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SUPREME COURT
STATE OF COLORADO

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 House Joint Resolution 20-1006 Submitted by the Colorado General Assembly.

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Case No. 2020SA00100

COMBINED BRIEF OF THE GOVERNOR AND THE ATTORNEY GENERAL OF THE STATE OF COLORADO

CERTIFICATE OF COMPLIANCE

I hereby certify that this Combined Brief of the Governor and the Attorney General of the State of Colorado complies with all requirements of C.A.R. 28 and C.A.R. 32, as reasonably applicable to a brief submitted in a matter arising under article VI, section 3, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limit set in the Court's March 16, 2020 Order. It contains 7,466 words (of the 9,500 permitted under the March 16, 2020 order).

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

s/ Russell D. Johnson

Signature of attorney or party

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INTERROGATORY PRESENTED

Does the provision of section 7 of article V of the state constitution that limits the length of the regular legislative session to "one hundred twenty calendar days" require that those days be counted consecutively and continuously beginning with the first day on which the regular legislative session convenes or may the General Assembly for purposes of operating during a declared disaster emergency interpret the limitation as applying only to calendar days on which the Senate or the House of Representatives, or both, convene in regular legislative session?

STATEMENT OF THE CASE AND FACTS

In the 1980s, Colorado voters acted to preserve their part-time, citizen legislature by amending the state constitution to limit a regular legislative session to 120 "calendar days." The 120-day provision does not state whether the days must be counted consecutively. The provision also does not suggest that voters intended the General

Assembly be deprived of the full 120 calendar days in which it may legislate when circumstances beyond its control prevent it from meeting during its regular session.

The General Assembly adopted rules to clarify the constitutional language. Those rules provide that the Assembly will count days consecutively from the start of the session to the 120th day with one exception: if a public health disaster outside of the General Assembly's control that causes widespread infections—such as COVID-19—disrupts the regular session, then the General Assembly only counts "working calendar days" during that disaster.

This narrow exception—triggered not at the General Assembly's discretion but upon the Governor's declaration of a qualifying disaster emergency—is consistent with the voters' intent that the General Assembly be a part-time, citizen legislature and provides flexibility to the General Assembly to fulfill its obligations responsibly while the State is facing a public health crisis.

This Court should hold that for the purpose of operating during a declared public health disaster emergency, the General Assembly reasonably gave meaning to section 7 of article V of the state constitution by allowing it to count only calendar days when at least one chamber of the General Assembly is in session against the 120-calendar-day limit.

I. Colorado voters amended the state constitution to preserve the General Assembly as a part-time, citizen legislature by limiting the number of days it could meet in regular session.

Prior to 1982, the General Assembly's operations varied by year. In odd years, the Assembly held a general session where it set the agenda. In even years, the Assembly held a more limited session where the governor determined the agenda. *See* "An Analysis of 1982 Ballot Proposals," LEGIS. COUNCIL OF THE COLO. GEN. ASSEM. 20 (Aug. 19, 1982) ("1982 Blue Book") (relevant excerpts attached as Appendix A).

In 1982, the Assembly referred a measure to voters to remove the governor's authority to set the even-year agenda. S. Con. Res. No. 1, 53rd Gen. Assem., 2d Reg. Sess. (Colo. 1982). The Assembly included a

limit of 140 "calendar days" for even-year sessions in the measure. *Id.* § 1. As explained to voters, the 140-day limit was intended to maintain the Assembly as a "part-time, citizen legislature." 1982 Blue Book at 21. Voters approved the change and amended the constitution.

The 1982 amendment, however, created a situation where even-year sessions were limited to 140 days, but odd-year sessions had no limit. The Assembly moved to address this issue in 1988 when it referred a new measure to voters, asking that the voters limit all regular sessions to 120 "calendar days." S. Con. Res. No. 1, 56th Gen. Assem., 2d Reg. Sess. (Colo. 1988).

As explained to voters, "The proposal [was] necessary to maintain the 'citizen legislature' which has existed since statehood." "An Analysis of 1988 Ballot Proposals," LEGIS. COUNCIL OF THE COLO. GEN. ASSEM. 6 (Aug. 16, 1988) ("1988 Blue Book") (relevant excerpts attached as Appendix B). The arguments for the proposal extolled the virtues of having a diverse set of legislators who represented "[a] variety of professional and occupational backgrounds, and the social and

demographic composition of the various communities" in Colorado. *Id.* The 1988 Blue Book also informed voters that the significant time commitment of participating in the General Assembly led some legislators to leave office. *Id.*

The 120-calendar-day limit was intended to require the General Assembly to act efficiently without harming its ability to legislate effectively. As the 1988 Blue Book noted, "State legislatures in other states of comparable or greater population are in session fewer days per year than Colorado and appear to meet their responsibilities." *Id.* The expectation was that "critical or important issues" could be dealt with during the 120 days and emergencies arising after a regular session ended could be dealt with through a special session. *Id.*

Voters again agreed, favoring a part-time, citizen legislature and granting the legislature 120 calendar days in which to legislate. As a result, the state constitution now reads, "Regular sessions of the general assembly shall not exceed one hundred twenty calendar days." COLO. CONST. art. V, § 7 ("Section 7").

II. The General Assembly adopted a rule that limits the length of a regular session with one narrow exception for public health disasters that make it dangerous for the General Assembly to meet.

The Colorado Constitution vests each house of the General Assembly with the "power to determine the rules of its proceedings." COLO. CONST. art. V, § 12. Exercising that authority, the General Assembly adopted Joint Rules 23(d) and 44. H.R.J. Res. No. 1014, 54th Gen. Assem., 1st Reg. Sess. (Colo. 1983) (adopting Joint Rule 23(d)); H.R.J. Res. No. 1003, 57th Gen. Assem., 1st Reg. Sess. (Colo. 1989) (amending Joint Rule 23(d)); S.J. Res. 2009-004, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009) (adopting Joint Rule 44). Taken together, these rules clarify the application of the constitution's 120-day rule.

Joint Rule 23(d) is the general rule. It provides, "The maximum of one hundred twenty calendar days … shall be deemed to be one hundred twenty consecutive calendar days." COLO. LEGIS. RULES, JOINT

RULES OF THE SEN. & H.R., Rule 23(d) (Dec. 2019) ("Joint Rule 23(d)").[1] Joint Rule 23(d) provides one additional detail not included in Section 7: days count toward the 120 calendar-day limit consecutively.

Joint Rule 44 allows the General Assembly to deviate from Joint Rule 23(d)'s consecutive-counting rule only when three conditions—all of which are beyond the General Assembly's control—are met:

1. The governor "declares that the state of Colorado is in a state of disaster emergency";
2. The emergency is "caused by a public health emergency infecting or exposing a great number of people to disease, agents, toxins, or such other threats"; and
3. The governor has activated the Colorado emergency operations plan.

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[1] A complete copy of the Joint Rules is available at https://www.leg.state.co.us/CLICS/cslFrontPages.nsf/FileAttachVw/2019Rules/$File/2019CombinedLegislativeRules.pdf (last visited Mar. 24, 2020). Joint Rules 23 and 44 were also provided to the Court with the General Assembly's Interrogatory.

COLO. LEGIS. RULES, JOINT RULES OF THE SEN. & H.R., Rule 44(a) (Dec. 2019) (stating when Joint Rule 44 applies). If all three conditions are satisfied, then the General Assembly counts only "working calendar days" against the 120-day limit instead of consecutive calendar days. COLO. LEGIS. RULES, JOINT RULES OF THE SEN. & H.R., Rule 44(g) (Dec. 2019) ("Joint Rule 44(g)"). Once the emergency is over, Joint Rule 23(d) automatically applies again. *Id.*

Joint Rule 44 has never been triggered before now, and it is easy to see why. Joint Rule 44's conditions focus on the rare situation where it would be dangerous for the General Assembly to meet and conduct legislative business in session. The danger of holding daily sessions of the General Assembly during an ongoing public health crisis caused by a disease infecting large numbers of people is readily apparent, particularly since, by law, the public must have access to those sessions. COLO. CONST. art. V, § 14.

III. Colorado faces a public health emergency that makes participation in the very public and interactive legislative process dangerous.

COVID-19 represents a public health crisis on a scale unseen since the 2009 enactment of Joint Rule 44. In response to this crisis, the Governor issued an executive order declaring a disaster emergency and activating the state emergency operations plan. Exec. Order No. D 2020 003, "Declaring a Disaster Emergency due to the Presence of Coronavirus Disease 2019 in Colorado" (Mar. 11, 2020) (Appendix C). In subsequent orders, the Governor required a wide variety of organizations and businesses—from schools to ski resorts—to close for prolonged periods of time to protect public health. Exec. Order No. D 2020 007, "Ordering Suspension of Normal In-Person Instruction at All Public and Private Elementary and Secondary Schools in the State of Colorado Due to the Presence of COVID-19" (Mar. 18, 2020) (Appendix D); Exec. Order No. D 2020 004, Ordering Closure of Downhill Ski Resorts due to the Presence of COVID-19 in the State of Colorado" (Mar. 14, 2020) (Appendix E).

The Colorado Department of Public Health and Environment similarly issued a sweeping public health order shutting down a wide variety of facilities. Am. Pub. Health Order 20-22, "Closing Bars, Restaurants, Theaters, Gymnasiums, Casinos, Nonessential Personal Services Facilities, and Horse Track and Off-Track Betting Facilities Statewide," COLO. DEP'T OF PUB. HEALTH & ENV'T (Mar. 16, 2020, amend. Mar. 18, 2020) (Appendix F). Even the Colorado State Capitol has been ordered closed to the general public indefinitely. *See* "State Capitol Closed to Public Indefinitely," COLO. STATE CAPITOL (Mar. 18, 2020).[2] Normal daily activities are significantly disrupted.

The disruption has also been felt by the courts. Chief judges throughout Colorado have issued orders modifying their courts' normal procedures. *See, e.g.*, Admin. Order 2020-05 (21st Jud. Dist. Mar. 18, 2020) (Appendix G). Jury trials have been delayed; oral arguments have been vacated; and hearings are being converted to teleconferences when

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[2] *Available at* https://www.colorado.gov/pacific/capitol/news/state-capitol-closed-public-indefinitely (last visited Mar. 21, 2020).

possible. *See, e.g.*, Order of Court, *People v. Roddy*, Case No. 2017CA2267 (Mar. 16, 2020) ("The Court of Appeals is vacating all oral arguments scheduled between March 17, 2020 and April 30, 2020."); Admin. Order 2020-01 (2d Jud. Dist. Mar. 16, 2020) at 3, 5 (converting civil division hearings to teleconferences and cancelling jury calls with return dates between March 17, 2020 and May 15, 2020) (Appendix H).

The General Assembly has also been impacted. The State barred public gatherings of more than ten people to control the spread of COVID-19. Pub. Health Order 20-23, "Implementing Social Distancing Measures," COLO. DEP'T OF PUB. HEALTH & ENV'T (Mar. 18, 2020) (Appendix I). But such gatherings in which citizens express their opinions regarding legislation are a pillar of the democratic process. The legislators and their staff also represent a substantial number of people—people who gather in a large group while in session and then disperse throughout the state, potentially accelerating the spread of COVID-19 in Colorado. Thus, while the order exempts the General Assembly, the danger remains. *Id.* at 3.

To protect the public and its members, on March 14, 2020, the General Assembly adjourned until March 30, 2020. *See* H.R.J. Res. 2020-1006, 72d Gen. Assem., 2d Reg. Sess. (Colo. 2020) at 2–3 (stating why the Assembly would likely adjourn); H.R.J. Res. 2020-1007, 72d Gen. Assem., 2d Reg. Sess. (Colo. 2020) (adjourning the Assembly until March 30, 2020). Following that adjournment, one General Assembly member tested positive for COVID-19, further highlighting the risk to both legislators and members of the public with whom they interact. Jesse Paul, *Colorado lawmaker tests positive for coronavirus*, THE COLO. SUN (Mar. 23, 2020).[3] It remains very possible that the existing adjournment of the General Assembly will extend well beyond March 30, 2020 and even beyond the 120th consecutive calendar day from the start of its current session.

Because some have voiced uncertainty over whether the Joint Rules satisfy the constitution, and a subsequent ruling that they do not

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[3] *Available at* https://coloradosun.com/2020/03/23/jim-smallwood-coronavirus/ (last visited Mar. 24, 2020).

would cast doubt on any work done after May 6, 2020 (the 120th consecutively counted day from the beginning of the session), the General Assembly sought the Court's guidance. The Governor and the Attorney General are grateful for the Court's consideration of this issue. The Court's answer will significantly impact the General Assembly's ability to respond to this emergency, as well as carry out all of its regular duties.

APPLICABLE LEGAL STANDARDS

Two sets of interpretive principles apply here: (1) the principles applicable when interpreting constitutional amendments, and (2) the principles governing constitutional challenges to legislative rules.

Interpretation of a Constitutional Amendment. 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). The Court first looks to the amendment's plain language and applies it as written if it is unambiguous. *Gessler v. Smith*, 419 P.3d 964, 969 (Colo. 2018). To be unambiguous, the

amendment must be reasonably susceptible to only one interpretation. *Id.*

If the plain language is reasonably susceptible to more than one interpretation, it is ambiguous. *Id.* Courts interpret ambiguous amendments "in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Zaner*, 917 P.2d at 283. To do so, the Court may examine relevant materials, including the ballot information booklet ("Blue Book") provided to voters at the time of the amendment's adoption. *Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004) (quoting *In Re Submission of Interrogatories on H.B. 99-1325*, 979 P.2d 549, 554 (Colo. 1999)). Preceding legislative debates, however, are not relevant because the Court's analysis must focus on what the *electorate* believed when it adopted the amendment. *In Re S. Res. No. 2 Concerning Constitutionality of House Bill No. 6*, 31 P.2d 325, 330 (Colo. 1933); *see also Davidson*, 83 P.3d at 655 ("The intent of the drafters, not expressed in the language of the amendment, is not relevant to our inquiry.").

Constitutionality of Legislative Rules. This Court has repeatedly recognized that statutes receive a presumption of constitutionality. *See, e.g.*, *People v. Ford*, 773 P.2d 1059, 1062 (Colo. 1989). The same logic supports giving legislative rules the same presumption, as the Court of Appeals has done. *Grossman v. Dean*, 80 P.3d 952, 964 (Colo. App. 2003).

The presumption of constitutionality arises from the Court's conclusion that legislators act in good faith to uphold their oaths to the constitution. *In re S. Res. No. 2*, 31 P.2d 325, 329–30 (Colo. 1933); *see also City of Greenwood Vill. v. Petr's for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000) (The reason for the presumption is the "foundational premise" that each branch of government "observe[s] and effectuate[s] constitutional provisions in exercising their power."). Similar to statutes, the General Assembly adopts legislative rules under a specific grant of constitutional authority and through a formal process. COLO. CONST. art. V, § 12 ("Each house shall have power to determine the rules of its proceedings …."); *see, e.g.*, S.J. Res. 2009-004,

67th Gen. Assem., 1st Reg. Sess. (Colo. 2009) (adopting Joint Rule 44). Therefore, the presumption of constitutionality applies to legislative rules. Any person challenging a legislative rule must prove that the rule is unconstitutional beyond a reasonable doubt for this Court to declare it void. *See Greenwood Vill.*, 3 P.3d at 440.[4]

In addition to the general presumption, the General Assembly is entitled to clarify ambiguities in the constitution "in a manner consistent with the terms and underlying purposes of the constitutional

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[4] In a previous interrogatory, this Court indicated that the presumption of constitutionality is inapplicable when "the bill in question has not been passed and the legislature has certified to us that they are not certain of its constitutionality." *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999). That holding does not apply here because Joint Rule 44 has already been passed. S.J. Res. 2009-004, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009). Indeed, its passage appears to have been unanimous. S. Journal at 26, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009) (reporting vote of 33 "yes" and 0 "no" votes with 1 excused); *Introduction and Consideration of S.J.R. 09-004*, 67th Gen. Assem., 1st Reg. Sess. (Colo. H.R. Jan. 9, 2009) at 6:28–6:46 (recording of voice vote with no audible opposition). Not applying the presumption would discard the assumption that the legislators that passed Joint Rule 44 acted in a manner consistent with their oaths of office. Respect for a co-equal branch of government should stay the Court's hand in doing so here.

provisions." *In re Great Outdoors Colo. Tr. Fund*, 913 P.2d 533, 539 (Colo. 1996). And, "[w]here possible, courts should adopt a construction of a constitutional provision in keeping with that given by coordinate branches of government." *Id.* at 538. Taken together, these rules place a heavy burden on a constitutional challenge to a legislative rule.

SUMMARY OF THE ARGUMENT

The Colorado Constitution's requirement that a regular session of the General Assembly may not exceed "one hundred twenty calendar days" is ambiguous because it does not state whether the days must be counted consecutively or in some other manner. While this language demonstrates a desire for a limited session, it provides no guidance regarding what should occur when circumstances outside of the legislature's control prevent the General Assembly from meeting.

Exercising its constitutional authority, the General Assembly adopted rules clarifying the constitutional language and filling this gap. These rules count the 120 days consecutively except when the Governor has declared a specific type of public health disaster emergency, in

which case only "working calendar days" count for the duration of the emergency.

The General Assembly's rules are consistent with the voters' intent. Voters adopted the 120-day limit to protect the General Assembly's status as a part-time, citizen legislature while still giving it enough time to legislate. The General Assembly's rules foster both goals by making it easier for individuals to serve in legislative office while reserving time for the General Assembly to legislate when events entirely out of its control disrupt the regular session.

Rejecting the General Assembly's rules threatens to cripple government. It would deprive the General Assembly of much needed flexibility during a public health crisis and place legislators in the position of choosing between their families' and their own personal safety, and their obligations to their constituents. It would also require legislators to consider proceeding under circumstances that limit—or even exclude—the public's direct access to the legislative process.

The General Assembly's rules regarding the 120-day limit cannot be shown to be unconstitutional beyond a reasonable doubt. Indeed, they are constitutional because they clarify an ambiguity in the constitution in a manner consistent with the voters' intent. This Court should affirm their constitutionality.

ARGUMENT

I. While Section 7 demonstrates an intent to limit the legislature's term, it is ambiguous because its plain language does not address how to count the 120 calendar days permitted in a regular session.

Section 7 provides, "Regular sessions of the general assembly shall not exceed one hundred twenty calendar days." COLO. CONST., art. V, § 7. While this language limits a regular session to 120 "calendar days," it sheds no light on how the days should be counted.[5] It could mean

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[5] While the use of "calendar days" avoids the issue of what counts as a "day," it does not answer whether the days must be consecutive. For example, the Wyoming Supreme Court has held that "a day commencing at noon means a day closing at noon the following day." *White v. Hinton*, 30 P. 953, 955 (Wyo. 1892). "Calendar days" avoids such an interpretation.

consecutive days. It could mean days of the week excluding Saturday, Sunday, and holidays. It could mean any combination of non-consecutive days, so long as the total count does not exceed 120 calendar days.[6]

Indeed, case law from other jurisdictions demonstrates that referring to a "day" or a "calendar day" does not necessarily mean consecutive days. For example, the Wyoming Supreme Court has noted, "Whether the limitation of 40 days means 40 consecutive days, or 40 days of actual legislative session, … is a question upon which there seems to be some conflict of judicial opinion." *White*, 30 P. at 955. And the Alabama Supreme Court has held that days when both houses of that State's legislature are adjourned do not count when determining if its legislature has been in session for "longer than fifty days," as prohibited in the Alabama Constitution. *In re Opinions of the Justices*,

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[6] Section 2-4-108, C.R.S., which uses consecutive days for measuring periods of time, does not answer the question here because to the extent it conflicts with Joint Rule 44, the joint rule is the more specific of the two and would control. § 2-4-205, C.R.S.

113 So. 621, 622 (Ala. 1927) (interpreting ALA. CONST. art. IV, § 48) (citing *Moog v. Randolph*, 77 Ala. 597, 608 (1884)).[7]

Looking at how some other state constitutions determine when their legislative sessions must end only further demonstrates Section 7's ambiguity:

- North Dakota: "No regular session of the legislative assembly may exceed eighty natural days …. Days spent in regular session need not be consecutive …. As used in this section, a "natural day" means a period of twenty-four consecutive hours." N.D. CONST. art. IV, § 7.
- Washington: "During each odd-numbered year, the regular session shall not be more than one hundred five consecutive days." WASH. CONST. art. II, § 12.

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[7] Citing the case law from Alabama and Wyoming, one leading treatise states, "Where a session is limited to a specified number of days, *courts usually hold the provision to mean legislative working days, rather than consecutive days*." Norman Singer & Shambie Singer, 1 SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 6:7 (7th ed. Oct. 2019) (emphasis added).

- Oklahoma: "[T]he regular session shall be finally adjourned sine die not later than five o'clock p.m. on the last Friday in May of each year." OKLA. CONST. art. V, § 26.

Section 7 lacks this level of clarity, leaving it reasonably susceptible to at least two relevant interpretations: (1) A regular session of the General Assembly cannot exceed 120 consecutive calendar days; or (2) A regular session of the General Assembly is limited to 120 calendar days and must be completed within 120 consecutive calendar days except when deviating from consecutively counting days is consistent with the overarching goal of ensuring a part-time, citizen legislature.

In short, Section 7 is ambiguous.

II. The General Assembly's interpretation of Section 7 is consistent with the voters' intent because it maintains the part-time, citizen legislature voters intended by adding the 120-day limit to the constitution.

Because Section 7 is ambiguous, the question becomes whether the General Assembly's rules clarify those ambiguities "in a manner consistent with the terms and underlying purposes of the constitutional

provisions." *In re Great Outdoors Colo. Tr. Fund*, 913 P.2d 533, 539 (Colo. 1996). They do.

A. Voters adopted the 120-day limitation to maintain the General Assembly as a part-time, citizen legislature while still giving it sufficient time to legislate.

The 1982 and 1988 Blue Books provide the strongest guidance on why the voters chose to limit the number of days in a regular session because they provide insight into what voters understood about the provisions. *In Re S. Res. No. 2 Concerning Constitutionality of House Bill No. 6*, 31 P.2d 325, 330 (Colo. 1933). Both Blue Books make clear that the purpose behind their respective amendments was to maintain a part-time, citizen legislature while giving the General Assembly sufficient time to legislate.

For example, the 1982 Blue Book advised voters that the purpose behind including the then-140-day limit was to "assur[e] continuation of the part-time, citizen legislature" while providing the General Assembly enough time "to meet forseeable [sic] workloads." 1982 Blue Book at 21–22.

The 1988 Blue Book similarly stated, "The proposal is necessary to maintain the 'citizen legislature' which has existed since statehood." 1988 Blue Book at 6. It argued that the 120-day limit would require the legislature to be more efficient but also noted, "State legislatures in other states of comparable or greater population are in session fewer days per year than Colorado and appear to meet their responsibilities. Critical or important issues can be considered and acted upon within this time limitation." *Id.* This language again expresses the concern that the General Assembly have sufficient time to legislate and contemplated that the full 120 calendar days would be available for that purpose.

Thus, as explained to voters, the amendments' objectives were to maintain the part-time, citizen legislature Colorado has enjoyed since statehood in a way that would still provide enough time to legislate. The General Assembly's rules are consistent with these goals.[8]

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[8] It is this consistency with the electorate's goals that prevents Joint Rule 44 from running afoul of this Court's admonition that the fact of

B. The General Assembly's rules promote a part-time, citizen legislature by providing certainty in normal times and addressing the unique challenges a public health crisis presents in a way that encourages Coloradans from all walks of life to serve in legislative office.

The General Assembly gave effect to the voters' intent through Joint Rules 23(d) and 44(g). Joint Rule 23(d) provides that the 120 days of the legislative session will be counted consecutively. This is the most conservative approach for counting days and results in the shortest possible session when compared to other possible interpretations. Joint Rule 23(d) also provides the greatest level of certainty for legislators regarding when a session will end, enabling them to order their non-

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an emergency does do not itself create exceptions to clear constitutional language. *See In Re S. Res. No. 2*, 31 P.2d at 332 (criticizing the United States Supreme Court for approving "emergency legislation" that would be considered unconstitutional "in times of prosperity"). Unlike in *In Re Senate Resolution No. 2*, the General Assembly's interpretation of Section 7 is consistent with the voters' intent. *See id.* at 330, 332 (comparing the nature of the bill at issue with "the purpose of the people in adopting" the relevant constitutional provision).

legislative citizen affairs appropriately and predictably. This promotes the General Assembly's status as a part-time, citizen legislature by providing greater predictability and available time for legislators to manage their non-legislative responsibilities. This, in turn, makes it easier for regular citizens to be members of the legislature, as the voters intended.

Joint Rule 44 similarly promotes the General Assembly's status as a part-time, citizen legislature by pausing the consecutive-counting rule in the rare event of a public health disaster. First, Joint Rule 44 fosters a citizen legislature by assuring lawmakers that if there is a public health disaster, they will not have to choose between remaining at the legislature to represent their constituents or returning home to protect their health and support their families and communities.

Instead, once the emergency has passed, they can return to the legislature to finish the session, representing their constituents after the public health crisis has abated without sacrificing some or all of the available calendar days remaining under the 120-day limit. Providing

that flexibility makes it more—not less—likely that every-day citizens from all walks of life can be legislative members.

Second, pausing the consecutive counting of days during a public health crisis ensures that Colorado will have a functioning legislature if such a crisis occurs by guaranteeing that the General Assembly receives the full 120 days voters granted it to exercise its broad authority to legislate. Without Joint Rule 44, a public health crisis arising early in the regular session could deprive Coloradans of an effective legislature in the first instance. One hundred twenty days was the amount of time voters chose to grant to the General Assembly, believing that was a sufficient period of time for the Assembly to meet. Joint Rule 44 ensures that, in times of public health crises, legislators receive that full period to fulfill their legislative responsibilities.[9] In addition, it protects the

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[9] To be clear, all that happens when the conditions for Joint Rule 44 exist is that the consecutive counting of days pauses and only working calendar days count toward the 120-day limit. To use the current circumstances, every calendar day from the beginning of the session until the Governor declared a public health disaster emergency would count. Until the public health disaster emergency ends, only days on

legislators' health by not requiring them to work during a public health emergency, and it protects the ability of citizens to engage safely in the legislative process.

Finally, Joint Rule 44 is unlikely to deter anyone from seeking legislative office because the conditions that satisfy the rule will so rarely come to pass. Joint Rule 44(a) (governing when Joint Rule 44 applies). This public health crisis represents the first time the rule has been triggered and likely the first time the conditions the rule requires have been present in at least 60 years.[10] Thus, the possibility that a regular session may not end after 120 consecutively counted days in the

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which at least one of the General Assembly's houses meets will count. And once the public health disaster emergency ends, the General Assembly must automatically resume counting consecutive calendar days toward the 120-day limit. Joint Rule 44 does not grant the General Assembly additional days to conduct official business.

[10] The Federal Emergency Management Agency maintains a database of all federal disaster declarations since 1953 by state. Given the type of disaster necessary for Joint Rule 44 to apply, a corresponding disaster declaration at the federal level would have been likely. No such declaration appears for Colorado when searching that database. https://tinyurl.com/tgvq8uz (last visited Mar. 22, 2020).

event of a public health crisis does not undermine the goal of having a part-time, citizen legislature.

In promoting both goals behind the 1982 and 1988 amendments, the General Assembly's rules are "consistent with the terms and underlying purposes of the constitutional provisions." *In re Great Outdoors Colo. Tr. Fund*, 913 P.2d 533, 539 (Colo. 1996). The Court should affirm their constitutionality.

C. Nothing in the information provided to voters demonstrates that the General Assembly's rules are unconstitutional beyond a reasonable doubt.

As explained above, the General Assembly developed joint rules consistent with the voters' intent in adopting the 1982 and 1988 amendments. Although some statements in the Blue Book appear, at first blush, to create some doubt regarding the rules' constitutionality, they do nothing of the sort on closer examination. And even if they raised questions, these statements still would not demonstrate that the General Assembly's rules are unconstitutional beyond a reasonable doubt.

1. The discussion of a special session as a response to a crisis occurring after adjournment has no bearing on the issue here and would be an inadequate remedy to the problem Joint Rule 44 seeks to solve.

In justifying the 120-day limit, the 1988 Blue Book notes, "State emergencies which may arise *in the legislative interim* can still be addressed through special sessions …." 1988 Blue Book at 6 (emphasis added). Some might argue that this language supports the use of special sessions to address emergencies.

But the rules at issue here contemplate a crisis during the regular session—not the legislative interim. The language from the 1988 Blue Book does not address the remedy for an interrupted regular session. In fact, the statements in the Blue Book all presume that the General Assembly will have full use of the 120 days the amendment allows.

A special session is also an inadequate remedy for an interrupted regular session for two reasons. First, if the governor calls the special session, the legislature is bound by whatever subject matter the governor chooses. COLO. CONST. art. V, § 7 (providing that the Assembly

may only legislate in areas specified by the party calling the special session). This provision allows the governor to choose the areas in which the legislature may legislate instead of maintaining the broad authority the legislature enjoys during a regular session. *Colo. Gen. Assem. v. Lamm*, 704 P.2d 1371, 1380 (Colo. 1985) ("In broad outline, it is the province of the general assembly to enact legislation and the province of the executive to see that the laws are faithfully executed.").

Second, the idea that a special session the governor calls could serve as a remedy is also inconsistent with the primary reason for the 1982 amendment: ending the practice of the governor setting the legislative agenda in even-year sessions. 1982 Blue Book at 21–22. To argue that a special session called by the governor is the remedy for losing the ability to legislate during the regular session is to disregard the voters' intent in passing the 1982 amendment. This argument would also deprive voters of their elected officials' ability to consider legislation that may not be aligned with the governor's call for the special session.

The General Assembly's ability to call a special session is also an inadequate remedy for three reasons. One, the General Assembly would still be bound by whatever topics it included in the call for a special session. COLO. CONST. art. V, § 7 Although the Assembly could attempt to write the topics broadly, uncertainty remains regarding how broad the scope of a special session may be before running afoul of the constitution. *Denver & R. G. R. Co. v. Moss*, 115 P. 696, 697 (Colo. 1911) (holding unconstitutional legislation enacted under broadly phrased special session); *but see Empire Savings, Bldg. & Loan Ass'n v. Otero Savings & Loan Ass'n*, 640 P.2d 1151, 1156 n. 8 (Colo. 1982) (criticizing *Moss* in *dicta*).

Two, two-thirds of both houses must agree to call a special session. COLO. CONST. art. V, § 7. Because legislators will know the kinds of legislation to be introduced in the special session based on the legislation that was at issue before the regular session was disrupted, they may choose to withhold their support for a special session unless particular topics are expressly excluded or included in the special

session's "call" for topics to be addressed.[11] This essentially imposes a super-majority requirement on the lawmaking process that undermines the constitution's directive that bills pass on a majority vote. COLO. CONST. art. V, § 22.

Three, presuming that a special session's "call" allows for bill subjects to be considered that were terminated during the regular session and would have otherwise been enacted, a special session—called by either the governor or the General Assembly—would reset the legislative process for those bills. If the General Assembly were forced to start anew with a special session, the 355 bills pending in the current regular session would either be limited from introduction by the special

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[11] The "call" is a term used to refer to the document that delineates the specific topics to be considered at a special session. *See, e.g.*, Exec. Order No. D 2012-010, "Call for the First Extraordinary Session of the Sixty-Eighth General Assembly," (May 10, 2012) (Appendix J) ("EO 2012-010"). The 2012 call demonstrates the governor's authority to limit the session to those topics the governor believes the General Assembly should consider. *Id.* at 1–2.

session "call"; or, if allowed under the "call," subject to reintroduction at the initial starting point of the legislative process.

Starting the process over because of an intervening public health crisis places unnecessary burdens on Coloradans and undermines the intent behind the 120-day limit. Members of the public who already testified regarding a bill during the interrupted session would need to attend new hearings during the special session to ensure their voices were heard.[12] If the bill followed the same committee process, they

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[12] For example, in the 2012 special session, at least ten people attended two separate hearings on two separate days on a bill dealing with penalties for driving under the influence that had been part of the 2012 regular session. *Hearing on H.B. 12S-1005 Before the H. Comm. on State, Veterans, and Military Affairs*, 68th Gen. Assem., 1st Extraordinary Sess. (Colo. May 14, 2012); *Hearing on H.B. 12S-1005 Before the S. Comm. on State, Veterans, and Military Affairs*, 68th Gen. Assem., 1st Extraordinary Sess. (Colo. May 15, 2012); *compare* S.B. 12-117, 68th Gen. Assem., 2d Reg. Sess. (Colo. 2012) *and* H.B. 12S-1005, 68th Gen. Assem., 1st Extraordinary Sess. (Colo. 2012). At least some of these individuals had already testified on the bill in the regular session. *Compare Hearing on H.B. 12S-1005 Before the H. Comm. on State, Veterans, and Military Affairs*, 68th Gen. Assem., 1st Extraordinary Sess. (Colo. May 14, 2012) *and Hearing on S.B. 12-117 Before the S. Comm. on State, Veterans, and Military Affairs*, 68th Gen. Assem., 2d Reg. Sess. (Colo. Feb. 27, 2012)

would even be making the same arguments on the same bills to the same legislators. This is a considerable burden, particularly for Coloradans living outside the Denver metropolitan area. Moreover, starting over would require substantial additional time to repeat procedures for those bills that are well underway, requiring the legislature to remain in session for a *longer* period of time—or to short-circuit the process for evaluating complex legislation.[13] In either case, starting the process over undercuts the goal of a part-time, citizen legislature that produces effective results for the people of Colorado.

In short, a special session is an inadequate remedy for an interrupted regular session.

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[13] It would be tempting to point to the 2012 special session, which lasted three days, to argue that a special session would not necessarily result in either of these problems. H. Journal at 7, 26, 68th Gen. Assem., 1st Extraordinary Sess. (Colo. 2012) (noting ready for business on May 14, 2012 and adjournment *sine die* on May 16, 2012)). But the 2012 special session was limited to issues that had been thoroughly vetted by the General Assembly in the regular session. EO 2012-010 at 1-2. It did not include bills that had never been subjected to the full legislative evaluation process, as would be the case with a special session called to compensate for a public health disaster.

2. The desire to prevent changes to the 120-day limit by statute or rule does not invalidate the General Assembly's rules.

The 1988 Blue Book also explained that by placing the 120-day limitation in the constitution, "the limitation cannot be changed by statute or legislative rule." 1988 Blue Book at 6. This is true to the extent it means that the General Assembly has no power to change the 120-day limit to 200 days, for example. Indeed, it appears to have been related to the argument against the proposal that there may be years when 120 days is insufficient and locking the requirement into the constitution would deprive the General Assembly of the ability to modify the length of the session to handle those issues. *Id.*

But the General Assembly's rules do not modify the 120-day limit. They reasonably clarify the limit the voters put in place.

To the extent the voters intended to prevent legislative manipulation of the 120-day limit, that concern does not arise here. *See Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996) (explaining courts should consider the "mischief" to be prevented in interpreting a

constitutional amendment). The General Assembly's rules do not vest it with the discretion to avoid the 120-day limit. Indeed, the conditions to trigger Joint Rule 44 rarely occur, are entirely outside of the legislature's control, and are subject to the governor's declaration of a public health disaster, removing any possible specter of legislative manipulation.[14] The same is true regarding when Joint Rule 44 ceases to operate. Once the disaster emergency is over, Joint Rule 23(d) automatically applies again.

The General Assembly's rules clarify the application of the 120-day limit in a way that supports the voters' desire to maintain a part-time, citizen legislature. The rules are consistent with the constitution—and at the very least not unconstitutional beyond a reasonable doubt—and the Court should uphold them.

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[14] Indeed, a rule that was open to legislative manipulation would likely be inconsistent with the voters' intent in adopting the 1988 amendment. Such a rule could not pass constitutional muster.

III. Holding the General Assembly's interpretation unconstitutional threatens to cripple government.

In cases involving a different constitutional amendment that places some limitations on government, this Court has applied the principle that it will not interpret constitutional amendments in a way that cripples government. *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (applying this principle in context of article X, section 20 ("TABOR")); *see also Dwyer v. State*, 357 P.3d 185, 196 (Colo. 2015) (Márquez, J., dissenting) (applying the same principle in context of article IX, § 17). Here too, voters intended to place some limits on the General Assembly, but they did not intend to cripple the government's ability to function.

That is exactly what would happen if Section 7 were read to require that days be counted consecutively without exception. Requiring consecutive counting in all situations would deprive the General Assembly of flexibility at the exact moment it needs it most.

During a public health crisis the General Assembly may not have sufficient time to plan around it and prioritize legislation as it could with other emergencies. Such a crisis may also make it unsafe for the General Assembly to meet and consider bills that need to pass—as happened here—or to meet under circumstances that would limit public access to the legislative process. Beyond certain obvious candidates such as passage of the annual Long Appropriations Act, School Finance Act, and rule review bill,[15] any number of regulatory regimes may need to be reauthorized as part of a sunset review. Yet, in a strict consecutive-only approach, the General Assembly may not be able to act unless it can later convince the governor to call a special session or obtain the super majority needed to call its own special session. That may not always be possible.

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[15] The annual rule review bill approves new agency rules unless the rules are specifically listed as expiring in the bill. *See, e.g.*, Administrative Rule Review, 2019 Colo. Sess. Laws 1896. Failing to pass the rule review bill would cause substantial harm to administrative agencies.

Further, a strict, consecutive-only interpretation places the General Assembly in a very challenging situation. Its members can forgo the opportunity to legislate on matters important to their constituents; or they can stay in session but receive limited or no public comment because the disaster forces citizens to avoid the State Capitol, making the process much less democratic; or they could remain in regular session and place themselves and their constituents in the position of either participating in the democratic process or protecting their health. The recent example of a legislator contracting COVID-19, which could spread to other General Assembly members or members of the public, only highlights the risk.

It is also unclear how a consecutive-only approach would be consistent with section 20 of article IV of the state constitution, which requires that every bill referred to committee be considered on its merits. During a public health crisis, the General Assembly may not be able to return by the end of a consecutive 120-day period to hold hearings on every bill referred to committee. Consequently, all pending

bills remaining on the House and Senate calendars, including those not having yet met the constitution's requirement of consideration on the merits, will be terminated upon adjournment *sine die*. And even if the General Assembly is able to return before the 120th consecutive day, there may not be enough time for a vote and consideration on the merits of all of the previously pending bills.

A strict consecutive-only approach could require the General Assembly to either violate the constitution's requirement that all bills receive a vote and consideration on the merits or to return within the 120-day period—but before it is actually safe to do so—solely to comply with this requirement. That cannot be what the constitution requires.

By contrast, Joint Rules 23(d) and 44 avoid all of these issues in the event of a public health crisis. They safeguard the health of the public and lawmakers, promote democratic engagement, and allow the General Assembly to uphold its constitutional obligations. And they do so in a way that furthers the voters' overall intent in adopting the 120-day limit. The General Assembly's rules permissibly clarify the

application of the 120-day limit, and this Court should affirm their constitutionality.

CONCLUSION

The General Assembly has reasonably interpreted Section 7's requirement that regular legislative sessions may not exceed 120 calendar days. The Court should hold that in a declared disaster emergency, as contemplated in Joint Rule 44, the 120-day limitation applies only to calendar days on which the Senate or the House of Representatives, or both, convene in regular legislative session.

Respectfully submitted this 24th day of March 2020,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **COMBINED BRIEF OF THE GOVERNOR AND THE ATTORNEY GENERAL OF THE STATE OF COLORADO** upon all parties listed below by Colorado Courts E-Filing or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 24th day of March, 2020, addressed as follows:

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