

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: March 24, 2020 4:05 PM FILING ID: 3F0B58DE87D22 CASE NUMBER: 2020SA100</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to Article VI, Section 3 of the Constitution of the State of Colorado</p>	
<p>In Re: Interrogatory on House Joint Resolution 20- 1006 Submitted by the Colorado General Assembly.</p>	
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<p>BRIEF FOR INTERESTED PARTY COLORADO ASSOCIATION OF LOCAL PUBLIC HEALTH OFFICIALS</p>	

Interested party Colorado Association of Local Public Health Officials
(CALPHO), by and through its undersigned counsel of record, respectfully submits
this brief in the above captioned matter.

Certificate of Compliance

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32, including:

Word Limits: My brief has 2,740 words, which is less than the 9,500 word limit.

Included Sections: Before arguing the issue before this Court, I have included a separately titled subsection discussing the standard of review, with the required citations.

I understand that my brief may be rejected if I fail to comply with these rules.

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ISSUE PRESENTED FOR REVIEW

The Colorado General Assembly's Interrogatory asks:

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 the purposes of operating during a declared disaster emergency interpret the limitation as applying only to calendar days on which the Senate or House of Representatives, or both, convene in regular legislative session?

STATEMENT OF THE CASE

This Interrogatory comes to this Court in the context of a global pandemic that threatens significant and lasting harm to America and the world. In particular, this Court is called upon to determine the legality of a joint rule of the General Assembly which, in the event of a declared disaster emergency, allows the state legislature to meet intermittently, throughout the year, to address the crisis.

In December 2019, a new viral outbreak began in Wuhan, China. This virus (now known as SARS-CoV-2) causes COVID-19, a respiratory illness characterized by fever, coughing and difficulty breathing. The disease has spread rapidly. What began in a single province in China has, as of March 24, 2020, infected nearly 400,000 people in 169 countries and caused more than 17,000 deaths. Coronavirus (COVID-19) Global Cases, Johns Hopkins Univ.,

<https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd402994234>

67b48e9ecf6 (Mar. 22, 2020). There is currently no vaccine or effective antiviral treatment. Coronavirus disease (COVID-19) advice for the public: Myth busters, World Health Org., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters> (Mar. 22, 2020).

COVID-19 is spreading in Colorado and, as elsewhere, has already caused significant economic and social disruption. See Sam Tabachnik, Polis orders more financial support for Coloradans and businesses feeling coronavirus' strain, The Denver Post, Mar. 20, 2020, <https://www.denverpost.com/2020/03/20/coronavirus-colorado-polis-financial-support/>. Governor Jared Polis has closed schools and many non-essential businesses, including gyms and restaurants, and has also suspended elective surgeries. Id. In preparation for a dramatic anticipated economic recession, the state has relaxed unemployment insurance requirements and made plans to provide financial support to small businesses. Id. The City of Denver has taken additional action, issuing a stay-at-home order to all residents effective from Tuesday, March 24 through April 10, 2020. Ryan Osborne, Denver mayor issues stay-at-home order amid coronavirus outbreak, Denver7, Mar. 23, 2020, <https://www.thedenverchannel.com/news/coronavirus/denver-mayor-issues-stay-at-home-order-amid-coronavirus-outbreak>.

Nevertheless, the problem continues to grow rapidly. There are now more than 700 confirmed cases in Colorado. CORONAVIRUS COVERAGE, KKTU,

Mar. 24, 2020, <https://www.kktv.com/content/news/BREAKING--568535251.html>. Seventy-two people have been hospitalized, and seven have died. Id. Hospitals are already experiencing shortages of personnel and supplies, and experts warn that if these trends continue, the “[p]eak of [the] virus could cripple health care facilities in the state.” John Daley & Allison Sherry, Colorado hospitals already seeing shortages, *The Journal*, Mar. 18, 2020, <https://the-journal.com/articles/171569>.

Two facts have become painfully clear. First, all Coloradans must practice “social distancing” to stave off transmission and slow the rate of viral infection. Second, the state and local governments that serve the people of Colorado must be ready and able to respond quickly, intelligently, and lawfully to this rapidly-evolving and increasingly devastating pandemic.

It is in the context of this pandemic that this Court is called upon to address the constitutionality of General Assembly Joint Rule 44. In ordinary times, the legislature’s session is governed by Joint Rule 23, which states that “[t]he 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.” Jt. Rule 23(d). However, in 2009 the General Assembly adopted Joint Rule 44, which states that “[n]otwithstanding the provisions of Joint Rule 23(d) . . . 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 due to a public health emergency” Jt. Rule 44(g) (emphasis added). In narrow and unique situations posing a serious threat to public health, Joint Rule 44 relaxes the calendar for the state legislature to provide it with the freedom and flexibility it requires to respond adequately in a crisis.

On March 10 of this year, Governor Polis declared a state of emergency in Colorado due to the COVID-19 pandemic, which triggered Joint Rule 44. Gov. Jared Polis Declares State of Emergency in Colorado, CBS Denver, Mar. 10, 2020, <https://denver.cbslocal.com/2020/03/10/coronavirus-jared-polis-state-emergency-colorado/>. On March 14, 2020, the General Assembly adjourned until March 30, 2020. John Frank, Colorado lawmakers upend the legislative session with decision to adjourn. Here’s what comes next., The Colorado Sun, Mar. 14, 2020, <https://coloradosun.com/2020/03/14/colorado-lawmakers-adjourn-coronavirus-whats-next/>. Given the state of affairs, however, that adjournment will likely be extended. The General Assembly thereafter submitted an interrogatory to this Court, which is called upon to consider whether Joint Rule 44 is constitutional in light of Article V, Section 7 of the state constitution.

IDENTITY AND POSITION OF CALPHO

The Colorado Association of Local Public Health Officials (CALPHO) is the professional association representing Colorado's Local Public Health Agencies (LPHAs). Every county in the state has an LPHA, either for the individual county or for a region of counties. Colorado's LPHAs are on the frontlines of any disease outbreak, charged with communicable disease prevention, investigation and control for the communities within their jurisdiction. LPHA staff are currently working tirelessly across the state to control the outbreak of COVID-19.

Joint Rule 44 is constitutional. In the context of a declared disaster emergency, Article V, Section 7's one hundred twenty day limitation on the General Assembly session may – and *should* – be interpreted to apply only to calendar days on which the legislature is actually in session. Such an interpretation is consistent with and responsive to the language and intent of the Colorado Constitution, the application of longstanding Supreme Court precedent, and the ongoing public threat posed by this pandemic.

STANDARD OF REVIEW

The Interrogatory raises a pure question of law, and the Court should be guided by its longstanding principles of constitutional interpretation. As a legislative enactment, Joint Rule 44 is due a presumption of constitutionality. See Mt. Emmons Min. Co. v. Town of Crested Butte, 690 P.2d 231, 240 (Colo. 1984).

The fundamental aim of the Colorado Constitution is to provide a framework for a government whose purpose is to “insure tranquility; provide for the common defense; promote the general welfare and secure the blessings of liberty” for the people of Colorado. Colo. Const. Preamble. The brilliance of the Colorado Constitution lies in its flexibility. To achieve its goals, the state constitution is best understood as “a living document, designed for application to new circumstances upon a principled and historic yet realistic basis.” Conrad v. City & Cty. of Denver, 724 P.2d 1309, 1318 (Colo. 1986) (Kirshbaum, J., specially concurring). Although Colorado has changed dramatically since its inception, “our [144]-year-old constitution endures because its principles are adaptable to changing times.” In re People, 593 P.2d 1356, 1359 (Colo. 1979).

When constitutional language is open to multiple reasonable meanings, this Court “interpret[s] constitutional provisions as a whole and attempt[s] to harmonize all of the contained provisions.” Bruce v. City of Colo. Springs, 129 P.3d 988, 992 (Colo. 2006). In doing so, it seeks “to preserve the spirit and intent plainly manifested in the language,” and does not “adopt a narrow construction.” Id. As Justice Oliver Wendell Holmes explained nearly a century ago: “The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.” Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931).

This Court has long understood, adopted, and reiterated these principles, rejecting “[n]arrow and technical reasoning” in favor of construing the Colorado Constitution “as a frame of government or fundamental law” whose overall purpose as a tool by, of, and for the people would be stymied by overly rigid analysis. Colo. Common Cause v. Bledsoe, 810 P.2d 201, 207 (Colo. 1991).

SUMMARY OF THE ARGUMENT

CALPHO asserts that Joint Rule 44 is constitutional based on three interrelated points.

First, Joint Rule 44 does not violate the language of Article V, Section 7, but is instead consonant with the purpose and intent of the Colorado Constitution as a whole. That document’s primary purpose is to structure a government that protects the rights and interests of the people of Colorado, and Joint Rule 44 provides the General Assembly with the ability to do that during crises.

Second, given the serious, escalating, and likely long-lasting nature of the COVID-19 pandemic, the General Assembly must be able to meet intermittently in order to effectively address this problem. Unless the state legislature is able to dynamically respond to this rapidly-changing crisis, it will not be able to protect Coloradans and carry out the key purpose of the state constitution.

Third, if the General Assembly is unable to meet and act intermittently, that will itself create a public health crisis. Legislators will either have to stay in session

right now, likely exacerbating the spread of COVID-19 in an effort to pass forward-looking legislation, or continue their adjournment and risk devastating inaction. Only through application of Joint Rule 44 can these intolerable situations be avoided.

ARGUMENT

In the rare context of a declared disaster emergency, Article V, Section 7 of the Colorado Constitution may be interpreted to apply only to those days on which the General Assembly is actually in session. This approach is appropriate and consistent both with the ambiguous language of this provision and longstanding principles of constitutional interpretation. It is also fundamentally responsible, and is the only interpretation that will enable the members of the state legislature to respond appropriately to this crisis.

A. Article V, Section 7 is ambiguous and subject to interpretation, and the General Assembly's proposed reading is consistent with the state constitution as a whole

Article V, Section 7 states only that “[r]egular sessions of the general assembly shall not exceed one hundred twenty calendar days.” Colo. Const. art. V, § 7. As a threshold matter, this language is ambiguous and susceptible to interpretation by this Court. It is silent as to whether these calendar days must be counted continuously or whether they may, at least in some limited circumstances, be counted piecemeal.

Understanding Article V, Section 7 to allow the legislature to operate non-continuously for one hundred twenty calendar days total is consonant with the intent and purpose of the Colorado Constitution. Although as a general matter the Colorado state legislature is intended to operate part-time and on a consecutive basis, see Joint Rule 23, the overall goal of the state constitution is to structure a state government capable of serving the needs and protecting the interests of the citizenry. Among the core considerations of the state government is using its authority to promote public health, safety, and welfare. See, e.g., People v. Zinn, 843 P.2d 1351, 1354 (Colo. 1993) (discussing the legislature’s “broad discretion to enact measures for the protection of the public health, safety, and welfare”). It is consistent with the key purpose of the state constitution to interpret it to allow the legislature to operate intermittently over the course of a crisis that will likely last for many months.

B. The Colorado legislature’s proposed approach is the only one that will allow the General Assembly to respond effectively to this problem

If the legislative session must end one hundred twenty continuous calendar days after it begins, then this year’s session will end on May 6, 2020. Applying an overly rigid interpretation to Article V, Section 7 would unnecessarily hamstring the General Assembly’s ability to respond to the extraordinary situation posed by the COVID-19 pandemic. This would be devastating to the people of Colorado.

The current crisis is rapidly evolving and growing exponentially worse. The United States saw its first confirmed case on January 20, 2020; just over two months later, more than 46,000 are confirmed sick. Coronavirus in the US: Map, case counts, and news, LiveScience, <https://www.livescience.com/coronavirus-updates-united-states.html>, Mar. 24, 2020). Experts warn that this number is artificially low due to a paucity of testing, and that the medical system, already under great strain, will soon be overrun with patients. Alexis C. Madrigal & Robinson Meyer, How the Coronavirus Became an American Catastrophe, The Atlantic, Mar. 21, 2020, <https://www.theatlantic.com/health/archive/2020/03/how-many-americans-are-sick-lost-february/608521/>. This will almost certainly be the case despite widespread social distancing and the measures that Governor Polis has already implemented. This problem will get worse before it gets better, and we do not know how long it will last.

This public health crisis requires a concerted public response, and that means that the General Assembly must have the flexibility and authority to respond to changing circumstances. It must be able to evaluate, re-evaluate, and address the situation on a continuing basis, which will be impossible if it is constitutionally prohibited from taking any action of any kind after May 6, 2020. This crisis will not be over before then, nor could the legislature possibly anticipate when, why, how, and to what extent circumstances will change. Absent a

reasonable interpretation of Article V, Section 7, the General Assembly will not be able to “insure tranquility; provide for the common defense; promote the general welfare and secure the blessings of liberty” for Coloradans. See Colo. Const. Preamble.

C. Requiring the Colorado legislature to stay in session right now would itself threaten public health

Finally, an inflexible interpretation of Article V, Section 7 would force the General Assembly to choose between two dangerous and unacceptable options.

In the first scenario, lawmakers could stay in session at the Capitol and pass legislation now to help mitigate this problem. But the world is in the midst of a crisis that is growing exponentially worse, and all Americans are being told to stay at home and avoid gathering in groups. See, e.g., Lisa Lockerd Maragakis, Coronavirus, Social Distancing and Self-Quarantine, Hopkins Medicine, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine>. To gather now would itself be irresponsible and dangerous. A single person with COVID-19 – even if they are asymptomatic or pre-symptomatic – has the potential to set off a chain reaction of transmission, given the virus’ high transmission rate. Morgan McFall-Johnsen & Holly Secon, The average coronavirus patient infects at least 2 others, suggesting the virus is far more contagious than the flu, Business Insider, Mar. 17, 2020, <https://www.businessinsider.com/coronavirus-contagious-r-naught->

average-patient-spread-2020-3. While sickness in any person is distressing, an outbreak among the leaders of our state would be particularly devastating. Indeed, one state legislator has already tested positive, and another contracted an alternative coronavirus.¹

Alternatively, legislators could avoid meeting at the Capitol, extending the adjournment of this session until the crisis has passed or, at the least, calmed. This would hinder or entirely prevent the General Assembly from passing responsive, crucial legislation now. It would not be able to react to this growing public health crisis, which will worsen dramatically, *especially* without serious government intervention.

Neither situation is acceptable. Both will almost certainly result in unnecessary sickness and death, as COVID-19 continues to spread and the legislature is not able to respond appropriately. These circumstances may only be

¹ Senator Jim Smallwood tested positive for COVID-19 on March 22, 2020. Thankfully, his symptoms have been mild. Sage Naumann, [Senator Smallwood Tests Positive for COVID-19](https://www.coloradosenaterepublicans.com/smallwoodcovid19/?fbclid=IwAR0czhDIrhU_YBYO9PFFmiIf1LVpAvq9o0vnCT3MfRxe6wLd18mbDDeqOr8), https://www.coloradosenaterepublicans.com/smallwoodcovid19/?fbclid=IwAR0czhDIrhU_YBYO9PFFmiIf1LVpAvq9o0vnCT3MfRxe6wLd18mbDDeqOr8.

Representative Dafna Michaelson Jenet contracted “a different coronavirus,” which “does not require her to be isolated from family.” Marianne Goodland, [Rep. Dafna Michaelson Jenet cleared of COVID-19](https://www.coloradopolitics.com/coronavirus/rep-dafna-michaelson-jenet-cleared-of-covid/article_66e311c6-6d39-11ea-98ff-4f4ff809de41.html), Colorado Politics, Mar. 23, 2020, https://www.coloradopolitics.com/coronavirus/rep-dafna-michaelson-jenet-cleared-of-covid/article_66e311c6-6d39-11ea-98ff-4f4ff809de41.html.

avoided by applying a reasonable, flexible interpretation to Article V, Section 7 that will allow the General Assembly to meet intermittently during this crisis.

CONCLUSION

The Colorado Association of Local Public Health Officials strongly urges the Colorado Supreme Court to hold that Joint Rule 44 is constitutional. This interpretation is the only reasonable one in light of the ongoing pandemic, the state constitution's overall purpose, and the liberal frame through which constitutional questions are analyzed.

Respectfully submitted this 24 day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2020, I filed the foregoing Brief for Interested Party Colorado Association of Local Public Health Officials via the Colorado Court's E-Filing System, which will send notification to all parties who have entered an appearance in this matter.

/s/Matthew Fritz-Mauer
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