

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to Article V, Section 48.3 of the Colorado Constitution</p>	
<p>In Re: Petitioner: Colorado Independent Congressional Redistricting Commission.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">STATEMENT OF INTERESTED PARTY–OPPOSER THOMAS E. NORTON IN OPPOSITION TO THE COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION’S FINAL SENATE PLAN</p>	

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CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g) and the Order of Court in this matter dated July 26, 2021.

It contains 5,093 words in sections that count toward word limits under C.A.R. 28(g).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

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

[Pursuant to Rule 121(c) § 1–26, the signed original is on file.]

s/ Robert A. McGuire

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Interested Party–Opposer Thomas E. Norton, by and through undersigned counsel, hereby submits this Statement Of Interested Party–Opposer Thomas E. Norton In Opposition To The Colorado Independent Legislative Redistricting Commission’s Final Senate Plan, pursuant to article V, section 48.3(1) of the Colorado Constitution and pursuant to the schedule established by the first bullet point of the Order of Court in this matter dated July 26, 2021.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

Interested Party–Opposer Thomas E. Norton wishes to participate in the oral argument on this matter that is set for October 25th at 2:00 p.m., and hereby respectfully requests leave to do so.

I. INTRODUCTION

Thomas E. Norton (“Norton”) opposes the Final Senate Plan adopted by the Colorado Independent Legislative Redistricting Commission (the “Commission”).

Norton is an Interested Party because he is the former Mayor of the City of Greeley and a citizen and resident of the City of Greeley. Norton previously served as Colorado State Senator from Greeley and President of the State Senate, and he formerly served as Executive Director of the Colorado Department of Transportation.

For the past 10 years, since the 2011 redistricting cycle, the City of Greeley has been contained within a single state senate district—district 13. As a result, the entire City of Greeley has been represented by a single state senator. Figure 1 immediately below shows the map of 2011 senate district 13.

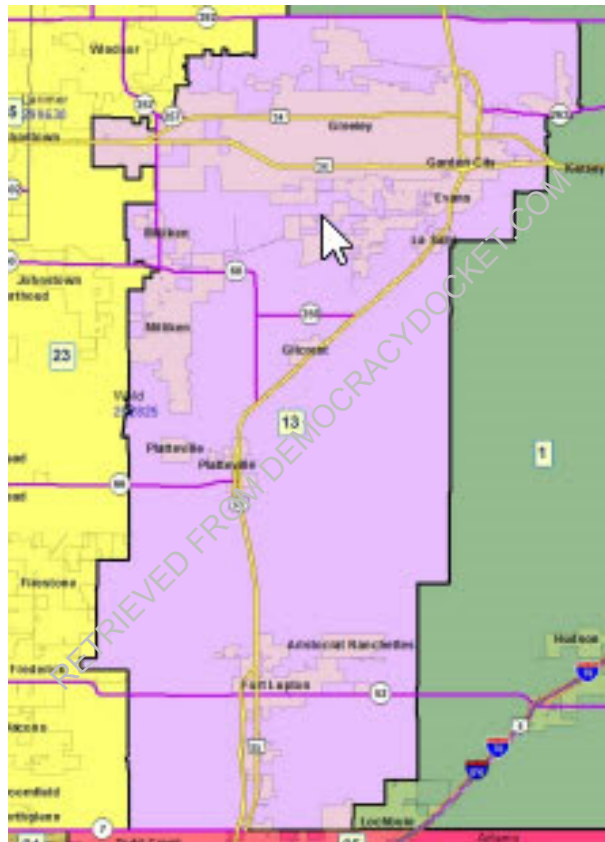


Figure 1.¹

¹ Colo. Reapportionment Comm’n Staff, Legislative District Information After 2011 Reapportionment—Senate District 13 (Dec. 22, 2011), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJmcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBY009IiwiaXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19--db73455a972d9a16f5c75163b14159d935d69ea2/SD%2013%20Info%20Sheet%20and%20Map.pdf (last visited Oct. 21, 2021).

According to the 2011 reapportionment commission's district information sheet, 2011 senate district 13's population was 37.77% Hispanic when the 2011 state senate map was approved.²

After nearly a decade of population growth, the 2011 senate district 13's population had expanded, and the 2020 U.S. Census showed the 2011 senate district 13 to now be 41.1% Hispanic.³

This year's Colorado Independent Legislative Redistricting Commission released a Preliminary Plan on June 29, 2021; a First Staff Plan on September 13, 2021; and a Second Staff Plan on September 23, 2021. All three of these plans kept the City of Greeley whole, and in each plan the City was contained entirely within a proposed single senate district.

The percentage of this proposed new district's population that was Hispanic increased with each new plan that was released, beginning with a low of 33%

² *See id.*

³ *See* U.S. Census Bureau, 2020 Table P2, Hispanic or Latino, and Not Hispanic or Latino By Race (Colo. State S. Dist. 13), *available at*, <https://data.census.gov/cedsci/table?t=Hispanic%20or%20Latino&g=610U600US08013&y=2020&d=DEC%20Redistricting%20Data%20%28PL%2094-171%29&tid=DECENNIALPL2020.P2> (last visited Oct. 22, 2021). The table for 2011's state senate district 13 shows 69,223 Hispanic people out of 168,608 total residents, or a Hispanic population percentage of 41.05%.

Hispanic population in the Preliminary Plan (proposed district 2),⁴ increasing to 38.2% Hispanic population in the First Staff Plan (proposed district 13),⁵ and finally reaching 41.1% Hispanic population in the Second Staff Plan (proposed district 13)⁶—this last percentage being a nearly perfect match to the actual 2020 census demographics of 2011’s senate district 13.⁷

Importantly, none of these three plans divided the City of Greeley, and none of the plans drew Greeley into a senate district with the City of Brighton.

⁴ See Colo. Ind. Redist. Comm’n Staff, Colo. S. Prelim. Plan—Hispanic Origin and Race (June 29, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJmcmFpbHMiOmsibWVzc2FnZSI6IkJBaHBBc3dCIiwZlXhwIjpudWxsLCJwdXliOiJibG9iX2lkIn19--c7e8cdeb515a6dc36028bfdcd893251e7644d9a5/Attachment%20F%20-%20Senate%20Race%20and%20Ethnicity.pdf (last visited Oct. 21, 2021).

⁵ See Colo. Ind. Redist. Comm’n Staff, Population Summary Report—First Senate Staff Plan Final (Sept. 13, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJmcmFpbHMiOmsibWVzc2FnZSI6IkJBaHBBbFVDIiwZlXhwIjpudWxsLCJwdXliOiJibG9iX2lkIn19--dac28c6bc3fdc16bdf35f28718f720c5853d784c/Final_Report_1st_Senate_Staff_Plan_20210913.xlsx (last visited Oct. 21, 2021).

⁶ See Colo. Ind. Redist. Comm’n Staff, Population Summary Report—Second Senate Staff Plan Final (Sept. 23, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJmcmFpbHMiOmsibWVzc2FnZSI6IkJBaHBBbFFDIiwZlXhwIjpudWxsLCJwdXliOiJibG9iX2lkIn19--d7e6eb4aa6b6f7f63b603f7e61a3cf136a50af61/Population%20Summary.pdf (last visited Oct, 21, 2021).

⁷ See *infra* note 3 and accompanying text.

Figure 2 immediately below shows the Second Staff Plan’s map of proposed senate district 13.

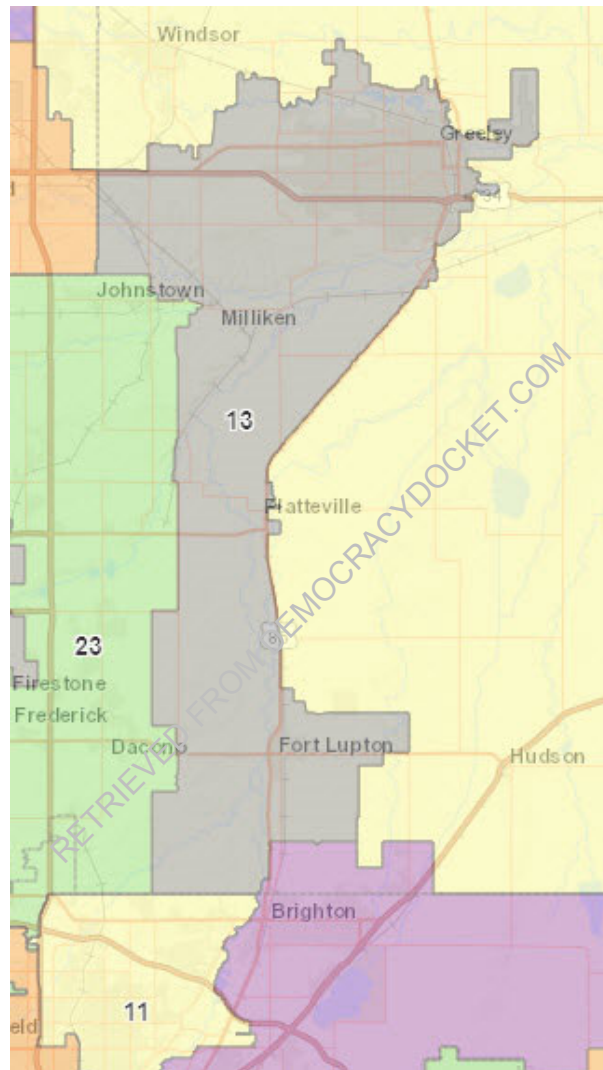


Figure 2.⁸

⁸ See Colo. Ind. Redist. Comm’n Staff, Second Senate Staff Plan Interactive Map (Sept. 23, 2021), *available at*, <https://bit.ly/3o1Nenq> (last visited Oct. 21, 2021).

The record before the Commission contains significant input from the public in the City of Greeley that weighed in favor of Greeley's placement in a senate district like the one set out in the Second Staff Plan's map for proposed senate district 13. On August 14, 2021, the Commission held a public hearing in Greeley jointly with the Colorado Independent Congressional Redistricting Commission.⁹ At the Greeley meeting, there was support for keeping Latino communities together. Staff notes reveal no suggestion that the City of Greeley should be divided and no comments at all that suggested Greeley should be aligned with the City of Brighton in a single senate district.¹⁰

The Commission also heard from the public in the City of Brighton at a hearing held there on August 25, 2021.¹¹ At the Brighton meeting, staff notes

⁹ See Staff Summary of Meeting, Other Committee, Committee On Joint Independent Redistricting Commissions (Aug. 14, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJmcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBb1VDIiwiaXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19--f03c42b27259013540e45c9f304f4bd28cada046/Greeley%2008142021.pdf (last visited Oct. 21, 2021).

¹⁰ See *id.*

¹¹ See Staff Summary of Meeting, Other Committee, Committee On Joint Independent Redistricting Commissions (Aug. 25, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJmcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBdVVDIiwiaXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19--d8acb67925dfb9c89b60c79e493c81a382b0fe3e/Brighton%2008252021.pdf (last visited Oct. 21, 2021).

show that only a single commenter even mentioned Greeley. The individual commenter suggested only that Greeley, Brighton, and Commerce City’s substantial Hispanic populations “should be taken into account as non-English speakers.”¹² Apart from this single reference to the ethnicity of a common Hispanic language minority, nothing in the record of public testimony before the Commission appears to demonstrate any ties whatsoever between the City of Brighton and any portion of the City of Greeley.

The Second Staff Plan’s map of proposed senate district 13 did three things—(1) it kept Greeley whole and entirely contained within a single senate district; (2) it contained a significant district-wide Hispanic population of 41.1%, which was higher than the 37.77% Hispanic percentage in 2011’s district 13; and (3) it reflected the absence in the Commission’s record of any public input showing ties (other than racial) between Greeley and Brighton. Despite these three things weighing in favor of maintaining district 13 as proposed by the Second Staff Plan, the Commission nevertheless chose to significantly alter the treatment of the City of Greeley in the Third Staff Plan that was released on October 5, 2021.

The Third Staff Plan’s senate map, for the first time in the entire redistricting process, divided Greeley into two separate districts. It did this by placing the

¹² *Id.* at 3.

eastern part of the City of Greeley (with 34,733 Hispanic and 36,706 non-Hispanic people) into proposed district 13, which was extended even further south to include the City of Brighton, and by placing the western part of the City of Greeley (with 9,299 Hispanic and 28,502 non-Hispanic people) into proposed district 1, which aligned with northeast Colorado.¹³ The resulting district 13 was 46.0% Hispanic,¹⁴ up from 41.1% in the Second Staff Plan's map.

The Commission's division of the City of Greeley drove most of the other changes to the senate map that were included in the Third Staff Plan. At the Commission's October 6, 2021 meeting, Commission staff explained that this division of the City of Greeley into two different senate districts was the major change made by the Third Staff Plan and that it had been done with input from the

¹³ See Colo. Ind. Redist. Comm'n Staff, Assigned District Splits - City—Senate Staff Plan 3 Final, at 2, 13 (Oct. 5, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJmcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBa01EliwiZXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19--c1d7320b18363ed4116704f4b396de1752c2b751/City%20Splits.pdf (last visited Oct. 21, 2021).

¹⁴ See Colo. Ind. Redist. Comm'n Staff, Population Summary Report—Senate Staff Plan 3 Final 1 (Oct. 5, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJmcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBajREliwiZXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19--acc5117df5a18af5c78c46acaee5e61bc954f1d/Population%20Summary.pdf (last visited Oct, 21, 2021).

Commission.¹⁵ Staff explained that most of the rest of the changes to the senate map were adjustments that only became necessary once Greeley was divided.

The purpose for dividing the City of Greeley was entirely driven by racial considerations. Commissioners McReynolds and Schepper requested staff to redraw the Second Staff Plan's senate map to ensure compliance with the Voting Rights Act of 1965. At the Commission's meeting on October 12, 2021, to approve the Final House and Senate Plans,¹⁶ Commissioner Barnett alluded to these requests when he explained that the division of the City of Greeley in the Third Staff Plan, for the first time in the entire redistricting process, had been done as part of a "CLLARO configuration" that had been provided to address "VRA concerns." But Commissioner Barnett noted that the Voting Rights Act concerns that had supposedly necessitated this division of Greeley "ultimately did not come to fruition."¹⁷

¹⁵ See Recording of Colo. Ind. Redist. Comm'n Meeting (Oct. 6, 2021), available at, <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210401/155/12392> (5:23:30 p.m.–5:28:29 p.m.).

¹⁶ See Recording of Colo. Ind. Redist. Comm'n Meeting (Oct. 12, 2021), available at, <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20211012/1/12395> (6:58:34 p.m.– 7:00:44 p.m.).

¹⁷ *Id.*

Commissioner Greenidge spoke next at the October 12 meeting. He stated that he had requested the Greeley split. Commissioner Greenidge stated that he had “promised” a man at an earlier public hearing that he “would be voting ‘no’ on any map in which I thought that the Latino community in eastern Greeley would not be able to select its candidate of choice.”¹⁸ Greenidge stated that,

I am convinced that this configuration for district 13 is necessary for the Latino community in east Greeley to be able to elect a candidate of choice. And for that reason that is absolutely a hill I’m willing to die on. And I have not dug my heels in on anything else, and I am willing to consider compromises on all the other maps, but not on Staff Plan 2. Because Staff Plan 2 does not have this configuration.¹⁹

At this same meeting, Commissioner Perez asked staff to confirm whether *any* of the maps being considered by the Commission violated the Voting Rights Act of 1965.²⁰ Nonpartisan staff confirmed that their analysis had concluded that none of the plans considered by the Commission raised any VRA issues. Later in this same meeting, the Commission adopted the Final Senate Plan, which included only nominal changes to the Third Staff Plan’s map for district 13.

¹⁸ *Id.* (7:01:26 p.m.–7:01:34 p.m.).

¹⁹ *Id.* (7:01:34 p.m.–7:02:14 p.m.).

²⁰ *Id.* (7:07:45 p.m.–7:10:11 p.m.).

This record shows that racial considerations alone, namely the purpose of increasing proposed district 13's Hispanic population above the 41.1% level that the Second Staff Plan's map had already produced, were the only driver of the Third Staff Plan's—and ultimately the Final Senate Plan's—division of the City of Greeley into two separate senate districts. In light of the record before it, the Commission abused its discretion—both committing errors of law and acting arbitrarily, unreasonably, and unfairly—when it approved the Final Senate Plan's division of the City of Greeley. The Colorado Constitution's legislative redistricting criteria and the equal protection guarantees of the Colorado and United States Constitutions were violated by the Commission's decision to divide the City of Greeley for racial reasons.

To right these violations, Thomas E. Norton, as Interested Party, opposes this Court's approval of the Final Senate Plan's division of the City of Greeley. The Court should disapprove the Final Senate Plan based on this isolated issue and should return that plan to the Commission with instructions to make the minimum amount of amendments to the senate map necessary to keep the City of Greeley wholly contained within a single senate district, as both the Colorado and the United States Constitutions require under the circumstances.

II. STATEMENT OF ISSUES

A. Did the Commission abuse its discretion by committing an error of law and by acting arbitrarily, unreasonably, and unfairly when it approved a Final Senate Plan that split the City of Greeley into two senate districts in violation of Colorado Constitution article V, section 48.1(2)(a)?

B. Did the Commission abuse its discretion by committing an error of law when it approved a Final Senate Plan that split the City of Greeley into two senate districts primarily for reasons of race or ethnicity, in violation of the Equal Protection Clause of the United States Constitution?

III. STATEMENT OF THE CASE

The Commission's Final Senate Plan must satisfy certain substantive criteria that are set out in the Colorado Constitution. Colo. Const. art. V, § 48.1. These criteria require, "among other things, that":

the final maps represent "a good-faith effort" to achieve "population equality between districts," *id.* § 48.1(1)(a); preserve "communities of interest" as much as is reasonably possible, *id.* § 48.1(2)(a); maximize politically competitive districts, *id.* § 48.1(3)(a); not be drawn for the purpose of protecting any political party or candidate, *id.* § 48.1(4)(a); and not "dilut[e] the impact of [any] racial or

language minority group’s electoral influence,” *id.*
§ 48.1(4)(b).

In re Interrogatories on Senate Bill 21-247 Submitted by the Colo. Gen. Assembly,
2021 CO 37, ¶ 14 (internal citations pertinent only to congressional redistricting
omitted).

An additional constraint is imposed by the Equal Protection Clause of the
United States and Colorado Constitutions, which require that race cannot be the
“predominant consideration” in the drawing of electoral districts. *See Hall v.*
Moreno, 2012 CO 14, ¶ 25 (citing *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999)
 (“[A]ll laws that classify citizens on the basis of race, including racially
gerrymandered districting schemes, are constitutionally suspect and must be
strictly scrutinized.”)). As this Court did in *Hall*, the U.S. Supreme Court has
consistently treated ethnicity and race as synonymous for purposes of applying
constitutional equal protection guarantees. *See, e.g., Abbot v. Perez*, 138 S. Ct.
2305, 2314 (2018) (legislative apportionment); *Grutter v. Bollinger*, 539 U.S. 306,
332–34, 337, 339 (2003) (law school admissions); *Hernandez v. New York*, 500
U.S. 352, 369–70 (1991) (jury selection). In addition, Amendment Z defines “race”
to include “ethnic origin” per the census. Colo. Const. art. V, § 46(3)(c).

The Final Senate Plan was submitted to this Court on October 15, 2021. The Final Senate Plan divides the City of Greeley into two senate districts—senate district 1 and senate district 13.

This Court is now charged with reviewing the Commission’s submitted Final Senate Plan to determine whether that plan complies with the constitutional criteria. Colo. Const. art. V, § 48.3(1). Even if the criteria are satisfied, the Court still may not approve the Commission’s submitted final plan if the Commission “abused its discretion in applying or failing to apply the criteria, . . . in light of the record before the commission.” *Id.* § 44.5(2); *see also In re Interrogatories on Senate Bill 21-247*, 2021 CO 37, ¶ 18.

IV. SUMMARY OF ARGUMENT

The Commission abused its discretion by approving a Final Senate Map that splits the City of Greeley into two senate districts. First, dividing Greeley is contrary to the requirements of article V, section 48.1(2)(a) of the Colorado Constitution, which requires the Commission to presume that cities shall be wholly contained in a single senate district if the city’s population size permits, as Greeley’s does. Second, the Commission invited strict scrutiny, which its Final Senate Map cannot survive, by splitting the City of Greeley for what the record conclusively shows were predominantly racial considerations. Third, the

Commission was not required by article V, section 48.1(4)(b) of the Colorado Constitution to divide the City of Greeley to avoid diluting the influence of the Hispanic population in district 13. On the contrary, the Commission violated that constitutional provision with respect to the non-Hispanic population by seeking to enhance the influence of Hispanics. Finally, the existence of earlier maps in the record, in which Greeley is wholly contained in a senate district, show that it is possible for the Commission's division of the City of Greeley to be corrected on remand without unraveling the rest of the Final Senate Map. The Commission abused its discretion by dividing the City of Greeley. The Court should disapprove the Final Senate Map with respect to the treatment of the City of Greeley and should return the map to the Commission for limited amendments to correct this isolated issue.

V. ARGUMENT

A. **Standard of Review**

The Constitution requires that the Court must approve the Commission's final house and senate plans *unless* the Commission "abused its discretion in applying or failing to apply" the specified criteria, "in light of the record before the commission." Colo. Const. art. V, § 48.3(2); *In re Interrogatories on Senate Bill*

21-247, 2021 CO 37, ¶ 54. In assessing whether the Commission abused its discretion, the Court “may consider any maps submitted to the commission.” *Id.*

An abuse of discretion occurs if the Commission makes “erroneous legal conclusions” in applying the criteria, *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004), or commits an “error of law in the circumstances,” *Cook v. Dist. Court of Cty. of Weld*, 670 P.2d 758, 761 (Colo. 1983). In other words, the Commission lacks discretion to adopt an unconstitutional map. *See In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d 1237, 1247 (Colo. 2002) (“The choice among alternative plans, ***each consistent with constitutional requirements***, is for the Commission and not the Court.”) (emphasis added).

Alternatively, an abuse of discretion occurs if the Commission’s decisions with respect to how it applied the criteria are “manifestly arbitrary, unreasonable, or unfair.” *People v. Muckle*, 107 P.3d 380, 382 (Colo. 2005); *see also Colo. Nat’l Bank v. Friedman*, 846 P.2d 159, 167 (Colo. 1993). “[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.” *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999).

B. Splitting The City Of Greeley Violated Article V, Section 48.1(2)(a) Of The Colorado Constitution

Splitting the City of Greeley into two senate districts was an abuse of discretion because it violated the criterion set out in Colorado Constitution article V, section 48.1(2)(a). The threshold legislative redistricting criteria require the Commission, first and foremost, to make “a good-faith effort to achieve mathematical population equality between districts” within a five-percent tolerance, Colo. Const. art. V, § 48.1(1)(a), and to comply with the Voting Rights Act of 1965, *id.* § 48.1(1)(b). Having satisfied these two threshold requirements, the Commission’s next constitutional obligation is to, “As much as is reasonably possible, . . . preserve whole communities of interest and whole political subdivisions, such as counties, cities, and towns.” Colo. Const. art. V, § 48.1(2)(a).

Elaborating on the obligation to preserve political subdivisions, in particular, section 48.1(2)(a) mandates that the Commission “shall presume” that a “county, city, city and county, or town should be wholly contained within a district” where the population of the political subdivision “is less than a district’s permitted population.” *Id.* The only exception to this requirement allows for the division of cities, counties, and towns “where, based on a preponderance of evidence in the

record, a community of interest's legislative issues are more essential to the fair effective representation of residents of the district." *Id.*

The Second Staff Plan's senate map—not to mention the senate maps in both the Preliminary Plan and the First Staff Plan—conclusively establishes that it was “reasonably possible” for the Commission to form senate maps that preserved the City of Greeley whole in a senate district. By adopting the Final Senate Map that instead divided the City of Greeley into two separate senate districts, the Commission violated the constitutional requirement to “presume” that the City of Greeley should be wholly contained within a single district, since the City's population was less than a senate district's permitted population.

Under the plain language of the Colorado Constitution, no division of the City of Greeley was permissible because the “preponderance of the evidence in the record” did not support a conclusion that any community of interest's legislative issues were “more essential to the fair and effective representation of residents of the district” than the maintenance of the City of Greeley as a political subdivision “wholly contained within a district.” Colo. Const. art. V, § 48.1(2)(a).

By failing to presume Greeley should be kept undivided, the Commission failed to apply the criterion set out in article V, section 48.1(2)(a). With this failure, the Commission committed an error of law. Given that nothing in the

record, apart from considerations of race or ethnicity, supported the Commission's decision to divide the City of Greeley, the Commission also acted arbitrarily, unreasonably, and unfairly. The Commission abused its discretion.

C. Splitting The City Of Greeley For Predominantly Racial Reasons Violated Constitutional Guarantees Of Equal Protection

Splitting the City of Greeley into two senate districts for the purpose of increasing the Hispanic percentage of population of district 13 from 41.1% (in the Second Staff Plan) to 46.0% (in the Final Senate Plan) was an abuse of discretion because drawing legislative districts based predominantly on race or ethnicity violated equal protection guarantees under both the United States and Colorado Constitutions.

The Commission's record shows that the City of Greeley was only split in order to increase the Hispanic percentage of the population of district 13. No Voting Rights Act considerations demanded this result. Moreover, Commissioner Greenidge explicitly stated that his purpose in requesting the division of Greeley, his "hill to die on," was to adopt a map for senate district 13 that ensured the ability of "the Latino community in eastern Greeley" to "be able to select its candidate of choice." By choosing to divide the City of Greeley to serve this race-conscious purpose, and apparently no other purpose that is evident from the record, and to do so in spite of the contrary requirements of article V, section 48.1(2)(a),

the Commission plainly subordinated race-neutral criteria, such as “political, social, and economic” ties, to “racial considerations.” *Miller v. Johnson*, 515 U.S. 900, 916, 919–20 (1995).

This decision by the Commission invites the application of strict scrutiny—a standard that the Commission’s decision cannot survive. *See Hall*, 2012 CO 14, ¶ 25 (citing *Hunt*, 526 U.S. at 546 (“[A]ll laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized.”)). Because both the United States and the Colorado Constitutions guarantee equal protection, the Commission’s decision to divide the City of Greeley can only stand if it “was in pursuit of a compelling state interest, but also . . . is narrowly tailored to achieve [that] compelling interest.” *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). Ensuring that “the Latino community in eastern Greeley” will “be able to select its candidate of choice,” though perhaps a laudable goal, is not a constitutionally compelling governmental interest. Even if it were otherwise, the record still does not allow the Commission to satisfy the “narrowly tailored” requirement because the Second Staff Plan’s map for district 13 already had a 41.1% Hispanic population. There is no evidence in the record to suggest that shifting district 13’s population from 41.1% Hispanic to a

46.0% Hispanic would contribute in any material way to achieving any compelling government interest.

The Commission committed an error of law when it approved a Final Senate Plan that divided the City of Greeley predominantly for the purpose of changing the racial or ethnic composition of district 13. The Commission abused its discretion.

D. Splitting The City Of Greeley Was Not Necessary To Satisfy—And In Fact Violated—Article V, Section 48.1(4)(b) Of The Colorado Constitution

Section 48.1(4)(b) of article V prohibits the Commission from approving, and this Court from giving effect to, any map if the map “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.” For purposes of this prohibition, the Colorado Constitution defines “race” and “racial” to mean “a category of race or ethnic origin documented in the federal decennial census.” Colo. Const. art. V, § 46(3)(c).

Splitting Greeley into two senate districts was not something that the Commission had to do to satisfy criterion 48.1(4)(b). First, as already noted, the Second Staff Plan’s map for district 13, which did not divide the City of Greeley,

produced a district with a population that was 41.1% Hispanic. This percentage, compared to the originally drawn 2011 district 13, is an *increase* in the Hispanic percentage of the district's population, not a reduction. Moreover, the Hispanic percentage of the population in the Second Staff Plan's map for senate district 13 almost perfectly equals the current (2020 census) population of 2011's senate district 13.²¹ In short, keeping Greeley wholly contained in a single senate district, as the Second Staff Plan's map did, would not have diluted the impact of the Hispanic population's electoral influence.

Second, the Commission's decision to divide the City of Greeley in order to increase the electoral influence of the Hispanic population in district 13 actually *violated* Section 48.1(4)(b) of article V to the extent that the Commission thereby deliberately reduced the electoral influence of all the *other*, non-Hispanic persons in the resulting district 13. It is an unavoidable consequence of increasing one racial or ethnic group's electoral influence that the influence of all other racial or ethnic groups is necessarily diluted.

The Commission has stated that the final house and senate plans were not drawn for the prohibited purpose of diluting the impact of any racial group's electoral influence, but this simply cannot be true with respect to the Final Senate

²¹ See *infra* note 3 and accompanying text.

Plan's district 13, where the Commission sought to increase one racial or ethnic group's electoral influence at the expense of others by dividing the City of Greeley. It is significant that article V, section 48.1(4)(b) speaks of a person's "race"—without qualifying the word to limit it to only minority races or ethnicities—"or membership in a language minority group." Colo. Const. art. V, § 48.1(4)(b). People of all races and ethnicities are protected from racial gerrymandering by this constitutional provision.

The Commission committed an error of law when it approved a Final Senate Plan that divided the City of Greeley predominantly for the purpose of changing the racial or ethnic composition of district 13. The Commission abused its discretion.

E. It Is Possible For The Commission, On Remand, To Correct Its Division Of The City Of Greeley Without Undoing The Entire Senate Map

Relief can easily be ordered in this case because the record shows that the Commission can eliminate its division of the City of Greeley without causing a domino effect that will disrupt the entire rest of the Final Senate Map. The Commission's discussion of the limited changes that were required to move from the Second Staff Plan's senate map to the Third Staff Plan's senate map shows that, on a limited remand or a remand with instructions, it would be "reasonably

possible” for the Commission to revise the Final Senate Map to wholly contain the City of Greeley within a single senate district. Senate district 13 is not a thread that will unravel the entire sweater that the Commission has knitted. There will be no cascading disruptions that affect the entire senate map, especially if the Court provides guidance, as it has done in the past, that instructs the Commission to minimize map amendments on remand. *See, e.g., In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 112 (Colo. 2011) (“The Commission shall determine how to formulate a plan that complies with article V, sections 46 and 47, in accordance with the guidance offered on remand in our 2002 opinion.”); *In re Reapportionment*, 45 P.3d at 1254 (providing guidance for drawing districts that comply with constitutional criteria on remand).

In any event, article V, sections 48.3(3) and (4) of the Colorado Constitution expressly contemplate that a plan for one house may be disapproved even if the plan for the other house is approved. Section 48.3(2) provides that, “The 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.” Just as a map in the record may be considered to determine whether an abuse of discretion has occurred, so too can maps in the record be used to demonstrate that abuses of

discretion can be corrected. Since the City of Greeley was not divided in the Second Staff Plan, and since the record shows that most of the changes made in the course of moving from the Second Staff Plan's map to the Third Staff Plan's map were done in consequence of the division of the City of Greeley, it is clearly possible to unwind those changes to the extent necessary, without affecting the rest of the senate map. Accordingly, this Court should not hesitate to require the Commission to correct its division of the City of Greeley.

F. The Commission Abused Its Discretion By Dividing Greeley

The Final Senate Plan cannot be approved with its division of the City of Greeley. Article V, section 48.3(1) provides that this Court must review the submitted plan “and determine whether the plan complies with the criteria listed in section 48.1 of this article V.” The next subsection, article V, section 48.3(2), provides that “The supreme court shall approve the plans submitted unless it finds that the commission . . . abused its discretion in applying or failing to apply the criteria listed in section 48.1 of this article V, in light of the record before the commission.” Colo. Const. art. V, § 48.3(2) (emphasis added).

Applying the “abuse of discretion” standard, this Court should conclude that the Commission did, in fact, abuse its discretion in applying or failing to apply the constitutional criteria set out in article V, section 48.1 when the Commission

approved a Final Senate Plan that divided the City of Greeley. The Commission's failure to apply the constitutional criteria, in light of the record before the Commission, and the Commission's approval of the division of Greeley for predominantly racial considerations were at once errors of law and arbitrary, unreasonable, and unfair actions. The Commission abused its discretion.

VI. CONCLUSION

This Court should disapprove the Commission's Final Senate Plan based on its division of the City of Greeley and should return the Final Senate Plan to the Commission, along with the Court's reasons for disapproval of this isolated issue, pursuant to article V, section 48.3(2)–(3) of the Colorado Constitution. On remand, the Court should instruct the Commission and its staff to amend the Final Senate Plan to the minimum extent necessary to keep the City of Greeley wholly contained within a single senate district.

Dated this 22nd day of October, 2021.

THE ROBERT MCGUIRE LAW FIRM

[Pursuant to Rule 121(c) § 1–26, the signed original is on file.]

s/ Robert A. McGuire, III

ROBERT A. MCGUIRE, III, Reg. No. 37134

Attorney for Interested Party–Opposer Thomas E. Norton

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2021, I served a true and correct copy of the foregoing, together with all exhibits and attachments referenced therein, to all counsel of record who have active appearances by ICCES.

<u>Person Served:</u>	<u>Address:</u>	<u>Method:</u>
All counsel of record	Email addresses as shown on record with the ICCES system	ICCES

S/ Robert A. McGuire, III
Robert A. McGuire, III

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