

<p>SUPREME COURT, STATE OF COLORADO  2 East 14th Avenue  Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to  COLO. CONST., art. VI, § 3</p> <hr/> <p>In Re: Interrogatory on House Joint Resolution 20-1006  Submitted by the Colorado General Assembly.</p>	
<p>GREENBERG TRAURIG, LLP</p> <p>TROY A. EID  Atty. # 21164  JOSIAH E. BEAMISH  Atty. # 52445  1144 15<sup>th</sup> St., Suite 3300  Denver, CO 80202  Phone: 303-572-6500  Fax: 303-572-6540  Email: eidt@gtlaw.com  beamishj@gtlaw.com</p>	<p><b>COURT USE ONLY</b></p>
<p>ATTORNEYS FOR:</p> <p>Senator Robert S. Gardner  Senator John Cooke  Senator Don Coram  Senator Larry Crowder  Senator Owen Hill  Senator Dennis Hisey  Senator Chris Holbert  Senator Paul Lundeen  Senator Vicki Marble  Senator Kevin Priola  Senator Bob Rankin  Senator Ray Scott  Senator Jim Smallwood  Senator Jerry Sonnenberg  Senator Jack Tate  Senator Rob Woodward</p> <p>Representative Mark Baisley  Representative Rod Bockenfeld  Representative Perry Buck</p>	<p>Case No. 2020SA100</p>

Representative Terri Carver Representative Marc Catlin Representative Richard Champion Representative Timothy Geitner Representative Richard Holtorf Representative Steve Humphrey Representative Lois Landgraf Representative Colin Larson Representative Larry Liston Representative Hugh McKean Representative Patrick Neville Representative Rod Pelton Representative Kim Ransom Representative Janice Rich Representative Lori Saine Representative Shane Sandridge Representative Matt Soper Representative Kevin Van Winkle Representative Perry Will Representative Dave Williams Representative Jim Wilson	
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<p style="text-align: center;"><b>BRIEF OF 40 INDIVIDUAL MEMBERS OF THE COLORADO GENERAL ASSEMBLY</b></p>
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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) as it contains 6,058 words.

The brief complies with C.A.R. 28(k) as it contains under separate heading a concise statement of the applicable standard of appellate review with citation to authority.

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

*/s/ Troy A. Eid*

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Troy A. Eid

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## INTRODUCTION

The submitted Interrogatory, accepted by the Court on March 16, 2020, inquires:

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?

The plain language of this constitutional amendment, approved overwhelmingly by Colorado voters as Amendment No. 3 on November 8, 1988, limits the regular legislative session each year to 120 consecutive calendar days. COLO. CONST. art. V, § 5. The history of Senate Concurrent Resolution No. 1, which became Amendment No. 3, explicitly reinforces the identical understanding, as does the way the General Assembly – regardless which political party held the majority in either or both houses – conducted its official business for the next 32 years.

The singular exception to the decades-old public consensus regarding the 120 consecutive calendar day limit is an obscure legislative provision, Joint Rule 44(g), adopted in 2009, which purports to count each of the 120 days separately –



not consecutively – so long as (1) the accumulated 120 days all fall within the same calendar year; and (2) the Governor has declared a disaster due to a public health emergency. Colorado’s constitution is supreme to statutory law. Joint Rule 44(g) is not even a statute. Besides being unconstitutional, Rule 44(g) is not necessary to address the declared public health emergency. The constitution empowers the Governor to convene a special legislative session and likewise authorizes the General Assembly to call itself back into session after the 120-day calendar day limit has passed. Especially during this very serious time, respecting the constitution, and the protections it provides all Coloradans, has never been more important. Faced with previous emergencies – including during the depths of the Great Depression in 1933-34 – this Court has insisted on adhering to the constitution’s plain language and meaning, and honoring the will of the people who create and preserve it, despite the formidable exigencies of the moment.

## **ISSUE PRESENTED**

Whether Joint Rule 44(g) of the Joint Rules of the Senate and House of Representatives, adopted in 2009, is supreme to the plain language, legislative history, and shared public understanding of section 7 of article V of the state constitution, approved by Colorado voters as a referred measure in 1988, that limits the length of the regular legislative session of the Colorado General Assembly to 120 consecutive calendar days with an adjournment *sine die* on May 6, 2020.

## SUMMARY OF THE ARGUMENT

1. The plain language of section 7 of article V of the state constitution limits the regular legislative session each year to 120 consecutive calendar days.
2. The legislative history of Senate Concurrent Resolution No. 1 – approved overwhelmingly by Colorado voters as a referred measure, Amendment No. 3, in 1988 – reflects a consensus among supporters and opponents alike that the annual regular session shall be limited to 120 consecutive calendar days.
3. Rule 44(g) is unconstitutional because it either ignores or effectively changes the plain language in the Colorado constitution, which only the people may amend as the constitution itself provides.
4. The Constitution already provides alternative means for ensuring legislative action during a declared disaster emergency, including the authority of both the Governor and the General Assembly to convene in special session after the 120-day regular session adjourns *sine die* on May 6, 2020.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF SECTION 7 OF ARTICLE V OF THE COLORADO CONSTITUTION LIMITS THE REGULAR LEGISLATIVE SESSION EACH YEAR TO 120 CONSECUTIVE CALENDAR DAYS.

The plain language of section 7 of article V is clear, contains no ambiguities, and leaves no reasonable doubt that the legislative session shall be limited to 120 consecutive calendar days. The Court should honor the “ordinary and common meaning” of the term calendar days because “[o]ur state constitution derives its force . . . from the people who ratified it, and their understanding of it must control. This is to be arrived at by construing the language, used in the instrument according to the sense most obvious to the common understanding.” *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005) (quoting *Alexander v. People*, 167, 2 P. 894, 900 (Colo. 1884) (internal quotations omitted). In *Rodriguez*, Justice Martinez relied on the ordinary and common meaning of what constitutes a valid jury trial in Colorado to hold that the constitution requires twelve jurors, not six, even though the constitutional provision at issue was silent as to the number. *Id.* at 709.

So too here. For all intents and purposes, the term “120 calendar days” has always meant *consecutive* calendar days – not the accumulated total of 120 days

over the course of any one calendar year with legislators adjourning and then reconvening non-sequentially as determined by the General Assembly's leadership. "When the language is plain, its meaning clear, and no absurdity involved, constitutional provisions must be declared and enforced as written." *Id.* at 696 (quoting *In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo. 1996)) (Kourlis, J.) ("[C]ourt's duty in interpreting a constitutional amendment is to give effect to the will of the people adopting such amendment.").

In contrast, upholding Rule 44(g) – a legislative outlier that departs from the longstanding and uncontested understanding of the term "calendar days" as consecutive calendar days – would contravene the plain language of the 120-day limit as written in 1988 and enforced continually ever since. Rule 44(g) must fail because it relies on an impermissible rule of construction that "should not be applied so as to defeat the objectives sought to be accomplished by the provision under consideration." *Cooper Motors, Inc. v. Bd. of County Comm'rs*, 279 P.2d 685, 688 (Colo. 1955) (in construing a constitutional provision affecting tax valuation of motor vehicles, the Court must "ascertain and give effect to the intent of the framers thereof and of the people who adopted it").

As with the number of permissible jurors in *Rodriguez*, the term “calendar days” has but one commonly understood meaning: Consecutive days, including successive business days, weekend days, and legal holidays. As detailed below, the legislative history and attendant public debate over Senate Concurrent Resolution No. 1 and Amendment No. 3 plainly reflect a consensus that there would always be hard start and stop dates to the regular legislative session capped at 120 successive calendar days per year. This same popular and common-sense definition of the term “calendar days” pervades this Court’s rulings on a wide range of other issues.

For instance, in *People v. Zhuk*, 239 P.3d 437, 438 (Colo. 2010), the District Attorney for the 18th Judicial District challenged the District Court’s dismissal of her interlocutory appeal as untimely under Colorado Rule of Criminal Procedure Rule 37.1. The Court agreed with the DA’s calculation under that rule that the 10-day period must exclude intervening Saturdays, Sundays and legal holidays. *Id.* at 440. Yet in making these calculations, everyone concerned—the DA, state public defender, and the Court—assumed that the total days to be counted (minus excluded days) meant consecutive calendar days. *Id.* at 438. Myriad other examples abound. *See, e.g., Nguyen v. Indus. Claim Appeals Office*, 174 P.3d 847, 847–48 (Colo. App. 2007) (“The notice indicated that the deputy's decision would

become final unless claimant filed a written appeal *within fifteen calendar days*”) (emphasis added); *City of Englewood v. Indus. Claim Appeals Office*, 954 P.2d 640, 641 (Colo. App. 1998) (“Claimant testified, however, that he missed 23 consecutive shifts *which encompassed 71 calendar days*”) (emphasis added); *Andersen v. Indus. Comm’n*, 447 P.2d 221, 224 (Colo. 1968) (“Their argument if directed to the requirement in the statute is that the new job *last at least ninety calendar days* from the first day of employment before it can be considered a better job”) (emphasis added).

Provisions across various Colorado statutes also confirm the plain understanding of “calendar days” as consecutive calendar days. That definition pervades Colorado’s election process. *See, e.g.*, § 1-12-117(1), C.R.S. (2019) (“Nomination petitions . . . *shall be filed no later than fifteen calendar days prior* to the date for holding the election”) (emphasis added); § 1-40-118(1), C.R.S. (2019) (“If the secretary of state fails to issue a statement *within thirty calendar days*, the petition shall be deemed sufficient”) (emphasis added). The same definition applies to Colorado’s workers compensation insurance system. *See, e.g.*, § 8-43-204(7), C.R.S. (2019) (benefits to injured workers “shall be paid to the claimant or the claimant's attorney *within fifteen calendar days* after the date the executed settlement order is received”) (emphasis added); § 8-74-103(1), C.R.S.

(2019) (benefits appeals “must be received by the [administrative hearing officer of the] division *within twenty calendar days* after the date of notification of the decision”) (emphasis added).

In a similar vein, and within the specific context of the regular legislative session, Joint Rule 23(d), adopted by the General Assembly in 1983, expressly provides: “The maximum of one hundred twenty calendar days prescribed by section 7 of article V of the state constitution for regular sessions of the General Assembly shall be deemed to be one hundred twenty consecutive calendar days.” Rule 23(d) applied at the time when legislators were deliberating Senate Concurrent Resolution No. 1, and when Colorado voters approved Amendment No. 3. Notwithstanding the narrow exception to the constitution purportedly made by Rule 44(g), Rule 23(d) remains in force today and reflects the continuing shared understanding of “calendar days” to mean consecutive such days.

The net effect of these and many other statutes and rules, which have never before been called into serious doubt by the General Assembly, is to validate the plain meaning of calendar days under section 7 of article V.



**II. THE LEGISLATIVE HISTORY OF SENATE CONCURRENT RESOLUTION NO. 1, APPROVED OVERWHELMINGLY BY COLORADO VOTERS AS AMENDMENT NO. 3 IN 1988, REFLECTS A CONSENSUS AMONG SUPPORTERS AND OPPONENTS ALIKE THAT THE ANNUAL REGULAR SESSION SHALL BE LIMITED TO 120 CONSECUTIVE CALENDAR DAYS**

The history behind what became section 7 of article V of the state constitution more than three decades ago is no less clear than the plain language by which it was decisively enacted into law by popular referendum. An account of that history attests to that shared understanding of “calendar days” as consecutive days. That same understanding was repeatedly expressed by the legislative authors of Senate Concurrent Resolution No. 1, the referred matter that became Amendment No. 3 in 1988.

Legislative history is especially helpful where, as here, it all points in the same direction: in support of the plain language of the constitutional provision at issue. *See Griffin v. S.W. Devanney & Co.*, 775 P.2d 555, 559 (Colo. 1989). In *Griffin*, the Court analyzed a state securities statute, stressing the overarching primacy of deferring to plain language, but acknowledged the value of examining legislative history for any unclear or ambiguous terms or phrases:

Where the statutory language is clear and unambiguous there is no need to resort to interpretative rules of statutory construction; the statute, in that instance, should be applied as written, since it may be presumed that the General Assembly meant what it clearly said. If, however, statutory

language is uncertain as to its intended scope, with the result that the statutory text lends itself to alternative constructions, then a court may appropriately look to pertinent legislative history in determining which alternative construction is in accordance with the objective sought to be achieved by the legislation.

*Id.* (internal citations omitted). Section 7 of article V does not permit any reasonable alternative construction to consecutive calendar days. Yet even if it did, the legislative history in favor of this definition is unassailable.

The 1988 amendment at issue today has its roots in an earlier referred measure, Amendment No. 4, approved by Colorado voters in 1982. Prior to Amendment No. 4's passage, section 7 of article V of the constitution provided that "at regular sessions convening in even-numbered years, the general assembly shall not enact any bills except those raising revenue, those making appropriations, and those pertaining to subjects designated in writing by the governor during the first ten days of the session." *See* Amendment No. 4, Constitutional Amendment Proposed by the General Assembly, BLUE BOOK (1982), p. 20. Amendment No. 4 repealed that language and substituted the following:

Regular sessions of the general assembly convening in even-numbered years shall not exceed one hundred forty calendar days.

*Id.* According to the Comments section of the 1982 Blue Book analysis of Amendment No. 4, it had been the practice of the General Assembly from

statehood until the early 1950s to convene regular sessions only every other year, starting in January in odd-numbered years. *Id.* In the 1950 general election, Colorado voters approved the amendment containing the language repealed in 1982 by Amendment No. 4. *Id.* Between 1951 and 1983, the first regular session of each biennium was known as the “long session,” during which the General Assembly could consider any topic. *Id.* The second regular session of each biennium was the “short session” because it was limited to revenue-raising measures, appropriations, and the Governor’s agenda or “call.” *Id.* The 1982 Blue Book description of “Arguments For” Amendment No. 4 notes, beginning in Paragraph 3:

The amendment would place an explicit time limitation (140 calendar days) on the length of even-numbered year legislative sessions, assuring continuation of the part-time citizen legislature. The limit would provide sufficient flexibility to balance the workload between legislative sessions.

*See id.* at p. 21. After Amendment No. 4’s passage, the General Assembly in 1983 adopted Rule 23(d), explicitly noting that calendar days were consecutive.<sup>1</sup>

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<sup>1</sup> During the legislative session following the passage of Amendment No. 4, the General Assembly adopted House Joint Resolution No. 1014. The resolution amended Rule No. 23(a) of the Joint Rules of the Senate and House of Representatives. It imposed a deadline schedule for bills and specified: “The maximum of one hundred forty calendar days prescribed by section 7 of article V of the state constitution for regular sessions of the general assembly convening on

Six years later, the referred measure known as Senate Concurrent Resolution No. 1 was placed on the general election ballot as Amendment No. 3. It provided that “[r]egular sessions of the general assembly shall not exceed one hundred twenty calendar days.” *See* Amendment No. 3, Constitutional Amendment Proposed by the General Assembly, BLUE BOOK (1988), p. 5. Each year’s annual session was capped at 120 days. The opening paragraph in the “Arguments For” section of the 1988 Blue Book echoed the “citizen legislature” theme of Amendment No. 4 six years earlier:

The proposal is necessary to maintain the “citizen legislature” which has existed since statehood. A legislature composed of citizens willing to take time from their private lives to serve the public good has been our basic instrument of representative government. A variety of professional and occupational backgrounds, and the social and demographic composition of the various communities should be reflected in the legislature if it is to function effectively. A broad range of vocations and occupations allow a greater diversity of viewpoints to impact the formulation of state policy. Legislators returning to and living among their constituents provide better insight for representing districts. A constitutional limitation on the length of sessions will ensure a part-time legislature and best maintain the “citizen legislature” concept.

*See id.* at p. 6. Importantly, the remainder of the “Arguments For” section of the Blue Book expanded on the “citizen legislature” concept in two new and distinct

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even-numbered years shall be deemed to be one hundred forty consecutive days.” Colo. S., H.R. Joint Rules § 23(a) (1984).

ways. Paragraph 2 emphasized the threat to the citizen legislature posed by lengthier legislative sessions, resulting in more self-described full-time legislators at the expense of the diversity sought in Paragraph 1. *Id.* More specifically to the Special Interrogatory now before the Court, the third and final paragraph argued that Amendment No. 3 was needed to “ensure that the limitation cannot be changed by statute or legislative rule.” *Id.* Rule 23(d), explicitly defining the 120-day limit as consecutive calendar days, had been in force for nearly six years prior to Amendment No. 3’s passage—reflecting the shared understanding of the voters who approved that amendment in 1988—and endures to this day.

Opponents of Senate Concurrent Resolution No. 1 likewise understood calendar days to be consecutive. For example, the “Arguments Against” section of the 1988 Blue Book provides in Paragraph 2 that Amendment No. 3 “is too restrictive and inflexible. Establishing the 120-day limitation in the constitution does not allow the legislature the flexibility to respond if important issues arise that require legislative action after the 120-day session and could prevent effective legislative response to the growing needs and demands of the citizens.” *Id.* The ensuing paragraph in the “Arguments Against” section also notes that Amendment No. 3 might give more power to the Governor, who by convening a special session

could “set the agenda for any legislative action after the 120 days expire.” *Id.* at p. 7.

As voters prepared to go to the polls on November 8, 1988, newspaper editorials mirrored lawmakers’ understanding that the 120-day limit was just that: A cap on how long the General Assembly would meet with a defined beginning and end. Or as the editorial board of the *Colorado Springs Gazette* put it: “At the very least, if you believe the adage that no one's life, liberty or property are safe when the Legislature is in session, then Amendment 3 would keep us safe for two-thirds of the year.” Editorial, “Assure Citizens’ Legislature,” *Colorado Springs Gazette* (Nov. 5, 1988).

There are also the unequivocal statements of the legislative sponsors of Senate Concurrent Resolution No. 1, the measure referred to the voters as Amendment No. 3. The chief bill sponsors were Senator Wayne Allard and Representative Chris Paulson. Introducing the bill in the state House, Paulson, the Majority Leader, explained: “It would limit both sessions of the legislature to 120 *consecutive* calendar days.” (emphasis added). See Audio Transcription of Senate Concurrent Resolution, House 2nd Reading, at 3, lines 5–7 (Mar. 28, 1988).

The legislative tapes also indicate that the General Assembly discussed specific dates for convening and adjourning the regular legislative session,

evincing legislators' intentions to limit regular sessions to 120 consecutive calendar days.<sup>2</sup> See, e.g., Audio Transcription of Senate Concurrent Resolution, Senate 2nd Reading, at 3, lines 7–9 (Jan. 15, 1988) (“...it will be the first Wednesday in February; which means that we would get out at the end of May....”); *id.* at 10, lines 18–21 (“It would be coming into session the 15th of February, we would get out the end of May. One hundred twenty days take us to the end of May.”); *id.* at 11, lines 1–9 (“I think it’s a mistake to keep us here after Memorial Day. If we’re here working into the middle of June, I think that’s going to be a problem in the future. I totally support the idea of shortening the sessions, I just think that it’s going to lead to a lot of problems and a lot of frustration.”); *id.* at 18, lines 18–21 (“I really think we shouldn’t start at a reasonable time to get these things done and – shut this thing down in the spring and get everybody out of here.”); *id.* at 21, lines 1–6 (“The whole purpose of this resolution is to shorten the session. And if we don’t have the figures, how do we budget? And if we come in the 8<sup>th</sup> of – January, we will be finishing here about the 30th of April. And that will mean we’ll have to go in recess about the 10th of April.”); Audio

Transcription of Senate Concurrent Resolution, House 2nd Reading, at 4, lines 19–

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<sup>2</sup> The official electronic recordings of these deliberations do not identify the individual legislator speaking at any given time, although this can sometimes be directly inferred by the specific context in which a given Senator or Representative makes remarks.

23 (Mar. 28, 1988) (“It seems to me that if we start in March and go for 120 days, this whole place is going to have to be air conditioned, because we will be meeting here in the heat of June.”); *id.* at 21, lines 6–9 (Mar. 28, 1988).

The legislative records demonstrate that legislators considered how the 120 consecutive calendar day schedule might impact the General Assembly’s ability to conduct its work, recognizing the authority of both the Legislature and the Governor to call special sessions if and as needed. *See, e.g.*, Audio Transcription of Senate Concurrent Resolution, Senate 3rd Reading, at 10, lines 10–13 (Jan. 25, 1988) (“What it amounts is, we may indeed reduce a number of days that we’re in this chamber; but that also opens up the special sessions, it opens up to much more interim committee meetings.”); Audio Transcription of Senate Concurrent Resolution, House 2nd Reading, at 23, lines 16–19 (Mar. 28, 1988) (“And finally I think what will happen is that since we won’t resolve those – those problems and those issues during the regular session, we’ll be faced almost every year, I suggest, with special sessions.”).

Finally, lawmakers agreed on the part-time nature of the “citizen legislature” as reinforced by a 120-day calendar with a known start and stop date. *See, e.g.*, Audio Transcription of Senate Concurrent Resolution, Senate 2nd Reading, at 12, lines 6–9 (Jan. 15, 1988) (“The February thing really bothers me for several



reasons: One, is that in my occupation, I like to get out of here as early as possible in the spring.”); *id.* at 21, lines 11–12 (“I am a rancher-farmer, I like to be home in the spring, too.”); *id.* at 22, lines 16–23 (“Now, I know there’s farmers and ranchers of all varieties; some have a lot of employed people who – who therefore have a (inaudible) some already do a lot of work themselves, and I think that for those people it would be very difficult for them to choose to serve in the general assembly if we move this to February 15th.”); Audio Transcription of Senate Concurrent Resolution, Senate 3rd Reading, at 9, lines 9–10 (Jan. 25, 1988) (“I know we want to keep the citizen legislature.”); *id.* at 12, lines 1–4 (Jan. 25, 1988) (We can have that commitment to work on other systems also to make this really happen, and Senator [Ray] Powers [the Senate President at the time] will indeed have a part-time job.”); Audio Transcription of Senate Concurrent Resolution, House 2nd Reading, at 14, lines 14–17 (Mar. 28, 1988) (“His [Senator Allard’s] goal is so that we get out of here early so that you can work at another job; because we all agree, your \$17,500 certainly is not an annual salary...”); *id.* at 20, lines 16–20 (Mar. 28, 1988) (“If we can go all the way up to March before we start and then we go 120 days from there, people like I who are trying to have a second job and be a real citizen-legislature kind of person, they’re going to be in the same boat.”); *id.* at 22, lines 23–25 and 23, lines 1–2 (“I know there are important problems,

we’re dealing with people who need to earn a living. I respect that. I need to do that, too. And I like summers off, and I need to teach in the fall.”); *id.* at 23, lines 19–22 (“And that will even create more mayhem with those of you who have to address other careers; because I have to address another career.”).<sup>3</sup>

In sum, the entire legislative history, with the sole exception of Rule 44(g) – passed more than 20 years later – consistently supports the plain language of section 7 of article V as limited to 120 consecutive calendar days.

### **III. RULE 44(G) IS UNCONSTITUTIONAL BECAUSE IT PURPORTS TO AMEND LANGUAGE IN THE COLORADO CONSTITUTION, YET THE POWER OF AMENDING THE CONSTITUTION RESIDES SOLELY WITH THE PEOPLE**

The power to amend Colorado’s constitution rests *solely* with the people through the initiative and referendum process. *See* COLO. CONST. art. V, § 1(1) (“the people 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 and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.”). The constitution cannot be amended, altered, or changed by statute, let alone legislative

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<sup>3</sup>Additionally, legislators discussed how the 120 consecutive calendar day schedule would impact the scheduling of bills. *See, e.g.*, Audio Transcription of Senate Concurrent Resolution, House Committee on State Affairs, at 2, lines 16–20 (Mar. 1, 1988) (“You can see that those deadlines really are not that onerous, even for 90 days. You see the deadlines for introduction – for the first House final passage.”).

rule. See *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1209 n. 6 (Colo. 1994) (“Because the office of county coroner is created by the Constitution and qualifications for holding office are specified in the Constitution, [the General Assembly] cannot add to those qualifications by adopting experience and training requirements for that office.”); *Yenter v. Baker*, 248 P.2d 311, 316 (Colo. 1952) (“Where the Constitution declares the qualifications for office, it is not within the power of the Legislature to change or add to them, unless the Constitution gives that power.”) (internal citations and quotations omitted). Interpretations of the constitution by this Court are similarly beyond the General Assembly’s power to change according to longstanding case law. See, e.g., *People ex rel. Juhan v. District Court*, 439 P.2d 741, 745 (Colo. 1968).<sup>4</sup>

Adopted in 2009, Rule 44(g) upends this entire constitutional regime.

Approved more than two decades after Amendment No. 3’s passage, Rule 44(g)

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<sup>4</sup> The General Assembly’s legislative powers to amend the Constitution are further narrowed by Colorado’s single-subject rule, whereby no amendment to the Colorado constitution may contain more than one subject and the single subject of the amendment must be clear from the title. See COLO. CONST. art. XIX, § 2(3) (“No measure proposing an amendment or amendments to this constitution shall be submitted by the general assembly to the registered electors of the state containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed.”).

purports to amend clear constitutional language, notwithstanding the will of

Colorado voters, by providing:

Notwithstanding the provisions of Joint Rule 23(d) of the Joint Rules of the Senate and the House of Representatives regarding counting legislative days of a regular session as consecutive days, the maximum of one hundred twenty calendar days prescribed by section 7 of Article V of the State Constitution shall be counted as one hundred twenty separate working calendar days if the Governor has declared a state of disaster emergency.

Rule 44(g) supposedly allows, in the face of a declared disaster emergency, an alteration in the language of the constitution or, alternatively, in how section 7 of article V must be interpreted. Neither machination is constitutionally permissible, emergency declaration or not. This Court and the United States Supreme Court have both repeatedly warned that constitutional rights, which reside with the people rather than their government, are not to be degraded or jettisoned in the face of an emergency. *See, e.g., Wilson v. New*, 243 U.S. 332, 372 (1917) (Day, J., dissenting) (“Constitutional rights, if they are to be available in time of greatest need, cannot give way to an emergency, however immediate, or justify the sacrifice of private rights secured by the Constitution.”); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339–40 (1909) (“If the proposition implies that the right of Congress to enact legislation is to be determined, not by

the grant of power made by the Constitution, but by considering the particular emergency which has caused Congress to exert a specified power, then the proposition is obviously without foundation.”); *Walker v. Bedford*, 26 P.2d 1051, 1054 (Colo. 1933) (“We pronounce as the most certain of law that there has never been, and can never be, an emergency confronting the state that will warrant the servants of the Constitution waiving so much as a word of its provisions.”).<sup>5</sup>

*Walker* is particularly apropos. The petitioner, an aggrieved automobile owner, challenged the General Assembly’s constitutional authority to impose certain new state emergency taxes for what he contended were county rather than state revenue-generating purposes. *Walker*, 26 P.2d at 1052–54. The General Assembly took this extraordinary step during a special session to help speed disaster relief to economically hard-hit counties during the depths of the Great Depression in 1933-34. *Id.* at 1055 (Butler, J., dissenting). The disaster declaration notwithstanding, the Court agreed with the taxpayer and invalidated the

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<sup>5</sup> *But see Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (affirming conviction of U.S. citizen of Japanese descent by a Federal district court for remaining in declared "Military Area," of California contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that, after May 9, 1942, all persons of Japanese ancestry should be excluded from that area). *Korematsu* was controversial even at the time, yet the Court did not have an opportunity to overrule it for the next 74 years. *See Trump v. Hawaii*, Slip Op. No. 17-965, p. 38 (June 26, 2018) (upholding Presidential Proclamation No. 9645, imposing travel restrictions on foreign nationals seeking entry to the United States).

taxes: In so holding, the Court analyzed section 7 of article X of the constitution, which provided: “The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation.” *Id.* at 1052–54. Despite the emergency, the Court insisted that the constitution’s plain language must prevail over the emergency statutory relief measures enacted by the General Assembly. *Id.* at 1053–54. Unlike in *Walker*, however, the Constitution already provides viable alternatives to the unconstitutional Rule 44(g) to address the most recent declared emergency.

#### **IV. THE CONSTITUTION ALREADY PROVIDES ALTERNATIVE MEANS FOR ENSURING LEGISLATIVE ACTION DURING A DECLARED DISASTER EMERGENCY, INCLUDING THE AUTHORITY OF BOTH THE GOVERNOR AND THE GENERAL ASSEMBLY TO CONVENE IN SPECIAL SESSION AFTER THE 120-DAY REGULAR SESSION ADJOURNS *SINE DIE* ON MAY 6, 2020**

When the Legislature reconvenes on March 30, 2020, there will be 38 calendar days remaining in the regular session.<sup>6</sup> After this year’s regular session adjourns *sine die* on May 6<sup>th</sup>, any additional legislation that might be passed by the General Assembly in reliance on Rule 44(g) should, as with the unconstitutional

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<sup>6</sup> On March 14, 2020, the General Assembly passed House Joint Resolution 20-1007, "Concerning a Temporary Adjournment of the Second Regular Session of the Seventy-Second General Assembly to a Day Certain." According to that resolution, the Legislature has temporarily adjourned from that date until March 30, 2020. H.R.J. Res. 20-1007, 72nd Leg., 2d Sess. (Colo. 2020).

taxes challenged in *Walker*, be considered null and void. Fortunately, the constitution already allows both the Governor and the General Assembly to reconvene in special session. This has been done many times before, including during the Great Depression as in *Walker*, and is the constitutional way to proceed given the current declared public health emergency.

More specifically, the Governor may call a special legislative session under section 9 of article IV of the state constitution:

The governor may, on extraordinary occasions convene the general assembly, by proclamation, stating therein the purpose for which it is to assemble; but at such special session no business shall be transacted other than that specially named in the proclamation. He may by proclamation, convene the senate in extraordinary session for the transaction of executive business.

COLO. CONST. art. IV, § 9. The General Assembly, by a two-thirds vote by both houses, may also call itself into special session as provided in section 7 of article V of the state constitution, which states in pertinent part:

The general assembly shall meet at other times when convened in special session by the governor pursuant to section 9 of article IV of this constitution or by written request by two-thirds of the members of each house to the presiding officer of each house to consider only those subjects specified in such request.

COLO. CONST. art. V, § 7. The concept of convening one or more special sessions is time-tested and familiar to Coloradans. Just since the September 11, 2001

terrorist attacks against the United States, the General Assembly has met in special session on at least five separate occasions:

1. 2017 First Special Session, October 2–4, 2017, Governor Hickenlooper called the special session to allow the General Assembly to restore authority to special districts to tax recreational marijuana. *See* “Session Laws from the 2017 Extraordinary Session,” Office of Legislative Legal Services, at [https://leg.colorado.gov/sessionlaws?field\\_sessions\\_target\\_id=27016&sort\\_bef\\_combine=field\\_page\\_value%20ASC](https://leg.colorado.gov/sessionlaws?field_sessions_target_id=27016&sort_bef_combine=field_page_value%20ASC).
2. 2012 First Special Session, May 14–16, 2012, Governor Hickenlooper called the special session to allow the General Assembly to act on approximately 30 bills, including civil unions. *See* “Prior Legislative Information” at <http://www.leg.state.co.us/clics/cslFrontPages.nsf/PrevSessionInfo?OpenForm>.
3. 2006 First Special Session, July 6–10, 2006, Governor Owens called the special session to allow the General Assembly to address immigration. *See* “Prior Legislative Information” at <http://www.leg.state.co.us/clics/cslFrontPages.nsf/PrevSessionInfo?OpenForm>
4. 2002 First Special Session, July 8–11, 2002, Governor Owens called the special session to allow the General Assembly to address several issues, including capital punishment. The General Assembly passed legislation only in response to wildfires and drought. *See* “Prior Legislative Information” at <http://www.leg.state.co.us/clics/cslFrontPages.nsf/PrevSessionInfo?OpenForm>; *see also* “Session Laws 2002,” Office of Legislative Legal Services, at <https://leg.colorado.gov/agencies/office-legislative-legal-services/session-laws-2002>.



5. 2001 Second Special Session, September 20 – October 9, 2001, Governor Owens called the Second Special Session to allow the General Assembly to address 14 matters including – representation in the U.S. Congress; master plans; sales and use tax transfers to the Highway Users Tax Fund; driving under the influence penalties; and use of Tobacco Program Fund monies to implement the Breast and Cervical Cancer Act. *See* Executive Order D01101: Call for the Second Extraordinary Session of the Sixty-Third General Assembly, Sept. 10, 2001 at <https://www.colorado.gov/pacific/sites/default/files/d01101.pdf>.

As the framers of the constitution envisioned, the special session provides an effective way to address matters of public interest and concern outside of the regular session.<sup>7</sup> There is no reason why the Governor and/or the General Assembly could not convene one or more special sessions after May 6th. Indeed, special sessions have been declared for matters less urgent than the current declared public health disaster emergency, yet also – as in *Walker* – for far-reaching crises of the most pressing public importance. Circumstances may yet prove that working through, rather than against, the dictates of our constitution is

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<sup>7</sup> Ironically, it is at least questionable whether the General Assembly has effectively adjourned. On information and belief, its members are apparently still accumulating per-diem payments, which by statute are provided to legislators for each “legislative day” they are in session. *See* § 2-2-317(1)(a), C.R.S. (2019). This may indicate that the General Assembly is still operating as if in regular session, based on how “legislative day” is defined. *See* § 2-2-317(3), C.R.S. (2019) (“‘legislative day’ means any day during the legislative session, including legal holidays, primary election days, and Saturdays and Sundays.”).

the most appropriate way to preserve its protections over individual life, liberty and property.

### **CONCLUSION**

For the foregoing reasons, the elected Senators and Representatives of the Colorado General Assembly listed below respectfully ask this Court to invalidate Joint Rule 44(g) by affirming the plain language of section 7 of article 5 of the Colorado constitution, which reflects the will of the voters who enacted it, as well as the succeeding generation of Coloradans who have consistently interpreted it to limit the regular session of the General Assembly to 120 consecutive calendar days.

Respectfully submitted this 24th day of March, 2020.

**GREENBERG TRAURIG, LLP**

*s/ Troy A. Eid*

**Troy A. Eid, #21164**

**Josiah E. Beamish, #52445**

***ATTORNEYS FOR***  
**SENATOR ROBERT S. GARDNER**  
**SENATOR JOHN COOKE**  
**SENATOR DON CORAM**  
**SENATOR LARRY CROWDER**  
**SENATOR OWEN HILL**  
**SENATOR DENNIS HISEY**  
**SENATOR CHRIS HOLBERT**  
**SENATOR PAUL LUNDEEN**  
**SENATOR VICKI MARBLE**

**SENATOR KEVIN PRIOLA  
SENATOR BOB RANKIN  
SENATOR RAY SCOTT  
SENATOR JIM SMALLWOOD  
SENATOR JERRY SONNENBERG  
SENATOR JACK TATE  
SENATOR ROB WOODWARD**

**REPRESENTATIVE MARK BAISLEY  
REPRESENTATIVE ROD BOCKENFELD  
REPRESENTATIVE MARC CATLIN  
REPRESENTATIVE PERRY BUCK  
REPRESENTATIVE TERRI CARVER  
REPRESENTATIVE RICHARD CHAMPION  
REPRESENTATIVE TIMOTHY GEITNER  
REPRESENTATIVE RICHARD HOLTORF  
REPRESENTATIVE STEVE HUMPHREY  
REPRESENTATIVE LOIS LANDGRAF  
REPRESENTATIVE COLIN LARSON  
REPRESENTATIVE LARRY LISTON  
REPRESENTATIVE HUGH MCKEAN  
REPRESENTATIVE PATRICK NEVILLE  
REPRESENTATIVE ROD PELTON  
REPRESENTATIVE KIM RANSOM  
REPRESENTATIVE JANICE RICH  
REPRESENTATIVE LORI SAINÉ  
REPRESENTATIVE SHANE SANDRIDGE  
REPRESENTATIVE MATT SOPER  
REPRESENTATIVE KEVIN VAN WINKLE  
REPRESENTATIVE PERRY WILL  
REPRESENTATIVE DAVE WILLIAMS  
REPRESENTATIVE JIM WILSON**

## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2020, a true and correct copy of the foregoing **BRIEF OF 40 INDIVIDUAL MEMBERS OF THE COLORADO GENERAL ASSEMBLY** was served on the below-listed counsel of record via Colorado Courts E-Filing e-service or USPS as noted:

Jacqueline Cooper Melmed – via USPS  
Colorado Governor’s Office  
200 E. Colfax Ave  
Denver, CO 80203  
*Attorney for Respondent Governor Jared Polis*

Jason Andrew Gelender – via e-service  
*Attorney for Interrogatory – Party Suppressed*

Hon. Philip Jacob Weiser – via USPS  
1300 Broadway  
Denver, CO 80203  
*Attorney for Respondent Philip Weiser*

*s/ M. Hope Watkins*

M. Hope Watkins

(Original on file at offices of  
Greenberg Traurig, LLP, pursuant to  
C.R.C.P. 121, § 1-26)