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MEMORANDUM

TO: Interested Persons
FROM: Office of Legislative Legal Services
SUBJECT: Safety Clauses and Act-Subject-to-Petition Clauses¹

Executive Summary

Article V, section 1(3) of the Colorado Constitution reserves to the people the power to refer all or a portion of an act to the ballot for voter approval. There are two exceptions to this power: 1) Laws "necessary for the immediate preservation of the public peace, health, or safety"; and 2) appropriations for the support and maintenance of the state departments and state institutions. To invoke the first exception, the General Assembly includes language in a bill, referred to as a "safety clause", which is derived from the language in the first exception.

Case law concerning the use of the safety clause in legislation clearly states that the General Assembly may prevent the people from referring an act to the ballot by declaring that the act is "necessary for the immediate preservation of the public peace, health, or safety". Further, the General Assembly is vested with exclusive power to determine whether that declaration is appropriate. The question of including the safety clause in legislation is a matter of debate in the legislative process, and the courts will not review or call into question the General Assembly's decision.

¹ This memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

If a bill does not include a safety clause, it is subject to the power of referendum. An individual has 90 days after the General Assembly adjourns *sine die* to exercise that power by submitting a petition to the Secretary of State's office. Thus, a bill that does not have a safety clause must include an act-subject-to-petition clause, and the bill cannot take effect until at least 90 days after the General Assembly adjourns *sine die*.

Discussion

1. An act that includes a safety clause is not subject to the power of referendum.

A safety clause is a clause placed at the end of a bill that reads as follows:

SECTION ___ . Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, or safety.

The language of the safety clause is derived from an exception to the referendum power described in article V, section 1(3) of the Colorado Constitution. The use of a safety clause arises out of the provisions of article V, sections 1(1) and 1(3) of the Colorado Constitution (sections 1(1) and 1(3)) relating to the power of the people to use the referendum process to refer an act or a portion of an act passed by the General Assembly to the ballot for voter approval. As originally adopted by the people in 1876, the Colorado Constitution vested the legislative power only in the General Assembly. In 1910, Colorado voters adopted an amendment to the Colorado Constitution that reserved to the people the right to propose laws (the right of the initiative) and the right to approve or reject the laws passed by the General Assembly (the right of the referendum).

Sections 1(1) and 1(3) provide:

Section 1. General assembly - initiative and referendum. (1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, **but 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.**

(3) **The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions, against any act or item, section, or part of any act of the general assembly, either by a petition signed by registered electors in an amount equal to at least five percent of the total number**

of votes cast for all candidates for the office of the secretary of state at the previous general election **or by the general assembly**. Referendum petitions, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section, or part of any act shall not delay the remainder of the act from becoming operative. **(Emphasis added)**

Sections 1(1) and 1(3) provide for two types of referenda:

- The General Assembly may refer statutes to the voters in a statewide election by attaching a referendum clause to a bill;² or
- The voters may submit a petition to the Secretary of State signed by a number of registered electors equal to five percent of the total number of votes cast for the office of Secretary of State in the previous general election³ requesting a referendum vote against an act or item, section, or part of an act adopted by the General Assembly.

The type of referendum exercised by the voters has been called a "rescission" referendum. This means that a specified number of registered electors can sign a petition and provide the electorate with the opportunity to rescind all or part of an act enacted by the General Assembly. Section 1(3) provides two exceptions to this "rescission" referendum:

- Laws "necessary for the immediate preservation of the public peace, health, or safety"; and
- Appropriations for the support and maintenance of state agencies and state institutions.

2. Courts have held that the General Assembly has exclusive authority to decide whether an act is necessary for the immediate preservation of the public peace, health, or safety.

The case law in Colorado is well settled that a legislative body may prevent a referendum to the people by declaring that an act is "necessary for the immediate preservation of the public peace, health, or safety". The courts have also held that the legislative body is vested with exclusive power to determine whether that declaration is appropriate. While the question of whether to use a safety clause in a bill is certainly a matter that legislators

² Such a bill is often called a "referred bill".

³ This number varies based on the election. For 2019 through 2022, the number of signatures required for a statewide initiative or referendum petition is 124,632.

may debate in the legislative process, once the legislative body decides that question, that decision stands, and the judiciary will not overturn it.

Specifically, in 1913, the Colorado Senate asked the Colorado Supreme Court whether the General Assembly could lawfully prevent a proposed act concerning the eight-hour-day law for persons employed in mines from being referred to the voters by the use of a safety clause declaring that the act was a law necessary for the immediate preservation of the public health and safety. The Supreme Court held that the General Assembly had the authority under the constitutional language to make such a determination⁴ and that "such declaration is conclusive upon all departments of government, and all parties, in so far as it abridges the right to invoke the referendum."⁵ The General Assembly passed the bill in question with a safety clause.

A few years later in *Van Kleeck v. Ramer*,⁶ the Supreme Court affirmed its 1913 ruling. The Colorado Supreme Court noted that, except as limited by the federal or the state constitution, the authority of the General Assembly is plenary and the judicial branch cannot exercise any authority or power except that granted by the Constitution. The Court held that, in deciding whether an act is necessary for the immediate preservation of the public peace, health, or safety, the General Assembly "exercises a constitutional power exclusively vested in it, and hence, such declaration is conclusive upon the courts in so far as it abridges the right to invoke the referendum."⁷

The Court responded to the argument that the people would be deprived of the right to refer a law if the legislature, either intentionally or through mistake, declares falsely or erroneously that a law is necessary for the immediate preservation of the public peace, health, or safety. The Court said:

The answer to this proposition is, that under the Constitution the general assembly is vested with exclusive power to determine that question, and its decision can no more be questioned or reviewed than the decisions of this court in a case over which it has jurisdiction.⁸

⁴ *In re Senate Resolution No. 4*, 54 Colo. 262, 130 P. 333 (1913).

⁵ *Id.* at 271, 130 P. at 336.

⁶ *Van Kleeck v. Ramer*, 62 Colo. 4, 156 P. 1108 (1916).

⁷ *Id.* at 10-11, 156 P. at 1110.

⁸ *Id.* at 11-12, 156 P. at 1111.

The *Van Kleeck* case has been cited in several subsequent Colorado cases involving the use of the public exception clause in municipal ordinances or actions taken by a governmental body.⁹

3. A bill that does not include a safety clause is subject to the power of referendum and therefore cannot take effect until at least 90 days after the legislative session adjourns.

If an act is not necessary for the immediate preservation of the public peace, health, or safety, and therefore does not include a safety clause, then under section 1(3), an individual may refer all or a portion of the act to the ballot for voter approval. As discussed previously, to refer the act, an individual must collect a specified number of signatures on a petition and file the petition with the Secretary of State's office within 90 days after the regular legislative session adjourns *sine die*. Thus, an act that does not have a safety clause cannot take effect until the 90-day period has passed, in case the act is referred to the ballot.¹⁰ And if the act is referred to the ballot and approved by the voters, it cannot take effect until the governor declares the final vote following the election.¹¹

A bill that does not include a safety clause includes the following standard language, referred to as an "act-subject-to-petition clause" or "ASP clause":

SECTION ____ . Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly ([date 90 days after anticipated 120th legislative day for the applicable year] if adjournment *sine die* is on [anticipated 120th legislative day for the applicable year]); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November [next general election year] and, in such case,

⁹ See for example, *Fladung v. City of Boulder*, 160 Colo. 271, 417 P. 2d 787 (1966); *Enger v. Walker Field*, 181 Colo. 253, 508 P. 2d 1245 (1973); *Lyman v. Bow Mar*, 188 Colo. 216, 533 P.2d 1129 (1975); *Board of County Comm'rs v. Denver*, 193 Colo. 211, 565 P.2d 212 (1977); *McKee v. Louisville*, 200 Colo. 525, 616 P.2d 969 (1980); *Cavanaugh v. State, Dept. of Social Services*, 644 P.2d 1 (Colo. 1982); *Slack v. Colorado Springs*, 655 P.2d 376 (1982).

¹⁰ See *In re Interrogatories of the Governor*, 66 Colo. 319, 181 P. 197 (1919) (Held: To allow the opportunity for filing a "rescission" referendum petition for 90 days after the legislative session, a bill without a safety clause cannot take effect for 90 days.)

¹¹ By comparison, an act that includes a safety clause may take effect as soon as the governor signs the act or allows it to become law without a signature. See Colo. Const. art. IV, § 11.

will take effect on the date of the official declaration of the vote thereon by the governor.¹²

It is the practice of the staff of the Office of Legislative Legal Services to ask a bill sponsor whether the sponsor wants to include a safety clause or an ASP clause in the bill. In determining whether the changes effected by the bill are necessary for the immediate preservation of the public peace, health, or safety, the bill sponsor should consider how quickly the bill needs to take effect in order to accomplish the purposes of the bill. The text of a bill that does not include a safety clause cannot include effective dates that precede the date that is 90 days after the General Assembly adjourns *sine die*.

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¹² An ASP clause may be modified to reflect an effective date that is later than 90 days after the General Assembly adjourns *sine die*.