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JURISDICTIONAL STATEMENT

The Request for an Advisory Opinion on the matter of the interpretation of South Dakota’s Constitution regarding the Lieutenant Governor’s power to vote on final passage of legislation in the case of a tie was filed by Governor Larry Rhoden (the “Governor”), by and through counsel, on January 26, 2026. The Request was submitted pursuant to the authority vested in the Governor by the South Dakota Constitution, Article V, Section 5, and this Court has original jurisdiction. For the reasons discussed *infra.*, the Governor renews his Request for an advisory opinion.

STATEMENT OF ISSUES

The broad issues before this Court are:

A. Does the Governor’s Request present a solemn occasion?

It does.

Relevant Case:

In re Noem, 2024 S.D. 11, 3 N.W.3d 465

Relevant Constitutional Provision:

S.D. Const. art. V, § 5

B. Does the state Constitution grant the Lieutenant Governor, while serving as the President of the Senate, the authority to cast a tie-breaking vote on final passage of a bill or joint resolution in the Senate?

It does.

Relevant Cases:

Advisory Opinion on Constitutionality of 1978 PA 426, 272 N.W.2d 495 (Mich. 1978)

Opinion of the Justs., 225 A.2d 48 (Del. 1966)
State ex rel. Easbey v. Highway Patrol Bd., 372 P.2d 930 (Mont. 1962)

Relevant Constitutional Provisions:

S.D. Const. art. III, § 18

S.D. Const. art. IV, § 5

C. Does separation of powers prevent the Court from rendering a judicial opinion?

It does not.

Relevant Cases:

Gray v. Gienapp, 2007 S.D. 12, 727 N.W.2d 808

State ex rel. Easbey v. Highway Patrol Bd., 372 P.2d 930 (Mont. 1962)

Relevant Constitutional Provisions:

S.D. Const. art. II

STATEMENT OF THE CASE AND FACTS

January 13, 2026, was the first day of South Dakota's 101st Legislative Session. Due to illness, the Senator from District 12 has been absent. This absence leaves an even number of Senators when all others are present.

On January 22, 2026, the 6th Legislative Day, a vote on final passage of Senate Bill 25 (as amended) resulted in a tie vote of 17 yeas, 17 nays, and 1 excused. Given the tie vote, the President of the Senate, Lieutenant Governor Tony Venhuizen, cast a tie-breaking vote in favor of the bill and declared it passed.

Consistent with Senate Rules, a Senator noted an intent to move to reconsider the result by which Senate Bill 25 had passed, which would be taken up the following legislative day. App A.

On January 23, 2026, before a motion to reconsider Senate Bill 25 was offered, Senator Chris Karr raised a point of order questioning the President's declaration the day before that Senate Bill 25 had passed. Lieutenant Governor Venhuizen explained the rationale for his ruling, after which Senator Karr challenged the President's ruling and explained his rationale.

On a roll call vote, the Senate voted to support Senator Karr's challenge, overruling the President. This meant that the Lieutenant Governor's "yea" vote on Senate Bill 25 was struck, and Senate Bill 25 failed because of senatorial deadlock.¹ App B.

On January 26, 2026, Governor Larry Rhoden requested an advisory opinion of this Court (the "Request") and asked for interpretation of two constitutional provisions, to wit: Article III, Section 18 and Article IV, Section 5 of the South Dakota Constitution. The Governor asked, "Does the State Constitution grant the Lieutenant Governor, while serving as the

¹ The video found at <https://www.youtube.com/watch?v=aCu2T1BTtPY>, beginning at 34:40 and ending 47:38 (last retrieved January 30, 2026).

President of the Senate, the authority to cast a tie-breaking vote on final passage of a bill or joint resolution in the Senate?” On January 27, 2026, the Senate Leadership filed a letter, asserted its arguments, requested briefing, and requested oral argument.

The Court entered an Order on January 28, 2026 directing briefing by both the Governor and the Senate Leadership. This Brief contains the legal authority and argument supporting why this question is a solemn occasion and supporting the Lieutenant Governor’s authority that, while serving as the President of the Senate, he has the expressed constitutional right to cast a vote in the event of a tie on any matter pending before the Senate.

ARGUMENT

The heart of this Request asks this Court for a harmonious interpretation of two constitutional provisions. Article III, Section 18 (the emphasized phrase hereinafter the “Majority Provision”) states:

The enacting clause of a law shall be: “Be it enacted by the Legislature of the State of South Dakota” and no law shall be passed unless by assent of a majority of all the members elected to each house of the Legislature. And the question upon the final passage shall be taken upon its last reading, and the yeas and nays shall be entered upon the journal.

S.D. Const. art. III, § 18. Article IV, Section 5 (the emphasized phrase hereinafter the “Casting Vote Provision”) expressly authorizes and grants the casting vote power to the Lieutenant Governor:

The lieutenant governor shall be president of the senate but shall have no vote unless the senators be equally divided. The lieutenant governor shall perform the duties and exercise the powers that may be delegated to him by the Governor.

S.D. Const. art. IV, § 5.

The people of South Dakota answered this question in the affirmative by enshrining into our founding state Constitution the authority of casting a vote when the Senate is equally divided on any vote. *See infra.*, at B.1. The Lieutenant Governor presides as the President of the Senate, usually as a nonvoting member of the Senate. S.D. Const. art. IV, § 5; Senate Rule 1-1. That role is typically functionary and ensures the diligent handling of the Senate’s legislative process with one expressed exception: *if* the Senate is equally divided, *then* the Lieutenant Governor is expressly authorized to cast a vote on final passage. Adherence to this constitutional expression of power neither violates the Majority Provision nor implicates the separation of powers. However, when the Senate overruled a valid tie-breaking vote on Senate Bill 25, the Senate violated our state Constitution and the Casting

Vote Provision. The Governor respectfully urges the Supreme Court to conclude the question posed in the affirmative.

A. Solemn Occasion Factors Weigh in Favor of Answering the Governor's Request.

There are two situations when the Court has jurisdiction to answer a question of law posed by the Governor. The Governor may “require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive powers and upon solemn occasions.” S.D. Const. art. V, § 5. This provision is disjunctive so that providing an advisory opinion may be supported in either situation. *In re Noem*, 2024 S.D. 11, ¶ 9, 3 N.W.3d 465, 471.

This Court considers eight factors to determine whether a question presented constitutes a solemn occasion:

[1] whether an important question of law is presented, [2] whether the question presents issues pending before the Court, [3] whether the matter involves private rights or issues of general application, [4] whether alternative remedies exist, [5] whether the facts and questions are final or ripe for an advisory opinion, [6] the urgency of the question, [7] whether the issue will have a significant impact on state government or the public in general, and [8] whether the Court has been provided with an adequate amount of time to consider the issue.

Id., ¶ 17, 3 N.W.3d at 472-73 (citing *In re Daugaard*, 2016 S.D. 27, ¶ 13, 884 N.W.2d 163, 167). The Governor asserts this is a solemn occasion and the greater weight of all the factors supports answering the question posed.

Factor 1 – An Important Question of Law

Construing apparent conflicts in the Constitution is an important question of law. Moreover, determining the role and authority of the office of the Lieutenant Governor is important and is no passing concern. *See* 1990 *Idaho Op. Atty. Gen.* No. 47 (opining that adjudicating legal and constitutional rights of parties is responsibility of the courts).

Factor 2 – Unknown Issue Pending Before the Court

The Court is in the best position to determine if any controversy pending on its docket may relate to any issue herein. To the best of the knowledge of the undersigned, there is no similar issue pending before the Court.

Factor 3 – Issue of General Application

No private rights are being adjudicated by this Request as this is an issue of general application. There are no factual questions. The merits of Senate Bill 25 are irrelevant to this question because another tie vote could happen on any bill being considered by the Senate, making this question a matter of general applicability and not directed toward any particular bill.

Further, the relevance of this question will march well into the future, making an advisory opinion evergreen for future Senates and executives.

Factor 4 – No Alternative Remedies

An advisory opinion from the Court is the most practical way to resolve this question now that the Senate has overruled the Lieutenant Governor's right to vote, reversing its historical position of upholding the Casting Vote Provision.² By overruling the casting vote, legislation will not pass, thus depriving other causes of action from being judiciable through traditional adversary actions, such as writ of prohibition, mandamus, or other original action. *See, e.g., State ex rel. Easbey v. Highway Patrol Bd.*, 372 P.2d 930 (Mont. 1962) (writ of prohibition); *Center Bank v. Dep't of Banking & Finance of State*, 313 N.W.2d 661 (Neb. 1981) (original action); *Coleman v. Miller*, 71 P.2d 518, 518 (Kan. 1937), *aff'd*, 307 U.S. 433, 59 S. Ct. 972 (1939) (writ of mandamus); *State ex rel. Sanstead v. Freed*, 251 N.W.2d 898 (N.D. 1977) (writ). In addition, two other courts have granted advisory opinion proceedings to answer similar questions. *Advisory Opinion on Constitutionality of 1978 PA 426*, 272 N.W.2d 495, 498 (Mich. 1978); *Opinion of the Justs.*, 225 A.2d 481, 485 (Del. 1966).

Factor 5 – Matter is Ripe for Review

² *See supra.*, at fn 4.

The matter is final and ripe. “Ripeness involves the timing of judicial review and the principle that “[j]udicial machinery should be conserved for problems which are real and present or imminent[.]” *Boever v. S. Dakota Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995) (quoting *Gottschalk v. Hegg*, 228 N.W.2d 640, 643-44 (S.D. 1975)); see *Investigation of Highway Const. Indus. v. Bartholow*, 373 N.W.2d 419, 420 (S.D. 1985) (recognizing that the doctrines of mootness and ripeness may overlap but the question is whether there is an existing controversy). A resolution as to the fate of Senate Bill 25 does not render this Request moot. This matter presents a classic example of a question that is “capable of repetition, yet evading review.” *Matter of Woodruff*, 1997 S.D. 95, ¶ 15, 567 N.W.2d 226, 229 (recognizing the public interest exception to mootness in exceptional circumstances of “general public importance, probable future recurrence, and probable future mootness”). A tie vote on final action requires a decision by the Lieutenant Governor to vote, which the current Senate would challenge, and the Senate and the office of the Lieutenant Governor would be in the same position of constitutional conflict again.

Factor 6 – Matter is of Relative Urgency

The Governor’s question implicates the State Constitution during the ongoing regular session. Further, the Senate’s conduct – if it is determined to

be unwarranted – has constrained the Lieutenant Governor’s constitutional authority. In other words, the Governor’s question is relatively urgent because it is reasonable to expect that the Senate will have an even number of members present for the rest of this regular session and continue to challenge the casting vote of the Lieutenant Governor.

Factor 7 – Matter has Significant Impact

This issue has a significant impact on State government and the public in general. Clarity as to the constitutionality on final passage of legislation is important to the rule of law and order in legislative proceedings. “It is in the public interest that there be a proper method to break deadlocks and to avoid impasse in the Senate.” *Opinion of the Justs.*, 225 A.2d at 485 (holding the Lieutenant Governor can cast tie votes on final action); *Easbey*, 372 P.2d at 939 (holding that a casting vote is an “efficient parliamentary device that decides and determines the fate of the bill or proposition being voted upon”); *Advisory Opinion on Constitutionality of 1978 PA 426*, 272 N.W.2d at 498 (concluding that a casting vote on final passage relieves “apparent and frustrating deadlock”). “This was the rationale for vesting in the Vice President the casting vote in the United States Senate: ‘to secure at all times the possibility of a definitive resolution of the body.’” *Opinion of the Justs.*, 225 A.2d at 485 (citing *The Federalist Papers*, No. 68: (Alexander

Hamilton)). Answering will have a significant impact on securing the definitive resolution of legislation in the event of a tie. Without binding authority, any future tie vote on final passage of a bill, as happened with Senate Bill 25, could result in repeating the same challenge process, and cause uncertainty as to whether the Senate will uphold a tie-breaking vote or not. A ruling of the Court will provide clarity and certainty going forward.

Factor 8 – Adequate Time for Consideration

While there is urgency in answering this question during this Legislative Session, there is sufficient time to interpret and reconcile the Majority Provision with the Casting Vote Provision, so that the State Senate can move forward with efficiency, certainty, and consistency as to the scope of the constitutional grant of power to the Lieutenant Governor while presiding as the President of the Senate. There are no questions of fact, the question of law is not too complex, and there is relatively little case law on the issue. By illustration, the Delaware Supreme Court was asked the same question on December 21, 1966, and responded on December 29, 1966.

Opinion of the Justs., 225 A.2d 481.

The greater weight of the factors concludes this question presents a solemn occasion.

The Senate’s Letter to this Court argues that an advisory opinion can *only* deal with purely executive powers, and not legislative prerogatives. This argument fails to recognize South Dakota precedent that analyzed legislative matters when it is a solemn occasion. For instance, Governor Rounds requested an advisory opinion as to whether, by going past midnight, the Legislature had used up their 40th, and last, legislative day. *In re Rounds*, 2003 S.D. 30, 659 N.W.2d 374. This Court took up the question and answered in the negative. *Id.* Other instances include Governor Noem’s two requests for advisory opinions interpreting legislative conflicts of interest in Article III, the Legislative Department, of the State Constitution, and both times, the Court provided a very detailed guide on proper constitutional interpretation of Article III, Section 12. *In re Noem*, 2020 S.D. 58, 950 N.W.2d 678; *In re Noem*, 2024 S.D. 11, 3 N.W.3d 465; *see also In re Opinion of the Judges*, 246 N.W. 295 (S.D. 1933) (answering despite lack of executive duty but impacting a reapportionment question); *Opinion of the Judges*, 119 N.W.2d 145 (S.D. 1963) (answering when calculating session timeframe after constitutional amendment allowed regular annual sessions that blended “the exercise and coordination of [the Governor’s] executive powers with the legislative department of our state”); *but cf. Matter of Constr. of Article III, Section 5, of the S. Dakota Const.*, 464 N.W.2d 825,

826 (S.D. 1991) (declining to answer request regarding political question of the redistricting preparation legislative committee as purely legislative); *In re Constr. of Const.*, 54 N.W. 650, 651 (S.D. 1893) (declining to answer a question of legislative duty for the number of votes on a resolution where no executive action was involved). In summary, this Request, like those posed and answered during the Rounds and Noem administrations, involves constitutional interpretation of a blended legislative and executive power, and it is a solemn occasion appropriate for judicial interpretation. *See infra.*, further analysis in Section C.

B. The Majority Provision of Article III, § 18 and Casting Vote Provision of Article IV, § 5 Can Be Harmonized.

1. History and Context of the Casting Vote Provision

A casting vote is a deciding vote cast by the presiding officer when the vote for and the vote against any proposal are equal. Therefore, the casting vote is specifically intended to break a tie. *Mason's Manual of Legis. Proc.* § 513 (ed. 2020).³ The unique concept of the casting vote by the President of the Senate dates back to the New York Constitution.

³ At least 23 States' Casting Vote Provisions: Ala. Const. art. V, § 117 ("shall have no right to vote except in the event of a tie"); Ark. Const. amend. 6, § 5 ("shall have only a casting vote therein in case of a tie vote"); Cal. Const. art. V, § 9 ("has only a casting vote"); Conn. Const. art. IV, § 17 ("have, when in committee of the whole, a right to debate, and when the senate is equally divided, to give the casting vote"); Del. Const. art. III, § 19 ("shall have no vote unless the Senate be equally divide"); Idaho Const. art. IV,

The history and concept of a lieutenant governor's 'casting vote' . . . is found in the New York Constitution of 1777, which provided that the lieutenant governor would, by virtue of this office: be president of the senate, and, upon an equal division, have a casting voice in their decisions, but not vote on any other question. This provision for a casting vote was incorporated into Article I Section 3 of the United States Constitution a decade later: 'The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.' In essence, then, a 'casting vote' is one that is cast only to break a tie. It cannot be cast to create a tie. Nor can it be cast to create a quorum of the body. *See Opinion of the Justs.*, 225 A.2d 481, 483 (Del. 1966). The policy reason for the existence of the casting vote in the

§ 13 ("shall vote only when the senate is equally divided"); Ind. Const. art. 5, § 21 ("have a right, when in committee of the whole, to join in debate, and to vote on all subjects; and, whenever the Senate shall be equally divided, he shall give the casting vote"); Mich. Const. art. V, § 25 ("shall have no vote, unless they be equally divide"); Miss. Const. art. 5, § 129 ("In committee of the whole he may debate all questions, and where there is an equal division in the senate, or on a joint vote of both houses, he shall give the casting vote"); Mo. Const. art. IV, § 10 ("In committee of the whole he may debate all questions, and shall cast the deciding vote on equal division in the senate and on joint vote of both houses"); Neb. Const. art. III, § 10 ("shall vote only when the Legislature is equally divided"); Nev. Const. art. 5, § 17 ("but shall only have a casting vote therein"); N.M. Const. art. V, § 8 ("shall vote only when the senate is equally divided"); N.Y. Const. art. IV, § 6 ("but shall have only a casting vote therein"); N.C. Const. art. III, § 6 ("shall have no vote unless the Senate is equally divided"); N.D. Const. art. V, § 12 (amended 1996) ("If the senate is equally divided on a question, the lieutenant governor may vote on procedural matters and on substantive matters if the lieutenant governor's vote would be decisive"); Okla. Const. art. VI, § 15 ("shall have only a casting vote therein, and also in joint vote of both house"); Pa. Const. art. IV, § 4 ("may vote in case of a tie on any question except the final passage of a bill or joint resolution, the adoption of a conference report or the concurrence in amendments made by the House of Representatives"); S.D. Const. art. IV, § 5; Tex. Const. art. IV, § 16 ("shall have, when in Committee of the Whole, a right to debate and vote on all questions; and when the Senate is equally divided to give the casting vote"); Vt. Const. Ch. II, § 19 (" shall have a casting vote, but no other"); Va. Const. art. V, § 14 ("shall have no vote except in case of an equal division"); Wash. Const. art. II, § 10 ("shall have the deciding vote in case of an equal division of the senate").

senior branch of the legislature is set forth by the Michigan Supreme Court: ‘it is generally an unfortunate thing from the standpoint of the people watching the legislative process to find the legislature deadlock on an issue by an absolutely even vote, and that it is desirable from the standpoint of having the people feel that the legislative process does and can move forward at all times to have it possible for a tie vote to be broken.

1990 *Idaho Op. Att’y Gen. No. 47* (quoting *Advisory Opinion on Constitutionality of 1978 PA 426*, 272 N.W.2d at 499). The Federalist Papers described the same rationale for why the U.S. Constitution vests in the Vice President of the United States, when acting as the President of the Senate, the power of casting a tie-breaking vote: “to secure at all times the possibility of a definitive resolution of the body, . . . a constant for a contingent vote.” *The Federalist Papers*, No. 68 (Alexander Hamilton); U.S. Const., art. I, § 3 (“The vice president of the United States shall be president of the senate, but shall have no vote unless they be equally divided”). “The instances where the Vice-President of the United States has voted . . . are far too numerous to here recite. John Adams, our first Vice-President, [voted on a tie] twenty-nine times and John C. Calhoun, while Vice-President of the United States and President of the Senate, voted therein twenty-eight times.” *Easbey*, 372 P.2d at 936-37. The same is true for the South Dakota Senate

where the Lieutenant Governor has voted yea at least 17 times on bills and 3 times on resolutions.⁴

The records of the South Dakota Constitutional Convention debates do not include comments about the Casting Vote Provision, the meaning, or how it was intended to work in concert with the Majority Provision.⁵

However, for similar reasons provided in the constitutional convention debates of New York and in the Federalist Papers, Michigan also concluded that the purpose of the Casting Vote Provision, “expressly provided for, when cast, is to be counted and when counted it becomes and is the efficient

⁴ The state Senate has accepted prior tie-breaking votes cast by the Lieutenant Governor on final passage. The last tie-breaking vote cast by the President of the Senate in favor of final passage of a bill was cast by Lieutenant Governor Dennis Daugaard on Senate Bill 169 in the 2010 Legislative Session. His authority was not challenged. 2010 SB 169 (S. Journal at 431). There are many other instances in our state’s long history of accepting the Lieutenant Governor’s casting vote. The instances cited herein are not exhaustive. The Lieutenant Governor has voted “yea” on bills. *See e.g.*, 1999 SB 97 (S. Journal at 242-43); 1999 SB 107 (S. Journal at 306-307); 1996 SB 262 (S. Journal at 467, *but cf.* on reconsider motion next day vote nay, S. Journal at 490); 1995 SB 207 (S. Journal at 465); 1993 SB 247 (S. Journal at 480); 1992 HB 1096 (S. Journal at 983); 1992 SB 9 (S. Journal at 995); 1988 SB 47 (S. Journal at 378); 1986 SB 137 (S. Journal at 866); 1985 HB 1179 (S. Journal at 771-772); 1985 SB 308 (S. Journal at 746-47); 1985 SB 55 (S. Journal at 266); 1984 SB 88 (S. Journal at 259); 1984 SB 166 (S. Journal at 429) (tabling motion); 1982 HB 1283 (S. Journal at 919-20); 1915 HB 21 (S. Journal at 315-16) (tabling motion).

The Lieutenant Governor has also voted “nay” on bills. *See e.g.*, 1996 SB 178 (S. Journal at 345); 1996 SB 173 (S. Journal at 437-38); 1992 SB 249 (S. Journal at 483); 1989 HB 1365 (S. Journal at 913-14); 1986 HB 1140 (S. Journal at 1050).

Other times the tie-breaking vote were cast on resolutions, either yea or nay. *See e.g.*, 1993 HCR 1006 (S. Journal at 379-80); 1982 SJR 2 (S. Journal at 334); 1981 HCR 1031 (S. Journal at 1124-25).

⁵ *Recommendations of the Constitutional Revision Commission*, Vol. 1. at 22, Dec. 15, 1971, <https://babel.hathitrust.org/cgi/pt?id=umn.31951d02413555h&seq=33> (last retrieved February 2, 2026).

parliamentary device that decides and determines the fate of the bill or proposition being voted upon. Such ‘casting vote’ tips the scales and breaks the deadlock and tie of an ‘equally divided’ Senate.” *Easbey*, 372 P.2d at 939 (noting Michigan’s Majority Provision is based on members present and not members elect). The rules of the 1890 South Dakota State Senate (the first Senate that convened after the constitutional convention) affirmed the Lieutenant Governor’s power to vote in the case of a tie. App C.⁶ This is also consistent with Mason’s Manual of Legislative Procedure, adopted by Senate Rule 5-2 to fill any gap in procedure, that sets out the parliamentary procedure that allows a presiding officer the authority to facilitate legislative process by breaking a tie vote when the vote is equally divided. *Mason’s Manual of Legis. Proc.* § 513(1)-(4) (ed. 2020); *see* S.D. Senate Rule 5-2.

These responsibilities have been present since statehood. Originally, the Casting Vote Provision was in Section 7 of Article IV and stated, “The Lieutenant Governor shall be President of the Senate, but shall have only a casting vote therein. . . .”⁷ In 1972, the Legislature adopted and voters

⁶ When the first legislative session was convened in 1890, the adopted Senate Rules were nearly identical to the constitutional provisions at issue. 1890 S. Journal, at 26, <https://babel.hathitrust.org/cgi/pt?id=uc1.a0002045920&seq=32> (last retrieved February 2, 2026).

⁷ 1889 Journal of the Convention, at 169 (S.D. Const. art. IV, Executive Department, § 7. “The Lieutenant Governor shall be President of the Senate, but shall have only a casting vote therein”).

approved a revised Executive Article, and relevant here, moved the Casting Vote Provision from Section 7 to Section 5 in Article IV, where it remains today in its current form. That revision, which retained the Casting Vote Provision, prevailed by a significant margin of 182,248 to 96,914.

Since, there have been three attempts by the Legislative Branch through resolution to remove the Casting Vote Provision and remove the Lieutenant Governor as President of the Senate. Amendments were proposed in 1974 (rejected attempt to delete the first sentence of Section 5 of Article IV to remove the Lieutenant Governor as President of the Senate and repeal Casting Vote Provision), 1976 (same), and 1986 (same). Each was rejected by the voters.

The people of South Dakota have supported that the Lieutenant Governor should remain as the President of the Senate and continue to maintain the power to cast tie-breaking votes to prevent deadlock. Put another way, the State Constitution has enshrined this power, and the people have rejected multiple attempts to remove it. Presently, by overruling the Lieutenant Governor's tie vote on Senate Bill 25, the Senate encroaches on the Executive's constitutional authority and goes against the people of this State.

2. Harmonizing Two Constitutional Provisions

As this Court reasoned in *In re Daugaard*, “[t]he members of the Constitutional Revision Commission [] were acutely aware of the inconsistencies caused throughout the years by heavily amending the 1889 Constitution. In drafting the 1972 Constitution they sought to avoid inconsistencies and conflicts between provisions. It is this Court’s responsibility to give a reasonable construction to each provision, give effect to each provision, and construe them together to make them harmonious and workable.” *In re Daugaard*, 2011 S.D. 44, ¶¶ 12-13, 801 N.W.2d 438, 442 (cleaned up); *see S.D. Auto. Club v. Volk*, 305 N.W.2d 693, 696 (S.D. 1981). Indeed, by giving effect to the Majority Provision and Casting Vote Provision, they can be fairly construed to be harmonious, workable, and consistent.

At first blush it may appear that the Majority Provision, restricting the passage of laws unless supported by a majority of all the members elected, is at odds with the Casting Vote Provision, prohibiting the Lieutenant Governor, who is not a member elected, from voting unless the senators are equally divided. It is agreed that the Lieutenant Governor is not a member elected to the Senate, so how can the Lieutenant Governor’s vote count to pass a bill and have that bill still pass by a majority of the members elected?

In overruling the Lieutenant Governor’s tie-vote on Senate Bill 25, the Senate argues that if the casting vote of the Lieutenant Governor is what causes the bill to pass by a majority of yea votes, that bill’s vote violates the Majority Provision because the Lieutenant Governor is not a member elected. However, this argument fails. The Court can harmonize these two provisions in accordance with the basic rules of constitutional construction and conclude that the Lieutenant Governor can cast a tie-breaking vote on a bill or joint resolution.⁸

a. Harmonizing and giving effect to both provisions

First, overruling the Lieutenant Governor’s vote on a tie because it did not pass by a majority of members elected is inconsistent with longstanding rules of interpretation by failing to harmonize the Majority Provision with the specific exception to it of the Casting Vote Provision and does not give full effect to the Casting Vote provision at issue.

“A Constitutional provision, like a statute, must be read giving full effect to all of its parts.” *In re Certification of a Question of L. from U.S. Dist. Ct., Dist. of S. Dakota*, W. Div., 2000 S.D. 97, ¶ 15, 615 N.W.2d 590,

⁸ The Governor’s Request does not ask for an opinion on other types of votes because it is not anticipated that the Senate would object to the Lieutenant Governor’s vote on any other matter. The Court should refrain from expanding or reframing the question asked as suggested by the Senate January 27, 2026 Letter.

596 (quoting *Assoc. Gen. Contractors v. Schreiner*, 492 N.W.2d 916, 922-23 (S.D. 1992)). “[I]n construing a constitutional provision, we ‘must give regard to the whole instrument, must seek to harmonize the various provisions, and must, if possible, give effect to all the provisions.’” *In re Daugaard*, ¶ 6, 801 N.W.2d at 440 (quoting *Volk*, 305 N.W.2d at 696). The plain language used in the provision is of primary importance in determining its meaning. *Id.*

The Majority Provision requires “assent of a majority of all the members elected to each house of the Legislature.” S.D. Const. art. III, § 18. It is agreed that the Lieutenant Governor is not a member elected to the Senate. Since statehood, there have been an odd number of members elected, and since 1939, there have been 35 total senators elected. A bill must receive the affirmative vote of 18 senators on final passage for it to be declared pass. However, when a bill does not receive a majority but instead is deadlocked at a tie, the Constitution does not immediately consider the bill to have failed because it created an exception by allowing the Lieutenant Governor to then cast a vote. The Lieutenant Governor is not empowered to vote unless and until the Senate is equally divided on a vote. *See Easbey*, 372 P.2d at 939. A tie vote is a condition precedent that must arise before the Lieutenant

Governor may cast a vote and is a power that vests in the Lieutenant Governor, alone.

In striking the Lieutenant Governor's vote, the Senate gives no effect to the Casting Vote Provision. Further, it violates the expressed constitutional authority that vests in the Lieutenant Governor. *See Easbey*, 372 P.2d at 935 (holding that the Montana Constitution "expressly directed . . . and conferred various special powers on the Lieutenant Governor, not the least of which, is the power, right[,] and high privilege of presiding over the sessions and meetings of the State Senate as its President with the express direction that, while so presiding, he 'shall vote only when the senate is equally divided'"). By not allowing the Lieutenant Governor to vote in the event of a tie, the Senate has not harmonized the Casting Vote Provision, but expunged it.

b. Specific provisions prevail over the general

"[W]here more than one statute touches upon the same subject matter, we presume that the statute with the more specific language 'relating to a particular subject will prevail over the general terms of another statute.'"

Lewis & Clark Rural Water Sys., Inc. v. Seeba, 2006 S.D. 7, ¶ 63, 709

N.W.2d 824, 841 (quoting *Martinmaas v Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611).

The Majority Provision reflects a general requirement on the vote needed to pass a law. The Casting Vote Provision, however, creates a specific exception by allowing a law to pass if the Senators are equally divided and then the Lieutenant Governor casts a vote in the affirmative. *See Advisory Opinion on Constitutionality of 1978 PA 426*, 272 N.W.2d at 498 (holding the Majority Provision “applies to every bill considered for final passage . . . except those rare situations where the Senate is ‘equally divided’”). While both provisions can be harmonized, the Casting Vote Provision specifically applies to a tie, instead of being a general requirement. Concluding that the more general limitation for majority of members to pass a bill prevails over the specific grant of authority to cast a tie-breaking vote in a limited situation would expunge the Lieutenant Governor’s constitutional grant of authority. This Court should not read the Constitution in this fashion.

c. Cannot add language or construe language to make Constitutional provisions mere surplusage

It may be argued that the Casting Vote Provision only applies to certain votes, but not to bills. However, this interpretation would violate settled principles of construction by adding language or construing language in a way to give it no effect at all. It is well established that a Court may not add language to a statute by “judicial legislation.” *Hannon v. Weber*, 2001

S.D. 146, ¶ 5, 638 N.W.2d 48, 49 (citing *Rabenberg v. Rigney*, 1999 S.D. 71, ¶ 9, 597 N.W.2d 424, 426; *In re Estate of Gossman*, 1996 S.D. 124, ¶ 11, 555 N.W.2d 102, 106 (“A court is not at liberty to read into the statute provisions which the legislature did not incorporate, or enlarge the scope of the statute by an unwarranted interpretation of its language”).

This Court must adhere to the plain meaning of the words expressed. The plain reading of the Casting Vote Provision finds no limitation that its application is only to a particular type of action, be it a procedural vote, resolution, confirmation, or final passage of legislation. The language of the two constitutional provisions is plain, the meaning cannot be mistaken, and the purpose of the provisions is apparent. No law may pass without a majority of the Senators voting yea except, if the Senators are equally divided in that vote, then the Lieutenant Governor may cast a tie-breaking vote. There is no restriction as to the type of vote eligible for a casting vote. Had this been intended, the Casting Vote Provision would have expressed as such, like the Pennsylvania’s Constitution, which expressly limits the casting vote “on any question except the final passage of a bill or joint resolution, the adoption of a conference report or the concurrence in amendments made by the House of Representatives”. Pa. Const. art. IV, § 4.

Three persuasive cases have agreed with the reasoning the Governor is proffering. *Advisory Opinion on Constitutionality of 1978 PA 426*, 272 N.W.2d 495; *Opinion of the Justs.*, 225 A.2d 481; *Easbey*, 372 P.2d 930.

The Michigan Court considered the argument of limiting the type of vote eligible for the casting vote and in very clear terms disagreed with it. *Advisory Opinion on Constitutionality of 1978 PA 426*, 272 N.W.2d 495.

The Court reasoned that such interpretation

would effectively strip [the Casting Vote Provision] of its significance and its plain meaning. It would be incongruous to give the Lieutenant Governor a tie-breaking vote in preliminary stages and at the same time to deny that vote at the final consideration of the same legislation. No more of an apparent and frustrating deadlock could exist than that which would occur on the final passage of a bill. If the drafters of the constitution had intended such result, they most assuredly could have modified the language of [the Casting Vote Provision] to limit the Lieutenant Governor's tie-breaking power to those situations.

Id., at 498.⁹

The Delaware Court agreed the Casting Vote Provision is not “modified, restricted or limited” by the constitutional provisions which

⁹ The Michigan Supreme Court, having first held in *Kelley* a strained and unwarranted construction of its Casting Vote Provision that virtually eliminated and expunged the Casting Vote Provision, *Kelley v. Sec'y of State*, 112 N.W. 978 (Mich. 1907), was later corrected in *Advisory Opinion on Constitutionality of 1978 PA 426*, 272 N.W.2d 495.

require action by a majority of the members of the Senate. That Court decided an identical question in the identical form of an advisory opinion with similar constitution language as South Dakota. *Opinion of the Justs.*, 225 A.2d 481.

Implicit in [the Casting Vote Provision], we think, is the unqualified power of the Lieutenant Governor to vote on any question—large or small—whenever the Senate is equally divided. This conclusion maintains the underlying principle of the ‘majority of members’ provisions: the expression of the will of the majority of the people of the State. That principle is not violated by the vote of the Lieutenant Governor who is elected by all of the people of the State. To conclude otherwise, on the other hand, would be to substantially impair, if not nullify, the [Casting Vote Provision].

Id. at 485 (citations omitted).

The Montana Court held the Montana Constitution “expressly directed or permitted and conferred various special powers on the Lieutenant Governor, not the least of which, is the power, right[,] and high privilege of presiding over the sessions and meetings of the State Senate as its President with the express direction that, while so presiding, he shall vote only when the senate is equally divided.” *Easbey*, 372 P.2d at 935 (cleaned up). Absent any South Dakota case law reviewing this issue, the Governor asserts the foregoing cases are founded on sound legal analysis and win the day.

The Senate may rely on three other cases as the basis for its interpretation, but each of the three cases violates South Dakota's basic rules for construction. *Center Bank*, 313 N.W.2d 661; *Coleman v. Miller*, 71 P.2d 518, *aff'd on different grounds*, 307 U.S. 433, 59 S. Ct. 972 (1939); *Sanstead*, 251 N.W.2d 898, *superseded by* N.D. Const. art. V, § 12 (amended 1996) ("If the senate is equally divided on a question, the lieutenant governor may vote on procedural matters and on substantive matters if the lieutenant governor's vote would be decisive)."

First to review is the Nebraska case, where a divided Court made a strained interpretation of the Casting Vote Provision when attempting to harmonize it with the Majority Provision. The *Center Bank* Court added limitations on the power and words to the provision that are not there. In *Center Bank*, with Nebraska's unique unicameral legislature, a final passage vote resulted in equal division and so the President of the Legislature then voted in the affirmative and declared the bill passed. *Center Bank*, 313 N.W.2d 661. In an original action before the Nebraska Supreme Court, the majority opinion found that the Majority Provision must be so strictly followed that the Casting Vote Provision must mean that "the lieutenant governor is eligible to vote on all *other* questions before the Legislature,

when it is equally divided,” but not on final passage of a bill. *Id.* (emphasis added).

The Nebraska Court violated the rule of construction that “assumes no part of the statutory scheme was intended to be ‘mere surplusage.’” *Double Diamond Const. v. Farmers Co-op. Elevator Ass’n of Beresford*, 2003 S.D. 9, ¶ 7, 656 N.W.2d 744, 746. Such holding left the Casting Vote Provision in Nebraska’s Constitution as having no meaning for any votes of real import. *Center Bank*, 313 N.W.2d at 665-667 (Krivosha, C.J., dissenting) (stating such limiting “interpretation has the effect of repealing” the casting vote).

The Kansas case, *Coleman v. Miller*, again having a divided court opinion, committed the same construction violation. The dissent in the Kansas case of *Coleman v. Miller* understood it, reasoning that “[t]he section does not say that the President of the Senate shall not vote on the passage of a bill or a joint resolution, but it says he shall vote only when the Senate is evenly divided”). *Coleman*, 71 P.2d at 528 (Hutchison, J., dissenting).

The North Dakota case, again a divided court, heavily weighed the longstanding practice to not allow the Lieutenant Governor to vote, completely opposite to the tradition of the South Dakota Senate. *See supra.*, fn 4. Had the founders of our State Constitution intended for the casting vote to only trigger upon any *other* matter than final passage of a bill, it would

have expressed that limitation. The corresponding provision in the Constitution of the United States is certainly not limited to matters other than final passage. *See Easbey*, 372 P.2d at 936-37 (citing Hinds' Precedents, Vol. V).¹⁰ App D.

The Governor urges this Court to conclude, as the Michigan, Delaware, and Montana Supreme Courts have, that the Lieutenant Governor's action in casting an affirmative tie-breaking vote on final passage of a bill is constitutionally proper.

d. Tie vote may be cast on each vote that is equally divided, not when the membership is an even total

Another argument the Senate Letter offers in order to give effect to the Casting Vote Provision is to allege that it only goes into effect when the Senate has even membership and that as long as the Senate has 35 members, as it does today, the Casting Vote Provision has no application. Senate January 27, 2026 Letter, ¶ 4. This is a novel, perhaps even a straw man, argument not argued in any of the cases on this subject. Even the three cases holding opposite of the Governor's position *at least* would allow the Lieutenant Governor to vote on other matters that are not final passage of a law. *Center Bank*, at 663; *Coleman*, at 520-1; *Sanstead*, at 904. Even the

¹⁰ Hinds' Precedents, Vol. V (<https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V5/pdf/GPO-HPREC-HINDS-V5.pdf>) (last retrieved January 30, 2026).

Center Bank Court (where the Nebraska legislature had an odd number of members at 49) did not entertain an argument that the Lieutenant Governor could never vote because the chamber was not equally divided in total membership.

For the purposes of this question, whether the Senate has an even or odd number of members is a distinction without a difference. In the case of an odd number of members, for example 35, a tie occurs when the vote is 17 to 17 with 1 excused or absent. In the case of an even number of members, for example 30, a tie occurs when the vote is 15 to 15 or perhaps 14 to 14 with 2 excused. In either case, the tie vote falls short of a majority and triggers the Casting Vote Provision, and the argument is identical. *See Mason's Manual of Legis. Proc.*, § 513(1); (2) (“When the vote for and the vote against any proposal are equal, there is a tie vote”; “In some instances, provisions are made to break a tie. This is accomplished by giving the presiding officer a vote in case of a tie. This vote is called a “casting” vote. Such a vote can be cast only when it will decide the tie”).

To follow the Senate's assertion would mean as long as the Senate has 35 members elected, never could the Lieutenant Governor cast a vote, ever, be it on a procedural motion, a senate confirmation, any type of resolution, or law. If that were true, each tie broken by the Lieutenant Governor's vote

over a hundred years would be questioned as unconstitutional. *See supra.*, fn 4. That would render an absurd result. *Breck v. Janklow*, 2001 S.D. 28, ¶ 12, 623 N.W.2d 449, 455 (“[i]t is the responsibility of this Court to interpret the constitution in a manner that avoids such absurd results”).

The reason no other court considers this interpretation is the plain reading of the phrase “shall have no *vote* unless the senators be equally divided.” S.D. Const. art. IV, § 5 (emphasis added). The phrase “senators be equally divided” modifies “vote”. This provision applies to each vote, on its own, being equally divided, not the total number of members elected being an even division. Regardless of the number of members elected, be it an odd number of 35 as it is today, or an even number of members that could make up the body sometime in the future, each vote resulting in equal division of the members voting is an opportunity for the Lieutenant Governor to cast a vote.

If “equally divided” refers to the total number of senators in the body, then *Center Bank* should have held that the Lieutenant Governor could never vote, on any matter, because the body had an odd number of members. Further, the Senate’s January 27, 2026 Letter at paragraph 5 summarizes that the Lieutenant Governor did not cast a vote in 2024 when another senator was gone for 19 days. This fact does not support the argument in paragraph

4 because regardless of absence, the state Senate has had an odd number of Senators since statehood (45 from 1889-1937 and 35 since 1939). Voting on a tie is the constitutional prerogative of the Lieutenant Governor.

C. Separation of Powers Does Not Prevent Rendering a Judicial Opinion.

The Governor’s Request for an advisory opinion is squarely within the authority of this Court to determine and does not offend the separation of powers. Questions that arise out of the Executive Department’s authority and its ability to carry out constitutionally required obligations are not exclusively legislative duties.

The Senate argues that because the Lieutenant Governor acts as the President of the Senate when casting a vote, this question “does not relate to any executive action” and his “actions are not executive.” Senate’s January 27, 2026 Letter.

Generally, courts decline to adjudicate disputes involving internal legislative procedures. “Each branch, *so long as it acts within the limitations set by the constitution*, may exercise those powers granted to it by the constitution without interference by the other branches of government.” *Gray v. Gienapp*, 2007 S.D. 12, ¶ 17, 727 N.W.2d 808, 812 (withholding intervention in discipline proceeding of state senator) (emphasis added); *see*

Beitelspacher v. Risch, 671 P.2d 1068, 1069 (Id. 1983) (“The interpretation of internal procedural rules of the Senate is for the Senate”). The separation of powers doctrine prohibits one branch from exercising powers belonging to another *only* when the Constitution has not expressly authorized the overlap. *Gray*, 2007 S.D. 12, ¶ 17, 727 N.W.2d at 812. Each house of the legislature “shall be the judge of the election returns and qualifications of its members” and “shall determine the rules of its proceedings.” S.D. Const. art. III, § 9.

However, deference to the Legislature is not absolute when it interferes with the Executive branch’s constitutional authority. Neither the Legislature nor any other branch of government stands above the law to encroach or usurp the powers of another. *Gray*, 2007 S.D. 12, ¶ 17, 727 N.W.2d at 812; *see* 1990 *Idaho Op. Att’y Gen.* No. 47 (opining that a Casting Vote Provision does not confer on an executive branch official an encroachment of legislative power). When a claim credibly alleges that a legislative action violates the rights secured by our Constitution, the Judiciary not only has the authority to act, it has the duty to act. *Dye v. State ex rel. Hale*, 507 S.2d 332 (Miss. 1987).

The Senate argues that because the Lieutenant Governor acts as the President of the Senate when casting a vote, this question is not about an

executive power but is a legislative question. *See* Senate’s January 27, 2026 Letter. The Governor disagrees. The South Dakota Constitution’s Casting Vote Provision states, “The lieutenant governor shall be president of the senate but shall have no vote unless the senators be equally divided.” S.D. Const. art. IV, § 5. This voting authority derives neither from Senate Rules or Mason’s Rules, nor a long-standing practice or a matter of mere internal legislative procedure. It is a constitutional responsibility enacted in the “Executive Department” Article of the state Constitution. *See* 1990 *Idaho Op. Att’y Gen.* No. 47 (opining that casting a tie-breaking vote is not purely internal to a legislature).

“In the absence of ambiguity, the language in the constitution must be applied as it reads.” *In re Janklow*, 530 N.W.2d 367, 370 (S.D. 1995). The Casting Vote Provision is unambiguous. The Constitution assigns the Lieutenant Governor a defined role within the legislative process and affirmatively authorizes the casting of a vote in the event of equal division. The power is not implied, incidental, or discretionary; it is expressly conferred to an executive branch official. Further, the authority of the Lieutenant Governor is not unfettered; it is only used when the condition precedent is present, i.e., an equally divided senate vote. Upon equal division and the fulfillment of the condition precedent, then the Lieutenant

Governor is constitutionally empowered to cast a tie-breaking vote. This power, which the people of South Dakota have conferred upon the Lieutenant Governor, vests in the Lieutenant Governor alone, and no other state Senator may ever have that power. *See Easbey*, 372 P.2d at 939.

Article II of the South Dakota Constitution divides the powers of the government into three branches “and the powers and duties of each are prescribed by this Constitution.” S.D. Const., art. II. Article IV, Section 5 expressly authorizes a blend of the two branches. This is a “specific blending or tying of the executive and legislative departments together[.]” *Easbey*, 372 P.2d at 935. The Lieutenant Governor’s participation in the Senate is not an intrusion by the executive branch; it is the execution of a constitutionally mandated executive power in a legislative role.

While this is constitutional, it is also common sense. It promotes efficient process for law-making. The Casting Vote Provision is not a quirk of procedure, but a core constitutional mechanism designed to resolve legislative deadlocks.

Accordingly, the Governor’s request squarely presents a question of constitutional interpretation concerning the scope and exercise of executive power. It is not an issue of legislative self-governance which the Senate may redefine or evade through procedural machinations. The Senate cannot

override the Constitution. This Court should render its opinion that the Casting Vote Provision does not conflict with the Majority Provision on all actions resulting in a tie-vote so that any future tie-breaking vote is not unconstitutionally struck by the Senate.

CONCLUSION

It has been this Court's common practice to issue advisory opinions without briefing or oral argument. *In re Noem* was a very different type of request and distinguishable from the instant Request as the *Noem* Court was considering fact-intensive questions affecting the interests of many individual legislators and potential legislators. Here, there is no question of fact and is purely a question of law. To expedite the Court's advisory opinion timeline, the Governor respectfully asks for the Court's consideration on the merits of the briefs and without oral argument.

For the above reasons, the Governor respectfully requests that this Court accept the Request for an advisory opinion and settles the question in favor of the Lieutenant Governor's constitutional right to cast a tie-breaking vote on final passage of legislation.

Dated this 4th day of February, 2026.

Respectfully submitted,

/s/ Katie J. Hruska

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CERTIFICATE OF SERVICE

Katie J. Hruska, attorney for the Office of the Governor, State of South Dakota, hereby certifies that on February 4, 2026, an electronic copy of the Governor's Brief and Appendix in the above-entitled action was served via Odyssey File and Serve upon the following:

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Katie J. Hruska also hereby certifies that the original of the Governor's Brief and Appendix in the above-entitled action were hand delivered to the Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 and one electronic copy (in Word format) of the Governor's Brief was emailed to SCClerkBriefs@ujs.state.sd.us and also filed through Odyssey File and Serve on February 4, 2026.

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CERTIFICATE OF COMPLIANCE

Katie J. Hruska, attorney for the Office of the Governor, hereby certifies that the foregoing Governor's Brief meets the requirements for proportionally spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

- a. Governor's Brief does not exceed 38 pages.
- b. The body of Governor's Brief was typed in Times New Roman 14-point typeface and footnotes 12-point typeface; and
- c. The body of Governor's brief contains 8,599 words and 43,319 characters (no spaces), excluding the Table of Contents, Table of Authorities, Jurisdictional Statement, and Certificates of Counsel, according to the word and character counting system in Microsoft Word used by the undersigned.

Dated this 4th day of February, 2026.

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APPENDIX

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1 The question being "Shall **SB 17** pass?"

2 And the roll being called:

3 Yeas 34, Nays 0, Excused 1, Absent 0

4 Yeas: Blanc, Carley, Crabtree, Davis, Deibert, Duhamel, Foster, Grove, Hohn, Howard, Hulse,
5 Jensen (Kevin), Karr, Kolbeck (Steve), Lapka, Larson, Marty, Mehlhaff, Miskimins, Nelson, Otten,
6 Perry, Peterson (Sue), Pischke, Reed, Rohl, Sauder, Schoenfish, Smith, Vilhauer, Voight, Voita,
7 Wipf, and Zikmund

8 Excused: Beal

9 So the bill having received an affirmative vote of a two-thirds majority of the members-elect,
10 the President declared the bill passed and the title was agreed to.

11 **SB 25**: FOR AN ACT ENTITLED, An Act to update provisions related to the permit application
12 process for proposed energy and transmission facilities.

13 Was read the second time.

14 The question being "Shall **SB 25** pass as amended?"

15 And the roll being called:

16 Yeas 17, Nays 17, Excused 1, Absent 0

17 Yeas: Crabtree, Davis, Deibert, Duhamel, Karr, Kolbeck (Steve), Larson, Mehlhaff, Miskimins,
18 Reed, Rohl, Sauder, Schoenfish, Smith, Vilhauer, Wipf, and Zikmund

19 Nays: Blanc, Carley, Foster, Grove, Hohn, Howard, Hulse, Jensen (Kevin), Lapka, Marty,
20 Nelson, Otten, Perry, Peterson (Sue), Pischke, Voight, and Voita

21 Excused: Beal

22 The President voted Yea.

23 So the bill having received an affirmative vote of a majority of the members-elect, the President
24 declared the bill passed and the title was agreed to.

25 Sen. Hohn announced her intention to reconsider the vote by which **SB 25** passed.

26 There being no objection, the Senate reverted to Order of Business No. 8 - Motions and
27 Resolutions.

28 MOTIONS AND RESOLUTIONS

29 Sen. Mehlhaff moved that the balance of the calendar including **SB 34, 44, and 71** be deferred
30 to Friday, January 23, 2026, the 8th legislative day.

31 Which motion prevailed.

1 MR. PRESIDENT:

2 The Committee on Senate Transportation respectfully reports that it has had under
3 consideration **SB 83** which was deferred to the 41st Legislative Day.

4 Respectfully submitted,
5 Randy Deibert, Chair

6 **MESSAGES FROM THE HOUSE**

7 MR. PRESIDENT:

8 I have the honor to transmit herewith **HB 1012, 1013, 1014, 1022, 1023, 1024, and 1054**
9 which have passed the House and your favorable consideration is respectfully requested.

10 Also MR. PRESIDENT:

11 I have the honor to transmit herewith **HCR 6003** which has been adopted by the House and
12 your concurrence is respectfully requested.

13 Respectfully,
14 Patricia Miller, Chief Clerk

15 **MOTIONS AND RESOLUTIONS**

16 Sen. Karr rose as to his point of order from the 7th legislative day on the President's ruling on
17 the passage of **SB 25**, not being resolved, and that the President is not able to break a tie in a
18 matter when there is final passage involved.

19 President Venhuizen provided a basis for his ruling.

20 Sen. Karr appealed the ruling of the President.

21 And the roll being called:

22 Yeas 24, Nays 10, Excused 1, Absent 0

23 Yeas: Blanc, Carley, Deibert, Foster, Grove, Hohn, Howard, Hulse, Jensen (Kevin), Karr,
24 Kolbeck (Steve), Lapka, Larson, Marty, Mehlhaff, Nelson, Otten, Perry, Peterson (Sue), Pischke,
25 Smith, Voight, Voita, and Zikmund

26 Nays: Crabtree, Davis, Duhamel, Miskimins, Reed, Rohl, Sauder, Schoenfish, Vilhauer, and
27 Wipf

28 Excused: Beal

29 So the question having received an affirmative vote of a majority of the members-elect, the
30 President declared the challenge of the President was sustained.

31 The President declared the journal should reflect that **SB 25** failed to pass on a vote of 17-17.

1 Thereby the vote on **SB 25** is as follows:

2 The question being "Shall **SB 25** pass?"

3 And the roll being called:

4 Yeas 17, Nays 17, Excused 1, Absent 0

5 Yeas: Crabtree, Davis, Deibert, Duhamel, Karr, Kolbeck (Steve), Larson, Mehlhaff, Miskimins,
6 Reed, Rohl, Sauder, Schoenfish, Smith, Vilhauer, Wipf, and Zikmund

7 Nays: Blanc, Carley, Foster, Grove, Hohn, Howard, Hulse, Jensen (Kevin), Lapka, Marty,
8 Nelson, Otten, Perry, Peterson (Sue), Pischke, Voight, and Voita

9 Excused: Beal

10 So the bill not having received an affirmative vote of a majority of the members-elect, the
11 President declared the bill lost.

12 Sen. Kolbeck (Steve) announced his intention to reconsider the vote by which **SB 25** lost.

13 **SCR 602:** A CONCURRENT RESOLUTION celebrating the sister-state relationship with Taiwan.

14 Introduced by: **Senator** Zikmund

15 **SCR 603:** A CONCURRENT RESOLUTION supporting the secretary of the United States
16 Department of Agriculture in establishing a working group of nutrition experts to determine national
17 standards for foods and beverages purchased with supplemental nutrition assistance program
18 benefits.

19 Introduced by: **Senator** Karr

20 Were read the first time and the President waived the committee referral pursuant to
21 JR 6D-1.

22 **SCR 604:** A CONCURRENT RESOLUTION urging the people of the state of South Dakota to
23 return to the Lord Most High, the Almighty and Uncreate, and plead for His mercy upon the state.

24 Introduced by: **Senator** Voita

25 Was read the first time.

26 **HCR 6003:** A CONCURRENT RESOLUTION recognizing the importance of conservation and
27 restoration practices in addressing water shortages and forest fire mitigation in the Black Hills, and
28 commending the organizations engaged in this work.

29 Was read the first time and the President waived the committee referral pursuant to JR 6D-1.

the concurrence of two-thirds of all the members elected, expel a member, but not a second time for the same cause; and the reason for such expulsion shall be entered upon the journal, with the names of the members voting on the question.

5. The Senate during its session, may punish by imprisonment, any person, not a member, who shall be guilty of disrespect to the same, by any disorderly or contemptuous behavior in their presence; but such imprisonment shall not at any time exceed twenty-four hours, unless the person shall persist in such disorderly or contemptuous behavior.

6. The doors of the Senate shall be kept open, except in such cases as in the opinion of the Senate require secrecy.

7. The Senate shall not adjourn without the consent of the House of Representatives, for more than three days, nor to any other place than that in which the two houses shall be sitting.

8. On the final passage of all bills, the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of all the Senators elect.

9. Every bill shall be read three several times, but the first and second reading may be on the same day and the second reading may be by title of the bill, unless the reading at length be demanded. The first and third readings shall be at length.

10. The Lieutenant Governor shall be president of the Senate, and shall vote only when the Senate is equally divided.

DUTIES OF THE PRESIDENT.

11. The Lieutenant Governor, or, in his absence, the President, *pro tempore*, or, in the absence of both, any Senator called to the chair by the Senate, shall take the chair every day precisely at the hour to which the Senate shall have adjourned; shall immediately call the members to order, and on the appearance of a quorum, shall cause the journal of the preceding day to be read.

12. The presiding officer shall preserve decorum and order, may speak to points of order, in preference to other members, rising from his seat for that purpose, and shall decide questions of order, subject to an appeal to the Senate by any two members; on which appeal no member shall speak more than once unless by leave of the Senate.

13. He shall rise to put a question, but may state it sitting.

14. Questions shall be put in this form, viz: As many as are of opinion that (as the case may be) say "aye" and after the affirmative voice is expressed, "as many as are of the contrary opinion say, no." If the President doubt the result of the vote, or a division be called for, the Senate shall divide; those in the affirmative shall first rise from their seats, and afterwards those in the negative.

15. The president shall examine and correct the journal before it is read; he shall have the general direction of the Senate chamber; he shall have the right to name any member to perform the duties of the chair, and such substitute shall be vested with all the powers of the President during the time he shall act as such, and shall not lose the right of voting on any question while so presiding; but such substitution shall not extend beyond one day.

16. In case of any disturbance or disorderly conduct in the lobby or gallery, the President shall have power to order the same to be cleared.

17. The President shall assign to the Sargeant-at-arms his assistants, messenger, watchman and janitors, their respective duties and stations.

DECORUM AND DEBATE.

18. When any member is about to speak or deliver any matter to the Senate, he shall rise from his seat and address himself to "Mr. President" and shall confine himself to the question or debate and avoid personalities.

19. If any member, in speaking (or otherwise) transgresses the rules of the Senate, the President shall, or any member may call him to order, in which case the member so called to order shall sit down, unless permitted to explain; and the Senate, if appealed to shall decide on the case without debate. If the decision

Mr. Henry B. Anthony, of Rhode Island, moved to postpone indefinitely the resolution; and the Vice-President¹ announced:

The yeas are 37, and the nays are 37. The Senate being equally divided, the Chair votes "yea."

Mr. Eli Saulsbury, of Delaware, without raising a question of order, expressed the opinion that the Constitution did not confer on the Vice-President the right to vote on a question of this character.

Mr. John A. Logan, of Illinois, replied, citing a precedent of the Senate, made on December 15,² 1829, when Vice-President John C. Calhoun, of South Carolina, voted in the case of a tie on the election of Chaplain.

Mr. Anthony then offered a resolution providing a plan of committee assignments, and on the vote the yeas were 37, nays 37. Thereupon the Vice-President voted in the affirmative, and the resolution was agreed to.

5976. The Vice-President votes on all questions wherein the Senate is equally divided, even on a question relating to the right of a Senator to his seat.—On November 26, 1877,³ in the Senate, a motion was made that the Senate proceed to the consideration of executive business, and there appeared, yeas 29, nays 29. Thereupon the Vice-President⁴ voted "aye" and the motion was agreed to.

5977. On November 28, 1877,⁵ the Senate was considering the following:

Resolved, That William Pitt Kellogg is, upon the merits of the case, lawfully entitled to a seat in the Senate of the United States, etc.

To this Mr. Allen G. Thurman, of Ohio, offered an amendment to strike out all after the word "resolved" and insert the following:

That M. C. Butler be now sworn as a Senator from the State of South Carolina.

On agreeing to this amendment there appeared, yeas 30, nays 30.

The Vice-President⁴ thereupon said:

The vote of the Senate being equally divided, the Chair votes in the negative.

Mr. Thurman challenged the right of the Vice-President to vote on a question affecting the right of a Senator to his seat. Debate arose, during which reference was made to the precedent of January 9, 1850, when the Vice-President voted on the election of an officer of the Senate.

Mr. Thurman finally withdrew his question of order.

The Vice-President said:

The Chair * * * has very carefully considered the question raised by the Senator from Ohio, and he has no doubt of his right to vote in all cases in which the Senate is equally divided * * * as at present advised, he will, on occasion, exercise the right in his discretion.

5978. The House chose the location of the World's Columbian Exposition by a viva voce vote.—The selection of a place for holding the World's

¹ Chester A. Arthur, of New York, Vice-President.

² This election occurred December 14, 1829. (See section 5973 of this chapter.)

³ First session Forty-fifth Congress, Record, p. 650.

⁴ William A. Wheeler, of New York, Vice-President.

⁵ First session Forty-fifth Congress, Record, pp. 737–740.

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 31355

**IN RE: REQUEST OF GOVERNOR LARRY RHODEN
FOR AN ADVISORY OPINION**

**BRIEF OF THE
SOUTH DAKOTA SENATE LEADERSHIP**

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Order Directing Briefing filed on January 28, 2026

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JURISDICTIONAL STATEMENT

This Court has limited original jurisdiction over the Governor's request for an advisory opinion, pursuant to the express terms of Article V, § 5 of the South Dakota Constitution.

STATEMENT OF THE ISSUES

- I. Should this Court issue an advisory opinion when the Request at issue does not address the exercise of the Governor's power, but instead seeks to dictate to the Senate whether the Lieutenant Governor, as President of the South Dakota Senate, may cast a vote in some future hypothetical circumstance?**
- Article V, § 5 of the South Dakota Constitution.
 - Article II of the South Dakota Constitution
 - *In re Construction of Constitution*, 54 N.W. 650 (S.D. 1893).
 - *The Matter of Construction of Article III, Section 5 of the SD Constitution*, 464 N.W.2d 825 (1991).
- II. Under the plain meaning of Article III, § 18, may a vote cast by someone other than an elected member of the Senate be counted toward the "majority of all the members elected" threshold that is constitutionally necessary for final passage of a bill?**
- Article III, § 18 of the South Dakota Constitution
 - Article IV, § 5 of the South Dakota Constitution

STATEMENT OF THE PROCEEDINGS

A. Procedural History

On January 26, 2026, Governor Rhoden submitted the request for an advisory opinion, *In the Matter of the Interpretation of South Dakota Constitution Regarding President of the Senate's Power to Vote on Final Passage of Legislation in the Case of a Tie* (hereafter, the "Request").

The events that gave rise to the Request arose during the prior week. On January 22, 2026, the Senate took a vote on final passage of Senate Bill ("SB") 25, which yielded 17 yeas, 17 nays, and 1 excused. In response, the President of the Senate, the Hon. Lieutenant Governor Tonnis H. Venhuizen, purported to cast a vote in favor of the bill and declared it passed. A Senator gave notice of intention to reconsider the vote pursuant to Joint Rule 5-11, allowing for the potential to reconsider the bill on the next legislative day.

On January 23, 2026, Senate President Pro Tempore Karr raised a point of order and challenged the President's ruling. By roll call vote, that challenge passed, 24 yeas to 10 nays. A Senator then gave notice of the intention to reconsider the vote on the bill. The next legislative day, January 26, the Senate voted 30-3 in favor of reconsidering the bill, then amended the bill and passed it by a vote of 30-3. SB 25 was given its first reading in the house on January 27 and referred to the House Committee on Commerce and Energy on January 28.

In response to the Governor's Request, Senate Leadership submitted a letter to the Court objecting to the Request and setting forth concerns that the advisory opinion power was being invoked for an improper purpose. On January 28, 2026, this Court entered its

Order Directing Briefing providing that written argument be submitted by February 4, 2026.

B. Other Relevant Background

Senate Leadership provides the following historical, institutional, and factual backdrop to help frame the issues raised by the Request and to assist the Court in determining whether an advisory opinion should issue.

1. 1891 Senate Rules and 1897 Modification

Following the third Constitutional Convention of 1889, South Dakota's Constitution was submitted to the people for ratification in a general election on October 1, 1889.¹ The people approved the Constitution and President Benjamin Harrison signed a proclamation making South Dakota the fortieth state in the Union. In 1891, the South Dakota Legislature convened for the second legislative session after South Dakota entered the Union. The Senate established rules for itself, at least two of which address the requirements applicable to final passage of a bill and the role of the Lieutenant Governor in his or her capacity as President of the Senate. *See* APP_0002.

Senate Rule 8 in that version states: "On the final passage of all bills, the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal, and no bill shall become a law without the concurrence of a majority of all the Senators elect." *Id.*

Senate Rule 10 states: "The Lieutenant Governor shall be president of the Senate, and shall vote only when the Senate is equally divided." *Id.*

¹ *See* Patrick M. Garry & Candice Spurlin, *History of the 1889 South Dakota Constitution*, 59 S.D. L. REV. 14, 29-31 (2014).

In 1897, the Senate modified Senate Rule 10 by adding a clause that would preserve the ability to reconsider any question on which the Senate was “equally divided” and the President of the Senate decided to cast a vote. The 1897 version of Senate Rule 10 states as follows:

The Lieutenant Governor shall be president of the Senate, and shall vote only when the Senate is equally divided. In all such cases a majority vote for reconsideration, if made in time, shall be in order from any Senator who voted on the question.

APP_0007. Under parliamentary law, the effect of reconsideration is to cancel the original vote, “as completely as though it had never been taken.” Mason’s Manual of Parliamentary Procedure, § 468. By preserving the ability to reconsider a vote, the Senate retained the power to depart from the result that would have obtained based on a vote cast by the President of the Senate.

2. Attorney General Opinions

On two occasions, the South Dakota Attorney General has considered the nature and extent of the power to vote granted to the President of the Senate.

In February 1949, Lieutenant Governor Rex Terry asked the Attorney General: “Does the Lieutenant Governor cast a vote in case of a tie?”² The Attorney General opined that “the Lieutenant Governor does not have a casting vote in case of a tie where the vote is upon a law that requires passage by assent of the majority of all the members elected to each house of the legislature.” See APP_0010 (citing and relying on *Kelley v. Secretary of State*, 112 NW 978 (Mich. 1907) and *Coleman v. Miller*, 71 P. 2d 518 (Kan. 1937)). The opinion further stated that “the casting vote of the Lieutenant Governor

² Lieutenant Governor Terry apparently made this request orally.

could be used only in case of a tie on resolutions or motions which do not have the effect of law.” *Id.*

In 1975, then-Attorney General William Janklow responded to a similar question posed by Lieutenant Governor Harvey Wollman. *See* 1975 WL 343372, Official Opinion No. 75-7, Jan. 23, 1975. That opinion addressed the following question: “On what occasions before the Senate is the Lieutenant Governor, as President of the Senate, entitled to cast a vote?” The 1975 Attorney General Opinion noted that Article IV, § 5 was modeled on language in Article I, §3, of the United States Constitution, which states, in pertinent part, the President of the Senate “shall have no Vote, unless they be equally divided.” The 1975 Opinion emphasized that “an absolute majority of all senators is necessary to pass a bill” under Article III, §18. *Id.* at 1. The 1975 opinion states:

At first it would appear that Section [18] of Article III would prohibit the Lieutenant Governor from voting on the final passage of any law because he is not a member of the Legislature. On two prior occasions, my predecessors have so held. 1949-50 A.G.R. 58; 1933-34 A.G.R. 548.³

Id. The 1975 Opinion departed from the prior opinion, on the grounds that the Constitutional Revision Commission in 1972 patterned the language of Article IV, § 5 after Article I, § 3 of the United States Constitution and indicated in its commentary that adopting the federal language “allows the Lieutenant Governor to vote in a case of tie.” *Id.* (citing and quoting *Reports on Article IV by Committee Number 2 of the Constitutional Revision Commission*, at 21 (Aug. 2, 1971)).

³ The 1933 Attorney General Opinion considered whether the Lieutenant Governor was a member of the Legislature as a predicate to determining whether the Lieutenant Governor could be appointed as Director of Taxation or Assistant Director.

The Attorney General considered case law from other jurisdictions and opined that the “newer, better reasoned cases hold that the Lieutenant Governor may vote in any situation, including final passage of law.” *Id.* at 2 (citing and discussing *Opinion of the Justices*, 225 A.2d 481 (Del. 1966)). The opinion also suggested that the question presented was “one of those solemn occasions when the Governor should request an opinion of the justices of the Supreme Court. Otherwise, this question may arise in the form of expensive and lengthy litigation over the legality of any law passed by virtue of the Lieutenant Governor’s tie-breaking vote.” *Id.* at 3.

In the fifty years following the opinion, it appears that no dispute arose as to the nature of the power wielded by the President of the Senate; no Governor, including Governor Janklow, ever asked this Court to address the issue; and no private party ever initiated litigation contesting any law passed as a result of a majority that was reached by exercise of the President of the Senate’s vote.

3. The Senate’s Voting Records and Procedural Rules

Each house of South Dakota Legislature is obligated to keep a journal of its proceedings and publish the same in a form that records the yeas and nays of members. *See* Article III, § 13. The Senate Journals have been maintained in electronic form on the Legislative Research Council’s website since 1997. According to Legislative Research Council data and analysis of those electronically accessible records, there have been fifteen instances since 1997 where a vote on final passage of a bill resulted in a 17-17 tie

among present and voting members of the Senate. *See* APP_0012.⁴ In six instances, the President voted “yes” to break the procedural impasse. *Id.* In six others, the President took no action and the motion pending therefore failed for lack of a majority. *Id.* In the remaining three instances, the President voted no, and the motion pending therefore failed. *Id.*

The predominant trend over the last ten years (2016-2026) has rejected the notion that the President has so-called “tie-breaking” authority if a vote for final passage of a bill results in a 17-17 tie. That was the result in five of the six instances where the initial vote on final passage of a bill was 17 yeas and 17 nays:

- (1) HB 1109 on February 19, 2025 (APP_0014-15)
- (2) SB 163 on February 23, 2022 (APP_0018);
- (3) SB 172 on February 22, 2022 (APP_0020-21);
- (4) HB 1088 on February 21, 2019 (APP_0023);
- (5) SB 107 on February 7, 2019 (APP_0025);
- (6) HB 1034 on March 17, 2017 (APP_0028).

Other than HB 1034 in 2017, the tie vote on final passage was deemed to be a loss on the question of whether to pass the bill under consideration. The following entry was then

⁴ The LRC exercised its best efforts to review potentially relevant data by close of the briefing deadline and to assure that the summative overview provided here is both accurate and informative. This summary should be understood as illustrative of general trends, as the LRC was unable to perform a more exhaustive analysis that would include voting records before 1997 in the given timeframe. In the event the Court has additional questions related to voting patterns or histories, Senate Leadership will provide additional information if that would assist the Court or otherwise respond to questions that may arise.

made in the House or Senate Journal: “So the bill not having received an affirmative vote of a majority of the members-elect, the President declared the bill lost.”

This recent sampling should not be construed as evidence of intractable impasse or an ineffective legislative law-making process. The bills under consideration did not pass on the vote in question. Some, but not all, were reconsidered and subsequently passed when a majority of the members elected to the Senate voted in favor of their passage.

Both houses of the South Dakota Legislature have adopted Mason’s Manual of Legislative Procedure (“Mason’s Manual”). Senate Rule S5–2 provides “Mason’s Manual of Legislative Procedure governs the proceedings of the Senate in all proceedings of the Senate in cases not covered by these rules or the Joint Rules.” The House has a similar rule. Rule H4–2.

A number of provisions in Mason’s Manual speak to the question of voting thresholds and the degree to which legislative bodies are bound by constitutional requirements that set these thresholds. Sections 510 and 511 in Chapter 44 of Mason’s Manual set out specific rules regarding majority voting and how the concept of obtaining a majority vote should be understood. Section 510.2 states:

Where a majority or other proportion of voters is required without specifying whether the vote refers to the entire membership or to the members present, or to the members present and voting, the general rule is that the proportion refers to the number present and voting.

See APP_0037.

Section 511.1 clarifies that when the constitution “requires a majority vote of the entire membership,” then “that vote must be obtained.” *Id.* “A vote of less than [a majority vote of the entire membership], although a majority of those present and voting,

a quorum being present, is not sufficient.” *Id.* It further advises that “[c]onstitutional provisions as to the number of votes required for the final passage of bills are mandatory.” APP_0038 (quoting § 511.3).

ARGUMENT

Governor Rhoden asks this Court to expand the scope and function of its advisory opinion authority under Article V, § 5, of the South Dakota Constitution. The Court should decline to do so. The question presented does not implicate the Governor’s exercise of an executive function and does not constitute a “solemn occasion” warranting advisory intervention.

The Governor asks the Court to instruct the Senate when, and under what circumstances, the Lieutenant Governor—acting as President of the Senate—may vote. The Request asserts that judicial guidance is needed so the Senate may “move forward with clarity” regarding the Lieutenant Governor’s constitutional authority. But the Request itself confirms that the advisory opinion is not sought to guide executive action. Rather, the Request seeks to enlist the judiciary to direct, even overrule, a coordinate branch in the conduct of its internal affairs.

This fundamentally misconstrues the function of an advisory opinion. The advisory opinion exists to provide legal guidance to the executive on live questions implicating core executive responsibilities, particularly in the face of pressing constitutional indeterminacy. An advisory opinion is not a vehicle by which one branch may challenge, supervise, or override the internal operations of another.

Issuance of an opinion is also unwarranted because the Request does not present a “solemn occasion.” There is no urgent or unsettled crisis requiring judicial intervention.

The Senate does not lack clarity as to its rules, customs, or constitutional obligations. Its deliberations and resolution of SB 25 were undertaken pursuant to the Constitution and parliamentary law. The Senate acted by a supermajority of its elected membership, which derived from and was fully consistent with its autonomous lawmaking function. As a result, there is no longer a live issue in dispute.

Long-standing precedent confirms that advisory opinions should “never” be used to address the legislative branch’s function and internal governance. *See In re Construction of the Constitution*, 3 S.D. 548 (1893). That principle, consistently reaffirmed by this Court, reflects a tradition of judicial restraint grounded in separation-of-powers concerns. This Court should adhere to that tradition here.

Accordingly, the Court need not—and should not—wade into these deep and murky constitutional waters. The Request should be denied.

If the Court were to issue an advisory opinion that reaches the merits, it should reject the Governor’s position. The Senate’s understanding of when the President of the Senate may vote is the only interpretation consistent with the plain, unambiguous command of Article III, § 18. The Lieutenant Governor is not an “elected member” of the Senate. If the elected members of the Senate end up in a tie vote on final passage of a bill, the President’s vote cannot carry the motion because a vote from someone other than an elected member of the Senate does not count to satisfy the absolute majority requirement of Article III, § 18. This does not render the President’s power to vote a dead

letter, which may be exercised on other matters if and when the members are “equally divided” in accordance with the Senate’s own rules and procedures.⁵

The Senate’s recent decision conforms with and gives effect to the plain, unequivocal language of Article III, § 18. The Governor’s alternative interpretation does not. If the Court wades into this matter, it should side with the Senate.

I. THE COURT SHOULD DECLINE TO EXERCISE ITS ADVISORY OPINION POWER.

Article V, § 5 of South Dakota’s Constitution gives the Governor “authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of [his or her] executive power and upon solemn occasions.” This Court has read this provision disjunctively, such that the power to issue advisory opinions may be exercised to resolve issues involving the exercise of the Governor's executive power or those which present solemn occasions. *In re Noem*, 2024 S.D. 11, ¶9, 3 N.W.2d 465, 471; *In re Daugaard*, 2016 SD 27, ¶ 7, 884 N.W.2d 163, 166.

The advisory opinion power vests the Court with limited original jurisdiction. Early in its history, this Court recognized that the far-reaching nature of the power requires that it be limited to the “the rarest instances.” *In re House Resolution No. 30*, 72 N.W. 892 (1897).

Senate Leadership submits that the question presented by Governor Rhoden in his pending request does not pass that high threshold. The Request is not cognizable because it neither implicates the exercise of the Governor’s executive power nor constitutes a “solemn occasion.” Furthermore, the Request, as framed, is not justiciable. The

⁵ This view accords with the conclusions set forth in the Attorney General’s Opinion from 1949. *See* APP_0010.

Governor's Request assumes that the judiciary is empowered to dictate to the legislative branch how it both conducts its business and fulfills the separate and independent legislative function. That prospect is offensive to separation of powers principles, which are the bedrock of South Dakota's constitutional design. For these reasons, the Court should decline the Request to issue an advisory opinion.

A. The Governor's Request does not implicate the exercise of the Governor's executive power:

The Governor's Request does not appear to be grounded on the first clause of Article V, § 5. If the Governor argues that the Request is cognizable on this basis in its briefing, that argument necessarily fails.

The analysis begins with the constitutional text. The first clause of Article V, § 5 does not speak in terms of the executive branch, appointed officers within that branch, or the Lieutenant Governor. Rather, the provision limits this Court's consideration to requests that implicate "important questions of law involving the exercise of the Governor's power." To be cognizable, a request for an advisory opinion must implicate action or contemplated action by the Governor himself or herself. Thus, advisory opinions have been issued concerning the Governor's power to appoint members of the Bridge Authority⁶ and the Rural Credit Board;⁷ the nature of the Government's power following executive reorganization;⁸ and the nature of the Governor's duty to recommend reapportionment.⁹ Most recently, the Court determined that confusion and uncertainty relating to the Contracts Clause "profoundly impacted" the Governor's imminent exercise

⁶*In re Opinion of Supreme Court*, 257 N.W.2d 442 (1977).

⁷*In re Opinion of Judges*, 38 S.D. 635, 162 N.W. 536 (1917).

⁸*In re Opinion of Supreme Court*, 87 S.D. 156, 204 N.W.2d 184 (1973) and *In re Opinion of Justices*, 87 S.D. 114, 203 N.W.2d 526 (1973)

⁹*In re Opinion of Judges*, 61 S.D. 107, 246 N.W. 295 (1933)

of the power to appoint individuals to serve in vacant seats of the Legislature under Article III, § 10.¹⁰

On a number of occasions, the Court has refused to issue an advisory opinion where no question of the Governor's power is involved. This line of authority demonstrates why neither Article III, § 18, nor Article IV, § 5 involves any action or contemplated action by the Governor.

In 1893, four years after South Dakota became a state, this Court was asked to determine the meaning of Article III, § 18. *See In re Construction of Constitution*, 54 N.W. 650 (S.D. 1893). The Senate and House of Representatives had adopted a joint resolution asking that the governor request an opinion from this Court as to the appropriate interpretation of Article III, § 18. The Governor submitted the request. The three sitting Justices, all of whom had been appointed during the 1885 Constitutional Convention¹¹, unanimously determined that the advisory opinion power could not appropriately be reached to answer the Governor's Request. The Court first held that the legislative branch, not the judiciary, must determine how Article III, § 18 should be read and how that understanding should be implemented in legislative practice. The Court stated, in pertinent part:

[I]t could not have been the intention of the constitution makers to permit the presentation of questions [to the judiciary] as to whether a bill has been passed by the legislature by the requisite number of votes or not. This question, primarily, must be left to the judgment of that department of our government, and their judgment must be final until it shall be called in question through the usual avenue provided for testing it. A proper regard for the constitutional arrangement of the different departments of government and the constitutional powers and duties devolving upon each

¹⁰ *In re Noem*, 2024 S.D. 11, ¶9, 3 N.W.2d 465, 471.

¹¹ *See* 1 SOUTH DAKOTA CONSTITUTIONAL DEBATES 47 (1907).

department, forbids the conclusion that this court should have anything to do with such matters.

Id. at 652.

The Governor's Request is asking this Court to do what it has long held it cannot do. More than 130 years ago, this Court declined to use its advisory opinion power to interpret and define the scope of Article III, § 18. It held that determining whether a bill has been passed by the required number of votes is a matter of parliamentary law and must be decided by the legislative branch.

This Court followed the same principle of judicial self-restraint in another Article V, § 5 case that arose nearly one hundred years later. In *The Matter of Construction of Article III, Section 5 of the SD Constitution*, 464 N.W.2d 825 (1991), the Governor sought an advisory opinion relating to redistricting that arose after members of a redistricting committee disagreed about the meaning of Article III, § 5. This Court concluded that the Governor was effectively asking the judiciary to “giv[e] an advisory opinion to the Redistricting Preparation Committee of the legislature.” As such, the Request called for relief that “exceeds [this Court’s] authority.” The underlying rationale is particularly instructive here:

It is not contended that this request is made pursuant to any contemplated executive action. The request relates to the duties of the legislature - not the executive. The Governor states in his request that the question arose from a dispute in a committee of the legislature. The Governor is not faced with the need to veto legislation whose legality is questioned, or to enforce any completed legislation. The Governor's power to require an advisory opinion from the Supreme Court “is confined exclusively to such questions as may raise a doubt in the executive department – never in the legislative. Were we to construe it otherwise, it would be liable to become the medium of great abuse.”

Id. at 826 (citing and quoting *In re Construction of Constitution*, 54 N.W. 650, 651-652 (S.D. 1893)).

Here, too, the Request calls for the Court to restrain the legislative branch; it does not seek advice “involving” exercise of the Governor’s power under conditions of constitutional indeterminacy. The Governor asks this Court to improperly exceed its authority by issuing an advisory opinion instructing the Senate on a legislative function.

In the Request, Governor Rhoden argues that the question presented “relates to a provision of the executive article and to the power of the Lieutenant Governor, a member of the executive branch, to cast tie-breaking votes as President of the Senate.” *Id.* at 3. The “power of the Lieutenant Governor” is not the “power of the Governor.” What’s more, when the Lieutenant Governor presides over the Senate, that function is not executive in nature, i.e., it is not a power that the Governor delegates to the Lieutenant Governor pursuant to Article III, § 3.

The President of the Senate is the presiding officer of the Senate floor sessions. *See* Senate Rule 1-2. The President of the Senate does not exercise any executive authority when fulfilling his legislative duties as presiding officer. To suggest that President of the Senate drew upon the Governor’s power at the time he initially determined it was appropriate to cast a vote is a categorical error. Stated differently, the Lieutenant Governor’s executive status is not portable. When presiding over floor sessions, he is the President of the Senate. The President of the Senate’s duties do not implicate “the exercise of the Governor’s power,” let alone satisfy the requirements of Article V, §5.

Finally, the nature of the requested relief also belies any claim that the Request directly touches the exercise of the Governor’s power. Governor Rhoden is asking that this Court tell the Senate how it must order its own affairs. The “clarity” sought by the Request focuses on what happens in the Senate’s chamber and the vote-tallying process used in considering legislation.

For the foregoing reasons, the Request does not raise “an important question of law regarding the exercise of the Governor’s power.”

B. The Governor’s request is not a “solemn occasion” and instead calls upon the Court to exceed the bright-line limits of its advisory opinion power.

This Court has consistently held that no “solemn occasion” exists if the Governor asks this Court to interpret and rule on internal processes and functions of the legislature.

The “solemn occasion” analysis turns on eight factors:

[1] whether an important question of law is presented, [2] whether the question presents issues pending before the Court, [3] whether the matter involves private rights or issues of general application, [4] whether alternative remedies exist, [5] whether the facts and questions are final or ripe for an advisory opinion, [6] the urgency of the question, [7] whether the issue will have a significant impact on state government or the public in general, and [8] whether the Court has been provided with an adequate amount of time to consider the issue.

In re Daugaard, 2016 S.D. 27, ¶ 13, 884 N.W.2d at 167 (citing *In re Janklow*, 530 N.W.2d 367, 369 (S.D. 1995)). The multi-factor test strongly favors the exercise of judicial restraint here. That conclusion is further supported by the political question doctrine and other standards of justiciability that routinely guide this Court’s analysis.

While Senate Leadership acknowledges the President of the Senate’s significant institutional role, the current inquiry does not constitute an “important question of law” requiring an advisory opinion. Likewise, the question is not urgent. Legislative procedure is both well-established and functional. Indeed, the events surrounding SB 25

demonstrate how the legislative process, following well-settled rules of parliamentary procedure, effectively works through disagreements on a bill. The Senate ultimately reached a compromise, passing SB 25 by an overwhelming 30-3 margin. SB 25 is now proceeding through the House committee process.

The very events that give rise to the Request demonstrate that there is no urgency to the matter and no final or “ripe” dispute exists for the Court to address. With respect to other factors of the “solemn occasion” analysis, there is no related issue pending before the Court, nor does the Request implicate private rights of citizens in a direct, immediate way. Of the thousands of bills that have been considered and voted on, the research from the LRC indicates that since 1997 only seventeen votes on a final passage of a bill have resulted in a tie.

All of these factors show that there is no imminent crisis of constitutional indeterminacy and weigh decidedly against a determination that the Request creates a “solemn occasion” that would call for issuance of an advisory opinion.

Another factor – whether alternative remedies exist – dramatizes the threshold question of justiciability that sits at the heart of these proceedings. If at some point in the future the Senate once again concluded that the President of the Senate was foreclosed from casting a vote on final passage of a bill, a public official who disagrees with that position could conceivably bring a writ of mandamus or writ of prohibition. A plaintiff in this kind of direct action, however, would need to establish that the claim was justiciable.

This Court has consistently rejected the notion that the judiciary may halt the Legislature from conducting its business or dictate to the legislative branch how or when such business may be conducted. In *Gray v. Gienapp*, 2007 S.D. 12, 727 N.W.2d 808,

the Court affirmed that it had constitutional authority to arrest or halt proceedings in a lower or inferior judicial tribunal. *Id.* at ¶18, 727 N.W.2d at 812. It held, however, that the power to restrain inferior tribunals is inoperative as against the legislative branch, because the judiciary had no authority over that branch’s internal operations. This Court held that a writ of prohibition could not be used to interfere with the legislative branch or halt disciplinary proceedings concerning a sitting member because each legislative house had exclusive authority over such proceedings. *Id.* at ¶31, 727 N.W.2d at 815.

Assume that a cognizable case or controversy arose regarding the ability of the President of the Senate to cast a vote in the Senate in which the aggrieved plaintiff had standing to seek a writ of prohibition or mandamus. The alternative remedy to an advisory opinion exists, but whether it would prove justiciable is another matter. Under such a scenario, *Gray* strongly suggests that the political question doctrine may foreclose this Court from adjudicating that dispute. If the issue is not justiciable in a direct action involving traditional adversarial litigation, that is all the more reason why it should not be resolved through exercise of this Court’s advisory opinion power.

In the present dispute, the mere act of answering the Request poses a serious threat to the separation of powers. Consider again the bright-line rule that has guided this Court for more than 130 years: the power to issue advisory opinions “is confined exclusively to such questions as may raise a doubt in the executive department,—never in the legislative. Were we to construe it otherwise, it would be liable to become the medium of great abuse.” *In re Construction of Constitution*, 54 N.W. at 652.

The Governor urges that the need for clarity regarding when the President of the Senate may cast a vote is so pressing as to justify issuance of an advisory opinion.

Unsurprisingly, this is not the first time that arguments of policy, convenience, or expedience have been marshaled in this fashion.

In *State ex rel Cranmer v. Thorson*, 68 N.W. 202 (S.D. 1896), the Court concluded that it lacked jurisdiction to enjoin the secretary of state from certifying to the voters a proposed constitutional amendment passed by the legislature. This Court reasoned that “no consideration of policy or convenience should induce the courts to assume to exercise a power that does not belong to them.” *Id.* at 204. To do so would “disturb the system of checks and balances which the constitution has so carefully constructed and which the courts have ever guarded with the most scrupulous care.” *Id.*

This Court has steadfastly refused to use its advisory opinion power to settle uncertainties about the law-making power and internal affairs of the legislative branch. Article II of the South Dakota Constitution expressly provides that “[t]he powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution.”

Separation of powers does not just mandate separate spheres of authority and autonomy; it constitutes “a basic principle of noninterference with the affairs of a coordinate branch of the government.” *South Dakota ex rel. Evans v. Riiff*, 42 N.W.2d 887, 889 (S.D. 1950). Moreover, our national constitutional culture recognizes that each independent and separate branch must necessarily interpret the Constitution in determining the nature and exercises of its own core functions.¹²

¹² In Federalist No. 49, James Madison observed that because the separate branches of government are “perfectly co-ordinate,” no branch can “pretend to an exclusive or superior right of settling the boundaries between their respective powers[.]”

The principle of deference to the legislative branch has particular salience in South Dakota’s constitutional design. In the federal system, Congress derives its power from the United States Constitution – legislative power is affirmatively *granted* in specific domains.¹³ In South Dakota, the reverse is true: the legislative power is not granted by the Constitution. Legislative power is plenary and unlimited, except to the extent that South Dakota’s Constitution expressly limits it. *See Doe v. Nelson*, 2004 SD 62, ¶25, 680 N.W.2d 302, 312.

One example of the legislative branch’s “inherent authority” is “the power ‘to *superintend its internal management* and carry out its constitutionally-mandated duties.’” *Gray v. Gienapp*, 2007 S.D. 12, ¶ 23, 727 N.W.2d 808, 813–14 (citing and quoting *Doe*, ¶ 25 n. 12, 680 N.W.2d at 312 n. 12; emphasis added in *Gray*). The South Dakota Constitution is unequivocal on this point: the Legislature “shall determine the rules of its proceedings.” S.D. Const., Art. III, § 9. The Legislature’s affirmative power to superintend its own affairs is insulated from interference and second-guessing via a Governor’s request for an advisory opinion focused on the Senate’s core functions.

Near the end of his life, after having served in Congress, completed two terms of President, and retired from public life, Madison expressed a similar sentiment:

As the Legislative, Executive & Judicial Departments of the U.S. are co-ordinate, and each equally bound to support the Constitution, it follows that each must in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it

See Letter from James Madison to Unknown Recipient (Dec. 1834), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON.

¹³ *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power to “lay and collect Taxes”); *id.* art. I, § 8, cl. 2 (giving Congress the power to “borrow Money”); *id.* art. I, § 8, cl. 18 (giving Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”).

There is no question that the Court is empowered to decide whether a bill that has been enacted into law is constitutional. But the Governor's Request does not target the contents of a specific bill or the procedure by which that bill ostensibly became law. It targets the Senate's view of what Article III, § 18 means. That is not an appropriate subject for this Court's advisory opinion power. To hold otherwise calls into question the Legislature's affirmative power to superintend its own affairs. This Court should adhere to *In re Construction of the Constitution* (1893) and decline to issue an advisory opinion that purports to dictate to the Senate how it must fulfill its core legislative function.

II. IF THE COURT ANSWERS THE GOVERNOR'S REQUEST, IT SHOULD DETERMINE THAT THE SENATE'S UNDERSTANDING OF ARTICLE III, § 18 AND ARTICLE IV, § 5 IS CORRECT.

If this Court seeks to address the Request on its merits, it should reject the Governor's suggestion that Article IV, §5 should be interpreted to grant the Lieutenant Governor, as President of the Senate, the authority to cast a decisive vote when the Senate is deliberating on final passage of a bill and the vote tally results in an equal number of yea and nay votes. The Governor's position ignores the plain meaning of Article III, §18, and rests on a flawed analysis of the dispositive legal issues.

The Governor presumes that the general grant of power to the Lieutenant Governor to cast a vote in Article IV, § 5 can somehow change the meaning of specific, clear language in Article III, §18 mandating that an absolute majority of elected Senators assent to final passage of a bill. The text and structure of these two provisions in no way supports this view, nor do principles of constitutional interpretation. The Senate's reading of Article III, §18 and Article IV, § 5 is the only reading that gives effect to both

provisions and harmonizes them in accordance with governing canons of constitutional interpretation and construction.

A. The Senate’s current practice fully accords with and gives effect to the plain meaning of Article III, §18.

The principles of constitutional interpretation are well-settled. The object of constitutional construction is “to give effect to the intent of the framers of the organic law and of the people adopting it.” *Doe v. Nelson*, 2004 SD 62, ¶12, 680 N.W.2d 302, 307 (quoting *Poppen v. Walker*, 520 N.W.2d 238, 242 (S.D. 1994)). The analysis of what the South Dakota Constitution means starts with what it says. Words used in the Constitution are taken in their natural and obvious sense and given the meaning they have in common usage. See *In re Janklow*, 1999 SD 27, ¶5, 589 N.W.2d 624, 626. Absent ambiguity, the Court applies the plain meaning of the language in the Constitution as it reads. *Brendtro v. Nelson*, 2006 SD 71, ¶36, 720 N.W.2d 670, 682; *In re Issuance of Summons*, 2018 S.D. 16, ¶18, 908 N.W.2d 160, 167.

The plain meaning of Article III, § 18 unambiguously requires that a majority of all the members elected to the Senate and the House give their assent to enact a bill into law. The provision states as follows:

[N]o law shall be passed unless by assent of a majority of all the members elected to each house of the Legislature. And the question upon the final passage shall be taken upon its last reading, and the yeas and nays shall be entered upon the journal.

Constitution, Art. III, §18.

What constitutes a majority logically depends on how many members-elect comprise each house of the Legislature. The Constitution sets upper and lower limits on how many members-elect may comprise the House and how many may comprise the

Senate. As to the Senate, Article III, § 2 states: “the number of members of the senate shall not be less than twenty-five nor more than thirty-five.” The total number of elected Senators is 35. *See* SDCL § 2-2-42. Thus, under Article III, § 18, “a majority of *all* the members elected to” the Senate cannot be achieved unless 18 or more *elected* members assent to the passage of the proposed bill. If 17 Senators vote in favor and 17 oppose, then the bill cannot pass because the limiting condition set out in Article III, Section 18 has not been satisfied.

Senate Leadership is not aware of any authority holding that the Lieutenant Governor, as President of the Senate, is an elected member of the Senate. Even the 1975 Attorney General Opinion does not advance this position. Instead, that opinion provided an exceedingly thin justification for treating the President of the Senate *as though he were effectively a member* of the Senate if and when the actual, elected members reached an impasse. The 1975 opinion relies on comments made during the 1972 Constitutional Revision Commission, which say nothing about the meaning of the term “evenly divided” or otherwise support the view that adoption of Article IV, § 5 changed the settled, accepted meaning of Article III, § 18. Apart from citing the commentary, the 1975 opinion relies heavily on *Opinion of Justices*, 225 A.2d 481 (Del. 1966) a decision from the Delaware Supreme Court holding that, under Delaware’s Constitution, the Lieutenant Governor is not a member of the Senate and does not count for purposes of determining whether a quorum exists. The Court then pivoted and held that, while not a member, the Lieutenant Governor, when acting in the capacity of President of the Senate, can vote *as a member* if the Senate “be equally divided,” even on matters that required a majority of “elected members” under Delaware’s Constitution.

To bolster this dizzying result, the Delaware Court reasoned that the Lieutenant Governor was elected by the people and that the purpose behind providing the President of the Senate was to assure that the Senate could achieve a definitive result on all votes. The Delaware Court found that it was more reasonable to assume that the vote-casting power “was intended to break ties in the more important matters before the Senate, as well as the less important ones.” *Id.* at 485.

That kind of analysis begs far more questions than it answers, and the Governor’s reliance on the Delaware decision in no way justifies overruling the Senate’s own understanding of its internal voting procedures and of the law-making process. The idea that a more expansive grant of power to the Lieutenant Governor makes for better policy because it avoids the potential for gridlock or impasse is dubious, at best. If there is a tie, the version of the bill under consideration does not become law precisely because it did not garner a majority. The assumption that a tie vote blocks a definitive result ignores the dynamic, complex “sausage-making” realities of the political process.

If a bill under consideration for final passage does not capture at least 18 votes, that result does not necessarily end the matter, as the vote history of SB 25 makes clear. A majority of senators may decide to reconsider the bill and then try to persuade a current yea or nay vote to change sides. Alternatively, the bill can be amended to remove a provision, add clarifying language, or otherwise modify what the bill says and does, all in the hopes of garnering a majority that is currently lacking.

Even if the bill is “lost,” it can always be taken up again during the next regular, annual legislative session. Lastly, if voters think that any legislative outcome is unsatisfactory, they can elect different representatives. That direct link of political

accountability does not exist as to the office of the President of the Senate, as he or she does not represent any particular Senate district.

The argument that the President of the Senate should have a vote on “important matters,” lest there be a tie, is also confounding. There is no reason to assume that the Senate is more likely to have a split 17-17 vote on “important” matters than pedestrian ones. Further, this mode of argument furnishes no criteria to assess relative degrees of importance. Important to whom? Legislators vote for or against particular versions of particular bills for myriad reasons. That a vote on final passage of a bill resulted in a tie is not evidence that the Senate is somehow unresponsive to the public interest.

The Delaware decision offers little more than a naked, outcome-oriented policy assessment and a simplistic analysis that should not serve as a blueprint for this Court’s analysis. Evaluating competing interpretations of constitutional text neither starts nor ends with the question of what makes for the best policy. There is no role for guesswork as to what the constitutional Framers may have intended by judicial assumption as to what best serves the public interest. These *normative* determinations – what voting procedure is best, what is in the public’s interest – are to be made by the legislative branch. The *legal* analysis is governed by what the constitutional text says because, absent a crippling ambiguity, the text means what it says. No such ambiguity exists here, and no basis exists to speculate whether a more expansive view of the President’s voting power will create better or worse outcomes.

B. Nothing in Article IV, § 5 alters the plain meaning of Article III, § 18, and its strict requirement of an absolute majority of elected members.

The Request alludes to a need “to reconcile Article III, § 18 with Article IV, § 5” and claims that such reconciliation is necessary so that “the Senate can move forward

with clarity on the scope of the constitutional grant of power to the Lieutenant Governor to cast tiebreaking votes.” *Id.* at 3. The solution being proffered would address a non-existent problem. First, the Senate already has clarity on its own internal rules, practices, and procedures. Just as importantly, the text of the two cited constitutional provisions do not conflict.

Article IV, § 5 addresses the functions of the Lieutenant Governor. It states:

The lieutenant governor shall be president of the senate but shall have no vote unless the senators be equally divided. The lieutenant governor shall perform the duties and exercise the powers that may be delegated to him by the Governor.

The first sentence states a general prohibition, followed by a limited exception. The President of the Senate “shall have no vote *unless* the senators be equally divided.” The most natural reading of this provision assumes that the President of the Senate would only vote if two conditions obtain: the aggregate number of senators must be an even number, and the vote tally of a particular question being voted on must result in a tie. Thus, by negative implication, the President of the Senate has a vote to cast if, and only if, the senators be “equally divided.”

Article IV, § 5 specifically answers *when* the President of the Senate may vote and is completely silent on the issue of *what constitutes passage* of a particular kind of vote. This is unsurprising, as the determination on that issue is – as demonstrated above – a core legislative function. For this reason, Article IV, § 5 cannot fairly be read to alter the constitutional vote threshold that must be obtained to secure final passage of a bill.

There is no need to reconcile Article IV, § 5 with Article III, § 18 because the two provisions do not conflict. The reason is simple: a legislative body consisting of 35 duly-elected members cannot be evenly divided; it is a mathematical impossibility, akin to

stating that $2 + 2 = 5$. The Governor errs in concluding otherwise. Further, the Governor's position assumes that, by negative implication, the power to cast a vote also includes the power to unilaterally lower the strict constitutional threshold for final passage of a bill.

The Nebraska Supreme Court analyzed this exact structural tension in *Center Bank v. Department of Banking and Finance of State*, 313 N.W.2d 661 (Neb. 1981). Its analysis demonstrates why the supposed conflict between the two constitutional provisions is illusory:

The language of article III, § 13, is so clear that we believe there can be little doubt about its meaning. That provision requires "the assent of a majority of all members elected" to the Legislature. The Lieutenant Governor is not a member of the Legislature. Since the Legislature consists of 49 members, a bill must receive the affirmative vote of 25 senators on final reading before it can become law. Because L.B. 376 received the affirmative vote of only 24 senators on final reading, it failed of passage and did not become law. This interpretation does not destroy the meaning of article III, §10, but harmonizes the two provisions and gives effect to both. The Lieutenant Governor is eligible to vote on all other questions before the Legislature, when it is equally divided.

Id. at 663.

The rationale of the majority opinion in *Center Bank* applies with equal force here. Because the Senate has 35 members-elect, the potential for a tie-breaking vote on a proposed law will not arise unless at least one senator is absent. If one senator is absent, then any vote on final passage of a bill cannot garner the "assent" of "a majority of all the members elected" to the Senate, if the senators are "evenly divided." In other words, if 34 members are present, and 17 vote yea and 17 vote nay, then the bill is lost. If 30 senators are present, and 15 vote yea and 15 vote nay, the same outcome necessarily recurs.

The vote of the Lieutenant Governor cannot create “a majority of all members elected” to the Senate on a vote for final passage because the Lieutenant Governor is not an elected member of the Senate. This conclusion does not mean the Lieutenant Governor’s power to vote as President of the Senate becomes superfluous. The President retains the power to vote on any question, if the members present and voting are evenly divided and the question is not one of final passage. This would include, for example, voting on the adoption of simple and concurrent resolutions and motions to amend a bill, a resolution, or another amendment. It would also include a motion to adjourn; to recess; to calendar; to refer to a committee; and to table a bill, resolution, or amendment. *See* Joint Rules Chapter 5 and 6F.

In arguing against this conclusion, it is anticipated that the Governor may invoke a decision from the Michigan Supreme Court, *Advisory Opinion on Constitutionality of 1978 PA 425*, 272 N.W.2d 495 (Mich. 1978), to support his position. The Michigan case concerned a challenge to a bill that was signed into law after exercise of the President of the Senate cast a tie-breaking vote. Opponents of the bill challenged the constitutionality of its passage, arguing that a vote from the President of the Senate could not satisfy Michigan’s constitutional requirement that a bill cannot become law “without the concurrence of a majority of members elected to and serving in each house.” *Id.* at 497.

By 3-2 vote, the Court held that the provision authorizing the President to break ties was an implied exception to the requirement that a majority of members elected is necessary to secure final passage of a bill. The Michigan Court reasoned that such a result was further justified because the voting provision was more “specific” than the numerical voting requirement. At the time of the decision, the total number of elected

members of the Senate was fixed to thirty-eight members. As a structural matter, when “all members elected” to the Senate participated in a vote on final passage of a bill, there existed a possibility that the Senate would be equally divided. That possibility does not exist in the South Dakota Senate, which is comprised of 35 elected members.

The Michigan decision and the Governor’s interpretation depend on the idea that the President of the Senate becomes the functional equivalent of an “elected member” of the Senate if the senators are equally divided. That proposition does not derive from the plain language of Article III, §18, nor can it plausibly be inferred from that language. Based on a plain language approach, Article III, § 18 sets the constitutional threshold for when a bill becomes a law. First, it does this by defining whose vote counts (only the votes of elected members of each house). Second, it fixes how many of those qualifying votes are required for passage (a majority of all elected members). The Senate cannot alter these elements by adopting rules or procedures that vary from these strict constitutional thresholds.

No doubt, the President of the Senate may vote if the senators present are equally divided *and* if the question before the body does not require a “majority of all members elected” for passage of that specific question. This interpretation is consistent with the objection voiced by Senate President Pro Tempore Karr in the context of SB 25. More importantly, this interpretation harmonizes Article III, §18 and Article IV, §5 because it renders them compatible, not contradictory. *See Center Bank*, 313 N.W.2d at 663.

On all final passage votes, the specific mandate of Article III, § 18—requiring an absolute majority of “all the members elected”— must govern in determining any

question on what is required for all the members elect of the Senate to assent to final passage of a bill.¹⁴ On all other matters, the President of the Senate may vote if the senators present and voting be equally divided.

C. The Governor’s interpretation fails to harmonize Article III, § 18 and Article IV, §5.

The Governor understands Article IV, § 5 to create a hidden exception to the requirement that the “majority of all members elected to” the Senate assent to final passage of a bill. Under this view, if the Senate splits 17-17 with one member excused, the President of the Senate could cast the deciding vote. This result is a constitutional impossibility: the Senate would “pass” a bill that has secured only 17 yeas votes from the members elected to the Senate—one vote short of the mandatory threshold of 18. Further, it treats the President of the Senate as though he were an “elected member of the Senate” on an ad hoc basis.

The Governor’s argument is built from two untenable assumptions. First, it requires accepting that a provision designed to confer a limited power on the Lieutenant Governor—specifically, a conditional authority to vote while presiding—silently and radically alters the meaning of Article III, § 18, not by express language but by negative implication. Second, it requires accepting that a clause defining the Lieutenant Governor’s role is somehow more “specific” to the requirements for enacting legislation than Article III, § 18 itself, which speaks directly and definitively on that very issue.

¹⁴ When Governor Rhoden was Lieutenant Governor and presiding officer in the Senate, there are multiple instances in which the outcome of a vote on a motion considering final passage was a 17-17 tie and the bill was declared lost because it did not “receive an affirmative vote of a majority of the members-elect.” See SB 163 on February 23, 2022 (APP_0018); SB 172 on February 22, 2022 (APP_0020-21); HB 1088 on February 21, 2019 (APP_0023); and SB 107 on February 7, 2019 (APP_0025).

Obviously, the language of Article IV, § 5 could have been drafted to support these unstated assumptions. It could specify that the President *must* break any and all ties in the Senate, regardless of the question under consideration, and it could unequivocally state that a vote cast by the President of the Senate *must* be treated as though it were being made by a “member elected” to the Senate. Article IV, § 5, as written, is not susceptible to this reading.

The Governor’s position also suffers from another form of internal inconsistency. If the Governor's interpretation were adopted, the condition that a “majority of all members elected” must assent to final passage of a bill would be a fixed, absolute requirement for the House, but a fluctuating, conditional one for the Senate. Such an interpretation violates the “presumption of consistent usage” canon of constitutional interpretation.

This canon holds that “a word or phrase is presumed to bear the same meaning throughout a text.” *See* Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, p. 170 (2012). The Governor’s interpretation forces two divergent meanings on Article III, § 18 – one for the House and one for the Senate. By rejecting that indefensible interpretation and requiring a uniform 18-vote threshold for the Senate, the Court ensures that the Constitution speaks with a single, consistent voice across both chambers of the Legislature. That, in turn, supports the structural principle of bicameralism that is an essential feature of South Dakota’s form of government.

It is axiomatic that “to be valid all legislation must be enacted in conformity with the constitution.” *Minnehaha County v. South Dakota St. Bd. of Equal.*, 176 N.W.2d 56 (S.D. 1970). Article III, § 18 establishes a mandatory, absolute requirement for the

passage of laws in South Dakota: “no law shall be passed unless by assent of a majority of all the members elected to each house of the Legislature.” The Governor’s interpretation suggests that for the House, this provision means what it says, while for the Senate, this provision has a context-dependent, fluid meaning. Such an interpretation transforms the meaning of the absolute majority requirement without any textually-based, defensible justification.

In 1893, four years after South Dakota became a state, this Court determined that it could not issue an advisory opinion decreeing to the legislative branch how to interpret and apply the language of Article III, § 18 because the issue was governed by matters of parliamentary law that must be interpreted and determined by the legislative branch itself. If this Court deviates from settled precedent and agrees to referee the dispute between the Senate and the Governor, it should side with the Senate Leadership’s interpretation. That interpretation gives effect to the plain meaning of the relevant provisions. The Governor’s contrary proposal does not.

CONCLUSION

Senate Leadership respectfully requests that this Honorable Court decline to exercise its power to issue an advisory opinion in response to the Request from Governor Rhoden. In the event that this Court takes up the Governor’s Request, it should affirm the Senate Leadership’s view of the Lieutenant Governor’s vote-casting role because that interpretation gives effect to both constitutional provisions at issue.

Dated: February 4, 2026

CADWELL SANFORD DEIBERT
& GARRY LLP

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Majority Leader Jim Mehlhaff
and Senate Minority Leader
Liz Larson***

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft 365 Word, and contains 9,392 words, excluding the table of contents, table of cases, jurisdictional statement, statement of issues, and certificates of compliance and service. I have relied on the word count calculation of the word-processing program to prepare this certificate.

/s/ Alex M. Hagen
Alex M. Hagen

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Brief and accompanying Appendix were served via eFileSD on the following:

Katie J. Hruska
General Counsel for Governor Larry Rhoden
Katie.Hruska@state.sd.us

and a copy mailed by U.S. mail, postage prepaid, to:

Shirley A. Jameson-Fergel
Supreme Court Clerk
500 E. Capitol Avenue
Pierre, SD 57501-5070

on this 4th day of February, 2026.

/s/ Alex M. Hagen _____
Alex M. Hagen

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SECOND DAY.

STATE OF SOUTH DAKOTA,
SENATE CHAMBER,
PIERRE, SOUTH DAKOTA, JANUARY 7, 1891.

Senate convened pursuant to adjournment, Lieutenant Governor G. H. Hoffman in the chair.

The roll was called and all the members responded to their names.

Prayer was offered by the Chaplain.

Journal of the previous day was read and approved.

The Committee on Rules, through its Chairman, submitted the following report:

MR. PRESIDENT:

Your Committee on Rules have instructed me to report the following as the rules for the government of the proceedings of the Senate during the present session and recommend that the same be adopted.

JOHN L. JOLLEY,
Chairman.

RULES OF THE SENATE.

1. A majority of the Senate shall constitute a quorum, but a smaller number may adjourn from day to day, or for less time than one day, and compel the attendance of absent members.

2. The Senate shall keep a journal of its proceedings which shall be published at the close of the session. At the request of two members the yeas and nays shall be taken on any question and entered on the journal.

3. Any two members of the Senate shall have the liberty to dissent and protest, in respectful language, against any act or resolution which they may think injurious to the public or

to any individual, and have the reason of their dispute entered upon the journal. *Provided*, That when objection is made that the language is not respectful, the Senate may refer the same back to the Senator protesting.

4. The Senate may punish its members for disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member, but not a second time for the same cause; and the reason for such expulsion shall be entered on the journal, with the names of the members voting on the question.

5. The Senate, during its session, may punish by imprisonment, any person, not a member, who shall be guilty of disrespect to the same, by any disorderly or contemptuous behavior in their presence, but such imprisonment shall not at any time exceed twenty-four hours, unless the person shall persist in such disorderly or contemptuous behavior.

6. The doors of the Senate shall be kept open, except in such cases as in the opinion of the Senate require secrecy.

7. The Senate shall not adjourn, without the consent of the House of Representatives, for more than three days, nor to any other place than that in which the two houses shall be sitting.

8. On the final passage of all bills, the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal, and no bill shall become a law without the concurrence of a majority of all the Senators elect.

9. Every bill shall be read three several times, but the first and second reading may be on the same day, and the second reading may be by title of the bill, unless the reading at length be demanded. The first and third readings shall be at length.

10. The Lieutenant Governor shall be the president of the Senate, and shall vote only when the Senate is equally divided.

DUTIES OF THE PRESIDENT.

11. The Lieutenant Governor, or, in his absence, the President *pro tempore*, or, in the absence of both, any Senator called to the chair, by the Senate, shall take the chair every day pre-

APR 0002

State of South Dakota.

JOURNAL OF THE SENATE

OF THE

South Dakota Legislature,

COMMENCING JANUARY 5, 1897.

FIFTH SESSION.

PIRRE &
CARRER PUBLISHING CO.
- 1896.

Journal of the Senate.

FIFTH SESSION.

FIRST DAY.

SENATE CHAMBER,

PIERRE, SOUTH DAKOTA,

January 5, 1897.

Be it remembered that on this, the Fifth day of January, A. D. One Thousand Eight Hundred and Ninety-seven, at the hour of twelve o'clock meridian, being the first Tuesday after the first Monday of January, the day and hour fixed by the Constitution for the convening of the Legislature, the Fifth regular session of the Senate of the State of South Dakota was called to order by Lieutenant Governor Charles N. Herried, in the Senate Chamber, in the Capitol, in the City of Pierre, the seat of government.

The oath of office was administered to His Excellency, the Hon. Andrew E. Lee, Governor elect of the State of South Dakota, by Chief Justice Corson, of the Supreme Court of the State of South Dakota, in the Executive office at 12 o'clock M.

Prayer was offered by the Rev. W. A. Lyman, of Pierre.

The oath of office was administered to Hon. Daniel T. Hindman, Lieutenant Governor elect, by the Hon. H. G. Fuller, Justice of the Supreme Court of the State of South Dakota, in the presence of the Senators elect. Upon which Lieutenant Governor Hindman assumed the duties of his office.

In the absence of R. S. Person, Secretary of the Fourth session, the Hon. M. F. Greeley, Senator from Deuel County,

was, by unanimous consent, selected Secretary pro tem. and the following named Senators elect responded to their names, their election having been certified to by the Secretary of State:

- District No. 1, Dale county—Louis N. Crill.
 District No. 4, Beaumont county—J. H. Stephens.
 District No. 6, Lincoln county—W. H. Wilkinson.
 District No. 6, Turner county—A. A. Powell.
 District No. 7, Hutchinson county—E. T. Sweet.
 District No. 9, Mitchell county—C. S. Patton, Lasse Bohann.
 District No. 10, McCook county—D. C. Morgan.
 District No. 11, Hanson county—E. E. King.
 District No. 12, Davison county—George A. Schlund.
 District No. 13, Aurora county—V. S. Cook.
 District No. 14, Deuel county—J. S. Stewart.
 District No. 15, Moody county—Rufus Wheatley.
 District No. 15, Lake county—M. E. Hurt.
 District No. 17, Miner county—D. W. Jackson.
 District No. 18, Sully county—S. T. Winslow.
 District No. 19, Jernold and Buffalo counties—Jefferson Slichter.
 District No. 21, Kingsbury county—T. A. Kelch.
 District No. 22, Deadle county—H. C. Hockley.
 District No. 23, Hand county—W. S. Major.
 District No. 24, Hughes and Stanley counties—H. B. Horner.
 District No. 26, Deuel county—M. F. Greenly.
 District No. 27, Hamlin county—S. R. Hoffmann.
 District No. 28, Codington county—O. W. Case.
 District No. 28, Clark county—J. A. Grant.
 District No. 30, Spink county—W. D. Craig.
 District No. 31, Grant county—Thos. L. Bunk.
 District No. 33, Brown county—Frank W. Webb and John C. Kindschy.
 District No. 34, Marshall and Robert counties—James Ross.
 District No. 35, Faulk and Potter counties—John F. Whitlock.
 District No. 36, Edmunds and Walworth counties—E. J. McGlenn.
 District No. 37, McPherson and Campbell counties—Ira A. Hatch.
 District No. 38, Lawrence county—John D. Fairbank.
 District No. 39, Fremont county—Joseph P. Buck.
 District No. 40, Meade and Butte counties—William Bradley.
 District No. 41, Custer and Fall River counties—A. J. Keller.

The following named Senators were absent:

- District No. 2, Clay county—Carl Gustafson.
 District No. 3, Yanikon county—F. D. Wymen.
 District No. 8, Charles Mix and Douglas counties—W. A. Prather.
 District No. 35, Brookings county—D. D. Sage.
 District No. 25, Sully and Hyde counties—D. B. Thayer.
 District No. 32, Day county—J. T. Goodwin.

The Secretary announced that a quorum of the Senate was present, whereupon the oath of office was administered to each of the said Senators elect by the Hon. H. G. Fuller, Justice of the Supreme Court of the State of South Dakota, which oath was subscribed to by each, and together with the certificates of election, was placed on file in the office of Secretary of State.

Senator Palmer, of Minnehaha County, moved

The adoption of certain rules, which he read:

RULES OF THE SENATE

FIFTH SESSION.

1. A majority of the Senate shall constitute a quorum, but a smaller number may adjourn from day to day, or for less time than one day, and compel the attendance of absent members.

2. The Senate shall keep a journal of its proceedings, which shall be printed daily in pamphlet form and laid upon the desks of Senators and officers the following morning. The Journal need not be read unless ordered by the Senate, and the report of the Committee on Senate Journal may be taken up and disposed of at any time.

3. Any two Members of the Senate shall have the liberty to dissent and protest, in respectful language against any act or resolution which they may think injurious to the public or to any individual, and have the reason of their dissent entered upon the journal. Provided, That when objection is made that the language is not respectful, the Senate may refer the same back to the Senator protesting.

4. The Senate may punish its members for disorderly behavior and, with the concurrence of two-thirds of all the members elected, expel a member; and the reason for such expulsion shall be entered on the journal, with the names of the members voting on the question. But a second offense for the

same cause shall subject the offender to expulsion on a majority vote of all members elected.

5. The Senate, during its session, may punish by imprisonment any person, not a member, who shall be guilty of disrespect to same by any disorderly or contemptuous behavior in its presence, but such imprisonment shall not at any time exceed twenty-four hours, unless the person shall persist in such disorderly or contemptuous behavior.

6. The doors of the Senate shall be kept open, except in such cases as in the opinion of the Senate require secrecy.

7. The Senate shall not adjourn, without the consent of the House of Representatives, for more than three days, nor to any other place than that in which the two houses shall be sitting.

8. No person, except members of the House of Representatives and their officers, the head of executive departments of this state, Chaplains, Judges of the United States Courts, and Supreme and Circuit Judges of this state, former Governors, Lieutenant Governors and ex-members of the Senate of this state, and reporters of the press shall be admitted to the floor of the Senate, unless by leave of the President of the Senate.

HOOR OF MEETING.

9. Until otherwise ordered, the regular hour of meeting of the Senate shall be 2 o'clock p. m., daily, Sunday excepted.

OFFICERS OF THE SENATE AND THEIR DUTIES.

10. The Lieutenant Governor of the state shall be the President of the Senate. He may vote only when the Senate is equally divided. In all such cases a majority vote for reconsideration, if made in time, shall be in order from any Senator who voted on the question.

11. The Senate shall elect a president pro tempore for the session, who shall possess all the powers and prerogatives of the President of the Senate in the absence of the President;

and shall also biennially, on or before the second day of actual sitting, elect by ballot a Secretary and an Assistant Secretary who shall be severally sworn to the faithful discharge of their duties and shall hold their offices until superseded by a new election.

12. The Lieutenant Governor, or in his absence, the President pro tempore, or, in the absence of both, any Senator called to the chair, by the Senate, shall take the chair every day precisely at the hour to which the Senate shall have adjourned; shall immediately call the members to order, and on the appearance of a quorum, shall cause the Journal of the preceding day to be read.

13. The presiding officer shall preserve decorum and order, and may speak to points of order in preference to other members, and shall decide questions of order, subject to an appeal to the Senate by any two members, on which appeal no member shall speak more than once except by leave of the Senate.

14. He shall rise to put a question, but may state it sitting.

15. He shall sign all acts, memorials, addresses and resolutions; and all writs, warrants and subpoenas that may be issued by the Senate shall be signed by him and attested by the Secretary.

16. Questions shall be put in this form, viz: As many as are of the opinion that—(as the case may be)—say "Aye" and, after the affirmative voice is expressed, as many as are of the contrary opinion say "No." If the President doubt the result of the vote, or a division be called for, the Senate shall divide; those in the affirmative shall first rise from their seats, and afterwards those in the negative.

17. The President may examine and correct the Journal before it is read; he shall have the general direction of the Senate Chamber; he shall have the right to name any member to perform the duties of the chair, and such substitute shall be vested with all the powers of the president during the time he

BIENNIAL REPORT
ATTORNEY GENERAL
SOUTH DAKOTA

1949-1950

LIEUTENANT GOVERNOR

When votes in case of tie.

February 26, 1949

Hon. Rex Terry, Lieut. Gov.
State of South Dakota
Pierre, South Dakota

On February 24th, 1949, you orally requested my opinion as follows:

"Does the Lieut. Governor cast a vote in case of a tie?"

Section 18, Article 3, of the State Constitution reads as follows:

"18. The enacting clause of a law shall be: 'Be it enacted by the legislature of the State of South Dakota' and no law shall be passed unless by assent of a majority of all the members elected to each house of the legislature. And the question upon the final passage shall be taken upon its last reading, and the yeas and nays shall be entered upon the journal."

Section 7, Article 4, of the State Constitution reads as follows:

"7. The lieutenant governor shall be president of the senate, but shall have only a casting vote therein. If during a vacancy in the office of the governor the lieutenant governor shall be impeached, displaced, resign or die, or from mental or physical disease or otherwise become incapable of performing the duties of his office, the secretary of state shall act as governor until the vacancy shall be filled or the disability removed."

I call your attention to that portion of Section 18, Article 3, which reads as follows:

"... and no law shall be passed unless by assent of a majority of all the members elected to each house of the legislature . . ."

The Lieutenant Governor is not one of the elected members of the Senate. It therefore would appear that the casting vote of the Lieutenant Governor authorized by Section 7 of Article 4 could not be cast in voting for the passage of a law. In Kelly vs. the Secretary of State, 149 Mich 343, 112 NW 978, the Court held that where the State Constitution provided that no bill or joint resolution should become a law without the concurrence of a majority of all the members elected to each house or an equal division in the Senate, a bill or a joint resolution could not become a law by the casting vote of the President. The Court in Coleman vs. Miller (Kansas) 71 P 2nd 523, followed the reasoning in Kelly vs. Secretary of State, supra.

I am therefore of the opinion that the Lieutenant Governor does not have a casting vote in case of a tie where the vote is upon a law that requires passage by assent of the majority of all the members elected to each house of the legislature.

It would therefore appear that the casting vote of the Lieutenant Governor could be used only in case of a tie on resolutions or motions which do not have the effect of law.

APPROPRIATIONS—CONTRACTS—WORDS AND PHRASES

Appropriation should be effective before contract let. Letting may be advertised before. "Indebtedness" defined.

February 26, 1949

President I. D. Weeks
University of South Dakota
Vermillion, South Dakota

Your letter of the 12th instant requests my opinion as follows:

"The 1947 legislature appropriated \$300,000 for a mens' dormitory at the University. Since this was not sufficient to build the structure the legislature in 1948 passed Senate Bill 72 which has now been signed by the Governor. This bill appropriates \$200,000 more for the dormitory. The question is, when may the Board of Regents advertise for bids? May we advertise in June so that the letting of contracts could be made on or after July 1?"

Chapter 374, Session Laws of 1947, and Senate Bill No. 72 together authorize the described construction, furnishing and equipment, the same as though authorized in one act, to become effective July 1, 1949. Section 9 of Art. XI of the state Constitution provides: "No indebtedness shall be incurred or money expended * * * except in pursuance of an appropriation for the specific purpose first made." Section 13.1307 of the South Dakota Code also refers to the creation of any indebtedness without express statutory authority.

According to Black's Law Dictionary, "Obligations yet to become due constitute indebtedness as well as those already due", and cases are cited in Volume 20 of Words and Phrases at page 637 holding that indebtedness "means a sum of money which one has contracted to pay to another, whether the day of payment has come or not."

It is therefore my opinion that contracts should not be made before July 1, 1949, but that proper advertisement for bids may be made before that time and that bids may be received and contracts let on or after July 1. See 1930 A.C.R. 290.

SCHOOLS AND SCHOOL DISTRICTS

Where school is closed by reason of inclement weather, the time lost need not be made up by teacher.

February 26, 1949

John George Day
State's Attorney
Martin, South Dakota

Your letter of the 11th instant presents the following fact statement and inquiries with a request for my official opinion; your fact statement and inquiries are as follows:

"Various of our schools as a result of the blizzard in January were closed from one to five weeks; seemingly none of the contracts provide for this contingency. The facts are that some teachers were living in tenagerages and were present and ready to teach school every day of this period if there had been any students present. Another class of teachers contacted one or all of their school board and were informed

LRC Research Findings

Instances where Senate split into 17-17 vote on final passage of a bill and the President of the Senate recorded a yea vote

1. 1998 – HB 1302
2. 1999 – SB 97 (later vetoed)
3. 2002 – HB 1080
4. 2003 – SB 127 (reconsidered and amended, passed Senate 20/15)
5. 2010 – SB 169 (amended by house and later vetoed)
6. 2017 – HB 1034

Instances where Senate split into a 17-17 vote on final passage of the bill and the President of the Senate took no action

1. 2001 – HB 1072 (reconsidered and passed Senate 26/8, later signed by Governor)
2. 2019 – SB 107 (reconsideration motion failed 5/26)
3. 2019 – HB 1088 (reconsideration motion failed 17/14)
4. 2022 – SB 172 (reconsidered and passed Senate 18/17, later killed in the house)
5. 2022 – SB 163 (reconsideration motion failed 16/19)
6. 2025 – HB 1109 (LG Venhuizen no vote on 17/17 split; reconsideration motion failed 16/19)

Instances where Senate split into a 17-17 vote on final passage of the bill and the President of the Senate recorded a nay vote

1. 2002 – SB 152 (reconsideration motion passed but was lost on final passage vote, 17/18)
2. 2003 – SB 55
3. 2003 – SB 173 (reconsideration motion passed but was lost on final passage vote, 17/18)

JOURNAL OF THE SENATE

ONE HUNDREDTH SESSION

TWENTY-THIRD DAY

STATE OF SOUTH DAKOTA
Senate Chamber, Pierre
Wednesday, February 19, 2025

The Senate convened at 2:00 p.m., pursuant to adjournment, the President presiding.

The prayer was offered by the Chaplain, Rev. Sam Handschke, followed by the Pledge of Allegiance led by Senate page Audrey Patterson.

Roll Call: All members present except Sen. Jensen (Kevin) who was excused.

APPROVAL OF THE JOURNAL

MR. PRESIDENT:

The Committee on Legislative Procedure respectfully reports that the Secretary of the Senate has had under consideration the Senate Journal of the 22nd day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Respectfully submitted,
Chris Karr, Chair

Which motion prevailed.

1 The question being "Shall **SCR 605** be adopted?"

2 And the roll being called:

3 Yeas 32, Nays 2, Excused 1, Absent 0

4 Yeas: Beal, Blanc, Carley, Crabtree, Davis, Deibert, Duhamel, Grove, Hohn, Howard, Hulse,
5 Karr, Kolbeck (Steve), Lapka, Larson, Marty, Mehlhaff, Miskimins, Nelson, Otten, Perry,
6 Peterson (Sue), Pischke, Reed, Rohl, Sauder, Schoenfish, Vilhauer, Voight, Voita, Wheeler, and
7 Zikmund

8 Nays: Foster and Smith

9 Excused: Jensen (Kevin)

10 So the motion having received an affirmative vote of a majority of the members-elect, the
11 President declared the motion carried and **SCR 605** was adopted.

12 **SECOND READING OF HOUSE BILLS AND JOINT RESOLUTIONS**

13 **HB 1053:** FOR AN ACT ENTITLED, An Act to require age verification by websites containing
14 material that is harmful to minors, and to provide a penalty therefor.

15 Was read the second time.

16 The question being "Shall **HB 1053** pass as amended?"

17 And the roll being called:

18 Yeas 34, Nays 0, Excused 1, Absent 0

19 Yeas: Beal, Blanc, Carley, Crabtree, Davis, Deibert, Duhamel, Foster, Grove, Hohn, Howard,
20 Hulse, Karr, Kolbeck (Steve), Lapka, Larson, Marty, Mehlhaff, Miskimins, Nelson, Otten, Perry,
21 Peterson (Sue), Pischke, Reed, Rohl, Sauder, Schoenfish, Smith, Vilhauer, Voight, Voita, Wheeler,
22 and Zikmund

23 Excused: Jensen (Kevin)

24 So the bill having received an affirmative vote of a majority of the members-elect, the President
25 declared the bill passed and the title was agreed to.

26 **HB 1109:** FOR AN ACT ENTITLED, An Act to prohibit the manufacture, sale, or distribution of
27 cell-cultured meat in this state, and to provide a penalty therefor.

28 Was read the second time.

29 The question being "Shall **HB 1109** pass as amended?"

30 And the roll being called:

31 Yeas 17, Nays 17, Excused 1, Absent 0

1 Yeas: Blanc, Carley, Foster, Grove, Hohn, Howard, Hulse, Karr, Lapka, Marty, Nelson, Otten,
2 Perry, Peterson (Sue), Pischke, Voight, and Voita

3 Nays: Beal, Crabtree, Davis, Deibert, Duhamel, Kolbeck (Steve), Larson, Mehlhaff, Miskimins,
4 Reed, Rohl, Sauder, Schoenfish, Smith, Vilhauer, Wheeler, and Zikmund

5 Excused: Jensen (Kevin)

6 So the bill not having received an affirmative vote of a majority of the members-elect, the
7 President declared the bill lost.

8 Sen. Voita announced her intention to reconsider the vote by which **HB 1109** lost.

9 **SIGNING OF BILLS**

10 The President publicly read the title to

11 **SB 33:** FOR AN ACT ENTITLED, An Act to make appropriations for water and environmental
12 purposes and to declare an emergency.

13 **HB 1056:** FOR AN ACT ENTITLED, An Act to prohibit the preparation, sale, and distribution of
14 certain kratom products and to provide a penalty therefor.

15 **HB 1072:** FOR AN ACT ENTITLED, An Act to modernize provisions relating to water
16 development districts.

17 **HB 1125:** FOR AN ACT ENTITLED, An Act to create a share the road bicyclist safety emblem
18 for use on an emblem specialty plate.

19 And signed the same in the presence of the Senate.

20 Sen. Larson moved that the Senate do now adjourn, which motion prevailed and at 3:41 p.m.
21 the Senate adjourned.

22 Peggy Laurenz, Secretary

JOURNAL OF THE SENATE

NINETY-SEVENTH SESSION

TWENTY-SEVENTH DAY

STATE OF SOUTH DAKOTA
Senate Chamber, Pierre
Wednesday, February 23, 2022

The Senate convened at 1:00 p.m., pursuant to adjournment, the President presiding.

The prayer was offered by the Chaplain, Fr. Joe Holzhauser, followed by the Pledge of Allegiance led by Senate pages Grace Barnett and Kathryn Doom.

Roll Call: All members present.

APPROVAL OF THE JOURNAL

MR. PRESIDENT:

The Committee on Legislative Procedure respectfully reports that the Secretary of the Senate has had under consideration the Senate Journal of the 26th day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Respectfully submitted,
Lee A. Schoenbeck, Chair

Which motion prevailed.

1 Maher, Nesiba, Novstrup, Herman Otten, Rohl, Rusch, Schoenbeck, Schoenfish, V. J. Smith, Stalzer,
2 Steinhauer, Sutton, Symens, Tobin, Wheeler, Wiik, and Zikmund

3 So the bill having received an affirmative vote of a majority of the members-elect, the President
4 declared the bill passed and the title was agreed to.

5 **SB 156:** FOR AN ACT ENTITLED, An Act to revise certain provisions regarding census estimates
6 for the purposes of off-sale and on-sale liquor licenses.

7 Was read the second time.

8 The question being "Shall **SB 156** pass?"

9 And the roll being called:

10 Yeas 35, Nays 0, Excused 0, Absent 0

11 Yeas: Bolin, Breitling, Cammack, Castleberry, Crabtree, Curd, Diedrich, Duhamel, Duvall,
12 Foster, Frye-Mueller, Brock Greenfield, Heinert, Hunhoff, Johns, David Johnson, Klumb, Kolbeck,
13 Maher, Nesiba, Novstrup, Herman Otten, Rohl, Rusch, Schoenbeck, Schoenfish, V. J. Smith, Stalzer,
14 Steinhauer, Sutton, Symens, Tobin, Wheeler, Wiik, and Zikmund

15 So the bill having received an affirmative vote of a majority of the members-elect, the President
16 declared the bill passed and the title was agreed to.

17 President Rhoden now presiding.

18 **SB 163:** FOR AN ACT ENTITLED, An Act to address transparency in prescription drug pricing.

19 Was read the second time.

20 Sen. Curd moved that **SB 163** be amended as follows:

21 163D

22 On page 4, line 5, of the Senate Health and Human Services Engrossed bill, after "Medicald;"
23 insert " and"

24 On page 4, line 13, of the Senate Health and Human Services Engrossed bill, after "secrecy"
25 delete "; and

26 (18) "340B entity," an entity participating in the federal drug discount program, as described
27 in section 340B of the Public Health Service Act, 42 U. S. C. § 256b, as of January 1, 2022"

28 On page 7, line 14, of the Senate Health and Human Services Engrossed bill, after "product."
29 delete "Section 11. That chapter 58-29E be amended with a NEW SECTION:

30 "

31 On page 7, line 15, of the Senate Health and Human Services Engrossed bill, after "SECTION:"
32 delete "A pharmacy benefit manager may not:

1 (1) Take any action that prevents a 340B entity from dispensing drugs purchased under section
 2 340B of the Public Health Service Act, 42 U. S. C. § 256b, as of January 1, 2022, to patients of the
 3 340B entity;

4 (2) Refuse to contract with a 340B entity or impose on a 340B entity any contracting standards
 5 that differ from those imposed on a non-340B entity;

6 (3) By contract, provider manual, or any other means:

7 (a) Modify the definition of a pharmacy, as set forth in chapter 36-11;

8 (b) Provide a lower reimbursement for a drug purchased under section 340B than that provided
 9 for the same drug if purchased by a non-340B entity pharmacy in the same class of trade;

10 (c) Impose, on a 340B entity, any fee, chargeback, financial or other adjustment, or claims-
 11 related information, which is not imposed, in the same manner, on a non-340B entity;

12 (d) Prevent or otherwise interfere with the ability of covered individuals to receive drugs from
 13 a 340B entity of the individual's choice, including through mail order pharmacy services; or

14 (e) Require or compel the submission of ingredient costs, pricing data, or any other data
 15 pertaining to drugs purchased under section 340B."

16 Which motion prevailed.

17 The question being "Shall **SB 163** pass as amended?"

18 And the roll being called:

19 Yeas 17, Nays 17, Excused 1, Absent 0

20 Yeas: Bolin, Breitling, Curd, Diedrich, Foster, Heinert, Hunhoff, Johns, Maher, Nesiba,
 21 Novstrup, Herman Otten, Rusch, Schoenfish, V. J. Smith, Steinhauer, and Tobin

22 Nays: Cammack, Castleberry, Crabtree, Duhamel, Duvall, Frye-Mueller, Brock Greenfield,
 23 David Johnson, Klumb, Kolbeck, Schoenbeck, Stalzer, Sutton, Symens, Wheeler, Wiik, and Zikmund

24 Excused: Rohl

25 So the bill not having received an affirmative vote of a majority of the members-elect, the
 26 President declared the bill lost.

27 Sen. Diedrich announced his intention to reconsider the vote by which **SB 163** lost.

28 Today, Sen. Schoenbeck announced his intention to reconsider the vote by which **SB 3** passed.

29 No member moved to reconsider the vote by which **SB 3** passed.

30 **SB 198**: FOR AN ACT ENTITLED, An Act to revise provisions related to juvenile offenders.

31 Was read the second time.

32 Sen. Wheeler moved that **SB 198** be amended as follows:

33

JOURNAL OF THE SENATE

NINETY-SEVENTH SESSION

TWENTY-SIXTH DAY

STATE OF SOUTH DAKOTA
Senate Chamber, Pierre
Tuesday, February 22, 2022

The Senate convened at 1:00 p.m., pursuant to adjournment, the President presiding.

The prayer was offered by the Chaplain, Rev. Sam Handschke, followed by the Pledge of Allegiance led by Senate page Sequoia Altamirano.

Roll Call: All members present.

APPROVAL OF THE JOURNAL

MR. PRESIDENT:

The Committee on Legislative Procedure respectfully reports that the Secretary of the Senate has had under consideration the Senate Journal of the 25th day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Respectfully submitted,
Lee A. Schoenbeck, Chair

Which motion prevailed.

1 Yeas: Bolin, Breitling, Cammack, Castleberry, Crabtree, Curd, Diedrich, Duhamel, Duvall,
2 Foster, Brock Greenfield, Heinert, Hunhoff, Johns, David Johnson, Klumb, Kolbeck, Maher, Nesiba,
3 Novstrup, Herman Otten, Rohl, Rusch, Schoenbeck, Schoenfish, V. J. Smith, Stalzer, Steinhauer,
4 Sutton, Symens, Tobin, Wheeler, Wiik, and Zikmund

5 Nays: Frye-Mueller

6 So the bill having received an affirmative vote of a two-thirds majority of the members-elect,
7 the President declared the bill passed and the title was agreed to.

8 **SB 159:** FOR AN ACT ENTITLED, An Act to exempt any person suffering from a severe mental
9 illness from capital punishment.

10 Was read the second time.

11 Sen. Johns moved that **SB 159** be amended as follows:

12 159B

13 On page 1, line 22, of the Senate Judiciary Engrossed bill, after "features." insert " The term
14 does not include drug-induced psychosis."

15 Which motion prevailed.

16 The question being "Shall **SB 159** pass as amended?"

17 And the roll being called:

18 Yeas 21, Nays 14, Excused 0, Absent 0

19 Yeas: Breitling, Curd, Diedrich, Duhamel, Duvall, Foster, Heinert, Hunhoff, Johns, David
20 Johnson, Kolbeck, Nesiba, Herman Otten, Rohl, Rusch, Schoenbeck, Schoenfish, V. J. Smith,
21 Steinhauer, Tobin, and Wheeler

22 Nays: Bolin, Cammack, Castleberry, Crabtree, Frye-Mueller, Brock Greenfield, Klumb, Maher,
23 Novstrup, Stalzer, Sutton, Symens, Wiik, and Zikmund

24 So the bill having received an affirmative vote of a majority of the members-elect, the President
25 declared the bill passed and the title was agreed to.

26 **SB 172:** FOR AN ACT ENTITLED, An Act to revise provisions regarding eligibility for parole for
27 certain persons sentenced to life imprisonment.

28 Was read the second time.

29 The question being "Shall **SB 172** pass as amended?"

30 And the roll being called:

31 Yeas 17, Nays 17, Excused 1, Absent 0

1 Yeas: Bolin, Breitling, Duhamel, Duvall, Foster, Heinert, Hunhoff, Johns, David Johnson,
2 Kolbeck, Nesiba, Rohl, Rusch, Schoenfish, V. J. Smith, Steinhauer, and Wheeler

3 Nays: Cammack, Castleberry, Crabtree, Curd, Diedrich, Frye-Mueller, Brock Greenfield, Klumb,
4 Maher, Novstrup, Herman Otten, Schoenbeck, Stalzer, Sutton, Tobin, Wiik, and Zikmund

5 Excused: Symens

6 So the bill not having received an affirmative vote of a majority of the members-elect, the
7 President declared the bill lost.

8 Sen. Rusch announced his intention to reconsider the vote by which **SB 172** lost.

9 **SB 199**: FOR AN ACT ENTITLED, An Act to revise provisions related to a name change for
10 certain crime victims.

11 Was read the second time.

12 The question being "Shall **SB 199** pass as amended?"

13 And the roll being called:

14 Yeas 35, Nays 0, Excused 0, Absent 0

15 Yeas: Bolin, Breitling, Cammack, Castleberry, Crabtree, Curd, Diedrich, Duhamel, Duvall,
16 Foster, Frye-Mueller, Brock Greenfield, Heinert, Hunhoff, Johns, David Johnson, Klumb, Kolbeck,
17 Maher, Nesiba, Novstrup, Herman Otten, Rohl, Rusch, Schoenbeck, Schoenfish, V. J. Smith, Stalzer,
18 Steinhauer, Sutton, Symens, Tobin, Wheeler, Wiik, and Zikmund

19 So the bill having received an affirmative vote of a majority of the members-elect, the President
20 declared the bill passed and the title was agreed to.

21 **SB 205**: FOR AN ACT ENTITLED, An Act to index a certain level of municipal proceeds regarding
22 the disbursements from the Gaming Commission fund to an inflation index.

23 Having had its second reading was up for consideration and final passage.

24 The question now being on Sen. Johns' pending motion to amend **SB 205** as found on page
25 262 of the Senate Journal.

26 Which motion prevailed.

27 The question being "Shall **SB 205** pass as amended?"

28 And the roll being called:

29 Yeas 16, Nays 19, Excused 0, Absent 0

JOURNAL OF THE SENATE

NINETY-FOURTH SESSION

TWENTY-SEVENTH DAY

STATE OF SOUTH DAKOTA
Senate Chamber, Pierre
Thursday, February 21, 2019

The Senate convened at 2:00 p.m., pursuant to adjournment, the President presiding.

The prayer was offered by the Chaplain, Pastor Seth LaBounty, followed by the Pledge of Allegiance led by Senate pages Caitlin Kroemer and Taylor Eggert.

Roll Call: All members present except Sen. Rusch who was excused.

APPROVAL OF THE JOURNAL

MR. PRESIDENT:

The Committee on Legislative Procedure respectfully reports that the Secretary of the Senate has had under consideration the Senate Journal of the twenty-sixth day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Respectfully submitted,
Brock L. Greenfield, Chair

Which motion prevailed.

The President read Senate Commemoration 29 honoring Lois Henry for her twenty years of service as a committee secretary.

COMMUNICATIONS AND PETITIONS

February 20, 2019

Mr. President and Members of the Senate:

Klumb; Kolbeck; Langer; Maher; Monroe; Nelson; Novstrup; Otten (Ernie); Partridge; Russell; Schoenbeck; Smith (VJ); Soholt; Solano; Stalzer; Steinhauer; Sutton; White; Wiik; Youngberg

Nays:

Kennedy; Nesiba; Wismer

Excused:

Rusch

So the bill having received an affirmative vote of a majority of the members-elect, the President declared the bill passed and the title was agreed to.

HB 1088: FOR AN ACT ENTITLED, An Act to prohibit the use of certain electronic devices while driving.

Was read the second time.

The question being "Shall HB 1088 pass?"

And the roll being called:

Yeas 17, Nays 17, Excused 1, Absent 0

Yeas:

Blare; Bolin; Curd; Ewing; Foster; Heinert; Kennedy; Nesiba; Novstrup; Otten (Ernie); Smith (VJ); Soholt; Solano; Steinhauer; White; Wismer; Youngberg

Nays:

Cammack; Cronin; DiSanto; Greenfield (Brock); Jensen (Phil); Klumb; Kolbeck; Langer; Maher; Monroe; Nelson; Partridge; Russell; Schoenbeck; Stalzer; Sutton; Wiik

Excused:

Rusch

So the bill not having received an affirmative vote of a majority of the members-elect, the President declared the bill lost.

Sen. Soholt announced her intention to reconsider the vote by which HB 1088 lost.

HB 1257: FOR AN ACT ENTITLED, An Act to authorize the Department of the Military to construct two storage buildings, to make an appropriation therefor, and to declare an emergency.

Was read the second time.

The question being "Shall HB 1257 pass?"

And the roll being called:

Yeas 34, Nays 0, Excused 1, Absent 0

Yeas:

Blare; Bolin; Cammack; Cronin; Curd; DiSanto; Ewing; Foster; Greenfield (Brock); Heinert; Jensen (Phil); Kennedy; Klumb; Kolbeck; Langer; Maher; Monroe; Nelson; Nesiba; Novstrup; Otten (Ernie); Partridge; Russell; Schoenbeck; Smith (VJ); Soholt; Solano; Stalzer; Steinhauer; Sutton; White; Wiik; Wismer; Youngberg

JOURNAL OF THE SENATE

NINETY-FOURTH SESSION

NINETEENTH DAY

STATE OF SOUTH DAKOTA
Senate Chamber, Pierre
Thursday, February 7, 2019

The Senate convened at 2:00 p.m., pursuant to adjournment, the President presiding.

The prayer was offered by the Chaplain, Rev. Dr. Bill Meirose, followed by the Pledge of Allegiance led by Senate page Erica Howard.

Roll Call: All members present except Sen. Foster who was excused.

APPROVAL OF THE JOURNAL

MR. PRESIDENT:

The Committee on Legislative Procedure respectfully reports that the Secretary of the Senate has had under consideration the Senate Journal of the eighteenth day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Respectfully submitted,
Brock L. Greenfield, Chair

Which motion prevailed.

COMMUNICATIONS AND PETITIONS

January 24, 2019

The Honorable Larry Rhoden
President of the Senate
State Capitol
Pierre, SD 57501

Dear President and Members of the Senate:

by a preponderance of the evidence, that the defendant

reasonably believed that the victim had attained the age of consent or was capable of giving consent."

Which motion lost.

The question being "Shall SB 107 pass?"

And the roll being called:

Yeas 17, Nays 17, Excused 1, Absent 0

Yeas:

Blare; Curd; DiSanto; Greenfield (Brock); Jensen (Phil); Klumb; Kolbeck; Monroe; Nelson; Otten (Ernie); Russell; Smith (VJ); Soholt; Solano; Stalzer; Sutton; White

Nays:

Bolin; Cammack; Cronin; Ewing; Heinert; Kennedy; Langer; Maher; Nesiba; Novstrup; Partridge; Rusch; Schoenbeck; Steinhauer; Wiik; Wismer; Youngberg

Excused:

Foster

So the bill not having received an affirmative vote of a majority of the members-elect, the President declared the bill lost.

Sen. Nelson announced his intention to reconsider the vote by which SB 107 was lost.

SIGNING OF BILLS

The President publicly read the title to

HB 1007: FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the exemptions from the twelve-month residency requirement for university students.

HB 1012: FOR AN ACT ENTITLED, An Act to revise certain provisions regarding state laboratory services.

HB 1018: FOR AN ACT ENTITLED, An Act to transfer the collection of various fees from the Department of Revenue to the Department of Environment and Natural Resources.

HB 1023: FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the sale and purchase of big game animal parts.

HB 1038: FOR AN ACT ENTITLED, An Act to authorize the demolition of a South Dakota State University building and to make an appropriation therefor.

HB 1048: FOR AN ACT ENTITLED, An Act to authorize a public body to conduct certain deliberations in an executive or closed meeting.

And signed the same in the presence of the Senate.

COMMEMORATIONS

JOURNAL OF THE SENATE

NINETY-SECOND SESSION

THIRTY-FOURTH DAY

STATE OF SOUTH DAKOTA
Senate Chamber, Pierre
Tuesday, March 7, 2017

The Senate convened at 10:00 a.m., pursuant to adjournment, the President presiding.

The prayer was offered by the Chaplain, Rev. Peggy Stempson, followed by the Pledge of Allegiance led by Senate page Kadon Leddy.

Roll Call: All members present.

APPROVAL OF THE JOURNAL

MR. PRESIDENT:

The Committee on Legislative Procedure respectfully reports that the Secretary of the Senate has had under consideration the Senate Journal of the thirty-third day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Respectfully submitted,
Brock L. Greenfield, Chair

Which motion prevailed.

COMMUNICATIONS AND PETITIONS

March 7, 2017

Mr. President and Members of the Senate:

I have the honor to inform you that on March 6, 2017, I approved Senate Bills 51, 52, 64, 73, 83, 137, and 146, and the same have been deposited in the office of the Secretary of State.

programs and projects.

Was read the second time.

1157fg

Sen. Maher moved that HB 1157 be amended as follows:

On page 1 of the Senate Agriculture and Natural Resources Committee engrossed bill, delete lines 11 to 14, inclusive.

On page 2, delete lines 1 to 24, inclusive.

On page 3, delete lines 1 to 9, inclusive.

On page 3, line 20, delete "Section 5 of this Act" and insert "Section 2 of this Act".

Which motion prevailed.

The question being "Shall HB 1157 pass as amended?"

And the roll being called:

Yeas 31, Nays 4, Excused 0, Absent 0

Yeas:

Bolin; Cammack; Curd; Ewing; Frerichs; Greenfield (Brock); Haverly; Heinert; Kennedy; Killer; Klumb; Kolbeck; Langer; Maher; Monroe; Nelson; Nesiba; Netherton; Novstrup; Otten (Ernie); Partridge; Peters; Rusch; Soholt; Solano; Stalzer; Sutton; Tapio; Tidemann; White; Youngberg

Nays:

Cronin; Jensen (Phil); Russell; Wiik

So the bill having received an affirmative vote of a two-thirds majority of the members-elect, the President declared the bill passed.

The question being on the title.

1157ftd

Sen. Maher moved that the title to HB 1157 be amended as follows:

On page 1, line 1, of the Senate Agriculture and Natural Resources Committee engrossed bill, delete everything after "fund".

On page 1, delete line 2.

Which motion prevailed and the title was so amended.

HB 1034: FOR AN ACT ENTITLED, An Act to establish certain fees for receiving electronic files of petitions, to revise certain provisions concerning filing petitions and other documents, and to revise certain provisions concerning elections and voting.

Was read the second time.

Sen. Bolin moved that HB 1034 be amended as follows:

On page 9, after line 4 of the Senate State Affairs Committee engrossed bill, insert:

" Section 11. That § 12-13-23 be amended to read:

12-13-23. The secretary of state shall distribute public information on any constitutional amendment, initiated, or referred measure submitted to the electors for approval. The secretary of state shall compile the public information by printing a statement in support of the constitutional amendment, initiated, or referred measure written by its proponents, if any can be identified, and a statement against the constitutional amendment, initiated, or referred measure written by its opponents, if any can be identified. The secretary of state is not responsible for the contents, objectivity, or accuracy of the statements written by the proponents and opponents. The pamphlet shall also include the attorney general's title, explanation, and a clear and simple recitation of the effect of a "Yes" or "No" vote; number of pages and sections in the proposed or referred language; and, if applicable, a prison or jail population cost estimate and fiscal note. "

Which motion prevailed.

1034jb

Sen. Nesiba moved that HB 1034 be amended as follows:

On page 3, line 6, of the Senate State Affairs Committee engrossed bill, overstrike "No" and insert "A".

Which motion lost.

The question being "Shall HB 1034 pass as amended?"

And the roll being called:

Yeas 17, Nays 17, Excused 1, Absent 0

Yeas:

Bolin; Cronin; Curd; Ewing; Frerichs; Heinert; Kennedy; Killer; Klumb; Maher; Nesiba; Netherton; Novstrup; Rusch; Stalzer; Sutton; White

Nays:

Cammack; Greenfield (Brock); Haverly; Jensen (Phil); Kolbeck; Langer; Monroe; Otten (Ernie); Partridge; Peters; Russell; Soholt; Solano; Tapio; Tidemann; Wiik; Youngberg

Excused:

Nelson

The President voted Yea.

So the bill having received an affirmative vote of a majority of the members-elect, the President declared the bill passed and the title was agreed to.

HB 1035: FOR AN ACT ENTITLED, An Act to revise and provide certain procedures for filing, certifying, and challenging petitions.

Was read the second time.

Mason's
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OF
LEGISLATIVE PROCEDURE
2020

MASON'S MANUAL OF LEGISLATIVE PROCEDURE

2020 Edition



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APP_0030



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APP_0031

CHAPTER 7

POWERS OF THE JUDICIARY WITH REFERENCE TO LEGISLATIVE PROCEDURE

Sec. 71. The Judiciary Cannot Interfere with Rule- Making Powers of Legislative Bodies

1. The judiciary will not disturb a decision on parliamentary procedure made by a legislative body having authority to make rules for its governance and acting within the scope of its powers.
2. A rule of procedure adopted by a legislative house pursuant to the constitutional provision authorizing each house to determine its rules of procedure cannot be impeached on the grounds that some other rule would be better or more accurate or more just, if the rule, as adopted, does not ignore constitutional restraints or does not violate fundamental rights and there is a reasonable relation between the mode or method of procedure and the result that is sought.
3. An interpretation by a house of a state legislature as to the extent of power conferred upon it by the constitution to determine the rules of its own proceedings is not binding on the judiciary, but should be accepted

Sec. 71, Par. 1: 1; *Malone v. Meekins* (Alaska, 1982); *Bevin v. Beshear* (Ky., 2018); *Brinkhaus v. Senate of State of Louisiana* (La., 1995); *Davies v. City of Saginaw* (Mich., 1891); *Missouri ex rel. Fox v. Alt* (Mo., 1887); *Heimbach v. New York* (N.Y., 1982); *Dank v. Benson* (Okla., 2000); *Sierra Club v. State ex rel. Okla. Tax Comm'n* (Okla., 2017); *Wells v. Baine* (Pa., 1873); *Brown v. Owen* (Wash., 2009).

Sec. 71, Par. 2: Ex parte Marsh (Ala., 2013); *Heimbach v. New York* (N.Y., 1982); *Urban Justice Ctr. v. Silver* (N.Y., 2009); *South Carolina ex rel. Coleman v. Lewis* (S.C., 1936).

by them unless manifestly wrong. Separation of powers principles lead the judiciary to defer such questions to the legislature.

4. Where no precise forms are prescribed, as in the removal of an official, a procedure may be adopted that incorporates the fundamentals of due process.

5. The rules of legislative bodies are not reviewable by the judiciary except on constitutional grounds.

Sec. 72. Legislative Procedure Is Not Within Control of the Judiciary

1. It is for the judiciary to decide whether there has been compliance with constitutional provisions and whether a bill of the legislature has become a law.

2. Where the constitution declares certain forms indispensable to the passage of laws, the judiciary will

Sec. 71, Par. 3: *Calvo v. I Mina Trenta; Kuattro Na Liheslaturan Guahan*, (Guam, 2018); *Witherspoon v. Mississippi ex rel. West* (Miss., 1925); *Tuck v. Blackmon* (Miss., 2001); *Zemprelli v. Daniels* (Pa., 1981); *Wisconsin ex rel. Ozanne v. Fitzgerald* (Wis., 2011).

Sec. 71, Par. 5: *Birmingham-Jefferson Civic Center Authority v. City of Birmingham* (Ala., 2005); *Malone v. Meekins* (Alaska, 1982); *People's Advocate, Inc. v. Superior Court* (Calif., 1986); *Moffitt v. Willis* (Fla., 1984); *Paisner v. Attorney General* (Mass., 1983); *In re Lamb* (N.J., 1961); *Gewertz v. Joint Legislative Committee on Ethical Standards* (N.J., 1975); *Urban Justice Ctr. v. Silver* (N.Y., 2009); *In the Matter of Tallarino v. Oneida County Board of Legislators* (N.Y., 2015).

Sec. 72, Par. 1: *City of Ensley v. Simpson* (Ala., 1909); *Larry Menke, Inc. v. DaimlerChrysler Motors* (Calif., 2009); *International Union, United Automobile, Aerospace, and Agr. Implement Workers of America v. Green* (Mich., 2013); *Neiberger v. McCullough* (Ill., 1912); *Gunn v. Hughes* (Miss., 2017); *Sierra Club v. State ex rel. Okla. Tax Comm'n* (Okla., 2017).

declare acts invalid unless passed according to those provisions.

See also Sec. 697, Journal as Showing Passage and Legality of Bills, particularly Par. 1, Mandatory Requirements Must Be Complied With.

3. The judiciary will go behind an act to the legislative record to ascertain whether the act has legal existence only when the attention of the judiciary is called to a particular error.

See also Sec. 697, Journal as Showing Passage and Legality of Bills.

4. Under the constitutional provision of separation of powers, the judiciary is without jurisdiction to interpose judicial authority against the exercise of legislative authority and power. However, an act that violates the constitutional provisions of separation of powers will be declared a nullity by the judiciary.

Sec. 72, Par. 2: *International Union, United Automobile, Aerospace, and Agr. Implement Workers of America v. Green* (Mich., 2013); *Gunn v. Hughes* (Miss., 2017); *Wells v. Missouri Pacific Ry. Co.* (Mo., 1892); *Sierra Club v. State ex rel. Okla. Tax Comm'n* (Okla., 2017).

Sec. 72, Par. 3: *Alabama ex rel. McKinley v. Martin* (Ala., 1909); *Corcoran v. Geffin* (Fla., 2018).

Sec. 72, Par. 4: *Malone v. Meekins* (Alaska, 1982); *Copren v. State Bd. of Equalization* (Calif., 1988); *Am. Indian Health & Servs. Corp. v. Kent* (Calif., 2018); *Martinez v. Scanlan* (Fla., 1991); *Greer v. Georgia* (Ga., 1975); *Cross v. Alexander* (Ia., 1986); *Alexander v. State of Mississippi by and through Allain* (Miss., 1983); *Ashwell v. Mississippi* (Miss., 2017); *Hertz Corporation v. Attorney General of the State of New York* (N.Y., 1987); *North Dakota Legislative Assembly v. Burgum* (N.D., 2018); *City of Bethany v. Dist. Court of Oklahoma County* (Okla., 1948); *Martinez v. Texas* (Tex., 2016); *Randall v. Fairmont City Police Dept.* (W.Va., 1991); *Tony P. Sellitti Constr. Co. v. Caryl* (W.Va., 1991); *West Virginia ex rel. Holmes v. Clawges* (W.Va., 2010).

Sec. 73. Powers of the Judiciary over Legislative Bodies Generally

See also Sec. 15, *Failure of a House of the Legislature to Conform to Its Rules Does Not Invalidate Its Acts.*

1. The people of each state are vested with sovereign authority, expressed by their elected representatives serving in a legislature. Thus, legislative power is absolute and unlimited except as restrained by constitution.
2. Insofar as legislative acts and actions are restrained by constitution, the judiciary may examine the same and have the authority to rule upon the validity of such acts or actions.
3. The judiciary cannot declare an act of a legislature void on account of noncompliance with rules of procedure made by itself to govern its own deliberations and not involving any constitutional provision.

See also Sec. 15, *Failure of a House of the Legislature to Conform to Its Rules Does Not Invalidate Its Acts.*

Sec. 73: *Bevin v. Beshear* (Ky., 2018); *Common Cause of Pennsylvania v. Commonwealth* (Pa., 1995).

Sec. 73, Par. 1: *In re Sherrill* (N.Y., 1907); *Bryan v. Liburd* (Virgin Is., 1996).

Sec. 73, Par. 2: *Marbury v. Madison* (U.S., 1803); *Schabarum v. California Legislature et al.* (Calif., 1998); *Pelligrino v. O'Neill* (Conn., 1984); *Bevin v. Beshear* (Ky., 2018); *Martin v. Louisiana Stadium and Exposition Dist.* (La., 1977); *Alexander v. State of Mississippi by and through Allain* (Miss., 1983); *Sierra Club v. State ex rel. Oklahoma Tax Commission* (Okla., 2017).

Sec. 73, Par. 3: *St. Louis & S.F. Ry. Co. v. Gill* (Ark., 1891); *Ricarte v. Arkansas* (Ark., 1986); *Bevin v. Beshear* (Ky., 2018); *Schweizer v. Territory* (Okla., 1897); *South Carolina v. Brown* (S.C., 1890); *Bryan v. Liburd* (Virgin Is., 1996); *McDonald v. Wisconsin* (Wis., 1891); *In re Ryan* (Wis., 1891).

4. The legislature cannot do indirectly that which it cannot do directly.

See also Sec. 12, *Rules Must Conform to Constitutional Provisions, particularly Par. 1.*

5. Where an alleged illegal ministerial official act has relation to legislative action, such action may be considered by the judiciary in determining the validity or invalidity of the ministerial act. This is not an interference by the judiciary with the legislative branch of the government.

6. An amendment to a state constitution otherwise validly proposed and adopted by the people is valid, notwithstanding the fact the legislature may have failed to have the proposed amendment entered at length upon its journals as required by the constitution.

7. What constitutes related matters that can be submitted to the vote of the people in one constitutional amendment is for the legislature to determine in the first instance.

8. The judiciary has jurisdiction to decide whether a house of a legislature has been organized in violation of the constitution. A *quo warranto* action will not lie to determine the title of the presiding officer to that office.

Sec. 73, Par. 4: *Rutan v. Republican Party of Illinois* (U.S., 1990); *Brennan v. Connolly* (Mich., 1919); *Corre v. Ohio* (Ohio, 1883).

Sec. 73, Par. 5: *Crawford v. Gilchrist* (Fla., 1912).

Sec. 73, Par. 6: *West v. Florida* (Fla., 1905).

Sec. 73, Par. 7: *Keenan v. Price* (Idaho, 1948).

Sec. 73, Par. 8: *Attorney General ex rel. Werts v. Rogers* (N.J., 1894).

9. Constitutionality of legislative acts is presumed until unconstitutionality is established.

10. The judiciary will decline to interfere in the internal affairs of a legislative body conducted in accordance with constitutional mandates.

11. Where a statute passed by the legislature has been submitted to referendum and approved, it is against public policy for the judiciary thereafter to declare it invalid because it did not receive the publicity required by law before the election.

Sec. 73, Par. 9: *City of Greeley v. Hamman* (Colo., 1891); *Berry v. Crawford* (Ind., 2013); *Iowa v. Vail* (Iowa, 1880); *Bevin v. Beshear* (Ky., 2018).

Sec. 73, Par. 10: *Birmingham-Jefferson Civic Center Authority v. City of Birmingham* (Ala., 2005); *People's Advocate, Inc. v. Superior Court* (Calif., 1986); *Moffitt v. Willis* (Fla., 1984); *Paisner v. Attorney General* (Mass., 1983); *Gunn v. Hughes* (Miss., 2017); *Monserate v. New York State Senate* (2d Cir., 2010); *North Dakota ex rel. Spaeth v. Meiers* (N.D., 1987); *Zemprelli v. Daniels* (Pa., 1981); *Brown v. Owen* (Wash., 2009).

Sec. 73, Par. 11: *Allen v. Arizona* (Ariz., 1913). *Cf. Prohibitory Amendment Cases* (Kan., 1881); *Shepherd v. Schedler* (La., 2016).

PART II. DEBATE

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CHAPTER 44

VOTE REQUIRED

Sec. 510. Majority of Votes Is Required

See also Sec. 42, Indispensable Requirements for Making Valid Decisions, particularly Par. 8; and Sec. 47, Majority Control.

1. A majority of the votes cast, a quorum being present, is sufficient to carry a proposal unless a larger vote is required by the constitution. Members present but not voting are disregarded in determining whether an action carried.

Sec. 510, Par. 1: Cushing's Legislative Assemblies, Sec. 412; St. Joseph Township v. Rogers (U.S., 1872); U.S. v. Ballin (U.S., 1892); Rhode Island v. Palmer (U.S., 1920); Tayloe v. Davis (Ala., 1924); *In re* Opinion of the Justices (Ala., 1934); City of Batesville v. Ball (Ark., 1911); Smith v. Los Angeles Immigration & Land Coop. Ass'n (Calif., 1889); California Bldg. Indus. Assn. v. State Water Res. Control Bd., (Calif., 2018); Connecticut *ex rel.* Cole v. Chapman (Conn., 1877); Shaughnessy v. Metro. Dade County (Fla., 1970); City of Carrollton v. Clark (Ill., 1886); Walden v. Vanosdal (Ind., 1892); Thurston v. Huston (Iowa, 1904); Adams v. Fort Madison Cmty. Sch. Dist. in Lee, Des Moines and Henry Counties (Iowa, 1970); Wheeler v. Kentucky (Ky., 1895); Barry v. New Haven (Ky., 1915); Wesley v. Bd. of Educ. of Nicholas County (Ky., 1966); Warnock v. Lafayette (La., 1849); Murdock v. Strange (Md., 1904); First Parish in Sudbury v. Stearns (Mass., 1838); Merrill v. City of Lowell (Mass., 1920); Kay Jewelry Co. v. Bd. of Registration in Optometry (Mass., 1940); Green v. Weller (Miss., 1856); Ezell v. City of Pascagoula (Miss., 1970); Missouri *ex rel.* Kiel v. Reichmann (Mo., 1911); *In re* State Treasurer's Settlement (Neb., 1897); Houser v. School Dist. of South Sioux City in Dakota County (Neb., 1972); Chase v. Bd. of Tr's of Nebraska State Colleges (Neb., 1975); Attorney General v. Shepard (N.H., 1882); Attorney General v. Remick (N.H., 1902); Attorney General v. Bickford (N.H., 1914); Frost v. Hoar (N.H., 1932); *In re* Opinion of the Justices (N.H., 1953); Abels v. McKeen (N.J., 1867); Mount v. Parker (N.J., 1867); Hutchinson v. Belmar (N.J., 1898); Housman v. Earle (N.J., 1923); *Ex parte* Willcocks (N.Y., 1827); McFarland v. Crary (N.Y., 1830); *In*

2. Where a majority or other proportion of votes is required without specifying whether the vote refers to the entire membership or to the members present, or to the members present and voting, the general rule is that the proportion refers to the number present and voting.

3. In the absence of an express rule or constitutional provision, a proposal is carried in legislative bodies by a majority of the votes cast, and the exercise of law-making power is not stopped by mere silence and inaction of some who are present but do not vote.

4. In the conduct of the business of a legislative body, the principle of majority rule is of the very essence. Parliamentary law is based firmly upon it. It is, in fact, the basis upon which popular self-government largely rests.

re Brearton (N.Y., 1904); *Morris v. Cashmore* (N.Y., 1938); *Town of Smithtown v. Howell* (N.Y., 1972); *Hill v. Ponder* (N.C., 1942); *North Dakota ex rel. Moore v. Archibald* (N.D., 1896); *Ohio ex rel. Shinnich v. Green* (Ohio, 1881); *Commonwealth v. Fleming* (Pa., 1903); *Meyers v. Philadelphia Union League* (Pa., 1908); *Commonwealth ex rel. Fox v. Chace* (Pa., 1961); *South Carolina v. Dellesseline* (S.C., 1821); *Webb v. Carter* (Tenn., 1914); *Common's Court of Limestone County v. Garrett* (Texas, 1922); *McMillen v. Neeley* (W.Va., 1909); *Wisconsin ex rel. Burdick v. Tyrrell* (Wis., 1914).

Sec. 510, Par. 2: *Iowa v. Dickie* (Iowa, 1878); *Warnock v. Lafayette* (La., 1849); *Doll v. Flintkote Co.* (La., 1955); *Missouri v. McBride* (Mo., 1836); *Green v. Weller* (Miss., 1856); *Morton v. Comptroller General* (S.C., 1873); *English v. Texas* (Texas, 1879); *Wisconsin ex rel. Burdick v. Tyrrell* (Wis., 1914).

Sec. 510, Par. 3: *Waples*, Sec. 134; *In re Opinion of the Justices* (N.H., 1953); *Laconia Water Co. v. City of Laconia* (N.H., 1955).

Sec. 510, Par. 4: *Tilson's Manual*, Sec. 19.

Sec. 511. More Than Majority of Votes Cast May Be Required

See also Sec. 42. Indispensable Requirements for Making Valid Decisions, particularly Par. 8.

1. Where the constitution requires a majority vote of the entire membership or of all members present or any other number or proportion to take a particular action, that vote must be obtained; a vote of less than that number, although a majority of those present and voting, a quorum being present, is not sufficient.

2. The constitutions of many of the states require an affirmative vote of a majority of the members elected to each house of the legislature for the passage of bills.

See also Sec. 501. Computing a Quorum.

Sec. 511, Par. 1: *Anniston v. Davis* (Ala., 1893); *McCracken v. San Francisco* (Calif., 1860); *Pimental v. San Francisco* (Calif., 1863); *People ex rel. Funk v. Wright* (Colo., 1902); *Connecticut ex rel. Duane v. Fagan* (Conn., 1875); *Evanston v. O'Leary* (Ill., 1897); *Cascaden v. City of Waterloo* (Iowa, 1898); *Hansen v. Town of Anthon* (Iowa, 1919); *Warnock v. Lafayette* (La., 1849); *Louisiana ex rel. Garland v. Guillory* (La., 1935); *Marionneaux v. Hines* (La., 2005); *Zeiler v. Central Ry. Co.* (Md., 1896); *Baker v. Police Comm'rs of Port Huron* (Mich., 1886); *Missouri ex rel. Kiel v. Reichmann* (Mo., 1911); *Center Bank v. Dept. of Banking and Finance* (Neb., 1981); *Commonwealth ex rel. Swartz v. Wickersham* (Pa., 1870).

Sec. 511, Par. 2: State Constitutions: Ala. IV, 63; Alaska II, 14; Ariz. IV, Part 2, 15; Ark. V, 22; Calif. IV, 8(b); Colo. V, 22; Del. II, 10; Fla. III, 7; Ga. III, Sec. V, 5; Hawaii III, 13; Idaho III, 15; Ill. IV, 8; Ind. IV, 25; Iowa III, 17; Kan. II, 13; Ky. 46; La. III, 15(g); Md. III, 28; Mich. IV, 26; Minn. IV, 22; Miss. IV, 55, 62; Mo. III, 27; Mont. V, 11; Neb. III, 13; Nev. IV, 18; N.H. II, 20, 37; N.J. IV, Sec. IV, 6; N.M. IV, 17; N.Y. III, 14; N.C. II, 23; N.D. IV, 13; Ohio II, 15; Okla. V, 34; Ore. IV, 25; Pa. III, 4; S.D. III, 18; Tenn. II, 18; Utah VI, 22; Va. IV, 11; Wash. II, 22; Wis. VIII, 8; Wyo. III, 25; *People ex rel. Reitz v. DeWolf* (Ill., 1871); *Louisiana ex rel. Garland v. Guillory* (La., 1935); *Marionneaux v. Hines* (La., 2005); *Washington County Comm'rs v.*

3. Constitutional provisions as to the number of votes required for the final passage of bills are mandatory.

Sec. 512. Two-Thirds Vote

See also Sec. 281, Right of Legislative Bodies to Suspend Rules; and Sec. 285, Vote Required to Suspend the Rules.

1. When a two-thirds vote is required for any purpose by the constitution, that vote must be obtained for the vote to be effective.

2. A two-thirds vote means that the affirmative vote must be equal to twice the negative vote. It is not necessary that it exceed a ratio of two to one.

Baker (Md., 1922); *Minnesota ex rel. Eastland v. Gould* (Minn., 1883); *Missouri ex rel. McCaffery v. Mason* (Mo., 1900); *Hull v. Miller* (Neb., 1876); *Center Bank v. Dept. of Banking and Finance* (Neb., 1981).

Sec. 511, Par. 3: *Fisher v. Petroni* (Ark., 1989); *Butler v. Bd. of Directors* (Ark., 1912); *Rash v. Allen* (Del., 1910); *Cohn v. Kingsley* (Idaho, 1897); *People ex rel. Reitz v. DeWolf* (Ill., 1871); *McCulloch v. Indiana* (Ind., 1858); *Washington County Comm'rs v. Baker* (Md., 1922); *Minnesota ex rel. Eastland v. Gould* (Minn., 1883); *Missouri ex rel. McCaffery v. Mason* (Mo., 1900); *Missouri ex rel. Schmoll v. Drabelle* (Mo., 1914); *Nebraska ex rel. Blessing v. Davis* (Neb., 1902); *Center Bank v. Depr. of Banking and Finance* (Neb., 1981); *People v. Devlin* (N.Y., 1865); *Burlingham v. City of New Bern* (N.C., 1914); *North Dakota v. Schultz* (N.D., 1919).

Sec. 512, Par. 1: *Iowa v. Dickie* (Iowa, 1878); *Warnock v. Lafayette* (La., 1849); *Doll v. Flintkote Co.* (La., 1955); *Whitney v. Village of Hudson* (Mich., 1888); *Green v. Weller* (Miss., 1856); *Missouri v. McBride* (Mo., 1836); *Morton v. Comptroller General* (S.C., 1873); *English v. Texas* (Texas, 1879); *Wisconsin ex rel. Burdick v. Tyrrell* (Wis., 1914).

Sec. 512, Par. 2: *In re Opinion of the Justices* (Ala., 1934); *Zeiler v. Central Ry. Co.* (Md., 1896); *City of North Platte v. North Platte Water Works* (Neb., 1898).

3. The requirement of a two-thirds vote, unless otherwise specified, means two-thirds of the votes cast, not two-thirds of the members present or two-thirds of all the members.

4. Where the constitution requires a two-thirds vote of all members, a vote of less than that number, although two-thirds of a quorum, is not sufficient. Even though there are vacancies, a vote equal to two-thirds of the total membership is required.

5. A constitutional provision providing that a certain action requires a two-thirds vote of both houses means a two-thirds vote of each house, and not merely an aggregate two-thirds of the members of both houses.

6. A legislative body cannot by its own act or rule require a two-thirds vote to take any action where the constitution requires only a majority vote. To require a

Sec. 512, Par. 3: U.S. Constitution, Art. I, Sec. 7, Par. 2, Note 106 in *House Manual* (1947); U.S. Constitution, Art. V, Sec. 1, Note 224 in *House Manual* (1947); *Rhode Island v. Palmer* (U.S., 1920); *In re Opinion of the Justices* (Ala., 1934); *Warnock v. Lafayette* (La., 1849); *Zeiler v. Central Ry. Co.* (Md., 1896); *Kay Jewelry Co. v. Bd. of Registration in Optometry* (Mass., 1940); *Southworth v. Palmyra & J. R. Co.* (Mich., 1851); *Green v. Weller* (Miss., 1856); *Missouri v. McBride* (Mo., 1836); *City of North Platte v. North Platte Water Works* (Neb., 1898); *English v. Texas* (Texas, 1879).

Sec. 512, Par. 4: *Buffington Wheel Co. v. Burnham* (Iowa, 1883); *Griffin v. Messenger* (Iowa, 1901); *Speed v. Crawford* (Ky., 1860); *Blood v. Beal* (Maine, 1905); *Whitney v. Village of Hudson* (Mich., 1888); *Pollasky v. Schmid* (Mich., 1901); *Minnesota ex rel. Eastland v. Gould* (Minn., 1883); *Minnesota ex rel. Kohlman v. Wagner* (Minn., 1915); *Cleveland Cotton Mills v. Cleveland County Comm'rs* (N.C., 1891). *Cf. Missouri v. McBride* (Mo., 1836).

Sec. 512, Par. 5: *Belote v. Coffman* (Ark., 1915); *Morton v. Comptroller General* (S.C., 1873).

two-thirds vote, for example, to take any action would be to give to any number of more than one-third of the members the power to defeat the action and amount to a delegation of the powers of the body to a minority.

See also Sec. 48, Delegation of Powers.

7. When a constitutional provision requires more than a majority vote for the passage of certain types of bills, such bills can be amended by a majority vote and an amendment to such a bill by the other house, not involving any proposal itself requiring more than a majority vote, requires only a majority vote for concurrence; but it has been held in Congress that a two-thirds vote is necessary to agree on a conference report on a proposed amendment to the constitution.

See also Sec. 772, Vote on Report of Conference Committee, particularly Par. 2.

8. An action requiring a two-thirds vote for passage can be repealed by a majority vote. The general rule is that an act requiring a two-thirds vote for passage can be reconsidered or rescinded by a majority vote.

See also Sec. 473, Vote Required for Reconsideration.

9. There is no rule of parliamentary procedure enforced by the judiciary or generally accepted in practice by which a two-thirds vote is required in legislative bodies for procedural questions such as: to limit debate, to

Sec. 512, Par. 6: *Taylor v. Davis* (Ala., 1924).

Sec. 512, Par. 7: U.S. Constitution, Art. V, Note 224 in House Manual.

Sec. 512, Par. 8: *Crawford v. Gilchrist* (Fla., 1912); *City of Chariton v. Holiday* (Iowa, 1883).

make special orders, to take up a motion out of order, or even to suspend their rules. It is not unusual for such bodies to provide by their rules for a two-thirds vote or other vote of more than a majority or to require notice. Such rules are not imposed upon them by parliamentary law.

10. Since it is a fundamental principle of parliamentary law that the deliberate will and judgment of the majority shall prevail in the decision of such questions as can properly come before the legislative body, the requirement of a two-thirds vote is exceptional. Such a vote is not required except in the particular cases in which it is mandated by the constitution.

Sec. 513. Tie Votes and Casting Votes

1. When the vote for and the vote against any proposal are equal, there is a tie vote. A tie vote decides nothing but leaves the situation unchanged. The voice of the majority decides, for the *lex majoris partis* (law of the majority) is the law of all legislative bodies and elections where not otherwise expressly provided. However, if the body be equally divided, *semper presumitur pro negante* (always presume against the negative), the former law is not changed because no affirmative action can be taken except by a majority. A ruling of the presiding officer is not overruled on appeal by a tie vote.

See also Sec. 244, Vote on Appeal, particularly Par. 1.

Sec. 512, Par. 9: Cushing's Legislative Assemblies, Secs. 115, 116, 119, 412; Waples, Sec. 134.

Sec. 512, Par. 10: Cushing's Legislative Assemblies, Sec. 1826.

Sec. 513, Par. 1: Cushing's Legislative Assemblies, Sec. 412; Jefferson, Sec. XII.

2. In some instances, provisions are made to break a tie. This is accomplished by giving the presiding officer a vote in case of a tie. This vote is called a "casting" vote. Such a vote can be cast only when it will decide the tie.

3. The casting vote is usually given to a presiding officer, when the presiding officer is not a regular member of the body and does not otherwise have a vote. On rare occasions, the casting vote has been given to a presiding officer who is a regular member who may first vote as a member and then may vote again to break a tie.

4. When not a member of the body, the presiding officer can cast a vote only when expressly authorized to do so.

See also Sec. 582, Rights of Presiding Officer to Debate, Vote and Introduce Business, particularly Par. 5.

Sec. 513, Par. 2: Opinion of the Justices (Del., 1966); Hansen v. Town of Anthon (Iowa, 1919); Mississippi *ex rel.* Booz v. Cresswell (Miss., 1918); Merriam v. Chicago R. I. & P. Ry. Co. (Mo., 1908); Montana *ex rel.* Easbey v. Highway Patrol Bd. (Mont., 1962); Advisory Op. on Constitutionality of 1978 P.A. 426 (Mich., 1978); Center Bank v. Dept. of Banking and Finance (Neb., 1981).

Sec. 513, Par. 3: Connecticut *ex rel.* Cole v. Chapman (Conn., 1877); Opinion of the Justices (Del., 1966); Carroll v. Wall (Kan., 1886); Reynolds v. Baldwin (La., 1846); Advisory Op. on Constitutionality of 1978 P. A. 426 (Mich., 1978); Small v. Orne (Maine, 1887); Montana *ex rel.* Easbey v. Highway Patrol Bd. (Mont., 1962); Center Bank v. Dept. of Banking and Finance (Neb., 1981); People *ex rel.* Remington v. Church of the Atonement (N.Y., 1866); Reeder v. Trotter (Tenn., 1919).

Sec. 513, Par. 4: People *ex rel.* Funk v. Wright (Colo., 1902); Opinion of the Justices (Del., 1966); City of Carrollton v. Clark (Ill., 1886); Advisory Op. on Constitutionality of 1978 P.A. 426 (Mich., 1978); Montana *ex rel.* Easbey v. Highway Patrol Bd. (Mont., 1962); Center Bank v. Dept. of Banking and Finance (Neb., 1981); Reeder v. Trotter (Tenn., 1919).

5. A presiding officer who is a member of the body and has already voted as such has no power to cast a second vote to break a tie unless such right is given by rule or statute expressly so providing.

Sec. 514. When a Casting Vote Is in Order

See also Sec. 582, Rights of Presiding Officer to Debate, Vote and Introduce Business, particularly Par. 5.

1. A casting vote is in order only when there is a tie vote, as when the votes are equally divided between two candidates or when there is an equal number for and against a proposal.

2. A casting vote is not in order in an election to give one candidate a majority where the other votes are scattered among other candidates. A casting vote would be in order where the vote was four to four but not where the vote was three for one candidate, two for another and one for a third. A casting vote is not in order to give one candidate a plurality where two or more have an equal number of votes.

3. When the presiding officer is a member of a body and entitled to vote with the other members, the fact

Sec. 513, Par. 5: O'Neil v. O'Connell (Ky., 1945). *Cf.* Opinion of the Justices (Ala., 1969).

Sec. 514, Par. 1: Wooster v. Mullins (Conn., 1894); Gossin v. Brooks (Ga., 1892); City of Carrollton v. Clark (Ill., 1886); Rich v. McLaren (Miss., 1903); Grant City to use of O'Neil v. Salmon (Mo., 1926); Montana *ex rel.* Young v. Yates (Mont., 1897); McClain v. Church (Utah, 1930); Wisconsin *ex rel.* Nelson v. Mott (Wis., 1901).

Sec. 514, Par. 2: Cushing's Legislative Assemblies, Sec. 306; McCourt v. Beam (Ore., 1902); Wisconsin *ex rel.* Nelson v. Mott (Wis., 1901).

that the member was chosen to act as the presiding officer will not deprive the presiding officer of the privilege of voting as a member.

4. When voting in case of a tie, the presiding officer may explain reasons for a specific vote and have them entered in the journal the same as a regular voting member.

See also Sec. 582, Rights of Presiding Officer to Debate, Vote and Introduce Business, particularly Par. 3.

5. When exercising a casting vote, the presiding officer should cast the vote in the same manner as the members' votes were cast. However, the mere announcing of the vote, adding the presiding officer's own vote, may be upheld by the judiciary based upon the presumption of constitutionality.

Sec. 515. Presumptions as to Effect of Members Not Voting

There has been considerable discussion by the judiciary as to presumptions concerning the effect of members not voting. There appear to be two distinct situations:

Sec. 514, Par. 4: Cushing's Legislative Assemblies, Sec. 311; N.Y. Manual (1948-49), p. 443.

Sec. 514, Par. 5: Cases not requiring separate castings of vote are: *Small v. Orne* (Maine, 1887); *Minnesota v. Armstrong* (Minn., 1893). Cases requiring separate castings of vote are: *Hornung v. Indiana* (Ind., 1888); *Casler v. Tanzer* (N.Y., 1929).

Sec. 515: *Hartford Accident and Indem. Co. v. City of Sulphur* (10th Cir., Okla., 1941); *Ixta v. Rinaldi* (Calif., 1987); *Wheeler v. Kentucky* (Ky., 1895); *Murdock v. Strange* (Md., 1904); *Montana ex rel. Young v. Yates* (Mont., 1897); *Mount v. Parker* (N.J., 1867); *Russell v. Murphy* (Okla., 1936); *Caffey v. Veale* (Okla., 1944); *Meyers v. Philadelphia Union League* (Pa., 1908).

- (a) When only a majority of the votes cast is required, failure to vote or the casting of a blank ballot reduces the number of affirmative votes necessary to take an action. Under this situation, failure to vote reduces the vote required to take the action and so has, in part, the same effect as a "yes" vote. The members not voting are sometimes said to be presumed to agree to abide by the decision of those voting.
- (b) When a set number of votes or a majority or other proportion of the entire membership or of the members present is required, failure to vote does not reduce the vote required but reduces the pool of voters available to take the action and, therefore, has, in part, the same effect as a "no" vote. It would not be correct to say that members not voting are presumed to be voting in the negative, although that is the effect of the failure to vote.

Sec. 515(a): *Ohio ex rel. Shinnich v. Green* (Ohio, 1881).

Sec. 515(b): *Commonwealth ex rel. Swartz v. Wickensham* (Pa., 1870).