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CERTIORARI TO THE COURT OF APPEALS Case No. 2024CA774	
DISTRICT COURT, WELD COUNTY Honorable Todd L. Taylor, Case No. 2023CV30834	
Petitioners: LEAGUE OF WOMEN VOTERS OF GREELEY, WELD COUNTY, INC.; LATINO COALITION OF WELD COUNTY; BARBARA WHINERY; & STACY SUNIGA v. **Respondent**: BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY	▲ **COURT USE ONLY**
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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO IN SUPPORT OF PETITIONERS

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28(a)(2) & (3), C.A.R. 32, and C.A.R. 29.

This brief complies with the word limits set forth in C.A.R. 29(d) (an amicus brief may be no more than one-half the length authorized for a party's principal brief). It contains 3,831 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 29.

/s/ Timothy R. Macdonald

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IDENTITY AND INTEREST OF AMICI CURIAE

The American Civil Liberties Union Foundation is a nationwide, nonpartisan, nonprofit organization with almost two million members and supporters. The ACLU of Colorado, with over 45,000 members and supporters, is one of the ACLU's statewide affiliates. The ACLU is dedicated to the principles of liberty and equality embodied in the U.S. and state Constitutions and our nation's civil rights laws, including laws protecting the right to cast a meaningful vote. The ACLU litigates cases aimed at preserving these rights and it has regularly appeared before courts throughout the country to vindicate them, including in *Reynolds v. Sims*, 377 U.S. 533 (1964), *Allen v. Milligan*, 599 U.S. 1 (2023), *Alexander v. South Carolina State Conference of NAACP*, 144 S. Ct. 1221 (2024), *League of Women Voters v. Utah State Legislature*, 2024 UT 21, 2024 WL 3367145 (Utah S. Ct. 2024), and *Graham v. Sec'y of State Michael Adams*, 684 S.W.3d 663 (Ky. S. Ct. 2023).

The ACLU has an interest in this case because issues of standing and a right of action are central to enforcement of civil rights and civil liberties, both in the voting context and in other legal areas relevant to the ACLU's mission. In addition, the ACLU seeks to preserve robust state-level enforcement of laws designed to ensure free and fair elections, particularly against the backdrop of federal courts' recent retrenchment on voting rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court concluded that the League of Women Voters and other plaintiffs in this case (collectively, the "Voters") have standing and a right of action under House Bill 21-1047 (the "Redistricting Statutes") to enforce compliance with the law's terms. That decision is legally correct under this Court's precedent. *Amici* write to emphasize two specific points in relation to these holdings on review.

First, the failure of the Board of County Commissioners of Weld County ("the Board") to comply with the Redistricting Statutes denies the Voters access to key information required by law, their ability to participate in the redistricting process to the full extent contemplated by law, and a right to vote under maps determined through a fair redistricting process. Each of these harms is independently sufficient to demonstrate the Voters' constitutional standing. The Voters also have a legally protected interest at stake, as required under this Court's established test for standing. Such an interest is equivalent to a private right of action, which the Redistricting Statutes impliedly confer on the Voters through their mandatory language intended for the Voters' benefit.

Second, the district court's determination that the Voters have standing and a right to sue is critically important to the overall protection of free and fair elections in Colorado. The Board's contrary position would slam the courthouse doors shut in a wide range of proceedings related to elections, threatening state-court avenues to justice at a time when federal courts are already in retreat on voting rights. This Court should not countenance such an outcome.

ARGUMENT

I. THE VOTERS HAVE STANDING BECAUSE THEY ARE HARMED BY THE BOARD'S CONDUCT AND HAVE A RIGHT OF ACTION UNDER THE REDISTRICTING STATUTES

A. This Court's two-prong standing test considers a plaintiff's injury and the existence of an express or implied right of action.

Unlike Article III of the U.S. Constitution, the Colorado Constitution lacks a case-or-controversy requirement. *See Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977). Accordingly, Colorado courts apply a two-prong standing test that is distinct from (and less stringent than) the test used by federal courts. *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000); *e.g.*, *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1007 (Colo. 2014) (emphasizing state taxpayer standing sweeps more broadly than the federal doctrine).

The first, "constitutional prong of [this Court's] standing jurisprudence" asks whether the plaintiff has or will "suffer an 'injury in fact' from the challenged action." *City of Greenwood Vill.*, 3 P.3d at 437. The Court has held that this first prong is animated by article VI, section 1 of the Colorado Constitution, the state's separation-of-powers clause. That provision governs the metes and bounds of judicial authority, helping to ensure that Colorado courts do not improperly encroach on the legislative and executive branches.

The second prong of standing, which this Court has described as "prudential," is animated by non-constitutional principles of judicial restraint. *City of Greenwood Vill.*, 3 P.3d at 437. Under this prong, courts ask whether the plaintiff has demonstrated that the suffered injury "is to a legally protected right," that is, whether the plaintiff has properly alleged "a claim for relief under the constitution, the common law, a statute, or a rule or regulation." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) (citation omitted).

This prong is "not equivalent to a holding on the merits of [a] plaintiff[']s claim." *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 668 (Colo. 1982). Instead, it considers whether the injury, if demonstrated by the plaintiff, "is actionable" under the relevant law. *City of Arvada ex rel. Arvada Police Dep't v. Denver Health & Hosp. Auth.*, 403 P.3d 609, 613 (Colo. 2017); *see also Weld Cnty. Colo. Bd. of Cnty.*

Comm'rs v. Ryan, 536 P.3d 1254, 1258 (Colo. 2023). "When a statute does not specify what constitutes an actionable injury, [Colorado courts] look to the law of implied private rights of action to determine whether the statute might still create a claim conferring standing." *City of Arvada*, 403 P.3d at 613 (footnote omitted); *Colo. State Bd. of Educ. v. Adams Cnty. Sch. Dist. 14*, 537 P.3d 1, 12 (Colo. 2023) (stating that the inquiry into "whether a statutory or constitutional provision confers upon the plaintiff a right to judicial review" "essentially collapses into *Wimberly*'s 'legally protected interest' inquiry").[1]

B. The Board's failure to comply with the Redistricting Statutes injures Voters in numerous ways sufficient to support standing.

As this Court has explained, the harm necessary for litigants to establish standing can be demonstrated not only through tangible injuries—such as physical damage or economic harm—but also through intangible ones, such as harm to one's aesthetic interests or by the deprivation of civil liberties. *Ainscough*, 90 P.3d at 856

[1] The Court's precedent treating the second prong as prudential appears to be in tension with its statement that this prong bears on a court's jurisdiction to decide a case. *Colo. State Bd. of Educ.*, 537 P.3d at 7. For example, a prudential consideration would normally be subject to waiver. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 193–94 (1976); *June Med. Servs. LLC v. Russo*, 591 U.S. 299, 317 (2020) (plurality op.), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (same); *id.* at 354 (Roberts, C.J., concurring) (same). Yet this Court has indicated that standing "can be raised at any time during the proceedings." *Schaden v. DIA Brewing Co., LLC*, 478 P.3d 1264, 1273 (Colo. 2021), *as modified on denial of reh'g* (Feb. 1, 2021) (internal quotation omitted).

(citing *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1058 (Colo. 1980)). The Voters meet this bar, which has "traditionally been relatively easy to satisfy." *Id.*

First, the Board's violation of the Redistricting Statutes harms the plaintiffs by denying them access to information that the Statutes require the Board to create and maintain. The Statutes include, for example, the establishment of a publicly accessible website to post about proposed plans, C.R.S. § 30-10-306.2(3)(c), (d); a mandate that the Board release to the public not just one, but *three*, potential redistricting plans under consideration, *id.* § 30-10-306.3(1)–(3)(a); and the requirement that the Board hold three public hearings before adopting a redistricting plan, *id.* § 30-10-306.2(3)(b). And the Redistricting Statutes require the Board to memorialize its rationale for adopting the plan it selects, including by explaining how the plan satisfies the substantive criteria set out in the statutes. *Id.* § 30-10-306.2(4)(b)(C); § 30-10-306.4(1)(e). This information is critical for the public to assess, for example, whether unlawful political gerrymandering or intentional vote dilution has taken place.

The denial of information legally required to be made public has long been recognized to constitute an injury in fact in this state, and under federal law. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (citing *Public Citizen v. Dep't of*

Justice, 491 U.S. 440, 449 (1989), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982)); *Weisfield v. City of Arvada*, 361 P.3d 1069, 1073–74 (Colo. App. 2015) (concluding that "violation of the express statutory prohibition against secret ballots in the [Colorado] Open Meetings Law" amounted to an injury in fact).

There is no question that the Voters were denied access to key information in the redistricting process, including information that bears heavily on the substantive validity of the map. For example, the Statutes require that "[a]s much as is reasonably possible," a redistricting plan "must preserve whole communities of interest and whole political subdivisions, such as cities and towns." C.R.S. § 30-10-306.3(2)(a). The division of a city or town is permitted only "where, based on a preponderance of the evidence in the record, a community of interest's legislative issues are more essential to the fair and effective representation of" district residents. *Id.* By failing to hold the public hearings required by law, and by refusing to develop and disclose the statutorily required record for its redistricting decision, the Board denied the Voters access to information legally required by law and helpful to assessing the map's substantive adherence to the Statutes.

Second, the Board's failure to comply with the Redistricting Statutes foreclosed the plaintiffs' ability to participate in the redistricting process to the full extent contemplated by the Statutes. For example, the Board fell far short of

satisfying the statutes' command that it hold three public hearings to receive testimony from the public and solicit feedback from county residents on at least three proposed maps. Dist. Ct. Op. 6–7.

Colorado courts have recognized that the denial of a right to be heard may constitute injury sufficient to satisfy standing. In *Ainscough v. Owens*, for example, this Court concluded that "depriv[ation] of a right to apply for a [payroll] deduction and receive a non-arbitrary ruling" is sufficient to constitute injury. 90 P.3d at 857–58. Similarly, in *Weld County Colorado Board of County Commissioners v. Ryan*, the Court suggested that a litigant alleging "evidence was excluded, or that its arguments were otherwise ignored" in an administrative proceeding could demonstrate an injury in fact. 536 P.3d at 1259. Accordingly, the Voters need not show that the outcome of additional hearings and testimony would have resulted in a materially different plan. It is enough that they were denied the opportunity to present further testimony and have that testimony considered by the Board.

Third, the Board's failure to comply with the Redistricting Statutes denied plaintiffs a right to vote under maps determined through a fair redistricting process. And in this respect, it makes no difference whether the Voters actually challenge the plan's compliance with substantive criteria set out in the Redistricting Statutes, such as a limitation on the overall population differential among districts. The Voters have

an independent interest in not being subject to voting plans adopted in derogation of procedures deemed necessary to ensure fairness. *See Matter of Title, Ballot Title, Submission Clause, & Summary Adopted Apr. 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rts. in Waters II*, 898 P.2d 1076, 1078 (Colo. 1995), *as modified on denial of reh'g* (rejecting a proposed ballot measure as violative of the Colorado Constitution's "single subject requirement for initiatives"); *In re House Bill No. 1353*, 738 P.2d 371, 371 (Colo. 1987) (invalidating statute adopted through violation of legislative single-subject requirement); *INS v. Chadha*, 462 U.S. 919, 954, 959 (1983) (invoking separation of powers in a challenge to the validity of a statute to conclude that the "one-House veto" is unconstitutional).

C. Voters have a "legally protected interest" because they have an implied right of action under a law intended to benefit them.

As noted above, this Court's precedent equates a "legally protected interest" for the purpose of standing with the existence of a right of action. *See supra* pp. 4–5. Although the Redistricting Statutes do not expressly provide such a right here, the district court was correct to hold that they impliedly do.

In *Allstate Insurance Co. v. Parfrey*, 830 P.2d 905 (Colo. 1992), this Court established the factors relevant to identifying implied rights of action. Under that precedent, a court asks "whether the plaintiff is within the class of persons intended to be benefitted by the legislative enactment; whether the legislature intended to

create, albeit implicitly, a private right of action; and whether an implied civil remedy would be consistent with the purposes of the legislative scheme." *Id.* at 911 (citing *Cort v. Ash*, 422 U.S. 66, 77–78 (1975)). The Voters satisfy this test.

First, the history of the Redistricting Statutes and the constitutional amendments on which they are based strongly supports concluding that the statutes were adopted to benefit voters precisely like the Voters here. The Redistricting Statutes are but one of the most recent attempts to address the "checkered history" of redistricting in Colorado. *In re Interrogs. on Sen. Bill 21-247 Submitted by Colo. Gen. Assembly*, 488 P.3d 1008, 1012 (Colo. 2021) (internal quotation marks omitted). Although the original 1876 Colorado Constitution vested the general assembly with authority to create congressional and legislative districts, the legislature continually "failed to produce a constitutional redistricting plan." *Id.* (citing *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 739 (1964)).

Accordingly, in 2018, Coloradans adopted Amendments Y and Z to the Colorado Constitution to "end" the state's "practice of political gerrymandering." Colo. Const., art. V, §§ 44, 46. Such gerrymandering involves the "purposeful[] draw[ing]" of districts "to favor one political party or incumbent politician over another." *Id.* To combat this practice, Amendments Y and Z established independent

commissions to create congressional and state legislative election districts and placed carefully designed requirements on the redistricting process. *Id.*

Those requirements, including many procedural ones, gave new rights to voters. As Coloradans declared in adopting the amendments, "[c]itizens want and deserve an inclusive and meaningful [] redistricting process that provides the public with 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." Colo. Const. art. V, § 44(1)(f). The amendments were also intended to ensure "the protection of minority group voting," and to secure "competitive elections" that reflect "fair and effective representation" of all citizens. *Id.*; *see also* Legis. Council, Colo. Gen. Assembly, Rsch. Pub. No. 702-2, *2018 State Ballot Information Booklet* 8 (2018) (the "Blue Book") (describing amendments' transparency goals).

In 2021, the general assembly furthered the people's will by adopting the Redistricting Statutes at issue here, thus extending the requirements in Amendments Y and X to county commissioners, "[t]he only partisan offices elected by districts in Colorado" that were not already covered by the constitutional amendments. H.B. 21-1047, 73rd Gen. Assembly, 1st Reg. Sess. § 1(1)(e), (g) (2021); C.R.S. §§ 30-10-

306–306.4. In doing so, the legislature declared a "statewide interest" in ensuring 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, § 1 (emphasis added); *see also id.* (declaring that the "people are best served when districts are not drawn to benefit particular parties or incumbents").

As this history shows, the plaintiffs in this case fall squarely within the "people," "citizens," and "voters in every Colorado county," *supra* pp. 11–12, who were intended to benefit from the Redistricting Statutes.

Second, the Redistricting Statutes speak in mandatory terms that require no further legislative action to ensure their application to Colorado counties, strong evidence that the legislature intended to create a right of action for their enforcement. *See Developmental Pathways v. Ritter*, 178 P.3d 524, 531 (Colo. 2008) (in determining whether a constitutional provision is self-executing, Colorado courts "[f]ocus[] on the intent behind a provision's enactment," examining "the language used and the object to be accomplished").

For example, under the statutes, Commission members *must* propose three redistricting plans for public comment and accept other proposed plans from county residents. C.R.S. § 30-10-306.3(1)–(3)(a). They *must* hold three public hearings

before adopting a plan, *id.* § 30-10-306.2(3)(b), and create and maintain a written record of the redistricting process, including by establishing a website, *id.* § 30-10-306.2(3)(d). Committee members *must* abide by rules designed to prevent ex parte or other improper conversations about a plan's "content or development." *Id.* § 30-10-306.3(1)–(3)(a). And they *must* ensure that any plan complies with enumerated substantive requirements *Id.* § 30-10-306.3(1)(a). Through these requirements—and many others—the general assembly made clear that it expected the Redistricting Statutes to have teeth.

Third, recognition of "an implied civil remedy" in this case "would be consistent with the purposes of the legislative scheme," thus satisfying the third factor identified in *Parfrey*, 830 P.2d at 911. This is not a case, for example, where another party closer to the harm would have the ability and incentive to seek enforcement. *E.g.*, *City of Arvada*, 403 P.3d at 616 ("[W]e cannot say that to ensure a detainee receives the care the statute promises him we must impute a private right of action for hospitals."). Instead, without the threat of enforcement by plaintiffs like the Voters, the "benefits promised under the statute[s]" at issue here would be illusory. *Id.* at 615 (recognizing implied right of action for insureds to sue under law designed for their benefit); *State v. Moldovan*, 842 P.2d 220, 226 (Colo. 1992)

(imputing private right of action to sue state highway department under law that required agency to erect fencing to prevent animals from venturing onto its roads).

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For all these reasons, the district court was correct to conclude that the Voters have suffered a cognizable injury from the Board's failure to comply with the Redistricting Statutes and have demonstrated a right of action to sue.

II. PRESERVING VOTERS' ACCESS TO STATE COURT IS CRITICAL IN THIS TIME OF FEDERAL RETREAT ON VOTING RIGHTS

Despite the Redistricting Statutes' history and broadly applicable text, the Board contends that the laws do not apply to Weld or any other home rule county, and in any event cannot be enforced by the Voters or other private litigants. In addition to being legally incorrect, the Board's position would have far-reaching, dangerous implications for Coloradans' access to free and fair elections. In particular, the Board's position would constrain state courts' ability to protect voting rights at the same time that such rights are under assault in the U.S. Supreme Court and other federal courts.

For example, in 2019, the U.S. Supreme Court declared in *Rucho v. Common Cause*, 588 U.S. 684 (2019), that federal courts cannot remedy even the most extreme partisan gerrymandering. The Court recognized, consistent with

longstanding precedent, that such gerrymandering is "incompatible with democratic principles." *Id.* at 718; *see Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality op.); *id.* at 165 (Powell, J., concurring). However, in *Rucho*, the Court concluded that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." 588 U.S. at 718 (cleaned up).

Notably, the Court in *Rucho* indicated that its decision did not "condemn complaints about districting to echo into a void." *Id.* at 719. Rather, it explained, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," and it provided as an example Colorado's "constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts." *Id.* (citing Colo. Const., art. V, §§ 44, 46). Yet the Board's argument here would foreclose such state routes to Voters, at least in the context of redistricting for county commissioners.

In addition, over the past decade, the U.S. Supreme Court has undercut key pillars of the federal Voting Rights Act ("VRA"), which—among other things—protects against voting practices that "result[] in a denial or abridgment of the right … to vote on account of race." 52 U.S.C. § 10301.

In 2013, in *Shelby County v. Holder*, the Court struck down the VRA's preclearance regime, under which certain states and localities with a history of racial discrimination in elections had long been required to obtain approval from the federal government before implementing a voting change. *See* 570 U.S. 529, 546 (2013). *Shelby County* has proved disastrous, prompting a wave of voter suppression in states that were previously covered by the preclearance process, and reducing enforcement risks to states and localities that engage in the unlawful use of race in redistricting. *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143, 2145–46 (2015) (summarizing the impact of voter suppression laws after *Shelby County* was decided); *Brnovich v. Democratic Natl. Comm.*, 594 U.S. 647, 698 (2021) (Kagan, J., dissenting) (same).

One intermediate federal court of appeals has also sought to foreclose claims brought by private litigants under Section 2 of the VRA entirely. *See Arkansas State Conference of NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023). *Contra Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (plurality op.) (describing Section 2's private right of action as "clearly intended by Congress since 1965" (cleaned up)); *id.* at 240 (Breyer, J., concurring) (same).

In addition to its assault on the VRA, the U.S. Supreme Court recently curtailed longstanding precedent prohibiting racial gerrymandering as violative of the federal Fourteenth Amendment, effectively adopting "rules to specially disadvantage suits to remedy race-based redistricting." *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1269 (2024) (Kagan, J., dissenting). These rules "stack the deck" against federal challengers of racial gerrymanders by resolving in the state's favor "every doubt" as to whether race or some other factor drove the challenged redistricting efforts. *Id.* at 1285–86 (Kagan, J., dissenting).

Against this backdrop of federal retrenchment on voting rights, it is imperative that this Court construe the Redistricting Statutes to apply broadly to all Colorado counties, home rule or otherwise, and to carry with them a private right of action so that Voters can seek enforcement of the Statutes' important terms.

CONCLUSION

For the reasons set forth above and in the Voters' filings, the ACLU respectfully requests that the Court affirm the trial court's grant of summary judgment to the Voters but reverse its decision not to order the Board to engage in a new redistricting process compliant with the Redistricting Statutes.

Dated: August 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2024, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO IN SUPPORT OF PETITIONERS** was electronically filed and served via Colorado Courts E-Filing on all counsel of record.

/s/ Mia Bailey