met here. And the list of noncompliance is extensive.

The Board defends its actions by claiming that, as the commissioners of a home rule county, they are free to ignore these mandatory statutory procedures and requirements. *See* Attach. 2-5 to Ex. 2 at 2 *infra*; *see also* Defs.’ Mot. to Dismiss at 13 (“Neither the General Assembly nor this Court can foist the Redistricting statutes on a home rule county like Weld County.”). Weld County’s home rule status does not exempt the Board from complying with these statutes, nor does it justify the Board’s choice to dominate the redistricting process to the public’s exclusion. These statutory requirements and procedures apply to Weld County as a matter of law. Because the Board undisputedly failed to comply with them, Plaintiffs (collectively, Voters) are entitled to judgment in their favor and a permanent injunction declaring the county commissioner district map adopted by the Board void and requiring compliance with the applicable statutes in drawing redistricting maps going forward.

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<sup>1</sup> Pursuant to C.R.C.P. 121, section 1-15(8), Plaintiffs’ counsel conferred with Defendants’ counsel. Defendants oppose this Motion.

## BACKGROUND

Coloradans value the use of independent redistricting commissions to protect voting rights. In 2018, they passed Amendments Y and Z to the Colorado Constitution to end the practice of political gerrymandering. Colo. Const. art. V, §§ 44–48.4. These amendments created independent redistricting commissions to establish the congressional and legislative election districts in Colorado. *Id.* art. V, §§ 44(2), 46(2). The amendments’ purpose was to provide an “inclusive and meaningful” redistricting process that gives the public “the ability to be heard as redistricting maps are drawn, to be able to watch the witnesses who deliver testimony and the redistricting commission’s deliberations, and to have their written comments considered before any proposed map is voted upon by the commission as the final map.” *Id.* art. V, §§ 44(1)(c), (1)(d), (1)(f), 46(1)(c), (1)(d), (1)(f).

County commissioner districts were the only partisan offices not included in Amendments Y and Z—until 2021. At that time, House Bill 21-1047 was signed into law and codified at sections 30-10-306 to -306.4, C.R.S. (2023) (Redistricting Statutes). The Redistricting Statutes fill the gap Amendments Y and Z left open and apply the same “inclusive and meaningful” redistricting process to the county commissioner redistricting. The reason was clear: “it is of statewide interest that voters in **every Colorado county** are empowered to elect commissioners who will reflect the communities within the county and who will be responsive and accountable to them.” H.B. 21-1047, 73rd Gen. Assembly, 1st Reg. Sess. § 1(1)(i) (2021) (emphasis added).

## STATEMENT OF UNDISPUTED MATERIAL FACTS<sup>2</sup>

1. Voters are Weld County residents and Weld County-based nonprofit organizations interested in local government and ensuring fair elections are conducted in compliance with applicable laws. Ex. 1, Whinery Decl., ¶¶ 1–3; Ex. 3, Suniga Decl., ¶¶ 1–3.

2. Weld County is a Colorado county organized under a home rule charter effective January 1, 1976 (Charter). Ex. 2, Beckwith Decl., ¶ 2 & Attach. 2-1 at 1.<sup>3</sup>

3. The Board consists of five members, two elected by the entire County and three elected by the voters within each of the County’s three county commissioner districts. Attach. 2-1, § 3-1 at 4.

4. On January 11, 2023, the Board published notice of a hearing set for January 23, 2023. Ex. 2 ¶ 3 & Attach. 2-2 at 1.

5. The hearing’s stated purpose was for the Board to “consider a plan to modify the boundary lines of Commissioner Districts in Weld County Colorado” and to “receive input from the public regarding the plan.” Attach. 2-2 at 1.

6. There was no Zoom or other electronic means provided in the January 11 notice or elsewhere to allow remote participation in the hearing. *Id.*; Ex. 1 ¶ 7; Ex. 3 ¶ 7.

7. The January 11 notice stated that the hearing would be held at the Weld County

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<sup>2</sup> Abbreviated hereinafter as “SUMF.”

<sup>3</sup> This Court must, upon a party’s request, take judicial notice of a fact not subject to reasonable dispute that is capable of accurate and ready determination “by resort to sources whose accuracy cannot reasonably be questioned.” C.R.E. 201(c), (d). Voters ask that the Court take judicial notice of the fact of Weld County’s home rule status and the specific provisions of its charter set forth throughout this Motion.

Administration office in Greeley, Colorado. Attach. 2-2 at 1.

8. At the time of the January 11 notice, the Board's sole publicly proposed redistricting plan had already been drawn. *Id.* (advising that the proposed plan could be examined prior to the hearing); Ex. 2 ¶ 4 & Attach. 2-3 at 1, Jan. 23, 2023 Hr'g Mins. (stating that county clerk Carly Koppes had "followed" the "process and procedure" for redistricting provided by Weld County's charter and including a copy of the proposed plan as an attachment).

9. The only place to view the proposed plan was the office of the Clerk to the Board. Attach. 2-2 at 1.

10. Approved hearing minutes exist concerning a January 23, 2023 hearing by the Board regarding redistricting. Attach. 2-3.

11. On January 29, 2023, the Board noticed a second public hearing for March 1, 2023. Ex. 2 ¶ 5 & Attach. 2-4, Jan. 29, 2023 Notice.

12. The January 29 notice stated that the Board would consider a resolution to adopt their proposed plan and that public comments would be considered. Attach 2-4.

13. The January 29 notice did not state where the meeting would be held. *Id.*

14. There was no Zoom or other electronic means provided in the January 29 notice or elsewhere by which to participate in the hearing. *Id.*; *see also* Ex. 1 ¶ 7, Ex. 3 ¶ 7.

15. More than fifty comments related to the proposed plan were submitted to the Clerk of the Board prior to the March 1 hearing, the majority of which opposed the plan and/or the Board's process to date. Ex. 1 ¶ 10 & Attach. 1-3.

16. The Board did not maintain a website where the public could submit comments or

proposed plans without attending a hearing. Ex. 1 ¶¶ 6, 11, 13; Ex. 3 ¶ 6.

17. The Board did not separately publish the written comments it received related to the proposed redistricting plans on its own website or elsewhere prior to the filing of the subject lawsuit. Ex. 1 ¶¶ 8, 11, 13; Ex. 3 ¶¶ 8.

18. The written comments submitted to the Board were only obtained by Voters pursuant to Colorado Open Records Act requests submitted by Plaintiff Barbara Whinery to Weld County Attorney Bruce Barker on March 22, 2023 and June 19, 2023. Ex. 1 ¶¶ 9–11 & Attachs. 1-1 and 1-2.

19. The March 1 hearing was held at the Weld County Administration office in Greeley, Colorado. Ex. 1 ¶ 4; Ex. 3 ¶ 4.

20. At the March 1 hearing, several members of the public spoke in opposition to the Board’s proposed map. Ex. 2 ¶ 6 & Attach. 2-5, Mar. 1, 2023 Hr’g Mins. at 1–2.

21. Plaintiffs Barbara Whinery and Stacy Suniga requested that the Redistricting Statutes be followed in developing a new redistricting plan. Ex. 1 ¶ 5; Ex. 3 ¶ 5; Attach. 2-5 at 1–2.

22. The March 1 approved hearing minutes state that “Bruce Barker, County Attorney, stated HB 21-1047 does not require Home Rule Charter counties to comply with its provisions,” and “the Board must comply with the procedures of the Charter as it currently stands.” Attach. 2-5 at 2.

23. The Charter provides only that “[t]he Board shall review the boundaries of the districts when necessary, but not more often than every two years, and then revise and alter the boundaries so that districts are as nearly equal in population as possible.” Attach. 2-1 § 3-2 at 4.

24. The March 1 approved hearing minutes do not attribute statements to Mr. Barker, or to any members of the Board, explaining how the plans comply with the criteria prescribed in section 30-10-306.3, C.R.S. Attach. 2-5; *see also* Ex. 1 ¶ 13.

25. A member of the Board stated at the March 1 hearing that the boundary lines were “based on population only.” Attach. 2-5 at 3.

26. At the conclusion of the March 1 hearing, the Board approved the redistricting plan as presented. *Id.*; Ex. 2 ¶ 7 & Attach 2-6, Mar. 1 Res.

27. The redistricting map attached to the January 23 approved hearing minutes is identical to the one approved by the March 1 resolution. *Compare* Attach. 2-3 at 5 *with* Attach. 2-6 at 3. *See also* Ex. 1 ¶ 12.

28. This has resulted in a final map for use in the 2024 election for county commissioners (Map). Attach. 2-6 at 3; *see also* Ex. 2 ¶¶ 8, 9 & Attachs. 2-7 and 2-8 (showing that the terms for Commissioners Mike Freeman and Lori Saine end December 31, 2024, so the commissioner seats for Districts 1 and 3 will be part of the 2024 election).<sup>4</sup>

### LEGAL STANDARD

This Court has the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” § 13-51-105, C.R.S.; *see also* C.R.C.P. 57. Where, as here,

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<sup>4</sup> These attachments are the webpages for Commissioners Mike Freeman and Lori Saine published on the Weld County Board of County Commissioners’ own website at <https://weld.gov/Government/Elected-Officials/County-Commissioners>. Because the expiration of their terms is not subject to reasonable dispute given that the information is promulgated by the Board itself, Voters ask the Court to take judicial notice of this fact under C.R.E. 201(c) and (d).



there are no genuine issues as to any material fact, a party is “entitled to a judgment as a matter of law” on a declaratory judgment claim. *McCormick v. Union Pac. Res. Co.*, 14 P.3d 346, 348–49 (Colo. 2000); *see also* C.R.C.P. 56(c) (providing that “judgment sought shall be rendered forthwith” if there is “no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law”). “Constitutional and statutory interpretation present questions of law.” *Kulmann v. Salazar*, 521 P.3d 649, 653 (Colo. 2022).

## **ARGUMENT**

As a matter of law, the Redistricting Statutes apply to Weld County. It is undisputed that the Board did not comply with the Redistricting Statutes. Weld County’s status as a home rule county does not excuse the Board’s failure to comply. Voters are therefore entitled to declaratory relief and a permanent injunction to address the Board’s statutory violations and deprivation of Voters’ liberty interest in voting rights without due process.

### **I. The Redistricting Statutes apply to the Board.**

When interpreting a statute, a court’s “primary aim is to effectuate the legislature’s intent.” *Nieto v. Clark’s Mkt., Inc.*, 488 P.3d 1140, 1143 (Colo. 2021). Courts “look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and ... apply words and phrases in accordance with their plain and ordinary meanings.” *Id.* (quoting *Bill Barrett Corp. v. Lembke*, 474 P.3d 46, 49 (Colo. 2020)); *see also* § 2-4-101, C.R.S. (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”).

Section 30-10-306.1(1)(a) applies to boards of county commissioners in counties “that have **any number** of their county commissioners not elected by the voters of the whole county[.]” (Emphasis added.) This language is unambiguous: if less than all of the voters in a county elect even one county commissioner, the Redistricting Statutes apply.

Here, it is beyond dispute that the Board has five members, three of whom are elected by separate geographic districts and not by the whole county. SUMF ¶ 3. Because some Weld County commissioners are elected by less than all the voters in the county, the Redistricting Statutes unambiguously apply to the Board. Nowhere in section 30-10-306.1 are home rule counties exempted. *See Larimer Cnty. Bd. of Equalization v. 1303 Frontage Holdings LLC*, 531 P.3d 1012, 1023 (Colo. 2023) (prohibiting courts from adding words to statutes).

The Board disregarded that requirement, relying instead on the County Clerk to prepare the plan. SUMF ¶¶ 5, 8. In fact, the General Assembly expressly contemplated that the Redistricting Statutes would apply to the Board.

While the Redistricting Statutes are unambiguous, this Court may consider the legislative history in determining whether it contradicts a plain language interpretation of those statutes. *People v. Rockwell*, 125 P.3d 410, 418–19 (Colo. 2005). The final fiscal note attached to House Bill 21-1047 (which enacted the Redistricting Statutes) identified Weld County as one of three counties that would be affected by the Redistricting Statutes at the time they were passed. Final Fiscal Note, H.R. 73rd Gen. Assembly, 1st Reg. Sess., LLS 21-0131, HB 21-1047 (Colo. July 14, 2021).

The General Assembly also concluded it was of “statewide interest that voters in every Colorado county” be empowered by the statutes to “elect commissioners who will reflect the communities within the county and who will be responsive and accountable to them.” H.B. 21-1047, 73rd Gen. Assembly, 1st Reg. Sess. § 1(1)(i) (2021). Thus, the General Assembly was motivated by concerns applicable to all counties in the state and expressly stated its intent that the bill be applied to “every” county that satisfies the threshold criteria. This legislative history reinforces that the Redistricting Statutes apply to the Board.

Accordingly, the plain language of the Redistricting Statutes and their legislative history and placement within the Colorado Revised Statutes show those statutes apply to the Board.

**II. It is undisputed that the Board did not comply with the Redistricting Statutes.**

**A. The Board did not designate a county commissioner redistricting commission.**

Section 30-10-306.1(1) directs that the Board “**must** designate a county commissioner district redistricting commission, and [is] encouraged to convene an independent county commissioner district redistricting commission[.]” (Emphasis added.); *see also* § 2-4-401(6.5)(a), C.R.S. (stating that “must,” when used in a statute, “means that a person or thing is required to meet a condition for a consequence to apply.”); *Silverview at Overlook, LLC v. Overlook at Mt. Crested Butte Liab. Co.*, 97 P.3d 252, 255 (Colo. App. 2004) (“Use of the word ‘must’ [in a statute] connotes a requirement that is mandatory and not subject to equivocation.”). In appointing members to the commission, careful consideration should be given to appointing persons who “accurately reflect” the political affiliations of the county’s residents (including unaffiliated residents) and the county’s “racial, ethnic, gender, and geographic diversity[.]” §

30-10-306.1(2)(a)–(b). Careful consideration should also be given to “[a]void conflicts of interest based on partisan alignments.” § 30-10-306.1(2)(c).

The commission’s purpose is to “adopt a plan to divide the relevant county into as many districts as there are county commissioners elected by voters of their district.” § 30-10-306.1(1). A board of county commissions in these counties “may not revise or alter county commissioner districts” except in accordance with an adopted redistricting commission final plan. § 30-103-306.1(3).

It is **undisputed** here that the Board did not create a county commissioner redistricting commission, much less an independent one. SUMF ¶¶ 5, 8, 22–25. Instead, the Board determined it was not required to follow any of the requirements of the Redistricting Statutes. SUMF ¶ 22. Because no commission was created, no consideration was given to whether the commission accurately reflected Weld County’s residents’ political affiliations or racial, ethnic, gender, or geographic diversity. Nor was any consideration given to forming a commission that avoided conflicts of interest based on partisan alignments.

The Redistricting Statutes require that the redistricting commission, not a board of county commissioners, conduct the mandatory redistricting tasks. §§ 30-10-306.2 to -306.4. The Board’s failure to designate a redistricting commission is therefore dispositive of Voters’ first claim, and this Court should enter judgment in Voters’ favor as to their first claim. Even assuming the Board could fulfill the mandatory tasks itself, the undisputed facts here show it failed to do so.

**B. The Board did not comply with any other redistricting requirements.**

Further provisions of the Redistricting Statutes impose requirements on the commission and establish actions that the commission “shall” perform. §§ 30-10-306.2 to -306.4. The General Assembly’s use of the words ‘shall’ and ‘must’ throughout these requirements make the requirements mandatory. *See Bd. of Cnty. Comm’rs of Saguache Cnty. v. Edwards*, 468 P.2d 857, 859 (Colo. 1970) (interpreting use of the word ‘shall’ in earlier version of county commissioner redistricting statutes as “impos[ing] upon the county commissioners a mandatory duty”); *People v. Dist. Ct., Second Jud. Dist.*, 713 P.2d 918, 921 (Colo. 1986) (“[T]his court has consistently held that the use of the word ‘shall’ in a statute is usually deemed to involve a mandatory connotation.”).

It is undisputed that the Board failed to comply with the Redistricting Statutes:

<b>Redistricting Statutes’ Requirement</b>	<b>Board’s Actions</b>
Public input on the redistricting process must first be solicited and at least three proposed plans must be presented for public comment. § 30-10-306.4(1)(d).	The Board published just one proposed plan and only sought public input after it had been developed internally. SUMF ¶¶ 8, 12, 26.
Public input had to be considered in developing the proposed plans. §§ 30-10-306.4(1)(d); 30-10-306.2(3)(a).	Despite the dozens of written comments submitted to the Board critiquing the proposed plan and public comments made at the March 1 hearing, the Board did not make any changes to the plan after developing it in January—before any comments were received. SUMF ¶¶ 8, 15, 20–21, 26–27.

There must be three public hearings before a plan can be approved. § 30-10-306.2(3)(b).	The Board held only two public hearings before approving a map. SUMF, ¶¶ 4–5, 11–12.
<p>The commission must provide meaningful and substantial opportunities for county residents to present testimony either in person or electronically.</p> <p>If hearings are held electronically, the board may solicit feedback from the whole county at each hearing or may solicit feedback from a different third of the county at each hearing.</p> <p>If hearings are held in-person, each hearing must be held in a different third of the county. § 30-10-306.2(3)(b).</p>	Both hearings were held at the Board’s office. SUMF ¶¶ 7, 19. The Board provided no electronic means to attend or participate in the meetings. SUMF ¶¶ 6, 14.
A website must be maintained where the public can submit comments or proposed plans and written comments can be published. § 30-10-306.2(3)(d).	The Board did not maintain a website, much less one where public comment could be submitted or plans and comments could be posted. SUMF ¶¶ 15–18.
The plan must (a) make a good-faith effort to achieve mathematical population equality between districts; (b) comply with the Voting Rights Act of 1965; and (c) “[a]s much as is reasonably possible” preserve whole communities of interest and whole political subdivisions, such as cities and towns. The districts shall be as compact as reasonably	The Board stated its boundary lines were “based on population only.” SUMF ¶ 25. No other criteria were considered. <i>Id.</i>

possible and, finally, “maximize the number of politically competitive districts.” § 30-10-306.3(1)–(3)(a).	
Public explanation was required as to how the proposed plans address the mandatory redistricting criteria and how they followed. § 30-10-306.4(1)(e). Within 72 hours of approved a plan, the record and a report demonstrating how the plan reflects the evidence presented to it and findings concerning competitiveness and other criteria was required to be issued. § 30-10-306.3(3)(c).	The Board never explained its internal process, much less how it met the statutory criteria, aside from stating its boundary lines were “based on population only.” SUMF ¶¶ 24–25. It denied it was obligated provide any such explanations. SUMF ¶ 22.
A final plan could not be approved until at least seventy-two hours after the plan was proposed in a public meeting. § 30-10-306.2(2).	The Board approved the plan at the March 1, 2023 meeting at which the plan was presented. SUMF, ¶¶ 12, 26.

The Board’s failure to designate a redistricting commission is dispositive of Voters’ claims. Even were that not so, the Board’s failure to comply with the requirements above further demonstrates that, as a matter of law, the Board failed to comply with the Redistricting Statutes. Voters are therefore entitled to judgment in their favor as to their first claim for this additional reason.

### **III. Weld County’s home rule status does not excuse its disregard of the Redistricting Statutes.**

In public statements that predate this litigation, the Board contended that because Weld County was a home rule county, it was exempt it from complying with the Redistricting Statutes.

*See, e.g.*, SUMF ¶ 22. It did the same throughout its Motion to Dismiss. *See, e.g.*, Defs.’ Mot. to Dismiss at 13, C381F77198AB7. The Board is wrong.

Colorado’s Constitution and the Colorado County Home Rule Powers Act (section 30-35-101, C.R.S., *et seq.*) vests registered electors in each county “with the power to adopt a home rule charter establishing the organization and structure of county government consistent with” article XIV of the Constitution and “statutes enacted pursuant hereto.” Colo. Const. art. XIV, § 16(1); §§ 30-11-501–513, C.R.S. (detailing procedures for adopting charter); *see also Bd. of Cnty. Comm’rs v. Andrews*, 687 P.2d 457, 458 (Colo. 1984) (observing that home rule counties’ authority is “limited” by the Colorado constitution and statutes).<sup>5</sup> Weld County adopted a home rule charter in 1976. *See generally* Charter.

As a home rule county, Weld County “**shall** provide all mandatory county functions, services, and facilities and shall exercise all mandatory powers as may be required by statute.” Colo. Const. art. XIV, § 16(3) (emphasis added). The General Assembly made this clear: home rule counties “shall exercise such duties and authority and shall have all the powers and responsibilities as provided by law for governing bodies of counties not adopting a home rule charter.” § 30-35-201, C.R.S.; *see also* § 30-35-103(4), C.R.S. (“A home rule county shall provide all mandatory county functions, services, and facilities and shall exercise all mandatory powers as are required by law for counties not having home rule powers.”); § 30-11-513, C.R.S. (stating that

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<sup>5</sup> By way of example, Weld County may adopt a personnel system unique from other counties because it “relates to structure and organization of county government, not to the functions of [the] government,” at “least if it was not contrary to other provisions of general law.” *Andrews*, 687 P.2d at 459.



home rule county officers shall be appointed or elected as provided by charter, but their duties “shall be as provided by statute”); *Andrews*, 687 P.2d at 458 (holding that “home rule counties are given broad discretion in the area of structure ... [t]hey are given much less freedom in determining what functions they may choose to have their county government perform”).

Weld County is also “empowered to provide such permissive functions, services, and facilities and to exercise such permissive powers as may be authorized by statute applicable to all home rule counties, except as may be otherwise prohibited or limited by charter” or by Colorado’s Constitution. Colo. Const. art. XIV, § 16(4); § 30-35-103(4) (same). There “are numerous provisions in the Colorado statutes that either allow home rule counties to expand upon the powers already granted to statutory counties or grant home rule counties new powers altogether.” *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1208 (10th Cir. 2002) (interpreting Colorado Constitution’s home rule provision). Permissive powers granted to home rule counties are found in article 35 of title 30 of the Colorado Revised Statutes and may be “included in the county’s home rule charter or in any amendment thereto,” as provided in section 30-35-103. § 30-35-201. None of these permissive powers include redistricting. *Id.* (detailing administrative, public works and services, building and zoning regulations, condemnation, and ordinance powers).

Certain constitutional provisions applicable to statutory counties apply to home rule counties “only to such extent as may be provided” in their charters. Colo. Const. art. XIV, § 16(5). Specifically, this means that home rule counties may opt into constitutional provisions that set forth the type of officers who shall be elected in each county and how to choose and

compensate them. *See* Colo. Const. art. XIV, §§ 6, 8, 9, 10, 12, 15. None of the opt-in provisions address redistricting. Thus, nothing in Colorado’s Constitution or statutory scheme for home rule counties exempts Weld County from the Redistricting Statutes or permits the Board to do so unilaterally.

Moreover, nothing in section 30-10-306.1 makes the formation of a redistricting commission and compliance with the Redistricting Statutes “permissive” such that Weld County would have the constitutional or statutory authority to either decline to follow them or “otherwise prohibit[] or limit[]” Weld County from doing so in its Charter. Colo. Const. art. XIV, § 16(4); § 30-35-201. Nor does the text of § 3-2(2) of the Charter even purport to do so, as any such attempt would be void at the outset under Colorado’s Constitution.

Because the Redistricting Statutes provide an essential, mandatory county function and power, and because some commissioners of Weld County are not elected by voters of the whole county, the Statutes apply to Weld County and the Board must follow them. *See* Colo. Const. art. XIV, § 16(3). The analysis ends there, and Weld County’s home rule status does not excuse its failure to comply with the Redistricting Statutes. Judgment in Voters’ favor as to their first claim is therefore warranted.

**IV. Weld County’s arbitrary redistricting process violated the due process clause of the United States Constitution with respect to Voters’ voting rights.**

The Redistricting Statutes create a protected liberty interest in voting rights held by the citizens of Colorado, including the residents of Weld County. It guaranteed to them the right to meaningfully participate in the redistricting process, the results of which ultimately would decide how their county representatives would be chosen. By failing to adhere to the Redistricting

Statutes and instead pursuing its own arbitrary process for redistricting, the Board denied Voters the due process owed to them with respect to their constitutionally protected liberty interest in their voting rights.

**A. The Redistricting Statutes created a protected liberty interest in the redistricting process.**

The Fourteenth Amendment of the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. XIV, § 1. “Procedural due process ... requires that an adequate process be afforded before the government deprives a person of a life, liberty, or property interest.” *Cendant Corp. & Subsidiaries v. Dep’t of Rev.*, 226 P.3d 1102, 1109 (Colo. App. 2009) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). A constitutionally protected liberty interest “may arise from the Constitution itself ... or it may arise from an expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *see also Atherton v. D.C. Off. of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (“State regulations may give rise to a constitutionally protected liberty interest if they contain substantive limitations on official discretion, embodied in mandatory statutory or regulatory language.”); *Evans v. Dillahunty*, 662 F.2d 522, 525 (8th Cir. 1981) (holding where “the decisionmaker is required to base its decisions on specific, defined criteria, a protectible interest is created that is entitled to some degree of due-process protection”); *Montero v. Meyer*, 13 F.3d 1444, 1447 (10th Cir. 1980) (holding a liberty interest exists when a plaintiff has a “legitimate claim of entitlement” to the benefit) (emphasis in original removed).

Here, the General Assembly determined that for “our democratic republic to truly represent the voices of the people, districts must be drawn such that the people have an opportunity to elect representatives who are reflective of and responsive and accountable to their constituents.” HB 21-1047, 73rd Gen. Assembly, 1st Reg. Sess. § 1(1)(a) (2021). The General Assembly also concluded that “[t]he people are best served when districts are not drawn to particular parties or incumbents, but are instead drawn to ensure representation for the various communities of interest and to maximize the number of competitive districts.” *Id.* § 1(b). The Redistricting Statutes were enacted to ensure the redistricting process includes “robust public participation” and is based on “fair criteria for drawing districts.” *Id.* § 1(2). The Redistricting Statutes therefore extend to all Colorado voters the right to meaningful participation in the redistricting process and to vote in commissioner districts that are drawn based on fair criteria. The General Assembly expressly articulated this interest and outlined a set of procedural safeguards to protect it. The Redistricting Statutes use mandatory language that limits counties’ discretion in the redistricting process and identifies criteria that must be considered, consistent with the “substantive limitations” discussed in *Atherton* and “specific, defined criteria” referenced in *Evans*. The General Assembly’s actions confirm that Colorado voters, including Voters, hold a liberty interest protected by the due process clause in meaningful participation in the redistricting process and in county commissioner districts drawn based on fair criteria.

The weight of federal authority holds that where a state extends privileges related to the right to vote, it creates a liberty interest and must provide due process before arbitrarily removing those privileges. *See e.g., Frederick v. Lawson*, 481 F. Supp. 3d 774, 794 (S.D. Ind. 2020) (“We

therefore hold, in line with the vast majority of courts addressing this issue, that, having extended the privilege of mail-in absentee voting to certain voters, the State must afford appropriate due process protections to the use of [mail-in] absentee ballots.”); *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (collecting similar cases finding protected liberty interest exists in context of absentee voting).<sup>6</sup> Similar to mail-in ballots, the General Assembly gave privileges to its voters, and the Board was not permitted to arbitrarily remove them. The case law finding that the state can create constitutionally protected liberty interests related to the right to vote is the logical result of the long-accepted principle that a protected liberty interest may arise from state laws or policies. *See Wilkinson*, 545 U.S. at 221. The Redistricting Statutes therefore created a constitutionally protected liberty interest that the Board could not deny to Voters without due process.

**B. The Board deprived Voters of their protected interest in voting in fair and representative county commissioner districts without providing due process.**

If a person is deprived of a protected interest without constitutionally adequate process, courts must weigh three factors: “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens

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<sup>6</sup> Statutory provisions related to voting privileges have been held to create liberty interests supporting due process claims in contexts other than absentee voting. *See e.g., Tenn. Conf. of the Nat’l Ass’n for the Advancement of Colored People v. Lee*, No. 3:20-CV-01039, 2022 WL 982667, at \*6–7 (M.D. Tenn. Mar. 30, 2022) (holding the plaintiffs stated a due process claim based on deprivation of liberty interest in certificate of restoration of voting rights).

that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Each of these factors weigh in favor of finding that Voters unconstitutionally were deprived of their protected liberty interest.

**1. Voters’ private interest in the Board’s actions is significant.**

The General Assembly determined that districts drawn to ensure voters can elect representatives who are “reflective of and responsive and accountable to their constituents” was necessary “in order for our democratic republic to truly represent the voices of the people.” HB 21-1047, 73rd Gen. Assembly, 1st Reg. Sess. § 1(1)(a) (2021). The State of Colorado, acting through the General Assembly, likewise declared that the people are best served when districts are not drawn to benefit particular parties or incumbents, but to ensure representation for various communities of interest and to maximize the number of competitive districts. *Id.* § 1(b). It passed the Redistricting Statutes specifically to achieve these goals.

The state has already determined that the interests created and protected by the Redistricting Statutes are necessary to ensure that voting in county commissioner elections translates to a genuine impact on county-level governance. The alternative is a self-interested and unprincipled process where communities of interest may not be represented and where incumbents can slant the playing field in their favor. Because the interest at issue is essential to the effective exercise of the fundamental right to vote, it is therefore “entitled to substantial weight.” *See, e.g., Frederick*, 481 F. Supp. 3d at 794; *Martin*, 341 F. Supp. 3d at 1338.

**2. The lack of safeguards in the Board’s redistricting process makes an erroneous deprivation likely, and the value of the safeguards in the Redistricting Statutes are high.**

The Board has acknowledged that the only criteria it applied in drawing the boundaries of Weld County’s commissioner districts was ensuring the three districts are equal in population. SUMF ¶¶ 24–25. There are nearly infinite ways to draw a map of the county that divides the population equally, meaning the Board’s discretion to choose the citizens that will elect and reelect Board members is boundless. Whether the Board drew completely arbitrary boundary lines or drew the boundaries based on other considerations it has chosen not to reveal, the result is the same: an opaque process that is in no way calculated to ensure voters can elect commissioners who are reflective of, and responsive and accountable to, the people of each of the three districts in Weld County. Moreover, the notice provided to Voters of the Board’s process was illusory and did not afford them a meaningful opportunity to be heard. The Board never changed the Map from its original iteration despite receiving dozens of comments in opposition to the proposed plan and their process, and they approved the Map immediately following a hearing at which Voters and others requested that the Board follow the Redistricting Statutes. SUMF ¶¶ 15, 20, 21, 26, 27. The Board’s failure to follow the redistricting procedures set forth in the Redistricting Statutes, and the process it used instead, all but guaranteed that Voters were deprived of their articulated voting rights.

In contrast, the Redistricting Statutes provide a number of safeguards to protect Voters’ liberty interest. It identifies specific criteria that a designated redistricting commission must consider in drawing proposed plans and requires that the commission explain how it considered

the criteria in formulating its proposal. *See* §§ 30-10-306.3, -306.4(1)(e). The Statutes provide notice and hearing requirements intended to enable all citizens in the county to comment on proposed plans and attend hearings either in person or electronically. § 30-10-306.2(3)(b). They require that the commission formulate multiple different versions of the redistricting plan and wait at least 72 hours after a public hearing presenting the plan before approving it. § 30-10-306.2(2). Each of these procedures are calculated to provide for robust public participation, a meaningful opportunity to be heard, and fair criteria to be utilized in the redistricting process. By providing “an opportunity to be heard at a meaningful time and in a meaningful manner,” the Redistricting Statutes fulfilled “the fundamental requirement of due process.” *Whiteside v. Smith*, 67 P.3d 1240, 1248 (Colo. 2003). The Board’s process did not.

**3. The Board’s interest in ignoring the applicable statutes and imposing a secretive and arbitrary process of its own design is owed no weight.**

The third prong of *Mathews* requires weighing the government’s interest against the protected liberty interest at issue. Here, the state of Colorado is aligned with Voters. By passing the Redistricting Statutes, the General Assembly confirmed that the fiscal and administrative burden to counties of following the statutory process is outweighed by the benefits to Colorado’s citizens. The fact that Weld County may incur some administrative expenses to comply with state law cannot outweigh Voters’ legally protected liberty interest. *See e.g., Fish v. Kobach*, 840 F.3d 710, 754–55 (10th Cir. 2016) (holding administrative burden of altering registration status of voters could not outweigh liberty interest for due process purposes, and that burden was “of Kansas’s own creation” because it chose to violate applicable statute); *see also League of Women*



*Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1006 (W.D. Mo. 2018) (protected liberty interests related to provisional ballot process “outweigh any financial burden on Defendants”).

The only countervailing interest is the Board’s claimed “constitutional duty to its citizens” as a home rule county. *See* Mot. to Dismiss at 24–25. But Weld County’s home rule status does not permit the Board to override the will of the General Assembly when it comes to the mandatory powers and functions it must exercise. *See* Section I *supra*. As such, the Board has not articulated any legitimate interest in following its own arbitrary process over the Redistricting Statutes. The balance of the *Mathews* test confirms that Voters suffered an unconstitutional deprivation by the Board’s actions.

**V. Voters are entitled to a permanent injunction of the Board’s use of the Map.**

Voters seek a permanent injunction voiding the Map approved by the Board’s March 1 resolution and requiring the Board to comply with the Redistricting Statutes. To obtain a permanent injunction, a party must show “(1) he or she has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.” *Cronk v. Bowers*, 537 P.3d 401, 407, (Colo. App. 2023), *as modified*, (July 27, 2023). Voters have satisfied each element.

First, Colorado law and the United States Constitution required the Board not to arbitrarily depart from the redistricting procedures provided by the Redistricting Statutes. *See* Sections I and III *supra*. The undisputed facts show that the Board did so, violating the Redistricting Statutes and depriving Voters of constitutionally protected rights. *See* Section II

and III *supra*. Voters therefore succeed on their claims for declaratory relief that the Board must comply with the requirements of the Redistricting Statutes as a matter of constitutional and statutory law. *See* § 13-51-106, C.R.S. (“Any person ... whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.”).

Second, Voters will suffer irreparable harm if the injunction is not issued because the districts that apply to the 2024 Weld County elections will be governed by the Map, which was developed via Weld County’s secretive, arbitrary, and illegal process that denied Voters their voting rights. SUMF, ¶ 28.

Third, the injury to Voters’ constitutional rights outweighs any harm that could be caused by requiring the Board to comply with statutes that are binding upon Weld County and every other county in Colorado—statutes the Board should have adhered to in the first place.

Finally, the injunction will not harm the public interest; rather, it will advance it by ensuring that the citizens of Weld County are not deprived of meaningful participation in the redistricting process. Together with the other relief sought herein, it will ensure that Weld County voters have the same opportunity as other Coloradans to vote within county commissioner districts that are drawn to provide for representative, responsive, and accountable political leaders.

## CONCLUSION

The Redistricting Statutes apply to Weld County. The Board failed to follow those statutory mandates, which promised participation in fair and competitive elections for responsive, accountable representatives to Coloradans. This failure deprived Voters and the other citizens of Weld County of their protected liberty interest, which cannot be remedied without a permanent injunction voiding the map produced as a result of the Board's flawed process. The Court should grant Voters' motion for summary judgment and issue the complete relief requested herein.

Dated: January 23, 2024.

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### **CERTIFICATE OF SERVICE**

I certify that on January 23, 2024 a true and accurate copy of Plaintiffs' Motion for Summary Judgment was filed using the Colorado Courts E-filing System and served on all counsel of record.

*s/Kendra N. Beckwith*  
Of Lewis Roca Rothgerber Christie