

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

OCT 20 2023

  
Clerk

IN THE MATTER OF	)	REQUEST OF KRISTI NOEM
INTERPRETATION OF SOUTH	)	GOVERNOR OF SOUTH
DAKOTA CONSTITUTION AND STATE	)	DAKOTA FOR AN ADVISORY
LAWS REGARDING STATE	)	OPINION
LEGISLATOR INTEREST IN STATE	)	
OR COUNTY CONTRACTS	)	

TO: THE SOUTH DAKOTA SUPREME COURT

COMES NOW, Kristi Noem, Governor of the State of South Dakota, and pursuant to the authority vested in the Governor under Article V, § 5 of the South Dakota Constitution, hereby requests an advisory opinion of the Supreme Court regarding the questions of law set forth below relative to the exercise of my executive power.

### BACKGROUND

1. Article III, Section 12 of our State Constitution has been unchanged since adopted in 1889. The final phrase prevents “any member of the Legislature during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term for which he shall have been elected.” (referred to herein as the “contract section”).

2. Two attempts have been made to amend the contract section of Article III, Section 12, to clarify its broad scope, and two other attempts have been made to repeal it.

3. In the last several months, recent events and the resulting great public interest in the scope of this contract section has caused legislators, prospective candidates for the legislature, and employees at all levels, especially fiscal and program staff, across state and county governments and within constitutional offices, to make inquiries to the Governor’s Office and agencies, to the Legislature, and to the Attorney General’s Office requesting interpretation of this contract section of Article III, Section 12.

4. The Governor supervises the administration of both state and federal funds and is constitutionally and statutorily required to ensure that those funds are appropriately expended.

5. As the Governor's designees, state employees strive to follow the constitution and laws of the state to only administer and expend funds to an eligible person and not for the pecuniary benefit, direct or indirect, of a legislator in violation of this contract section of Article III, Section 12.

6. In addition, Article III, Section 10 of our State Constitution grants the Governor appointment authority for legislative vacancies, and one such vacancy is currently pending. Time is of the essence to fill that vacancy ahead of the 99th Legislative Session opening on January 9, 2024.

7. The Speaker of the House and other Legislative Leaders support and endorse this request for opinions of the Supreme Court upon these important questions of law and solemn occasions. Attached please find a letter to the Court in support.

8. The Attorney General supports and endorses this request for opinions of the Supreme Court upon these important questions of law and solemn occasions. Attached please find his letter to the Court in support.

### **QUESTION OF LAW**

The South Dakota Constitution, Article 3, Section 12 prohibits “. . . any member of the Legislature during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term for which he shall have been elected.” This Court recently explained in *In re Noem*, “State constitutional prohibitions on a legislator having interest in state contract if authorized by any law during legislator’s term are broad in scope and extend to any contract between a legislator and the State, including a general appropriations bill.” 950 N.W. 2d 678 (S.D. 2020).

While this holding instructs legislators on their affirmative personal obligation to avoid contracts between the legislator and the State, the extent of what constitutes an *indirect* interest is not so clear and the possible breadth of which has a significant impact on state government. Considering the importance of clarity to our legislators willing to serve without fear of inadvertently violating the contract section of Article 3, Section 12 and the necessity of clear guidance to our state employees expending funds in accordance with the contract section, and my ability to appoint a willing legislator, I am requesting the Supreme Court’s opinion on these important questions of law. These questions are premised on the fact that the payment was authorized by a state general appropriation bill, or a special appropriation bill passed during the term for which that

legislator shall have been elected. These questions address the scope of a direct or indirect interest in a contract:

- **May a vendor of the state receive a state payment if that vendor employs a legislator, and such legislator is not an owner of the vendor?**
- **May a vendor of the state receive a state payment if that vendor is a publicly traded company, and a legislator owns any shares or stock in such vendor?**
- **May a legislator be a state, county, city, or school district employee, either full time, part time, or seasonal, or an elected or appointed official?**
- **May a legislator receive retirement compensation from the South Dakota Retirement System for services rendered other than acting as a legislator?**
- **May a legislator or a business owned by a legislator subcontract for payment, goods, or services provided to or from the state?**
- **May a legislator or a business owned by a legislator receive Medicaid reimbursements administered by a state agency?**
- **May a legislator receive an expense reimbursement for foster children in their care administered by a state agency?**
- **May a legislator or a business owned by a legislator purchase or receive goods or services, including state park passes, lodging, and licenses, from the state when such goods or services are offered to the general public on the same terms?**
- **How do the instances detailed above apply to a legislator's spouse, dependent, or family member?**

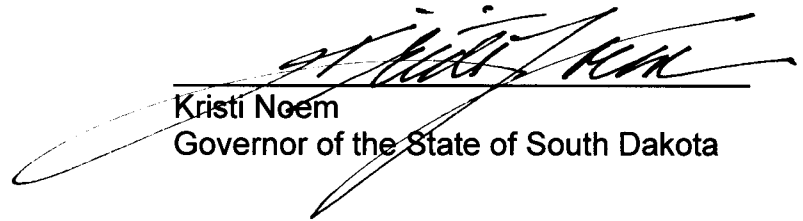
This solemn request is necessary to prevent former, current, and prospective legislators and candidates from unwittingly violating this broad constitutional prohibition.

In addition, these important questions of law are connected to my executive power to overseeing the faithful execution of, adherence to, and restraining violations of Article III, Section 12 by the state agencies under my authority. Article IV, Section 3. Every day, state employees execute contracts or authorize contract payments. I ask these questions

for guidance and protection of those public servants to ensure that contracts are executed, and payments are made in accordance with and authorized by state law.

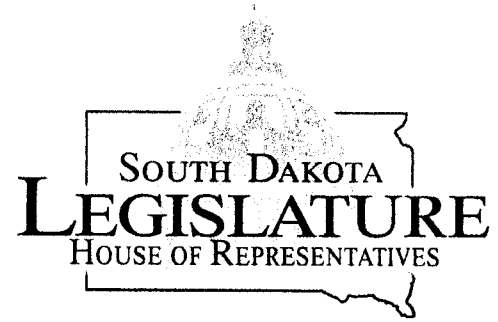
Considering the importance of proper expenditure of public funds and the potential conflicts of interest, this is a matter of great public importance and of significant impact on state government.

Dated this 20th day of October, 2023, at the State Capitol in Pierre, South Dakota.



Kristi Noem  
Governor of the State of South Dakota

REPRESENTATIVE HUGH M. BARTELS | DISTRICT 05  
SPEAKER OF THE HOUSE



October 20, 2023

South Dakota Supreme Court  
500 East Capitol  
Pierre, South Dakota 57501

Re: Letter in Support of Governor Noem's Request for an Advisory Opinion

To; The Members of the Supreme Court:

As Speaker of the House, I fully support Governor Noem's request for an Advisory Opinion on the Interpretation of the South Dakota Constitution and State Laws Regarding State Legislator Interest in State or County Contracts. With the recent public interest, the Governor's upcoming appointment to the Senate and the start of elections season, multiple questions have been received on this topic from the public, Legislative members and potential legislative candidates.

The Executive Board of the Legislature has requested the Legislative Research Council staff draft a memo on the issue. The draft reviews all past case law but still leaves many unanswered questions as outlined in the Governor's Request. To be useful these issues need answers.

I encourage the Court to timely answer the Governor's Request to enable the best person to be appointed to the Senate, to enable the Legislature to provide guidance to members, and to allow as many citizens as possible run for Legislative positions. Thank you in advance for your prompt and positive action in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Hugh Bartels". The signature is written in a cursive, flowing style.

Hugh Bartels  
Speaker of the House



*Marty J. Jackley*  
ATTORNEY GENERAL  
STATE OF SOUTH DAKOTA

October 19, 2023

The Honorable Chief Justice Jensen  
Justices of the S.D. Supreme Court  
500 E. Capitol  
Pierre, S.D. 57501

Dear Chief Justice Jensen and Supreme Court Justices,

The Governor of South Dakota, Kristi Noem, is submitting a formal request for an advisory opinion pursuant to her authority under Article V, Section 5 of the South Dakota Constitution. The request seeks the Supreme Court's opinion on several important questions of law regarding the application of Article III, Section 12 of our State Constitution. As Attorney General, I have reviewed the request, support and endorse the request, and affirm the request involves important questions of law concerning the exercise of executive power.

Based upon the Attorney General's enforcement authority on this subject, I respectfully request further direction on the available remedy for a violation. Specifically, if there is a violation of Article III, Section 12, is disgorgement of past proceeds received a remedy? If so, do statutory and common law defenses such as waiver and estoppel apply to such a Constitutional violation?

Thank you for your consideration on these important matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Marty J. Jackley".

Marty J. Jackley  
ATTORNEY GENERAL

MJJ/dd