



HOUSE JOINT RESOLUTION 21-1008

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

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

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

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

WHEREAS, In sections 44 and 46 of article V of the state constitution, the people declared that they wanted and deserved a "redistricting process that provides the public with the ability to be heard as redistricting maps are drawn, to be able to watch the witnesses who

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

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

- Nonpartisan staff prepares and presents a preliminary redistricting plan to each commission, to be completed between May 1 and May 15;
- The commissions conduct numerous public hearings on the preliminary plans in locations across the state, to be completed by July 7 for the congressional commission and by July 21 for the legislative commission, allowing at least five weeks for the public hearings to be held;
- The commissions provide direction to nonpartisan staff, who then prepares and presents up to three staff plans to each commission, which the commissions review, consider, and possibly amend;
- Each commission approves a plan to be submitted to the Colorado Supreme Court, by September 1 for the congressional commission and by September 15 for the legislative commission. If a commission is unable to approve a plan by the deadline specified in the state constitution, nonpartisan staff submits the unamended third staff plan to the Colorado Supreme Court.
- The Colorado Supreme Court either approves each commission's plan or sends the plan back to the commission with the reason for its disapproval, by November 1 for the congressional commission and by November 15 for the legislative commission; and
- The Colorado Supreme Court gives final approval to the congressional redistricting plan by December 15 and the legislative redistricting plan by December 29; and

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

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

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

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

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

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

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

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

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

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

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

WHEREAS, If the commissions are delayed in submitting the final plans to the Colorado Supreme Court, it is likely the court will not be able to approve or disapprove the plans by November 1 for the congressional commission and by November 15 for the legislative commission; and

WHEREAS, If the commissions cannot begin the public hearing process prior to the release of the final census data, there is likely to be substantially less public discussion of the proposed district boundaries in the preliminary and staff plans and their adherence to the criteria specified in sections 44.3 and 48.1 of article V of the state constitution, contrary to voter expectations when they adopted Amendments Y and Z; and

WHEREAS, It is to the public's benefit for redistricting to be completed and the new district boundaries known well in advance of the 2022 primary election so that potential candidates can make decisions about whether to run for office and meet the deadlines for nomination by petition or assembly that precede the primary election; and

WHEREAS, If the start of the redistricting processes is delayed until approximately September 30, 2021, when receipt of the final form of data from the United States Census Bureau is anticipated, it is possible that election events such as precinct caucuses and the primary election will need to be delayed as well, allowing less time for voters to consider and choose among candidates for United States Senate and statewide elected offices, as well as candidates in the newly drawn districts for Representatives in Congress and members of the Colorado State Senate and House of Representatives, and potentially creating conflicts with related deadlines in federal law for the 2022 general election; and

WHEREAS, To achieve the voters' intent stated in Amendments Y and Z to allow sufficient opportunities for public input, to minimize disruption to and uncertainty in the 2022 election calendar, and to comply with the constitutional mandates and timelines for public input, Senate Bill 21-247 was introduced in the Senate of the Seventy-third General Assembly on April 16, 2021; and

WHEREAS, Senate Bill 21-247:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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