

# A Review of the Legislative Emergency Clause



ISSUE  
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## Introduction

[Article III, § 22 of the South Dakota Constitution](#) provides that legislation is generally only effective at least ninety days after the session adjourns. This constitutional provision offers a single exception to this rule—the existence of an emergency, expressed in the preamble or body of the legislation.

Responding to the COVID-19 pandemic in the waning days of the 2020 regular session, as well as in the 2021 and 2022 regular legislative sessions, the South Dakota Legislature saw an increase in the number of bills introduced with an emergency clause. Despite a decline in the introduction and enactment of bills with emergency clauses in the 2023 regular session, the use of the clause will remain an important constitutional mechanism by which legislation can quickly take effect. The purpose of this memo is to summarize the history and relevant authorities describing the emergency clause.

## Constitutional Background

The South Dakota Legislature, with its plenary power, does not receive its authority from the South Dakota Constitution. Rather, "except as limited by the state and federal constitutions, the legislative power of the state legislature is unlimited."<sup>1</sup> Article III, § 22 of the South Dakota Constitution provides one such limitation, along with an exception to the limitation:

*No act shall take effect until ninety days after the adjournment of the session at which it passed, unless in case of emergency, (to be expressed in the preamble or body of the act) the Legislature shall by a vote of two-thirds of all the members elected of each house, otherwise direct.*

As the quoted language provides, the exception is the emergency clause. An emergency clause may make an act of the Legislature effective on the day it is constitutionally enacted (i.e., on the day it is signed by the Governor),<sup>2</sup> or effective on any other day from the date of enactment to the eighty-ninth day after the Legislature adjourns sine die.

The concept of the emergency clause is reinforced, in relevant part, in [Article III, § 1 of the South Dakota Constitution](#), where the purpose of the ninety-day period and the emergency clause are explained:

*The legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives. However, the people expressly reserve to themselves the right to propose measures, which shall be submitted to a vote of the electors of the state, and also the right to require that any laws which the Legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions. Not more than five percent of the qualified electors of the state shall be required to invoke either the initiative or the referendum.*

<sup>1</sup> See, e.g., [Wyatt v. Kundert](#), 375 N.W.2d 186, 190-91 (S.D. 1985).

<sup>2</sup> S.D. Const., Art. IV, § 4.

(Emphasis added). As suggested by the plain language, the purpose of the ninety-day period is to facilitate the people's right to refer laws enacted by the Legislature, commonly referred to as a "popular referendum,"<sup>3</sup> except for two types of emergency legislation.<sup>4</sup>

This language in Article III, § 22, has been unchanged since early statehood, alongside the adoption of the popular referendum power by the voters in 1898—the first such state power in the United States.<sup>5</sup> The voters rejected the only two attempts to amend Article III, § 22, in 1974 and 1976. Both amendments were a part of a comprehensive revision of Article III, the Legislative Department. Yet in those revisions of Article III, the Constitutional Revision Commission saw fit to keep the emergency clause substantively untouched. The Commission's proposal was to heed the Supreme Court and merely combine Article III, § 22, with that portion of Article III, § 1 on referred measures:

*The people may approve or reject by referendum any act of the Legislature except such laws as may be necessary for the immediate preservation of the public peace, health or safety, the support of the state government, and its existing public institutions. The petition to refer a measure must be filed within ninety days after the measure to be referred was enacted.*<sup>6</sup>

For more information on how Article III, § 1 has been amended over time, as well as details on the referendum process, please consult [LRC Issue Memorandum 17-02](#).

### Case Law Interpreting Emergency Clause Use

As a limitation on legislative power, the language of Article III, § 22, has been interpreted by the Court on multiple occasions. In these cases, plaintiffs often assert that an emergency clause contained in legislation did not actually meet the constitutional grounds for an emergency.

The Court's background jurisprudence on the subject can be summarized as follows:

- There are "two classes of laws that are excepted from the referendum":
  - Laws that are necessary for the immediate preservation of the public peace, health, or safety; and
  - Laws that are necessary for the support of state government and its institutions;<sup>7</sup>
- To invoke the emergency exception, at least an implicit declaration of an emergency must exist in the bill;<sup>8</sup>

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<sup>3</sup> The popular referendum is distinct from the Legislature's ability to refer a law to the ballot, circumventing the Governor's signature that is required for enacting all other laws passed by the Legislature. See S.D. Const., Art. IV, § 4. While South Dakota's constitution, unlike other states, does not expressly grant the Legislature this ability to refer, the South Dakota Supreme Court has found the constitution implicitly gives the Legislature this authority. See Wyatt v. Kundert, 375 N.W.2d 186, 190-91 (S.D. 1985).

<sup>4</sup> Both sections of Article III "are to be construed together 'as if forming different parts of but one section.'" State ex rel. Kornmann v. Larson, 81 S.D. 540, 138 N.W.2d 1 (1965) (*quoting* State ex rel. Lavin v. Bacon, 14 SD 394, 85 N.W. 605 (1901)).

<sup>5</sup> SL 1897, ch 39, approved Nov. 8, 1898.

<sup>6</sup> SL 1974, ch 1, rejected Nov. 5, 1974; SL 1975, ch 2, amended by SL 1976, ch 1, rejected Nov. 2, 1976.

<sup>7</sup> Hodges v. Snyder, 43 S.D. 166, 178 N.W. 575 (1920).

<sup>8</sup> Culhane v. Equitable Life Assur. Soc'y of U.S., 65 S.D. 337, 274 N.W. 315 (1937). Also, the title of the act need not include a reference to the emergency clause to be lawful. State ex rel. Driscoll v. Smith, 49 S.D. 106, 206 N.W. 233 (1925).



- For either of the two classes, the Court's standard of review is to "give . . . every favorable presumption" of fact to the Legislature,<sup>9</sup> but not to allow the Legislature to simply declare it into existence:
  - The Court will nullify the emergency clause "where the act could not by any fair inference" be necessary for the immediate preservation of public peace, etc., or be necessary for the support of state government or its institutions;<sup>10</sup>
  - The Court will not rely upon sworn witnesses and authenticated documents to make its determination. It will decide "upon the face of the act and facts within the court's judicial knowledge," including bill language, House and Senate Journals, and other items for which judicial notice is appropriate,<sup>11</sup> which existed at the time of the act's enactment;<sup>12</sup> and
  - In other words, if the Court finds "from the information at hand" that the emergency is "fairly debatable,"<sup>13</sup> or has a "rational basis,"<sup>14</sup> the Court will uphold the use of the emergency clause.
  
- For laws that are necessary for the support of state government and its existing institutions:
  - The Court must determine the impact on state government that a delay in effectiveness would cause and the consequences if the law is defeated by referendum—if "the efficient operation of the state government" is unaffected, the emergency clause is improper;<sup>15</sup>
  - Necessary support of state government may take the form of "securing additional revenue" as well as "preventing a shriveling of present sources of revenue";<sup>16</sup>
  - An "existing public institution" is "any organized activity created and established by law or public authority" including "all branches and departments created by law and exercising any activity or function defined by the Legislature and existing at the time the [act] was adopted";<sup>17</sup> and
  - Actions taken by the state in a proprietary and not a governmental capacity are not necessary for the support of state government and its institutions;<sup>18</sup> and
  
- For laws that are necessary for the immediate preservation of the public peace, health, or safety, the preservation of public peace, health, or safety is synonymous with the "police power" of the Legislature, which includes actions for the public welfare and to "promote and protect a state's major industry."<sup>19</sup>

The table on the next page contains a summary of South Dakota Supreme Court cases addressing the emergency clause. Cases are listed in reverse chronological order. In most cases, the Court upheld the immediate effectiveness or inability to refer the act. If, however, the Court found an emergency clause to be improper, only the emergency clause would be void, with the rest of the act taking effect July 1.<sup>20</sup>

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<sup>9</sup> Kornmann, supra.

<sup>10</sup> Gravning v. Zellmer, 291 N.W.2d 751 (S.D. 1980) (quoting Kornmann, supra); see also Breck v. Janklow, 2001 S.D. 28, 623 N.W.2d 449.

<sup>11</sup> Gravning, supra.

<sup>12</sup> Breck, supra.

<sup>13</sup> Breck, supra (quoting Gravning, supra).

<sup>14</sup> Breck, supra.

<sup>15</sup> Kornmann, supra.

<sup>16</sup> Breck v. Janklow, 2001 S.D. 28, 623 N.W.2d 449 (quoting Kornmann, supra).

<sup>17</sup> Gravning, supra. In other words, a new program, facility, or agency cannot be an "existing public institution" on its own.

<sup>18</sup> State ex rel. Hurd v. Blomstrom, 72 S.D. 526, 37 N.W.2d 247 (1949).

<sup>19</sup> In re Advisory Opinion Concerning Construction of HB 1388, 387 N.W.2d 239 (S.D. 1986).

<sup>20</sup> State ex rel. Richards v. Whisman, 36 S.D. 260, 154 N.W. 707 (1915).



Case Name and Cite	Bill Description – Emergency Invoked	Emergency fairly debatable? - Decision
<u>Breck v. Janklow</u> , 2001 S.D. 28, 623 N.W.2d 449 (2001)	Approval of the sale of the state cement plant – Public peace and support of state government.	<b>Yes.</b> Shown by assertions made at Governor's address at the start of the <a href="#">2000 Special Session</a> , in which the sale was authorized.
<u>In re Advisory Opinion Concerning Construction of HB 1388</u> , 387 N.W.2d 239 (1986)	Establishing the SD Agriculture and Business Development Authority, to fund private loans for ag or business enterprises (SL 1986, chs 16-17) – Public peace (ch 17) and support of state government (ch 16).	<b>Yes.</b> Shown by eight legislative findings in the two bills, all generally invoking the farm and credit crisis. The Court also highlighted the importance of agriculture to the state economy.
<u>Gravning v. Zellmer</u> , 291 N.W.2d 751 (1980)	Creation of state railroad board, temporary increase in taxes, and ability for state to purchase rail – Support of state government.	<b>Yes.</b> Rail is an existing public institution (not a new authority per se), the emergency was the imminent demise of short line railroads in South Dakota. Shown by bankruptcy filings, court cases, Governor's address, other Legislative proceedings, Court's personal knowledge.
<u>State ex rel. Kornmann v. Larson</u> , 81 S.D. 540, 138 N.W.2d 1 (1965)	Imposing a sales tax increase on certain professions (SL 1965, ch 296) – Support of state government.	<b>Yes.</b> Increasing expenditures associated with education and need for state aid to local governments shown by budget report, unobligated fund balance; rejecting later data that came out after enactment.
<u>State ex rel. Hurd v. Blomstrom</u> , 72 S.D. 526, 37 N.W.2d 247 (1949)	Prohibiting municipalities from granting a franchise to utilities that compete with an existing municipal utility for which revenue bonds were issued (SL 1949, ch 191) – Support of state government.	<b>No.</b> Laws impacting any actions taken by government in its proprietary capacity (i.e., government acting like a business) are distinct from actions taken in its governmental capacity (i.e., the support of state government), and only the latter is exercised for emergency purposes.
<u>Culhane v. Equitable Life Assur. Soc'y of U.S.</u> , 65 S.D. 337, 274 N.W. 315 (1937)	Extending a moratorium on foreclosure and execution sales of real property during the Great Depression/Dust Bowl (SL 1937, ch 207) – Public peace and support of state.	<b>Yes.</b> An economic emergency exists as shown by the Legislature's findings of fact in the bill and by the Court's personal knowledge.
<u>City of Pierre v. Siewert</u> , 63 S.D. 485, 261 N.W. 42 (1935)	Adopting a licensing and taxing regime on alcohol (SL 1935, ch 134) – Support of state government and for the public peace.	<b>Yes.</b> The act increased revenue for the state, and the state government is dependent upon revenue, particularly for poor relief as intended.
<u>State ex rel. Martin v. Eastcott</u> , 53 S.D. 191, 220 N.W. 613 (1928)	Fixing the salaries of certain officers – Support of state government.	<b>No.</b> Only appropriations are acts that are necessary for the support of state government. The ability to expend money supports government, not the creation of entitlements.
<u>State ex rel. Kleppe v. Steensland</u> , 46 S.D. 342, 192 N.W. 749 (1923)	Creating a cause of action against fathers of children born out of wedlock and maximum child support payments (SL 1921, ch 137) – Support of state government.	<b>No.</b> The idea that this law was necessary for the support of state government was implicitly found to be a "mere absurdity" without further comment, by citing <u>Hodges</u> .
<u>Hodges v. Snyder</u> , 43 S.D. 166, 178 N.W. 575 (1920)	Authorizing any two or more school districts to consolidate (SL 1919, ch 170) – Support of state government.	<b>No.</b> The support of state government "could not be seriously contended" to depend upon this law going into immediate effect; that is "a mere absurdity."



The above cases establish a trend. The Court's earliest cases took a more categorical approach to legislative emergencies. This may have resulted in more Court rejections of their use.<sup>21</sup> Where the Court found the emergency clause improperly invoked, the clause is severed from the rest of the bill and ineffective, any bill substance to which the clause once applied is effective on July 1 instead of the earlier date.<sup>22</sup>

In the last fifty years, however, the Court has consistently upheld the use of emergency clauses with a seemingly more deferential and nuanced analysis. In that analysis, emergency clauses appear to be upheld where some rationale sourced from common knowledge, facts presented to legislators, or other public records, indicate that either there is an immediate need to address the public welfare through the act (public peace), or that the efficient operation of state government and its existing public institutions would be affected if the act were delayed to July 1 or denied by referendum (support of state government).

### Recent History of Emergency Clause Use

As with the ebb and flow of case law on the subject, the South Dakota Legislature's use of the emergency clause has also varied over time. Below is a table summarizing emergency clause use at various sessions over the last forty years:

REGULAR SESSION YEAR	# of bills introduced (% enacted)	# of bills introduced w/ emergency clause (% bills introduced)	# of bills enacted w/ emergency clause (% out of all introduced bills w/emergency clause)	Enacted bills citing support of state gov't (# bills w/appropriation)
2023	451 (46%)	67 (15%)	8 (12%)	6 (3)
2022	553 (45%)	104 (19%)	9 (9%)	5 (1)
2021	478 (52%)	101 (21%)	11 (11%)	9 (2)
2020	492 (49%)	50 (10%)	17 (34%)	8 (4)
2019	463 (47%)	32 (7%)	9 (28%)	6 (4)
2018	535 (54%)	37 (7%)	17 (46%)	11 (3)
2017	390 (56%)	29 (7%)	15 (52%)	8 (4)
2016	419 (56%)	36 (9%)	29 (81%)	26 (21)
2015	429 (60%)	37 (9%)	30 (81%)	26 (25)
2010	474 (52%)	26 (5%)	19 (73%)	16 (8)

<sup>21</sup> For the cases omitted from this table, nearly all are from the first forty years of statehood. Cases are only included in the table if the Court indicated why a particular act did not have a valid emergency clause.

<sup>22</sup> *State ex rel. Kleppe v. Steensland*, 46 S.D. 342, 192 N.W. 749, 749 (1923); *Whisman*, 36 S.D. 260, 154 N.W. at 712.



2005	491 (58%)	25 (5%)	22 (88%)	19 (11)
2000	527 (48%)	12 (2%)	8 (66%)	7 (5)
1995	602 (50%)	23 (4%)	12 (52%)	12 (8)
1990	730 (57%)	45 (6%)	40 (88%)	32 (14) *
1985	684 (57%)	32 (5%)	27 (84%)	15 (6) *, **
1981	631 (59%)	43 (7%)	37 (86%)	31 (13) ***
<b>AVERAGE</b>	<b>521 (53%)</b>	<b>44 (9%)</b>	<b>19 (56%)</b>	<b>15 (8)</b>

\* 1985 had six bills with a "public safety" emergency clause and an appropriation. LRC staff was only able to find one other bill from the sessions profiled above that fell into this category—1990's HB 1006. All other bills with an emergency clause and appropriation language had a "support of state government" emergency clause.

\*\* A single style and form veto was used in the above-reviewed sessions to eliminate an emergency clause—1985's SB 211. The style and form revision was approved by both chambers. S. Journal, 60<sup>th</sup> Legis., 1133 (S.D. 1985); H. Journal, 60<sup>th</sup> Legis., 1305 (S.D. 1985).

\*\*\* HB 1058 (SL 1981, ch 367), § 5 contains the only emergency clause found by staff that did not invoke one of the two constitutional grounds: "Whereas, private employment agencies are required to be licensed no later than the last day of April of each year, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval."

A few points emerge from the above table. A seeming paradox has occurred over the last few years as the large amount of bills introduced with emergency clauses has been a historical outlier, as have the few bills with emergency clauses enacted during that time. Additionally, it is also clear that the "support of state government" basis for emergency rules heavily predominates, with nearly 80% of all emergency clauses relying upon it.

### Other Authorities Associated with the Emergency Clause

While the South Dakota Constitution only permits enacted bills without an emergency clause to be effective a minimum of ninety days from the end of session, the Legislature is otherwise permitted to set effective dates of its enacted bills within the bills themselves. Most bills do not contain such a date. Where a bill is silent, the effective date is the subsequent July 1,<sup>23</sup> coinciding with the start of state government's next fiscal year. If there is a need for an appropriation to be made in the current fiscal year, the Legislature may express in the bill a specific date, anticipated to be at least ninety days after the end of session but before July 1, for the appropriation to be made from the current fiscal year's funds.

Additionally, an emergency clause need not make the bill effective upon enactment. The clause can and has been used to specify an effective date certain that will be prior to ninety days after the end of session, such as to align with compliance deadlines imposed by the federal government.

Two rules in the *Redbook* speak to the emergency clause—one on procedure, one on drafting.

- Joint Rule 5-13.1 authorizes either chamber of the Legislature, upon motion, to immediately reconsider an affirmative vote on a bill with an emergency clause if the vote was a majority, but not two-thirds of the

<sup>23</sup> [SDCL 2-14-16](#).



members elect. A motion to reconsider, if successful, allows the body to consider amending the bill to remove the emergency clause and associated title reference.

- Joint Rule 6A-7 requires what has otherwise been a traditional drafting practice—that a bill with an emergency clause must have the emergency clause placed at the very end of the bill. This may have arisen out of the practice of placing the date of enactment of a session law immediately after the final bill text. In that way, the reader clearly understood when the bill was "immediately" effective.

### Emergency Clauses and Referred Laws in Other States

The referendum that South Dakota pioneered is now employed, in some form, in 21 other states.<sup>24</sup> A review of these other states provides certain insights:

- Many other states share similarities with South Dakota:
  - Twelve other states require two-thirds of the members elect to vote in favor of legislation with an emergency clause;
  - Approximately half of the other states have ninety days (or an approximate denomination) that describes the minimum timeframe from enactment, or the end of the session, after which non-emergency legislation may be effective; and
  - Ten states share one or both of the grounds for an emergency clause found in the South Dakota Constitution;
- Montana, Nevada, and Wyoming do not appear to have emergency clause provisions (thereby allowing the Legislature to make the laws effective immediately upon enactment), despite authorizing the public to refer measures. The public is permitted to refer already effective laws;
- Idaho, Nebraska, North Dakota, and Oregon only require an emergency to be referenced, regardless of the nature of the emergency;
- Alaska, Michigan, and Utah merely require a two-thirds vote for a bill's immediate effect, without attribution to an emergency; and
- Massachusetts allows its governor to establish the emergency nature of enacted legislation independently of its legislature.

Authorities regarding the emergency clause in these 21 states are summarized in the below table:

STATE	Citation	Minimum Effective Date After Enactment	Subject Required to Invoke?	Vote Required to Invoke?
South Dakota	<a href="#">Art. III, §§ 1 &amp; 22</a>	90 days after close of session	Public peace, health, safety; Support of state gov't	2/3rds members elect
Alaska	<a href="#">Art. II, § 18</a>	" "	None	" "
Arizona	<a href="#">Art. IV, pt. 1, § 1, cl. 3</a>	" "	Public peace, health, safety; Support of state gov't	" "
Arkansas	<a href="#">Art. 5, § 1</a>	" " (in statute)	Public peace, health, safety	" "

<sup>24</sup> NCSL, "Initiative and Referendum States, <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-states> (updated Mar. 15, 2023).



California	<a href="#">Art. IV, § 8(c)(2)</a>	January 1 next following 90 days after enactment	Election district boundaries, calling elections, tax levies, approps for state current expenses	No unique vote required in constitution
Idaho	<a href="#">Art. III, § 22</a>	60 days after close of session	Emergency (generally)	" "
Maine	<a href="#">Art. IV, § 16</a>	90 days after recess of session	Public peace, health, safety, and excluding 3 types of bills	2/3rds members elect
Maryland	<a href="#">Art. III, § 31;</a> <a href="#">Art. XVI, § 2</a>	June 1 after close of session (limited exception)	Public health or safety, excluding types of bills	3/5ths members elect
Massachusetts	<a href="#">Art. XLVIII.VI.I &amp; .II</a>	90 days after enactment	Public peace, health, safety, convenience; excluding types of bills	2/3rds members present
Michigan	<a href="#">Art. IV, § 27</a>	90 days after close of session	None	2/3rds members elect
Missouri	<a href="#">Art. III, §§ 29, 52(a)</a>	90 days after session close, recess of 30 or more days	Public peace, health, safety; Approps for current State gov't expense	" "
Montana	<a href="#">Art. III, § 5</a>	No clause, Legis. gets to set; 6 months to refer	N/A	N/A
Nebraska	<a href="#">Art. III, § 27</a>	3 calendar months after session close	Emergency (generally)	2/3rds members elect
Nevada	<a href="#">Art. XIX</a>	No clause, Legis. gets to set; Aug. 1 of year prior to election to refer	N/A	N/A
New Mexico	<a href="#">Art. IV, § 23</a>	90 days after close of session (G-bill immediate effect)	Public peace, health, safety	2/3rds members elect
North Dakota	<a href="#">Art. IV, § 13</a>	Aug. 1 or, if after, Jan. 1 of the year following 90 days after filing	Emergency (generally)	" "
Ohio	Art. II, §§ <a href="#">1c</a> & <a href="#">1d</a>	90 days after filing (tax levies and G-bill immediate)	Public peace, health, safety	" "
Oklahoma	<a href="#">Art. V, § 58</a>	90 days after close of session (G-bill or initiative/referred law immediate)	Public peace, health, safety, and excludes types of bills	" "





Oregon	<a href="#">Art. IV, §§ 3(a)(b) &amp; 28</a> ; Art. IX, § 1(a)	90 days after close of session	Emergency (generally), tax or tax exemption laws exempt	No unique vote required in constitution
Utah	Art. VI, §§ <a href="#">1(2)(i)(B)</a> , <a href="#">25</a>	60 days after close of session	None	2/3rds of members elect
Washington	<a href="#">Art. II, §§ 1(b)(c) &amp; 41</a>	90 days after close of session	Public peace, health, safety; Support of state gov't	No unique vote required – struck by popular vote
Wyoming	Art. III, § 52	No clause, Legis. sets for each bill; 90 days after close of session to refer	N/A	N/A

### Conclusion

Most legislation in South Dakota takes delayed effect to facilitate the popular referendum—the people's ability to petition and vote to stop an enacted law from becoming effective. There are two narrow exceptions to this delayed effect. These exceptions are exercisable by the people's representatives in the Legislature when the immediate preservation of the public welfare or the support of state government and its existing institutions necessitate it. The proper use of the clause prevents a minority of citizens from using the popular referendum as a delaying tactic to address emergent needs. In this way, the emergency clause forms an important aspect of our constitutional checks and balances.

This issue memorandum was written by Justin Goetz, Code Counsel, on August 7, 2023, for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

