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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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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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