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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 Original Proceeding Pursuant to Colo. Const. art VI, §3 In re: Interrogatory on Senate Bill 21-247 Submitted by the Colorado General Assembly	▲ COURT USE ONLY ▲ Case Number: 2021SA146
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BRIEF OF THE COLORADO GENERAL ASSEMBLY

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 the word limits set forth in C.A.R. 28(g) as it contains 9,195 words.

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

/s/ *Richard A. Westfall*

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INTERROGATORIES PRESENTED

1. Are the provisions of Senate Bill 21-247, which amend the statutory definition of "necessary census data," establish statutory authority for nonpartisan staff to use that data for preliminary plans, and confirm in statute that the staff plans which provide the basis for action by the Commissions must be based on final census data, constitutional in allowing the Commissions to perform their constitutional responsibilities in accordance with sections 44 to 48.4 of article V of the state constitution following the 2020 federal census?

2. Is the provision of Senate Bill 21-247 that directs a court to apply the standard of substantial compliance when adjudicating a legal proceeding that challenges the lack of compliance with the technical requirements for the redistricting process established in the state constitution and related statutes, such as the timing of this court's review of a Commission's first approved map or a staff map when the Commission is unable to adopt a plan by the deadline to do so, constitutional?

INTRODUCTION

In 2018, the voters of Colorado overwhelmingly approved Amendments Y and Z. These amendments transformed the manner in which Colorado's congressional and state legislative districts are to be re-drawn in the wake of the once-a-decade census process. For the first time in Colorado, newly formed

Commissions will draw the congressional and legislative district lines. These Commissions are selected via a detailed process to insure balance between Unaffiliated, Democratic and Republican members (four each). Nonpartisan staff prepares a preliminary redistricting plan for each Commission. The Commissions conduct numerous public hearings in each congressional district of the State. The Commissions then provide direction to nonpartisan staff who prepares and presents to the Commissions up to three "staff plans" that the Commissions review, consider, and possibly amend. Ultimately the Commissions adopt final plans for congressional and legislative districts. Adoption of a plan requires an affirmative vote of at least eight Commission members, with the extra requirement that at least two commissioners voting to approve the plan must be Unaffiliated.

Each Commission then submits its adopted plan to the Colorado Supreme Court unless a Commission failed to adopt a final plan in time for any reason. In that case, the nonpartisan staff for that Commission must submit its unamended third staff plan to the Court. Under Amendments Y and Z, the congressional plan must be submitted by September 1 and the legislative plan must be submitted by September 15. This Court must review each plan and either approve it or remand it to the appropriate Commission with the Court's reasons for disapproval by November 1 for the congressional plan and November 15 for the legislative plan.

Amendments Y and Z provide that this Court must approve final plans by December 15 for the congressional plan and December 29 for the legislative plan.

The deadlines established by Amendments Y and Z were based on federal law that requires final census data to be provided to the States by March 31 of the redistricting year, which for this cycle is this year, 2021. Due to the pandemic and numerous procedural issues – all detailed below – the State of Colorado did not receive the data that is used to apportion congressional seats among the States – data that was due on December 31, 2020 – until April 26, 2021. Reportedly, Colorado will not receive the final census data in the format in which federal law requires it to be provided to the States – data that was due on March 31, 2021 – until, at the earliest, September 30, 2021. The underlying census data will be provided in a "legacy format summary redistricting data file" reportedly in August, but that data will require additional processing before the Commissions can use it in preparing plans.

On April 16, 2021, Senate Bill 21-247 ("SB21-247") was introduced to address the fact that, because of the United States Census Bureau's delay in releasing the census data, it is impossible for the Commissions to do their work and secure final approval by this Court of the new congressional and legislative district plans under the deadlines required by Amendments Y and Z. The essential features of SB21-247 are: (1) Allowing the Commissions to develop preliminary plans using

the data provided by the Census Bureau on April 26, 2021, and allowing the Commissions to use other available federal and state population and demographic data that the Commissions determine are appropriate; (2) allowing the Commissions to conduct the necessary public hearings and solicit the required public input in developing the plans; (3) requiring that any plans developed after the final census data is released, including the final plan, must be based on final census data; and (4) in the event that there is an alleged non-compliance with a technical provision (such as a deadline is not met), providing that any such legal challenge be adjudicated under the substantial compliance standard.

By amending the current definition of "necessary census data," SB21-247 authorizes the Commissions to perform their constitutional functions with the transparency and public participation required in Amendments Y and Z, despite the delay in receiving the critically important census data necessary to complete these functions. Adopting a substantial compliance standard for adjudicating any litigation involving technical requirements such as deadlines should help streamline and simplify the litigation, hopefully leading to an expedited final resolution and the least possible disruption to the 2022 election process. SB21-247 furthers the purposes of Amendments Y and Z while avoiding major disruption of the 2022 election cycle in light of the delay in receiving the necessary census data. The

General Assembly respectfully requests that the Court answer both interrogatories in the affirmative.

I. Background on Amendments Y and Z and Census Data

A. Overview of the federal census process

The Census Bureau conducts a national census at the start of each decade. Beginning on April 1 of the census year, the Census Bureau collects population and demographic data for the entire country.[1] By December 31 of the census year, federal law requires the Census Bureau to report "the total population by state as required for the apportionment of Representatives in Congress among the several states," or apportionment data, to the President.[2] And by March 31 of the year following the census year, the Census Bureau must provide each State with the specific tabulations of populations necessary to allow the State to draw congressional districts as well as state legislative districts.[3] This data, referred to as Pub. L. 94-171 data, includes the "counts of population by race, ethnicity (Hispanic or Latino origin), voting age,

[1] 13 U.S.C. § 141 (a), (b).

[2] 13 U.S.C. § 141 (b).

[3] 13 U.S.C. § 141 (c). Specifically, 13 U.S.C. § 141 (c) provides that the data shall be provided "as expeditiously as possible…except that such tabulations…shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date." The decennial census date is defined in section 13 U.S.C. § 141 (a) as April 1 of the census year, making the deadline March 31 of the following year.

housing occupancy status, and group quarters population, all at the census block level."[4] Once the redistricting data is provided to the States, each State follows its own process to draw the redistricting maps for federal and state legislative districts.

B. Colorado's Redistricting Process: Amendments Y and Z

At the 2018 general election, Colorado voters adopted a new redistricting process through two amendments to the Colorado Constitution, referred to as Amendments Y and Z.[5] The General Assembly referred the amendments to the voters, although the referred amendments were based upon citizen initiatives on the issue.[6]

Prior to the adoption of Amendments Y and Z, the Colorado Constitution provided since 1974 that the General Assembly itself drew the State's congressional districts and the Colorado Reapportionment Commission drew the state legislative

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[4] United States Census Bureau, *Census Bureau Statement on Redistricting Data Timeline* (February 12, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html.

[5] In accordance with C.R.S. § 1-5-407 (5)(b)(1) and (5.4)(a), a measure placed on the ballot by the General Assembly amending the Colorado Constitution is labeled an "Amendment" and is lettered consecutively.

[6] *See* SCR 18-004 and SCR 18-005; Chris Bianchi, *Bye, Bye, Gerrymandering? Inside Amendments Y and Z*, Westword (October 15, 2018), https://www.westword.com/news/inside-amendments-y-and-z-which-try-to-eliminate-gerrymandering-in-colorado-10885833.

districts.[7] The Colorado Reapportionment Commission consisted of 11 members appointed by legislative leaders, the Governor, and the Chief Justice of the Colorado Supreme Court.[8]

Amendments Y and Z, codified as Colo. Const. art. V, §§ 44.3 – 48.4, instead create two independent commissions comprised of 12 members each: The Independent Congressional Redistricting Commission (Congressional Commission) and the Independent Legislative Redistricting Commission (Legislative Commission). Amendments Y and Z establish a multi-step process for selecting the commission members and require that each Commission have four members affiliated with the Democratic party, four members affiliated with the Republican party, and four Unaffiliated members. They also provide that the Commissions should "reflect Colorado's racial, ethnic, gender, and geographic diversity, and must include members from each congressional district, including at least one member from the Western Slope."[9]

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[7] In practice, Colorado's congressional districts were drawn by the courts in the last few cycles because the General Assembly could not reach a consensus on any proposed plan.

[8] Colo. Const. art. V, §§ 44, 48 (2017).

[9] Legislative Council Staff, *2018 State Ballot Information Booklet*, pg. 9 (2018).

Amendments Y and Z also include substantive criteria to guide the Commissions' work in drawing the plans. Colo. Const. art. V, § 44.3 establishes the criteria for congressional districts. It requires the Congressional Commission to make "a good-faith effort to achieve precise mathematical population equality between districts, justifying each variance, no matter how small, as required by the constitution of the United States," requires districts to "be composed of contiguous geographic areas," and requires the Commission to comply with the federal "Voting Rights Act of 1965."[10] It then provides that, "[a]s much as is reasonably possible, the commission's plan must preserve whole communities of interest and whole political subdivisions, such as counties, cities, and towns," and that districts should be as compact as is reasonably possible.[11] Thereafter, the Commission is directed to maximize the number of politically competitive districts to the extent possible.[12] Finally, the section provides that a plan cannot be approved by the Commission or given effect by the Colorado Supreme Court if:

[10] Colo. Const. art. V, § 44.3 (1).

[11] Colo. Const. art. V, § 44.3 (2).

[12] Colo. Const. art. V, § 44.3 (3)(a).

(a) It has been drawn for the purpose of protecting one or more incumbent members, or one or more declared candidates, of the United States house of representatives or any political party; or

(b) It has been drawn for the purpose of or results in the denial or abridgement of the right of any citizen to vote on account of that person's race or membership in a language minority group, including diluting the impact of that racial or language minority group's electoral influence.[13]

Colo. Const. art. V, § 48.1 provides substantially similar criteria for determining legislative districts, with additional criteria requiring that "in no event shall there be more than five percent deviation between the most populous and the least populous district in each house," and providing additional direction with regard to avoiding the division of a county, city, city and county, or town.[14]

Finally, the constitutional sections adopted through Amendments Y and Z establish a robust process for public hearings to receive input from citizens, consideration and adoption of plans by the Commissions in public meetings, submittal of a staff plan if a Commission does not adopt a plan, and review and

[13] Colo. Const. art. V, § 44.3 (4).

[14] Colo. Const. art. V, § 48.1 (1)(a), (2)(a).

approval of plans by the Colorado Supreme Court, with several specific deadlines, as follows:

- Nonpartisan staff prepares and presents a preliminary redistricting plan to each Commission, to be completed between 30 and 45 days after the necessary census data is released or the Commissions convene, whichever is later, which would normally fall between May 1 and May 15 in a redistricting year;
- Each Commission conducts numerous public hearings on its preliminary plan in locations across the state, to be completed by July 7 for the Congressional Commission and by July 21 for the Legislative Commission, allowing at least five weeks during which the public hearings are to be held;
- Each Commission provides direction to nonpartisan staff, who then prepares and presents up to three staff plans to that Commission, which the Commission reviews, considers, and possibly amends;
- Each Commission approves a plan to be submitted to the Colorado Supreme Court for review and approval, by September 1 for the Congressional Commission and by September 15 for the Legislative Commission. If a Commission is unable to approve a plan by the deadline specified in the Colorado Constitution, nonpartisan staff submits the unamended third staff plan to the Court.

- The Colorado Supreme Court either approves each Commission's plan or sends the plan back to the Commission with the reason for its disapproval, by November 1 for the Congressional Commission and by November 15 for the Legislative Commission; and
- The Colorado Supreme Court gives final approval to the congressional redistricting plan by December 15 and the legislative redistricting plan by December 29.[15]

These deadlines were all established based on the knowledge that federal law required the redistricting data to be provided to the state by March 31, allowing the Commissions and nonpartisan staff to begin their work on the preliminary plans that initiate the process of public comment and review, which would inform the Commissions' work. In fact, both Colo. Const. art. V, 44.4 (1) and 48.2 (1) of calculate the deadlines for the preliminary plans based on when "the necessary census data are available."

C. The 2020 Census Delays

Due to the COVID-19 pandemic, the Census Bureau experienced significant delays in completing the 2020 census and did not meet the deadlines established in federal law for releasing either the apportionment or the redistricting data. As

[15] Colo. Const. art V, §§ 44.4, 44.5, 48.2, and 48.3.

described by one court considering the impact of the pandemic on the federal census, "[j]ust as the 2020 decennial census was getting underway, the COVID-19 pandemic hit, freezing operations and disrupting a process that had taken nearly a decade to plan."[16]

The Operation Plan for conducting the 2020 census was adopted in December 2018, and included phases for both data collection and data processing to be completed in 2020. The data collection phase included time for self-responses to the census questionnaires and time for nonresponse follow-ups, which involve in-person contact attempts at every housing unit that did not self-respond.[17] The Operation Plan provided for data collection to be completed by July 31, 2020.[18] Following the completion of data collection, the plan allowed for 22 weeks of data processing to be able to provide the required reports to the President and eventually to the States.[19] Due to the pandemic, however, the Census Bureau announced that it was ceasing all field operations on March 18, 2020.[20] Over the next month, the Census Bureau

[16] *Nat'l Urban League v. Ross*, 977 F.3d 770, 773 (9th Cir. 2020) (*NUL II*).

[17] *Nat'l Urban League v. Ross*, 489 F. Supp. 3d 939, 951 (N.D. Cal. 2020) (*NUL I*).

[18] *Id*.

[19] *Id.* at 951-52.

[20] *Id*. at 952.

created a new plan to complete the census, essentially extending the deadlines for each phase of the operation, and initially requested that Congress extend the statutory deadlines for reporting the data accordingly.[21]

However, on July 29, 2020, the Secretary of Commerce directed the Census Bureau to create a plan with an accelerated timeline that would allow the Census Bureau to meet the December 31, 2020, deadline to present the apportionment data to the President.[22] This plan, called the Replan, shortened the time frame for both data collection and data processing in order to meet that deadline, calling for data collection to conclude by September 30, 2020.[23] The Replan was challenged in federal court on the grounds that it could not result in an accurate count.[24] The federal district court in that litigation issued a preliminary injunction, enjoining the Census Bureau from concluding data collection on that date, but the injunction was eventually stayed by United States Supreme Court on appeal.[25] The Bureau

[21] *Id*. at 952-55.

[22] *Id*. at 977.

[23] *NUL II*, 977 F.3d at 774-75.

[24] *Id*. at 775.

[25] *Ross v. Nat'l Urban League*, 141 S. Ct. 18 (October 13, 2020).

completed its data collection operations for the 2020 census on October 15, 2020, nearly three months later than originally planned.[26]

While the Replan was intended to allow the Census Bureau to present the apportionment data to the President within the statutory deadline, in the end the Census Bureau was not able to do so.[27] Consistent with a stipulated order entered in the litigation, the Bureau announced in February 2021 that it would provide the apportionment data no later than April 30, 2021, and in fact released this data on April 26, 2021.[28]

With regard to the Pub. L. 94-171 data or final census data needed by the States, the Census Bureau announced in February 2021 that it would release the data to all States by September 30, 2021, nearly six months after the statutory deadline.[29]

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[26] United States Census Bureau, *Census Bureau Statement on 2020 Census Data Collection Ending* (October 13, 2020), https://www.census.gov/newsroom/press-releases/2020/2020-census-data-collection-ending.html.

[27] United States Census Bureau, *Census Bureau Statement on National Urban League Case 21-Day Stay* (January 16, 2021), https://www.census.gov/newsroom/press-releases/2021/national-urban-league-21-day-stay.html.

[28] *Id*.; United States Census Bureau, *2020 Census Apportionment Results Delivered to the President* (April 26, 2021), https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html.

[29] United States Census Bureau, *Timeline for Releasing Redistricting Data* (February 12, 2021), https://www.census.gov/newsroom/blogs/random-samplings/2021/02/timeline-redistricting-data.html.

In March 2021, the Census Bureau also indicated that it would release a "legacy format summary redistricting data file" to the States in mid-to-late August 2021.[30] This legacy format summary file will provide final census data to the States but in a format that will require additional processing to use. According to the Census Bureau, the final step in completing the final census data is "creating 'tabulations' (data tables) from the data we have collected for each state and creating a user-friendly system for data access."[31] By releasing the legacy format summary file, the Bureau will allow states to complete that step themselves or by using an outside vendor.[32]

D. SB21-247

On April 16, 2021, SB21-247 was introduced in the Colorado Senate to address the fact that, as a result of the federal Census Bureau's delay in providing final census data, it is impossible for the Commissions to do their work and secure final approval by this Court under the deadlines required by Amendments Y and Z.

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[30] United States Census Bureau, *U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File* (March 15, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html.

[31] *Id*.

[32] *Id*.

As noted in House Joint Resolution 21-1008 ("HJR21-1008"), without action by the General Assembly, the objectives of Amendments Y and Z cannot be met:

> WHEREAS, If the commissions are delayed in submitting the final plans to the Colorado Supreme Court, it is likely the court will not be able to approve or disapprove the plans by November 1 for the congressional commission and by November 15 for the legislative commission; and
>
> WHEREAS, If the commissions cannot begin the public hearing process prior to the release of the final census data, there is likely to be substantially less public discussion of the proposed district boundaries in the preliminary and staff plans and their adherence to the criteria specified in sections 44.3 and 48.1 of article V of the state constitution, contrary to voter expectations when they adopted Amendments Y and Z; and
>
> WHEREAS, It is to the public's benefit for redistricting to be completed and the new district boundaries known well in advance of the 2022 primary election so that potential candidates can make decisions about whether to run for office and meet the deadlines for nomination by petition or assembly that precede the primary election; and
>
> WHEREAS, If the start of the redistricting processes is delayed until approximately September 30, 2021, when receipt of the final form of data from United States Census Bureau is anticipated, it is possible that election events such as precinct caucuses and the primary election will need to be delayed as well, allowing less time for voters to consider and choose among candidates for United States Senate and statewide elected offices, as well as candidates in the newly drawn districts for Representatives in Congress and members of the Colorado State Senate and House of Representatives, and potentially creating conflicts with related deadlines in federal law for the 2022 general election; and
>
> WHEREAS, To achieve the voters' intent stated in Amendments Y and Z to allow sufficient opportunities for public input, to minimize disruption to and uncertainty in the 2022 election calendar, and to comply with the constitutional mandates and timelines for public input, Senate Bill 21-247 was introduced in the Senate of the Seventy-third General Assembly on April 16, 2021 . . . .

HJR21-1008 at 4. And, as set forth in SB21-247, the General Assembly made the finding that:

> Delays in receiving final approval of the plans of the commissions would severely impact the election calendar of 2022. After the commission plans are approved, section 2-1-104(1)(a), C.R.S., requires county clerks to redraw precincts so that each precinct contains only one congressional, one state senate, and one state house of representative district and to have their county commissioners approve the changes. Section 1-5-103(1), C.R.S. requires that this be done at least twenty-nine days before precinct caucuses are held. Section 1-3-102(1)(a)(I), C.R.S., provides that precinct caucuses are to be held on March 1, 2022, meaning that counties must have redrawn precincts approved by January 29, 2022. The remainder of the election calendar is based upon when the precinct caucuses occur.

See revised version of SB21-247 submitted to the Court at 6.

The General Assembly in SB21-247 is considering statutory changes to clarify essentially two provisions in the constitutional redistricting and reapportionment process and thereby empower the Commissions to perform their essential functions despite the failure of the Census Bureau to provide the necessary data in a timely fashion as required by federal law.

First, SB21-247 amends the statutory definition of "necessary census data" that can be used for the preliminary plans and public input process while still requiring staff plans and the final plans adopted by the Commissions to be based on "final census data" once available in some form hopefully in August of this year. Both the Congressional Commission (see Colo. Const. art. V, § 44.4(1)) and the Legislative Commission (see Colo. Const. art. V, § 48.2(1)) are to use "necessary

census data" to prepare their preliminary plans that form the basis for the public hearings and public input. Under existing statute, this "necessary census data" is the redistricting data the Census Bureau provides the States under federal law (13 U.S.C. § 141 (c)) that provides detailed census data at the census block level, with the federal deadline for providing this data being March 31 of the redistricting year.

SB21-247 amends the current Colorado statutory definition of "necessary census data," C.R.S. § 2-2-902(1)(c), by changing the current definition to "final census data," and adding a new C.R.S. § 2-2-902(1)(c.5)(II), which creates a new definition of "necessary census data" for the 2021 redistricting year only. C.R.S. § 2-2-902(1)(c.5)(II) defines "necessary census data" as the state reapportionment data required by 13 U.S.C. § 141 (b), which is usually provided to the States on December 31 of the census year and was provided to the States this redistricting year on April 26, 2021, and allows the Commissions to supplement this data with "such other total population and demographic data from federal or state sources as are approved by either the independent congressional redistricting commission or the independent legislative redistricting commission to facilitate the development of preliminary plans under section 44.4 or 48.2 of article V of the state constitution, as applicable." See revised version of SB21-247 submitted to the Court at 8. "Final census data," under the new C.R.S. § 2-2-902(1)(c)(II), see *id.*, is the final census block data that the Census Bureau was to provide on March 31, but also includes for only the 2021

redistricting year the anticipated "legacy format summary redistricting data file" from the Census Bureau that is reportedly to be delivered to Colorado in August.

Under new C.R.S. § 2-2-902(6.5), see *id.* at pp. 10-11, the nonpartisan staff will use "necessary census data," as amended, to prepare the preliminary plans and use "final census data" for staff plans prepared after such data is released. Each Commission is to hold at least one public hearing on a plan prepared using the "final census data" prior to adopting a final plan. *Id.* at 10-11.

Second, SB21-247 adds a new C.R.S. § 2-2-903. That new section provides for a substantial compliance standard of review for any legal proceeding challenging compliance by the Commissions, this Court, or nonpartisan staff, "with the technical rather than substantive provisions that implement the redistricting processes established in the Colorado Constitution and related statutes." See revised version of SB-21247 submitted to the Court at 11-12.

As set forth in new C.R.S. § 2-2-903(1)(a), this new provision is designed to address the likelihood that the Commissions will be unable to prepare their final plans by the necessary deadlines, which, in turn, will make it likely that this Court will be unable to approve or disapprove the plans within the Court's deadlines prescribed by Amendments Y and Z. As noted in C.R.S. § 2-2-903(1)(b), Colorado Courts and election statutes enacted by the General Assembly commonly apply the substantial compliance standard to election matters. The General Assembly notes

that "Colorado courts also interpret election requirements to avoid absurd results that would be produced by an overly technical application of a statutory or constitutional requirement." *Id.* Also, in C.R.S. § 2-2-903(1)(c), the General Assembly notes that this Court has both inherent authority over its own procedures and is expressly authorized by Amendments Y and Z to develop rules for judicial review of redistricting plans.

SB21-247 does not limit in any way the powers of the Commissions to perform their key functions under Amendments Y and Z. Rather, it empowers the Commissions, although deprived of the necessary data at this time, to begin their work with the level of transparency and public participation that voters anticipated in passing Amendments Y and Z and to complete their work and enable this Court to complete its work with the least amount of disruption to the 2022 election process.

SUMMARY OF ARGUMENT

The General Assembly has plenary power to legislate so long as it is not prohibited by the United States or Colorado Constitutions. There is nothing in the Colorado Constitution that prohibits the General Assembly from defining "necessary census data" or directing the Commissions to use the amended definition of "necessary census data" in performing their functions under Amendments Y and Z. Nor is there anything in Amendments Y and Z, or any other Colorado constitutional provision, prohibiting the General Assembly from enacting a substantial compliance

standard for adjudicating legal challenges to compliance with technical redistricting process requirements.

ARGUMENT

I. This Court Properly Accepted Jurisdiction

This Court has original jurisdiction, inter alia, to "give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives . . . ." Colo. Const. art. VI. §3, By adopting HJR21-1008, both the Colorado Senate and the House of Representatives have asked this Court to opine on two interrogatories that deal with yet another crisis arising from the current pandemic. *See In Re: Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶29, ___ P.3d. ___ (in recognizing jurisdiction, referencing the "virtually unprecedented public health crisis").

Here, the Colorado General Assembly is addressing a situation where, as a result of the pandemic, the Census Bureau has failed to meet its deadlines under federal law, which, in turn, is jeopardizing the ability of the Commissions to perform their constitutional functions consistent with the Colorado Constitution and applicable statutory law. In addition, the interrogatories submitted to the Court under HJR21-1008 involve the constitutionality of two provisions of SB21-247, which, as recognized in *In Re: Interrogatory on House Joint Resolution 20-1006*, is an appropriate exercise of the Court's original jurisdiction. 2020 CO 23, ¶27 ("We

have held, for example, that a question posed by the legislature 'must be connected with pending legislation and must concern either the constitutionality of the legislation or matters connected to the constitutionality of the legislation concerning purely public rights.' *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999).").

These interrogatories raise purely legal questions that cannot be readily addressed through ordinary litigation. By answering them promptly, the Court will provide certainty to the Commissions and the public as to how the congressional and legislative redistricting processes set forth in Amendments Y and Z can proceed as intended despite the pandemic-caused delay in receiving the redistricting data and without causing major disruptions to the 2022 election cycle that commences in mid-January of 2022.

II. Standard of Review

The General Assembly has plenary power to enact legislation, and it exceeds its plenary power only if its legislative enactments are prohibited by the United States or Colorado Constitutions. *See People, Int. of Y.D.M.*, 593 P.2d 1356, 1359 (Colo. 1979) ("The people of Colorado, in adopting the state constitution, created the General Assembly and vested it with plenary power to adopt general laws, subject only to the restraints and limitations of the state and federal constitutions . . . . The General Assembly, therefore, ***may enact any law*** not expressly or inferentially

prohibited by the constitution of the state or of the nation." Emphasis added. Internal citations omitted.).

In addressing the constitutionality of a statute enacted by the General Assembly, this Court requires proof that the statute is "unconstitutional beyond a reasonable doubt." *TABOR Foundation v. Regional Transportation Dist.*, 416 P.3d 101, 104 (Colo. 2018).[33]

III. There is Nothing in the Colorado Constitution that Prohibits the General Assembly from Defining "Necessary Census Data" or Directing the Commissions to Use the Amended Definition of "Necessary Census Data" in Performing Their Functions Under Amendments Y and Z

A. Nothing in Amendments Y and Z Limit the General Assembly's Authority to Amend the Definition of Necessary Census Data

Colo. Const. art. V, § 44.4(1) and Colo. Const. art. V, § 48.2(1) reference the availability of "necessary census data" as the starting point for staff to create the preliminary plans and the process for the Commissions to consider them. "Necessary census data" is not defined in the constitution, and there is nothing explicit or implicit in either constitutional provision that prohibits the General

[33] SB21-274, because it has not been finally enacted, is not presumed to be constitutional and therefore does not benefit from the beyond-a-reasonable-doubt standard. *See Submission of Interrogatories on SB 93-74*, 852 P.2d 1, 6 n.4 (Colo. 1993). However, the other statutes enacted by the General Assembly that are relevant in this case, including and especially C.R.S. §§ 2-2-901 and 2-2-902, discussed below, are entitled to the presumption of constitutionality.

Assembly from defining or subsequently amending the definition of "necessary census data." In fact, the General Assembly, in exercising its plenary authority, has several times enacted legislation defining or describing the data to be used in redistricting.

The General Assembly addressed by statute the data to be used for congressional and legislative redistricting in Senate Bill 99-206 ("SB99-206"), codified at C.R.S. § 2-2-901. As noted in the legislative declaration of SB99-206, at that time, there was consideration of using statistically modified population data for redistricting. The General Assembly determined that the data set used for Colorado's congressional and legislative redistricting should be the same data set used to apportion the seats in the United States House of Representatives (see 13 U.S.C. § 141(b)). *See* 1999 Colo. Sess. Laws 559. In 2010, the General Assembly made a slight modification to C.R.S. § 2-2-901, changing the year 2000 to 2010. 2010 Colo. Sess. Laws 1635.

In 2020, the General Assembly enacted House Bill 20-1010 (HB20-1010), which amended C.R.S. § 2-2-901 by providing that the Congressional Commission and Legislative Commission would use population data supplied by the United States Census Bureau, as adjusted pursuant to C.R.S. § 2-2-902, newly enacted in House Bill 20-1010. *See* HB20-1010 at 6. That same legislative session, the General Assembly later enacted Senate Bill 20-186 (SB20-186), further amending C.R.S. §

2-2-901 to make it clear that the data to be used for redistricting in Colorado must be the same as that used to apportion congressional seats—the 13 U.S.C. § 141(b) data. *See* SB20-186 at 13. This further amendment addressed the then pending issue of whether the redistricting data that the Census Bureau would supply to the States would exclude undocumented persons. Significantly, SB20-186 (a 22-page bill titled: "concerning the independent redistricting commissions in Colorado") provided for an extensive set of procedural, resource, and funding provisions related to the Commissions and their work, as is explained below.

The General Assembly also enacted a new C.R.S. § 2-2-902 in HB20-1010, which accomplishes a number of things. Inter alia, it defines "necessary census data" as "the federal decennial Pub. L. 94-171 data," as adjusted by subsections (5) and (6) of C.R.S. § 2-2-902.[34] Subsection (5) requires nonpartisan staff to make adjustments to account for prison populations as provided for in the remainder of C.R.S. § 2-2-902. Subsection (6) of this section provides that the nonpartisan staff's adjustment for the prison population must be completed no later than 30 days after the State receives the Pub. L. 94-171 data. C.R.S. §§2-2-901 and 2-2-902 are both duly enacted law and presumed constitutional.

[34] Public Law 94-171 amended 13 U.S.C. 141 by adding a subsection (c). That subsection provides the March 31-in-the-redistricting-year deadline and provided for collection and distribution to the states of the census block level data referred to as Pub. L. 94-171 data.

There is nothing in Amendments Y and Z that even remotely suggests that the General Assembly is limited in any way from enacting legislation to specify the data to be used in the redistricting process in Colorado, as it has done since 1999. Moreover, under C.R.S. §§ 2-2-901 and 2-2-902 as they read today, without being amended by SB21-247, the Commissions cannot use any data other than the Pub. L. 94-171 data.

In SB21-247, the General Assembly is again exercising its plenary authority to redefine the term "necessary census data" and authorize the nonpartisan staff to use the defined data to create the preliminary plans. This legislation empowers the Commissions to move forward in considering the preliminary plans and implementing the process for public input as soon as possible, given the Census Bureau's significant delay in providing the redistricting data. SB21-247 simply fills a gap in the provisions of Amendments Y and Z, which the General Assembly, in its plenary authority to legislate, is constitutionally authorized to fill.

B. Sb21-247's Amendment Of "Necessary Census Data" And The Provision For Its Use Are Consistent With And Advance The Purposes Of Amendments Y And Z

Moreover, the provisions of SB21-247, which amend "necessary census data," authorize the use of the defined data for preliminary plans, and require the use of final data once available for the staff plans, are consistent with and advance the purposes of Amendments Y and Z. In divining the purpose of a constitutional

amendment, this Court considers the amendment "in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996).

Colo. Const. art. V, § 44 (1) and Colo. Const. art. V, § 46 (1) both contain a "declaration of the people," which describes the purposes of Amendments Y and Z, including to create "an inclusive and meaningful legislative 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."

SB21-247 helps ensure that this purpose is achieved. As noted in both HJR21-1008 and in SB21-247 itself, without the amendments adopted in SB21-247, it will be impossible for the Commissions to consider and hold public hearings on the preliminary plans as required in Amendments Y and Z, and meet the deadlines to submit their plans to this Court. If the Commissions must wait to receive the Pub. L. 94-171 data before they can consider the preliminary plans, public input and participation in the redistricting process, one of the express purposes stated in Amendments Y and Z, will unquestionably be severely truncated. And there will be significantly less transparency in the process as envisioned by the voters in enacting Amendments Y and Z. By changing the definition of "necessary census data" and

authorizing the nonpartisan staff to create the preliminary plans based on that necessary census data, but still requiring the final plans to be based on the final census data, SB21-247 puts in place the necessary statutory provisions to support the Commissions in meeting the purposes of Amendments Y and Z.

C. Possible Objections

The General Assembly is aware that the Commissions may file briefs opposing the findings of constitutionality as requested by the General Assembly. For example, one or both Commissions may assert that they are already moving forward with "alternative" data, and that SB21-247's amendment of the definition of "necessary census data" is not needed. The response to this is two-fold. First, it is needed. Under existing statute (C.R.S. §§ 2-2-901, 902), the Commissions are required to use the Pub. L. 94-171 data. The Commissions have no independent authority granted in the Colorado Constitution or in statute to change the data they use to perform their functions. Second, even if the Commissions did not need the General Assembly's assistance, that is not the test. The test for determining whether the provisions of SB21-247 are constitutional is whether there is anything in Amendments Y and Z that ***prohibits*** the General Assembly from amending the definition of "necessary census data" and authorizing the use of such data in creating the preliminary plans. As noted above, there is nothing.

The Commissions or someone else may argue that Amendments Y and Z are self-executing, and therefore amending the definition of "necessary census data," allowing nonpartisan staff to use the newly defined data for the preliminary plans, and allowing the Commissions to perform their responsibilities using the newly defined data until the Pub. L. 94-171 data is provided is unconstitutional. There are a myriad of problems with such an argument.

First, to be self-executing, a measure must specifically state that it is intended to be self-executing. This Court in *Yenter v. Baker*, 248 P.2d 311 (Colo. 1952), provided a detailed discussion of what constitutes a self-executing measure. There, the measure at issue "provides that it shall be in all respects self-executing. It is not a mere framework, but contains the necessary detailed provisions for carrying into immediate effect the enjoyment of the rights therein established." *Id.* at 236. "An equally important object of self-execution is to put it beyond the power of the legislature to render it nugatory by passing restrictive laws." *Id.* at 314.

Colo. Const. art. V, § 1, at issue in *Yenter*, contains an explicit self-execution clause. *See* subsection (10) ("This section of the constitution shall be in all respects self-executing; except that the form of the initiative or referendum petition may be prescribed pursuant to law."). TABOR contains a similar clause. Colo. Const. art. X, § 20(1) ("All provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local

provisions.). A series of home rule provisions contain explicit self-executing language. *See, e.g.,* Colo. Const. art. XX, § 6 (home rule for cities and towns) ("This article shall be in all respects self-executing."). The provision related to marijuana use also contains explicit language declaring it to be a self-executing measure. Colo. Const. art. XVIII, § 16 ("All provisions of this section are self-executing except as specified herein, are severable, and, except where otherwise indicated in the text, shall supersede conflicting state statutory, local charter, ordinance, or resolution, and other state and local provisions."). There are other examples. By contrast, Amendments Y and Z contain no such explicit self-executing language.

In analyzing a measure, this Court can look to "relevant materials such as the ballot title and submission clause and the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature." *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999). The Bluebook for the 2018 election contains no reference to Amendments Y and Z being self-executing.[35]

Second, even if Amendments Y and Z were self-executing, the amendment of the definition of "necessary census data" in SB21-247 and the provision for its use

[35] The Blue Book contains in the "arguments for" the following statement: "Amendment Y limits the role of partisan politics in the congressional redistricting process by transferring the legislature's role to an independent commission." The plain language refers to transferring the General Assembly's role of actually drawing the maps. Nothing in this statement contemplates negating the General Assembly's role with regard to census data and addressing the problems caused by its unavailability specifically or the redistricting process generally.

by the Commissions and nonpartisan staff would be constitutional. The applicable test in that context is set forth in *Zaner v. City of Brighton*, 917 P.2d 280 (Colo. 1996). Under *Zaner*: "A statute is presumed to be constitutional, and a party asserting that a statute is unconstitutional has the burden of proving that assertion beyond a reasonable doubt. . . . Although constitutional provisions which are self-executing require no implementing legislation . . ., legislation that furthers the purpose of self-executing constitutional provisions to facilitate their enforcement is permissible . . . . However, legislation which directly or indirectly impairs, limits or destroys rights granted by self-executing constitutional provisions is not permissible . . . ." *Id.* at 286.

As described above, SB21-247 furthers the purposes of Amendments Y and Z and facilitates their implementation. The provisions of SB21-247 do not impair or limit any rights of the Colorado citizenry or the Commissions, let alone cause the destruction of these rights. In fact, allowing more types of data to be used by the nonpartisan staff and the Commissions so that the redistricting process can proceed ensures that the rights of the citizens and the functions of the Commissions, as envisioned by Amendments Y and Z, can be fully exercised as intended.

It is worth noting that Amendments Y and Z expressly contemplate assistance from the General Assembly in implementing the redistricting process. Colo. Const. art. V, §§ 44.2(1) and 48(1) provide that the General Assembly's director of research

of the legislative council and the director of the office of legislative legal services shall appoint the nonpartisan staff from their respective offices to assist the Commissioners. The nonpartisan General Assembly staff, in turn, provides support to the Commission including acquiring and preparing necessary resources, including hardware, software, and demographic, and political databases, "as far in advance as necessary to enable the commission to begin its work immediately upon convening." In addition to showing that Amendment Y and Z contemplate a continued role for the General Assembly, these provisions patently are not inconsistent with SB21-247 and its amendment of "necessary census data."

Further demonstrating that any argument that the Commissions are somehow insulated from statutory enactments by the General Assembly is false, SB20-186 demonstrates the myriad issues related to the Commissions' work where legislation is appropriate and even required. For example, under SB20-186, conflicting statutory provisions were deleted (at 1-2); definitions were provided (at 2-3); the citation to the Voting Rights Act in Amendments Y and Z was corrected (at 3); the process for counties to redraw precinct boundaries was clarified (at 3-4); filing requirements for the Commissions regarding the final plans were addressed (at 4); "attachments" and "detachments," which arise where areas are unintentionally added to or omitted from a drawn district, were addressed (at 4-6); changes in county and municipal boundaries were addressed (at 6-7); the filing of the plans and their public

availability were addressed (at 7); an array of amendments were made to harmonize various statutes impacted by Amendments Y and Z (at 7-13); cash funds accounts for the Commissions were established with the terms for their use (at 13-15); statutory provisions and authority were established for the nonpartisan staff to do their jobs under Colo. Const. art. V, §§ 44.2(1) and 48(1), discussed above (at 17-18); provisions were provided to flesh out the forms required for Commission membership applications (at 18); an extensive set of provisions were put in place to effectuate Amendments Y and Z until the Commission members were selected, including providing for all of the necessary databases that the Commissions need to use the census data once it is provided (at 18-20); provisions were made for the Commissions' computer systems (at 20); and provisions were adopted to ensure the Commissioners receive per diem and reimbursement for expenses (at 20-21).

Lastly, any challenge to the General Assembly's power to define what data the Commissions use to perform their functions is effectively an assertion that C.R.S. §§ 2-2-901 and 2-2-902, as currently enacted, are unconstitutional. Any such challenge would have to prove that these provisions are unconstitutional beyond a reasonable doubt – a standard no one can come close to meeting here.

In sum, Interrogatory Number 1 should be answered in the affirmative. The provisions of SB21-247, which amends the statutory definition of "necessary census data," establishes statutory authority for nonpartisan staff to use that data for

preliminary plans, and confirms in statute that the staff plans used for final adoption must be based on final census data, are constitutional in allowing the Commissions to perform their constitutional responsibilities under Amendments Y and Z.

IV. Nothing in Amendments Y and Z, Or Any Other Colorado Constitutional Provision, Prohibits the General Assembly From Enacting a Substantial Compliance Legal Standard for Redistricting Compliance Challenges Involving Technical Provisions

SB21-247 establishes substantial compliance as the standard a court must apply in adjudicating any legal proceeding that challenges the Commissions', the nonpartisan staff's, or this Court's compliance with the technical provisions of Amendments Y and Z and related statutes. See revised version of SB21-247 at 11-12. Amendments Y and Z are silent concerning any aspect of legal challenges to the Commissions' work, their use of non-final data for preliminary plans and public input, or the failure to meet a deadline. There is, accordingly, nothing in Amendments Y and Z that prohibits the General Assembly, in the exercise of its plenary authority, from enacting a substantial compliance standard for courts to use in deciding legal challenges based on alleged lack of compliance with technical provisions related to Amendments Y and Z.

Moreover, the General Assembly's enactment of the substantial compliance standard in SB21-247 unquestionably furthers the purposes of Amendments Y and Z. Application of the standard will minimize any delay in adopting and

implementing the plans that subsequent litigation would cause in the upcoming 2022 election cycle.

The General Assembly has periodically directed in statute that legal challenges related to certain issues, particularly those involving election-law compliance, must be adjudicated using a substantial compliance standard. In what may be the most analogous situation, C.R.S. § 1-1-113(1) provides that, in any litigation arising from a public official's failure to comply with the Election Code, if there is a violation, a district court "shall issue an order requiring substantial compliance with the provisions of this code."[36]

There are a number of other examples where the General Assembly has statutorily established substantial compliance as the legal standard to be applied: C.R.S. § 1-1-103 (Colorado Election Code) ("Substantial compliance with the provisions or the intent of this article is all that is required for the proper conduct of an election . . . ."); C.R.S. § 1-13.5-109 (local government elections) ("Substantial compliance with the provisions or the intent of this article is all that is required for the proper conduct of an election . . . ."); C.R.S. § 1-13.5-1501(1) (local elections) (courts are to summarily adjudicate a dispute "with a view to obtaining a substantial compliance with this article by the parties to the controversy"); C.R.S. § 1-7-907

[36] C.R.S. § 1-1-113, which provides for a three-day deadline to appeal to this Court and allows for summary affirmance by declining jurisdiction, is an important provision to ensure that litigation causes minimal disruption to elections in this State.

("The ballot issue notice shall be prepared and mailed in substantial compliance with" TABOR, a constitutional provision); C.R.S. § 1-7-116(3) (for coordinated elections, a ballot issue notice "shall be prepared and mailed in substantial compliance with" the Election Code).

This Court has relied on the General Assembly's statutory guidance to determine whether to apply substantial compliance in interpreting various statutes and, if so, how the standard is to be applied. For example, in *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994), the Court considered whether failure to comply with a statutory affidavit requirement for petition circulation nevertheless constituted substantial compliance. In answering the question, this Court looked to the underlying purpose of the statutory affidavit requirement, even though it placed restrictions on the constitutional right of initiative. The purpose of the statute in that case was to properly protect and safeguard the right of initiative by imposing certain petition circulator affidavit requirements. *See* 882 P.2d at 1384. Accordingly, recognizing the General Assembly's rationale for the requirements, this Court found that substantial compliance was not met in that case.

Here, the General Assembly has looked at Amendments Y and Z and made a legislative determination that disputes involving alleged non-compliance with the technical provisions related to the redistricting process should be adjudicated using the substantial compliance standard. Applying such a standard will facilitate and

expedite litigation involving alleged technical non-compliance, including litigation that may arise from failing to meet a specific deadline for submission or review.

SB21-247's adoption of the substantial compliance standard for alleged non-compliance with technical provisions calls for litigation under this standard to be adjudicated by application of the substantial compliance test set forth in *Bickel v. City of Boulder*, 885 P.2d 215 (Colo. 1994). That three-part test involves consideration of: (1) the extent of non-compliance; (2) the purpose of the provision that was violated and whether that purpose is substantially achieved despite the non-compliance; and (3) whether it can reasonably be inferred that the person or entity in violation made a good faith effort to comply. *Id.* at 227.

As set forth in SB21-247 itself, a principal reason underlying the statutory adoption of this standard is to address the very likely situation in which a particular submission or review deadline is not met due to the delay in receiving redistricting data from the Census Bureau. See revised version of SB21-247 at 11. Applying the *Bickel* three-part test in a case challenging a missed deadline, a court would consider the extent to which the deadline was missed, the purpose of the deadline, and whether there was a good-faith attempt to comply.

The General Assembly asserts that the deadlines prior to the final December 15 and December 29 deadlines for final approval are technical.[37] The final deadlines may or may not be technical depending on the circumstances presented to a district court or this Court in a specific legal challenge. It will be up to this Court and the lower courts to make that determination and apply the substantial compliance standard if the courts determine that the alleged violation relates to a technical provision.[38] As noted in the section of SB21-247 establishing the substantial compliance standard, this Court has "inherent authority over its own procedures and is authorized by the Colo. Const. art. V § 44.5 and 48.3 to develop rules for judicial review of redistricting plans." See revised version of SB21-247 at 11.

It is important to note that the General Assembly cannot simply rewrite the deadlines in Amendments Y and Z. Colo. Const. art. V, §§ 44.4 (5)(c) and 48.2 (5)(c) specifically authorize the Commissions to adjust their preliminary deadlines, but set

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[37] The fact that the Commissions can modify certain deadlines under Colo. Const. art. V, §§ 44.4 (5)(c) and 48.2 (5)(c) short of the final plan for circumstances beyond their control demonstrates that deadlines short of the deadlines for approval of final plans are technical.

[38] *Compare Griswold v. Ferrigno Warren*, 2020 CO 34, ___ P.3d ___ (minimum signature requirement substantive and not subject to substantial compliance) *with Yenter v. Baker*, 248 P.2d 317 (Colo. 1952) (late publication of an amendment second time in one county held technical, and subject to substantial compliance). *See also Kuhn v. Williams*, 418 P.3d 478, 488 n.4 (Colo. 2018) ("[R]esidency is not a mere technical requirement that is subject to substantial compliance. A person either is a resident for purposes of the Election Code or he is not.").

specific deadlines by which the plans must be submitted to this Court. Colo. Const. art. V, §§ 44.5 and 48.3 specify the deadlines by which this Court must adopt the final plans. None of these provisions include language that allows for those deadlines to be changed by statute. Thus, the General Assembly's plenary authority does not extend to changing these deadlines. That said, the General Assembly can and is exercising its plenary authority to attempt to minimize the disruption that potential litigation concerning compliance with these deadlines will cause to the congressional and legislative redistricting process and to the 2022 election process. This plenary authority includes the authority to establish a substantial compliance standard for compliance issues related to technical provisions.

The General Assembly respectfully requests that this Court find that the provision of SB21-247 that directs a court to apply the standard of substantial compliance when adjudicating a legal proceeding that challenges the lack of compliance with the technical requirements of the redistricting process established in the Colorado Constitution and related statutes, such as the timing of this Court's review of a Commission's first approved map or a staff map when the Commission is unable to adopt a plan by the deadline to do so, is constitutional.

CONCLUSION

Due to extraordinary circumstances beyond the control of the General Assembly, the Commissions, and this Court, it is impossible for the Commissions to

do their work and secure final approval by this Court under the deadlines required by Amendments Y and Z. Through SB21-247, the General Assembly is exercising its plenary authority to facilitate and support the work of the Commissions and nonpartisan staff while meeting the voters' expressed intent in Amendments Y and Z to ensure a transparent redistricting process that includes robust public input and attempting to ensure that any legal challenges to the compliance with the technical aspects of the redistricting process do not cause delay in the 2022 election cycle. We respectfully ask that the Court answer the interrogatories in the affirmative.

Respectfully submitted this 13th Day of May, 2021.

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