Supreme Court, State of Colorado 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 05, 2021 1:27 PM
Original Proceeding Pursuant to COLO. CONST., art. VI, sec. 3	
In re Interrogatories as submitted by the Colorado General Assembly	↑ COURT USE ONLY ↑ Case Number:
Attorneys for Colorado General Assembly SHARON L. EUBANKS, Director, Office of Legislative Legal Services Atty. Reg. #16847 JULIE A. PELEGRIN, Deputy Director, Office of Legislative Legal Services Atty. Reg. #18947 Office of Legislative Legal Services State Capitol Building 200 E. Colfax Ave., Rm 091 Denver, CO 80203 Phone Number: (303) 866-2045 FAX Number: (303) 866-4157 E-mail: sharon.eubanks@state.co.us E-mail: julie.pelegrin@state.co.us	
Petition to Accept Interrogatories of the Colorado General Assembly	

The Colorado General Assembly, by the attached joint resolution and supporting materials, hereby submits its interrogatories on Senate Bill 21-247 and respectfully requests the opinion of the Supreme Court thereon pursuant to section 3 of article VI of the Colorado Constitution.

RESPECTFULLY SUMITTED this 5th day of May 2021.

By: Sharon L. Eubanks

SHARON L. EUBANKS, 16847
Director, Office of Legislative Legal Services
JULIE A. PELEGRIN, 18947
Deputy Director, Office of Legislative Legal Services

COLORADO

HOUSE OF REPRESENTATIVES

STATE CAPITOL

DENVER

80203

CERTIFICATE

This is to certify that the attached documents are true and correct copies of the following:

1. The adopted version of House Joint Resolution 21-1008. House Joint Resolution 21-1008 was duly introduced in the House of Representatives of the Seventy-third General Assembly of the State of Colorado on May 4, 2021, adopted by the House of Representatives on May 5, 2021, and adopted by the Senate of the Seventy-third General Assembly on the same day.

2. The revised version of Senate Bill 21-247. Senate Bill 21-247 was duly introduced in the Senate of the Seventy-third General Assembly of the State of Colorado on April 16, 2021, passed by the Senate on Third Reading on April 26, 2021, and passed by the House of Representatives of the Seventy-third General Assembly on Second Reading on May 4, 2021.

Alec Garnett
Speaker of the House of Representatives

Subscribed and sworn before me this 5th day of May 2021:

Notary Public

My commission expires 12/17/2024.

ROBERT GARCIA
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 19864021684
MY COMMISSION EXPIRES DECEMBER 17, 2024

HOUSE JOINT RESOLUTION 21-1008

BY REPRESENTATIVE(S) Esgar and McKean, Benavidez, Bernett, Bird, Boesenecker, Garnett, Herod, Hooton, Kennedy, Kipp, Lontine, McCluskie, McCormick, Michaelson Jenet, Ortiz, Snyder, Sullivan, Tipper, Young;
also SENATOR(S) Fenberg and Holbert, Bridges, Buckner, Cooke, Garcia, Gardner, Ginal, Gonzales, Hansen, Hisey, Jaquez Lewis, Kirkmeyer, Kolker, Lee, Liston, Lundeen, Moreno, Priola, Rankin, Simpson, Sonnenberg, Story, Winter, Zenzinger.

CONCERNING A REQUEST TO THE SUPREME COURT OF THE STATE OF COLORADO TO RENDER ITS OPINION UPON QUESTIONS REGARDING SECTIONS 44 TO 48.4 OF ARTICLE V OF THE STATE CONSTITUTION.

WHEREAS, In 2018, the voters in Colorado overwhelmingly approved Amendments Y and Z; and

WHEREAS, Amendment Y, which became sections 44 to 44.6 of article V of the state constitution, changed the entity responsible for redrawing congressional districts from the General Assembly to a new Independent Congressional Redistricting Commission (congressional commission), and Amendment Z, which became sections 46 to 48.4 of article V of the state constitution, changed the entity responsible for redrawing the districts for the state Senate and state House of Representatives from the Reapportionment Commission to a new Independent Legislative Redistricting Commission (legislative commission); and

WHEREAS, In sections 44 and 46 of article V of the state constitution, the people declared that they wanted and deserved a "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"; and

WHEREAS, Amendments Y and Z provide for a multi-stage process with specific deadlines for the consideration and development of redistricting plans, in which:

- Nonpartisan staff prepares and presents a preliminary redistricting plan to each commission, to be completed between May 1 and May 15;
- The commissions conduct numerous public hearings on the preliminary plans 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 for the public hearings to be held;
- The commissions provide direction to nonpartisan staff, who then prepares and presents up to three staff plans to each commission, which the commissions review, consider, and possibly amend;
- Each commission approves a plan to be submitted to the Colorado Supreme Court, 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 state constitution, nonpartisan staff submits the unamended third staff plan to the Colorado Supreme 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; and

WHEREAS, Amendments Y and Z provide for increased public participation at various stages of the redistricting process by:

- Requiring at least three public hearings on the preliminary plan of each commission in each of the seven existing congressional districts;
- Allowing any Colorado resident to submit a redistricting plan and provide comments to the redistricting commissions, with the plan and comments posted on the commissions' website; and

- After the commissions begin considering staff plans, prohibiting the commissions, unless waived by all commissioners, from voting to approve a plan for seventy-two hours after a staff plan is presented to the commissions, or the staff plan is amended at a public meeting, so that the public is aware of what is in each commission's final plan submitted to the Colorado Supreme Court; and

WHEREAS, Sections 44.4 (5)(c) and 48.2 (5)(c) of article V of the state constitution allow the commissions to adjust the specified timelines for their work if circumstances outside the commissions' control require such an adjustment to ensure the adoption of a plan, thus allowing the commissions the flexibility to ensure the public has functional opportunities to participate in the process when strict adherence to the specified deadlines would impair such participation; and

WHEREAS, The state constitution does not provide a mechanism by which to adjust the deadlines specified for the Colorado Supreme Court to review and approve the plans submitted by the commissions pursuant to sections 44.5 and 48.3 of article V of the state constitution; and

WHEREAS, The constitutionally mandated timelines and deadlines for the work of the commissions are based on the understanding that 13 U.S.C. sec. 141 requires the United States Census Bureau to provide the state by March 31, 2021, with the population and demographic data at the census block level necessary to redraw election districts; and

WHEREAS, Due to the COVID-19 pandemic, the United States Census Bureau did not provide the total population data for the state by March 31, 2021, as required by 13 U.S.C. sec. 141; and

WHEREAS, The tabulation of the total population by state required by 13 U.S.C. sec. 141 (b) was released on April 26, 2021, and the United States Census Bureau anticipates releasing the remaining data on the following schedule:

- The redistricting data, which is the population and demographic data at the census block level, will be released in a legacy format summary redistricting data file by mid- to late-August 2021; and
- The final census data, which is the redistricting data required by 13 U.S.C. sec. 141 (c), and fundamentally the same data to be

provided in the legacy format in August 2021, will be released on or after September 30, 2021, which is at least six months after the original deadline; and

WHEREAS, If the commissions are required to wait to begin work on their plans until the final census data is released on September 30, 2021, at the earliest, it will be impossible for the commissions to comply with the requirements and meet the mandated deadlines specified in the state constitution to submit their final plans for the Colorado Supreme Court's consideration and approval of the plans; and

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 the 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; and

WHEREAS, Senate Bill 21-247:

- Amends the statutory definition of the "necessary census data" to be used to create preliminary plans pursuant to sections 44 to 48.4 of article V of the state constitution in the 2021 redistricting year to include the tabulation of the total population by state published by the United States Census Bureau on April 26, 2021, along with additional state or federal data sources approved by each commission, while requiring the final census data to be used for all staff plans; and
- Finds that the Colorado Supreme Court has inherent authority over its own procedures and is authorized by sections 44.5 and 48.3 of article V of the state constitution to develop the rules for judicial review of redistricting plans; and
- Provides that, in a legal proceeding that challenges compliance with the technical requirements of the redistricting process established in the state constitution or in statute, a reviewing court shall evaluate the claims to determine whether there was substantial compliance with those requirements; and

WHEREAS, In the absence of guidance from the Colorado Supreme Court, there will likely be litigation challenging the constitutionality of the provisions of Senate Bill 21-247 authorizing nonpartisan staff to use "necessary census data" as defined in Senate Bill 21-247 or the inability of the commissions and the Colorado Supreme Court to comply with the requirements and mandated deadlines set forth in the state constitution; and

WHEREAS, Delays resulting from such litigation will create further uncertainty in the 2022 election and could necessitate redrawing the redistricting plans, which would create additional uncertainty for the 2022 general election and could imperil the state's ability to conduct elections in 2022 in a timely and orderly fashion and in compliance with related deadlines in federal law; and

WHEREAS, Section 3 of article VI of the state constitution directs the Colorado Supreme Court to "give its opinion upon important questions upon solemn occasions when requested by the ... senate, or the house of representatives; ..."; and

WHEREAS, Resolving the constitutional question of whether the General Assembly may enact statutory changes to the definition of the "necessary census data" to be used to draw preliminary plans in the 2021 redistricting year through an interrogatory proceeding will avoid imminent judicial action to determine how to redraw congressional and state legislative districts when it is impossible for the districts to be redrawn in the manner set forth in the state constitution without amending the definition; and

WHEREAS, A determination of the appropriate legal standard to apply in evaluating any noncompliance with the technical requirements of the state constitution and related statutory provisions concerning redistricting will similarly avoid or minimize the delays and disruptions from any litigation challenging that noncompliance; and

WHEREAS, The issues raised by Senate Bill 21-247 are strictly legal issues involving the interpretation and construction of various provisions of the state constitution or to purely public rights related to such provisions, and no factual issues are likely to arise in the context of a private suit that would enhance the Colorado Supreme Court's ability to adjudicate these issues; and

WHEREAS, Senate Bill 21-247 was passed on third reading by the Senate on April 26, 2021, was passed by the House of Representatives on second reading on May 4, 2021, and now awaits final passage by the House of Representatives; and

WHEREAS, If, prior to the adjournment sine die of the first regular session of the Seventy-third General Assembly, the Colorado Supreme Court determines that the provisions of Senate Bill 21-247 do not violate the state constitution, Senate Bill 21-247 will in all likelihood pass the House of Representatives on third reading and be presented to the Governor in accordance with section 11 of article IV of the state constitution; and

WHEREAS, The General Assembly has elected to submit these interrogatories by Joint Resolution of the two houses in order to demonstrate to the Colorado Supreme Court that both houses concur in the importance of the issues set forth below and the urgency of the situation described in this Joint Resolution constituting a solemn occasion as contemplated in section 3 of article VI of the state constitution; and

WHEREAS, The submission of these interrogatories in this manner in no way limits or modifies the authority of either house to submit separate interrogatories by a House of Representatives or Senate Resolution; now, therefore,

Be It Resolved by the House of Representatives of the Seventy-third General Assembly of the State of Colorado, the Senate concurring herein:

That, in view of the premises, there are important questions as to the constitutionality of Senate Bill 21-247, and it is the judgment of the Senate and the House of Representatives that the questions of the constitutionality of Senate Bill 21-247 are a matter of extreme importance and public interest; that it is essential that an immediate determination be secured so the commissions and the court know how they may proceed and how their actions, if challenged, would be evaluated by a court; that a solemn occasion within the meaning and intent of section 3 of article VI of the state constitution has arisen; and that the Senate and the House of Representatives accordingly request the Colorado Supreme Court to render its opinion upon the following questions:

Since circumstances beyond the control of the commissions and the General Assembly make it impossible to complete the 2021 redistricting process within the deadlines established by the state constitution:

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 the preliminary plans, and confirm in statute that the staff plans which provide the basis for action by the commission 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?

Be It Further Resolved, That, in view of the limited number of days remaining in the legislative session, the Senate and the House of Representatives respectfully request that, if the Supreme Court grants this request for interrogatories and requires briefing and oral argument, the Supreme Court consider adopting an expedited schedule to require submission of briefs within no more than five days after the order granting the request and submission of answer briefs and, if deemed necessary by the court, scheduling for oral arguments within no more than five days following submission of the briefs.

Be It Further Resolved, That the Speaker of the House of Representatives, immediately upon passage of this House Joint Resolution, shall transmit to the Clerk of the Colorado Supreme Court a certified copy thereof and certified copies of Revised Senate Bill 21-247, and that the Committee on Legal Services shall be directed to furnish said Court with an adequate number of copies of this House Joint Resolution and said bill and shall retain counsel or otherwise prepare and submit to

said Court such further documents and briefs as the Court may require to expedite its procedure in the premises.

Alec Garnett
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Leroy M. Garcia
PRESIDENT OF
THE SENATE

Robin Jones
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

First Regular Session
Seventy-third General Assembly
STATE OF COLORADO

REVISED

This Version Includes All Amendments Adopted on Second Reading in the Second House

LLS NO. 21-0774.03 Megan Waples x4348

SENATE BILL 21-247

SENATE SPONSORSHIP

Fenberg and Holbert, Garcia, Bridges, Buckner, Cooke, Gonzales, Hansen, Jaquez Lewis, Kirkmeyer, Lee, Liston, Moreno, Priola, Rankin, Scott, Simpson, Sonnenberg, Woodward

HOUSE SPONSORSHIP

Esgar and McKean, Garnett

Senate Committees
State, Veterans, & Military Affairs
Appropriations

House Committees
State, Civic, Military, & Veterans Affairs

A BILL FOR AN ACT

CONCERNING THE PROCEDURES OF THE INDEPENDENT REDISTRICTING COMMISSIONS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov/.)

Executive Committee of the Legislative Council. The COVID-19 pandemic has caused a delay in the ability of the United States Census Bureau (Census Bureau) to deliver to the state the population and demographic data necessary to redraw election districts. The Census Bureau has indicated that the final census data will not be available for at least 6 months after the deadline contemplated in federal law. Under the

HOUSE
Amended 2nd Reading
May 4, 2021

SENATE
3rd Reading Unamended
April 26, 2021

SENATE
Amended 2nd Reading
April 23, 2021

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

current definition of "necessary census data" contained in state law, this delay prevents the independent congressional redistricting commission and the independent legislative redistricting commission (commissions) from completing their work by the deadlines in the constitution. An extended delay in finalizing the commissions' redistricting plans will make it impossible to complete all of the steps in the 2022 election procedures in time for the general election.

For the commissions convened in 2021 only, the bill amends the definition of "necessary census data" to allow the preliminary and staff plans to be developed using the data on the total population by state that will be released by the Census Bureau on April 30, 2021, and other population and demographic data from federal or state sources that are approved by the commissions. Once final census data is released by the Census Bureau, the nonpartisan staff of the commission must complete adjustments for incarcerated populations required by current law within 5 days. All staff plans presented to the commissions or submitted to the Colorado supreme court after that date must use the final data as adjusted. A plan approved by the Colorado supreme court must be based on the final data as adjusted.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. (1) The general assembly finds and declares that:

(a) Due to the COVID-19 pandemic, the United States Census Bureau has been delayed in collecting the information for the census due to stay-at-home orders and an inability to conduct in-person visits to residences that did not reply to requests to respond to the census questions either online, telephonically, or through mailed paper responses. While the Census Bureau was to have completed its collection of the answers to the census by July 31, 2020, the Census Bureau finally ended its collection efforts on October 15, 2020.

(b) Pursuant to 13 U.S.C. sec. 141 (b), the Census Bureau was to have released the reapportionment data, which data is the total population figures at the state level necessary to reapportion the 435 seats in congress

among the states, by December 31, 2020, but has not yet been able to release those figures. After completing its collection efforts, due in part to the pandemic, the Census Bureau has found anomalies in the data and needs additional time to deliver accurate reapportionment data. The Census Bureau now intends to release this data by April 30, 2021, four months after its statutory deadline.

(c) Pursuant to 13 U.S.C. sec. 141 (c), the Census Bureau was to have released the redistricting data, which is the population and demographic data at the census block level, by March 31, 2021. However, in an attempt to get the reapportionment data finalized as quickly as possible, the Census Bureau "decoupled" some of the work on the final redistricting data so the redistricting data will now take longer to finalize after the reapportionment data is finalized.

(d) In light of the difficulties the delays are causing for the states, the Census Bureau has indicated it will release a legacy format summary redistricting data file to the states by mid to late August 2021; and

(e) The Census Bureau has not been able to inform the states as to when the redistricting data in its final format will be released, except to say that it will not be before September 30, 2021. Again, this means that the earliest the state will receive the final redistricting data will be six months after March 31, 2021, which is the statutory deadline to release the redistricting data to the states pursuant to 13 U.S.C. sec. 141.

(2) The general assembly further finds and declares that:

(a) In 2018, the voters in Colorado approved two amendments to the state constitution on redistricting, specifically:

(I) Amendment Y that changed the entity responsible for redrawing the boundaries of Colorado's congressional districts from the

general assembly to a new independent congressional redistricting commission created pursuant to sections 44 to 44.6 of article V of the state constitution (congressional commission); and

(II) Amendment Z that changed the entity responsible for redrawing the boundaries of the state senate and state house of representative districts from a reapportionment commission to a new independent legislative redistricting commission created pursuant to sections 46 to 48.4 of article V of the state constitution (legislative commission);

(b) Amendments Y and Z both contained specific requirements for increased public participation in the redistricting process, including:

(I) Sections 44.2 (3)(a) and 48 (3)(a) of article V of the state constitution, allowing any Colorado resident to present proposed redistricting maps or written comments to the commissions, and sections 44.2 (3)(c) and 48 (3)(c) of article V of the state constitution, requiring the commissions to maintain a website through which the public submits maps or comments;

(II) Sections 44.4 (1) and 48 (1) of article V of the state constitution, authorizing any member of the public to submit written comments to nonpartisan staff concerning the creation of the preliminary plans and communities of interest that require representation and require nonpartisan staff to consider the written comments in preparing the preliminary plan and later staff plans;

(III) Sections 44.2 (3)(b) and 48 (3)(b) of article V of the state constitution, requiring the commissions to hold at least three public meetings in each of the seven congressional districts on the preliminary plans created by nonpartisan staff prior to approving any plan;

(IV) Sections 44.4 (3) and 48.2 (3) of article V of the state constitution, requiring nonpartisan staff, after the hearings on the preliminary plans, to present to the commissions up to three staff plans that must be posted online prior to being presented and requiring the presentation of each staff plan to be separated by at least ten days; and

(V) Finally, sections 44.2 (2) and 48 (2) of article V of the state constitution, prohibiting each of the commissions from voting on a plan presented to the commission or amended at a meeting of the commission for at least seventy-two hours after the meeting unless the commission unanimously waives this requirement;

(c) Under sections 44.4 (1) and 48.2 (1) of article V of the state constitution, nonpartisan staff for the commissions are required to create preliminary plans and present the plans to the respective commissions between thirty and forty-five days after the commissions convene or the necessary census data are available, whichever is later;

(d) While amendments Y and Z establish certain deadlines by which the commissions are required to complete certain steps in the redistricting process, sections 44.4 (5) and 48.2 (5) of article V of the state constitution give the commissions authority to adjust those dates if conditions outside of the commissions' control make it impossible for them to meet those deadlines. The six-month delay in receiving the redistricting data qualifies as a condition outside of the commissions' control, requiring adjustment of the dates.

(e) Section 44.5 (4)(a) of article V of the state constitution requires that, by November 1, the Colorado supreme court must either approve the congressional plan or return the congressional plan with the reasons why it is not approved, and section 48.3 (4)(a) of article V of the

state constitution requires that, by November 15, the Colorado supreme court must either approve the legislative plans or return the legislative plans with the reasons why either is not approved;

(f) Section 44.5 (5) of article V of the state constitution requires the Colorado supreme court to give final approval to a congressional plan by December 15, 2021, and section 48.3 (5) of article V of the state constitution requires the Colorado supreme court to give final approval to legislative plans by December 29, 2021; and

(g) If the commissions are required to wait to begin their work until the final redistricting data is released by the Census Bureau on September 30, 2021, the deadlines in the state constitution for the Colorado supreme court's consideration and approval of the plans cannot be met.

(3) The general assembly also finds that:

(a) 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 representatives 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 on when the precinct caucuses occur.

(b) While the general assembly can change these dates by bill, any

significant delay in holding the precinct caucuses adversely affects all other aspects of the election calendar, including limiting the ability of candidates to petition onto the ballot and to campaign and limiting the ability of the electors to be informed of the positions of candidates.

(4) The general assembly finds that, in light of the delay by the Census Bureau in delivering the population and demographic data necessary to redraw election districts and the impossibility of complying with the constitutional deadlines, to effectuate the intent of the voters in approving amendments Y and Z, and to cause minimum disruption to the 2022 election calendar, it is in the best interest of the state to:

(a) Define the necessary census data for the purposes of drawing preliminary plans ___ to include the tabulation of the total population by state published by the Census Bureau for the state by April 30, 2021, along with additional state or federal data sources as approved by the commissions in order to allow the commission to begin their work and seek public input on a more timely basis; and

(b) Require that all plans developed after the final redistricting data is released, including the final plan approved by the Colorado supreme court, must be based on the final redistricting data.

SECTION 2. In Colorado Revised Statutes, 2-2-902, **amend** (1)(c), (4), (5)(a), (5)(b) introductory portion, and (6); and **add** (1)(c.5), (1)(e), and (6.5) as follows:

2-2-902. Accurate census data - electronic record of prisoner home address - adjustment of census data - definitions - repeal. (1) As used in this section, unless the context otherwise requires:

(c) (I) "~~Necessary~~ FINAL census data" means the federal decennial Pub.L. 94-171 data published for the state by the United States census

bureau ~~and adjusted by the general assembly's nonpartisan staff to reflect the changes pursuant to subsections (5) and (6) of this section~~ IN ACCORDANCE WITH 13 U.S.C. SEC. 141 (c).

(II) (A) FOR THE 2021 REDISTRICTING YEAR, "FINAL CENSUS DATA" ALSO INCLUDES A LEGACY FORMAT SUMMARY REDISTRICTING DATA FILE THAT NONPARTISAN STAFF CAN USE TO TABULATE THE REDISTRICTING DATA.

(B) THIS SUBSECTION (1)(c)(II) IS REPEALED, EFFECTIVE JULY 1, 2023.

(c.5) (I) "NECESSARY CENSUS DATA" MEANS FINAL CENSUS DATA AS ADJUSTED BY THE GENERAL ASSEMBLY'S NONPARTISAN STAFF TO REFLECT THE CHANGES PURSUANT TO SUBSECTIONS (5) AND (6) OF THIS SECTION, EXCEPT AS PROVIDED IN SUBSECTION (1)(c.5)(II) OF THIS SECTION.

(II) (A) FOR THE 2021 REDISTRICTING YEAR ONLY, IN LIGHT OF THE DELAYS CAUSED BY THE COVID-19 PANDEMIC AND FOR PURPOSES OF ALLOWING TIMELY PUBLIC INPUT AND CONSIDERATION OF PRELIMINARY PLANS FOR CONGRESSIONAL, STATE SENATORIAL, AND STATE REPRESENTATIVE DISTRICTS, "NECESSARY CENSUS DATA" MEANS THE TABULATION OF THE TOTAL POPULATION BY STATE PUBLISHED IN 2021 FOR THE STATE BY THE UNITED STATES CENSUS BUREAU IN ACCORDANCE WITH 13 U.S.C. SEC. 141 (b) AND 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.

(B) THIS SUBSECTION (1)(c.5)(II) IS REPEALED, EFFECTIVE JULY 1, 2023.

(e) "REDISTRICTING YEAR" MEANS THE YEAR FOLLOWING THE YEAR IN WHICH THE FEDERAL DECENNIAL CENSUS IS TAKEN.

(4) Pursuant to subsection (5) of this section, nonpartisan staff shall prepare redistricting population data to reflect incarcerated persons at their residential addresses in this state rather than their place of incarceration. EXCEPT AS PROVIDED IN SUBSECTIONS (1)(c.5)(II) AND (6.5) OF THIS SECTION, this data prepared by nonpartisan staff is the necessary census data provided to and to be used by the independent legislative and congressional redistricting commissions established pursuant to sections 44 and 46 of article V of the state constitution. The data is the population basis of congressional districts, state house of representative districts, and state senate districts. Nonpartisan staff shall make this census data available to the independent legislative and congressional redistricting commissions and to members of the public and any county or local governmental entity of Colorado upon request.

(5) (a) For each person included in a report received pursuant to subsections (2)(b) and (3) of this section, nonpartisan staff shall determine the geographic units for which population counts are reported in the ~~federal decennial~~ FINAL census DATA that contain the facility of incarceration and the legal residence in this state as listed in the report.

(b) For each person included in a report received pursuant to subsections (2)(b) and (3) of this section, if the legal residence is known and in this state, nonpartisan staff shall ADJUST THE FINAL CENSUS DATA TO:

(6) (a) EXCEPT AS PROVIDED IN SUBSECTION (6)(b) OF THIS SECTION, the data prepared by nonpartisan staff pursuant to this section must be completed and published no later than thirty days after the date that ~~federal decennial Pub.L. 94-171~~ FINAL CENSUS data for the state is delivered to the state.

(b) (I) FOR THE 2021 REDISTRICTING YEAR ONLY, THE DATA PREPARED BY NONPARTISAN STAFF PURSUANT TO THIS SECTION MUST BE COMPLETED AND PUBLISHED AS SOON AS PRACTICABLE BUT NO LATER THAN TEN DAYS AFTER THE DATE THAT ANY FINAL CENSUS DATA FOR THE STATE IS DELIVERED TO THE STATE.

(II) THIS SUBSECTION (6)(b) IS REPEALED, EFFECTIVE JULY 1, 2023.

(6.5) FOR THE 2021 REDISTRICTING YEAR ONLY:

(a) NONPARTISAN STAFF SHALL USE NECESSARY CENSUS DATA AS DEFINED IN SUBSECTION (1)(c.5)(II) OF THIS SECTION TO PREPARE PRELIMINARY PLANS AS REQUIRED BY SECTIONS 44.4 (1) AND 48.2 (1) OF ARTICLE V OF THE STATE CONSTITUTION.

(b) NONPARTISAN STAFF SHALL USE FINAL CENSUS DATA AS ADJUSTED PURSUANT TO SUBSECTIONS (5) AND (6)(b) OF THIS SECTION TO PREPARE STAFF PLANS AS REQUIRED BY SECTIONS 44.4 (3) AND 48.2 (3) OF ARTICLE V OF THE STATE CONSTITUTION.

(c) THE INDEPENDENT CONGRESSIONAL REDISTRICTING COMMISSION AND THE INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION SHALL NOT APPROVE A FINAL PLAN TO BE SUBMITTED TO THE COLORADO SUPREME COURT UNLESS THE COMMISSION HAS HELD AT LEAST ONE PUBLIC HEARING GIVING THE PUBLIC AN OPPORTUNITY TO COMMENT ON A PLAN PRESENTED TO THE COMMISSION THAT WAS DEVELOPED USING THE FINAL CENSUS DATA, AS ADJUSTED IF SUCH ADJUSTMENT IS REQUIRED

PURSUANT TO THIS SECTION.

(d) THIS SUBSECTION (6.5) IS REPEALED, EFFECTIVE JULY 1, 2023.

SECTION 3. In Colorado Revised Statutes, **add** 2-2-903 as follows:

2-2-903. Redistricting deadlines - legislative declaration. (1) THE GENERAL ASSEMBLY FINDS THAT:

(a) GIVEN THE EXTENSIVE DELAYS IN RECEIVING THE CENSUS DATA, THE INDEPENDENT CONGRESSIONAL REDISTRICTING COMMISSION AND THE INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION WILL LIKELY BE UNABLE TO ADOPT FINAL PLANS BY THE DEADLINES SET FORTH IN SECTIONS 44.4 (5)(b) AND 48.2 (5)(b) OF ARTICLE V OF THE STATE CONSTITUTION. IN TURN, THE COLORADO SUPREME COURT WILL LIKELY BE PREVENTED FROM APPROVING OR DISAPPROVING SUCH MAPS BY NOVEMBER 1 AND NOVEMBER 15, AS REQUIRED BY SECTIONS 44.5 AND 48.3 OF ARTICLE V OF THE STATE CONSTITUTION.

(b) COLORADO COURTS AND ELECTION STATUTES COMMONLY APPLY A SUBSTANTIAL COMPLIANCE STANDARD TO ELECTION MATTERS. 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.

(c) THE SUPREME COURT HAS INHERENT AUTHORITY OVER ITS OWN PROCEDURES AND IS AUTHORIZED BY SECTIONS 44.5 AND 48.3 OF ARTICLE V OF THE STATE CONSTITUTION TO DEVELOP THE RULES FOR JUDICIAL REVIEW OF REDISTRICTING PLANS.

(2) IN ANY LEGAL PROCEEDING CHALLENGING COMPLIANCE BY THE COMMISSIONS, THE COLORADO SUPREME COURT, OR NONPARTISAN STAFF WITH THE TECHNICAL RATHER THAN SUBSTANTIVE PROVISIONS THAT

IMPLEMENT THE REDISTRICTING PROCESSES ESTABLISHED IN THE COLORADO CONSTITUTION AND RELATED STATUTES, A COURT SHALL ADJUDICATE SUCH DISPUTE WITH A VIEW TO ASCERTAINING WHETHER THERE WAS SUBSTANTIAL COMPLIANCE WITH THE REQUIREMENTS OF SUCH CONSTITUTIONAL OR STATUTORY PROVISIONS.

SECTION 4. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, or safety.

DATE FILED: May 13, 2021 11:54 AM

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
Attorneys for Colorado General Assembly Richard A. Westfall, Reg. No. 15295 Westfall Law, LLC 5842 West Marquette Drive Denver, Colorado 80235 Telephone: (720) 904-6022 E-mail: rwestfall@westfall.law	

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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 13, 2021, a copy of the foregoing Brief of the Colorado General Assembly was electronically filed with the Court and served on the following:

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DATE FILED: May 13, 2021

COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to Article VI, Section 3 of the Constitution of the State of Colorado In re: Interrogatory on SB 21-247 Submitted by the Colorado General Assembly	
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THE GOVERNOR AND ATTORNEY GENERAL'S INTERROGATORY ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, or C.A.R. 28.1, including all formatting requirements set forth in these rules. Specifically, I certify that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 6,338 words.

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)

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

s/ Michael McMaster

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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 the preliminary plans, and confirm in statute that the staff plans which provide the basis for action by the commission 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 commissions is unable to adopt a plan by the deadline to do so, constitutional? [1]

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[1] This Answer Brief submitted by the Attorney General and Governor does not address the second interrogatory.

INTRODUCTION

In 2018, Colorado voters approved Amendments Y and Z. These amendments created the Independent Congressional Redistricting Commission and Independent Legislative Redistricting Commission, respectively. Colo. Const. art. V, §§ 44–48.4. These commissions are charged with redrawing congressional and state Senate and House of Representatives districts after the decennial census. Colo. Const. art. V, §§ 44(2), (3)(d), 46(2), (3)(d).

The Amendments seek to limit the influence of partisan politics on the redistricting process, increase transparency and public participation in the process of drawing the boundaries of federal and state legislative districts, and create districts that accurately represent their populations' interests. Sections 44 to 48.4 establish a detailed process for redrawing the districts intended to begin early in the redistricting year, defined as the year after the decennial census.

In March 2020, when the COVID-19 pandemic began to significantly impact the United States and Colorado, the federal government and the Governor of Colorado declared states of emergency, which remain in place today. The pandemic disrupted essentially every

aspect of daily life and severely curtailed in-person interactions. Among the pandemic's impacts, the decennial census was delayed well beyond its normal completion date. Consequently, the Census Bureau will not release the final census data until September 30, 2021, a full six months after the original federal deadline. James Whitehorne, *Timeline for Releasing Redistricting Data*, U.S. Census Bureau (Feb. 12, 2021), https://tinyurl.com/etv2n8p3.

Under current Colorado statutes, the lengthy process of redrawing district maps cannot begin until the Census Bureau releases the final census data. § 2-2-902(1)(c), C.R.S. (2020); *see also* Colo. Const. art. V, §§ 44.4(1), 48.2(1). If the commissions wait until September to begin, there are two potential outcomes: (i) the process outlined in article V, sections 44 to 48.4 will be drastically shortened, undermining the process's purpose; or (ii) the regular 2022 election cycle will be delayed and compressed, undermining election stability, potentially causing missed statutory deadlines, and potentially disenfranchising thousands.

To address this problem, the General Assembly proposed, and is one step away from enacting, Senate Bill 21-247. S.B. 21-247, 73rd Gen. Assem., 1st Reg. Sess. (Colo. 2021). ("SB 21-247"). SB 21-247 permits

the commissions, for this year only, to rely upon non-final census data and to begin drawing and considering the maps immediately. The bill further requires one additional public hearing based on the final proposed maps, requires the final maps be based upon the final census data, and directs courts to apply a substantial compliance standard to all challenges alleging technical violations of sections 44 to 48.4.

STATEMENT OF THE CASE AND FACTS

I. Colorado is a leader in non-partisan election reforms.

Colorado continues to be a leader in spearheading voting and election reforms, regularly increasing voter participation, representation, and access. Because of these reform measures, Colorado has the second highest voter participation rate in the country. *2020 November General Election Turnout Rates*, United States Election Project (Dec. 7, 2020), http://www.electproject.org/2020g.

In 1910, the General Assembly amended the Colorado Constitution to give Colorado voters the power to make laws and amend the constitution independent of the legislature. 1910 Colo. Sess. Laws, ch. 3, Colo. Const. art. V, § 1 at 11-12.

In 2013, Colorado became one of several states to adopt a universal vote-by-mail system. 2013 Colo. Sess. Laws, ch. 185, § 1-2-217.7, § 1-5-102.9, § 1-7.5-104, § 1-7.5-104.5(1), § 1-7.5-107 at 681-730. This system automatically sends every registered voter a ballot that can be mailed or deposited at drop boxes. §§ 1-7.5-104, -104.5(1), -107(4)(b)(I)(A), (B), C.R.S. (2020). Voters may also choose to vote in person. § 1-7.5-107(4)(b)(I)(C), C.R.S. (2020). And, unlike many other states, Colorado allows same-day voter registration. § 1-2-217.7(2), C.R.S. (2020). Colorado also has a lengthy early voting period with numerous polling locations. § 1-5-102.9, C.R.S. (2020).

In 2019, Colorado became the second state in the U.S. to implement an automatic voter registration system.[2] 2019 Colo. Sess. Laws, ch. 329, § 1-2-213.3, § 1-2-502.5, § 1-2-502.7 at 3048-54. Under that system, the Colorado Department of Revenue, Department of Health Care Policy and Financing, and other voter registration agencies must transfer to the Secretary of State records of unregistered electors. §§ 1-2-213.3(1), -502.5(1), -502.7(1), C.R.S. (2020). If, after receiving an

[2] Before 2019, voters could register to vote when they obtained or renewed a Colorado driver's license. § 1-2-213(1), C.R.S. (2020).

automatic registration notice, the elector does not decline registration, the elector is officially registered to vote. § 1-2-213.3(3), (7)(b), C.R.S. (2020).

In 2018, Colorado voters adopted Amendments Y and Z to the Colorado constitution. These amendments shifted the responsibility for reapportioning congressional and legislative districts away from the General Assembly to independent commissions.

II. Amendments Y and Z created a detailed process for the independent commissions to draw congressional and legislative maps.

Amendments Y and Z, codified in article V, sections 44 to 48.4 of the Colorado Constitution, redirected the drawing of congressional and state legislative maps from the General Assembly to two independent commissions. Colo. Const. art. V, §§ 44(1), 46(1). In enacting Amendments Y and Z, the voters sought to have districts more accurately represent their members' interests by limiting the influence of partisan politics over redistricting and making the process more transparent and inclusive. *Id.*; *see also* Colo. Legis. Council, Colo. Gen. Assem., Research Pub. No. 702-2, *An Analysis of 2018 Ballot Proposals* 10, 25-26 ("2018 Blue Book"). The voters established neutral criteria for

redistricting and created structured, transparent procedures, which include significant public participation. Colo. Const. art. V, §§ 44.3, 44.4, 46, 48.1, 48.2.

The neutral criteria require the commissions to first achieve mathematical precision and comply with the Voting Rights Act of 1965, then to preserve whole political subdivisions and communities of interest to the extent possible,[3] and lastly to maximize the number of politically competitive districts.[4] *Id.* at §§ 44.3(1)–(3), 48.1(1)–(3). The commissions are expressly prohibited from drawing maps to protect incumbents, candidates, or political parties. *Id.* at §§ 44.3(4), 48.1(4).

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[3] A community of interest is defined as "any group in Colorado that shares one or more substantial interests . . . , is composed of a reasonably proximate population, and thus should be considered for inclusion within a single district for purposes of ensuring its fair and effective representation." Colo. Const. art. V, §§ 44(3)(b)(I), 46(3)(b)(I). Substantial interests include a variety of public policy concerns but cannot be based on "relationships with political parties, incumbents, or political candidates." *Id.* at §§ 44(3)(b)(II), (IV), 46(3)(b)(II), (IV).

[4] Political competitiveness means "having a reasonable potential for the party affiliation of the district's representative to change at least once between federal decennial censuses." Colo. Const. art. V, §§ 44.3(3)(d), 48.1(3)(d).

To draw maps that meet these criteria, the commissions must follow detailed procedures and meet several deadlines. *Id.* at §§ 44.4, 48.2. This process normally begins early in the year after the federal decennial census occurs. *Id.* at §§ 44(3)(d), 46(3)(d). Within forty-five days of each commission convening[5] or when "the necessary census data are available," whichever is later, nonpartisan commission staff must publish a "preliminary plan" for review. *Id.* at §§ 44.4(1), 48.2(1).

Under federal law, census data must be "available" by March 31 of the redistricting year. SB 21-247, sec. 1(c); *see also* 13 U.S.C. § 141(c). Thus, the voters intended for nonpartisan staff to develop a preliminary plan no later than May 15 and May 30.[6] After nonpartisan staff publish the preliminary plan, the commissions must hold three "public hearings" in each congressional district on the preliminary plans. Colo.

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[5] The Congressional Commission must convene by March 15th, Colo. Const. art V, § 44.2(1), and the Legislative Commission must convene by March 30th, *id.* at § 48(1).

[6] Deadlines for the Independent Legislative Redistricting Commission are set 14 to 15 days after the associated deadlines for the Independent Congressional Redistricting Commission. *Compare* Colo. Const. art. V, §§ 44.4 and 44.5 *with id.* at §§ 48.2 and 48.3.

Const. art. V, §§ 44.2(3)(b), 44.4(1), 48(3)(b), 48.2(1).[7] The commissions must complete the hearings by July 7 and July 21. *Id.* at §§ 44.4(2), 48.2(2). During the development of the preliminary plan and the public hearing period, the public may submit written comments and provide evidence of communities of interest and political competitiveness. *Id.* at §§ 44.3(3)(b), 44.4(1), 48.1(3)(b), 48.2(1).

After the public hearings, nonpartisan staff is required to prepare for the commissions at least three "staff plans." *Id.* at §§ 44.4(3), 48.2(3). Each commission may adopt one of the staff plans, or such further plans as the commissions may ask the staff to prepare, any time after the first staff plan is presented. *Id.* at §§ 44.4(4), (5)(a), 48.2(4), (5)(a). However, nonpartisan staff and the commission must also consider the submitted public comments and evidence in developing or adopting any plan. *Id.* at §§ 44.4(1), (3), 48.2(1), (3). Although the commissions must adopt a final plan by September 1 and September 15, *id.* at §§ 44.4(5)(b), 48.2(5)(b), they can "adjust" these, and the earlier, deadlines "if

[7] At least one hearing must be held west of the continental divide and at least one hearing must be held east of the continental divide and south of El Paso County's southern border or east of Arapahoe County's eastern border. Colo. Const. art. V, §§ 44.2(3)(b), 48(3)(b).

conditions outside of the commission's control require such an adjustment to ensure adopting a final plan." *Id.* at §§ 44.4(5)(c), 48.2(5)(c).

Once the commissions have adopted final plans, they must submit the plans to this Court for its review. *Id.* at §§ 44.5, 48.3. The Court must either "approve the plan submitted or return the plan to the commission[s]" by November 1 and November 15. *Id.* at §§ 44.5(4)(a), 48.3(4)(a). If the Court returns the plan, the commissions and nonpartisan staff have no more than 15 days to prepare a new plan for the Court's review. *Id.* at §§ 44.5(4)(b), (c); 48.3(4)(b), (c). The Court must approve a final plan no later than December 15 and 29. *Id.* at §§ 44.5(5), 48.3(5).

III. Due to the COVID-19 pandemic, the federal census has been severely delayed, making it impossible for the commissions to begin the redrawing process.

Since March 2020, Colorado and the United States have been in declared states of emergency due to the COVID-19 pandemic. This cataclysmic event has cost hundreds of thousands of lives, upended the economy, and disrupted almost every aspect of life, including the normal functioning of government.

This disruption includes the release of the decennial census. As stated above, the U.S. Census Bureau was required to release the data necessary for states to conduct redistricting by March 31, 2021. *See* 13 U.S.C. § 141(c). But the Bureau informed state election officials this data will not be finalized before September 30, 2021. SB 21-247, sec. 1(e).

The Bureau will, however, release "a legacy format summary redistricting data file" in mid-to late-August. *Id.* at sec. 1(d); *see also* Declaration of James Whitehorne, *Ohio v. Raimondo*, No. 3:21-cv-00064-TMR (ECF No. 11-2) (S.D. Ohio. Mar. 12, 2021), *attached as* Ex. A. The Census Bureau anticipates releasing final data, in the new, updated format, by September 30, 2021. Whitehorne, *Timeline for Releasing Redistricting Data*, https://tinyurl.com/etv2n8p3.

Because the Census Bureau cannot meet its statutory deadline for releasing final census data, the commissions also cannot meet the constitutionally imposed deadlines.

IV. SB 21-247 allows the commissions to begin the redistricting process immediately.

To address this problem, Colorado's General Assembly introduced SB 21-247. The bill distinguishes between "necessary census data," a term used in article V, sections 44.4(1) and 48.2(1), and "final census data." SB 21-247, sec. 2, § 2-2-902(1)(c)(I), (c.5)(II)(A). While Amendments Y and Z did not define "necessary census data," the General Assembly defined it in 2020 to mean the "data published for the state by the United States census bureau." § 2-2-902(1)(c). SB 21-247 would redefine this term to include, for this year only, "the tabulation of the total population by state published in 2021 for the State" released by the Census Bureau on April 26, 2021,[8] and "such other total population and demographic data from federal or state sources as are approved by" either of the commissions. SB 21-247, sec. 2, § 2-2-902(1)(c.5)(II)(A). In effect, this would allow the commissions to

[8] Kristin Koslap, *Apportionment Population Counts and What to Expect on Release Day*, U.S. Census Bureau (April 26, 2021), https://tinyurl.com/mshpymdb.

use existing data from reputable sources to develop preliminary plans, should they so choose.[9]

SB 21-247 still, however, requires nonpartisan staff to use final census data to prepare the staff plans following public hearings. SB 21-247, sec. 2, § 2-2-902(6.5)(b). "Final census data" is defined to mean the federal decennial Pub. L. 94-171 data and, for this year only, the "legacy format" data scheduled to be released in August 2021. SB 21-247, sec. 2, § 2-2-902(1)(c)(II)(A), (c.5)(I). SB 21-247 also requires the commissions to hold at least one public hearing at which the public shall have an opportunity to comment on a plan prepared using the final census data. SB 21-247, sec. 2, § 2-2-902(6.5)(c).

Finally, given the uncertainty over whether this Court will be able to approve or disapprove the commissions' submissions by November 1

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[9] In addition to the total population tabulation, the sources would include the American Community Survey, or ACS, a monthly survey conducted by the U.S. Census Bureau that encompasses approximately 3.5 million households each year. It is "designed to provide communities with reliable and timely social, economic, housing, and demographic data," and provides a "continuous stream of updated information for states and local areas." U.S. Census Bureau, *American Community Survey Information Guide*, at 1 (Oct. 2017), https://tinyurl.com/rydb5b2j.

and November 15, SB 21-247 imposes a "substantial compliance" standard for judicial review of "the technical rather than substantive provisions that implement the redistricting processes." SB 21-247, sec. 3, § 2-2-903.

APPLICABLE LEGAL STANDARDS

When interpreting a constitutional amendment, the Court's goal is to give effect to the intent of the electorate that adopted it. *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). To do so, courts first look to the amendment's language, "and give words their plain and commonly understood meaning." *Id.* But courts must refrain from "a narrow or technical reading of language contained in an initiated constitutional amendment if to do such would defeat the intent of the people." *Id.* When interpreting the Constitution, the Court will also seek to avoid "an unjust, absurd[,] or unreasonable result." *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994).

The overarching obligation is to "prevent an evasion of the constitution's legitimate operation and to effectuate the intentions of the . . . people of the State of Colorado." *Markwell v. Cooke*, 2021 CO 17, ¶ 33 (citations and quotations omitted). Where possible, an

amendment's language must be construed "in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Gessler v. Smith*, 2018 CO 48, ¶ 18 (quotations and citations omitted).

A court should consider the constitutional provisions as a whole, and, when possible, choose a construction that harmonizes the relevant constitutional provisions over one which would render those provisions in conflict. *In re Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 538 (Colo. 1996). Further, where possible, "courts should adopt a construction of a constitutional provision in keeping with that given by coordinate branches of government." *Id.*

When examining constitutional provisions, this Court has recalled the wisdom of Justice Oliver Wendell Holmes, who "so aptly stated: 'The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.'" *People v. Y.D.M.*, 197 Colo. 403, 408, 593 P.2d 1356, 1360 (1979) (quoting *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931)); *see also M'Culloch v. Maryland*, 17

U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819) ("…we must never forget that it is a *constitution* we are expounding.").

SUMMARY OF THE ARGUMENT

This brief only addresses the first interrogatory accepted by this Court. This interrogatory asks whether the General Assembly can constitutionally amend the statutory definition of "necessary census data," establish authority for nonpartisan staff to use currently available data to create the preliminary plans, and require that staff plans be based on final census data. This Court should answer the interrogatory in the affirmative.

The General Assembly is authorized to enact legislation to supplement and further the purposes of constitutional provisions. This Court has specifically upheld legislation that resolves potential conflicts and fills gaps in constitutional provisions. SB 21-247 fills one such gap by defining "necessary census data." And the bill does not conflict with Amendments Y and Z.

SB 21-247 also serves voter intent and the purposes behind Amendments Y and Z by ensuring Colorado residents have sufficient opportunity to comment on and provide evidence relevant to the

proposed maps. This Court should construe SB 21-247 and Amendments Y and Z broadly to best effect voter intent. Allowing the commissions to begin work now under SB 21-247's definition of "necessary census data" does just that.

Lastly, Colorado has long been a leader in democratic reforms. SB 21-247 continues that legacy and protects the will of the people. The Court should answer the first interrogatory in the affirmative.

ARGUMENT

I. The General Assembly has the authority to enact legislation that furthers the purposes of constitutional provisions and voter-initiated amendments.

A. Absent a constitutional conflict or prohibition, the General Assembly may enact legislation that furthers voter intent.

At the very core of our republican form of government are both the right to vote and the right of initiative and referendum. *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980). Both rights guarantee participation in the political process. *Id.*; *see also* Colo Const. art II, § 1 ("All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.").

Although the General Assembly is vested with plenary power to adopt general laws, *Van Kleeck v. Ramer*, 62 Colo. 4, 9, 156 P. 1108, 1110 (1916), the power of the General Assembly is constrained by the rights of the people, who "reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly . . . ." Colo. Const. art. V, § 1(1).

But this limit does not mean that when the people exercise these rights, the General Assembly is entirely powerless or irrelevant. Instead, the General Assembly has the power to adopt legislation that furthers the purpose of a constitutional provision or facilitates its enforcement — even when the constitutional provision is self-executing. *Zaner*, 917 P.2d at 286 (citing *Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994)). This Court recognized this principle, stating: "[t]he fact that a provision in a Constitution is self-executing does not necessarily preclude the Legislature from legislating on the same subject. Such provision may be supplemented by appropriate laws designed to make it more effective, within the bounds reserved by the Constitution and not exceeding the limitations specified." *Yenter v. Baker*, 126 Colo. 232, 241,

248 P.2d 311, 316 (1952) (quoting *Ex parte Smith*, 218 P. 708, 710 (Okla. Crim. App. 1923)).

In contrast, the General Assembly's legislative authority is limited when legislation "directly or indirectly impairs, limits[,] or destroys rights granted." *Zaner*, 917 P.2d at 286. For example, in *Yenter*, this Court determined the General Assembly exceeded its authority in requiring voter initiative petitions to be filed "at least eight months" prior to an election because the constitution required only that such petitions be filed at least four months before an election. *Yenter*, 248 P.2d at 317. Thus, the legislative action did not enhance the rights of the people, but instead narrowed that right.

SB 21-247 does not conflict with the provisions of Amendments Y and Z. Thus, the General Assembly has the authority to adopt it.

B. The undefined term in Amendment Y and Z leaves room for the General Assembly to pass complementary legislation that enhances the rights protected by the Amendments.

The General Assembly's power to adopt supplemental or complementary provisions has often been tested when the General Assembly fills a gap in a constitutional provision. In 1975, this Court

was confronted with two conflicting voter initiatives. *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 189 Colo. 1, 8, 536 P.2d 308, 314 (1975). Anticipating the conflict, the General Assembly passed § 1-40-113, C.R.S. (1973), which provided that "in case of adoption of conflicting provisions, the one which receives the greatest number of affirmative votes shall prevail." *Id*. This Court held that the statute enhanced, rather than limited, the right of the people to amend our constitution. *Id*. Thus, the General Assembly was permitted to augment the constitutional provision because the legislation facilitated the operation of the voter initiative provision.

Here, SB 21-247 does not conflict with Amendments Y and Z. The constitutional text requires nonpartisan staff to prepare a "preliminary plan" within 30 or 45 days "after the commission has convened or the necessary census data are available, whichever is later." Colo. Const. art. V, §§ 44.4(1), 48.2(1). In preparing the preliminary plans, the Amendments do not require nonpartisan staff to use any particular census data set.

Likewise, the Amendments require robust public input on the preliminary plan. But the Amendments do not require the subsequent

nonpartisan staff plans or final plan to use the exact same data as the preliminary plan. In fact, it is reasonable to assume the Commissions will be armed with new information and perspective, gained from the public hearings required by Amendments Y and Z. Thus, SB 21-247 does not directly or indirectly conflict with any provision of Amendment Y or Z.

SB 21-247 augments Amendment Y and Z by filling a gap created by the provisions' silence. Amendments Y and Z do not define "necessary census data." The General Assembly was permitted to clarify this term in § 2-2-902(1)(c). For the same reasons the General Assembly was permitted to define the term at the outset, it is now permitted to amend that definition.[10] While both definitions are permissible, SB 21-247 better achieves the will of the people by accommodating the

[10] While the Court need not presume SB 21-247 is constitutional, it must afford that presumption to the legislature's choice to enact section 2-2-902(1)(c)(I), including its choice to define "necessary census data." *See Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 5 n.4 (Colo. 1993) (presumption does not apply to pending legislation); *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 189 Colo. 1, 8, 536 P.2d 308, 314 (1975) ("Every presumption in favor of the validity of questioned legislation is indulged by the courts in testing its constitutionality." (citation omitted)).

unforeseeable effects of the COVID-19 pandemic and affording the commissions an opportunity to utilize the available data in order to timely determine the new districts. *See* Part II, *infra*.

Other provisions within Amendment Y and Z benefit from supplemental legislation. For example, both commissions are subject to Colorado's Open Meetings Law. Colo. Const. art. V, §§ 44.2(4)(b)(I)(A), 48(4)(b)(I)(A). The Open Meetings Law, however, is contained in statute. *See* § 24-6-401, *et seq*., C.R.S. (2020). The General Assembly has crafted the current version and it is free to amend the precise contours of the Open Meetings Law in the future. There are two exceptions. First, Amendments Y and Z contain several express requirements the commissions must satisfy. *E.g.*, Colo. Const. art. V, § 44.2(2) (72-hours notice required before the commission may vote on the final plan). The General Assembly cannot abrogate these provisions. Second, the General Assembly would not be permitted to strip the Open Meetings Law of all meaning, such that it "destroys" the rights granted by Amendments Y and Z. *See Zaner*, 917 P.2d at 286. Outside of these limits, the General Assembly is free to adopt complementary legislation, much like it will do with SB 21-247.

In another example, already approved of by this Court, the Colorado constitution requires "genuine and true" signatures in initiative and referendum petitions. Colo. Const. art V, § 1(6); *see also Loonan*, 882 P.2d at 1388-89. The General Assembly defined this term through supplemental legislation in § 1-10-111(2), C.R.S. (1994 Supp.), by requiring petition circulators to attest to reading and understanding the law governing circulation of petitions. In *Loonan*, this Court determined that that complementary legislative action did not infringe on the constitutional right to petition. 882 P.2d at 1389.

SB 21-247 works in the same way. The term "necessary census data" is not defined in the constitutional text, leaving room for the General Assembly to define it and give effect to the voters' will. This Court should answer the first interrogatory in the affirmative because the General Assembly has defined the term in a way that enhances, rather than restricts, the right of the people in enacting Amendments Y and Z.

II. SB 21-247 furthers the intent and purpose of Amendments Y and Z and preserves the rule of law.

A. Colorado voters intended to implement a nonpartisan, transparent, and inclusive redistricting process.

In enacting Amendments Y and Z, the voters intended to limit the influence of partisan politics in drawing congressional and legislative maps, increase transparency and public participation in the redistricting process, and create districts that accurately represent their populations' interests. Colo. Const. art. V, §§ 44(1), (3)(b)(I), 46(1), (3)(b)(I), 48.1(2)(a) (stating that political subdivisions may be split between districts when "a community of interest's legislative issues are more essential to the fair and effective representation of the district"); *see also* 2018 Blue Book, p. 10, 25-26. The provisions of Amendments Y and Z include extensive procedures the commissions must follow to secure public input as to the redistricting process. The procedures' detailed and substantial nature shows that securing public input is a critical feature necessary to properly implement voter intent.

Even before the preliminary plans are published, within twenty days after the commissions convene, "any member of the public . . . may submit written comments" regarding the preliminary plan or

communities of interest. Colo. Const. art. V, §§ 44.4(1), 48.2(1). Nonpartisan staff must consider these comments in creating the preliminary plan and must explain at the first public hearing how the plan addresses the comments and complies with the criteria set forth in sections 44.3 and 48.1. *Id.* at §§ 44.4(1), 48.2(1).

The commissions must then complete no fewer than twenty-one public hearings, three in each existing district. *Id.* at §§ 44.2(3)(b), 44.4(1), 48(3)(b), 48.2(1). At each hearing, the commission must allow Colorado residents to present testimony as to the preliminary plan and must specifically solicit evidence as to the political competitiveness of the district. *Id.* at §§ 44.2(3)(b), 44.3(3)(b), 48(3)(b), 48.1(3)(b).

For those who cannot attend the hearings, the commissions must also broadcast the hearings online or via comparable means of communication. *Id.* at §§ 44.2(3)(e), 48(3)(e). And the commissions must maintain a website where Colorado residents can submit written comments or proposed maps. *Id.* at §§ 44.2(3)(c), 48(3)(c). All written comments relating to redistricting and communities of interest must be published online. *Id.* at §§ 44.2(3)(d), 48(3)(d).

After the preliminary plan hearings are complete, nonpartisan staff develop three "staff plans," which must also be published online. *Id.* at §§ 44.4(3), 48.2(3). In developing the plans, the staff must consider the public testimony and written comments relevant to the ultimate map criteria. *Id.* at §§ 44.4(1), (3), 48.2(1), (3).

In addition to limiting the influence of partisan politics and increasing public participation, Amendments Y and Z are also intended to reduce litigation and provide voters with a sense of stability and reliability as to the redistricting process. Under the previous redistricting process, the General Assembly was tasked with drawing the congressional districts via the standard legislative process, meaning the Governor also had to sign the proposed map into law. That process resulted in a "checkered history" of redistricting problems including use of decades-old maps, multiple court-drawn maps, and extensive litigation to break political stalemates. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1225-26 (Colo. 2003) (summarizing history of redistricting problems and noting that out of the previous thirteen federal censuses, the legislature redrew districts only six times); *see also Hall v. Moreno*, 270 P.3d 961, 964 (Colo. 2012) (affirming district

court's adoption of one of seven maps submitted at ten-day trial after legislature failed to adopt a map); *Beauprez v. Avalos*, 42 P.3d 642, 645-46 (Colo. 2002) (affirming district court's adoption of map submitted by Republican leadership after legislature failed to complete redistricting multiple times); *Carstens v. Lamm*, 543 F. Supp. 68, 71 (D. Colo. 1982) (federal district court drew map after several plans submitted at trial failed to meet legal criteria).

In its summary of Amendment Y, the Blue Book specifically noted that redistricting-by-litigation had occurred in the last four redistricting cycles, indicating the voters intended to end this reoccurring problem. 2018 Blue Book, p. 8; *see also Davidson v. Sandstrom*, 83 P.3d 648, 654-55 (Colo. 2004) (noting that court may rely on Blue Book to determine constitutional amendments' objectives). By taking the process out of the hands of the General Assembly and the Governor, and by adding deadlines by which the commissions must submit maps to this Court absent extraordinary circumstances, voters clearly demonstrated their desire for a reliable, nonpartisan redistricting process.

B. SB 21-247 safeguards the voter intent expressed in Amendments Y and Z.

SB 21-247 protects the intent and purpose of Amendments Y and Z by allowing the commissions to begin the work of redistricting immediately, by providing sufficient time for public input and for the commissions to complete their tasks. Under normal circumstances, the Amendments intend for the commissions to have at least seven weeks to complete the twenty-one public hearings. *See* Colo. Const. art. V, §§ 44.4(1), 48.2(1) (requiring preliminary plan to be published no later than forty-five days after census data is available, normally March 31st); *id.* at § 44.4(2) (requiring Congressional Commission to complete public hearings by July 7th); *id.* at § 48.2(2) (requiring Legislative Commission to complete public hearings by July 21st). SB 21-247 allows nonpartisan staff to begin developing preliminary plans now rather than wait until the end of September. If this Court answers the first interrogatory in the affirmative and SB 21-247 becomes law, the preliminary plan could be published thirty days later. *See* SB 21-247, sec. 2, § 2-2-902(1)(c.5)(II) (defining necessary census data as the

tabulation of total population data and other sources, both of which are available now); *see also* Colo. Const. art. V, §§ 44.4(1), 48.2(1).

Although the commissions will likely be unable to meet the July deadlines, they can adjust those deadlines where conditions outside their control demand it. Colo. Const. art. V, §§ 44.4(5)(c), 48.2(5)(c). By permitting the commissions to begin their work using non-final data, should they choose to do so, SB 21-247 gives the commissions additional flexibility, which could give them a more than two-month head start to hold public hearings. This additional flexibility and time will ensure Colorado residents have the opportunity to review the preliminary plans, submit written comments, and provide testimony and evidence at open hearings. Moreover, SB 21-247 requires at least one public hearing on a map developed using the final data. SB 21-247, sec. 2, § 2-2-902(6.5)(c). In short, not only does the bill preserve the "inclusive and meaningful" redistricting processes declared important by the people of Colorado, it expands the rights of the public by requiring additional public hearings. *In re House Bill 1078*, 536 P.2d at 314 (upholding statute that "enhance[d] rather than limit[ed]" the people's rights).

When considering SB 21-247 and Amendments Y and Z, the Court must construe initiated provisions broadly to accomplish the purposes for which they were enacted. *See Yenter*, 126 Colo. at 236, 248 P.2d at 314 ("[I]t is universally held that such initiated provisions shall be liberally construed in order to effectuate their purpose; to facilitate and not to hamper the exercise by the electors of rights granted thereby."). Under the unique circumstances presented here, a narrow construction of "necessary census data" in §§ 44.4(1) and 48.2(1) would undermine the purposes of the Amendments.

Without SB 21-247, the commissions would be required to opt for bad or worse alternatives, including that of significantly compressing the relevant public review period. If the public input process is shortened, public opportunity to participate may decrease. This decreased opportunity would likely reduce, in turn, the information presented to the commissions. Limited public input could impact the eventual maps and makeup of the districts. Communities of interest could be inadequately represented, and political competitiveness may not be properly considered. These consequences, as well as the inevitable piecemeal litigation, run directly counter to the purposes of

Amendments Y and Z. This cannot be the intent of the voters in approving Amendments Y and Z.

Accordingly, the Court should not apply a narrow construction to the Amendments. *See In re Great Outdoors*, 913 P.2d at 542. Because such a construction would ensure the constitutional deadlines are missed by months and would likely substantially reduce public opportunity to participate—effectively defeating the purposes for which Amendments Y and Z were enacted, thereby indirectly infringing on the people's right to initiative. *See Havens v. Bd. of Cnty. Comm'rs of Cnty. of Archuleta*, 924 P.2d 517, 524 (Colo. 1996) (stating that Colorado Constitution and implementing statutes must be liberally construed so as to not infringe on right to initiative); *City of Glendale v. Buchanan*, 195 Colo. 267, 272, 578 P.2d 221, 224 (1978) ("[T]he power of initiative is to be liberally construed to allow the greatest possible exercise of this valuable right.").

Because Amendments Y and Z do not define "necessary census data,"[11] and because the Amendments do not require or prohibit the use of a specific data set to develop the preliminary plan, it is reasonable to interpret the Amendments as giving the commissions the ability to use non-final data in the extraordinary circumstances presented here. *See In Re Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶¶ 46-47; *In re Great Outdoors*, 913 P.2d at 538.

SB 21-247 does not conflict with any constitutional provision and furthers voter intent. Absent a constitutional limitation, the bill falls within the legislature's plenary power. *Van Kleeck*, 62 Colo. at 9, 156 P. at 1110. For that reason, and given the implicit discretion granted to the commissions to use non-final data, the Court should answer the first interrogatory in the affirmative.

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[11] Although "necessary census data" need not be ambiguous for the legislature to enact supplemental legislation, *see Zaner*, 917 P.2d at 286, to the extent that phrase is ambiguous, the ambiguity must be resolved to allow for SB 21-247. *See In Re Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 33 ("[T]he General Assembly is authorized to resolve ambiguities in constitutional amendments in a manner consistent with the terms and underlying purposes of the constitutional provisions.")

C. Voters have made Colorado a leader in democratic reforms; SB 21-247 protects those reforms and the will of the people.

Amendments Y and Z are only part of Colorado's broader commitment to democratic governance, which includes procedural fairness, protections for the democratic process, and safeguards of the rule of law. SB 21-247 is necessary to continue that tradition.

Colorado voters have long prioritized electoral fairness. In 1893, Colorado became the first state to enfranchise women by popular vote. Rebecca Mead, *How the Vote Was Won: Woman Suffrage in the Western United States*, 1868-1914, at 56 (2004). In 1966, Colorado voters eliminated partisan judicial elections and adopted a merit-based nominating process. *See* Colo. Const. art VI, § 24. And today, Colorado leads in voter turnout—second in the nation only to Minnesota—through an electoral system that includes automatic voter registration, universal vote-by-mail, and same-day voter registration. *See* Statement of the Case and Facts, Part III, *supra*.

All of these measures share a common feature with Amendments Y and Z—they enhance public trust and confidence in the electoral system. Unfortunately, recent world events have shaken public

confidence, and dissatisfaction with democracy is at an all-time high. Foa, R.S., et al., *The Global Satisfaction with Democracy Report 2020*, 20 (Cambridge, United Kingdom: Centre for the Future of Democracy 2020), https://tinyurl.com/apby658.

The delay to the federal census, caused by the COVID-19 pandemic, also threatens to further erode trust in our democratic system. To address this threat, SB 21-247 restores predictability, certainty, and stability in Colorado's redistricting process.

By permitting the commissions to begin their work immediately, the commissions will be afforded the opportunity to gather public input as originally designed in Amendments Y and Z and build public trust in our democratic system.

CONCLUSION

The Court should affirm the constitutionality of SB 21-247's provisions enabling the commissions to use preliminary data to draft preliminary maps.

Respectfully submitted on this 13th day of May, 2021.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE GOVERNOR AND ATTORNEY GENERAL'S INTERROGATORY ANSWER BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 13th day of May, 2021, addressed as follows:

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BRIEF OF THE COLORADO SECRETARY OF STATE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 , or C.A.R. 28.1, including all formatting requirements set forth in these rules. Specifically, I certify that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 9,299 words.

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)

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

s/ Peter G. Baumann
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1) Whether the Supreme Court was correct to exercise its discretion to accept the first interrogatory posed by the Colorado General Assembly regarding its imminent enactment of Senate Bill 21-247.

2) Whether, in light of the Census Bureau's delayed release of final census data to states due to the COVID-19 pandemic, the use of non-final census data for preliminary legislative and congressional redistricting maps authorized by Senate Bill 21-247 comports with Sections 44 to 48.4 of Article V of the Colorado Constitution.[1]

STATEMENT OF THE CASE

I. Background

Since March 10, 2020, Colorado has been in a declared state of emergency due to the COVID-19 pandemic. This cataclysmic event has cost lives, disrupted large sectors of our economy, and upended the

[1] The Secretary of State takes no position on the second interrogatory posed by the General Assembly.

standard operating procedures of countless federal, state, and local government entities.

Among those affected is the United States Census Bureau. To fulfill its constitutional duty, U.S. Const. art. I § 2(3), the Census Bureau conducts a decennial census, 13 U.S.C. § 141(a). During the census, it collects data in a number of ways. *See generally Ohio v. Raimondo*, No. 3:21-cv-00064-TMR, Decl. of Michael Thieme (ECF No. 11-1), ¶¶ 7–29 (S.D. Ohio. March 12, 2021), *attached as* Ex. A. Two survey methods, in particular, generate the bulk of the responses. *Id.*

First, the Census Bureau attempts to contact individuals online, by telephone, or through the mail, and encourages them to complete a census they received in the mail. *Id.* ¶¶ 15–18. Second, the Bureau visits "nonresponding addresses to determine whether each address was vacant, occupied, or did not exist, and when occupied, to collect census data." *Id.* ¶ 19. As a result of the pandemic, the latter of these procedures was significantly delayed. *Id.* ¶¶ 30–35 ("While data collection began on schedule, the Census Bureau was forced on March

18, 2020 to announce a suspension of field operations because of the COVID-19 pandemic.").

This delay postponed the Census Bureau's delivery of census data to the states, including Colorado. Under federal law, the Census Bureau was obligated to release the data necessary for states to conduct redistricting by March 31, 2021. *A Bill for an Act Concerning the Procedures of the Independent Redistricting Commissions*, SB 21-247 ("SB 21-247") § 1(c); 13 U.S.C. § 141(c). But because of the pandemic, the Census Bureau has informed election officials that the release of this data will be delayed by six months. SB 21-247 § 1(e); *see also Ohio v. Raimondo*, No. 3:21-cv-00064-TMR, Decl. of James Whitehorne (ECF No. 11-2), ¶ 19 (S.D. Ohio. March 12, 2021) ("Whitehorne Decl."), *attached as* Ex. B.

The Bureau will, however, release "a legacy format summary redistricting data file" in mid-to late-August. SB 21-247 § 1(d). According to the Census Bureau, legacy format data is "fully reviewed redistricting data," that is compiled in "an older format of data" developed "decades" ago. Whitehorne Decl. ¶ 25. The Census Bureau

anticipates releasing final data in the new, updated format, by September 30, 2021. James Whitehorne, *Timeline for Releasing Redistricting Data*, U.S. Census Bureau (Feb. 12, 2021), *available at* https://tinyurl.com/etv2n8p3.

These delays have disrupted redistricting processes in dozens of states. *See generally* Nat'l Conference of State Legislatures, *2020 Census Delays and the Impact on Redistricting* (last updated April 26, 2021), *available at* https://tinyurl.com/2eat5wf5 (outlining challenges posed by census delays in various states). And these challenges are particularly acute in Colorado.

On April 26, 2021, the U.S. Census Bureau delivered to the President each state's total population and allocated number of representatives. U.S. Census Bureau, *Apportionment Population and Number of Representatives by State: 2020 Census* (April 26, 2021), *available at* https://tinyurl.com/58z7rmck. According to those figures, Colorado will gain an eighth congressional seat starting with the 2022 election. That seat reflects the significant population growth and demographic changes that have occurred since the 2010 census.

As a result, Colorado cannot address census delays by largely re-adopting its existing congressional and legislative maps. Significant input is needed from communities and stakeholders to ensure revised maps reflect and represent Colorado's diverse and shifting population. That such activity will occur in the context of newly created redistricting commissions only heightens both the importance of public engagement and the challenges facing the state in light of the Census Bureau's delay.

II. Amendments Y and Z

In 2018, Colorado voters approved Amendments Y and Z, establishing the Independent Congressional Redistricting Commission and the Independent Legislative Redistricting Commission to draw congressional and state legislative districts, respectively. Those Amendments are now enshrined in the Colorado Constitution. Colo. Const. art. V §§ 44–48.4.

The commissions were created to prevent gerrymandering, establish neutral criteria for redistricting and reapportionment, and create an "inclusive and meaningful" process through which the public

may express opinions about proposed boundaries. Colo. Const. art. V §§ 44(1), 46(1). To assist in these purposes, Amendments Y and Z establish an iterative process, with corresponding timelines.

First, within 45 days of each commission convening or when "the necessary census data are available," nonpartisan commission staff create a "preliminary plan" for review. Colo. Const. art. V § 44.4(1); *see also id.* § 48.2 (obligating legislative redistricting commission's nonpartisan staff to create a "preliminary house plan" and a "preliminary senate plan").

Next, the commissions hold "public hearings" on the preliminary plans in "several places" throughout the state. *Id.* §§ 44.4(2); 48.2(2). These hearings must be completed by July 7 and July 21 for the congressional and legislative commissions, respectively. *Id.*

After the public hearings, nonpartisan staff prepares for the commissions at least three "staff plans." *Id.* §§ 44.4(3); 48.2(3). Each commission may adopt one of these plans any time after presentation of the initial staff plans. *Id.* §§ 44.4(4)–(5)(a), 48.2(4)–(5)(a). In any event, however, the congressional commission is obligated to adopt a final plan

by September 1, and the legislative commission by September 15. *Id.* §§ 44.4(5)(b), 48.2(5)(b). The Amendments authorize the commissions to "adjust" these deadlines "if conditions outside of the commission's control require such adjustment to ensure adopting a final plan." *Id.* §§ 44.4(5)(c), 48.2(5)(c). The commissions may also allow nonpartisan staff "the authority to make technical de minimis adjustments" to the final plans. *Id.* §§ 44.4(5)(d), 48.2(5)(d).

Once the commissions have settled on final plans, those plans are submitted to this Court for its review and validation. *Id.* §§ 44.5, 48.3. With regards to the congressional map, the Court must either "approve the plan submitted or return the plan to the commission" by November 1. *Id.* § 44.5(4)(a). If the latter, the commission and nonpartisan staff have 15 days to prepare a new plan for the Court's review. *Id.* § 44.5(4)(c). In any event, the Court "shall approve" a plan and "shall order that such plan be filed with the secretary of state" no later than December 15. Amendment Z establishes a similar process for judicial review of the legislative map, with initial review completed no later

than November 15, and final approval no later than December 29. *Id.* § 48.3(4). These dates are reflected below:

Event	Congressional Commission Date	Legislative Commission Date
Statutory delivery of final census data	*March 31, 2021*	*March 31, 2021*
Preliminary Plan	Within 45 days of receiving "necessary census data"	Within 45 days of receiving "necessary census data"
Public Hearings	Completed by July 7, 2021	Completed by July 21, 2021
Staff Plans	Drafted following public hearings	Drafted following public hearings
Final Plan	Adopted by September 1, 2021	Adopted by September 15, 2021
Updated delivery of final census data	*September 30, 2021*	*September 30, 2021*
Initial Supreme Court Review	Approved or returned to the Commission by November 1, 2021	Approved or returned to the Commission by November 15, 2021
Final Map Filed with Secretary of State	No later than December 15, 2021	No later than December 29, 2021

In light of the Census Bureau's inability to meet its statutory deadline for releasing final census data, the commissions may no longer be able to meet all of these constitutional deadlines.

III. The 2022 Election Calendar

Failure to meet these deadlines and timely deliver final maps will almost certainly prevent the 2022 statewide primary election from proceeding as scheduled. Earlier this year, the Secretary released the unofficial 2022 Election Calendar. Secretary of State, *2022 Election Calendar*, last updated 03/12/2021, *available at* https://tinyurl.com/ya5ed96d. The 10-page calendar outlines the relevant dates related to the 2022 primary and general elections. As it demonstrates, the Secretary is already preparing for the 2022 elections. The Census Bureau's inability to deliver data on schedule, and the ensuing logjam at the commissions, threatens to delay—and in some cases derail—the state's election plans.

Final approval of legislative and congressional maps is the first step in a detailed process at both the state and county levels. Decl. of Dwight Shellman ("Shellman Decl."), ¶ 5 *attached as* Ex. C. Once the statewide boundaries are set, county election officials must reconfigure precinct boundaries so that no precinct overlaps with congressional or state legislative district boundaries. *Id.* ¶ 6. This time-consuming task

requires the manual re-assignment of voters displaced by precincts modified based on new congressional or legislative boundaries. *Id.* ¶ 7.

Under the best of circumstances, with the final maps filed with the Secretary by December 29, 2021, finishing this work before the counties' January 31, 2022 deadline for approving new precincts, § 1-5-101(1), would be a challenge. *Id.* ¶ 9. If the maps are delayed, many counties will not be able to hold precinct caucuses, or the June primary election, as scheduled. *Id.* ¶ 10.

This is because county clerks must provide the county chairpersons of major political parties a list of voters eligible to participate in precinct caucuses by February 8, 2022. § 1-3-101(3)(a); Shellman Decl. ¶¶ 10–12. This is the first step in the major party caucus process, in which precinct caucuses nominate delegates to county assemblies, where delegates are nominated to state assemblies. *See* § 1-4-602(1)(a)(1). Delayed adoption of precinct boundaries will cause county clerks to miss the initial deadline. If so, major party precinct caucuses, currently scheduled by law for March 1, 2022, § 1-3-

102(1)(a)(I), cannot occur as scheduled. This would, in turn, delay county and state assemblies.

Setting aside the caucuses, the June 28, 2022 primary election itself establishes deadlines that would be virtually impossible to meet if maps are not delivered on time. The Secretary must deliver the ballot order and content to county clerks by April 29, 2022, 60 days before the primary election. § 1-5-203(1)(a). And to comply with the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20302(a)(8)(A), ballots must be printed in time to be mailed to eligible military and overseas voters by May 14, 2022—45 days before the June 28, 2022 primary election, § 1-8.3-110(1).

The following is a non-exhaustive list of statutory deadlines relating to the June 28, 2022 primary election that would likely need to be revised by the General Assembly if final maps are not filed with the Secretary on schedule:

- **January 18, 2022**: the first day to circulate major party candidate petitions. § 1-4-801(5).
- **February 7, 2022**: the first day to circulate minor party candidate petitions. § 1-4-802(1)(d)(II).

- **February 28, 2022**: the last day for county clerks to submit their election plans to the Secretary of State for the primary election. § 1-7.5-105(1.3).

- **March 1, 2022**: Republican and Democratic Party precinct caucuses must occur on this date. § 1-3-102(1)(a)(I)

- **March 15, 2022**: the last day to file major party candidate petitions. § 1-4-801(5)(a).

- **April 4, 2022**: the last day to file minor party candidate petitions. § 1-4-802(1)(f)(II).

- **April 16, 2022**: the last day to hold major or minor party state assemblies. § 1-4-601(1).

- **April 20, 2022**: the last day for each political party to file with the Secretary the certificates of designation of each assembly that nominated candidates for any national or state office or for member of the general assembly. § 1-4-604(6)(a).

- **April 22, 2022**: the last day for a write-in candidate to file an affidavit of intent for the primary election. § 1-4-1102(1).

- **April 26, 2022**: the last day for election judges to be certified to the relevant designated election officials. § 1-6-104(1).

- **April 29, 2022**: the last day for the Secretary to deliver the certified Primary Election ballot order and content to county clerks. § 1-5-203(1)(a).

- **May 14, 2022**: the deadline for county clerks to transmit primary election ballots to military and overseas voters. § 1-8.3-110(1).

- **May 14, 2022**: the first day a county clerk may begin issuing ballots for the primary election to eligible electors who request one in person at the clerk's office. § 1-7.5-107(2.7).

- **May 19, 2022**: the first day an unaffiliated candidate may circulate or obtain signatures on a petition for nomination for the General Election. § 1-4-802(1)(d)(I).
- **May 27, 2022**: ballots for the primary election must be printed and in possession of the county clerk. § 1-5-402(1).
- **May 27, 2022**: county clerks must begin issuing ballots for the primary election to eligible electors who request one in person at the county clerk's office. § 1-7.5-107(2.7).
- **June 6, 2022**: the first day that mail ballots for the primary election may be mailed to non-military and overseas voters. § 1-7.5-107(3)(a)(I).
- **June 10, 2022**: the last day to send out initial mail ballots for the primary election. § 1-7.5-107(3)(a)(I).
- **June 20—28, 2022**: the minimum number of required voter service and polling centers must be open for the primary election for these dates. § 1-7.5-107(4.5)(c).
- **June 21, 2022**: the first day the minimum number of required Drop Boxes must be open for the primary election. § 1-7.5-107(4.3)(b).
- **June 28, 2022**: primary election. §§ 1-4-101(1), 1-7-101(1).

The Secretary, county clerks, and potential candidates are already planning around these deadlines. And any delay in delivery of the final legislative and congressional maps will require adjustments to the statutory deadlines. Such adjustments will be complicated by the cascading nature of the dates. For example, the Secretary must approve

each county's primary election plan "within 15 days of receiving that plan." § 1-7.5-105(2)(a). Those plans, in turn, are due to the Secretary "no later than one hundred twenty days prior to the election." § 1-7.5-105(1). This means that the date by which the Secretary must approve a county's election plan is contingent on the date on which it receives that plan, which itself is contingent on the date of the primary election.

Similarly, major party candidates petitioning onto the June 28, 2022 primary election ballot must submit their petitions to the Secretary of State no later than March 15, 2022. § 1-4-801(5)(a). But candidates can begin circulating those petitions on January 18, 2022. *Id.* If the final maps are open to legal challenges attacking the data, internal procedures, and deadlines utilized by the commissions, such challenges likely would not be brought until early 2022. Their resolution would threaten these cascading deadlines. In all likelihood, final judicial decisions would occur between dates that are linked in statute—for example, between the January 18, 2022 and March 15, 2022 dates for petition gathering.

This would leave the Secretary and the General Assembly scrambling to rearrange carefully positioned dominos after the first have already begun to fall.[2] This, in turn, would threaten the ability of the Secretary, county clerks, and the General Assembly to ensure that each eligible elector is able to cast primary and general election ballots in 2022.

Addressing this potential logjam is not as simple as moving the date of the primary election. While there is a narrow window of flexibility to push back the June 28, 2022 primary election, that flexibility is stringently limited by federal law. The general election must occur on November 8, 2022. 2 U.S.C. § 7. That deadline is inflexible. And under UOCAVA, the state must mail eligible military and overseas voters a general election ballot no later than September 24, 2022. 52 U.S.C. § 20302(a)(8)(A). To meet this deadline, Colorado

[2] In a worst-case scenario, a candidate may later be deemed ineligible for office in the district in which she collected petition signatures. Such a situation could result in ineligible candidates appearing on ballots, and votes for those ineligible candidates being counted. *See Hanlen v. Gessler*, 2014 CO 24, ¶¶ 36–39.

must adhere to the existing general election ballot certification deadline of September 12, 2022. Decl. of Hilary Rudy ("Rudy Dec.") ¶ 9, *attached as* Ex. D. The Secretary estimates that to comply with these federal deadlines, the primary election can occur no later than July 26, 2022. *Id.* ¶ 10.

Missing these federal deadlines would carry significant consequences for Colorado. During the 2018 midterm elections, a would-be candidate for statewide office pursued a legal challenge to the Secretary of State's determination that he had gathered an insufficient number of signatures to petition onto the primary election ballot. To give time for his challenge to proceed, he asked a state trial court to further extend the April 27 ballot content certification, which had already been extended to May 2, 2018. *See Levin v. Williams*, No. 2018CV031469 (Denv. Dist. Ct.).

But doing so would have led to non-compliance with UOCAVA and potential disenfranchisement of overseas and military voters. Indeed, the Civil Rights Division of the U.S. Department of Justice closely monitored the *Levin* challenge, and expressly urged then-Secretary

Wayne Williams to "take all steps necessary to comply with UOCAVA deadlines to avoid any potential harm to Colorado voters who are overseas or engaged in active-duty military service." Letter from Lema Bashir, Trial Attorney, U.S. Department of Justice, to Secretary of State Wayne Williams (May 1, 2018), *attached as* Ex. E.

Recognizing that the narrow margin of flexibility in the 2018 election calendar had been exhausted by the initial 5-day extension, the *Levin* trial court ultimately conducted an evidentiary hearing and issued a written ruling in favor of the Secretary of State at 10:12 pm on May 2, 2018 to avoid further extending the ballot content certification deadline. *Levin v. Williams*, No. 2018CV31469, Order Re: Pl.'s Compl. for Declaratory & Injunctive Relief (May 2, 2018), *attached as* Ex. F.

As this example demonstrates, the window of flexibility for the Secretary and the General Assembly to adjust statutory and regulatory deadlines is significantly constrained by federal law.

IV. SB 21-247

To proactively address the problems caused by the census delay, the General Assembly is prepared to pass SB 21-247. Senate Bill 21-247

facilitates the purposes of the commissions in several ways. First, SB 21-247 addresses the phrase "necessary census data," which establishes the deadline for preparing a preliminary plan. SB 21-247 § 2. While that term is not defined in Amendments Y or Z, the General Assembly previously defined it to mean the "data published for the state by the United States census bureau." § 2-2-902(1)(c)(I). Under SB 21-247, the term would be redefined to mean "final census data," including, for this year only, "legacy format" data. SB 21-247 § 2 (proposed § 2-2-902(1)(c)(II)(A)–(c.5)(I)).

Moreover, "in light of the delays caused by the COVID-19 pandemic and for purposes of allowing timely public input and consideration of preliminary plans," for this year only "necessary census data" would also include "the tabulation of the total population by state published in 2021 for the State" by the Census Bureau, and "such other total population and demographic data from federal or state sources as are approved by" either of the commissions. SB 21-247 § 2 (proposed § 2-2-902(1)(c.5)(II)(A)). In effect, this would allow the commissions to

use non-final data from reputable sources to develop preliminary plans if they so choose.

Senate Bill 21-247 still, however, requires final census data to be used to prepare the staff plans following public hearings. SB 21-247 § 2 (proposed § 2-2-902(6.5)(b)). And it ensures the public will have at least one hearing at which it may comment on a plan prepared using final census data. *Id.* (proposed § 2-2-902(6.5)(c)).

Finally, SB 21-247 imposes a "substantial compliance" standard for judicial review of "the technical rather than substantive provisions that implement the redistricting process." SB 21-247 § 3 (proposed § 2-2-903)).

STATEMENT OF IDENTITY AND INTEREST

As Colorado's chief election official, the Secretary of State is charged with supervising "the conduct of primary, general, congressional vacancy, and statewide ballot issue elections" in Colorado. § 1-1-107(1)(a). In this role, the Secretary promulgates election rules, *id.* § 107(2)(a), certifies the ballot order and content for each individual county, § 1-5-203(1)(a), and publishes and maintains the statewide

election calendar based on the deadlines established by law, *see, e.g.*, § 1-4-101(1) (establishing date for primary election).

The Census Bureau's failure to deliver final census data as scheduled threatens to disrupt the Secretary's administration of the 2022 elections. First, the 2022 election calendar is based on the understanding that final congressional and legislative maps will be filed with the Secretary by December 15, 2021 and December 29, 2021, respectively. Colo. Const. art. V, §§ 44.5, 48.3(5). Failure to finalize the maps by those dates will require the Secretary—and likely the General Assembly—to make substantial changes to the 2022 election calendar. Done with haste, these changes could burden state and local election officials, and could lead to voter confusion, or worse, disenfranchisement.

Second, the Elections Code overseen and implemented by the Secretary assumes the existence of legislative and congressional maps by specific dates. As just one example, candidates for the General Assembly must reside in the district they seek to represent. Colo. Const. art. V, § 4. Failure to timely adopt legislative and congressional maps

will leave candidates and election officials in needless limbo, unable to plan for rapidly approaching 2022 election deadlines.

SUMMARY OF THE ARGUMENT

This Court was correct to accept jurisdiction of these interrogatories and should reject arguments to now dismiss them as improvidently granted. Already the Secretary and county clerks are planning for the 2022 elections. Statutory deadlines, premised on the existence of final maps by the end of this year, begin to arrive in early-January 2022, cascading through to the June primary election and the November general election. The Census Bureau's delay has threatened to inject uncertainty and chaos into Colorado's efforts to conduct fair and orderly elections next year. Whether the General Assembly's attempt to mitigate those delays is constitutional is a question that should be answered now while there is still time for the Secretary and the General Assembly to develop contingency plans if necessary. Not next year in the heat of a contested election or after the relevant election deadlines have already begun to occur.

Although the Secretary's primary concern is mitigating uncertainty, she also supports the General Assembly's efforts to ensure the people's rights—as enshrined in Amendments Y and Z—are not derailed by pandemic-induced census delays. Senate Bill 21-247 is a sensible, constitutional effort to do just that. It offers the commissions needed flexibility, thereby reducing the possibility of a chaotic conclusion to the redistricting process which would undermine the purposes for which the Amendments were passed. Importantly, in doing so, it ensures a meaningful role for the public in the development of the final maps.

Through these interrogatories, this Court has the chance to provide much-needed certainty to the redistricting process. Even if the court disagrees with the propriety of SB 21-247, the question of whether the commissions may use non-final data to draw preliminary maps is squarely before the Court. It should take this opportunity to address the scope of the commissions' authority and the propriety of using non-final data to create the preliminary maps.

ARGUMENT

I. An answer to the General Assembly's interrogatories is needed to ensure the 2022 elections proceed uninhibited.

A. Standard of Review

Whether to accept an interrogatory under Article VI, § 3 is a matter left to this Court's discretion. *In re Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 26. Questions 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." *Id.* ¶ 27 (quoting *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999)).

This Court has accepted the interrogatories. Order of Court, No. 2021SA146 (Colo. May 6, 2021). The Court may, however, receive arguments that it should dismiss them as improvidently granted. *See, e.g.*, Answer Br. of Certain Identified Legislators, No. 2021SA97 (Colo. April 8, 2021) (arguing in original proceeding under Colo. Const. art. VI § 3 that "although the Court has already granted the petition

submitting the interrogatory," it should dismiss the petition presenting the interrogatory as improvidently granted). If so, the Court should reject those arguments.

B. This Court should determine now whether the commissions may take advantage of the flexibility offered by SB 21-247.

Courts across the country have recognized that "there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). And the planning necessary for that order is a significant and multi-year undertaking. "Ballots and elections do not magically materialize. They require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed." *Perry v. Judd*, 471 Fed. App'x 219, 226 (4th Cir. 2012)); *see also Garcia v. Griswold*, No. 20-cv-1268-WJM, 2020 WL 4926051, at *4 (D. Colo. Aug. 21, 2020).

In Colorado, the burden of preparing for and conducting an election falls largely to the Secretary of State and Colorado's 64 county

clerks. All of whom are already planning for the 2022 primary and general elections. This preparation, revolving around deadlines established by statute, relies on the existence of final legislative and congressional maps by the end of 2021. *See* Shellman Decl. ¶ 7.

If maps are not available by year-end, significant action will be necessary to address the delay. *See* Shellman Decl. ¶ 11; Rudy Decl. ¶ 6. That work would need to begin now. Thus, while the Secretary is of the view that SB 21-247 is constitutional, *see infra* Part II, her primary concern is that its constitutionality be tested and determined now—before the commissions begin their work in earnest, and while there is still time for any necessary legislative adjustments.

If the Court declines to answer the interrogatory, uncertainty will hang over the Secretary's preparations for the 2022 election. Rudy Decl. ¶¶ 4–5. The validity of SB 21-247 will undoubtedly be litigated, likely in state and federal courts, without this Court's guidance. And questions about its constitutionality will limit the Secretary's ability to effectively organize the 2022 elections in a manner that ensures no voters or candidates are disenfranchised or unduly burdened.

A valid interrogatory from the General Assembly must concern public rights. *In re Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 27. Such questions are those "where the interest of the state at large is directly involved . . . or the liberty of its citizens menaced." *In re Hickenlooper*, 2013 CO 62, ¶ 11 (quoting *Wheeler v. N. Colo. Irr. Co.*, 11 P. 103, 105 (Colo. 1886)). The interrogatories here, which address Colorado's ability to administer fair and orderly elections, implicate both. *See In re Hickenlooper*, 2013 CO 62, ¶¶ 12–13.

Colorado's statewide interest in the legality of its redistricting process stems first from the United States Constitution. Article 1, § 2 provides that representatives "shall be apportioned among the several states . . . according to their respective numbers." Thus, congressional redistricting, which enables Colorado's representation at the federal level, directly implicates "the interest of the state at large." *Wheeler v. N. Colo. Irr. Co.*, 11 P. 103, 105 (Colo. 1886).

Moreover, the activities of the legislative and congressional commissions affect each member of the electorate equally. This is not a case where the rights of some individuals are uniquely threatened. *See*

In re Senate Resolution Relating to Senate Bill No. 65, 21 P. 478, 479 (1889) (observing that a "careless construction and application of [Article VI, § 3] might lead to the ex parte adjudication of private rights by means of a legislative or executive question").

Although the answer to this interrogatory will affect the rights of individual Coloradans to cast a ballot in the 2022 election, it does so equally for each member of the electorate. As for potential liabilities, submission and acceptance of this interrogatory seeks to avoid the specific harm to Colorado of a potential violation of UOCAVA, which would expose the state to a federal enforcement action and penalties.

Finally, the question posed here is not "speculative" in the least. *See In re Hickenlooper*, 2013 CO 62, ¶ 7 (noting that the Court will not accept an interrogatory posing a "speculative" dispute). Already the commissions face constitutional dilemmas. Either they can unilaterally proceed using non-final data or they can wait until final data is released by the Census Bureau later this year and after some of their deadlines have come and gone. Under either course of action, the commissions risk contravening the constitution.

Litigation will ensue. Indeed, Colorado has a long history of vigorously litigating the validity of its redistricting plans. *See, e.g.*, *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982); *Avalos v. Davidson*, No. 2001CV2897, 2002 WL 1895406, at *1 (Denv. Dist. Ct. Jan. 25, 2002), *aff'd sub nom. Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), *cert. denied Colo. General Assembly v. Salazar*, 541 U.S. 1093 (2004); *Keller v. Davidson*, 299 F. Supp. 2d 1171 (D. Colo. 2004); *Lance v. Davidson*, 379 F. Supp. 2d 1117 (D. Colo. 2005), *vacated and remanded by Lance v. Dennis*, 546 U.S. 459 (2006); *Lance v. Dennis*, 444 F. Supp. 2d 1149 (D. Colo. 2006), *vacated and remanded by Lance v. Coffman*, 549 U.S. 437 (2007); *Lance v. Coffman*, No. 03-cv-02452, 2007 WL 915497 (D. Colo. 2007); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012).

These future challenges will present the same issues regarding the propriety of using non-final data to craft the preliminary maps that are currently before the Court. And there is no reason to wait for these inevitable challenges to arise. The particular issues presented by this interrogatory are ripe for review. *See, e.g.*, *Beauprez v. Avalos*, 42 P.3d

642, 648 (Colo. 2002) (discussing ripeness in the context of redistricting); *see also Wilson v. Eu*, 823 P.2d 545, 547 (Cal. 1992) (holding that a redistricting controversy is ripe for review when a court "lacks assurance" that the plans will be "validly enacted" prior to the upcoming elections).

In 2013, this Court accepted an Interrogatory from the Governor concerning the constitutionality of regulations governing an upcoming recall election. *In re Hickenlooper*, 2013 CO 62, ¶ 1. In doing so, the Court cited the benefits of establishing the constitutionality of disputed procedures prior to an upcoming election. *Id.* ¶¶ 13–15.

Specifically, it quoted from an opinion from the justices of the Rhode Island Supreme Court, issued "to avoid chaotic post-hoc decision making in the elections context." *Id.* ¶ 14 (citing *In re Advisory Opinion to Governor*, 856 A.2d 320, 326–27 (R.I. 2004)). Quoting that opinion, this Court noted: "[T]o delay the issuance of our opinion would only postpone the inevitable. . . . By delivering our advisory opinion before the [election], we give credence to this Court's recognition of the prevailing public policy in favor of finality and validity of the voting

process in this state." *Id.* ¶ 15 (noting that when it comes to issues affecting elections, "there are no do-overs").

So too here. Failure to address these issues now will only delay resolution. Disappointed parties may wait until the maps are finalized, and only then use the same issues presented here as basis for an outcome-oriented legal challenge. Such suits would undermine the non-partisan purposes of Amendments Y and Z and inject chaos into the 2022 election. And unlike the specific issue presented in *In re Hickenlooper*, which could have been addressed after the election given the "small number" of votes affected by the court's decision, *see* 2013 CO 62 ¶ 45 (Marquez, J., dissenting), answering this question in the negative would affect all voters across the state.

Refusing to answer this interrogatory may also force this Court to address these issues on an even more expedited basis. One reason the Court may decline to answer an interrogatory is where "hasty consideration" precludes the "thorough analysis" an issue normally requires." *In re Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 27. But in the election context questions tend to arise on an

expedited basis. *See, e.g.*, *Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 14 (accepting application for review under § 1-1-113(3) on April 24, directing a response by April 30, and issuing final order on ballot-access challenge on May 4); *Colo. Republican Comm. v. Schneider*, No. 2020SA164, Order of Court (May 5, 2020) (declining on May 5, 2020 to accept jurisdiction of petition filed on May 4, 2020 regarding whether certain candidates could be placed on party primary ballot); *Baca v. Williams*, No. 2016SA318, Order of Court (Dec. 16, 2016) (declining two days before the meeting of Colorado's presidential electors to review petition filed one day earlier challenging the trial court's interpretation of statutory procedures governing Colorado's Electoral College). Resolving the non-speculative issues presented in this interrogatory now will prevent "hasty consideration" of the same issues in the thralls of a rapidly approaching election. *See In re Hickenlooper*, 2013 CO 62, ¶ 46 (Marquez, J., dissenting) (distinguishing interrogatory posed on the eve of an election from one presented "at the very beginning" of an election cycle, offering the court "ample time" to consider the issues").

There is no doubt that this Court will ultimately need to answer whether the commissions may use non-final data to construct the preliminary maps. And if it declines to provide much-needed certainty now, valuable time will be wasted. This will leave the Secretary and the General Assembly less opportunity to adjust the statutory deadlines if necessary, creating mounting uncertainty about whether final maps will be filed with the Secretary on schedule.

Article VI, § 3 exists expressly so that this Court may, "upon solemn occasions," settle important questions affecting public rights. The present circumstances—created exclusively by a global pandemic outside the control of any Colorado entity—plainly satisfy this standard. The Court's opinion now is necessary to promote stable governance and ensure that the questions presented here do not crescendo in a way that prevents the Secretary and county election officials from conducting timely and orderly 2022 elections. The Court was correct to accept the interrogatories, and should decline invitations to reconsider that decision.

II. The flexibility offered the commissions by SB 21-247 is consistent with the intent and purpose of the Amendments.

A. Standard of Review

"When construing a constitutional amendment, courts must ascertain and give effect to the intent of the electorate." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). To do so, courts first look to the language of the amendment, "and give words their plan and commonly understood meaning." *Id.* But courts must refrain from "a narrow or technical reading of language contained in an initiated constitutional amendment if to do so would defeat the intent of the people." *Id.*

The overarching obligation is to "prevent an evasion of the constitution's legitimate operation and to effectuate the intentions of the . . . people of the State of Colorado." *Markwell v. Cooke*, 2021 CO 17, ¶ 33 (citations and quotations omitted). Where possible, an amendment's language must be construed "in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Gessler v. Smith*, 2018 CO 48, ¶ 18 (quotations and

citations omitted). The amendment should be considered as a whole, and, when possible, an interpretation which harmonizes its relevant provisions should be favored over one which would render those provisions in conflict. *Id.*

B. Using available data to craft the preliminary maps does not invalidate final maps based on final census data.

The delays caused by the COVID-19 pandemic threaten to upend the electorate's purposes in adopting Amendments Y and Z. Against this backdrop, SB 21-247 makes permissible adjustments to relevant law to ensure Amendments Y and Z operate as intended. The Court should validate the constitutionality of the proposed changes.

1. The General Assembly may enact legislation to further the purposes of constitutional provisions.

Unlike other, similar constitutional provisions, Amendments Y and Z are not explicitly self-executing. *See, e.g.*, Colo. Const. art. V, § 1(10) (declaring that constitutional provision related to initiatives and referenda "shall be in all respects self-executing); *id.* art. XXI § 4 (declaring that constitutional provision related to recall elections "is

self-executing"). Nor do the Amendments explicitly limit the General Assembly's ability to pass legislation concerning their provisions. *Contra* Colo. Const. art. XXIX § 9 (explicitly prohibiting legislation that "limit[s] or restrict[s]" the Independent Ethics Commission).

The Amendments "must be presumed to have been framed and adopted in the light and understanding of prior and existing laws." *Krutka v. Spinuzzi*, 384 P.2d 928, 933 (Colo. 1963). Thus, by declining to include limiting language like it did in Article XXIX, the electorate is presumed to have adopted the general rule for legislative facilitation of constitutional provisions. Namely that so long as it does not "impair[], limit[] or destroy[]" rights created by the Amendments, the General Assembly may enact legislation which "furthers the purpose" of the Amendments or "facilitates their enforcement." *Zaner*, 917 P.2d at 286; *see also Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994) ("Where a statute regulates situations not addressed in the constitutional text," courts should uphold the legislation so long as it "enhances rather than restricts" the rights established by the amendment).

Zaner is instructive. There, the General Assembly determined that a particular constitutional provision was ambiguous and passed legislation to resolve that ambiguity. *See* 917 P.2d at 286–87; §§ 1-41-101–103. This Court upheld the enactments because they were "consistent with and serve[d] to implement" the relevant constitutional provisions. *Id.* at 287–88.

In 1975, this Court applied a similar standard on review of legislation under Colo. Const. Art. VI § 3. *See In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 536 P.2d 308, 314 (Colo. 1975). There, the Court addressed the constitutionality of a statute declaring that when two "conflicting" initiatives are adopted by the voters, only the one receiving the greater number of votes will become law. *Id.* Citing John Marshall, the Court declared that "the legislative branch can and should give flesh and body to a constitutional provision." *Id.* Because the statute answered a question left open by the provision, and because it "enhance[d] rather than restrict[ed]" the rights established by the provision, it was a constitutional exercise of the General Assembly's authority. *Id.*

Senate Bill 21-247 functions similarly to ensure the rights established by Amendments Y and Z are protected amidst these unique emergency circumstances. The Amendments do not establish whether the commissions may use non-final data when necessary to comply with the constitutional deadlines. Rather, the constitutional text establishes only that the initial, "preliminary plan" is due between 30 and 45 days "after the commission has convened or the necessary census data are available, whichever is later." Colo. Const. art. V §§ 44.4(1), 48.2(1). From there, the Amendments establish procedures which are designed to encourage and facilitate public input into the designs. *See generally id.* § 44.4 (establishing process for congressional map); *id.* § 48.2 (establishing process for legislative map).

The Amendments do not define "necessary census data."[3] The General Assembly, however, has defined the term to mean the final

[3] The phrase appears to be a holdover from previous iterations of redistricting commissions in Colorado. *See, e.g.*, *In re. Colo. Gen. Assembly*, 828 P.2d 185, 188 n.1 (Colo. 1992) (quoting from Article V, § 48(e) of the Colorado Constitution as of that date: "Within ninety days after the commission has been convened or the necessary census data are available . . .").

census data published by the U.S Census Bureau. § 2-2-902(1)(c). Given that such data will not be available before mid- to late-August, SB 21-247 amends the existing statutory definition for this year only.

Legislative enactments are presumed constitutional, and "overcoming that presumption requires a showing of unconstitutionality beyond a reasonable doubt." *In re Interrogatory on H.J.Res. 20-1006*, 2020 CO 23, ¶ 34. This principle reflects the judicial branch's assumption that the General Assembly's passage of a bill means it is satisfied with the statute's constitutionality. *See, e.g.*, *In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6*, 31 P.2d 325, 330 (Colo. 1933).

Because it has not yet passed the General Assembly, SB 21-247 is not entitled to this presumption. *See, e.g.*, *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 5 n.4 (Colo. 1993). But the existing definition of "necessary census data" in § 2-2-902 warrants the general rule. A majority of the General Assembly has satisfied itself with the lawfulness of its authority to define that term, and upending their

ability to do so requires a showing of unconstitutionality beyond a reasonable doubt. No such showing can be made here.

The Amendments also are silent as to whether the data used to create the preliminary maps must be identical to the data used to create the final version. With a generational pandemic threatening to disrupt Colorado's carefully constructed electoral scheme, SB 21-247 furthers the purposes of Amendments Y and Z by filling in the gaps created by such silence. *See Zaner*, 917 P.2d 286.

Some may argue that the commissions are analogous to the Independent Ethics Commission ("IEC") created by Article XXIX, and that therefore the General Assembly is prohibited from enacting legislation related to the commissions. Such arguments should be rejected. In *Colorado Ethics Watch v. Independent Ethics Commission*, 2016 CO 21, ¶ 1, this Court held that the legislature could not authorize judicial review of IEC dismissals of "frivolous" complaints. That decision rested on the text of Article XXIX itself, specifically its admonition that "[l]egislation may be enacted to facilitate the operation of [Article XXIX], but in no way shall such legislation limit or restrict the

provisions of this article or the powers herein granted." Colo. Const. art. XXIX § 9. The Court concluded that because of this language, the General Assembly was "constitutionally prohibited from enacting legislation that could upend" IEC dismissals of a complaint. *Colo. Ethics Watch*, 2016 CO 21, ¶ 13.

The Amendments here contain no such language. And even absent the explicit limitation on legislative authority that is present in Amendment XXIX but absent here, the legislation at issue in *Colorado Ethics Watch* was much different than SB 21-247. There, the General Assembly had attempted to limit the commission's authority in ways other than specified in the constitutional text. Specifically, it had provided for judicial review of dismissals for which such review was not provided in the constitution. *Colo. Ethics Watch*, 2016 CO 21, ¶ 8–13.

Here, though, the General Assembly is explicitly acting to preserve the rights established by the Amendments, not restrict them. First, SB 21-247 explicitly allows the commissions to use non-final data to develop preliminary plans *if the commissions elect to do so*. SB 21-247 (proposed § 2-2-902(1)(c.5)(II)(A)). In fact, it is the Secretary's

understanding that, even absent the passage of SB 21-247, the commissions have already elected to use non-final data for this purpose.

Second, SB 21-247 endeavors to provide adequate opportunity for the public to offer meaningful feedback on the preliminary maps and on the maps ultimately prepared using final data. Thus, it furthers the purpose of the Amendments, and neither limits nor impairs the rights they establish.

Colorado Ethics Watch does not stand for the broad proposition that the General Assembly is powerless with regards to constitutionally established commissions. Amendments Y and Z contain no similar limiting language as is found in § 9 of Article XXIX. And SB 21-247 expands, rather than limits, the rights established by the Amendments. Thus, the traditional presumption applies. Namely that the General Assembly may enact legislation that furthers the purposes of constitutional amendments. *Zaner*, 917 P.2d at 286.

2. The purposes of Amendments Y and Z are best accomplished by allowing the commissions to use non-final data to draft the preliminary maps.

Both the General Assembly and this Court must construe initiated provisions broadly to accomplish the purposes for which they were enacted. *See Yenter v. Baker*, 248 P.2d 311, 314 (Colo. 1952) ("[I]t is universally held that such initiated provisions shall be liberally construed in order to effectuate their purpose; to facilitate and not to hamper the exercise by the electors of rights granted thereby."). Two key purposes of Amendments Y and Z are relevant here. First, to ensure maps are drawn on a nonpartisan basis, and second to offer the public meaningful participation in the process. Senate Bill 21-247 effectively and appropriately advances these purposes.

a. SB 21-247 ensures final maps are drawn through the commissions.

The opening lines of Amendments Y and Z declare that "the practice of political gerrymandering . . . must end," and that this goal is "best achieved by creating a new and independent commission that is

politically balanced, provides representation to voters not affiliated with either of the state's two largest parties, and utilizes nonpartisan legislative staff to draw maps." Colo. Const. art. V §§ 44(1)(a)–(b), 46(1)(a)–(b).

Senate Bill 21-247 ensures that this declaration is honored. If the commissions are unable to agree on a final map to submit to this Court, Amendments Y and Z require the submission of the unamended third staff plan. *Id.* §§ 44.4(6), 48.2(6). This guarantees that partisan bodies, or the lower courts, are not tasked with drawing the boundaries.

But if this Court were to reject that plan because it was not drawn using the same data as were the maps upon which the public commented, it is unclear what would happen next. The commissions would perhaps need to start the process anew, which could leave the General Assembly no choice but to pass emergency legislation regarding interim district boundaries. Or maybe the courts would be pressed into drawing and approving maps following adversarial briefing and evidentiary presentations from interested parties. *Cf. Hall v. Moreno*, 270 P.3d at 964 (affirming trial court's adoption of a congressional map

after legislature failed to adopt new boundaries). Neither is consistent with the Amendments' purposes.

Senate Bill 21-247 avoids the uncertainty created by this situation by enabling the commissions to use non-final data for the preliminary maps and final data for the staff maps. This ensures that the unamended third staff map will not later be declared invalid on the basis of this discrepancy. By offering needed flexibility, SB 21-247 dramatically increases the likelihood that the 2022 elections occur under maps drawn by non-partisan commissions as the people intended.

b. SB 21-247 preserves the public's opportunity for meaningful input into the redistricting process.

Alongside removing the influences of partisanship from redistricting, the people also adopted Amendments Y and Z to offer the public meaningful input into the redistricting process. This express purpose is reflected in the text of the Amendments:

> Citizens want and deserve an inclusive and meaningful . . . redistricting process that provides the public with the ability to be heard as redistricting maps are drawn, to be able to watch the witnesses who deliver testimony and the

> redistricting commission's deliberations, and to have their written comments considered before any proposed map is voted upon by the commission as the final map.

Colo. Const. art. V, §§ 44(1)(f), 46(1)(f).

By permitting the commissions to begin their work using non-final data should they choose to do so, and requiring a public hearing using final census data, SB 21-247 allows the commissions to stick largely to the constitutional deadlines while still enabling public comment, hearing, and review. *See* Colo. Const. art. V §§ 44.4, 48.2. It ensures the maps are discussed and debated in open hearings. And importantly in light of the Amendments' enumerated purpose of facilitating public input, it requires at least one public hearing on a map developed using the final data. SB 21-247 § 2 (proposed § 2-2-902(6.5)(c)).

Absent the flexibility offered by SB 21-247, the commissions may be forced to choose between truncating public review or missing the deadlines by which final maps must be filed with the Secretary. By authorizing the commissions to use non-final data to start the process, SB 21-247 charts a middle ground, thereby increasing the likelihood the Secretary will receive final maps by the end of the year without

sacrificing the meaningful public participation the people prioritized in adopting Amendments Y and Z.

Given the significant population and demographic changes in Colorado over the past decade, placement of new legislative and congressional boundaries will implicate critical issues for numerous Colorado communities. It is vital that the public have extensive opportunities to help the commissions understand the virtues of grouping or separating various communities.

Under the process enabled by SB 21-247, the initial round of public review and comment will enable communities of interest to pursue consolidation and comment on the proposed location and general boundaries of Colorado's new congressional district. And once maps have been developed using final data, the public will have a final opportunity to comment on the granular detail of those proposals.

3. Validation of SB 21-247 would not authorize the General Assembly to interfere with the commissions in future cycles.

This challenge arises in extraordinary circumstances. A global pandemic caused the Census Bureau to miss its federally proscribed deadline for the delivery of final census data. And at home, Colorado is standing up new legislative and congressional redistricting commissions amidst this swirling uncertainty.

Senate Bill 21-247 is not a long-term initiative. Its relevant provisions sunset after this redistricting cycle. *See, e.g.*, SB 21-247 (proposed § 2-2-902(1)(c.5)(II)(B)). And the circumstances here are unlikely to present themselves in 2030 or beyond. Whether legislation "furthers the purpose" or "facilitates the[] enforcement" of a constitutional provision is context dependent. *Zaner*, 917 P.2d at 286. Senate Bill 21-247 furthers the purposes of the Amendments by preserving the rights established by those enactments in the face of a once-in-a-century global pandemic and newly founded commissions.

A declaration that SB 21-247 furthers the purposes of the Amendments in this context would not be a broad invitation for the General Assembly to involve itself in the commissions' affairs. It would be an acknowledgement that unprecedented challenges require thoughtful solutions, which the General Assembly is authorized to provide under this Court's precedent.

The complications caused by pandemic-induced census delays are not unique to Colorado. Last summer, the California legislature submitted to their Supreme Court similar questions to those presented here. *Legislature v. Padilla*, 469 P.3d 405, 406 (Cal. 2020). There, the legislature asked the court whether it could grant California's redistricting commission four-month extensions to release draft maps and approve final maps. *Id.* at 408. The court agreed to answer the question under its authority to "consider and grant appropriate relief when necessary to the orderly functioning of our electoral system." *Id.*

The court framed the relevant questions as whether the deadlines established for the redistricting commission in the California Constitution "can be reformed in a manner that closely approximates

the framework designed by its enactors, and whether the enactors would have preferred the reform to the effective nullification of the statutory language." *Id.* at 410. After reviewing the California commission's purposes ("to ensure the timely display of draft redistricting maps to the public so that Californians can voice their views about the proposed district boundaries"), *id.*, the court concluded that the intent of the enactors would best be served by adopting the legislature's proposal. *Id.* at 412–13; *see also State ex rel. Kotek v. Fagan*, 367 Ore. 803, 814 (2021) ("In light of the impossibility of compliance with the constitutionally prescribed dates that is presented by the delay in delivery of the federal census data, we conclude that a writ of mandamus should issue" requiring the formulation of redistricting maps according to a revised timetable).[4]

[4] A similar action is pending before the Michigan Supreme Court, with a request for expedited consideration. *See In re Independent Citizens Redistricting Commission for State Legislative and Congressional District's duty to redraw districts by November 1, 2021*, Mich. S. Ct. No. 162891, *available at* https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Documents/2020-2021/162891/162891_01_01_Petition.pdf.

This Court should follow a similar approach. As in California, this matter arises in "extraordinary circumstances." *Id.* at 413. Specifically, a "public health crisis that has compelled declarations of emergency by both the President and the Governor, and that has compelled the federal government to pause the decennial census and seek congressional authorization for an extension of its own deadline." *Id.* In light of these circumstances, SB 21-247 effectuates the voters' intent in adopting Amendments Y and Z by ensuring a meaningful and inclusive process that is free from political pressure.

C. If the Court disagrees that the General Assembly is authorized to enact SB 21-247 to further the purposes of the Amendments, guidance is needed as to the scope of the commissions' authority to determine their own procedures.

For all the reasons discussed above, SB 21-247 is a permissible exercise of the General Assembly's legislative authority. If, however, the Court disagrees that the General Assembly may offer the commissions this necessary flexibility, it should establish the contours of the

commissions' authority in the face of these emergency circumstances, and specify the final deadline for approval of new districts.

Under *Zaner*, a holding that the General Assembly is not permitted to enact SB 21-247 would rest on a determination that the proposed legislation conflicts with the commissions' own authority. 917 P.2d at 286. On one theory, the commissions' authority with regards to necessary census data would be so expansive so as to preclude all other legislative action. On another, the permissible data for the commissions would be so narrowly constrained so as to do the same.

As far as the Secretary can tell, both the General Assembly and the commissions interpret the Amendments to offer the commissions flexibility as to what data may be used to begin the commissions' work, and whether that data must be the same as the data used to draw the final boundaries. While the Secretary remains convinced that the General Assembly's proposal is constitutional, her primary concern is ensuring that pandemic-induced census delays do not disrupt the 2022 elections and that late-stage litigation over the same issues presented here do not inject uncertainty into the electoral process.

Whether the commissions may use non-final data to draw the preliminary maps without invalidating final maps drawn using different data is at the heart of this matter. It speaks to the rights of Coloradans collectively, and the state itself. If the Court decides that the commissions' authority precludes legislation in this area, it should establish with specificity the scope of that authority. Specifically, whether the commissions are entitled to interpret the Amendments to permit the use of non-final data to craft preliminary maps.

Such an interpretation is the only way final maps will be filed with the Secretary on schedule. If it is impermissible, the commissions and the Secretary need to know that now. By answering that question here, where it is squarely presented, this Court can provide certainty for the 2022 election calendar, deter eleventh-hour challenges to the maps, and promote stable democratic governance.

CONCLUSION

The Court should retain jurisdiction over the interrogatories and affirm the constitutionality of SB 21-247's provisions enabling the commissions to use non-final data to draft preliminary maps.

Respectfully submitted on this 13th day of May, 2021.

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In Re Interrogatory on Senate Bill 21-247 Submitted by the Colorado General Assembly	**▲ COURT USE ONLY ▲**
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BRIEF OF THE COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION

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

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III. ISSUES PRESENTED

In its May 6, 2021 Order, the Court accepted Interrogatories from the Colorado General Assembly stated as follows:

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 the preliminary plans, and confirm in statute that the staff plans which provide the basis for action by the commission 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 statues, such as the timing of the 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?

IV. STATEMENT OF THE CASE

This matter arises out of Amendments Y & Z approved by the voters of Colorado in 2018, which enacted sections 44 through 48.4 of Article V of the Colorado Constitution.[1] Those sections removed the authority to conduct the redistricting of the congressional districts from the general assembly and to conduct the redistricting of the state legislative districts from the Colorado Reapportionment Commission. The Colorado Independent Congressional Redistricting Commission ("Congressional Commission") and the Colorado Independent Legislative Redistricting Commission ("Legislative Commission") (collectively, the "Redistricting Commissions") now have the constitutional authority to conduct redistricting in Colorado.

The COVID-19 pandemic has created additional issues for the first Redistricting Commissions. Pursuant to 13 U.S.C. § 141(c), the census data used to create final plans to be submitted to this Court was to be provided to the Redistricting Commissions by March 31, 2021. The United States Census Bureau has now indicated that this data will be provided to the Redistricting Commissions in an earlier format, referred to as the "legacy" data, by August 16, 2021, some four and a half

[1] References to sections in this brief refer to sections in Colorado Constitution article V unless otherwise specified.

months after it was due. The data required by 13 U.S.C. § 141(c) will be available by September 30, 2021.

Both Redistricting Commissions have heard from the Secretary of State's Office and county clerks that not completing redistricting before the end of 2021 would cause a complete restructuring of the 2022 election calendar, and if the delay was extended, could affect the state's ability to comply with federal election laws.

With this in mind, the Legislative Redistricting Commission examined the timeline for its work. It became obvious that if the Legislative Commission waited until August to begin the work specified in section 48.2, for nonpartisan staff to create preliminary plans and then conduct at least three public hearings in each of the existing congressional districts, it would be impossible for the Legislative Commission and this Court to meet their constitutional deadlines. The Legislative Commission then examined whether it was necessary to wait until August to start the work required by section 48.2.

The Legislative Commission examined the language in the Colorado Constitution and concluded that, since the phrase related to when the preliminary plans were to be presented, the phrase "necessary census data" meant the data necessary to create preliminary plans given the reasons in the constitution for the uses of the preliminary plans. It then examined available sources of data, including data

from the Census Bureau, and concluded that such data would be appropriate for the creation of preliminary plans. Thus, the Legislative Commission intends to have nonpartisan staff create the preliminary plans and conduct the hearings in the congressional districts prior to the receipt of the United States Census Bureau data used to create final plans provided pursuant to 13 U.S.C. § 141(c).

Apparently believing that the Redistricting Commissions were not moving fast enough to be able to complete redistricting by the end of the year, and without consulting the Redistricting Commissions, Senate Bill 21-247 was introduced. It is designed to require the Redistricting Commissions and this Court to complete redistricting before the end of the year. It creates a new definition of "necessary census data," S.B. 21-247, p. 8 line 15 through p. 9 line 1, so that the Redistricting Commissions do not have to wait until August to begin their work. The General Assembly creates a newly-defined term "necessary census data," which requires nonpartisan staff to use the General Assembly's definition of "necessary census data" to create the preliminary plans, S.B. 21-247 p. 10, lines 13 - 16. It contains a new definition of "final census data," and then requires nonpartisan staff to adjust that final census data by relocating incarcerated persons to their last known address as soon as practicable but no later than ten days after receipt of the data. All of this is

designed to force the Redistricting Commissions to complete their work before the end of 2021.

But S.B. 21-247 contains additional requirements not related to the timing of the work of the Redistricting Commissions. It requires nonpartisan staff to use this adjusted data in creating the staff plans required by section 48.2(3), p. 10 lines 17 - 20. Finally, it requires the Redistricting Commissions, prior to approving a plan, to conduct an additional hearing after a plan has been presented to the Redistricting Commissions based on the newly defined final census data. Such a hearing would actually make it more difficult for the Redistricting Commissions and this Court to complete redistricting by the end of the year.

Finally, recognizing that even with the requirements established in S.B. 21-247, it is unlikely that the Redistricting Commissions and this Court will be able to meet all of the deadlines in the Constitution, S.B. 21-247 requires a court considering a claim based on a failure to meet a constitutional deadline, to apply a substantial compliance standard to the deadline.

While the Legislative Commission understands the General Assembly's desire to ensure that redistricting will be completed before the end of the year, it fails to recognize that it no longer controls redistricting. Redistricting is now left to the Redistricting Commissions. The Legislative Commission intends to do everything

within its control to have redistricting completed by the end of the year, but cannot be legislated to do so.

V. ARGUMENT

A. Standard of Review

When construing a constitutional amendment, the Court ascertains and gives effect to the intent of the electorate adopting the amendment. *In Re Interrogatory on House Joint Resol. 20-1006*, 2020 CO 23, ¶¶ 30-33. The Court begins with the plain language, and terms in the amendment should be given their ordinary and popular meaning. *Id.* "When the language of an amendment is plain, its meaning clear, and no absurdity involved, constitutional provisions must be declared and enforced as written." *Id.* (quoting *In re Great Outdoors Colo. Tr. Fund*, 913 P.2d 533, 538 (Colo. 1996)). "In enacting legislation, the General Assembly is authorized to resolve ambiguities in constitutional amendments in a manner consistent with the terms and underlying purposes of the constitutional provisions." *Id.* (quoting *Great Outdoors Colo. Tr. Fund*, 913 P.2d at 539). However, where an amendment is self-executing no further action by the legislature is contemplated or necessary. *Davidson v. Sandstrom*, 83 P.3d 648, 658 (Colo. 2004).

Issues of constitutional interpretation are questions of law that are subject to *de novo* review. *Markwell v. Cooke*, 2021 CO 17, ¶ 20.

B. The Independent Legislative Redistricting Commission is an Independent Agency Separate and Apart from the Political Branches.

The two interrogatories accepted and now before the Supreme Court represent unconstitutional infringements and interference by the legislative branch of state government with the constitutional duties assigned to the Legislative Commission when Amendment Z was enacted by 70% of the electorate in the 2018 general election.

The constitutional scheme approved by the electorate was specifically designed to remove legislative redistricting from the influence and control of the two political branches of government, the executive and legislative branches of state government. *See* Colo. Const. art. V, § 46. That section contains several declarations by the people of the state of Colorado, including the practice of political gerrymandering "must end" and that end "is best achieved by creating a new and *independent* commission . . . ." *Id.* at § 46(1)(a), (d). Section 46 laments the past when "political interests" were in charge of redistricting and conducted the process to maintain "their own political power at the expense of fair and effective representation." *Id.* at § 46(e). These declarations establish the intent of the electorate to wrest control of redistricting from the political branches and assign it to the independent Legislative Commission, including the decisions regarding how redistricting is conducted.

Except in very limited circumstances, the Legislative Commission is just that, independent and given the constitutional authority, within the confines of Article V, to set its own rules and regulations and redistrict the state House and Senate. *See* Colo. Const. art. V, § 48(1)(e). In only three instances is the legislative branch assigned a role with the Commission. Two of those cover the same subject matter. The General Assembly "shall prescribe by law" the compensation paid to the panel of judges who select the commissioners of the Legislative Commission. *See* Colo. Const. art. V, § 47(5)(c). Similarly, Article V provides the General Assembly shall appropriate "sufficient funds" to compensate the panel of judges, the nonpartisan staff, pay the expenses of the Legislative Commission, and may appropriate a per diem for the commissioners. *See* Colo. Const. art. V, § 48(1)(d). The third one provides the majority and minority leaders of each house the responsibility of recommending ten qualified applicants each to the panel of judges for consideration and possible selection as commissioners. *See* Colo. Const. art. V, § 47(9)(a).

The role of the executive branch is similarly circumscribed by Article V and limited, like the legislative branch, to issues outside the actual redistricting. The Secretary of State is assigned the duty of investigating and assuring in "an objective and factual" manner whether each commissioner applicant is qualified under the constitutional requirements. *See* Colo. Const. art. V, § 47(2), (6). The Governor

convenes the Commission "no later than March 30 of the redistricting year and appoints a temporary chairperson." *See* Colo. Const. art. V, § 48(1)(a). Executive branch agencies and political subdivisions of the state are required to comply with the Legislative Commission requests for statistical information. *Id.* at § 48(1)(d).

Another indicium of the Legislative Commission's independence is the provision in Article V that places the Commission rules and mapping decisions outside the purview of the state Administrative Procedures Act (the "APA"). Almost all executive branch agencies must comply with the APA, but the electorate intended the Legislative Commission to exist and function outside the administrative laws governing executive agencies. Indeed, Article V assigns the Legislative Commission the responsibility of adopting its own rules and regulations, including rules governing the review of redistricting maps submitted to it.

All of this leads to the conclusion the Legislative Commission is, like the Independent Ethics Commission, an agency separate and apart from either the executive or legislative branches. *In re Colorado Ethics Watch v. Indep. Ethics Comm'n*, 2016 CO 21, ¶ 11 (IEC is an independent constitutionally created commission separate and distinct from both the executive and legislative branches). While Article V does not include, as Article XXIX does, a specific reference to whether or what kind of legislation the legislature may enact regarding the Commission, to allow the

legislature to define what census data the Commission can use or to reallocate the residency of the incarcerated population from the prison census block to their last known address defeats the core purpose of removing redistricting from the political branches. If the legislature can mandate what census data the Legislative Commission may utilize and how that data is allocated, there is nothing to stop a General Assembly from mandating specific kinds of data (*i.e.*, voting age population or citizen voting age population) that forces this Legislative Commission or a future one into partisan redistricting.

C. The Legislative Commission Decides How to Establish, Revise, and Alter the Senatorial and Representative Districts.

When interpreting a constitutional provision enacted by the electorate, a court should look to the electorate's intent. *Gessler v. Smith*, 2018 CO 48, ¶ 18. Words should be given "their ordinary and popular meaning." *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20. Where the meaning is clear, the amendment should be enforced as written. *Id.* Even where the language is "susceptible to multiple interpretations," the amendment should be construed "in the light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Id.* (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)). The primary objectives of Amendment Z were to remove legislative redistricting from control and influence of the political branches of government, and to eliminate the mischief of

drawing politically safe and uncompetitive legislative districts. Those objectives can only be accomplished by preventing the political branches from dictating or interfering with the Legislative Commission's work, especially its authority to determine what data may be utilized and how it should reallocate the electorate with that data.

Article V states, in part, "[a]fter each federal decennial census, the senatorial districts and representative districts shall be established, revised, or altered, and members of the senate and the house of representatives apportioned among them, by the independent legislative redistricting commission." *See* Colo. Const. art. V, § 46(2). Plenary authority to redistrict the legislative districts rests in the Legislative Commission. Article V expressly grants the Commission authority to "provide direction . . . for the development of staff plans through the adoption of standards, guidelines, or methodologies to which nonpartisan staff shall adhere, including standards, guidelines, or methodologies to be used to evaluate a plan's competitiveness . . . ." *See* Colo. Const. art. V, § 48.2(3). After consideration of the initial preliminary plans created by the nonpartisan staff, the Legislative Commission has the authority to adopt standards, guidelines, or methodologies which includes what data the Commission determines it will utilize for subsequent redistricting plans as well as how it will use it.

In Article V, § 48.2(1) the timing of the preliminary plans prepared by the nonpartisan staff must be "presented and published" no earlier than 30 days and no later than 45 days after the Legislative Commission is convened or when "necessary census data" is available whichever is later. It is within the purview of the Legislative Commission to define what is "necessary census data." When Amendment Z passed in the 2018 general election, the intent of the voters was clear. The Legislative Commission was charged with determining what data it would utilize and how it would use it.

S.B. 21-247 and the first interrogatory attempt to impose a definition of "necessary census data" on the Legislative Commission for the preparation of the initial "preliminary Senate plan" and "preliminary House plan" prepared by the nonpartisan staff as well as the subsequent plans prepared after the hearings on the preliminary plans. *See* S.B. 21-247 § 2. The Legislative Commission has determined "necessary census data" means the data necessary to create a preliminary plan given the constitutional purpose of the preliminary plans. The preliminary plans are designed to begin the redistricting process. The Legislative Commission has the constitutional responsibility and authority to interpret the provision that established it. The proposed statutory language clearly violates the intent and plain meaning of the language found in Article V. The Supreme Court should give effect to this language

and find the legislative intrusion on the Legislative Commission's constitutional mandate is unconstitutional. *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004).

Amendment Z is self-executing. Even where an amendment does not include a self-execution clause, courts presume it is self-executing if the amendment "takes immediate effect and there is no need for the legislature to take additional action to implement it." *Developmental Pathways v. Ritter*, 178 P.3d 524, 531 (Colo. 2008). Again, the focus is on the intent behind the amendment. *Id.* Here, the primary intent of the electorate and presumably the legislature, since Amendment Z was referred to the voters by that body, was to remove legislative redistricting from the control and influence of the political branches of government. That intent alone establishes the electorate did not anticipate or desire further legislative action. *Davidson*, 83 P.3d at 658. The 2018 Bluebook confirms this intent. Under the heading "Commission operations," it states "the commission is responsible for adopting rules to govern its administration and operation" which necessarily includes what population data it will utilize and how it will be utilized in drafting redistricting plans. *See* 2018 State Ballot Information Booklet, p. 24, https://leg.colorado.gov/sites/default/files/2018_english_final_for_internet_1.pdf.

D. S.B. 21-247 Includes a Provision for Additional Hearings in Contravention of Article V of the Colorado Constitution.

Although not specifically included in the two interrogatories submitted to the Supreme Court, the Legislative Commission believes it is important to point out another provision in S.B. 21-247 that contravenes the specific authority granted the Legislative Commission in Article V to establish its hearing schedule.

S.B. 21-247 prohibits the Legislative Commission from approving a final plan and submitting it to the Supreme Court for review unless it uses the newly defined "final census data" and holds an additional hearing beforehand. *See* S.B. 21-247, § 2, p. 10. The Court should reject the attempt to define "final census data" for the reasons set forth in Section C of the Legislative Commission's brief. If the political branches control what data is used by the Legislative Commission, one of the primary purposes of Amendment Z, placing redistricting into the hands of a nonpartisan Legislative Commission and out of the control of the political branches, is undermined and reduced to a hollow shell of meaningless words.

The same section is an attempt to control and set, in part, the Legislative Commission's hearing schedule. This new provision unconstitutionally interferes with the Legislative Commission's specific authority to set its hearing schedule. Colo. Const. art. V, § 48(1)(e)(V) provides the Legislative Commission shall adopt rules which set a "statewide meeting and hearing schedule." The Legislative Commission

has the constitutional duty to set its hearing schedule. Article V, section 48.2(5)(b) provides that once the Legislative Commission adopts final plans for the House and Senate, it will submit each to the Supreme Court for its review. S.B. 21-247 mandates the Legislative Commission cannot adopt a final plan until it has held at least one hearing on a plan using the "final census data." Article V, section 48(3)(b) already requires the Legislative Commission hold at least three hearings in each of the seven congressional districts before adopting a final plan. The General Assembly cannot add additional hearing requirements beyond those set forth in Article V. Interposing, by statute, another hearing contravenes the authority of the Legislative Commission to set its own schedule.[2] *Davidson*, 83 P.3d at 658.

E. Imposing upon the Judiciary, by Legislation, a Standard of Review for Constitutional Questions Violates the Province of the Judicial Branch.

The second interrogatory concerns the imposition by the legislature of a standard of review upon the Supreme Court when reviewing a map submitted by the Redistricting Commissions. In essence, the legislature is imposing a standard of review upon the Supreme Court when it reviews the actions of a commission operating, not under statutory authority, but constitutional authority. Imposing such

[2] Article V, sections 48.2(3) and 48(1)(e)(V), gives the Legislative Commission authority to establish a schedule for consideration of the "staff plans" prepared after hearings are completed on the preliminary plans. Within the timing requirements of Article V, the Constitution contemplates the Legislative Commission will set the schedule for the presentation of the staff plans.

a standard, invades the Supreme Court's province and duty to interpret and determine what the constitution means. *Lobato v. People*, 218 P.3d 358, 372 (Colo. 2009); *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1378 (Colo. 1985). While the Redistricting Commissions may sympathize and hope the Supreme Court will use a "substantial compliance standard," the standard of review is directly related to the Supreme Court's ultimate determination of whether the Legislative Commission has complied with the Constitution. Policy and value judgments are committed to the judgment and enactments of the political branches of government while constitutional interpretation falls squarely within the province of the judicial branch. *Markwell,* 2021 CO 17, ¶¶ 30-33 (interpretation of the constitution is the prerogative and responsibility of the judicial branch, even in cases where the actions of another branch of government is at issue). Whether the Supreme Court reviews the Legislative Commission's decisions through the lens of strict compliance, or a more lenient standard, is for the Court to decide. *Id.* at ¶ 45.

The genesis for this provision in S.B. 21-247 is the legislature's belief that if the deadlines found in the Article V cannot be met, the Legislative Commission and its actions may violate the Constitution. However, Article V, section 48.2(5)(c) provides "the commission may adjust the deadlines specified in this section if conditions outside of the commission's control require such an adjustment to ensure adopting a

final plan as required by this subsection (5)." The pandemic and its impact on the decennial census are certainly outside the control of the Legislative Commission and therefore, the Legislative Commission can revise the deadlines and remain in compliance with the purpose of Article V. While the Legislative Commission cannot modify the deadlines found in Article V, section 48.3(4)(a) and (5) regarding the Colorado Supreme Court's review, the Legislative Commission has the constitutional authority to modify those deadlines governing its constitutional responsibilities.

Respectfully submitted this 14th day of May, 2021.

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The undersigned hereby certifies that on the 14th day of May, 2021, a true and correct copy of the foregoing **BRIEF OF THE COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION** was served via the Court Electronic Filing System, upon the following:

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COLORADO SUPREME COURT 2 East 14th Avenue | Denver, CO 80203	
Original Proceeding Pursuant to Article VI, Section 3 of the Colorado Constitution	▲COURT USE ONLY▲
In re Interrogatory on Senate Bill 21-247 Submitted by the Colorado General Assembly	
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COLORADO INDEPENDENT CONGRESSIONAL REDISTRICTING COMMISSION'S BRIEF IN RESPONSE TO INTERROGATORIES

CERTIFICATE OF COMPLIANCE

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

> The brief complies with the word limit set by the Court in its May 6, 2021, Order because it contains 9,495 words.

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

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INTRODUCTION

The core question in this proceeding is whether the General Assembly can defeat the purposes of Amendment Y—which creates an ***independent*** congressional redistricting process, carried out by an ***independent*** Commission—by interposing the decisions of inherently political actors in the Commission's apolitical work. The answer is no.

All parties agree the Commission has taken the steps necessary to address the delays in the 2020 Decennial Census. Indeed, the Commission has already unanimously voted to use available data to draw a preliminary plan and begin the required statewide public comment process, as well as to adjust the deadlines governing its work. The "problem" SB 21-247 purports to solve has already been solved by a unanimous vote of the Commission acting under its constitutional authority.

SB 247 thus creates an unnecessary and dangerous precedent, which strikes at the heart of Amendment Y's design. Through SB 247, the General Assembly—the same inherently political body the people of Colorado overwhelmingly determined should no longer control

redistricting—is now claiming authority to influence and indeed dictate the outcome of redistricting in both this and future years. The Court, in its first time evaluating Amendment Y, in the first year a Commission has been convened under that amendment, should not approve a legislative effort to undermine the very purpose of Amendment Y by allowing a body composed of politicians to make decisions about how congressional lines will be drawn.

CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

A. In 2018, Colorado voters approved Amendment Y, transferring Congressional redistricting authority to an independent Commission insulated from partisan politics.

For decades, the task of congressional redistricting in Colorado—drawing boundaries for congressional districts after every Decennial Census—fell to the General Assembly. Colo. Const. Art. V § 4 (2017). The General Assembly's redistricting efforts, however, have "had a checkered history." *People ex re. Salazar v. Davidson*, 79 P.3d 1221, 1225 (Colo. 2003). In each of the last four cycles, court intervention was required; in three of those cycles, the General Assembly either failed to

pass a plan or passed one that a reviewing court struck down. *Hall v. Moreno*, 2012 CO 1; *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002); *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982).

The most recent round of redistricting illustrates the inherent partisanship of the General Assembly, and how that partisanship often results in gridlock during the redistricting process. In 2011, after the legislature failed to enact a congressional plan, groups of plaintiffs sued to prevent use of the outdated, malapportioned districts. *Hall*, 2012 CO 14, ¶ 4. Finding those outdated districts unconstitutional, the Denver District Court held a 10-day trial and selected a map. *Id.* ¶¶ 4–18. In its decision affirming the trial court, this Court observed that judicial redistricting "forces the apolitical judiciary to engage in an inherently political undertaking." *Id.* ¶ 5. Redistricting, the Court recognized, "is an incredibly complex and difficult process that is fraught with political ramification and high emotions." *Id.* ¶ 1. History has proven that the Colorado General Assembly is unfit for the task, and this Court's precedent makes clear that "[j]udicial redistricting is truly an 'unwelcome obligation.'" *Id.* ¶ 2 (citation omitted).

In the 2018 General Election, Colorado voters chose a different path. Amendment Y created an Independent Congressional Redistricting Commission to take the General Assembly's place in redistricting and to channel judicial intervention to this Court alone at a specified stage of the redistricting process.[1]

The unambiguous purpose of Amendment Y is to remove redistricting authority from the General Assembly and the political branches, placing that authority in the hands of the independent Commission. The language presented to voters on their ballots was clear on this point: "Shall there be an amendment . . . taking the duty to draw congressional districts ***away from the state legislature*** and ***giving it to an independent commission*** . . . ." Colo. Legislative Council, Research Pub. No. 702-2, *2018 State Ballot Information Booklet* ("Blue Book") at 11 (emphasis added).

[1] Amendment Z created a similar commission for the redistricting of state senate and house seats.

The Blue Book informed voters that a "yes" vote on Amendment Y would unambiguously strip the General Assembly of its authority over redistricting to eradicate partisanship from the redistricting process:

- "Amendment Y ***transfers*** the authority to draw congressional district maps ***from the state legislature to*** a newly created Independent Congressional Redistricting Commission." *Id.* at 8 (emphasis added).
- "Amendment Y ***limits the role of partisan politics*** in the congressional redistricting process by ***transferring the legislature's role*** to an independent commission." *Id.* at 10 (emphasis added).
- "These provisions encourage political compromise by ***keeping political parties and politicians*** with a vested interest in the outcome ***from controlling*** the redistricting process." *Id.* (emphasis added).

And of course, the Commission's independence was reflected in its name: the Colorado ***Independent*** Congressional Redistricting Commission.

Amendment Y passed with overwhelming support, receiving "yes" votes from nearly three-quarters of the electorate. *See* Colo. Sec'y of State, *2018 General Election Certificate & Results*, available at https://bit.ly/3bn1G24 (last visited May 14, 2021).

B. Amendment Y is self-executing and grants the Commission sufficient authority and flexibility to complete its constitutionally mandated work, while reserving a defined role for this Court under a specified standard of review.

The language of Amendment Y the voters overwhelmingly approved is set forth in sections 44 through 44.6 of Article V of the Colorado Constitution, attached as Exhibit A. That language is self-executing. The General Assembly is given authority to enact only three ministerial pieces of legislation: setting compensation for judicial panelists who assist in selecting Commissioners, Colo. Const. Art. V § 44.1(5)(c); appropriating "sufficient funds" for Commission expenses, *id*. § 44.2(1)(d); and providing a "per diem allowance" for Commissioners, *id*. Amendment Y gives the General Assembly no other role in the redistricting process, and there is no suggestion, express or implied, that additional legislation need be enacted before the amendment goes into effect.

Indeed, it would make no sense for a constitutional amendment that dispossessed the General Assembly of its redistricting power to require the General Assembly's blessing to come into being.

Developmental Pathways v. Ritter, 178 P.3d 524, 532–33 (Colo. 2008) (holding that "the nature of" an amendment to create an independent constitutional body "suggests that the voters wanted to minimize legislative involvement" and "avoid the possibility that the General Assembly would prevent them from establishing an independent commission"). It could not be more clear that Amendment Y is "a ***limitation*** on the power of the people's elected representatives." *Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994) (emphasis in original).[2]

[2] The General Assembly claims Amendment Y is not self-executing because it does not state explicitly that it is self-executing. Gen. Assembly Br. at 29. An amendment need not state "this amendment is self-executing" to be so. Indeed, voter-initiated amendments are ***presumed*** to be self-executing. *Developmental Pathways*, 178 P.3d at 530–32. Even if Amendment Y was not self-executing, that would not, as the General Assembly claims, give it free rein to legislate. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1238 ("Unfettered authority is especially unlikely in light of the limited authority the Colorado Constitution originally gave to Colorado's General Assembly."). The General Assembly's examples of redistricting legislation, which purportedly demonstrate its "plenary" authority, all ***predate*** Amendment Y.

The purpose of Amendment Y is also clear: "political gerrymandering . . . must end," and this "is best achieved by creating a new and independent commission that is politically balanced, provides representation to voters not affiliated with either of the state's two largest parties, and utilizes nonpartisan legislative staff to draw maps." Colo. Const. Art. V § 44(1)(a)–(b). The Commission has 12 members—four Democrats, four Republicans, and four unaffiliated members—who are selected though a rigorous vetting process. *Id.* § 44.1. Strict limitations on communications among the Commission and its staff, and among its staff and any outside party, ensure the redistricting process is fully independent. *Id.* § 44.2(4).

Once seated, the Commission "shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state." *Id.* § 44(2). This work must comply with specified substantive criteria: "precise mathematical population equality between districts," compliance with the federal Voting Rights Act (which itself reflects constitutional principles of nondiscrimination),

preservation of "whole communities of interest and whole political subdivisions," compactness, and political competitiveness. *Id.* § 44.3.

The Commission is self-contained and autonomous. Its nonpartisan staff are empowered to "acquire and prepare all necessary resources, including computer hardware, software, and demographic, geographic, and political databases." *Id.* § 44.2(1)(b). The Commission may compel state agencies and political subdivisions to provide "statistical information . . . as necessary for its duties." *Id.* § 44.2(1)(d). It has express authority to adopt rules governing its administration and operation. *Id.* § 44.2(1)(e). The Commission—and the Commission alone—may adopt "standards, guidelines, or methodologies to which nonpartisan staff shall adhere" in drawing up redistricting plans. *Id.* § 44.4(3).

The map-drawing process must be fully transparent and must, "to the maximum extent practicable, provide opportunities for Colorado residents" to provide input. *Id.* § 44.2(3). After public comments are received in at least 21 meetings across the State (three in each existing congressional district), adopting a plan based on Amendment Y's

substantive criteria requires an 8–12 vote, including at least two unaffiliated Commissioners. *Id.* § 44.2(2).

Judicial review of the Commission's work is channeled exclusively to this Court. *Id.* § 44.5. The Court must approve the Commission's final plan and can decline to do so only if the Commission "abused its discretion" in applying Amendment Y's substantive requirements. *Id.* § 44.5(2). "[I]n the absence of a commission-approved plan," the Court reviews a staff-submitted plan under the same standard. *Id.* § 44.5(2).

Amendment Y specifies deadlines for the Commission's work. For example, a "preliminary plan," which commences the public comment process, must be presented "no earlier than thirty days and no later than forty-five days after the commission has convened ***or*** the necessary census data are available, whichever is later." *Id.* § 44.4(1) (emphasis added). "Necessary census data" is undefined, and neither this provision nor any other dictates that "necessary census data" be used to draw up preliminary plan. Like Amendment Y generally, the Commission has authority to interpret this provision. Additionally, the Commission may adjust this deadline and all other deadlines that apply to it if

"conditions outside [its] control require an adjustment." *Id.* § 44.4(5)(c). This Court is likewise subject to deadlines in carrying out its judicial review, but Amendment Y is silent as to whether and how those deadlines may be adjusted or excused.

Nowhere does Amendment Y grant authority to the General Assembly to mandate how the Commission conducts its business, what data it must consider and how that data should be adjusted, whether and how deadlines should be changed, or how the Court must review the Commission's work. *Id.* §§ 44–44.6.

C. The Commission has engaged in a considered process to fulfill its constitutional duties, including addressing delays in the delivery of redistricting-level 2020 decennial census data.

All parties to this proceeding agree that this is a challenging redistricting year, and all agree that certain measures must be taken to ensure the redistricting process can be completed in a timely fashion: specifically, (1) commencing the redistricting process using data other than final redistricting-level data from the 2020 Decennial Census and (2) adjusting the Commission's deadlines. But the Commission has

already taken precisely those measures in an entirely reasonable, non-partisan way, using its own constitutional powers.

The Commission first convened on March 15. Since then, it has been working diligently. The full Commission and its committees have held over 30 meetings, records of which are available on the Commission's public website, https://redistricting.colorado.gov.[3] Committees include the Public Comment and Communities of Interest Committee, the Rules and Procedures Committee, the Outside Counsel Committee, and the Map Analytics Committee. The last is responsible for analyzing redistricting criteria, recommending guidelines for map creation, and understanding all population and other data that will inform the Commission's work.

This is an unprecedented year, not only because it is the first time a Commission has been convened under Amendment Y. The pandemic has affected the 2020 Decennial Census, causing delays in delivery of redistricting-level data on which the Commission's final map will rely.

[3] A public "Box" website contains additional Commission materials, available at https://bit.ly/3bq8iwB.

See U.S. Census Bureau, Release No. CB21-RTQ.09, *Statement on Release of Legacy Format Summary Redistricting File* (March 15, 2021), available at https://bit.ly/2SR0kq3. Redistricting-level census data was originally anticipated in April, but the Census Bureau has now informed States that a full data set (in legacy format) will be available in August. *Id.*

A core focus of the Commission's work has been to track these delays and, through its constitutional powers, adjust its procedures and deadlines accordingly. The Commission has received information from the Secretary of State regarding election deadlines in 2022 and how delays in delivery of redistricting-level census data could affect those deadlines. Ex. B, Meeting Minutes. Based on this and other information the Map Analytics Committee agreed at its May 6 meeting to recommend the use of a set of data—which includes the most recent data from the U.S. Census Bureau American Community Survey, the Census Bureau's Master Address file, and data from the Colorado State Demography Office—to prepare a preliminary plan and commence the statewide public comment process required by Amendment Y. *See* Ex.

C, Map Analytics Standing Comm., Report to the Colo. Indep. Cong. Redistricting Comm'n, May 10, 2021, at 1; Ex. D, Meeting Minutes. The Map Analytics subcommittee also recommended adjusting the dates and timelines for the Commission's work in light of the delays in the Decennial Census. Ex. B at 1. With these adjustments and procedural accommodations, the Commission will complete the constitutionally required three public hearings in each congressional district by August 16, 2021. *Id.*

On May 10, the full Commission voted 12–0 to use the recommended datasets to develop a preliminary map, launch the public comment process, and amend its public hearing schedule. Ex. E, Meeting Minutes. With those unanimously approved adjustments, the Commission's staff has begun preparing a preliminary plan and developed a schedule by which its work, and this Court's review, will be completed by the end of this year.

D. Through SB 21-247 and its predecessor statute HB 20-1010, the General Assembly is attempting to impose upon the Commission policy decisions that will directly affect the outcome of redistricting.

During the 2020 legislative session, which was held before the first Commission was selected or convened, the General Assembly passed legislation consistent with Amendment Y, which included necessary appropriations to fund the Commission's work. *See* SB 20-186. That bill passed unanimously. But during that same session—again, before the Commission had even been convened—the General Assembly also passed legislation that went beyond merely ensuring the independent Commission could carry out its duties.

HB 20-1010 defined, for the first time, the term "necessary census data" used in Amendment Y as "the Federal Decennial . . . data published for the state by the United States Census Bureau and ***adjusted*** by the General Assembly's nonpartisan staff." *Id.* § 2-2-902(1)(c) (emphasis added). The "adjustment" reassigns the State's prison population away from the location where they are currently incarcerated, and requires that they be counted where they resided before incarceration. *Id.* § 2-2-902(4) & (5) That "adjustment" is a

discretionary policy choice made by the General Assembly, which would remove the Commission's own discretion on this subject and would thereby directly affect, and apparently dictate, how congressional redistricting plans will be drawn during this and future redistricting cycles. And because the General Assembly is an inherently political entity, the discretionary policy choice reflected by HB 20-1010 is itself necessarily political. The Commission, however, is intended to be ***independent and apolitical***.

It is important to note that HB 20-1010 passed on a nearly party-line vote, with only one Republican voting in favor and one Democrat opposed: 38 to 23 in the House and 19 to 14 in the Senate. It was signed into law by Governor Polis on March 20, 2020. Thus, the policy preference adopted in HB 20-1010 represents an almost purely partisan intrusion into the Commission's functioning, and that intrusion occurred before the first Commission was even chosen or convened.

This is not to condemn or prejudge the wisdom of the policy choice expressed by HB 10-2020. Some of the Commission's members may support that policy, others may oppose it. But it is an indisputable fact

that HB 10-2020 seeks to remove that policy decision from the Commission and force the Commission to abide by General Assembly's own policy choice that population data used for redistricting should be adjusted because of a person's incarceration status, and districts should be drawn based on that adjustment.

The subject of these interrogatories, SB 21-247, would build on and expand HB 20-1010. SB 247 recognizes—for 2021 only—the Commission's constitutional duty and discretion to determine what data it will use to prepare a preliminary redistricting plan, and this presumably ***restricts*** the Commission's authority in this area for future years. *Id.* § 2-2-902(1) (c.5)(I) & (II). It also attempts to ***directly regulate and control*** the Commission's work, and this Court's review of that work, in a number of additional ways:

- First, it would define an entirely new term that appears nowhere in Amendment Y, "final census data," and require the Commission to use that "final census data" in its final plan. SB 21-247 § 2-2-902(1) (c)(I) & (II)(A).
- Second, it would amend HB 20-1010's definition of "necessary census data" to mean "final census data," but with the adjustments for prison population mandated by HB 20-1010. *Id.* § 2-2-902(1)(c.5)(I).

- Third, it would mandate what data must be used by Commission staff to prepare both preliminary and staff plans. *Id.* § 2-2-902(6.5)(a) & (b).

- Fourth, it would prohibit the Commission from approving a final plan until it holds a statutorily required meeting on a plan drawn using the bill's definition of "final census data" as adjusted for the prison population. *Id.* § 2-2-902(6.5)(c).

- Fifth, it would direct that, when courts review any challenge to the Commission's compliance with technical provisions, they must apply a "substantial compliance" standard of review. *Id.* § 2-2-903(2).

While some provisions of SB 21-247 would be automatically repealed in 2023, *see id.* §§ 2-2-902(1)(c)(II)(B) & (c.5)(II)(B), others—including the definition of "final census data" and "necessary census data" and mandated adjustments for prison populations—would remain in effect and would purportedly bind future Commissions.

The General Assembly has attempted to justify SB 247 based on the notion that the Commission must use "necessary census data," whatever its definition, to draw preliminary maps. Thus, SB 247 defines "necessary census data" to mean data that the Commission deems appropriate, rather than final redistricting-level census data that will be available late this summer. House Joint Resolution 21-1008

at 5–6. But as explained above, the Commission has already independently determined that it can and will draw up a preliminary plan based on data that is presently available. SB 247 therefore accomplishes nothing beyond what the Commission has already accomplished on its own—other than, as explained above, imposing the General Assembly's policy choice regarding how data should be adjusted based on prisoner populations.

SUMMARY OF ARGUMENT

I.A. The Court should answer Interrogatory No. 1 in the negative. The defining features of the Commission, as Amendment Y's text and purpose make clear, are that the Commission is ***independent*** of the General Assembly and that it replaces the General Assembly's role in congressional redistricting. Because the Commission is a voter-created constitutional body that is independent of the political branches, the General Assembly's power to legislate must derive exclusively from Amendment Y itself.

B. SB 247 is unconstitutional because it falls outside textual limits on the General Assembly's authority specified in Amendment Y.

The General Assembly must appropriate funds for the Commission's work and set the Commissioners' compensation, but Amendment Y gives the General Assembly no power to ***control how*** the Commission engages in redistricting. SB 247 does just that; it is therefore unconstitutional.

Even putting aside Amendment Y's textual limits on the General Assembly's authority, SB 247 impairs the Commission's independence and is therefore impermissible. SB 247 would mandate how the Commission conducts its business, overriding its discretion in at least six specific areas enumerated by Amendment Y. SB 247 imposes these mandates even though the Commission ***has already taken the steps*** all parties agree are necessary to address the delays in the 2020 Decennial Census. Even more concerning, SB 247 builds on and effectuates partisan legislation meant to directly control the substantive outcome of the 2021 and future redistricting. Because SB 247 impairs the Commission's constitutional independence in these ways, it is unconstitutional.

C. Although SB 247 is unconstitutional, the Court can and should decide the "connected" question of whether the Commission's decision to commence its work using available data is constitutional. The Secretary of State agrees the Court should reach this question. Because Amendment Y provides ample support for the Commission's use of currently available data to prepare a preliminary plan and initiate the statewide public comment process, and to adjust necessary deadlines to allow a final plan to be approved by this Court by the end of the year, the Court should hold that the Commission's decision is permissible under Amendment Y.

II.A. The Court should decline to answer Interrogatory No. 2. The question it presents is unripe and can be addressed by the Court, if at all, during the judicial review contemplated by Amendment Y, when "an entirely different aspect of the whole situation" will likely be presented. Nothing indicates the Commission or this Court will be powerless to address the delays in the 2020 Decennial Census as the Commission conducts its work in the coming months.

B. If the Court answers Interrogatory No. 2, it should answer it in the negative. Because Amendment Y creates a redistricting process independent of the General Assembly, an attempt to dictate a statutory standard of review governing this Court's constitutionally defined role in the redistricting process is unconstitutional.

C. Finally, Amendment Y already specifies a standard of review: the Court is required to uphold a Commission-approved final plan unless (1) the Commission abuses its discretion or (2) the Commission entirely fails to approve a final plan, in which case the Court must review a final plan approved by the Commission's staff. Amendment Y provides no other grounds to reject a Commission-approved plan, and nothing suggests that the Commission will be entirely unable to submit a final plan to the Colorado Supreme Court.

STANDARD OF REVIEW

Although enacted statutes are typically presumed constitutional, there is no presumption of constitutionality when this Court reviews pending legislation under Article VI, Section 3 "because the bill in question has not been passed and the legislature has certified . . . they

are not certain of its constitutionality." *In re Interrog. on H.B. 99-1325*, 979 P.2d 549, 554 (Colo. 1999). This Court thus cannot presume SB 247 is constitutional.

In construing Amendment Y, the Court "must ascertain and give effect to the intent of the electorate adopting the amendment." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). Thus, if "the language of [Amendment Y] is plain, its meaning clear, and no absurdity involved," it must "be declared and enforced as written." *In re Interrogs. relating to the Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo. 1996). And even if Amendment Y is ambiguous, it must be construed to effectuate the voters' intent. The Court must consider "the objective sought to be achieved and the mischief to be avoided" by the provision at issue, and "may consider . . . relevant materials" bearing on voter intent "such as the 'Blue Book" . . . prepared by the Legislative Council." *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009). While voters are deemed to incorporate into an initiated amendment background principles of law as they existed at the time of approval (unless the amendment changed the law), voters are not deemed to incorporate

statutory changes, like HB 20-1010 and SB 247, that post-date the amendment. "A court's interpretation of a constitutional amendment is constrained by consideration of the state of things existing at the time the provision was adopted." *Great Outdoors Colo.*, 913 P.2d at 540.

ARGUMENT

I. Interrogatory No. 1

A. Because Amendment Y explicitly requires the Commission to remain independent and nonpartisan, the political branches cannot dictate how the Commission carries out its redistricting duties.

The unmistakable intent of Amendment Y was to transfer authority over the redistricting process from the General Assembly to the Commission. In other words, Amendment Y was designed to keep politics, and the political branches, out of redistricting. The amendment says as much through its plain text: it creates an "***independent***" commission, which "shall divide the state" into congressional districts, Colo. Const. Art. V § 44(2) (emphasis added); it scrupulously guarantees the Commission's autonomy and independence, *e.g.*, *id.* §§ 44.2(1)(b), (d), (e); it channels and limits the scope of judicial review, *id.* § 44.5; and it assigns the General Assembly only a limited, confined set of

ministerial legislative duties, all of which directly facilitate the Commission's work, *id.* §§ 44.1(5)(c), 44.2(1)(d). Indeed, the most important of those ministerial legislative duties is part of what makes the Commission independent: appropriation of "sufficient funds for the payment of the expenses of the commission [and] the compensation and expenses of nonpartisan staff." *Id.* § 44.2(1)(d).[4]

Nothing in Amendment Y gives the General Assembly authority to dictate what data the Commission must or must not consider in drawing up preliminary or final plans, when the Commission must schedule its meetings, how the Commission must account for the various portions of the population and constituencies across the State, or how to go about drawing preliminary or final plans.

Those functions are vested solely, and explicitly, in the Commission. It is empowered to adopt rules governing its administration and operations, including rules for the hearing process

[4] The Blue Book confirms the purpose of this plain text repeatedly and unambiguously. *E.g.*, *Blue Book* at 10 ("Amendment Y limits the role of partisan politics in the congressional redistricting process by transferring the legislature's role to an independent commission.").

and review of proposed maps. *Id.* § 44.2(1)(e). It has authority to adjust its constitutional deadlines "if conditions outside of [its] control require such an adjustment." *Id.*§ 44.4(5)(c). And it is empowered to adopt "standards, guidelines, or methodologies to which nonpartisan staff shall adhere" in drawing up redistricting plans. *Id.* § 44.4(3). Most importantly, the Commission is granted ***discretion*** to carry out its constitutional duties: the only reason this Court may decline to "approve" a "commission-approved plan" is that the Commission "abused its discretion." *Id.* § 44.5(2). SB 247 violates Amendment Y because it seeks to directly control the Commission and to override its discretion as to every one of the subjects enumerated above.

As an independent, voter-created constitutional body, the Commission "must have the room to exercise" the power granted to it by the people. *Developmental Pathways*, 178 P.3d at 535. And because the Commission is explicitly independent, it must remain "separate and distinct from both the executive and legislative branches." *Id.* at 532. Amendment Y, and Amendment Y alone, "articulates what the General

Assembly can and cannot do." *Colo. Ethics Watch v. Indep. Ethics Comm.*, 2016 CO 21, ¶ 11.

As this Court explained in *Colorado Ethics Watch* when addressing the Independent Ethics Commission, another independent body created by a voter-approved constitutional amendment, "[a]ny authority that the General Assembly may exercise" must "derive[ ] exclusively from [the] Amendment . . . itself." *Id.* Thus, the General Assembly could not "constitutionally enact legislation" governing that independent commission except in the ***specifically enumerated area*** in which the General Assembly was authorized to legislate. *Id.* ¶ 12. The same analysis applies here.

The constitutional amendment that created the Independent Ethics Commission, Article XXIX, does differ from Amendment Y in one respect: Article XXIX contains an express provision prohibiting legislation that would "limit or restrict" the commission's powers. Colo. Const. Art. XXIX § 9. But this language does nothing more than reflect a longstanding general principle of constitutional law, expressed in

numerous decisions of this Court.[5] Given this well-established principle, the minor textual difference between Article XXIX and Amendment Y does not change the basic principle, applicable here, that when an independent body is created by constitutional amendment, that amendment "articulates what the General Assembly can and cannot do." *Colo. Ethics Watch*, 369 P.3d at 272. Nor does it change the reality of this case, which is that the General Assembly is attempting to legislate outside of its constitutional authority and encroach on the Commission's independence.

This case would be quite different if Amendment Y did not explicitly make the Commission independent. The Public Utilities

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[5] *E.g.*, *Buckley v. Chilcutt*, 968 P.2d 112, 119 (Colo. 1998) ("[L]egislation enacted to facilitate the carrying out of the provisions of the Constitution . . . may not avoid or restrict the minimum requirements set out in the Constitution." (citation omitted)); *Yenter v. Baker*, 248 P.2d 311, 314 (Colo. 1952) ("If a legislative act undertakes to limit the provisions of the Constitution, then in a contest, the Constitution survives and the act falls." (citation omitted)); *Baker v. Bosworth*, 222 P.2d 416, 418 (Colo. 1950) ("Only such legislation is permissible as is in furtherance of the purpose, or as will facilitate the enforcement, of such provision, and legislation which will impair, limit or destroy rights granted by the provision is not permissible." (citation omitted))

Commission, for example, was created by statute in 1918 and not mentioned in the state constitution until 1955. Colo. Const. Art. XXV. Not surprisingly, then, the constitution empowers the General Assembly's to restrict—or even supplant—the PUC's authority. *Id.* Accordingly, the General Assembly has passed extensive legislation that controls and directs the PUC's functioning. *See* C.R.S. §§ 40-2-101 *et seq.*; *see also Colo. Energy Advocacy Office v. Pub. Serv. Co. of Colo.*, 704 P.2d 298, 306 (Colo. 1985) ("The Colorado PUC is given power by the Colorado Constitution, . . . and its power is equivalent to that of the legislature ***except as limited by statute***." (emphasis added)).

The Commission sits on the other end of the constitutional spectrum. It was explicitly designed to be free from the control of the General Assembly. The Commission's independence was the primary and most important purpose of Amendment Y. Thus, "[a]ny authority that the General Assembly may exercise" over the Commission's operations must "derive[ ] exclusively from" Amendment Y. *Colorado Ethics Watch*, 2016 CO 21, ¶ 11. And any action the General Assembly

attempts to take with respect to the Commission, if it falls outside the defined authority granted by Amendment Y, is unconstitutional.[6]

B. SB 247 strays beyond the limited role of the General Assembly defined in Amendment Y's text and impermissibly impinges on the Commission's constitutional independence.

The answer to the first interrogatory must be "No" for two related reasons. First, SB 247 reaches beyond the limited grant of authority to the General Assembly articulated in Amendment Y's text. Second, even ignoring the fact that the General Assembly's power to legislate is constrained by Amendment Y's text, SB 247 reaches beyond any implied or plenary authority to legislate on redistricting matters that remains after Amendment Y's approval by the voters.

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[6] Certainly, the General Assembly can facilitate the Commission's functioning through legislation. For example, nothing would prevent the General Assembly from passing legislation to make data or other resources available to the Commission (including data or other resources that would enable the Commission to reassign prisoner populations to districts where they previously resided). What the General Assembly cannot do is "impair, limit, or destroy" the Commission's independence by dictating—in an inherently partisan manner—how the Commission is to engage in the now-independent process of congressional redistricting. *Zaner*, 917 P.2d at 286.

As to specific textual limits on the General Assembly's authority, Amendment Y permits legislation that would affect the Commission's operations in only two areas: compensation and appropriation of funds. Because this text is "plain, its meaning clear, and no absurdity [is] involved," it must be "enforced as written." *Great Outdoors Colo.*, 913 P.2d at 538. Indeed, the only way to enforce Amendment Y as written is to hold that the General Assembly cannot stray beyond its textually limited role. *See Colo. Ethics Watch*, 2016 CO 21, ¶ 12. Amendment Y unambiguously "negate[s] any . . . power in the General Assembly" to dictate the redistricting process through legislation. *See In re Interrogs. Concerning H.B. 1078*, 536 P.2d 308, 319 (Colo. 1975) (considering an earlier version of the legislative redistricting amendments and holding that "the only authority . . . under which the General Assembly" could legislate "must be found in the new sections 46, 47, and 48").

Even if the Court finds Amendment Y ambiguous as to the scope of the General Assembly's authority in redistricting matters, SB 247 is still unconstitutional. Any ambiguity must be resolved "in a manner consistent with the terms and underlying purposes of" Amendment Y.

Great Outdoors Colo., 913 P.2d at 539. The purpose of Amendment Y cannot be clearer: to strip the General Assembly of its previous power over congressional redistricting. *E.g.*, *Blue Book* at 10 ("Amendment Y limits the role of partisan politics . . . by transferring the legislature's role to an independent commission.").

Putting aside Amendment Y's express limitations on the General Assembly's role, SB 247 is invalid for a second reason: as a matter of substance, SB 247 represents an attempt by the General Assembly to impair the Commission's independence in carrying out its constitutional duties. *Zaner*, 917 P.2d at 286 (holding that "legislation which directly or indirectly impairs, limits or destroys rights granted by self-executing constitutional provisions is not permissible"). SB 247 purports to (1) define "necessary census data" and mandate the Commission use that data to draw up a preliminary plan; (2) define an entirely new term, "final census data," mandate that it be adjusted to reflect the General Assembly's policy choice regarding prisoner populations, and require the Commission to use that data in formulating a final plan; (3) dictate what data the staff must use in formulating preliminary and

staff plans; and (4) require the Commission to hold an additional meeting, not required by the constitution, on a plan drawn using the bill's definition of "final census data." Most of these provisions would apply not just in 2021, but in every future redistricting cycle.

Yet Amendment Y vests the Commission and its staff, not the General Assembly, with responsibility over all of these areas. The Commission has responsibility for:

- acquiring "necessary resources, including … demographic, geographic, and political databases" to enable the Commission's work, Colo. Const. Art. V § 44.2(1)(b);
- adopting "standards, guidelines, or methodologies to which nonpartisan staff shall adhere" in the development of plans, *id.* § 44.4(3);
- drawing up a preliminary plan, *id.* § 44.4(1);
- deciding the schedule of its public hearings and how many hearings (if any) it should conduct after the required three in each congressional district, *id.* § 44.2(1)(e)(V) & (3)(b);
- applying the specified substantive criteria in Amendment Y in the specified order of priority, *id.* § 44.3; and
- "adopt[ing] a final plan at any time after presentation of the first staff plan." *Id.* § 44.4(5)(a).

Every provision of SB 247 impairs the Commission's authority and discretion in one or more of the above areas. *Zaner*, 917 P.2d at 286. SB 247 is therefore unconstitutional.

The purported justification for SB 247 is to ensure that, if the Commission develops a preliminary plan and initiates the public comment process without the benefit of final, redistricting-level decennial census data, the Commission's ongoing work might be challenged in court, disrupting the redistricting process. That concern is both speculative and specious.

SB 247 itself recognizes (for 2021 only), that it will have to be ***the Commission*** that decides, in its discretion, what data to use in preliminary plans. SB 21-247 § 2-2-902 (1)(c.5)(II) (purporting to authorize the Commission to use "such other . . . data . . . sources as are approved by . . . the Independent Congressional Redistricting Commission"). The Commission ***has already made that decision*** under its own independent authority in a reasonable, deliberative, and apolitical fashion. Not a single party before the Court disputes the

Commission's decision. SB 247 is therefore unnecessary to serve its purported purpose.

Additionally, nothing in Amendment Y states that "necessary census data," whatever it is defined to mean, must be used to develop a preliminary plan. That term appears only once in all of Amendment Y, and its function is to provide one alternative for the triggering date to commence work on the preliminary plan. Colo. Const. Art. VI § 44.4(1) (stating that a "preliminary plan" must be presented "no earlier than thirty days and no later than forty-five days after the commission has convened ***or*** the necessary census data are available, whichever is later" (emphasis added)). It sets a deadline that can be "adjusted" for reasons outside the Commission's control. *Id.* § 44.4(5). The substantive requirements imposed on the Commission in developing its plans are contained in section 44.3, and that section says nothing at all about "necessary census data." Again, this makes SB 247 unnecessary.

Most concerning, SB 247 does not merely define an undefined term or recognize the Commission's constitutional authority to commence work on a preliminary plan in the absence of final census

data. It goes much further, building on partisan legislation meant to directly control the substantive outcome of the redistricting process.

The General Assembly claims that SB 247 is necessary to address the unusual circumstances of this redistricting year. But the Commission has all necessary tools at its disposal to address those circumstances in exactly the way all parties agree they should be addressed: through use of available data to prepare a preliminary plan and through adjustment of the Commission's deadlines. And the Commission has ***already used the tools at its disposal to do precisely what is necessary to commence the redistricting process***. SB 247 is dangerous because it goes far beyond the exigencies of the moment and would set unnecessary precedent—in ***the very first year*** of Amendment Y's operation—that would significantly impair the Commission's constitutional independence both now and in the future.

In the next redistricting cycle, another party may control the political branches. Blessing the constitutionality of SB 247 now would invite politicians in future years to once again violate the Commission's independence and restart the bitter partisan gridlock that prompted the

voters to approve Amendment Y in the first place. The vision for a redistricting process entirely free from partisan influence, which nearly three-quarters of the State's voters support, would be dead on arrival.

C. Despite SB 247's unconstitutionality, the Court can and should hold that the Commission's decision to commence its work is consistent with Amendment Y.

In answering Interrogatory No. 1 in the negative, the Court can and should hold that the Commission's decision to prepare a preliminary plan and commence the statewide comment process, despite delays in receiving final redistricting-level data from the 2020 Decennial Census, is consistent with Amendment Y. That question is a matter of "purely public rights" that is "connected with" SB 247. *In re Interrogs. of the House*, 162 P. 1144, 1144 (1917) (holding that the Court has jurisdiction over "matters connected [with pending legislation] and pertaining to purely public rights"). Indeed, one justification for SB 247 and this proceeding is to determine whether, as SB 247 states, the Commission may "approve" the use of "other . . . data" to draw up a preliminary plan. SB 21-247 § 2-2-902 (1)(c.5)(II)(A). This Court therefore has jurisdiction to decide the "connected" question of whether

the Commission's independent decision to begin its redistricting work is constitutional. *In re Interrog. on House Joint Resolution 20-1006*, 2020 CO 23, ¶ 27. The Secretary of State agrees. Secretary Br. at 52.

The answer to the question is yes. Amendment Y provides ample support for the Commission's decision to begin its redistricting duties using the data that is currently available.

First, Amendment Y does not require the Commission to wait for "necessary census data" (however defined) to prepare its preliminary plan and commence the public comment process. The availability of "necessary census data" is one alternative triggering date for preparation of a preliminary plan. Colo. Const. Art. V § 44.4(1) (stating that a "preliminary plan" must be presented "no earlier than thirty days and not later than forty-five days after the commission has convened ***or*** the necessary census data are available, whichever is later" (emphasis added)). It is a timing requirement, not a substantive requirement, and it is therefore subject to the Commission's discretion to adjust deadlines as necessary based on circumstances outside the Commission's control. *Id.* § 44.4(5)(c). The only substantive requirements for the Commission's

map-drawing are found in Section 44.3, and that Section says nothing about "necessary census data."[7]

The amendment's requirements for a preliminary plan are formal, not substantive. Along with the preliminary plan, the Commission's staff must "explain": "how the [preliminary] plan was created," how it "addresses the categories of public comments received," and how it "complies" with criteria in Section 44.3 (including equal population, compliance with the Voting Rights Act, and communities of interest). *Id.* § 44.4(1). Using the sources of data it has identified, the Commission can satisfy those formal requirements and provide the necessary explanation. The Census Bureau released apportionment data showing Colorado's total population count of 5,782,171. Based on the Census Bureau's apportionment-level population data, the Commission must draw eight congressional districts. This means the size of each district

[7] "Precise mathematical population equality," the first substantive mandate of Section 44.3 and the defining characteristic of "one person, one vote," requires that the Commission's final plan be based on the final 2020 redistricting-level census data. The Commission has made clear it will use that data in any plan eligible to be approved by the Commission as final and sent to this Court for review.

must be as close as possible to 722,171. The Commission, ***as all parties agree***, has access to data that will allow it to reasonably estimate where Colorado's population lives across the state, including the most recent data available from the Census Bureau's American Community Survey and data from the State Demography Office. Based on this data, the Commission's staff can prepare a preliminary plan and provide the explanation necessary to allow the public comment process to proceed.

Second, Amendment Y explicitly authorizes the Commission to change any deadline that governs its work, including the deadline to prepare a preliminary plan. Section 44.4(c) provides that "[t]he commission may adjust the deadlines specified in this section if conditions outside of the commission's control require such an adjustment." "This section" refers to Section 44.4, and the deadline to prepare a preliminary plan is set forth in Section 44.4(1), defined to include "no later than forty-five days after the commission has convened." Additionally, it is undisputed that the delays in the redistricting-level census data are "outside of the commission's control."

Thus, under the ordinary meaning of Amendment Y, the Commission is explicitly authorized to present its preliminary plan now, and to adjust any other deadlines as necessary during its work over the coming months. *Bolt v. Arapahoe Cty. Sch. Dist. No. Six*, 898 P.2d 525, 532 (Colo. 1995) (the Court must follow the plain meaning of the constitution).

Third, read as a whole, Amendment Y demonstrates that the purpose of the preliminary plan is to allow meaningful public input in the redistricting process, through three mandatory meetings in each of Colorado's existing congressional districts. Colo. Const. Art. V § 44.4(2) (describing "public hearings on the ***preliminary plan*** in several places throughout the state" (emphasis added)). Significantly, Amendment Y allows public comment ***even before*** the preliminary plan is published. *Id.* § 44.4(1). Indeed, the public has already submitted, and continues to submit, proposed maps to the Commission for the Commissioner's and staff's consideration, without the benefit of a preliminary plan and without the availability of final redistricting-level census data. This shows that final data from the 2020 Decennial Census is not a

prerequisite, as a constitutional or practical matter, to the meaningful public participation the preliminary plan is meant to facilitate.

The delays in the redistricting-level census data require the Commission to move forward with a preliminary plan as best as it can, consistent with Amendment Y's requirements. Commencing work now will give the Commission the best opportunity to complete its duties in time for the Court to review a final plan and approve it by the end of the year. Amendment Y's text and purposes require nothing more, and the Commission's decision to proceed in preparing a preliminary plan and commencing the statewide public comment process is therefore constitutional.

II. Interrogatory No. 2

A. The question presented by Interrogatory No. 2 is not ripe.

The Supreme Court should decline to answer Interrogatory No. 2 because the question it presents is unripe, and it would be inappropriate for the Court to prejudge that question when it may be addressed, if at all, during the judicial review mandated by Amendment Y. *See In re Interrogs. Concerning Senate Resolution No. 5*,

578 P.2d 216, 217 (Colo. 1978) (declining to answer an interrogatory for reasons of ripeness, because facts necessary to decide the question were unclear). No current or imminent controversy exists over the standard that will apply to this Court's review of the Commission's work or the Court's compliance with any of Amendment Y's deadlines. Interrogatory No. 2 thus fails to raise an "important question[ ] upon [a] solemn occasion[ ]" that requires this Court's extraordinary intervention. Colo. Const. Art. VI § 3.

This Court has declined to answer interrogatories propounded by either the General Assembly or the Governor when legal questions raised by the interrogatories would otherwise "reach [the] Court in due course" in a case that might present "an entirely different aspect of the whole situation." *In re Interrogs. Concerning House Bill 456*, 281 P.2d 1013, 1015 (Colo. 1955). The Court's longstanding practice of declining review based on considerations of ripeness reflects the extraordinary nature of interrogatory jurisdiction, which must be exercised with the "utmost vigilance and caution." *In re Interrog. by Governor*

Hickenlooper, 2013 CO 62, ¶ 36, 312 P.3d 153, 161 (Márquez, J., dissenting) (collecting cases).

If a legal question—even an important question relating to public rights—may reach this Court "through the regular judicial channels," the Court's practice has been to stay its hand. *In re Interrogs. by Governor Vivian*, 141 P.2d 899, 902 (Colo. 1943); *see also In re Interrogs. Submitted by Gen. Assembly on House Bill 04-1098*, 88 P.3d 1196, 1197 (Colo. 2004) (stating that it cannot resolve the question posed by an interrogatory "at this time"); *In re House Bill No. 1503*, 428 P.2d 75, 77 (Colo. 1967) (declining to engage in "hasty consideration" of an issue at the request of the Governor); *In re Interrogs. Concerning House Bill 456*, 281 P.2d at 1015 ("Should we answer the questions, there is no positive certainty that our conclusions in this sort of proceeding would be correct, and certainly they would not be final."). Amendment Y creates the Commission, the only body in Colorado that may engage in congressional redistricting, and it provides the sole and exclusive avenue through which the Commission's work is to be subject to judicial review. Colo. Const. Art. V § 44.5. The appropriate course is to allow the

Commission to perform its constitutional duty to adopt a final redistricting plan and await this exclusive judicial "channel." *Interrogs. by Governor Vivian*, 141 P.2d at 902.

SB 247 is based on speculation that the Commission and Supreme Court will, in the coming months, be unable to fulfill their constitutional duties under Amendment Y. SB 21-247 § 2-2-903(1)(a) (claiming that the Commission "will ***likely*** be unable to adopt final plans" and the Court "will ***likely*** be prevented from approving or disapproving such maps" by Amendment Y's deadlines (emphasis added)). The Commission—like the General Assembly, the Secretary of State, and the Governor—is keenly aware of the extraordinary circumstances presented by this redistricting year. The Commission as a whole, its subcommittees, its members, and its nonpartisan staff have all been working diligently to address those circumstances. They have been deciding what data will be used to prepare a preliminary plan and carefully considering the schedule by which the Commission can realistically perform its duties consistent with the substantive requirements of Amendment Y. The Commission strongly believes,

based on this careful work, that it can and will submit a "final plan" to the Colorado Supreme Court with sufficient time for the Court to "approve the plan" as required by Amendment Y.

SB 247 assumes that, even if some deadlines in Amendment Y are exceeded, the Commission and this Court will be powerless to address the problem. Nothing in Amendment Y suggests this will be the case, and Amendment Y commands that the Commission be given the opportunity to perform its constitutionally mandated role without premature interference from this Court and without ***any*** interference from the General Assembly. To the extent SB 247 reflects a concern about interference by other courts, including federal courts, case law addresses that concern directly.[8] And regardless of those deadlines, the

[8] Specifically, courts must refrain from inserting themselves into the redistricting process unless and until "it becomes clear" that the body assigned the task of redistricting "is ***unable or unwilling***" to complete it. *Hall*, 270 P.3d at 963 (citation omitted; emphasis added); *see also Avalos v. Davidson*, No. 01 CV 2897, 2002 WL 1895406, at *1 (Colo. Dist. Ct. Jan. 25, 2002), *aff'd sub nom. Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002) (explaining that "redistricting after a census is the responsibility of the state legislature," and courts should intercede only in extreme circumstances); *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state

Court must review the Commission's final plan and may decline to approve the Commission's final plan ***only*** if the Commission abuses its discretion or "in the absence of a commission-approved plan." Colo. Const. Art. V § 44.5(2) (stating that the Court "shall approve the plan" adopted by the Commission and may review an alternative staff plan only "in the absence of a commission-approved plan").

Interrogatory No. 2 is therefore an unnecessary attempt to prejudge the standards of review governing the Commission's work based on assumptions that may never come to pass. "[A]n entirely different aspect of the whole situation" may, and likely will, be presented by the time of this Court's review of the Commission's final plan later this year. *In re Interrogs. Concerning House Bill 456*, 281 P.2d at 1015.

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reapportionment nor permit federal litigation to be used to impede it."). Thus, courts have waded into the redistricting process in Colorado only where, for example, the legislature repeatedly failed to submit a plan, *Avalos*, 2002 WL 1895406 at *1, the legislature's plan was plainly unconstitutional, *Hall*, 270 P.3d at 964, or the legislature failed to act in a timely manner despite "having had an adequate opportunity to do so." *Beauprez*, 42 P.3d at 648. None of these conditions are present here and none are likely to arise.

B. The General Assembly does not have authority to dictate a standard of review to judge the Commission's work.

If the Supreme Court addresses the substance of Interrogatory No. 2, it should answer the interrogatory in the negative. Section 3 of SB 247 may have appeal as a practical matter, and the Court itself may have grounds to consider adoption of the "substantial compliance" standard for various aspects of Amendment Y if that becomes necessary during the Court's review of the Commission's final plan. But in light of Amendment Y's requirement of redistricting independence, the General Assembly lacks authority to impose a ***statutory*** standard of review on the ***constitutionally mandated*** functions of the Commission and this Court in redistricting matters.

In adopting Amendment Y, the voters deliberately and unambiguously removed the General Assembly from the redistricting process. Colo. Const. Art. V § 44(1)(b) ("The public' interest . . . is best achieved by creating a new and ***independent*** commission . . . . (emphasis added)); *Blue Book* at 10 ("Amendment Y limits the role of partisan politics in the congressional redistricting process by

transferring the legislature's role to an independent commission."). The voters instead vested redistricting authority solely in the Commission, with limited judicial review by this Court alone. Within this new constitutional framework, Amendment Y contemplates only limited functions for the General Assembly: setting the compensation for judicial panel members who assist in choosing Commissioners, Colo. Const. Art. V § 44.1(5)(c); appropriating "sufficient funds" for the Commission's expenses, *id.* § 44.2(1)(d); and setting a per diem allowance for Commissioners, *id.*

Nowhere in Amendment Y did the voters authorize the General Assembly to dictate the standard by which the Commission's actions must be judged or the Court's judicial review must be conducted. Amendment Y is even more restrictive of the General Assembly's role than Amendment 41, the voter-initiated amendment that created the Independent Ethics Commission. Amendment 41, in contrast to Amendment Y, includes an express grant of general lawmaking authority to the General Assembly. Colo. Const. Art. XXIX § 9 ("Legislation may be enacted to facilitate the operation of this article,

but in no way shall such legislation limit or restrict the provision of this article . . . ."). Despite that grant of general lawmaking authority, the General Assembly is "constitutionally prohibited from enacting legislation that could upend" certain Commission decisions on judicial review. *Colo. Ethics Watch*, 2016 CO 21, ¶ 13. Amendment Y includes no such grant of lawmaking authority to the General Assembly, and its language clearly indicates that no legislation can be enacted that would be contrary to its fundamental purpose of creating an independent redistricting process.

Nor does any other article of the constitution grant the General Assembly the authority it seeks to exercise here. No such provision is cited anywhere in SB 247 or in House Joint Resolution 21-1008. By contrast, the General Assembly's adoption of the "substantial compliance" standard for the Uniform Election Code, C.R.S. § 1-1-103, is based on the Constitution's express command that the General Assembly "***shall*** pass laws to secure the purity of elections, and guard against abuses of the elective franchise." *See* Colo. Const. Art. VII § 11 (emphasis added).

The General Assembly's attempt to mandate the "substantial compliance" standard may be well intentioned, but it is nevertheless an impermissible attempt to directly control the functions of the Commission and this Court in carrying out their independent duties under Amendment Y.

C. The Constitution already establishes the standard of review the Court must use to review the Commission's final plan.

Finally, the General Assembly's attempt to establish a statutory standard of review contained nowhere in Amendment Y's text conflicts with the explicit language of the amendment itself. Specifically, section 44.5 of Amendment Y establishes the only standard by which the Court may invalidate the Commission's final plan:

> The supreme court ***shall review*** the submitted plan and determine whether the plan complies with the criteria listed in section 44.3 of this article V.
>
> . . .
>
> The supreme court ***shall approve*** the plan submitted unless it finds that the commission or nonpartisan staff, in the case of a staff plan submitted in the absence of a commission-approved plan, ***abused its discretion*** in

> applying or failing to apply the criteria listed in section 44.3 . . . .

Colo. Const. Art. V § 44.5(1)–(2) (emphasis added). Under this unambiguous language, unless the Commission (1) abuses its discretion in applying Amendment Y's substantive criteria or (2) fails entirely to pass a final plan and thereby creates an "absence of a commission-approved plan," the Court may take no action other than to approve the Commission's final plan. Amendment Y provides no other grounds to reject a final plan adopted by the Commission.

SB 247's "substantial compliance" standard is impermissible and unnecessary. The Commission must approve a final plan, and the Court must likewise approve that final plan consistent with Amendment Y. Nothing suggests that when the Commission submits its final redistricting plan to this Court in the coming months, the Court will lack authority to review that plan despite the exceptional circumstances of this year and the challenges those circumstances have placed on the Commission to complete its constitutionally mandated work.

CONCLUSION

Interrogatory No. 1 should be answered in the negative. The Court should decline to answer Interrogatory No. 2 or, in the alternative, answer it in the negative.

Dated: May 14, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 14, 2021, a true and correct copy of **COLORADO INDEPENDENT CONGRESSIONAL REDISTRICTING COMMISSION'S BRIEF IN RESPONSE TO THE COLORADO GENERAL ASSEMBLY'S INTERROGATORIES** was filed with the Court via the Colorado Courts E-Filing System, with e-service to the following:

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