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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.

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Respectfully submitted,

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