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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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Case No. 2021SA146

THE GOVERNOR AND ATTORNEY GENERAL'S INTERROGATORY ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

> It contains 6,338 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b)

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

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

s/ Michael McMaster

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INTERROGATORY PRESENTED

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

2) Is the provision of Senate Bill 21-247 that directs a court to apply the standard of substantial compliance when adjudicating a legal proceeding that challenges the lack of compliance with the technical requirements for the redistricting process established in the state constitution and related statutes, such as the timing of this court's review of a commission's first approved map or a staff map when the commissions is unable to adopt a plan by the deadline to do so, constitutional? [1]

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

INTRODUCTION

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

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

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

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

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

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

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

STATEMENT OF THE CASE AND FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICABLE LEGAL STANDARDS

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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