

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue, Denver, Colorado, 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to Article VI, Section 3 of the Constitution of the State of Colorado</p>	
<p>In Re Interrogatory on Senate Bill 21-247 Submitted by the Colorado General Assembly</p>	
<p><i>Attorneys for the Colorado Independent Legislative Redistricting Commission:</i></p> <p>Richard C. Kaufman, #8343 LAW OFFICE OF RICHARD C. KAUFMAN PC, INC. 6464 S. Newport Court Centennial, CO 80111 303.564.6633 rkaufmanco@gmail.com</p> <p>Timothy R. Odil, #35771 PETERS SCHULTE ODIL & WALLSHEIN LLC 6125 Sky Pond Drive, Suite 250 Loveland, CO 80538 970.672.1876 todil@noco.law</p>	<p>Case No.: 2021 SA 146</p>
<p style="text-align: center;">BRIEF OF THE COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION</p>	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 32, including all formatting requirements set forth in this rule. I certify that the petition complies with the Court's May 6, 2021 Order since it contains 3,646 words.

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

Dated: May 14, 2021

s/ Richard C. Kaufman

Richard C. Kaufman, #8343
LAW OFFICE OF RICHARD C. KAUFMAN PC, INC.

Timothy R. Odil, #35771
PETERS SCHULTE ODIL & WALLSHEIN LLC

*Co-counsel for the Colorado Independent Legislative Redistricting
Commission*

I. TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE 2

I. TABLE OF CONTENTS..... 3

II. TABLE OF AUTHORITIES 4

III. ISSUES PRESENTED..... 6

IV. STATEMENT OF THE CASE..... 7

V. ARGUMENT..... 11

 A. Standard of Review 11

 B. The Independent Legislative Redistricting Commission is an Independent Agency Separate and Apart from the Political Branches. 12

 C. The Legislative Commission Decides How to Establish, Revise, and Alter the Senatorial and Representative Districts. 15

 D. S.B. 21-247 Includes a Provision for Additional Hearings in Contravention of Article V of the Colorado Constitution..... 19

 E. Imposing upon the Judiciary, by Legislation, a Standard of Review for Constitutional Questions Violates the Province of the Judicial Branch..... 20

CERTIFICATE OF SERVICE 23

II. TABLE OF AUTHORITIES

Cases

<i>Colorado General Assembly v. Lamm</i> , 704 P.2d 1371 (Colo. 1985).....	21
<i>Colorado Ethics Watch v. Senate Majority Fund, LLC</i> , 2012 CO 12.....	15
<i>Davidson v. Sandstrom</i> , 83 P.3d 648 (Colo. 2004).....	11, 18, 20
<i>Developmental Pathways v. Ritter</i> , 178 P.3d 524 (Colo. 2008).....	18
<i>Gessler v. Smith</i> , 2018 CO 48.....	15
<i>In re Colorado Ethics Watch v. Indep. Ethics Comm’n</i> , 2016 CO 21.....	14
<i>In re Great Outdoors Colo. Tr. Fund</i> , 913 P.2d 533 (Colo. 1996).....	11
<i>In Re Interrogatory on House Joint Resol. 20-1006</i> , 2020 CO 23.....	11
<i>Lobato v. People</i> , 218 P.3d 358 (Colo. 2009).....	21
<i>Markwell v. Cooke</i> , 2021 CO 17.....	11, 21
<i>Zaner v. City of Brighton</i> , 917 P.2d 280 (Colo. 1996).....	15

Constitutional Provisions & Statutes

Colo. Const. art. V.....7, 20

Colo. Const. art. V, § 46 12

Colo. Const. art. V, § 46(2)..... 16

Colo. Const. art. V, § 47(2)..... 13

Colo. Const. art. V, § 47(5)(c) 13

Colo. Const. art. V, § 47(6)..... 13

Colo. Const. art. V, § 47(9)(a) 13

Colo. Const. art. V, § 48(1)(a) 14

Colo. Const. art. V, § 48(1)(d).....13, 14

Colo. Const. art. V, § 48(1)(e) 13, 19, 20

Colo. Const. art. V, § 48(3)(b)..... 20

Colo. Const. art. V, § 48.2(1) 17

Colo. Const. art. V, § 48.2(3) 16

Colo. Const. art. V, § 48.2(5)20, 21

Colo. Const. art. V, § 48.3 22

13 U.S.C. § 141(c).....7, 8, 9

Other Authorities

Senate Bill 21-247 6, 9, 10, 17, 19, 20, 21

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 statutes, 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.

LAW OFFICE OF RICHARD C. KAUFMAN PC, INC.

s/ Richard C. Kaufman

Richard C. Kaufman, #8343

- and -

PETERS SCHULTE ODIL & WALLSHEIN LLC

s/ Timothy R. Odil

Timothy R. Odil, #35771

Co-counsel for the Colorado Independent Legislative Redistricting Commission