IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30488

In re THE REQUEST OF SOUTH DAKOTA GOVERNOR KRISTI NOEM FOR AN ADVISORY OPINION

SUPREME COURT
STATE OF SOUTH DAKOTA
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On October 20, 2023, in aid of her authority and duty to make appointments to fill legislative vacancies, South Dakota Governor Kristi Noem requested an opinion from the South Dakota Supreme Court on nine questions relating to the contract clause of Article III, Section 12 of the South Dakota Constitution. President *Pro Tempore* of the Senate Lee Schoenbeck, Speaker of the House Hugh Bartels, and Attorney General Marty Jackley joined in the request. On October 31, 2023, this Court directed briefing from the Governor's General Counsel, the Legislature, and the Attorney General.

JURISDICTIONAL STATEMENT

This Court has jurisdiction per Article V, Section 5 of the South Dakota Constitution to review gubernatorial requests for an advisory opinion on important and solemn matters involving the governor's exercise of authority. Filling a legislative vacancy in compliance with constitutional criteria involves an important and solemn exercise of authority by the state's chief executive.[1] This Court has also exercised Article V, Section 5 jurisdiction to render an advisory opinion on the question of whether a sitting legislator is eligible to receive state funds.[2]

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[1] *In re Daugaard,* 2011 SD 44, ¶¶ 5, 19, 801 N.W.2d 438, 440, 443 (jurisdiction to issue advisory opinion exercised over question of whether appointment of a nominee to judicial vacancy "complies with the constitutional directives of being a voting resident of the district from which" the nominee was selected).

[2] *In re Noem,* 2020 S.D. 58, 950 N.W.2d 678.

At the same time, this Court has recognized prudential constraints on its Article V, Section 5 jurisdiction against rendering advisory opinions on speculative questions,[3] questions which could adjudicate private rights,[4] and questions relating to the duties of the legislature rather than the executive.[5] These prudential considerations potentially constrain opining prospectively on even important questions concerning the exercise of executive power which involve hypothetical circumstances or determinations of fact,[6] or opining retrospectively on questions concerning a sitting legislator's compliance with Article III, Section 12

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[3] *Matter of Construction of Article III, Section 5 of the South Dakota Constitution,* 464 N.W.2d 825, 827 (S.D. 1991)(declining to render opinion where question "rest[ed] entirely on speculation and conjecture); *In re Request of Governor M. Michael Rounds for an Advisory Opinion,* # 25467 (S.D. 2009)(unpublished)(declining to render opinion where question "based merely on speculation"); 73A C.J.S. Public Contracts § 4 ("existence of an opportunity to exercise prohibited influence regarding any particular employee is a factual issue to be resolved on a case-by-case basis").

[4] *Construction of Article III,* 464 N.W.2d at 827 (recognizing constraint on rendering opinion on question involving "adjudication of private rights"); *In re Janklow,* 530 N.W.2d 367, 369 (1995)(same re questions "involv[ing] private rights"); *In re Opinion of the Judges,* 147 N.W. 729, 731 (S.D. 1914)(same "where private rights are involved").

[5] *Construction of Article III,* 464 N.W.2d at 827 (declining to render opinion on question "relat[ing] to the duties of the legislature – not the executive").

[6] *In re Daugaard,* 2011 SD 44 at ¶ 2 (citing *Rounds* for the need for "the factual circumstances presented in the course of an actual vacancy" to "better inform" the court's review of requested advisory opinion); *In re Opinion of the Supreme Court Relative to the Constitutionality of Chapter 239,* 257 N.W.2d 442, 443 (S.D. 1977)(recognizing potential constraint of being "handicapped" in rendering an opinion "by not having the facts before us which would be available in a litigated case").

which may implicate private rights or purely legislative duties and obligations.[7]

DISCUSSION

The starting point for analyzing the questions posed by the governor's request is Article III, Section 12 of the South Dakota Constitution, which states in pertinent part that a "member of the legislature" may not "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 [the member] shall have been elected" or "within one year thereof." According to its terms, Article III, Section 12 reaches: (1) a member of the legislature; (2) who has a direct or indirect interest in; (3) a state or a county (hereinafter "state") contract; (4) that was authorized by any law passed during the member's term or within one year thereof (hereinafter "term"). Whether Article III, Section 12 bars a contract requires an affirmative determination of the existence of each element. The first and third elements generally do not entail factual disputes so Article III, Section 12 questions generally entail determining if the second and fourth elements are met.

Interpreting and applying Article III, Section 12 (or like provisions in other states)[8] requires an appreciation of its purpose. In its loftiest

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[7] *Construction of Article III,* 464 N.W.2d at 827.

[8] Michigan, Mississippi, New Mexico, Oklahoma, Texas and West Virginia have functionally identical constitutional provisions as Article III, Section

sense, Article III, Section 12 is intended to not only "preclude the possibility of any member deriving, directly or indirectly, any pecuniary benefit from legislation enacted by the legislature of which he is a member" but also "to remove any suspicion which might otherwise attach to the motives of members who advocate for the creation of any offices or the expenditure of public funds." *Palmer v. State,* 75 N.W. 818, 819 (S.D. 1898); *Opinion re Robert T. Mullally,* S.D.Op.Atty.Gen. No. 76-104, 1976 WL 352354 (Janklow).[9] "[T]he constitutional prohibition against direct or indirect benefits indicates an intended broad scope of prohibition" that is meant as "an absolute prohibition against any such activity by present state legislators during their terms in office." *Opinion re J.E. Brinkman,* S.D.Op.Atty.Gen. No. 77-62, 1977 WL 36000 (Janklow); *Asphalt Surfacing v. S.D. Dept. of Transportation,* 385 N.W.2d 115, 118 (S.D. 1986)(Article III, Section 12 framed to effect a "broad prohibition").

So, while it is true that Article III, Section 12 "precludes a current state legislator from contracting directly or indirectly with the state," Article III, Section 12's preclusive effect is broader than simply contracts *created* between a legislator and the state. *In re Noem,* 2020 S.D. 58, ¶ 14, 950 N.W.2d 678, 682; *Pitts v. Larson,* 2001 S.D. 151, ¶¶ 25, 33, 638

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12. See Appendix hereto for the text of and notes of decisions interpreting these provisions.

[9] While the "Attorney General's opinions should be considered when construing statutes, such opinions are not binding on the courts." *Simpson v. Tobin,* 367 N.W.2d 757 (S.D. 1985).

N.W.2d 254, 260 (opining that Article III, Section 12 only "preclude[s] a sitting legislator from voting to create a contract between the legislator and the state")(Gilbertson dissenting); *Bosworth v. Hagerty,* 99 N.W.2d 334 (S.D. 1959)(a public official should not be on "both ends" of a public contract). The article "unambiguous[ly]" prohibits not simply the *creation*[10] of a contract between a legislator and the state but any *interest,* direct or indirect, in a state contract even if the legislator is not personally a party. *Norbeck & Nicholson Co. v. State of South Dakota,* 142 N.W. 847, 850 (S.D. 1913); *Pitts,* 2001 S.D. 151 at ¶ 13.[11]

Yet there must be rational limits. Mississippi cautioned against interpreting its constitutional counterpart to Article III, Section 12 so broadly as to "render vast sectors of our society ineligible for service in our Legislature." *Jones v. Howell,* 827 So.2d 691, 701 (Miss. 2002). "In a representative democracy the legislative branch of government should be sprinkled with members from all walks of life. Representative

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[10] Only the emoluments clause of Article III, Section 12 utilizes the term "created." The framers of the contract clause could have limited its scope to contracts "created" between a legislator and the state but instead selected terms broadly prohibiting an interest in "any" contract regardless of whether the legislator is a party. *Palmer,* 75 N.W. at 819.

[11] *Jones,* 827 So.2d at 697 ("[i]t is not required that one be a party to the contract in question to have an interest in the contract"); *People v. Darby,* 250 P.2d 743 (Cal. 1952)(though school trustee need not share directly in the profits to be realized by contract with vendor, trustee had a prohibited interest when trustee had entered agreement to lease property to vendor days before voting on vendor's contract; trustee had an interest the moment he placed himself in a situation where his personal interest will conflict with the faithful performance of his duties as trustee).

democracy is strengthened when representatives and senators truly reflect the professional, gender, racial and geographic diversity of the population at large. The need for members who possess particular skills as a result of education and training cannot be overemphasized." *Jones,* 827 So.2d at 701. Likewise, Texas has observed that "an overbroad interpretation" risks turning a provision adopted for the public benefit into a detrimental "deterrent to future legislative service." Tex.Op.Atty. Gen. No. GA-0567 (2007), 2007 WL 2684546.

In a small state such as South Dakota, "the likelihood of a public officer having some degree of 'interest' in a contract using that term in its most literal sense, is great." *Opinion re Thomas C. Todd,* S.D.Op.Atty.Gen. No. 77-80, 1977 WL 36018 (Janklow). A legislator certainly benefits from an appropriation to fund a contract to reconstruct a roadway near her home by providing her with an improved road on which she can drive, which arguably constitutes an "interest" in the project in a literal sense. But an "interest" has been described as something more than the possibility that a public official might incidentally realize the benefits of a law "to a greater or lesser degree" than other members of the general public. *Todd,* S.D.Op.Atty.Gen. No. 77-80. For an "interest" to arise, the benefits of a contract must in some manner flow discreetly to a public official as opposed to being realized by that official in the same manner as the public at large.[12] Such at-large benefits generally are "too remote

to constitute a conflict" or an "interest." *Todd,* S.D.Op.Atty.Gen. No. 77-80.

Still, "interest" has received "strict" and "expansive"[13] construction so as to effectuate both the letter and spirit of Article III, Section 12 and risk no compromise of the public's confidence in the legislative branch. Legislators are expected to be "absolutely free" of considerations of self-interest or of influences other than the "obligations he owes to the public at large." *Todd,* S.D.Op.Atty.Gen. No. 77-80. "Interest" has thus been variously described as any circumstance that would arouse "any suspicion" regarding a legislator's "motives" in supporting a particular "expenditure of public funds;"[14] or as any circumstance which might

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[12] *Opinion re Steven M. Christensen,* S.D.Op.Atty.Gen. No. 87-11, 1987 WL 341006 (Tellinghuisen)(fact that county commissioner's business would, the same as other business owners, incidentally benefit from community economic development project was not a sufficient interest); *Hanig v. City of Winner,* 2005 SD 10, ¶ 18, 692 N.W.2d 202, 207 (interest must be more "direct, definite [and] capable of demonstration" than what a public officer "holds in common with members of the public"); 73A C.J.S. Public Contracts § 4 (interest must be "certain, definable, pecuniary or proprietary"); *Spadanuta v. Village of Rockville Centre,* 230 N.Y.S.2d 69 (Ct.App.2 1962)(fact that property owned by mayor contiguous to an urban renewal project might incidentally benefit from the project did not invalidate contract where the benefit to mayor's property was no different than that realized by other adjacent landowners); Tex.Op.Atty. Gen. No. GA-0567 (2007), 2007 WL 2684546 (interest must be more than the general interest shared by the public; it must be one that involves gain or loss specific to the legislator).

[13] *Asphalt Surfacing,* 385 N.W.2d at 117; *Pitts,* 2001 SD 151 at ¶¶ 13; *Noem,* 2020 SD 58 at ¶ 13.

[14] *Palmer,* 75 N.W. at 819; *Jarrett Printing Co. v. Riley,* 424 S.E.2d 738 (W.V. 1992)("interest" afforded a broad "prophylactic" interpretation in order to alleviate any "harmful suspicion of corruption"); *Udall v. Public Employees Retirement Board,* 907 P.2d 190 (N.M. 1995)("[c]ritics are

tend to “influence” a legislator “in any degree” to approve the contract; or as any situation where a legislator’s “personal interest will conflict with the faithful performance of his duties.”[15] *Todd,* S.D.Op.Atty.Gen. No. 77-80.

Though there are few published South Dakota decisions construing what being “interested, directly or indirectly” means in the context of Article III, Section 12, some authority has developed interpreting nearly identical language in statutes prohibiting certain local government officials from having an interest in contracts entered into by the local governing entity. See SDCL 3-16-7; SDCL 6-1-1. These statutes certainly vindicate the same public interest in the absolute objectivity of public officials as Article III, Section 12.

In the context of interpreting a statute prohibiting certain local government officials from having an interest in contracts entered into by the local governing entity, an “interest, direct or indirect,” was described as an “interest in the contract . . . such as would tend in any degree to influence him in making the contract,” consistent with the proposition

quick to ascribe venal motives to any legislative decision which has the effect of benefitting those who hold office”); *State v. Furey,* 318 A.2d 783 (Ct.App.N.J. 1974)(contract may be set aside if it is infected with the taint of self-interest of the officials who voted for it); *Aldom v. Borough of Roseland,* 127 A.2d 190 (Ct.App.N.J. 1956)(validity of contract does not rest upon proof of fraud, dishonesty, loss to the municipality, whether contract was desirable or undesirable from a public standpoint but upon whether the officer had a personal interest in the matter).

[15] *Norbeck,* 142 N.W. at 849 (legislator “stands in a fiduciary and trust relation towards the state”).

that "a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations he owes to the public at large." *Todd,* S.D.Op.Atty.Gen. No. 77-80.

Hanig v. City of Winner, 2005 S.D. 10, ¶ 19, 692 N.W.2d 202, 209, endorsed general definitions of the term "direct pecuniary interests" as "when an official votes on a matter benefitting the official's own property or affording a direct financial gain" and the term "indirect pecuniary interests" as "when an official votes on a matter that financially benefits one closely tied to the official, such as an employer or family member." According to *Hanig,* "[i]f a [public official's] interest fits within any of these categories, that [official] either has an actual bias or an unacceptable risk of actual bias." *Hanig,* 2005 S.D. 10 at ¶ 19. Importantly, the bias need not be "actual" to constitute a prohibited interest; the "risk" of such bias, and likely also the appearance of such risk to the public,[16] is sufficient for an official to have an impermissible "interest" in a matter before the public body.

[16] *Norbeck,* 142 N.W. at 851 ("[i]t matters not if [a legislator] did in fact make his private interests subservient to his public duties"); SENATE JOURNAL, 45th L.D. 1362, 1363 (1977)(Governor Kneip observing that "[t]he best way to avoid conflicts of interest is to avoid the occasions for such conflicts"); N.M.Op. Atty.Gen. No. 90-17 (1990)(it is not necessary to show that an official sought a financial advantage, it is the potential for conflict which the law seeks to avoid); 73A C.J.S. Public Contracts § 4 (conflicts provisions "enacted as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing").

These definitions, however, provide little guidance on the degree of benefit an official act must confer on an official's property, family member or employer to be prohibited. *Hanig,* 2005 S.D. 10 at ¶ 19 ("[t]here is no mathematical way to quantify the interest necessary to taint the process"). In *Hanig,* a city council member who earned tips working in a restaurant with a liquor license was deemed to have a sufficiently "indirect pecuniary interest" in the question of whether a competitor to the restaurant should be granted a liquor license to invalidate the council's vote denying the license. *Hanig,* 2005 S.D. 10 at ¶¶ 20-23. The application of "indirect pecuniary interest" to the non-wage income earned by an employee of a business which could be adversely affected by council action authorizing a liquor license to a potential competitor affords extensive reach to the term "indirect."

The term "authorizes" is afforded extensive reach under state law as well. Per SDCL 4-8-1, an appropriation made by law is necessary to the authority to expend state funds. Thus, *Asphalt Surfacing* concluded that any state or county contract funded through either a specific or general legislative appropriation falls within the purview of Article III, Section 12.[17] *Asphalt Surfacing,* 385 N.W.2d at 117. Legislators know or

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[17] *Pitts,* 2001 SD 151 at ¶ 15 (general appropriation for payment of employees which funded contract between legislator and agency of the state created indirect interest in contract with the state); *Opinion re Terry C. Anderson,* S.D.Op.Atty.Gen. No. 90-45, 1990 WL 596811 (Tellinghuisen)(contract of insurance with agency owned by legislature invalid where premium would be paid from general appropriation voted

are presumed to know that a general appropriation bill they are voting on will fund a contract from which they may benefit directly or indirectly.[18] Thus, Article III, Section 12 "imposes a prohibition not only in the case where the Legislature passes a whole new act authorizing the specific project out of which the contract grows and is paid, but also in the case where everyday recurring contracts for state government supplies are bid and paid for out of general appropriated funds." *Brinkman,* S.D.Op.Atty.Gen. No. 77-62.

South Dakota's view that an appropriation serves to "authorize" a contract is shared by other states with Article III, Section 12-type conflict of interest prohibitions. In *Settles v. Board of Ed.,* 389 P.2d 356, 360 (Okla. 1964), the court ruled that Oklahoma's equivalent prohibition rendered a contract between a legislator-public school teacher void because "it was the act [of appropriating money to pay the contract] which made his contract enforceable and binding." According to *Settles,* "making available to the school district state aid funds with which to pay

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on by legislator); *Brinkman,* S.D.Op.Atty.Gen. No. 77-62, 1977 WL 36000 (Article III, Section 12 applies "where everyday recurring contracts for state government supplies are bid and paid for out of general appropriated funds").

[18] 73A C.J.S. Public Contracts § 4 (provision like Article III, Section 12 "necessarily implicates a collateral duty to apprise himself or herself of all facts and circumstances surrounding the matter which might lead a reasonable disinterested person to question the public official's impartiality"); N.M.Op.Atty.Gen. No. 91-11 (1991)(legislator knows or should know if sub-contract is paid for by state funds paid to general contractor).

[the legislator-teacher's] salary" gave "force and effect to his contract, the . . . legislature in fact authorized the contract." *Settles,* 389 P.2d at 360. Consistent with *Settles,* the Oklahoma Attorney General opined that "[a]n appropriation bill may give 'force and effect' to a contract in multiple ways, including (but not limited to) expressly directing an agency to enter into a specific type of contract or appropriating funds to pay the contract." Okla.Op.Atty.Gen. No. 05-13 (2005), 2005 WL 1142206.

Likewise, Texas has determined that "an appropriations act, as well as general legislation, will operate as authorizing legislation" for purposes of its constitutional conflicts provision. Tex.Op.Atty.Gen. No. JM-162 (1984), 1984 WL 182215, see also *Jones,* 827 So.2d at 697 ("legislative appropriations to state agencies 'authorize' contracts funded by those appropriations"); Mich.Op.Atty.Gen. No. 6615 (1989), 1989 WL 445982 ("[c]ontracts can, of course, only be entered into by state agencies with funds appropriated by the Legislature for that purpose").

In two cases, *Baca* and *Stratton,* New Mexico found that a general appropriation did not "authorize" employment contracts between legislator-teachers and the school districts for which they worked.[19] But these findings appear to be confined to their facts. New Mexico, like South Dakota, does not prohibit employment contracts between legislators and school districts. *Baca* and *Stratton* appear to say only

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[19] *Baca v. Otero,* 267 P. 68 (N.M. 1928); *Stratton v. Roswell Ind. Schools,* 806 P.2d 1085, 1096 (Ct.App.N.M. 1991).

that a non-prohibited employment contract between a legislator-teacher and a school district is not transformed into a prohibited "contract with the state" simply because the contract is funded in whole or in part by a general appropriation. The question of whether a general appropriation which funds a "contract with the state" serves to "authorize" such a contract was not before the court in either *Baca* or *Stratton* and appears to remain an open question in that state.[20]

It is worth bearing in mind, then, that Article III, Section 12 does not prohibit all contracts with legislators, only those "authorized" by a law passed during legislator's term. Consistent with this principle, one commentator has suggested a test for determining whether a contract was "authorized" during a legislator's term of office based on "whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is 'yes,' the act had no bearing on the contract and did not authorize it. If the answer is 'no,' the act made the formation of the contract possible. It permitted and

[20] Though *Maryland Casualty Co. v. State Highway Commission,* 35 P.2d 308 (N.M. 1934), addresses an alleged conflict under New Mexico's counterpart to Article III, Section 12, that case did not address whether a general appropriation authorizes a contract. The "conflict" stemmed from a legislator's vote for a 1929 act allegedly expanding the scope of workers compensation coverage during the same term that the legislator sold the state a workers compensation policy. The state subsequently balked at paying the portion of the premium due for the alleged expansion in coverage. The *Maryland Casualty* court, however, ruled there was no conflict because the premium in question was for a category of injury that was already covered by an earlier, 1927 version of the act.

therefore authorized the contract."[21] In other words, if a contract between a legislator and the state or a county in South Dakota could be entered into using non-state or non-appropriated funds – such as if a contract were paid from a continuing appropriation[22] or from federal funds, federal grants or private donations[23] – then such a contract should not violate Article III, Section 12.

These policies and principles necessarily inform the responses to the questions posed in the governor's request for an advisory opinion.

1. 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?

While a legislator's ownership of a company contracting with the state would usually pose a conflict if the contract is paid from funds

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[21] Note – Legislative Bodies – Conflict of Interest – Legislators Prohibited From Contract With State, 7 Nat.Res.J. 296, 302 (1967).

[22] *Opinion re Jeffrey R. Vonk,* S.D.Op.Atty.Gen. No. 08-03, 2008 WL 2131608 (Long); *Anderson,* S.D.Op.Atty.Gen. No. 90-45, 1990 WL 596811 (legislator-partner of insurance agency could not sell policy to state); Okla.Op.Atty.Gen. No. 72-288 (1973)(school principal paid from appropriated funds could not be legislator but school principal could be legislator if compensation comes from entirely separate funds).

[23] Okla.Op.Atty.Gen. No. 05-13 (2005)(finding contract of school teacher paid by federal funds not "authorized" by state law); Tex.Op.Atty.Gen. No. JM-782 (1987), 1987 WL 269346 (legislator was not prohibited from being employed by a non-profit corporation operating a local transit system because the legislator's salary was paid entirely from federal funds passed through the state highway department requiring no legislative action except to authorize department to participate in program); but see *Green v. Holloway,* Civ.No. 93-855 (7th Jud.Cir.) (opining that state senator could not be employed by county as chemical dependency counselor even though salary was paid with federal funds).

appropriated during the legislator's term of office,[24] it does not follow that non-ownership removes all potential for a prohibited interest. *Hanig,* 2005 S.D. 10 at ¶ 19 (recognizing public officer-employee's potential interest in wellbeing of her employer's business).[25] Non-ownership may remove a conflict if a legislator-employee is "a salaried employee [who] receives no commission based on receipts or earnings" derived from state funds. *Todd,* S.D.Op.Atty.Gen. No. 77-80.[26] Consistent with *Todd,*

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[24] Tex.Op.Atty. Gen. No. JM-162 (1984), 1984 WL 182215 ("ownership and control of a corporation gives a legislator an interest in its contracts"); Okla.Op.Atty.Gen. No. 80-301 (1980)(legislator could not, through any business enterprise in which he/she holds a financial interest, sell goods or services to any state agency, even if the contract is awarded pursuant to statutes relating to the Purchasing Division of the State Board of Public Affairs, where payment therefor would be made from funds appropriated during the legislator/vendor's term of office).

[25] Tex.Op.Atty.Gen. No. 0-6582 (1945)(Secretary of State not authorized to submit for publication constitutional amendments proposed at this session of the Legislature to a newspaper whose owner was a legislator); Tex.Op.Atty.Gen. No. M-625 (1970)(Comptroller may not lawfully issue payment for goods or services furnished to a state agency by a firm or partnership of which a legislator is member, when the payment is charged to funds appropriated by the Legislature during the term for which legislator was elected to office); Tex.Op.Atty.Gen. No. H-696 (1975)(neither legislator nor his firm could contract with state or county if the subject of the contract was authorized or funded by a legislature of which the individual was a member); Tex.Op.Atty.Gen. No. JM-162 (contract between the state and companies owned, controlled and operated by a member of the legislature prohibited if the contract was authorized by a general statute or appropriations act passed during the legislator's term of office).

[26] *Jones,* 827 So.2d at 697 (where appropriations to Medicaid did not affect the amount providers are reimbursed, legislator-employee of provider whose compensation was not tied to employer's Medicaid receipts did not have prohibited interest).

Oklahoma determined that a corporation of which a legislator was part owner could contract with a city so long as neither his compensation nor the activity which generated such business was funded by appropriations from the state legislature. Okla.Op.Atty.Gen. No. 74-268 (1975). Thus, as observed in *Hanig,* the question is less one of *proprietary* interest and more one of a legislator-employee's *financial* interest, direct or indirect, in her employer's contracts or business.

Like *Hanig,* New Mexico has noted that considerations of an employer's economic wellbeing can give rise to a prohibited interest by a legislator-employee even when the employer is a non-profit corporation. N.M.Op.Atty.Gen. No. 90-17 (1990), 1990 WL 509588 (citing *Norbeck*). "Although a non-profit organization, by definition, is not organized to make a profit, it usually performs services in exchange for payment and requires a certain amount of financial security in order to function." N.M.Op.Atty.Gen. No. 90-17. Directors of even non-profit corporations can realize salaries or other financial benefits tied to the success of a company contracting with the state, giving rise to a potential indirect financial interest in state funds. One commentator has observed that "a directorship alone constitutes an interest in the corporation's contract which would prevent the corporation from doing business with the government served by the director, even if it be shown that he derives no financial benefit from the contract."[27]

Consistent with this comment, New Mexico found that a "legislator who actively serves as a director of a non-profit corporation and who has more than a nominal interest in the organization's affairs is faced with the same potential for conflict when the organization contracts with the state as a legislator who receives a personal financial benefit from the contract." N.M.Op.Atty.Gen. No. 90-17 (citing *Norbeck*). Without defining what level of interest exceeds "nominal," New Mexico found that a legislator-director of a non-profit corporation had "an interest in conflict with his role as legislator in the form of a strong incentive to promote the goals of the organization and an indirect interest in the financial welfare of the company." N.M.Op.Atty.Gen. No. 90-17.

In *Cassibry v. State,* 404 So.2d 1360 (Miss. 1981), the Mississippi Supreme Court found that a legislator violated the constitution when he voted for appropriation bills authorizing a state agency to contract for services from a company for which he was outside counsel. As a legislator, Cassibry had been involved with the preparation and drafting of a contract between the state's social services department and his client. *Cassibry,* 404 So.2d at 1364. State funds were used to pay Cassibry's attorney fees, sometimes through direct payment to Cassibry

[27] KAPLAN & LILLICH, Municipal Conflicts of Interest: Inconsistencies and Patchwork Prohibitions, 58 Colum.L.Rev. 157, 180 (1958).

rather than through his client. *Cassibry,* 404 So.2d at 1364. The court found that Cassibry's involvement in promoting his client's business activities with the state and the financial benefits he realized from doing so, to the point that he was nearly "a corporate employee," created a prohibited interest in his employer's contracts with the state. *Cassibry,* 404 So.2d at 1364.

As a general proposition, the fact that a legislator-employee is a non-owner of a business does not categorically preclude the potential for a prohibited interest in her employer's contracts with the state. "Whether a legislator's interest in a business is significant enough to prevent that business from contracting with the state is a question of fact." Tex.Op.Atty. Gen. No. GA-0567.[28] The potential for a conflict depends on the circumstances of each case, such as the nature of the contract with the state, its source of payment, whether the legislator was involved in generating the business for her employer, the legislator's compensation structure, and the nature of the legislator's interest in the general success and economic wellbeing of her employer.

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[28] Tex.Op.Atty.Gen. No. GA-0087 (2003), 2003 WL 21660085 ("whether a public servant's outside employment creates a conflict of interest frequently requires resolving fact questions"); Tex.Op.Atty.Gen. No. M-625 ("[n]o single rule will serve to hold that when a member of the legislature owns stock in a corporation that corporation is or is not precluded from contracting with the state or a county under the provisions of this section. Each case must be determined strictly on the basis of a full development of the relevant facts").

2. 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?

Unlike a non-owner employee, a legislator who holds stock or shares in a corporation has a proprietary interest in the corporation even if the legislator is not employed by the corporation.[29] "A stockholder in a private corporation clearly has an interest in its contracts; and if [a governing entity] cannot make a contract with the officer himself, it cannot make it with a corporation in which such officer is a stockholder." *State v. Robinson,* 2 N.W.2d 183, 187 (N.D. 1942), citing *Norbeck*.

A shareholder's proprietary interest in a corporation conducting business with the state can, thus, create a conflict in any contract between the corporation and the state paid for with funds appropriated during the legislator's term. Thus, *Asphalt Surfacing* determined that Article III, Section 12 prohibited a state contract with a road surfacing company when one legislator was president of the company and another was 100% holder of the company's shares. *Asphalt Surfacing,* 385 N.W.2d at 119 Likewise, in *Ayres v. Junek,* 247 N.W.2d 488, 489 (S.D. 1976), a school board member who was a shareholder, officer and

[29] 63C Am.Jur.2d Public Officers and Employees § 248 ("[t]he interest of a public officer as a stockholder in a corporation entering into a contractual relation with the public is a prohibited interest – at least where the interest is substantial" and a "stronger case of interest exists where public officers are not only stockholders but also officers of corporations" contracting with the state.

director of vehicle repair shop was precluded from contracting with school district for the repair of school buses.

As found in *Norbeck,* “the fact that [a] contract . . . [is] made between . . . a corporation [owned by a legislator] and the state and not directly between [the legislator] and the state is immaterial” to the determination of whether the legislator has an “interest” in the contract. “The interest of a stockholder of a corporation is within the reason of the rule prohibiting [a public] officer from being interested, directly or indirectly, in a contract with the state.” *Norbeck,* 142 N.W. at 850.[30]

Thus, as with a legislator’s employment by a business contracting with the state, the question of potential pecuniary gain, rather than a legislator-shareholder’s degree of equity ownership in a company, is determinative of whether a legislator-shareholder has a prohibited “interest” in a contract with the state. A small ownership share of a company could nonetheless yield a sizable financial benefit that could influence, or raise a suspicion of influencing, a legislator’s actions. In this respect, *Norbeck* is consistent with other jurisdictions with constitutional conflict of interest provisions similar to South Dakota’s.

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[30] See also cases applying conflict of interest prohibition to legislator-shareholders: *Parking Printing & Stationary Co. v. Arkansas Printing & Lithography Co.,* 354 S.W.2d 560 (Ark. 1962); *Thomson v. Call,* 699 P.2d 316, 323 (Cal. 1985); *People v. Simpkins,* 359 N.E.2d 828, 832 (Ill. 1977); *Wilson v. Iowa City,* 165 N.W.2d 813, 824 (Iowa 1969); *Thompson v. District Bd. of Ed.,* 233 N.W. 439, 440 (Mich. 1930).

When a water users association sought to contract for project consulting services with a firm whose president and stockholder was a state legislator, New Mexico determined that this would create a prohibited indirect interest when the project in question was partially funded by a contract authorized by the legislature during the legislator-consultant's term of office. N.M.Op.Atty.Gen. Nos. 90-17, 91-11.[31] "The constitutional prohibition against any direct or indirect interest in state contracts ensures that legislators perform their public duties free of any personal influence." N.M.Op.Atty.Gen. Nos. 90-17, 91-11. These duties could not be met when the legislator-consultant "had an ongoing contractual relationship with the [water] association to perform work attributable specifically to the project that the legislature funded." N.M.Op.Atty.Gen. Nos. 90-17, 91-11.

At the same time, in the view of *Robinson* and other courts, the "interest" prohibited by Article III Section 12 "does not depend entirely upon the relationship that a stockholder bears to the corporation in which he owns a share of stock." *Robinson,* 2 N.W.2d at 189. On facts similar to *Ayres,* the *Robinson* court found that a contract for purchase of gasoline, lubricants and other material supplied for the maintenance of

[31] N.M.Op.Atty.Gen. No. 89-34 (1989)(Article 4, Section 28 applies to legislators who own shares in a company contracting with the state); Tex.Op.Atty.Gen. No. 0-6582 (Secretary of State not authorized to submit for publication constitutional amendments proposed at a session of the Legislature to a corporation newspaper of which a legislator is a stockholder).

the state motor pool was not invalid simply because a legislator was "merely a nominal" shareholder in the supplying corporation. *Robinson,* 2 N.W.2d at 189. According to *Robinson,* a legislator-shareholder's stake in a corporation doing business with the state must be "substantial" to give rise to a prohibited interest. *Robinson,* 2 N.W.2d at 189.

Likewise, in *Mississippi Power & Light Co. v. Town of Coldwater,* 168 F.Supp. 463, 477 (D.Ct.Miss. 1958), the court found that the fact that a town alderman held 50 out of 104,000 shares of a utility did not invalidate a contract with the utility to provide electricity to the town. When the alderman "owned no common stock and had no voting rights and never at any time participated in any of the stockholder meetings, or in any control of the corporation," his interest "was so infinitesimal as compared to the entire value of the [utility company] that it would not rise to the dignity of a conflicting interest." *Mississippi Power & Light,* 168 F.Supp. at 477; Mich.Op.Atty.Gen. No. 6151 (1983), 1983 WL 174693 (no substantial conflict of interest existed in contract between state and automobile dealership corporation in which a legislator had less than a 1% interest).

"No single rule will serve to hold that when a member of the legislature owns stock in a corporation that corporation is or is not precluded from contracting with the state or a county under the provisions of this section. Each case must be determined strictly on the basis of a full development of the relevant facts." Tex.Op.Atty.Gen. No.

M-625 (1970). Whether a legislator's ownership of stock or shares in a company doing business with the state rises to the level of a prohibited contract will depend on such variables as the amount of stock or shares owned, the degree of ownership and control those stocks or shares confer, whether the legislator-shareholder is also an officer and director, whether the legislator-shareholder solicited business on behalf of the company, and the amount of financial benefit realized by a legislator-shareholder from any contract with the state.

3. 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?

Unlike South Dakota, some states' counterparts to Article III, Section 12 prohibit contracts between legislators and "districts" including school districts (Michigan, Mississippi), municipalities (Mississippi, New Mexico, Michigan), or any state "subdivision[s]" (Michigan, Oklahoma). See Appendix. These states interpret their counterparts to Article III, Section 12 to prohibit contracts of employment with these political subdivisions.[32]

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[32] *Frazier v. State ex rel. Pittman,* 504 So.2d 675 (Miss. 1987)(legislator could not be a public school or university teacher during term of office); Okla.Op.Atty.Gen. Nos. 72-288 (1973), 82-48 (1982); 04-25 (2004) (legislator could not be a state employee or a public school administrator or teacher if her salary is authorized by law or appropriated by the legislature during her legislative term); Okla.Op.Atty.Gen. Nos. 05-13 (state legislator cannot be employed by state during term of office for which legislator was elected where source of funds for legislator's salary is authorized by law or appropriated by legislature during legislator's term of office); but see Tex.Op.Atty.Gen. No. JM-782 (1987), 1987 WL

South Dakota has likewise interpreted Article III, Section 12 to extend to state-funded contracts of employment with the state. *Palmer,* 75 N.W. at 819; *Pitts,* 2001 S.D. 151 at ¶ 14. However, unlike the foregoing states, Article III, Section 12 only prohibits legislator contracts with the state (or arms of the state) and counties. *Palmer,* 75 N.W. at 819. Though municipalities and school districts are subdivisions of the state, they are now, as they were at the time of Article III, Section 12's enactment, separate legal entities. Clearly, if the framers of Article III, Section 12 had intended to foreclose legislators from being employed by municipalities and school districts they would have added language necessary to accomplish that objective.

Thus, according to authorities interpreting Article III, Section 12, a person may not be both a legislator and an employee of the state or a county if the contract for employment is funded by an appropriation voted on during the legislator's term; but a legislator may be employed by other state subdivisions having a distinct legal identity such as municipalities or school districts. *Baca,* 267 P. at 69; *Stratton,* 806 P.2d at 1096. Also, as noted above, Article III, Section 12 should not prohibit contracts between a legislator and the state or a county in South Dakota

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269346 (legislator's employment by a non-profit corporation created to operate a local transit system did not violate the state's prohibition on legislators being state or county employees where the legislator's salary was paid entirely from federal funds passed through the state highway department requiring no legislative action except to authorize department to participate in program).

if the source of his or her salary is from non-state or non-appropriated funds, such as a direct federal grant or local funding. See Footnotes 22 and 23 *supra*; Okla.Op.Atty.Gen. No. 04-25 (2004).

With respect to other elected or appointed positions, if these positions do not entail a contract between the legislator and the state or a county, then service in these positions would not implicate the contract clause of Article III, Section 12. *Palmer,* 75 N.W. at 819. However, other constitutional provisions or laws, such as Article III, Section 3[33] or the appointments clause of Article III, Section 12,[34] may, and likely do, preclude the election or appointment of a legislator to other public offices.

4. May a legislator receive retirement compensation from the South Dakota Retirement System for services rendered other than acting as a legislator?

No South Dakota case has addressed this question, but in *Udall v. Public Employees Retirement Board,* 907 P.2d 190 (N.M. 1995), the court was asked whether retirement benefits paid to a legislator for his legislative service violated a constitutional prohibition on receiving any "emolument . . . directly or indirectly" other than the legislative

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[33] *Opinion re Alice Kundert,* S.D.Op.Atty.Gen. No 82-23, 1982 WL 188034 (Meierhenry)(legislator could not serve on county commission or state veterans commission); *Opinion re Tim Johnson,* S.D.Op.Atty.Gen. No. 84-24, 1984 WL 248730 (Meierhenry)(legislator cannot serve on school board).

[34] *Opinion re Terry C. Anderson,* S.D.Op.Atty.Gen. No. 88-51, 1988 WL 483610 (Tellinghuisen)(appointments clause of Article III, Section 12 "prohibits appointment of a member off the legislature to any state appointed office").

compensation specified in another constitutional provision. *Udall* ruled that "constitutional limitations on 'allowances' or 'emoluments' do not apply to pension programs" because of "the contingent nature of retirement benefits," such as length of service, lifespan or other potential variables. *Udall,* 907 P.2d at 193, 194.

In *Campbell v. Kelly,* 202 S.E.2d 369 (W.V. 1974), a legislative pension plan was challenged on the ground that it violated a prohibition on receiving an "allowance or emolument . . . directly or indirectly" other than that provided for by the constitution. Looking to "the great weight of precedent from other jurisdictions interpreting similar provision of other state constitutions," *Campbell* found that "[a]ll the modern decisions interpreting the power of legislators to enact pension programs hold that constitutional limitations on 'allowances' or 'emoluments' do not apply to pension programs." *Campbell,* 202 S.E.2d at 375. Likewise, in *Brown v. Meyer,* 787 S.W.2d 42, 45 (Tex. 1990), where the court also examined whether retirement benefits constituted a prohibited "emolument," the court ruled that "emolument" meant "only actual pecuniary gain and not contingent and remote benefits."[35]

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[35] See also *Bulgo v. Enomoto,* 430 P.2d 327, 330 (Haw. 1967)(disability benefits too remote and contingent to constitution compensation); *Lyons v. Guy,* 107 N.W.2d 211, 218-219 (1961)(increase in percentage of governor's social security tax paid by state is too remote to constitute an emolument under the constitution); *Johnson v. Nye,* 135 N.W. 126, 129 (Wis. 1912)(constitutional disqualification based on increase in emoluments cannot be based on conjecture or speculation).

According to *Chamber of Commerce v. Leone,* 357 A.2d 311, 321 (N.J.Super.Ct. 1976), "retirement benefits in the public sector are an integral component of compensation" schemes. "The early concept of a pension as a gratuity paid by the government in recognition of past services is now obsolete. Such benefits are now recognized as a type of deferred compensation," and, therefore an "integral component" of any employment contract. *Leone,* 357 A.2d at 321. This view might arguably bring the retirement component of a contract of employment between a legislator and an employer that participates in the state retirement system within the scope of Article III, Section 12.

But under the reasoning of *Udall, Campbell* and *Brown,* if a legislator's interest in retirement benefits earned from his or her current or past employment with an extra-legislative employer who participates in the state retirement program is not sufficiently "direct or indirect" to constitute an "emolument," it probably is too remote to constitute an "interest" within the meaning of Article III, Section 12. This construction would also conform to the principle that authorizations which tend to incidentally benefit a legislator the same as any other member of a large population are not a prohibited "interest."

The reasoning of *Udall, Campbell* and *Brown* might not, however, translate to a situation where a legislator takes action that benefits a discreet population of retirement program participants – school teachers or cabinet secretaries – of which the legislator or a legislator's spouse is a

member. But generally, *Udall, Campbell* and *Brown* deem retirement benefits too contingent and remote to constitute a direct or indirect interest.

5. May a legislator or a business owned by a legislator subcontract for payment, goods or services provided to the state?

No South Dakota authority has addressed this question, but other states have found that a legislator's sub-contract on a contract paid with state funds can create a prohibited interest. New Mexico found that, "[a]lthough there may be some indirect interests which are sufficiently attenuated so as not to violate" its constitutional prohibition on legislative conflicts, such was "not the case when the legislator, at the time the state contract is authorized, knows who the general contractor is and knows (or should know) that the contractor might use the legislator-subcontractor's supplies or services or knows (or should know) at the time of the negotiation of the subcontract that the state's contract with the general contractor was authorized by specific legislation enacted during the legislator's term of office." N.M.Op.Atty.Gen. No. 91-11 (1991), citing N.M.Op.Atty.Gen. No. 89-34 (1989).

Mississippi determined that its counterpart to Article III, Section 12 would prohibit an alderman from subcontracting to perform masonry work on houses for his father, who was the builder and developer of a subdivision in which the houses were located, when the alderman's father

received a loan approved by the board of aldermen to assist him in the development of the subdivision. Op.Miss. Ethics Comm. No. 00-128-E.[36]

Michigan, however, found that a legislator who operated an advertising and public relations firm could contract to provide services to a development company constructing a housing project which was funded by a loan from the state housing development authority because the legislator was "not a party to any contract with the state." Mich.Op.Atty.Gen. No. 6619 (1991), 1989 WL 445999. The fact that "the legislator ha[d] contracted to provide services to a company which has a contract with the state . . . further insulated and removed [the legislator] from any potential conflict of interest." The Michigan opinion does not identify whether state funds were to be used to pay for the legislator's services, or whether it would make a difference if they were.

Provisions like Article III, Section 12 do not require that a legislator contract directly with the state to give rise to a prohibited interest in a state-funded contract. *Palmer,* 75 N.W. at 819 (Article III, Section 12 "is intended to preclude the possibility of any member deriving directly or indirectly any pecuniary benefit from legislation" enacted by a legislator); *Cassibry,* 404 So.2d at 1364. Whether a legislator-subcontractor is in a

[36] Op.Miss. Ethics Comm. No. 18-052-E (mayor could serve as a paid consultant for a company so long as it did not contract or subcontract with the city); Op.Miss. Ethics Comm. No. 11-007-E (county supervisor could subcontract with a manufacturer who leased real property from the county).

conflict position will depend on such factors as the foreseeability that the legislator would bid on a subcontract at the time of voting on an appropriation to fund the general contract, the relationship between the general contractor and the legislator, and whether state funds are used to pay the subcontract.

6. May a legislator or a business owned by a legislator receive Medicaid reimbursements administered by a state agency?

This question has been answered in the affirmative in two states. In *Jones v. Howell,* 827 So.2d 691 (Miss. 2002), the court examined whether legislator-providers were permitted to receive Medicaid reimbursements paid by state funds appropriated during the legislators' terms. To participate in the Medicaid reimbursement program, providers in Mississippi were required to enter an agreement with the state's Medicaid division. Participation agreements fix a reimbursement formula of a certain amount for dispensing the drug and a certain percentage above wholesale price for the cost of the drug which, in turn, fix the provider's profit.

Jones ruled that the legislators' receipt of Medicaid reimbursements did not rise to the level of a prohibited conflict. The Medicaid program did not allow participating pharmacies the ability to negotiate a contract that was "any different from those entered into by every other member of their class." *Jones,* 827 So.2d at 701. The participation agreements they signed were "identical to the same forms executed by all other Mississippi pharmacists" and conferred no "pricing advantage over other licensed

pharmacies." *Jones,* 827 So.2d at 701; Mich.Op.Atty.Gen. No. 6653 (1990), 1990 WL 525919 (legislator could contract for federal low-income housing credits from state housing authority where the "contract" was simply conditions imposed by federal law applicable to all recipients). The participation agreement "amounted to nothing more than a license to fill prescriptions for Medicaid clients. Th[e legislators] received no special preference over other pharmacies." *Jones,* 827 So.2d at 698. Drugs sold by providers are sold to Medicaid recipients, not the state, making providers mere "conduits that distribute medication" covered by Medicaid. *Jones,* 827 So.2d at 698-699.

Jones observed that the legislators did "not have control, either direct or indirect, over the amount of compensation their respective pharmacies receive[d] from the state agency" because the amount they received was a function of the number of Medicaid recipients who decided to patronize their pharmacies. *Jones,* 827 So.2d at 699, 700. Medicaid reimbursements comprised only a portion of the income generated by the legislator-pharmacists' businesses. *Jones,* 827 So.2d at 701. Under the circumstances, the *Jones* court found that "the legislators' interest in Medicaid appropriations [wa]s so remote as to remove it from" the state's constitutional prohibition on contracts between legislators and the state. *Jones,* 827 So.2d at 699.

Interpreting a statutory prohibition on legislators transacting business with the state "the cost of which . . . is paid directly or

indirectly by state funds," the Georgia Supreme Court, like *Jones,* ruled that Medicaid reimbursements paid to legislator-owned pharmacies and nursing homes were too indirect to constitute "transacting business" with the state. *Georgia Dept. of Med. Assistance v. Allgood,* 320 S.E.2d 155 (Ga. 1984). Like *Jones, Allgood* was influenced by the facts that participation agreements with providers "established maximum allowable costs plus a dispensing fee determined according to federal regulations" and providers did not sell medications to the state, but to Medicaid recipients. *Allgood,* 320 S.E.2d at 157. Thus, under the circumstances reviewed in *Allgood,* the pharmacies and nursing homes were not involved with "transacting business" with the state.

Medicaid is a joint federal-state program whose operation and benefits are largely set by federal law. *Jones* and *Allgood* do not rule out the potential for conflict between a legislator-provider and the state arising from some state Medicaid-related legislative action. As in all questions arising under Article III, Section 12, the potential for conflict depends on the level of a legislator's interest. But, at least under the facts of *Jones* and *Allgood,* receipt of Medicaid reimbursements by legislator-owned pharmacies, clinics or companies which provide Medicaid services would not alone constitute a prohibited "interest" within the meaning of Article III, Section 12.

7. May a legislator receive an expense reimbursement for foster children in their care administered by a state agency?

No South Dakota authority has addressed this question, nor, apparently, have any of the states with constitutional counterparts to Article III, Section 12. But, like Medicaid providers, foster parents must enter a written agreement with a state agency, in this case the Department of Social Services (DSS). These "placement agreements" provide foster parents with appropriated funds for foster care services and allowances for the expense of caring for a child.

But the fact that there exists an agreement or "contract" that results in appropriated funds being paid to a legislator-foster parent through a DSS contract is not necessarily dispositive of whether Article III, Section 12 is implicated. In the context of a legislator's eligibility to receive federal low-income housing credits, Michigan, like Mississippi in *Jones,* found that an agreement between the state housing development authority and a legislator-recipient of the credits was "not a true contract in the sense intended by" Michigan's counterpart to Article III, Section 12. "The obligations assumed in the 'agreement' by the recipient of the tax credits are essentially those imposed by the federal act itself as prerequisites for participation in the program. No consideration is recited and consideration is a basic element of any contract . . . . Thus, these obligations are imposed by law, not by means of a contractual agreement." Mich.Op.Atty.Gen. No. 6653 (1990), 1990 WL 525919; *Jones,* 827 So.2d at 701.

Per the Michigan and Mississippi criteria, if the terms of the agreements are boilerplate and conditions of law applicable to all foster-parents equally, then a legislator-foster parent's receipt of appropriated funds in this manner and for this purpose may not rise to the level of a prohibited "interest" as contemplated by Article III, Section 12.

8. 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?

As noted above, for an interest to fall within Article III, Section 12's prohibitions, it "must be more than the general interest shared by the public; it must be one that involves gain or loss specific to" the legislator. Tex.Op.Atty.Gen. No. GA-0567; *Hanig,* 2005 S.D. 10 at ¶ 18. Thus, as a general proposition, legislator purchases of state goods or services do not appear to implicate Article III, Section 12 provided these transactions occur on the same terms and conditions as those goods or services are offered to the general public. Mich.Op.Atty.Gen. No. 6653 (1990), 1990 WL 525919; *Jones,* 827 So.2d at 701.

9. How do the instances detailed above apply to a legislator's spouse, dependent or family member?

Contracts between the state and a legislator's spouse, child, or other relatives can give rise to a prohibited "interest" on the part of a legislator. The highest potential for a prohibited interest in a contract between the state and a family member appears to be in cases of a legislator's spouse.

In *Jarrett Printing Co. v. Riley,* 424 S.E.2d 738, 741 (W.V. 1992), the court found "it disingenuous to state that a legislator has absolutely no interest in whether his or her spouse receives a government contract." According to *Jarrett,* there is "a relation existing between husband and wife, and mutual liabilities growing out of the family relation, which creates, on the part of each, an interest in the contracts of the other, out of which compensation arises, and the proceeds of which are used directly or indirectly within the family circle." *Jarrett,* 424 S.E.2d at 741. As a result, *Jarrett* found that a legislator had an interest in a printing contract with the state when her husband owned the printing company that had been awarded the contract, even though the printing company had been the lowest bidder. *Jarrett,* 424 S.E.2d at 741.

Oklahoma has determined that it would be improper for the wife of a legislator to lease property to the state department of corrections. Okla.Op.Atty.Gen. No. 72-292 (1973). Also, Oklahoma found that a company which was owned in whole or in part by the wife of a legislator could not lawfully contract with the state where the contract was paid from funds appropriated by the legislature during her husband's term. Okla.Op.Atty.Gen. No. 81-129 (1981); Okla.Op.Atty.Gen. No. 87-40 (1987)(wife of a former legislator prohibited from entering into a motor license agent contract with state when contract had been authorized during her husband's term).

But Michigan found no substantial conflict of interest existed with respect to potential contracts between the state and an automobile dealership in which a legislator's spouse held a majority interest in her own name, provided that the legislator did not solicit the contract, take part in negotiations for the contract, and did not represent either party in the transaction. Mich.Op.Atty.Gen. No. 6151, 1983 WL 174693. However, unlike South Dakota and other states with comparable constitutional conflicts provisions, a Michigan statute limited the meaning of "substantial conflict of interest" to situations where "a state legislator . . . participates in the negotiation of or in the performance of the contract." Mich.Op.Atty.Gen. No. 6151.

In another case, Michigan found that a legislator's spouse's lease of land to, and stock ownership in, a corporation which had been granted a parimutuel horse racing track license by the state did not present a conflict. The spouse owned only 80 of 15,000 shares of stock in the horse-racing corporation. The lease in question was with the horse racing corporation, not the state, and was not a subcontract with a state contractor because under Michigan law a license is not a contract with the state. Mich.Op.Atty.Gen. No. 5681 (1980), 1980 WL 114043.

No South Dakota authority has addressed contracts with other family members, but Mississippi has determined that the scope of the prohibition on contracts between the state and a public official's non-spouse family members is a function of whether the family member is

financially dependent on the public official, whether the public official was free of any pecuniary benefit from the contract, and whether the contract was competitively bid. See Appendix, Ops.Miss.Ethics.Comm.

When it comes to employment of a legislator's spouse or other family member by the state, two cases from Mississippi, whose constitutional conflicts of interest provision more broadly reaches both legislators and members of school boards, are instructive. In *Smith v. Dorsey,* 530 So.2d 5 (Miss. 1988), the court ruled that a member of the local school board had a prohibited interest in his spouse's teaching contract with the school district. In *Frazier v. State ex rel. Pittman,* 504 So.2d 675 (Miss. 1987), the court made it clear that a legislator could not be a public school (or state university) teacher. But *Frazier* further ruled that the fact that the legislator had voted on general school laws and funding did not create a prohibited interest in his spouse's employment as a teacher for a school district.

The difference in outcomes of *Smith* and *Frazier* appears to rest on the degree of control a public official has in hiring and compensation decisions affecting his or her spouse. In *Smith,* school board members were "directly responsible for the hiring and firing of their spouses" and participated "fully in the process behind which salaries [we]re awarded to public school teachers in their districts." *Smith,* 530 So.2d at 7. Under the circumstances, *Smith* "recognize[d] that each [school board member] ha[d] an indirect interest in his wife's contract." *Smith,* 530 So.2d at 7.

By contrast, in *Frazier* the court noted that legislators, though they vote on general appropriations to school districts, are not in the position of voting on contracts or setting compensation. *Frazier,* 504 So.2d at 698. In *Frazier,* the legislator's "wife [wa]s one of several thousand public school teachers in the state," which posed no "conflict of interest because [she was] employed by the state as one of a large class." *Frazier,* 504 So.2d at 698. Per *Frazier,* the fact that a legislator's spouse is employed by the state or county would not implicate Article III, Section 12 if the legislator is not in a position to vote to hire his or her spouse or influence his or her spouse's compensation other than as part of a large class of employees. But see Miss.Op.Atty.Gen. (Monty)(1990)(conflict might arise if a legislator's family member is part of a more discreet class which a legislator is in position to benefit).

As with all the questions posed, a legislator's "interest" in family member contracts is primarily a function of the potential financial benefit realized, directly or indirectly by the legislator. A financial benefit to a spouse is most likely to inure to the benefit of a legislator. With other family members the potential for conflict depends on the circumstances of each particular case.

CONCLUSION

Article III, Section 12 "is one of the most important of the many reforms attempted by the framers of our organic law." *Palmer,* 75 N.W. at

819. Guidance from this Court in its application will promote public confidence in our governmental institutions and open opportunities for citizen-legislators to serve.

Dated this 15th day of December 2023.

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