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Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

)	#30488
)	
IN RE: THE REQUEST OF KRISTI)	BRIEF IN SUPPORT OF REQUEST
NOEM GOVERNOR OF SOUTH)	FOR ADVISORY OPINION BY
DAKOTA FOR AN ADVISORY)	KRISTI NOEM GOVERNOR OF
OPINION)	SOUTH DAKOTA

Original Proceeding
South Dakota Supreme Court

BRIEF OF GOVERNOR KRISTI NOEM

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JURISDICTIONAL STATEMENT

The Request for an Advisory Opinion on questions regarding Article III, § 12 of the South Dakota Constitution was filed by Governor Kristi Noem (Governor), by and through counsel, on October 20, 2023. The Request was submitted pursuant to the authority vested in the Governor by South Dakota Constitution Article V, § 5. For the reasons discussed *infra*, the Governor renews her Request for an advisory opinion.¹

STATEMENT OF ISSUES

The Request asks for interpretation of the interested contract clause of the South Dakota Constitution Article III, § 12. The Request contains nine interrogatories:

- 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?

¹ In the Request, references to the “state” in each interrogatory should not be construed to include the authorities created by the Legislature. It is settled in South Dakota that the authorities have a separate and distinct status from the “state” for the purpose of constitutional analysis. *McFarland v. Barron*, 164 N.W.2d 607 (S.D. 1969) (holding that issuing bonds did not offend the constitutional debt limitation because the Building Authority was separate and distinct from the state). Any other suggested questions or considerations offered in the letters of support submitted with the Request may be provoking but answering would be outside the jurisdiction of the Court pursuant to S.D. Const. Art. V, § 5.

- 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?

The Court entered an Order on October 31, 2023 directing briefing by the Governor, the Attorney General, and the Legislature. This Brief will contain authority and argument supporting why these are important questions relating to the Governor's executive power and are solemn occasions and address the merits of each interrogatory. As this is a Request to the Court for its advisory opinion, this Brief provides authority from South Dakota and other jurisdictions to aid the Court in its interpretation of Article III, § 12 and answering each question but takes no position regarding how this Court should answer the specific interrogatories.

STATEMENT OF THE CASE AND FACTS

The application of the interested contract clause of Article III, § 12 was addressed recently by this Court's October 2020 advisory opinion holding that Legislators could not receive COVID stimulus money through the state's small business grant program. *In re Noem*, 2020 S.D. 58, 950 N.W.2d 678. In August 2023, Senator Jessica Castleberry, who received COVID stimulus money through her closely held business, entered a settlement for her receipt of those moneys and resigned her position in the Senate. In the wake, inquiries hit a fervor of uncertainty as to how far or remote an indirect interest may go to run counter to Article III, § 12.

As analyzed in this Brief, the extent of what constitutes an *indirect* interest as contemplated by Article III, § 12 is impacting the Governor’s ability to appoint eligible Legislators to vacant seats who have no potential conflict of interest and are willing to serve without fear of inadvertently violating the interested contract clause. The lack of clear guidance for our state employees is troublesome for their duty to expend funds in accordance with the interested contract clause. Uncertainty is having an impact on all three branches of our state government.

Each of the nine questions posed in the Request involves an inquiry either made by Legislators or state employees to the Governor’s Office on the propriety of making payments in compliance with Article III, § 12. These questions are the ones most often asked or ones in which the Court’s interpretation of Article III, § 12 may impact current Legislators. Additional inquiries could be sought but clarity on these nine questions will provide guardrails for understanding the extent to which Article III, § 12 applies to other situations. Unless otherwise noted, each question presented assumes the relevant expenditure of funds 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. *Pitts v. Larson*, 2001 S.D. 151, ¶ 7, 638 N.W.2d 254, 256 (holding that the general appropriation bill authorized payment for the employees of the state).

ANALYSIS

The Governor may “require opinions of the Supreme Court upon important questions of law involved in the exercise of [the governor’s] executive powers and upon solemn occasions.” S.D. Const. Art. V, § 5. Answering an advisory opinion request is

discretionary when one of these two situations are met. *In re Noem*, ¶ 8, 950 N.W.2d at 680 (citing *In re Daugaard*, 2011 S.D. 44, ¶ 4, 801 N.W.2d 438, 439).

A. The Governor’s Request raises an important question of law involving her exercise of executive power.

The Court may answer a request for an advisory opinion when the request raises an important question of law involved in the exercise of the Governor’s executive powers. S.D. Const. Art. V, § 5. The Court, on occasion, has answered such requests where the questions posed “will result in immediate consequences having an impact on the institutions of state government or on the welfare of the public and which involve questions that cannot be answered expeditiously through usual adversary proceedings.” *In re Daugaard*, 2016 S.D. 27, ¶ 9, 884 N.W.2d 163, 166 (quoting *In re Opinion of the Supreme Court Relative to the Constitutionality of Chapter 239, Session Laws of 1977*, 257 N.W.2d 442, 447 (1977) (Wollman, J., concurring specially)).

1. Governor’s Appointment Power

Article III, § 10 of the South Dakota Constitution grants the Governor appointment authority to fill Legislator vacancies.² The Governor now has two vacant legislative seats, House District 34 and Senate District 35, due to resignation. An appointment of a representative or senator by the Governor is different than the typical political selection process where voters vet candidate qualifications and elect their representative or senator. Here, the Governor exercises the authority delegated to her by the voters to make that selection. The Governor’s exercise of this unique constitutional

² *In re Opinion of Sup. Ct. Relative To Constitutionality of Ch. 239, Sess. Laws of 1977*, 257 N.W.2d at 443 (finding as one factor in answering a request for an advisory opinion that the power of the Governor to make appointments to the Bridge Authority involved the exercise of the Governor’s executive power).

appointment power ensures a representative democracy by equal representation in the Legislature.

However, the Governor should not make a constitutional appointment if doing so violates another constitutional provision. An appointment must be made in conformity with the interested contract clause of Article III, § 12; but, uncertainty in the application of Article III, § 12 is causing delays in making appointments. One candidate withdrew their application due to both potential concerns of a conflict under Article III, § 12 and the present delay. Additionally, it cannot be known how many interested, qualified citizens have not even applied because of uncertainty about their own perceived conflict, choosing not to risk unintentionally violating the Constitution.

Necessary to the Governor's consideration of any candidate must be an inquiry into whether the candidate is qualified and eligible for the appointment, possesses the skills to accomplish the job for their constituents, and whether a direct or indirect conflict of interest exists. *See Jones v. Howell*, 827 So.2d 691, 702 (Miss. 2002) (reasoning that qualified citizens should not be deterred from entering public service for fear of an inadvertent indirect conflict violation or not knowing whether they could have a remote indirect conflict). If these vacancies are maintained after legislative session begins on January 9, 2024, further impact to the Legislature will be felt as committee assignments are made, votes are taken, and policies are shaped, having an immediate impact on the legislative branch of state government. Answering the Request will provide necessary timely direction for the Governor to make appointments to vacant legislative seats. *See In re Daugaard*, ¶ 5, 801 N.W.2d at 440 (exercise of governor's power is affected by the Court's answer to these questions).

2. Administer and Supervise Spending

In addition to the Governor's constitutional powers and duties, state law requires the Governor to "supervise the official conduct of all executive and ministerial officers" in the administration and expenditure of state and federal funds through her designated state agencies. SDCL 1-7-1(1); 4-7-3. Specifically, the Governor has a direct role in expending federal funds through her designated state departments and officers. SDCL 4-8-17; *see also, In re Noem*, ¶ 9, 950 N.W.2d at 680-81. While the State Treasurer and State Auditor are ultimately charged with disbursing funds on warrants presented to them, state officers and employees across state government account for invoices received, review for appropriateness and eligibility with program standards or federal guidance, and approve payments by signing warrants. SDCL 4-9-1; ARSD 3:05:01:03 ("The authorization signature of the agency official is required on every voucher. . .").

The importance of properly expending federal and state funds cannot be overstated. Penalties exist for misappropriating state funds contrary to state law. SDCL 4-8-2. If an enforcement action must be taken due to the improper receipt of funds by a Legislator, it is the Governor, concurrent with the Attorney General, who "may, by appropriate action or proceeding brought in the name of the state, . . . restrain violation of any constitutional . . . power, duty or right by any officer, department or agency of the state or any of its civil divisions. . . ." S.D. Const. Art. IV, § 3; SDCL 1-11-1.

The Governor and the Attorney General recently exercised these powers when clear violations of Article III, § 12 occurred earlier this year. That clarity came from this Court's advisory opinion precluding current state Legislators from directly or indirectly contracting with the State to receive funds from CRF Grant programs, and by extension,

all COVID relief stimulus programs funded by federal dollars. *See In re Noem*, ¶ 14, 950 N.W.2d at 682. The Governor must uphold Article III, § 12 but presently lacks the clarity whether the scenarios provided in the Request meet the interested contract clause’s prohibition or go further than what that section contemplates as an “indirect” interest.

Prudent use of state resources would not permit investigations into every single allegation or inquiry of remote indirect interest scenarios. Before the Governor orders and directs the Attorney General to investigate any particular transaction, clear guidance is needed to determine whether a transaction constitutes a prohibited direct or indirect interest in any state or county contract. *See*, SDCL 1-11-1(2), (4); SDCL 1-11-7. Should the Court answer the proposed questions in the Request, the Governor could reasonably understand when an allegation requires an investigation of an alleged Article III, § 12 violation. Then, it would be in that venue where the private rights of the impacted Legislator can be fairly considered in the usual adversary proceeding. For now, these are strictly legal questions.

B. Solemn Occasion

In addition to implicating the Governor’s executive powers, these questions also present a solemn occasion.

In determining whether a request for an advisory opinion presents a solemn occasion, the Court weighs whether an important question of law is presented, whether the question presents issues pending before the Court, whether the matter involves private rights or issues of general application, whether alternative remedies exist, whether the facts and questions are final or ripe for an advisory opinion, the urgency of the question, whether the issue will have a significant impact on state government or the public in general, and whether the Court has been provided with an adequate amount of time to consider the issue.

In re Noem, ¶ 10, 950 N.W.2d at 681 (quoting *In re Daugaard*, ¶ 13, 884 N.W.2d at 167).

Each question asked in the Request presents a solemn occasion due to the underlying need for guidance on how to apply Article III, § 12. Questions that implicate the Constitution are important questions of law. As found in *In re Noem*, these questions present broad conflict of interest inquiries involving Legislators' entitlement to appropriated funds. The lack of clarity is already having a significant impact on the legislative and executive branches of state government. There is great public interest in the unbiased distribution of state funds. The undersigned is not aware of any pending proceedings before any court on the interpretation or application of Article III, § 12; however, Legislators have made inquiries as to the scope of Article III, § 12 and could apply the Court's holding to their own situation. These questions posed will inform future Legislators and would give broad guidance while not presenting any specific facts. This is a matter of great public importance requiring a prompt answer. *See, supra*, Section A. Overall, the factors weigh in favor of concluding these are solemn occasions.

C. Analysis of Each Interrogatory

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?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

In addition to the authority and arguments provided above, the Governor directs and controls the Commissioner of the Bureau of Administration, who is responsible for state procurement and contracting for goods and services. *See*, SDCL 1-14-3 ("under the general direction and control of the Governor, [the Commissioner of the Bureau of Administration] shall execute the powers and discharge the duties vested by law in the Bureau of Administration."). Those duties include the "procurement of supplies, services,

and public improvements as prescribed in chapters 5-18A, 5-18B, and 5-18D[.]” and “[c]ontract for such services as are required by multiple state agencies, if such a contract improves the efficiency of state government[.]” SDCL 1-14-12(2), (10). Illustrative of this duty, on August 11, 2023, the Governor issued Executive Order 2023-13 directing the Commissioner and all executive branch agencies to incorporate a provision in all contracts where feasible that requires the contractor to agree that the contract does not violate Article III, § 12. *App. 1.*

b) Addressing Merits of the Interrogatory

This question requires a determination as to how far the term “indirect” extends. Over a century ago, this Court said Article III, § 12 “is intended to 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.” *Palmer v. State*, 75 N.W. 818, 819 (S.D. 1898) (prohibiting state contract between a state board and lawyer who was a Legislator). Similarly, this Court applied Article III, § 12 to prevent a state contract with a Legislator-owned company who would indirectly receive a pecuniary benefit to his business. *Asphalt Surfacing Co. v. S. Dakota Dep't of Transp.*, 385 N.W.2d 115, 117 (S.D. 1986) (prohibiting state contract between state agency and president and owner of stock certificates of company who were both Legislators).

This question is distinguishable from *Palmer* and *Asphalt Surfacing*, wherein the Legislators had direct personal ownership interest in the contracting vendor. Instead, the present question looks at whether the same suspicion of improper influence attaches to the receipt of public funds when a vendor employs someone who is also serving in the Legislature.

Legislators have a “fiduciary and trust relation towards the state” which supports Supreme Court Presiding Judge Whiting’s proffering that the intent and application of Article III, § 12 focuses on:

the time and [the legislator’s] relation to the state *when he should cast his vote*, and [the framers] sought to remove from his path an influence that might affect *his vote*. This constitutional provision was designed to prevent any legislator, while he should be serving the state in the enactment of laws, from being tempted and influenced, either consciously or unconsciously, by any selfish interests.

Norbeck & Nicholson Co., 142 N.W. 847, 849, 853 (S.D. 1913) (*Norbeck I*) (Whiting, P.J., concurring specially) (emphasis in original). Certainly, a Legislator-employee’s private interest “should not become antagonistic to his public duty.” *Id.* at 849. The Legislature’s duty is to appropriate funds “for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools” and appropriate other funds to special purposes. S.D. Const. Art. XII, § 2. Our system of checks and balances separates those appropriations from the actual approval and expenditure of funds. *See generally*, SDCL Ch. 4-8. The State Auditor and State Treasurer issue vouchers and sign warrants for the expenditure of public funds. State officers and employees account for invoices received, review for appropriateness and eligibility with program standards or federal guidance, and authorize payments. Likewise, the Legislature neither negotiates nor executes contracts for goods or services, but state employees of the executive and judicial branches execute the procurement process and negotiate terms of thousands of contracts entered into every year.

Attorney generals in other states, applying similar interested contract clauses,³ have concluded differently. *See e.g., Okla. Att’y Gen. Op. No. 05-13, 2005 WL 1142206* (Apr. 25, 2005) (holding “when during the term of a legislator, the Legislature enacts an appropriation to a state agency or state board, and the agency or board uses part of that appropriation to match or acquire federal or private funds by which to employ the . . . legislator, when such appropriation does not have the effect of either authorizing the state agency or state board to enter into such a contract or employment relationship with the legislator or former legislator, or of giving ‘force and effect’ to the contract or employment relationship”); *Tex. Att’y Gen. Op. JM-782* (1987) (finding the Legislator’s pecuniary interest in the state contract consists of his salary as executive director for the contracting non-profit which was neither a direct nor indirect interest).

Under *Palmer* and *Asphalt Surfacing*, no company with ownership interest held by a Legislator may lawfully contract with the state. Does the same prohibition apply to a company that employs a Legislator? This is the situation which the Request wishes to be answered.

³ There are eight state constitutions which have the same or similar interested contract clause: Mich. Const. Art. IV, § 10 (prohibition applies only while serving); Miss. Const. Art. IV, § 109 (also applies to district, city, or town); Neb. Const. Art. III, § 16 (direct interest only and applies to cities too); N.M. Const. Art. IV, § 28 (applies to cities too but not counties); Okla. Const. Art. V, § 23 (two year prohibition and applies to political subdivisions); S.D. Const. Art. III, § 12; Tex. Const. Art. III, § 18 (prohibition applies only while serving); W. Va. Const. Art. VI, § 15 (prohibition applies only while serving).

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?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

In addition to authority and arguments provided above, this question raises a unique consideration for establishing this as a solemn occasion. During the week of December 4, 2023, a publicly traded financial institution questioned its ability to execute a contract with the state in compliance with Article III, § 12 when the financial institution did not know if any of its shareholders may be state Legislators or spouses of Legislators. This situation illustrates the potential significant impact this question may have on contracting within state government. Such ambiguity may be detrimental to the state's ability to contract with major publicly traded companies.

b) Addressing Merits of the Interrogatory

This question addresses the extent to which “indirect” interest may be interpreted. This Court previously interpreted Article III, § 12 as applied to closely held companies whose stocks were owned by Legislators. *See generally Norbeck I*, 142 N.W. 847 (holding that a contract between the state and a corporation whose stockholder was a Legislator was void); *Asphalt Surfacing*, 385 N.W.2d 115 (holding that a Legislator could not contract with the state for highway repairs when the Legislator was the president of the company). Similarly, situations in other states where a Legislator was a stockholder in small, closely held companies were also determined to be prohibited. *See e.g., Mich. Att’y Gen. Op. No. O-4451* (1945) (Legislator owned dairy company and could not sell product to the state). Under *Norbeck I* and *Asphalt Surfacing*, that question is settled.

This present inquiry, however, distinguishes those cases by questioning whether a Legislator may own shares or stock in large, publicly traded companies like Microsoft or

Apple from whom the state procures products or services without violating Article III, § 12. Direction is requested to establish a reasonable end to how indirect can an “indirect” interest be to violate Article III, § 12.

A contract with a Legislator-owned closely held business confers a clear pecuniary benefit to that Legislator. But contracts with a publicly traded company may be so far removed from benefiting a Legislator who owns shares or stock in that company, that it is not so clear Article III, § 12 prohibits it.

The Michigan Attorney General previously issued an analogous opinion on this subject. It considered whether the similar constitutional provision prohibited a contract with a large automobile dealership. Two important factors were weighed in that opinion: (1) the Legislator had less than a one percent interest in the company; and (2) the Legislator did not solicit or negotiate any contracts between the company or the state. *Mich. Att’y Gen. Op. No. 6151, 1983 WL 174693 (1983)*. It opined that this was not a violation of the interested contract clause.

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?

a) This is an important question of law regarding the exercise of the Governor’s executive power and is a solemn occasion.

In addition to authority and arguments provided above in Section A regarding the Governor’s role in authorizing and spending funds, for paying employment salaries, the Governor “supervise[s] the official conduct of all executive and ministerial officers”. SDCL 1-7-1. Such official conduct includes the Governor’s department heads being authorized to sign payroll authorizations. ARSD 3:05:02:01.

b) Addressing Merits of the Interrogatory

Pitts is the controlling case for this question for state employees. *Pitts*, 2001 S.D. 151, 638 N.W.2d 254. Carol Pitts was employed by South Dakota State University when she was elected to the Legislature. She continued employment and challenged the state auditor who refused to pay her for her SDSU salary. This Court held that “[t]he 2001 General Appropriation Bill authorized payment for the employees of the SDSU CES.” *Id.* at 258. Therefore, the interested contract clause would be violated, and her SDSU employment contract was void. *Id.*

This question asks whether *Pitts* should be extended to county employees and officials. Some states’ persuasive authority indicate that their interested contract clause is not a broad prohibition. The Oklahoma Attorney General opined that “a state legislator cannot be employed by the State during the term of office . . . when the source of funds for his or her salary was authorized by law or appropriated by the Oklahoma Legislature during the legislator's term of office.” *Okla. Att’y Gen. Op.* No. 04-25 (Aug. 11, 2004) (citing *State ex rel. Settles v. Board of Education*, 389 P.2d 356 (Okla. 1964)) (holding a Legislator could not have a teaching contract with a school district when the contract was funded with state aid dollars appropriated annually to school districts by the Legislature).

The following year, however, the same Attorney General issued an opinion when the state employment of a Legislator was funded by federal funds and concluded:

It cannot, however, be said that the appropriation act ‘authorizes’ employment of the legislator or former legislator. This is so because the appropriation act does not ‘give force and effect’ to the legislator's contract. . . . It is the federal funds that gave the contract ‘force and effect’ under the *Settles* test.

Okla. Att’y Gen. Op. No. 05-13, ¶ 10-11 (Apr. 25, 2005) (citing *Settles*, 389 P.2d at 360).

For county employees, a New Mexico Court of Appeals held that “the general appropriations bill increasing the salaries of public school employees did not authorize [a teacher’s] and [an administrator’s] employment contract[s];” therefore, there was no violation of New Mexico’s interested contract clause. *State ex rel. Stratton v. Roswell Indep. Sch.*, 806 P.2d 1085, 1096 (N.M. 1991).

Additionally, this question references elected or appointed officers.⁴ There is no South Dakota case analyzing the interested contract clause for elected or appointed state or county officials, yet the South Dakota Attorney General opined that a conflict of interest exists for a Legislator to be a county commissioner because, “a county commissioner elected to the Legislature would, perhaps, have the opportunity to vote on matters affecting his commission tenure and compensation while serving in the Legislature.” *S.D. Att’y Gen. Op.* 82-23 (1982). Indeed, county commissioners are compensated at rates set for per diem or salary by the board of county commissioners. SDCL 7-7-3. If the board of county commissioners does not set the salary, then state law sets a default amount for the county. SDCL 7-7-5. Perhaps there may be an opportunity to increase this default, but it has not been increased since 1992. *Id.*

No authority was located that would suggest there is any distinction between a full-time employee-legislator or one that is only employed temporarily. A plain reading of Article III, § 12 would not suggest a distinction either.

⁴ This question does not analyze that application of the emoluments clause, appointment clause, or lucrative office clause of the South Dakota Constitution that would apply to part of the question. S.D. Const. Art. III, § 12 (first and second clause); S.D. Const. Art. III, § 3.

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

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

This question does not present any additional authority or arguments other than provided above.

b) Addressing Merits of the Interrogatory

The South Dakota Retirement System (SDRS) is a defined benefit retirement plan responsible for managing the state's financially sustainable retirement system for employees of the state and its political subdivisions⁵ and prepares its members for retirement by providing members the foundation to achieve financial security.⁶ SDRS provides retirement, disability, and survivor benefits.⁷ SDRS benefits are based on the member's final average compensation, the member's years of service, and a benefit multiplier.⁸ Retirement benefits are payable for the member's life.⁹ All covered members are required to contribute a percentage of their salary to SDRS.¹⁰ All participating employers are required to contribute an amount equal to the member's contributions.¹¹

⁵ See *SDRS About SDRS*, at https://www.sd.gov/sdrs?id=cs_kb_article_view&sys_kb_id=19e8f9ca1b3abd1045aba93ce54bcb7d&spa=1 (last visited December 15, 2023). Members of SDRS include full-time employees of public schools, the State, the Board of Regents, city and county governments, and other public entities. For purposes of participation, the definition of a full-time employee is any employee who is considered full-time by the participating unit and is customarily employed by the participating unit for 20 hours or more a week and at least 6 months a year, regardless of classification of employment as seasonal, temporary, leased, contract, or any other designation. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

The right to receive retirement benefits vests after three years of contributory service.¹² A primary objective of establishing a state Retirement System for public employees “is to induce able persons to enter and remain in public employment, and to render faithful and efficient service while so employed.” *Chamber of Com. of E. Union Cnty. v. Leone*, 357 A.2d 311, 320 (Ch. Div. 1976), *aff’d*, 382 A.2d 381 (N.J. 1978) (citing 3 *McQuillin, Municipal Corporations*, 3d Ed.Rev.1963 § 12.141).

Retirement policy changes are recommended by the SDRS Board of Trustees to the Legislature, and such changes impact the membership as a whole, not an individual member. There are also intricate administrative rules promulgated by the Board of Trustees.¹³ There can be no change made to affect only a member-legislator’s interest in their retirement. A public employee who later became a Legislator would have, while employed by a participating employer, paid contributions and earned contributory service, all of which is required by law and not influenced by a legislative vote or an appropriation. The Legislature does not determine the annual cost of living adjustment (COLA). The process to determine the COLA considers affordability based on SDRS’s Fair Value Funded Ratio and the annual inflation rate as defined by the Consumer Price Index (CPI-W).¹⁴

In the end, “retirement benefits constitute as real and substantial a form of compensation as does a pay check” with the “significant difference [lying] in the time of payment”, “the right of payment in the future” was earned while public employment

¹² *Id.*

¹³ ARSD chapters 62:01, 62:03, and 62:04.

¹⁴ See *SDRS Cost of Living Adjustment* at https://www.sd.gov/sdrs?id=cs_kb_article_view&sys_kb_id=1cbeac22db5ce1904a395425f3961939&spa=1 (last visited December 15, 2023).

occurred and was paid only upon retirement. *See Leone*, 357 A.2d at 321. No South Dakota case or attorney general opinion has addressed this issue.

While there are cases which address the issue of a legislature creating its own pension and paying out benefits for legislative service, those authorities are distinguishable as this question focuses on retirement compensation for state service other than legislative service. *See Campbell v. Kelly*, 202 S.E.2d 369, 381 (W. Va. 1974) (holding the interested contracts clause did not prohibit the enactment of a legislative pension system). South Dakota does not have a pension plan for Legislators for legislative service.

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

a) This is an important question of law regarding the exercise of the Governor’s executive power and is a solemn occasion.

This question does not present additional argument other than provided above.

b) Addressing Merits of the Interrogatory

This question asks whether the *Norbeck I* and *Asphalt Surfacing* rationale extends to subcontracts. Article III, § 12 prohibits a Legislator’s interest, “directly or indirectly, in any contract with the state” This question asks whether it is a prohibited “indirect” interest to be a subcontractor under a state contract but not contract directly with the state. For the Court’s application, the State’s consultant contract template contains the following requirement:

SUBCONTRACTING: Contractor may not use subcontractors to perform the services described herein without the express prior written consent of the State. Contractor will include provisions in its subcontracts requiring its subcontractors to comply with the applicable provisions of this Agreement, to indemnify the State, and to provide insurance coverage in a manner consistent with this

Agreement. Contractor will cause its subcontractors, agents, and employees to comply with applicable federal, tribal, state, and local laws, regulations, ordinances, guidelines, permits and other standards and will adopt such review and inspection procedures as are necessary to assure such compliance. The State, at its option, may require the vetting of any subcontractors. Contractor shall assist in the vetting process.

App. 1-2. This template provision is generally used in every contract for services with the state. Without the primary contract for services with the state, there can be no subcontract to which the State must consent or require indemnification.

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

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

To add to the arguments provided above, this question invokes the Governor's responsibility of acceptance, administration, or supervision of funds as obligated by SDCL 4-8-17. The Governor accepts federal funds, including the Federal Medical Assistance Percentage (FMAP), received through the Centers for Medicare and Medicaid Services (CMS), enhanced FMAP from the Children's Health Insurance Program (CHIP) block grant, and supervises the administration and expenditure of those federal funds to pay partner providers for services provided to eligible recipients through the state Medicaid or CHIP programs. *See In re Noem*, ¶ 9, 950 N.W.2d at 680 (finding administering and expending funds pursuant to SDCL 4-8-17 involved the exercise of the governor's executive power). The Department of Social Services (DSS) is the federally designated State Medicaid Agency. SDCL 28-6-1; 1-36-5.1; 1-36-7.1. At least five other state agencies also pay Medicaid reimbursement claims to providers, processed through DSS: Department of Human Services (for developmental disabilities and long-term care

services), Department of Corrections (for inmates who are temporarily eligible), Department of Veterans Affairs (for long-term care), Department of Education, and Department of Health. *See, e.g.*, SDCL 1-36A-1.16(3); 1-36A-25 *et. seq.*; 27B-1-15; 28-6-1 (DHS); SDCL 33A-4-4 (DVA); SDCL 13-1-23; 13-14-1; 13-37-1.1 (DOE); SDCL 34-1-18 (DOH).

This question also presents a solemn occasion in three unique ways. First, while it may impact private rights of a Legislator or their business to be a Medicaid provider, it also raises the broader conflict of interest question involving a Legislator's ability to receive state and federal funds for services rendered, not to the state, but to eligible individuals through this program. As such, whether a Legislator may be a Medicaid provider receiving rate reimbursements from the State Medicaid program for services provided to Medicaid eligible recipients is a question that impacts the institutions of state government.

Second, this issue also impacts eligible individuals' access to the medical providers from whom they choose to seek services. Third, some Legislators—former, current, and prospective—are Medicaid providers and have an ownership interest in the company for which they work.¹⁵ To require a case in controversy for each would expend more judicial resources than necessary, whereas an advisory opinion could establish consistent parameters for each affected Legislator, including prospective candidates for the Legislature, to identify whether a conflict exists. As such, whether a Legislator may be a Medicaid provider receiving reimbursements from the State Medicaid program for

¹⁵ Whether a Legislator can be an employee of a Medicaid provider without violating Article III, § 12 is part of the analysis in question #1.

services provided to Medicaid-eligible recipients also is a question not easily answered through the usual adversarial proceeding.

b) Addressing Merits of the Interrogatory

Whether a Legislator or his or her business can contract with the state through a Medicaid provider participation agreement triggers the question as to how connected or remote an “indirect” interest may be for the Legislator to run afoul of Article III, § 12. A similar question was presented in Mississippi which has a very similar interested contracts clause to South Dakota’s clause. Miss. Const. Art. IV, § 109. In *Jones v. Howell*, Howell was a Legislator and owned a pharmacy that participated in the state Medicaid program. *Jones*, 827 So.2d at 693. Another Legislator pharmacist, Read, was an employee of a Medicaid provider pharmacy. *Id.* The Court consolidated both cases and held, “Section 109 must only be interpreted by this Court to provide a rational prohibition against self-dealing and abuse of power. We find that the best analysis hinges upon whether an individual member of the Legislature was in a position to advance the rights and benefits for himself, his friends and family beyond common rights and responsibilities provided to other members of his professional class.” *Id.* at 702. To foster a similar analysis of what level of influence a Legislator may have in deciding their amount of reimbursement in South Dakota, the following facts are helpful.

South Dakota Medicaid is a federal- and state-funded program providing health coverage for people who meet certain eligibility standards. Standards for eligibility are based on requirements set forth in federal law and regulation and are established by the State Medicaid Plan as designed by DSS and approved by CMS. SDCL 28-6-1.

The State Medicaid program acts as an insurance company that pays for medically necessary services for eligible individuals. The Legislature generally does not determine covered services; those are set through the State Medicaid Plan determined by the DSS and approved by CMS, with some benchmarks set by federal law. *Id.* Conceivably, Legislators could have the ability to exercise control over Medicaid covered services through legislation, although this type of legislation has been historically unsuccessful. *See e.g.*, 2018 SB 190 (an act to require the approval of the Legislature before the state adopts certain changes to the Medicaid program); 2019 HB 1229 (an act to require optional services through Medicaid to be authorized through special appropriation).

Healthcare providers wishing to participate in the Medicaid program must sign a provider agreement with DSS. *App.* 3-8. The agreement reflects both federal and state program requirements. For instance, the agreement establishes provider licensure and qualifications, record-keeping requirements, and data access and security requirements. It also describes billing processes and other terms and conditions. Setting these parameters has been delegated by the Legislature to the DSS to promulgate rules pursuant to SDCL 28-6-1.

After covered services are provided to an eligible individual, the Medicaid provider bills the State Medicaid program, which reimburses at certain rates set for that service. *See* SDCL 28-6-1.1; 28-6-1.2. The reimbursement rates may be based on several different calculations or considerations: an equivalent or percentage of the rates established by CMS for Medicare Fee schedule where applicable; Indian Health Services rates where applicable; provider cost data; or a percentage of providers' usual and customary charge passed on to other payors. Generally, the Legislature does not vote on,

approve, or set the rates of reimbursement for services paid to a provider. However, Legislators may pursue legislation to influence or impact rates. *See e.g.*, 2022 HB 1103 (an act to provide a reimbursement schedule for dental services under the Medicaid program). Additionally, the Legislature may set funding levels or targets, may set a methodology for rate setting for a particular service provider type, or may appropriate increases to rates to account for mandatory or discretionary inflation.

State payments made on behalf of an eligible individual are remitted directly to the billing provider pursuant to a participation agreement that is not subject to negotiation by the provider or determined by the Legislature. No provider receives any state payment unless an eligible individual chooses to use their services. In that case, the state payment derives from appropriated general funds and appropriated federal fund spending authority in the general appropriation act or a special appropriation act at roughly 45 cents state general funds and 55 cents federal funds, adjusted annually by the federal government, though currently the ratio is closer to 40% state and 60% federal.

A Legislator has minimal authority to affect any increased pecuniary benefit to themselves as a provider in their role as a Legislator. The funds that provider-legislator receives from the state are payments for services provided to an eligible individual, analogous to an insurance payment. The state receives no direct services or benefits from the provider, other than seeing that eligible individuals can receive the healthcare they need from the provider they choose.

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

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

To add to the arguments provided above, this question invokes the Governor's responsibility of acceptance, administration, or supervision of funds as obligated by SDCL 4-8-17. The Governor accepts federal funds, including Title IV-E funds through the Administration for Children and Families with the U.S. Department of Health and Human Services and supervises the administration and expenditure of those federal funds to pay foster parents on behalf of eligible children for services provided to eligible children through the state Foster Care program. *See In re Noem*, ¶ 9, 950 N.W.2d at 680-81 (finding administering and expending funds pursuant to SDCL 4-8-17 involved the exercise of the governor's executive power). DSS provides child protective services and administers these funds.

This question also presents a solemn occasion. While it may impact private rights of a Legislator being able to receive financial assistance on the same terms as any other citizen licensed to provide foster care, it also raises the broader conflict of interest question involving a Legislator's ability to receive state and federal funds for child protective services rendered to children, not to the state. This issue also impacts the children in need of foster care from being temporarily cared for by a foster parent who is also a Legislator. As such, whether a Legislator may receive financial assistance or other eligible reimbursements from DSS child protective services for foster care is a question that impacts the institutions of state government.

While this question remains pending, Legislators may choose not to agree to a placement which evades creating a case in controversy, and Legislators may opt out of

serving as foster parents due to the uncertainty. As such, whether a Legislator may receive financial assistance or other eligible reimbursements from the foster care program also is a question not easily answered through the usual adversary proceeding.

b) Addressing Merits of the Interrogatory

Hundreds of families across the state are licensed with DSS to provide foster care placement for a child in their community when a separation from the child's family is necessary to keep that child safe. In an abuse and neglect situation, DSS is granted legal custody of a child who is temporarily placed with a safe and stable resource, including a kinship placement if available and appropriate, a therapeutic foster care placement if the child needs a higher level of care, or more typically, a licensed foster parent. *See SDCL 26-8A-13; 26-8A-21; ARSD 67:14:31:21(5), (6), (7)*. This interrogatory is focused on the contractual nature and potential influence by a Legislator who may be a licensed foster parent on the financial aspects of this program.

DSS licenses foster parents annually through Child Protection Services. *SDCL 26-6-13; 26-6-14(2); ARSD 67:42:01; 67:42:05*. There could be state assistance to the foster parent for training needed to complete licensure, but any payment is provided solely at the discretion of DSS. *ARSD 67:42:05:03*.

A placement contract between the state and the licensed foster parent is only entered into when a child is needed to be placed, for either emergency care, specialized family treatment foster care, or basic family foster care. *ARSD 67:14:31:21(5)-(7)*. That agreement contains conditions and obligations for care of the child. *App. 9-16*. By entering into this contract, the foster parent is entitled to payment for services provided to the foster child.

Under Title IV-E of the Social Security Act, South Dakota may use partial federal reimbursement for costs of providing foster care, adoption assistance, and kinship guardianship assistance to children who meet federal eligibility criteria. 42 U.S.C. § 673; SDCL 26-4-7. Besides the state's use of these federal funds, which require a state general fund match, for administrative needs such as training, data collection, background checks, and licensing, these federal funds also pass through the Title IV-E program to pay for a monthly payment to a foster parent made on behalf of a placed eligible child. 42 U.S.C. § 672; SDCL 26-4-7. A licensed foster parent may receive this monthly payment, which can also be referred to as a foster care maintenance payment or allowance.¹⁶ DSS has promulgated rules for the payment. SDCL 26-6-16; ARSD 67:14:31:26; 67:14:31:38. This allowance is paid to the foster parent on behalf of the child and is expected to cover clothing, food, shelter, and incidentals in support of the child. ARSD 67:14:31:38. If income is within eligibility, this allowance is funded at the same ratio as is set for the FMAP. 42 U.S.C. § 674(a). The amount of monthly payment is set annually by DSS. The Legislature does not generally set this amount but impacts the annual increase by adopting a discretionary inflation rate every year in the general appropriations act.

In addition to the allowance, a foster parent may seek approval for foster care support reimbursement of certain other expenses such as special transportation, daycare, special purchases like a prom dress or football camp, or behavioral health support expenses. SDCL 26-6-16; ARSD 67:14:31:51. These reimbursements are approved at the

¹⁶ By example, if a ten-year-old child is placed in basic, non-specialized, foster care, the allowance as of June 1, 2023 is \$672.70.

discretion of DSS to encourage as much normalcy as possible. The Legislature does not determine what expense is reimbursable.

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?

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

This question does not present any additional arguments other than provided above.

b) Addressing Merits of the Interrogatory

While Legislators act as fiduciaries for the state by appropriating money, Legislators also use state roads, access state services, pay taxes, hold professional licenses, and enjoy our parks similar to other citizens. Although Article III, § 12 is interpreted “to include all kinds and all sorts of contracts, implied as well as express”, not all contracts or payments with the state are prohibited; the contract still must be “authorized by any law passed during the term for which he shall have been elected.” *Norbeck I*, 142 N.W. at 851; S.D. Const. Art. III, § 12; *see also Okla. Att'y Gen. Op. No. 05-13*, ¶ 1 (Apr. 25, 2005) (opining the interested contract clause does “not extend to all contracts, but [does] cover contracts authorized by law passed while the member was serving in the Legislature.”). As opposed to addressing the first seven questions in which a Legislator receives money from the state through a contract, this question analyzes the reverse, whereby the legislator-citizen pays money to the state, and in return, receives goods or services from the state on the same terms and conditions as any another citizen.

This question implicates the scope of the phrase “pecuniary benefit” the Court described in *Palmer*. *Palmer*, 75 N.W. at 819. The Court in *Palmer* held, “[t]he purpose of the provision is apparent. It is intended to 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.” *Id.* (emphasis added). Black’s Law Dictionary defines *pecuniary* to mean “[o]f, relating to, or consisting of money; monetary.” BLACK’S LAW DICTIONARY, *Pecuniary* (11th ed. 2019). If Article III, § 12 should be interpreted as only impacting direct or indirect *pecuniary* benefits to Legislators, then the receipt of the goods or services contemplated by this question to Legislators would not violate the interested contracts clause. By the *Palmer* Court adding to Article III, § 12 the requirement that the Legislator must derive a pecuniary benefit, the Court interpreted the clause as restricting the Legislator from directly or indirectly receiving money from the state. *Palmer*, 75 N.W. at 819. A Legislator paying taxes, licensing fees, park entrance fees, or lodging fees to use state services like other citizens does not create a monetary benefit to a Legislator.

The goods or services contemplated by this question are not new goods or services that the Legislature would authorize by the passage of a law. *See Asphalt Surfacing*, 385 N.W.2d 11, *see also S.D. Att’y Gen. Op. No. 08-03*, 2008 WL 2131608 (opining that a Legislator could participate in the GFP walk-in program and enter a contract for payment if that Legislator did not serve when the program was enacted or when substantive changes were made). Contemplated are ongoing programs and services.

A state park pass must be purchased to enter a state park and use those resources. SDCL 41-17-13. The fee amount is set by the GFP Commission in administrative rule, not by the Legislature. *Id.* The funds to operate the parks, including its facilities, are received into the GFP fund. SDCL 41-2-34. That fund is continuously appropriated to GFP, meaning that the funds are not within the general appropriations act and not

annually appropriated by the Legislature. SDCL 41-2-35; 41-2-35.1. The funds are set forth in an informational budget only subject to review by the Legislature. SDCL 41-2-35.1.

Apart from GFP goods or services, there are professional and occupational licensures where a legislator-professional receives services from the state that are offered to all other professionals on the same terms. For example, a nurse pays a license fee and enjoys the services the Board of Nursing provides to all nurses on no terms different than any other nurse licensee. A legislator-nurse has a direct interest in their implied contract with the Board but it is not pecuniary.

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

a) This is an important question of law regarding the exercise of the Governor's executive power and is a solemn occasion.

This question does not present additional argument other than provided above.

b) Addressing Merits of the Interrogatory

This question asks each of the eight questions again but asks whether the “indirect” interest prohibits Legislators’ spouses from contracting with the state.

There is conflicting authority in other states which have considered their similar interested contract clauses. In four scenarios, the Oklahoma Attorney General opined that a spouse’s direct or indirect interest in a contract would also be a violation of the interested contract clause. *Okla. Att’y Gen. Op.* No. 81-129, ¶ 15 (1981) (spouse who owned a company in whole or in part could not contract with the state when the compensation derived by such company or the contract which generates such business was funded by an appropriation); *Okla. Att’y Gen. Op.* No. 87-40, ¶ 14 (1987) (spouse could not enter into a motor license agent contract with the Oklahoma Tax Commission);

Okla. Att’y Gen. Op. No. 72-292 (1973) (spouse could not lease property to the state department of corrections by relying on *Norbeck I*); *Okla. Att’y Gen. Op. No. 81-129* (the interested contract clause extends to a close family member of a Legislator).

However, Michigan would allow a contractual arrangement with a Legislator’s spouse. *Mich. Att’y Gen. Op. No. 5681 (1980)* (spouse owned stock in a corporation which leased land to another corporation which was issued a parimutuel horse racing track license by the State Racing Commission) (other examples cited within opinion). The Michigan Attorney General found another constitutional provision persuasive when it opined that because married women are entitled to own, retain, and dispose of their earnings, a husband could be a county commissioner and his spouse could be the social services director in the same county. *Mich. Att’y Gen. Op. No. 4869 (1975)*. South Dakota has the same constitutional protection for the property of married women. “The real and personal property of any woman in this state, acquired before marriage, and all property to which she may after marriage become in any manner rightfully entitled, shall be her separate property, and shall not be liable for the debts of her husband.” S.D. Const. Art. XXI, § 5.

CONCLUSION

This Court is presented with an historic opportunity to provide constitutional direction regarding the interested contract clause of Article III, § 12. Separate from the need for this advisory opinion to fill two vacant legislative seats, the Legislature and Attorney General support seeking this Court’s guidance as these questions greatly impact all institutions of the State. For the above reasons, the Governor respectfully requests that

this Court accept the Request for an advisory opinion and address the specific interrogatory questions.

Dated this 15th day of December, 2023.

Respectfully submitted,

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