COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to Article VI, Section 3 of the Constitution of the State of Colorado	
In Re: Interrogatory on House Joint Resolution 20–1006 Submitted by the Colorado General Assembly.	**▲ COURT USE ONLY ▲**
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BRIEF OF THE INDEPENDENCE INSTITUTE	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the applicable requirements of C.A.R. 28 and 32. Specifically, I certify that this brief (including headings and footnotes but excluding the caption, table of contents, table of authorities, signature blocks, and certificate of service) contains 7,134 words. Accordingly, this brief does not exceed the 9,500 word limit of the Court's order for briefs in this case.

INDEPENDENCE INSTITUTE

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STATEMENT OF THE ISSUES 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

The above Statement of Issues was issued by this Court in response to a request from the Colorado General Assembly in House Joint Resolution 20–1006 pursuant to Colo. Const., art. VI, § 3. Because of the COVID-19 pandemic, the legislature has declared itself to be in temporary recess. Some legislators argue that a particular rule created by the legislature exempts the recess period from the constitutional "one hundred and twenty calendar days" limit on a regular legislative session. Colo. Const., art. V, § 7. It is universally agreed that the Calendar Days Clause does not restrict the power of the Governor or the General Assembly to call special sessions of unlimited duration.

SUMMARY OF ARGUMENT

Article V of the Colorado Constitution is the mechanism by which the sovereign People of Colorado create and regulate the General Assembly. Based on experience, the Founders and ratifiers of the 1876 Constitution established strict rules governing the legislature. Since statehood, the People have continued to adjust those rules by constitutional amendment. Although some of Article V's rules contain exceptions that the legislature may invoke at its own discretion, most rules have no exceptions. There are no exceptions in the Calendar Days Clause.

Historically and at present, the constitutional rules that *do* allow the legislature to exempt itself have been abused. The Safety Clause creates an exception to the standard right of referendum; the exception was intended only for laws "necessary for the immediate preservation of the public peace, health, or safety." Colo. Const., art. V, § 1(3). Yet the exception has been misused to extinguish or severely diminish the People's right of referendum. Like exempting a bill from referendum, allowing a legislature to extend its own session is dangerously tempting. The Calendar Days Clause is written to foreclose any possibility of acting on temptation.

Enacted in 1988, the Calendar Days Clause is a piece of Article V's the Constitutions extensive and strict controls on legislative process. The Article V

system was and is based on history showing the necessity of firm state constitutional regulation of the state legislature.

The SARS-CoV-2 virus is "novel," but emergencies are not. In 1988 as in 1876, the possibility of unforeseen emergencies was well-known—indeed, impossible to forget, in the light of experience.

The Calendar Days Clause results in a date certain for the adjournment of a regular legislative session. The clause is indispensable for the preservation of a citizen legislature, a foundation of Colorado's government. The clause in no way limits the ability of the Governor or the General Assembly to call special sessions of unlimited length, should necessary legislation not be completed in a regular session.

One of the few certainties of the present American crisis is that some government actors will assert that their own will trumps the plain language of the Constitution. By upholding the Calendar Day Clause, this Court can affirm and teach that the Rule of Law is always the rule.

ARGUMENT

I. The Colorado Constitution does not allow the legislature to exempt itself from any of the strict textual rules on legislative process.

In 1988, the People of Colorado enacted the GAVEL Amendment, to correct abuses of the legislative processes by the General Assembly. Among GAVEL's

reforms was the Calendar Day Clause, which limits regular legislative sessions to "one hundred twenty calendar days." Colo. Const., art. V, § 7. Because the Calendar Day Clause contains no exceptions, the General Assembly has no power to invent an exception by legislative rule.

A. When Article V rules have exceptions, Article V says so.

From 1876 to the present, the People who created and amended the Colorado Constitution have always known how to create exceptions to constitutional rules in Article V. For example, "Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy . . ." *Id.* art. V, § 13. "The members of the general assembly shall, in all cases except treason or felony, be privileged from arrest during their attendance at the sessions of their respective houses . . ." *Id.* art. V, § 16. "No bill, except general appropriation bills, shall be passed containing more than one subject . . ." *Id.* art. V, § 21. "[N]o member of congress, or other person holding any office (except of attorney-at-law, notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office." *Id.* art. V, § 8.[1] "Every order,

[1] For application, *see*, *e.g.*, *Hudson v. Annear*, 101 Colo. 551, 555, 75 P.2d 587 (1938) (low position in Tax Department; "A position, the duties of which are undefined, and which can be changed at the will of the superior; . . . is not an office

resolution or vote to which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of business of the two houses, shall be presented to the governor . . .” *Id.* art. V, § 39. “Except as provided by law,” the State Auditor is “ineligible for appointment to any other public office in this state from which compensation is derived.” *Id.* art. V, § 49.

In 1988, the year GAVEL was adopted, the People ratified a different amendment allowing the legislature to create more exceptions to the constitutionally-mandated eight-hour workday “for persons employed in underground mines or other underground workings, blast furnaces, smelters.” The 1988 amendment stated: “(2) The provisions of subsection (1) of this section to the contrary notwithstanding, the general assembly may establish whatever exceptions it deems appropriate to the eight-hour workday.” *Id.* art. V, § 25a.[2]

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but a mere employment, and the incumbent is not an officer but a mere employee.”) (internal quote omitted).

[2] The original version of article 25a, enacted in 1902, had expressly ordered the General Assembly to enact an eight-hour work-day for dangerous occupations. The 1902 amendment allowed only a very limited exception to the eight-hour rule:

> The general assembly shall provide by law, and shall prescribe suitable penalties for the violation thereof, for a period of employment not to exceed eight (8) hours within any twenty-four (24) hours (except in cases of emergency where life or property is in imminent danger) for persons

Article V does not make exceptions by implication. When exceptions are intended, the text says so.

B. When the legislature can decide on exceptions for itself, the power is often abused.

One exception that the People did put into Article V has been notoriously abused: the Safety Clause exception to the right of referendum. The constant misuse of this textual emergency power helps explain why the Calendar Day Clause contains no exceptions, including for emergencies.

In 1912, the People amended the Constitution to declare the People's powers of initiative, referendum, and recall. Colo. Const., art. V, § 1 (initiative and referendum), art. XXI (recall). The three powers were the trinity of Progressive reform; after years of stalling, the legislature had finally passed legislation allowing the people to vote on the reforms. The victories of 1912 were due in no small part to Governor John Shafroth, perhaps the most influential governor in Colorado history.

> employed in underground mines or other underground workings, blast furnaces, smelters; and any ore reduction works or other branch of industry or labor that the general assembly may consider injurious or dangerous to health, life or limb.

Colo. Const. art. V, § 25a(1) (section divisions added in 1988) .

See Stephen J. Leonard, Thomas J. Noel & Donald L. Walker, Jr., Honest John Shafroth: A Colorado Reformer (2003).

The rights of initiative and referendum are based on the Colorado Constitution's bedrock: "All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Colo. Const., art. II, § 1.

The People, not the government, possess the sovereignty. The government is the delegated agent of the sovereign people. This principle has been the foundation of American government since 1776. It is very different from the views in some other nations, where the government is considered to be the sovereign.

So in 1912, the People "reserved" to themselves "the referendum . . . except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations . . ." *Id.* art. V, § 1(3).

The amendment's obvious purpose was to make a referendum possible on almost all legislation, if the legislation were so controversial that the requisite number of signatures could be gathered. After voters in 1932 used the referendum to have a popular vote on a new tax on margarine, the General Assembly began attaching a safety clause to every single bill. In 1997, automatic insertion of the Safety Clause in every bill ended; legislative drafters were instructed to ask the sponsor whether to

include a Safety Clause. *See* Office of Legislative Legal Services, *Safety Clauses and Effective Date Clauses* (2018). Yet even today, "Nearly half of all bills in the last three years have come with a safety clause. 2019: 46% of 460 bills. 2018: 44% of 432 bills. 2017: 45% of 423 bills." Marshall Zelinger, *Safety clauses: This is how state legislators get new laws on the book quickly*, 9News.com, Feb. 17, 2020.

By the precedents of this Court, legislative invocation of the Safety Clause is "conclusive and not subject to judicial review." *Cavanaugh v. State*, 644 P.2d 1, 4 (Colo. 1982). In the foundational case for non-review, the Court's majority stated:

> It is a question of which the Legislature alone is the judge, and when it determines the fact to exist, its action is final . . . Power may be abused, but that is not a valid reason for one coordinate branch of the government to assign for limiting the power and authority of another department.

Van-Kleeck v. Ramer, 62 Colo. 4, 10–12, 156 P. 1108 (1916).

The *Van-Kleeck* dissent criticized the majority for allegedly holding:

> that the ipse dixit of the assembly is paramount to the Constitution; that it can, if it pleases, declare that to be constitutional, which the Constitution prohibits in unmistakable terms. Such is the logic of the majority opinion . . . I think no sane person will insist that a civil service law can be "immediately necessary for the preservation of the public peace, health or safety," under any sort of meaning to be applied to such terms.

Id. at 26–28 (Scott, J., dissenting).

The difference between *Van-Kleeck* and the instant case is that the former involved an express grant to the legislature of the power to invoke an exception, and in this case there is no such textual exception.

The history of the Safety Clause teaches that if the legislature is given the power to except itself from constitutional rules, the power can be routinely abused. From 1933 to 1996, the Safety Clause was perverted to extinguish the right to referendum. Little wonder that the GAVEL Amendment chose not to give the General Assembly the power to except itself from the Calendar Day Clause under any conditions.

The authors of the GAVEL Amendment knew how to create exceptions to absolute rules, when they wanted to. Under the Amendment, binding party caucus votes are prohibited. "(2) Notwithstanding the provisions of subsection (1) of this section, a member or members of the general assembly may vote in party caucus on matters directly relating to the selection of officers of a party caucus and the selection of the leadership of the general assembly." Colo. Const., art. V, § 22a.

Like the power to thwart the right of referendum, the power to extend legislative sessions is particularly tempting to legislatures. To allow the legislature to invent one exception to plain constitutional text governing legislative process is to invite more invented exceptions. The purpose of the Calendar Day Clause is to deprive the legislature of all discretion to extend a regular legislative session.

II. Strict control on legislative processes, with no exceptions, has always been the standard of Article V.

While the Calendar Day Clause was added over a century after statehood, its controls on the legislative process reinforce the constitutional structure that was established in 1876. In short: because state legislatures have proven that they are inclined to outrun their boundaries, the legislative process must be governed by clear, precise rules that the legislature can never evade.

The Colorado Constitutional Convention convened on December 20, 1875, at 15th and Blake Streets in downtown Denver. Donald Wayne Hensel, A History of the Colorado Constitution in the Nineteenth Century 102 (Ph.D. thesis in History, U. of Colo., 1957).[3] The convention finished its work by unanimously adopting a proposed constitution on March 14, 1876.

The 39 delegates were 24 Republicans and 15 Democrats. At the time, southern Colorado (the area south of the Palmer Divide—an east-west ridgeline north of Colorado Springs) was more Democratic and Catholic; the north was more Republican and Protestant.

[3] To this day, Hensel remains the authoritative source. No subsequent scholar has investigated the full scope of this topic in such depth.

On most issues, partisan divisions were not important. Wilbur Fiske Stone—a Democrat, delegate, and future Supreme Court Justice—recalled "there was no politics in it at all." *Id.* at 101 (citing interview with Stone in Denver Post, Oct. 22, 1911). As Stone put it, the "lines between Democrat and Republican were very lightly drawn in those days." *Id.*[4] E.T. Wells, a delegate and a Territorial Supreme Court Justice, wrote that on "no occasion whatever" did "personal acrimony or partisan feelings" impede the Convention. E.T. Wells, *State Constitutional Convention* in W.B. Vickers, Legislative, Historical and Biographical Compendium of Colorado 166 (2015) (1887).[5]

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[4] Newspapers agreed that partisan politics played no role in the Convention. *Id.* (citing Denver Times; Daily Rocky Mountain News, Mar. 8, 1876; Colorado Banner (Boulder), Mar. 16, 1876; Colorado Transcript (Golden), May 24, 1876). The *Rocky* was a Republican newspaper, while the Boulder and Golden newspapers were Democratic. *Id.*

[5] Wells was appointed Associate Justice of Territorial Supreme Court on Feb. 8, 1871. 2 Frank Hall, History of the State of Colorado 534 (2008) (1890). He had served as a Representative from Gilpin in the 6th session of the Territorial Assembly (Dec. 1866–Jan. 1867). *Id.* at 541–42.

After the Convention officers were elected, "no spectator could have supposed, from anything heard or seen in the assembly or in any outer room, that party politics had ever been so much as dreamed of in the loft of the mansard room occupied by the convention." *Id.* at 295. The Convention heeded its President's admonition against the "slightest semblance of partisanship or sectional spirit." It had neither "time, opportunity, or inclination to rethresh the oft cudgeled sheaves of party politics." *Id.* at 296. Frank Hall served as Territorial Secretary 1866–74 and Acting Governor in 1868.

The final text of the proposed Colorado Constitution was approved unanimously by the delegates. On issues where there was controversy—such as whether to acknowledge the deity in the preamble—the divisions did not break down along party lines.[6]

The fundamental problem for the Convention to solve was not a partisan one. Rather, it was the inherent tension in what the delegates wanted. They knew they didn't want a "do nothing" government. To the contrary, they required the creation of state institutions for higher education, for care for the insane, and for blind, deaf, and mute. Colo. Const., art. VIII. They required the creation of a thorough and uniform system of public schools, and that such schools not be racially segregated. Colo. Const., art. IX. They created a commissioner of mines and ordered the General Assembly to enact laws prohibiting child labor in mines, and to enact laws for safe working conditions in the state's most important industry. Colo. Const., art. XVI, §§ 1–2.[7] The Colorado Convention wrote the first American constitution to mention

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[6] In a compromise, the Preamble begins, "We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe . . ." Colo. Const., pmbl.

[7] The General Assembly was also allowed (but not mandated) to enact laws for mine drainage, and to provide for the science of metallurgy and mining to be taught in state institutions of learning. *Id.* §§ 3–4.

forests, instructing the General Assembly "to keep in good preservation, the forests upon the lands of the state." Colo. Const., art. XVIII, §§ 6–7.

Further, the General Assembly "shall" enact "liberal homestead and exemption laws," "shall" pass arbitration laws, and "shall" enact laws against "spurious, poisonous, or drugged spirituous liquors." Colo. Const., art. XVIII, §§ 1, 2, 5.

At the same time, the Convention profoundly distrusted the legislature. "The delegates created a legislature and then, as though they regretted their work, they took most discretionary authority from it." Hensel, *supra*, at 133. The Convention records give the sense that the Convention wished that it didn't have to establish a legislature. Richard Collins & Dale A. Oesterle, The Colorado State Constitution 4 (2011).

The 1876 Convention was meeting in "the post-Civil War era, when popular distrust of legislatures was at its height." G. Alan Tarr, Understanding State Constitutions 199 (1998). The early American state constitutions had been terse statements of principles, with a broad outline for the structure of government—similar to the U.S. Constitution.

At the federal level, the short constitution seemed to be working well enough, because Congress could only exercise the enumerated powers that it had been granted. At the state level, where legislatures could legislate on almost any topic,

special legislation for the benefit of powerful interests—especially railroads—had been rampant. Starting in the 1830s, the new state constitutions, and new constitutions adopted in older states—were much more energetic in constraining legislative discretion. *Id.* at 118–21.

Distrust of the legislature is one reason that the Colorado Constitution, like others of its time, is so detailed in prescribing what laws the legislature must, and must not, enact. "[T]he longer, more prescriptive and proscriptive state constitutions characteristic of the late nineteenth century reflected a desire to assert the public interest against ordinary politics." *Id.* at 126.

The Colorado Constitution fit the national trend in favor of legislative constraint. Article V, creating the Colorado House of Representatives and Senate, is much longer than Article I of the U.S. Constitution, which creates the Congress. Article V contains many restrictions on how the legislature may operate.

Persons who prefer constitutions that speak only in broad outlines can criticize the 1876 Constitution as too concerned with the picayune. The Constitution, for examples, specifies rules for contracts for legislative stationery. Colo. Const., art. V, § 29.

The Colorado Convention—and the People of Colorado who ratified the proposed constitution by a 3:1 margin—did not think that the Constitution had too

many specific, inviolable limits on the legislature. The Convention believed "that permitting too much freedom to govern was a far greater threat than possibly clogging the government's effectiveness in order to shield the people from their own rules. If the turnstiles blocked efficiency they also checked exploitation and rascality." Hensel, *supra*, at 120.

Some of the original Article V legislative restrictions, not paralleled in the U.S. Constitution, are:

- "No general assembly shall fix its own salary. Members . . . receive the same mileage rate permitted for travel as other state employees." Colo. Const., art. V, § 6.[8]
- "[N]o bill shall be so altered or amended . . . as to change its original purpose." *Id.* art. V, § 17.
- "No bill shall be considered or become a law unless referred to a committee, returned therefrom, and printed for the use of the members." *Id.* art. V, § 20.[9]

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[8] In 1992, the U.S. Constitution's Twenty-Seventh Amendment was adopted, preventing a Congress from raising its own salary.

[9] Additional controls on committee procedures were added to section 20 by the GAVEL Amendment.

- "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title . . ." *Id.* art. V, § 21.
- "Every bill shall be read by title when introduced, and at length on two different days in each house," unless dispensed by unanimous consent. *Id.* art. V, § 22.
- "All substantial amendments made thereto shall be printed for the use of the members before the final vote is taken on the bill . . . " *Id.*
- "[N]o bill shall become a law except by a vote . . . taken on two separate days in each house, nor unless upon its final passage the vote be taken by ayes and noes and the names of those voting be entered on the journal." *Id.* (Unlike in the U.S. Congress, two separate votes on separate days are necessary to pass a bill, and a bill may not be passed by unanimous consent.)
- Conference committee reports may only be adopted by a recorded vote of individual members, not by unanimous consent. *Id.* art. V, § 23.
- A law may not be altered "by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length." *Id.* art. V, § 24.

- "The presiding officer of each house shall sign all bills and joint resolutions passed by the general assembly, and the fact of signing shall be entered on or appended to the journal thereof." *Id.* art. V, § 25.
- Legislative employees may only be paid from the state treasury and may only be paid pursuant to law or resolution. *Id.* art. V, § 27.[10]
- "All stationery, printing, paper, and fuel used in the legislative and other departments of government . . . and the repairing and furnishing the halls and rooms used for the meeting of the general assembly and its committees, shall be performed under contract, to be given to the lowest responsible bidder . . . No member or officer of any department of the government shall be in any way interested in any such contract . . ." *Id.* art. V, § 29.
- "The general appropriation bill shall embrace nothing but appropriations for the expense of the . . . departments of the state, state institutions, interest

[10] The general assembly soon began evading section 27, with 175 employees who were being paid and given raises outside the constitutional system. Attorney General Theodore H. Thomas told the State Auditor that the warrants for salary payments were unlawful and should not be paid by the state treasury. After a fierce inter-branch battle, the Attorney General's position was enforced in *People ex rel. Clement v. Spuance*, 8 Colo. 307, 6 P. 831 (1885); Frank Hall, 4 History of the State of Colorado 597 (1895).

on the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject." *Id.* art. V, § 32.

- "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects . . . or to levy taxes or perform any municipal function whatever." *Id.* art. V, § 35.
- Members of the general assembly may not trade votes on different bills. *Id.* art. V, § 40.
- Members with "a personal or private interest in any measure or bill . . . shall disclose the fact . . . and shall not vote thereon. *Id.* art. V, § 43.

The new Constitution also imposed many restrictions on the legislature's ability to tax or borrow. *Id.* arts. X, XI. Legislative actions improperly benefitting corporations were so disfavored that they were prohibited by a separate article. *Id.* art. XV.

Through the amendment process, the People have sometimes chosen to expand legislative powers beyond those originally granted. *See*, *e.g.*, *id.* art. XXV (enacted 1954) (creating Public Utilities Commission, granting the legislature power to designate an agency to regulate public utilities, and forbidding legislative regulation

of "municipally owned utilities"); *id.* art. XVIII, § 2 (revised 1980) (removing previous prohibition on state-operated lottery).

Likewise, the original constraints on the legislature have been bolstered by additional amendments, as the People saw necessary. Among the most important was the GAVEL Amendment, which reformed Article V. *Id.* art. V. § 7 (adding 120 Calendar Day Clause); § 20 (adding controls on processes for hearings and votes on bills); § 22a (prohibiting binding party caucuses, with express exception for votes on legislative officers or leaders); § 22b (declaring all actions in violation of sections 20 or 22a to be "null and void").

The text and history of the Colorado Constitution teach against acceptance of a legislature making for itself an exception to the Constitution.

III. Unforeseen emergencies, including pandemics, are not new in Colorado and the United States.

When adding the Calendar Day Clause to the State Constitution, the People could not possibly have been unaware that emergencies occur. With knowledge based on experience, the People made no exceptions to the Calendar Day Clause—unlike some other provisions in Article V, which do have exceptions.

A. Emergencies from 1877 to 1988

"Remember Pearl Harbor" was oft said after the infamous Japanese attack of December 7, 1941.[11] The next day, the Congress of the United States declared war on Japan. Three days later, Hitler's Third Reich and Mussolini's fascist Italy declared war on the United States.

At peace with all the world on December 6, 1941, the United States less than a week later was at war with the three great Axis powers. The emergency was ultimate: "[I]f we fail, then the whole world, including the United States, including all that we have known and cared for, will sink into the abyss of a new Dark Age made more sinister, and perhaps more protracted, by the lights of perverted science." Winston Churchill, *Address of the United Kingdom House of Commons* (June 18, 1940).

The voters of 1988, many of whom had personally served in the Second World War, were hardly unaware that the most terrible crises could arise in a matter of days.

Nor were pandemics imagined to exist only in dystopian science fiction. The awful death toll of 1914–18 "Great War" (so named because no one foresaw a sequel

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[11] "We remember Pearl Harbor because the question was put to America. It is the most significant question ever put to our nation, and indeed that can be put to any nation. Abraham Lincoln captured it in the Gettysburg address . . . Can a nation, conceived in liberty and dedicated to the proposition that all men are created equal, long endure?" Trent J. Lythgoe, *Why Does America Remember Pearl Harbor?*, Modern War Institute at West Point, Dec. 6, 2019.

two decades hence) was far exceeded by the Great Pandemic (H1N1) of 1918–20. K. David Patterson & Gerald E. Pyle, *The Geography and Mortality of the 1918 Influenza Pandemic*, 65 Bull. Hist. Med. 1, 21 (1991). The 1918 influenza mortality rate in Colorado was 766 per 100,000 population, one of the highest in the nation. Thomas A. Garrett, *Pandemic Economics: The 1918 Influenza and Its Modern-Day Implications*, Fed. Reserve Bank of St. L. *Review* 75, 79 tbl. 1 (Mar./Apr. 2008).

In more recent memory, as of 1988, was the Asian Flu (H2N2) pandemic of 1957–58. It killed 115,700 Americans. The 1968–72 Hong Kong flu (H3N2) killed 111,927 in the U.S. *See* W. Paul Glezen, *Emerging Infections: Pandemic Influenza*, 18 Epidemiologic Reviews 64, 67–68 (1996).

Polio was rare in the United States until the 1907 New York epidemic. The polio pandemic of 1949–53 resulted in 150,000 cases, killing 5 to 10 percent, and disabling many more. *See* Barry Trevelyan, Matthew Smallman-Raynor & Andrew D. Cliff, *The Spatial Dynamics of Poliomyelitis in the United States: From Epidemic Emergence to Vaccine-Induced Retreat, 1910–1971*, 95 Ann. Assoc. Am. Geogr. 269 (2005) .

In 1988 itself, HIV was raging, and at the time, incurable. It would eventually kill 600,000. *Today's HIV/AIDS Epidemic*, CDC Fact Sheet (2016) The voters of 1988 knew that all sorts of surprising emergencies could arise.

B. Emergencies before the ratification of the Colorado Constitution

The 1875–76 Colorado Convention, and the ratifying voters, also knew about emergencies, including from personal experience. The direst threat to the survival of the Colorado Territory was the Colorado War of 1864–65.

While almost all the U.S. Army was busy in "the States" fighting the American Civil War, all-out war between Colorado tribes and settlers began in April 1864. At the time, Colorado was not self-sufficient in food. Three trails from the east brought in provisions: the South Platte Trail (northeast), the Smoky Hill Trail (central, from Kansas, today commemorated by the monument in Denver's Civic Center Park), and in the southeast, the Colorado spur of the Sante Fe Trail.

By August, the Cheyenne, Arapahoe, Comanche, and Kiowa had shut down all three trails. There was no mail, and more importantly, no incoming supplies hauled by oxen. "The halting of supply trains caused prices to soar, and starvation threatened." Ray C. Colton, The Civil War In The Western Territories: Arizona, Colorado, New Mexico, and Utah 156 (1984). "Cut off, the Colorado mining camps

were almost starving." T.R. Fehrenbach, Comanches: The Destruction Of A People 460. (1974).[12]

The dastardly Sand Creek Massacre in November 1864 made things even worse, inflaming previously neutral bands, and bringing the Sioux into the war. The Indian counter-offensive began in January 1865. By February, 200 miles of settlements along the South Platte had been wiped out. Doris Monahan, Destination: Denver City: The South Platte Trail 208–22 (1985). Acting Governor S.H. Elbert telegraphed Governor John Evans, who was in Washington. Elbert stated that "the cost of several food items" had soared "to almost starvation prices." Unless five thousand federal troops were dispatched, the settlers would have to leave Colorado, he warned. Colton, *supra*, at 159 (telegram of Jan. 7, 1865).[13]

Pressure was relieved in the spring, when many Indians headed north to fight the Crow; meanwhile, Union victories in the Civil War allowed troops to be sent to

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[12] Flour went from nine dollars per hundred pounds to forty-five. "Sugar, tea, and many other items were simply unobtainable." Nell Brown Propst, The South Platte Trail: Story Of Colorado's Forgotten People 62 (rev. ed. 1984).

[13] *See also* J.E. Wharton, *History of the City of Denver: From Its Earliest Settlement to the Present Time to Which is Added a Full and Complete Business Directory of the City by D.O. Wilhelm*, in Richard A. Ronzio, Silver Images Of Colorado: Denver And The 1866 Business Directory 56 (1986) ("Supplies and provisions raised to famine prices, and the poor of Denver were reduced to such a strait, that an idea of a descent upon the provision stores of the city was seriously entertained.").

Colorado. Even so, the summer's warfare drove freight prices so high "that it came near to bankrupting the country." 1 Frank Hall, History of The State of Colorado 305 (1889).

Peace treaties were signed in October 1865. *See* Treaty with the Cheyenne and Arapaho, 1865, 14 Stat. 703;[14] Treaty with the Apache, Cheyenne, and Arapaho, 1865, 14 Stat. 713; Treaty with the Comanche and Kiowa, 1865, 14 Stat. 717. *See generally* David B. Kopel, *The Right to Arms in Nineteenth Century Colorado*, 95 D.U. L. Rev. 329, 375–97 (describing Indian Wars in nineteenth century Colorado).

As for epidemics, they were unfortunately common in the collective experience of Coloradoans. Yellow fever was one. From the seventeenth century until 1905, "cities and towns, primarily coastal and river ports . . . were repeatedly attacked by lethal epidemics of this deadly tropical disease." K. David Patterson, *Yellow Fever Epidemics and Mortality in the United States, 1693–1905,* 34 Soc. Sci. Med. 855, 855 (1992). A series of epidemics in New Orleans in the 1850s killed tens of

[14] The treaty acknowledged the misdeeds at Sand Creek. *Id.* at art. 6. ("The United States being desirous to express its condemnation of, and, as far as may be, repudiate the gross and wanton outrages perpetrated against certain bands of Cheyenne and Arrapahoe Indians, on the twenty-ninth day of November, A.D. 1864, at Sand Creek, in the Colorado Territory."). Reparations were provided. *Id.*

thousands. *Id.* at 856. *See also id.* at 857–58, tbl. 1 (listing "Major yellow fever epidemics 1693–1905").

Cholera epidemics ravaged New York City (1832, 1848) and New Orleans (1832, 1848, 1866–67). *See* John Duffy, *The History of Asiatic Cholera in the United States*, 47 Bull. N.Y. Academ. Med. 1152, 1156–61 (1971).

"Scarlet fever used to cause pandemics with high mortality in the 19th century in the United States, Western Europe, and Scandinavia." Laura J. Cataldo, *Scarlet Fever*, in 2 Infectious Diseases 856, 857 (Thomas Riggs ed., 2018). For example, Massachusetts suffered scarlet fever epidemics of 1858–59 and 1867–68. Alan C. Swedlund & Alison K. Donta, *Scarlet Fever Epidemics of the Nineteenth Century: A Case of Evolved Pathogenic Virulence?*, in Human Biologists in the Archives: Demography, Health, Nutrition and Genetics in Historical Populations: Demography, Health, Nutrition and Genetics in Historical Populations 159, 165–69 (D. Ann Herring & Alan C. Swedlund eds., 2009) (discussing 1858–59 and 1867–68 Massachusetts epidemics, and studying mortality in four towns in western Massachusetts).

Although the possibility of emergencies was well-known, the GAVEL Amendment does not include an exception for emergencies. There was no need for an exception to the Calendar Days Clause. The clause does not limit the authority of

the Governor or the General Assembly to call one or more special sessions of unlimited length.

IV. The Calendar Day Clause preserves a citizen legislature.

Nineteenth century constitutions often limited the length of legislative sessions, to reduce the quantity of lawmaking. Tarr, *supra*, at 120–21.[15] A popular saying was "No man's life, liberty, or property are safe while the legislature is in session." *Final Accounting in the Estate of A.B.*, 1 Tucker 247, 249 (N.Y. Surr. 1866) (Judge Gideon J. Tucker).

In the 1876 Colorado Constitution, legislative sessions were limited to 40 days, with no legislative sessions in even-numbered years.[16] Because the first session of the legislature would have to create an entire legal code for the state and establish

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[15] For early examples, Tarr cites North Carolina (1835) (legislature may only meet biennially) and Virginia (biennially "and not oftener," with session of no more than 90 days). By 1900, 33 state constitutions limited the length of sessions, and only six allowed annual meetings. *Id.* at 121. "Although limiting legislative sessions served the reformers' goal of economy in government, equally important was their assumption that shorter sessions gave legislators less opportunity to do harm." *Id.*

[16] Colo. Const., art. V. § 6 (1876) ("No session of the General Assembly, after the first, shall exceed forty days); *id.* § 7 (alternate year sessions only, except when the Governor calls a special session).

the departments of state government, it was exempt from the time limit. The first General Assembly sat for 140 days. 2 HALL, *supra*, at 362.

Before a constitutional amendment in 1950, regular sessions of the Colorado legislature were held only in odd-numbered years. When even-year regular sessions were first allowed, they could only address topics enumerated in the "Governor's call," plus appropriations and revenue. The agenda-limited sessions in even-numbered years were known as the "short session." The "Governor's call" limit on the topics of even-year sessions was eliminated by amendment in 1982.

The short session could be up to 140 calendar days, and there was no limit on the odd-year session. The 140 days that had once been sufficient to create an entire state government from scratch were now labeled a "short" session.

Representative Wayne Knox (D-Denver) recognized a problem. "[N]ever . . . known as either a conservative or a maverick," he would become the most experienced state representative in Colorado history (32 years in the State House, 1961–96, continuously after 1975). Knox and Common Cause took the lead on the good-government GAVEL Amendment. Since Republicans controlled both houses, proponents wisely had a Republican as chief sponsor in each house. After the Amendment was enacted, he bucked Democratic Governor Romer and Democratic colleagues who tried to evade the new rules on caucuses. Peter Blake, *House Dems*

Deny Caucus Conspiracy, Rocky Mountain News, May 11, 1990, 1990 WLNR 414421.

Representative Knox and Common Cause fought for the Colorado ideal of a citizen legislature. According to the 1876 and 1988 Colorado view, full-time professional legislatures, such as in New York and California, cause cronyist, excessive, and bad government.

The longer a session runs, the less the ability of a legislator to earn an independent living. Thus the greater the legislator's dependence on powerful interests to promote re-election. In a vicious cycle, powerful interests become all the more powerful, as legislators protect them from competition and subsidize them with tax dollars.

The corrective was the GAVEL Amendment's Calendar Days Clause. Even opponents of the GAVEL Amendment's other provisions (such as the ban on pocket vetoes) praised the Calendar Days Clause. According to the *Colorado Springs Gazette*:

> The Legislature can currently stay in session as long as it wants on odd-numbered years and 140 days on even-numbered years. There has been a growing perception, inside and outside the capitol, that Colorado's legislative sessions have been dragging on too long. Since 1967, the Legislature has stayed in session as many as 185 days (more than half the year), with an average in the

> unrestricted odd years of 162.4 days and 128.2 days in even years.
>
> The result has been tired lawmakers who find it difficult to balance their duties as elected officials with their private lives outside government. In recent years, a number of legislators have retired from the public arena, citing the long sessions and the conflicts with their obligations to family and career.
>
> Since becoming a state, Colorado has aspired to maintain a "citizens' legislature." We have never wanted our elected representatives to be professional politicians. We'd rather they be business people, professionals and other productive members of society who are willing to take time from their private lives to serve the public. A true citizens' legislature allows elected representatives to spend more time working and living in the communities that elected them, rather than in the closed world of the capitol dome, with its lobbyists and its heady games of political wheeling and dealing.

Editorial, *Assure citizens' legislature*, Colo. Springs Gazette, Nov. 5, 1988.[17]

[17] Nevertheless, the editorial urged a vote against GAVEL, because of concerns that GAVEL's rule against binding caucuses and pocket vetoes in committee or on the floor could cause "chaos . . . The result could be longer sessions and endless hearings, which would run directly counter to the worthwhile benefits of a shorter session embodied in Amendment 3." *Id.* Happily, the editorial's fears that requiring a vote on every bill would thwart the 120 Calendar Day Clause did not come to pass.

In the English language, "one hundred twenty calendar days" has only one possible meaning. There is no such thing as "non-calendar day."[18] Every day that exists is on the calendar. "[O]ne hundred twenty calendar days" does not mean "any 120 of the 365 days on the calendar." It means one hundred twenty days in a row.

In *People v. Zhuk*, this Court explained that the time from December 3 to December 17 is "fourteen calendar days." This was contrasted with a criminal procedure filing limit of "ten days"; the procedural rule was interpreted as skipping weekends and legal holidays. So the defendant's motion filed on December 17 was timely. The day-skipping "ten days" criminal procedure rule was the same amount of time as "fourteen calendar days." *See People v. Zhuk*, 239 P.3d 437, 438–39 (Colo. 2010)..

Unlike some other constitutional procedural controls on the legislature, there are no exceptions. Importantly and prudently, the Calendar Day Clause imposes no constraint on the Governor's discretion to call the General Assembly into special sessions; nor does the clause limit the ability of the General Assembly itself, with a

[18] Except perhaps on other planets. Since a "day" is one revolution of a planet, a day on earth is not the same length of time as a day on planets that rotate at different speeds. "Calendar days" exist in places where calendars are kept.

modicum of bipartisan support, to call itself into special sessions, with its own agenda. Colo. Const. art. V, § 7.

SARS-CoV-2 (the virus that causes the disease COVID-19) is a "novel" coronavirus. The People who created the Colorado Constitution, and their successors, have long understood that novel emergencies, including pandemics, may arise. They have also understood that letting a legislature unilaterally exempt itself from the Constitution—from the Rule of Law itself—endangers "the public peace, health, or safety."

The instant case may not be the last one where this Court must judge a government's actor's assertion that emergency trumps constitutional text. Given the clarity of the constitutional text in the instant case, a ruling in favor of a government actor's bootstrapped exemption could embolden others to defy plain constitutional language. In times of crisis, the slippery slope can be steep.

Here, the law is clear and the "injury" resulting from a ruling in favor of constitutional text is low; the legislature can still convene in special sessions for as long as it deems necessary. Of course special sessions are typically subject to greater public attention than are regular sessions; more careful public scrutiny is a benefit, not an injury.

Any legislation truly "necessary for the immediate preservation of the public peace, health, or safety" can be enacted in the regular session in conformity with the Calendar Days Clause. If—as should not be assumed—the General Assembly were to somehow neglect such legislation during its regular session, special sessions are immediately available.

Confidence in the continuing orderly operation of our Colorado system of government will be enhanced by upholding the People's straightforward regulation of the operations of the government they created.

CONCLUSION

The Court should uphold the Calendar Day Clause rather than the legislature's self-exemption rule.

RESPECTFULLY SUBMITTED this 24th day of March, 2020.

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Pursuant to C.R.C.P. 121 §1–26(9), a printed copy of this electronically-filed document with original signatures is being maintained at the Independence Institute and is available for inspection by other parties or the Court upon request

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2020, I electronically filed the foregoing **BRIEF OF THE INDEPENDENCE INSTITUTE** with the Clerk of the Court using ICCES, which will send electronic notification of such filing all parties that file an Entry of Appearance.

S/David B. Kopel
David B. Kopel