IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30488

IN RE: REQUEST OF GOVERNOR KRISTI NOEM FOR AN ADVISORY OPINION

BRIEF OF THE SOUTH DAKOTA LEGISLATURE

FOR GOVERNOR KRISTI NOEM:

Katie J. Hruska
General Counsel
OFFICE OF THE GOVERNOR
500 East Capitol
Pierre, SD 57501
(605) 773-5999
Katie.Hruska@state.sd.us

FOR THE SOUTH DAKOTA LEGISLATURE:

Ronald A. Parsons, Jr.
JOHNSON JANKLOW & ABDALLAH LLP
101 S. Main Ave., Suite 100
Sioux Falls, SD 57104
(605) 338-4304
ron@janklowabdallah.com

FOR THE ATTORNEY GENERAL'S OFFICE:

Marty J. Jackley
SOUTH DAKOTA ATTORNEY GENERAL
Paul S. Swedlund
DEPUTY ATTORNEY GENERAL
1302 E. Highway 14 #1
PIERRE, SD 57501
(605) 773-3215
Marty.Jackley@state.sd.us
Paul.Swedlund@state.sd.us

Order Directing Briefing filed on October 31, 2023

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES:

SOUTH DAKOTA CASES:

TABLE OF AUTHORITIES (CONT.)

Page

OTHER CASES:

TABLE OF AUTHORITIES (CONT.)

Page

CONSTITUTIONAL PROVISIONS:

STATUTES:

TABLE OF AUTHORITIES (CONT.)

Page

SECONDARY SOURCES:

JURISDICTIONAL STATEMENT

This Court has express jurisdiction over this matter under Article V, Section 5 of the South Dakota Constitution.

REQUEST FOR ORAL ARGUMENT

The South Dakota Legislature respectfully requests the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. Should this Court provide advisory guidance requested by the Governor under Article V, Section 5 of the South Dakota Constitution?

- *In re Noem*, 2020 S.D. 58, 950 N.W.2d 678
- *In re Construction of Constitution*, 54 N.W. 650 (S.D. 1893)
- *Opinion of Judges*, 162 N.W. 536 (S.D. 1917)

II. What is the plain meaning and true scope of Article III, Section 12 of the South Dakota Constitution as applied to the questions certified by the Governor?

- *Palmer v. State*, 75 N.W. 818 (S.D. 1898)
- *Norbeck & Nicholson Co. v. State* (*Norbeck I*), 142 N.W. 847 (S.D. 1913)
- *Norbeck & Nicholson Co. v. State* (*Norbeck II*), 144 N.W. 658 (S.D. 1913)

STATEMENT OF THE PROCEEDINGS

On October 20, 2023, the Honorable Kristi Noem, 33rd Governor of the State of South Dakota, invoked the authority vested in her office by Article V, Section 5 of the South Dakota Constitution to seek an Advisory Opinion on a series of questions involving the exercise of her executive power and proper application of the Contracts Clause of Article III, Section 12.

This request was occasioned by immediate and profound concern raised by executive actions, and the prospect of additional executive action, to enforce various perceived interpretations of the Contracts Clause—about which there is substantial misconception and disagreement—presently casting a shadow of uncertainty across the spectrum of state government. In addition, there currently are at least two pending vacancies in the Legislature, for which the Governor has appointment authority under Article III, Section 10, that may be affected by the lifting of those clouds.

The Governor's request was supported by Representative Hugh Bartels, Speaker of the House, and Senator Lee Schoenbeck, President Pro Tempore of the Senate, and Attorney General Marty Jackley

On October 31, 2023, this Court entered its order directing the Governor, Attorney General, and Legislature to submit briefs addressing: (1) whether the Governor's request meets the standard for advisory opinions; and (2) the merits of the questions presented.

ARGUMENT

I. BECAUSE THEY RELATE TO HER EXECUTIVE POWERS, THIS COURT SHOULD PROVIDE GUIDANCE ON THE ISSUES RAISED BY THE GOVERNOR'S IMPORTANT AND SOLEMN REQUEST.

Article V, Section 5 provides that "[t]he Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of [her] executive power and upon solemn occasions." As this Court has explained, this provision "enlarged the usual jurisdiction and duties of the judges of the South Dakota Supreme Court by adding a unique and important proceeding devoid of the usual indica of judicial proceedings." *In re Daugaard*, 2016 S.D. 27, ¶4, 884 N.W.2d 163, 165; *In re Construction of Constitution*, 54 N.W. 650, 651 (S.D. 1893).

In 2020, this Court provided advisory guidance regarding the scope of Article III, Section 12. *See In re Noem*, 2020 S.D. 58, 950 N.W.2d 678. This Court held that the question presented raised an important question of law involved in the exercise of the Governor's executive power because her administration of federal Covid relief funds would "result in immediate consequences having an impact on the institutions of state government" and involved a question "that cannot be answered expeditiously through usual adversary proceedings." *Id.* ¶9, 950 N.W.2d at 680-81.

The same is true here, only in greater magnitude. As the Governor explained: "[T]hese important questions of law are connected to my executive power to overseeing the faithful execution of, adherence to, and restraining

violations of Article III, Section 12 by the state agencies under my authority." Guidance is essential to protect public servants who administer and remit funds for state and county contracts on an almost daily basis to "ensure that contracts are executed, and payments made in accordance with and authorized by state law."

The present situation is even more related to her executive duties because of the pending appointments invoking her power under Article III, Section 10. *Opinion of Judges*, 162 N.W. 536, 538 (S.D. 1917) (holding that issues raised by Governor's power to appoint members of rural credit board presented important questions of law under Article V, § 5). Guidance to alleviate the prevailing confusion is desperately needed because, in a state with part-time, citizen legislators who do not receive much compensation, many potential qualified candidates are deterred from ever stepping forward because the lack of clear direction makes public service an unnecessary risk to their livelihoods. Resolving such situations on a "case by case" basis has produced 130 years of disagreement and uncertainty, with only a handful of adversarial proceedings initiated during that time.

This Court further held in *Noem* that the Governor's request presented a solemn occasion, explaining:

> The Court has determined that you have presented an important question of law. The issue is not pending before the Court. While the issue does involve private rights, it also raises a broader conflict of interest question involving a legislator's entitlement to appropriated funds, which is an issue with significant impact on State government and public perceptions

> associated with the distribution of such an extraordinary large sum of money.

Id. Again, that same reasoning is applicable here. The solemnity of the occasion is further heightened, moreover, because of the necessity "to prevent former, current, and prospective legislators and candidates from unwittingly violating this broad constitutional prohibition." (Governor's Request at 3).

As recently noted in exceedingly informative and in some ways alarming testimony by the State Auditor, there may be a substantial number of current legislators—perhaps a quarter of the Legislature—whose status could be affected by an overly broad interpretation of the Contracts Clause. This is a potential crisis that could impact the entire government.[1]

Moreover, the potentially incorrect interpretation of a constitutional provision—resulting in self-disqualification of legislators and potential candidates, as well as economic uncertainty and anxiety experienced by legislators and their spouses regarding their livelihoods—presents a solemn occasion involving a potentially profound distortion of the democratic process.

The South Dakota Legislature supports the Governor's request.

[1] https://sdpb.sd.gov/sdpbpodcast/2023/interim/exe11142023.mp3 (testimony begins at 31:05).

II. UNDER THE PLAIN MEANING OF ITS TEXT, THE PROHIBITION IN THE CONTRACTS CLAUSE APPLIES TO CONTRACTS "AUTHORIZED" BY ANY LAW—IT EXPRESSLY DOES NOT APPLY TO CONTRACTS MERELY FUNDED BY ANY LAW.

A. An unambiguous constitutional provision must be interpreted according to the plain meaning of its text.

The object of constitutional construction is "to give effect to the intent of the framers of the organic law and of the people adopting it." *Doe v. Nelson*, 2004 SD 62, ¶12, 680 N.W.2d 302, 307 (quoting *Poppen v. Walker*, 520 N.W.2d 238, 242 (S.D. 1994)). When determining the meaning of the South Dakota Constitution, courts first examine its text. *See Brendtro v. Nelson*, 2006 SD 71, ¶16, 720 N.W.2d 670, 675. Words used in the Constitution are taken in their natural and obvious sense and given the meaning they have in common usage. *See In re Janklow*, 1999 SD 27, ¶5, 589 N.W.2d 624, 626.

"'In the absence of ambiguity,' moreover, 'the language in the constitution must be applied as it reads' and this Court is obligated to apply its 'plain meaning.'" *Brendtro*, 2006 SD 71, ¶36, 720 N.W.2d at 682; *In re Issuance of Summons*, 2018 S.D. 16, ¶18, 908 N.W.2d 160, 167. As this Court has explained this fundamental rule of construction:

> As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Schomer v. Scott, 274 N.W. 556, 561 (S.D. 1937).

This Court's textualist approach differs from those that broadly seek to enforce the perceived "spirit" or purpose behind an enactment:

> Perhaps the nontextualists' favorite substitute for text is purpose. So-called purposivism, which has been called 'the basic judicial approach these days,' facilitates departure from the text in several ways. Where purpose is king, text is not—so the purposivist goes around or behind the words of the controlling text to achieve what he believes is the provision's purpose.

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 18 (Thomson/West 2012).

Textualism, on the other hand, best validates the rule of law by: "(1) giving effect to the text that lawmakers have adopted and the people are entitled to rely on, and (2) giving *no* effect to lawmakers' unenacted desires." *Id.* at 29. The bottom line in South Dakota, as this Court consistently has held, is that "[w]e must assume the drafters said what they meant and meant what they said." *Brendtro*, 2006 SD 71, ¶36, 720 N.W.2d at 682.

B. The plain meaning of the text of the Contracts Clause unambiguously refers to the legislative authorization, not merely funding, of contracts in which a legislator has a direct or indirect interest.

Article III, Section 12 has remained unchanged since it was framed at our constitutional conventions and adopted by the people in 1889. It consists of two distinct clauses: (1) the Appointments Clause; and (2) the Contracts Clause. These two clauses do not overlap. Each establishes independent parameters of prohibited conduct for legislators.

1. The Appointments Clause

The Appointments Clause addresses a legislator being appointed or elected to other offices. It contains several specific prohibitions:

> No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased during the term for which he was elected,
>
> nor shall any member receive any civil appointment from the Governor, the Governor and senate, or from the Legislature during the term for which he shall have been elected,
>
> and all such appointments and all votes given for any such members for any such office or appointment shall be void;

S.D. Const., Art. III, § 12. The Appointments Clause is *not* at issue here.

2. The Contracts Clause

The Contracts Clause addresses the separate situation of a legislator who may be interested in a contract with the state or a county. It provides:

> [N]or shall any member of the Legislature during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term for which he shall have been elected.

S.D. Const., Art. III, § 12. The Governor's request here implicates the true meaning of the Contracts Clause.

Under the plain meaning of its text, the Contracts Clause prohibits a sitting legislator (or former legislator within one year) from being interested, directly or indirectly, in one specific category of contracts with the state or

any county. That category is limited to contracts "*authorized* by any law" passed by the Legislature during the term in which that legislator served.

The Contracts Clause clearly does not flatly prohibit a legislator from being interested in any contract with the state. If the framers intended for that to be the case, that is what they would have said in enacting the clause.

It also clearly does not prohibit a legislator from being interested in any contract merely *funded* by the state during the term for which that legislator was elected. If that is what the framers intended, that is what the clause would have said.

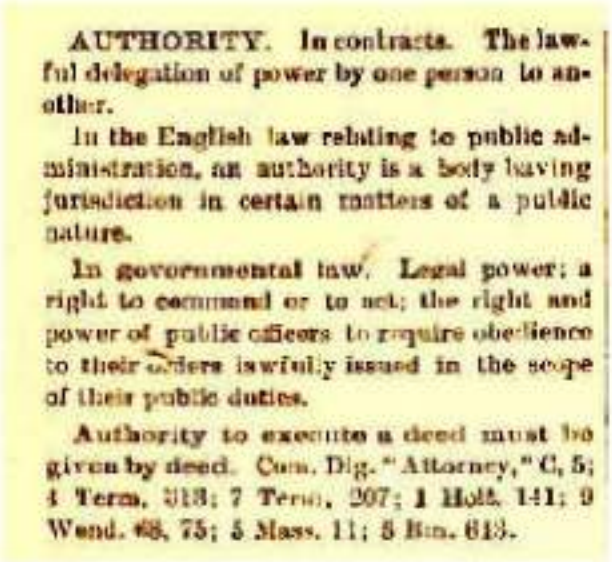
And it clearly does not broadly prohibit a legislator from simply being an end recipient of any funds appropriated during the term for which that legislator was elected. Once again, if that was the framers' intention, that is what they would have said.

Instead, the prohibition applies *only* to contracts with a state or county, and further applies *only* to contracts: (1) authorized; (2) by any law; (3) passed during the legislator's term. The scope of the prohibition thus turns on the plain meaning of those terms.

Unfortunately, none of this Court's previous decisions addressing the Contracts Clause (and there are only a handful) have engaged in the required textual analysis of the clause. Specifically, none of this Court's cases have examined the plain meaning of the phrase "authorized by any law" in the Contracts Clause. The South Dakota Legislature respectfully suggests that

in acting upon the Governor's request, this Court should engage in that textual analysis now.

The first edition of Black's Law Dictionary released in 1891 does not define the verb "authorize," but defines the term "authority" as "the lawful delegation of power" by one to another in contract law and as "Legal power; a right to command or to act" with regard to governmental law:



AUTHORITY. In contracts. The lawful delegation of power by one person to another.

In the English law relating to public administration, an authority is a body having jurisdiction in certain matters of a public nature.

In governmental law. Legal power; a right to command or to act; the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties.

Authority to execute a deed must be given by deed. Com. Dig. "Attorney," C, 5; 4 Term, 313; 7 Term, 207; 1 Holt, 141; 9 Wend. 68, 75; 5 Mass. 11; 3 Bin. 613.

Henry Campbell Black, *A Dictionary of Law* (West Publishing Co. 1891) (App. 1-2). Modern editions define "authorize" as:

> **1.** To give legal authority; to empower <he authorized the employee to act for him>. **2.** To formally approve; to sanction <the city authorized the construction project>.

Bryan Garner, *Black's Law Dictionary* (Thomson West 8th ed. 1999).

That definition is consistent with the plain meaning of the same term in 1889 when the South Dakota Constitution was framed and adopted. Webster's first comprehensive dictionary defined "authorize" and "authorized" as follows:

AU'THORIZE, *v. t.* [Fr. *autoriser*; Sp. *autorizar*.]

1. To give authority, warrant or legal power to; to give a right to act; to empower; as, to *authorize* commissioners to settle the boundary of the state.
2. To make legal; as, to *authorize* a marriage.
3. To establish by authority, as by usage, or public opinion; as an *authorized* idiom of language.
4. To give authority, credit or reputation to; as to *authorize* a report, or opinion.
5. To justify; to support as right. Suppress desires which reason does not *authorize*.

AU'THORIZED, *pp.* Warranted by right; supported by authority; derived from legal or proper authority; having power or authority.

Noah Webster, *An American Dictionary of the English Language* (S. Converse 1828). (App. 3-4). An even more contemporaneous edition of his magnum opus, released in 1880 only a few years before the first of South Dakota's three constitutional conventions, defined "authorize" as:

Au'thor-ize, *v. t.* [*imp.* & *p. p.* AUTHORIZED; *p. pr.* & *vb. n.* AUTHORIZING.] [L. Lat. *auctorizare*, Pr. *auctorisar*, *authorisar*, Fr. *autoriser*, Sp. & Pg. *autorizar*, It. *autorizzare*. See AUTHOR.]

1. To clothe with authority, warrant, or legal power; to give a right to act; to empower; as, to *authorize* commissioners to settle the boundary of the state.
2. To make legal; to legalize; as, to *authorize* a marriage.
3. To establish by authority, as by usage or public opinion; as, idioms *authorized* by usage.
4. To give authority, credit, reputation, or support to; as, to *authorize* a report, or an opinion.

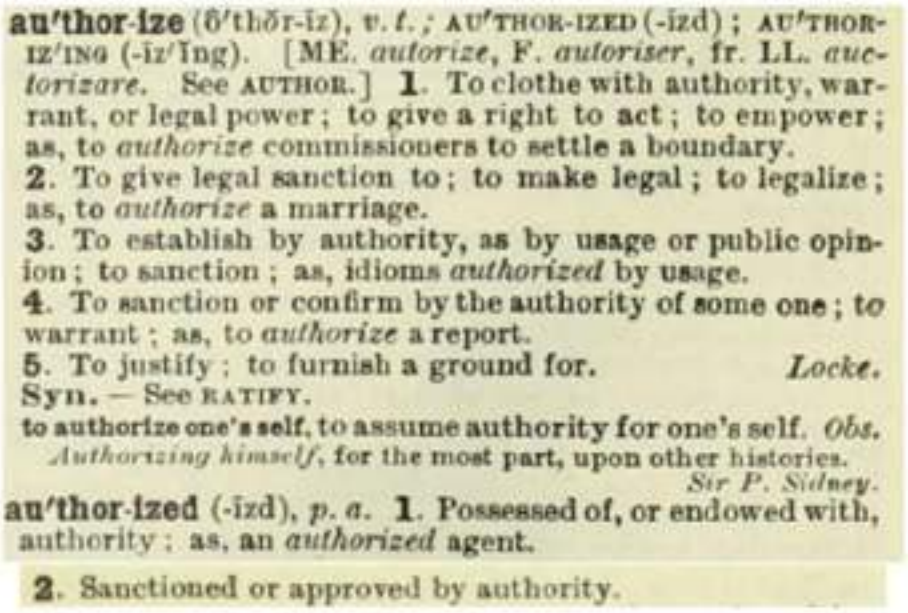
> A woman's story at a winter's fire
> *Authorized* by her grandam. *Shak.*

5. To rely for authority. [*Obs.*]

> *Authorizing* himself, for the most part, upon other histories. *Sidney.*

Noah Webster, *American Dictionary of the English Language* (G. & C. Merriam 1880) (App. 5-6).

Released in 1930, Webster's New International Dictionary defined "authorize" and "authorized" similarly:



au'thor-ize (ô'thŏr-īz), *v. t.*; AU'THOR-IZED (-īzd); AU'THOR-IZ'ING (-īz'ĭng). [ME. *autorize*, F. *autoriser*, fr. LL. *auctorizare*. See AUTHOR.] **1.** To clothe with authority, warrant, or legal power; to give a right to act; to empower; as, to *authorize* commissioners to settle a boundary.
2. To give legal sanction to; to make legal; to legalize; as, to *authorize* a marriage.
3. To establish by authority, as by usage or public opinion; to sanction; as, idioms *authorized* by usage.
4. To sanction or confirm by the authority of some one; to warrant; as, to *authorize* a report.
5. To justify; to furnish a ground for. *Locke.*
Syn. — See RATIFY.
to authorize one's self, to assume authority for one's self. *Obs.*
Authorizing himself, for the most part, upon other histories. *Sir P. Sidney.*
au'thor-ized (-īzd), *p. a.* **1.** Possessed of, or endowed with, authority; as, an *authorized* agent.
2. Sanctioned or approved by authority.

Webster's New International Dictionary of the English Language, (G. & C. Merriam Co. 1930) (App. 5-7).

None of these definitions equate the term "authorized" with the entirely separate notion of "funded." Indeed, the concepts of funding or appropriations do not make any appearance at all in the Contracts Clause.[2] Courts, of course, are precluded from reading language into laws that is simply not there. *See State through Attorney General v. Buffalo Chip*, 2020 S.D. 63, ¶29, 951 N.W.2d 387, 396 n.15. That basic rule is even more

[2] "Where the meaning of a constitutional provision is unclear, it is appropriate to look at the intent of the drafting bodies[.]" *Doe*, 2004 SD 62 at ¶10, 680 N.W.2d at 306. Because the plain meaning of "authorized by any law" is unambiguous, there is no occasion to consult the constitutional debates here. But in any event, there is no record of any debate or discussion of the Contracts Clause during the conventions in 1883, 1885, or 1889. There is only discussion of the Appointments Clause.

imperative as applied to the South Dakota Constitution. As this Court once explained in a somewhat analogous context:

> "[I]f the word 'expenses' had occurred in our Constitution, we would not hesitate for one moment to declare the law unconstitutional. It is the absence of this word, and the absence of any provision limiting the right of the Legislature to provide expenses, which it makes it difficult to see the applicability of this case to the matter at bar.

Christopherson v. Reeves, 184 N.W. 1015, 1018 (S.D. 1921). The framers clearly understood the concept of funding and appropriations as a distinct and unique part of the legislative process because they established an entire constitutional article to govern that area. *See* S.D. Const., Art XII. And yet those terms are absent from the Contracts Clause.

When analyzing the text of the Mississippi Constitution's contracts clause, Justice Robertson authored a thoughtful dissent engaging in a persuasive textual analysis of the plain meaning of the key term:

> The word "authorized," and the concept of authority, have familiar meanings. They import notions of legal power. One has authority regarding a matter not merely when as a practical matter he may act with effect but when some valid law provides that, if he so acts, no one may of right complain or interfere. Authority connotes the *lawful* delegation of power by one legal entity to another. Black's *Law Dictionary* 168 (4th ed. 1957). One "authorized" to act is one possessed of authority, that is, possessed of legal or rightful power." *Id.* at 169.
>
> How then do "contracts" become "authorized" within the best fit meaning of Section 109? The answer is found in identifying the legal entity which is *legally* empowered to obligate each contracting party to the terms of the contract.

Frazier v. State by and through Pittman, 504 So.2d 675, 711 (Miss. 1987) (Robertson, J., concurring and dissenting in part).

> The specific Section 109 question becomes, have Sen. Anderson and Rep. Frazier been interested in a contract "authorized by any law passed or order made by any board of which he may ... have been a member....?"
>
> On the facts before us, the answer is inescapably "No." The *only* legal entity that authorized, or that had authority to authorize, the contract was the Board of Trustees. There is no evidence before us that either Anderson or Frazier is or ever has been a member of the Board of Trustees.
>
> Conversely, neither the Senate, of which Anderson is a member, nor the House of Representatives, of which Frazier has been and is a member, has authorized either contract. That is, neither the Senate nor the House of Representatives has taken any action which has obligated anyone to perform the duties owing to Frazier by virtue of the contract.

Id. at 711-12.

> The majority's retort is that, even though the legislature has no legal power to authorize or enter a contract with Anderson or Frazier to teach at Jackson State, it "funds" contracts the Board authorizes. Funding is said to be tantamount to authorization.
>
> There are many problems with this argument, not the least of which is that neither Mr. Webster nor Mr. Black has ever defined "authorized" to include "funded," nor vice versa.
>
> . . . The suggestion that "authorized" encompasses "funded" purely and simply violates the rule of "best fit." Funding is not a meaning that fits the word "authorized."

Id. at 712-13.

Similarly, under the plain meaning of the term "authorized" in the Contracts Clause of the South Dakota Constitution, in order for a contract to have been "authorized by any law passed during the term for which he shall have been elected," a specific law must be identified that provided the legal authority, not simply a revenue source, for the contract in which the

legislator is interested. As noted by Justice Robertson, moreover, the modifiers "directly or indirectly" refer only to the *interest* that a legislator may have in a particular contract, and do not apply to the phrase "authorized by any law." *Id.* at 712.

C. Under the terms of Article XII, Section 2, a general appropriation bill provides funding to departments and agencies, as opposed to legal authority or authorization to enter into contracts.

This raises the question of whether a general appropriation bill, a unique species of law specifically defined under the South Dakota Constitution, does, in fact, "authorize" individual contracts under the plain meaning of that term, or whether it simply provides funding to the various departments and agencies of government. Unfortunately, although the issue has been summarily addressed in a few of this Court's decisions addressing the Contracts Clause, none have examined the question in any detail from a textual perspective.

Certainly, a general appropriation bill qualifies as "any law" as that phrase is used in the Contracts Clause. Each contains the enacting clause "Be it enacted by the Legislature of the State of South Dakota" and is passed by a majority of each branch as specified under Article III, Section 18.

Article XII, however, expressly limits what may be included in a general appropriation bill:

> The general appropriation bill *shall embrace nothing but appropriations* 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. All other appropriations shall be made by separate bills, each embracing one object, and shall require a two-thirds vote of all the members of each branch of the Legislature.

S.D. Const., Art. XII, Section 2. As this Court has explained:

> A general appropriation bill is not legislation in the true sense of the term. It is as its language implies 'a setting apart of the funds necessary for the use and maintenance of the various departments of the state government already in existence and functioning.
>
> . . . *In providing that it should embrace nothing else, the framers of the Constitution undoubtedly intended that members of the legislature should be free to vote on it knowing that appropriations and nothing else were involved.'*
>
> *Its singular subject is the appropriation of money. It serves no other purpose and its contents are constitutionally defined and limited.*

State ex rel. Oster v. Jorgenson, 136 N.W.2d 870, 872 (S.D. 1965) (emphasis supplied). As can be readily seen from Senate Bill 210, the general appropriation bill for 2023, the Legislature adheres to that requirement and simply appropriates funds to various departments and agencies:

An Act to appropriate money for the ordinary expenses of the legislative, judicial, and executive departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. There is hereby appropriated out of any money in the state treasury not otherwise appropriated the following sums of money or expenditure authority, or so much thereof as may be necessary, for the ordinary expenses of the legislative, judicial, and executive departments of the state, certain officers, boards, and commissions, and support and maintenance of the educational, charitable, and penal institutions of the state for the fiscal year ending June 30, 2024.

	GENERAL FUNDS	FEDERAL FUNDS	OTHER FUNDS	TOTAL FUNDS
SECTION 2. OFFICE OF THE GOVERNOR				
(1) Office of the Governor				
Personal Services	$2,185,269	$0	$0	$2,185,269
Operating Expenses	$489,907	$0	$0	$489,907
Total	$2,675,176	$0	$0	$2,675,176
FTE				21.5

(App. 9). Such blanket appropriations do not themselves clothe those departments and agencies with the legal authority necessary to enter into specific contracts. By constitutional imperative, such authority is conferred by other laws previously enacted, which is how the expenses become "ordinary expenses" and "current expenses" under Article XII, Section 2. Blanket appropriations set forth in a general appropriation bill constitutionally required to "embrace nothing but appropriations" thus do not "authorize" contracts within the plain meaning of the Contracts Clause in Article III, Section 12.

In sharp contrast, *special* appropriations (any appropriation not a general appropriation) must be passed in separate bills and require a two-thirds vote by each branch to become law under Article XII, Section 2. Indeed, a close reading of that provision strongly suggests that a special appropriation is what the framers had in mind when using the phrase "authorized by any law" in the Contracts Clause, because the Legislature routinely both "authorizes" *and* provides funding for specific purposes in which an individual member may have a contractual interest in special appropriations.

For example, Senate Bill 17 enacted this year authorizes and appropriates money for specific water resource projects to be overseen by the Board of Water and Natural Resources. (App. 42). Section one identifies eleven different water projects necessary for the general welfare and

"*authorizes* the projects, pursuant to [SDCL] 46A-1-2, to be included in the state water resources management system, to serve as the preferred, priority objectives of the state[.]" (App. 42). Additional sections appropriate money for those projects and other purposes. The result is that contracts for those projects have been "authorized by any law" enacted by the Legislature within the meaning of the Contracts Clause. No legislator serving during the term Senate Bill 17 was passed could have an interest in any such contracts without violating that constitutional provision.

The New Mexico Constitution contains a provision nearly identical to our Contracts Clause. In *State ex rel. Baca v. Otero*, 267 P. 68 (N.M. 1928), the New Mexico Supreme Court considered whether a sitting legislator's contract of employment as a rural school supervisor, funded by a state general appropriation bill, violated New Mexico's clause. Reversing the lower court, the Supreme Court held it did not:

> Respondent argues that an employment is based upon a contract, and that the only authority to employ any person to perform such duties rests in the general appropriation bill passed by the Legislature in 1927, and that inasmuch as relator was a member of that Legislature he was precluded from entering into such contract by the constitutional provision above quoted.
>
> In this position counsel for respondent are in error. *The contract of employment was not authorized by the appropriation bill of the 1927 Legislature, of which relator was a member, but was authorized by Laws 1923, c. 148, § 201, subsec. (a), which gives to the superintendent of public instruction the power to supervise all municipal and rural schools and authorities thereof. Relator was therefore entitled to enter into this contract of employment,*

and is entitled to receive his compensation and expenses incurred in the administration of the same.

Id. at 69 (emphasis supplied).

In *State ex rel. Maryland Casualty Co. v. State Highway Comm'n*, 35 P.2d 308 (N.M. 1934), similarly, the highway commission contracted with a local insurance agency owned by a state legislator for worker's compensation for state highway employees. Even though the contract was entered into and premiums invoiced to the commission during the legislator's term, the court held it did not violate the contracts clause because the statute by which the Legislature "authorized" the Commission to purchase such insurance was enacted before legislator took office. *See id.* at 309-12; *State ex rel. Stratton v. Roswell Ind. Schools*, 806 P.2d 1085, 1095-96 (N.M. Ct. App. 1991) (holding that "general appropriations bill increasing the salaries of public school employees did not authorize Casey's and Hocevar's employment contract").

The New Mexico courts thus recognize that the restriction created by the phrase "authorized by any law" in its contracts clause—virtually identical to the South Dakota provision—refers to laws that actually do "authorize" contracts under the plain meaning of that term, as opposed to laws such as a general appropriation bill that merely appropriate funds.

The framers of the South Dakota Constitution understood with unique precision how the legislative and appropriations processes were intended to work because they were the architects of those very processes. The South Dakota Legislature respectfully suggests that under the plain meaning of the

constitutional text selected by the framers and ratified by the people in 1889, the specific and limited prohibition regarding a legislator's interest in contracts "authorized by any law passed during the term for which he shall have been elected," does not broadly extend to all contracts that merely are funded by such a law.

Rather, the specific law in question must have provided the legal authority for the contract in question in order to fall within the plain meaning of the constitutional prohibition. To adopt a contrary interpretation, one would have to rationalize that the framers of the Constitution did not say what they actually meant—and did not mean what they actually said—in violation of this Court's fundamental precepts for interpreting constitutional provisions.

D. Under this Court's precedent, the Contracts Clause was interpreted in a manner consistent with its text until obiter dicta emphasizing public policy goals swallowed the true holdings in Palmer, Norbeck I, and Norbeck II.

When construing a constitutional provision, this Court "may look to the history of the times and examine the state of things existing when the constitution was framed and adopted." *City of Sioux Falls v. Sioux Falls Firefighters*, 234 N.W.2d 35, 37 (S.D. 1975). Without question, one of the overarching concerns of the framers was combatting corruption by the legislators. As detailed by one of South Dakota's leading historians:

> One of the strongest pillars of republican theory involves the need to guard against corruption. During the constitutional

> debates in Dakota Territory, perhaps the strongest efforts of the delegates were directed at crafting a document which limited corruption. Instead of being unconsciously mired in the political corruption of the post-Civil War era, the advocates of statehood were acutely aware of these democratic shortcomings and specifically sought to transcend them.
>
> . . . The delegates to the constitutional convention focused their anti-corruption efforts on the legislature. The Dakota constitution would include restrictions placed on legislator's ability to compete for state contracts, a prohibition on legislators' holding offices created when they were in the legislature, and bans on corrupt solicitation and "lobbying" which were punishable by fine and imprisonment.

Jon Lauck, "The Organic Law of a Great Commonwealth," 53 S.D. L. Rev. 203, 233 (2008); *see also* Jon Lauck, *Prairie Republic: The Political Culture of Dakota Territory, 1879-1889*, 102-04 (Univ. of Okla. Press 2010).

Even so, it is the text of the organic law actually adopted by the People that must delineate and govern the constitutional expression of the laudable public policy goal of anti-corruption. This Court thus "is not concerned with the wisdom or expediency or the need of a constitutional provision, but only whether it limits the power of the legislature." *Poppen*, 520 N.W.2d at 242; *State ex rel. Mills v. Wilder*, 42 N.W.2d 891, 895 (S.D. 1950) ("To bend our organic law to the popular will by astute construction is not our function").

In tracing this Court's decisions applying the Contracts Clause, it is possible to discern the point at which dicta related to enforcing the perceived public policy goals of the framers overwhelmed and subsumed the plain meaning of the constitutional text.

1. Palmer

This Court first took up the Contracts Clause in 1898, nine years after statehood. *See Palmer v. State*, 75 N.W. 818 (S.D. 1898). During the 1897 legislative session, a bill was passed (S.B. 1) entitled, in part, "An Act to ... to Confer upon the Board of Railroad Commissioners Certain Powers in Relation Thereto, and to Provide for the Enforcement of the Orders and Regulations of Said Commissioners." *Id.* at 819 (citing SL 1897, Ch. 110, § 41) (App. 48). Specifically, this law conferred authority on the Board to enter into certain contracts with outside legal counsel:

> Said commissioners are hereby also *authorized*, when in their opinion it is necessary or proper, to employ any and all additional legal counsel to assist them in the discharge of their duties and to conduct and prosecute any and all suits they may determine to bring under the provisions of this act or any law of this state, or to the assist the attorney general in the prosecution of the same.

Id. (emphasis supplied) (App. 48). During the same session, the Legislature passed the general appropriation bill (S.B. 244) which appropriated $4,500 to the Board's litigation fund. *See id.* (citing SL 1897, Ch. 10, § 20). (App. 70).

An attorney named C.S. Palmer elected to serve in the South Dakota Senate during the term for which these laws were passed was hired by the Board to defend it. When Senator Palmer's invoice was submitted for payment, the State Auditor "declined to allow it, for the reason that plaintiff was and is a member of the legislature which enacted the *law* which *authorized* his employment." *Id.* The law that *authorized* the contract, of

course, was *not* the general appropriation bill, but S.B. 1, the Railway Act authorizing the Board to retain him. Ratifying the Auditor's decision not to pay the invoice, this Court held:

> If the board was *authorized* to employ counsel at the expense of the state, and *the statute cited clearly clothed it with such authority*, such employment created a contract with the state. It was a contract authorized by laws passed during the term of the legislature for which plaintiff was elected, executed during the term for which he was elected, and in which the constitution expressly declares he shall not be directly or indirectly interested.

Id. (emphasis supplied). Because Senator Palmer was in the Legislature when it enacted the law that authorized the Board to employ legal counsel, his contract with the Board clearly violated the constitutional provision.

Unfortunately, the *Palmer* decision also included obiter dicta making broad policy pronouncements about the "spirit" and "purpose" of the Contracts Clause, as opposed to the plain meaning of its text. That policy-oriented dicta would seem to prohibit any funds originating from a general appropriation bill from eventually trickling down through state departments or agencies and ultimately being received, for whatever reason, by a legislator in office when the annual general appropriation bill was passed. *See id.* That same dicta also seems to flatly dismiss "[a]ll contracts made during the prohibited period" as "invalid" without regard to whether they were authorized by a law passed during the legislator's term. *Id.*

As discussed above, the broad policy pronouncement in *Palmer* concerning the "*spirit* of the constitutional inhibition," *id.* (emphasis

supplied), is irreconcilable with "the letter" or plain meaning of the text of the Contracts Clause. Only contracts in which a legislator is interested that were "authorized" by a law passed by the Legislature—not merely funded—during the legislator's term are prohibited, as the strict holding of *Palmer* provides.

2. Norbeck I and Justice Whiting's warning

The next decision addressing the Contracts Clause arrived in 1913. *See Norbeck & Nicholson Co. v. State*, 142 N.W. 847 (S.D. 1913) (*Norbeck I*). In *Norbeck I*, the sole law at issue involved a special appropriation (S.B. 11), rather than the general appropriation bill. *See id.* at 848 (citing SL 1911, Ch. 38) (App. 75). That law clearly both *authorized* the Board of Regents to contract for the sinking of an artesian well at the University of South Dakota *and* appropriated funds for that express purpose:

(S. B. 11)

APPROPRIATION FOR ARTESIAN WELL AT STATE UNIVERSITY

AN ACT Entitled, An Act Appropriating Money for Sinking and Equipping a Well at the State University and for Providing the Necessary Water Mains in Connection Therewith.

Be It Enacted by the Legislature of the State of South Dakota:

§ 1. That there be and is hereby appropriated out of any moneys in the state treasury not otherwise appropriated the sum of five thousand dollars ($5,000.00) or so much thereof as may be necessary, for the purpose of sinking a well at the state University and equipping the same with the proper and necessary pumping apparatus and water mains.

§ 2. The said well shall be sunk and equipped under the supervision of the regents of education, and by contract after receiving bids therefor, and the state auditor shall issue warrants on the state treasurer in payment for the sinking and equipping of said well as aforesaid upon proper verified vouchers of said regents of education, and upon presentation of such warrants the treasurer shall pay the same.

§ 3. Whereas, there are no funds available for the payment of the expense of sinking and equipping such well; and whereas, the water supply at present available for the state University buildings is wholly inadequate for fire protection and other daily necessary use, an emergency is hereby declared to exist, and this act shall take effect and be in force from and after its passage and approval.

Approved February 1, 1911.

(App. 75). Specifically, the law provided that "[t]he said well shall be sunk and equipped under the supervision of the regents of education, and by contract after receiving bids therefor[.]" (App. 75). A clearer and more obvious example of a contract "authorized by any law" enacted by the Legislature is hard to imagine.

Peter Norbeck (future Governor and United States Senator) was in the South Dakota Senate during the term S.B. 11 was passed. *See Norbeck I*, 142 N.W. at 848. He also was president and owner of the drilling company that later received the contract with the Regents to drill the well. *See id.* Norbeck thus had at least an indirect interest in the contract that was authorized by a law enacted during his legislative term. *See id.* at 850. As a result, the State Auditor refused to pay Norbeck under the contract due to the prohibition in the Contracts Clause. *See id.* at 848.

In an original action brought by Norbeck, this Court very properly held the contract to be in violation of the Contracts Clause. In what may fairly be described as a confusing exposition, however, Justice McCoy's majority decision anchored itself in a legislator's "fiduciary and trust relation toward the state" and "sound public policy," *id.* at 849-51, rather than the plain meaning of the text of the Contracts Clause. The confusion is heightened by the decision's primary reliance—not so much on the Contracts Clause of Article III, Section 12—but on a different provision that, coincidentally, has the same article and section number, only juxtaposed: Article XII, Section 3.

Justice Whiting authored a concurring opinion sounding a wise note of caution to courts considering future cases. Explaining he was unable to join the majority's errant reasoning, he wrote:

> Speaking of the members of the Legislature, Justice McCOY says: "It seems to be almost universally held that it is against sound public policy to permit such an agent, or any agent occupying a like position, to himself be directly or indirectly interested in any contract with the state or other municipality during the period of time of the existence of such trust or confidential relationship."
>
> My colleague is in error in such statement. The only contract that a legislator is forbidden to enter into with the state is a contract *authorized by a law passed while he was a legislator*. Even while a member of the Legislature, he is as free as any other person to enter into other contracts with the state.
>
> We have this constitutional provision, not because it is feared that a member of the Legislature would or might use his position to obtain an *unfair contract*, or would or might, owing to such position, attempt to *avoid full compliance* with the terms of his contract—the fear of which has led to the enactment of laws forbidding administrative officers from being parties to contracts with their corporate bodies—but this constitutional provision was enacted through fear that a legislator might be, either consciously or unconsciously, influenced by selfish motives when voting for or against a bill.
>
> If there were no danger that a legislator's vote might be so influenced, there would be absolutely no more reason to forbid his entering into a contract *authorized by the Legislature of which he was a member* than to forbid his entering into any other contract with the state.
>
> In the case of an enactment forbidding a legislative officer from being interested in a contract authorized by a law passed during his term, the law looks to a time prior to and entirely separate and distinct from the time of the entering into, or of the performance of, the contract.

> Such a contract is not forbidden because the contractor *as such* would be occupying an inconsistent position, in that he would, in entering into the contract, be attempting to serve the state as well as himself.
>
> So far as the state and he are concerned, when entering into the contract, they deal with one another at arm's length exactly as would the state and any other contractor; as a member of the Legislature, the contractor is not presumed to be in any better position to obtain an unfair contract than if the contract related to some matter concerning which he was not forbidden to contract.
>
> That the framers of our Constitution recognized that the legislator's position did not tend to affect the contract itself appears from the fact that the law not only forbids his entering into such a contract during the term for which he was elected, but during one year thereafter. Under some Constitutions such prohibition extends for all time.
>
> No person can presume that the framers of the Constitution imagined that any legislator, after he had gone out of office, would occupy a fiduciary relation to the state, or would be in a position enabling him to take an undue advantage of the state when contracting.
>
> In enacting this provision of the Constitution the framers thereof had in mind, not the time of entering into the contract nor the relation of the parties at that or any subsequent time, not even any danger that the legislator might obtain an unfair contract; but they had in mind solely the time and his relation to the state *when he should cast his vote*, and they 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 I, 142 N.W. at 852-53 (Whiting, J., concurring in result). Justice Whiting's construction of the true meaning of the Contracts Clause is a shining example of clear and thoughtful jurisprudential analysis.

3. The quick correction in Norbeck II

Demonstrating the persistence that came to characterize his later political life, Senator Norbeck was back almost immediately to test out a new theory to secure payment for digging the well. In *Norbeck & Nicholson Co. v. State*, 144 N.W. 658 (S.D. 1913) (*Norbeck II*), this Court again rejected his petition, but utilized the occasion to reframe and limit its decision in *Norbeck I* along the lines suggested by Justice Whiting's concurrence.

Senator Norbeck's new theory was that even though he was in the Legislature that passed S.B. 11, the law authorizing the contract for drilling the well, it did not necessarily need to be *paid* from the funds that also were appropriated by that law. *See Norbeck II*, 144 N.W. at 659. In rejecting that theory, this Court made clear that it was the "authorization" to contract, *not* the mere appropriation or source of the funds, which triggered the constitutional prohibition:

> [T]he contract was one "authorized" by chapter 38, Laws 1911, and that Peter Norbeck was then a member of the Legislature.
>
> Section 12, art. 3, of the state Constitution, declares that no member of the Legislature shall be interested, directly or indirectly, in any contract with the state, authorized by any law passed during the term for which he shall have been elected, or within one year thereafter.
>
> Under the former decision of this court upon the demurrer to the original complaint (142 N.W. 847), this identical contract was held void because in violation of this provision of the Constitution. It cannot therefore he made the ground of recovery in this action, even though there may have been funds available derived from other sources than the appropriation of 1911.

> *The validity of the contract is in no manner dependent upon the sources from which state funds may be derived to liquidate the indebtedness created by the contract*.

Id. (emphasis supplied). This Court then further limited its holding to align with Justice Whiting's concurrence in the prior decision:

> The contract here involved concededly was entered into pursuant to and in execution of an act of the legislative assembly, and its validity depended upon the conditions existing at the time of its execution, and not upon acts or conditions done or arising subsequently. If the contract itself was void at the time of its execution, because of the constitutional inhibition, no circumstances or facts thereafter arising could change its status or render it valid.

Id. As a result, as this Court squarely held:

> The contract upon which plaintiff seeks recovery was authorized by a legislative act, and is within the very language of the Constitution which says that no member of the legislative assembly shall be interested, directly or indirectly, in any contract authorized by a law passed during the term for which he shall have been elected.

Id. Interestingly, both Justice McCoy and Justice Whiting joined the decision in *Norbeck II* in full.

Norbeck II thus seemed to clear up the unfortunate obiter dicta from *Palmer* and *Norbeck I* quite swiftly and thoughtfully. This Court's statement in an unrelated case of the same era sums up the precedential value of overreaching dicta: "It was not necessary to decide that question in *Turner v. Hand County*, and the language used in that case, if construed as holding a different view, is obiter dictum, and does not express the views of the court in the present case." *Haggart v. Alton*, 137 N.W. 372, 376 (S.D. 1912); *see also*

McCoy v. Handlin, 153 N.W. 361, 367 (S.D. 1915) (quoting *Cohens v. State of Virginia*, 19 U.S. 264, 399-400 (1821) (Marshall, C.J.); Bryan Garner et al., *The Law of Judicial Precedent*, § 4, 58-59 (Thomson Reuters 2016).

4. Dicta resurrected in Asphalt Surfacing

It was not until almost three-quarters of a century after the course correction in *Norbeck II* that this Court would have occasion to examine the Contracts Clause again. In *Asphalt Surfacing Co. v. South Dakota Dep't of Transp.*, 365 N.W2d 115 (S.D. 1986), the SDDOT held a bid letting for road projects. Asphalt Surfacing, whose president was state Senator Thomas Krueger, was the low bidder.

Relying on the Contracts Clause, the DOT Commission did not award the contracts to Asphalt Surfacing on the basis that Senator Krueger was a legislator during the 1985 legislative session that enacted a general appropriation bill (H.B. 1371). (App. 76).

In an action challenging the Commission's decision, this Court correctly framed the question:

> The key issue presented is whether article III, section 12 of the South Dakota Constitution prohibits the State from awarding a contract for highway repair to a company because its president was a legislator at the time the general appropriation bill covering the repair funds was passed.
>
> This issue may be divided into subparts: *(1) whether passage of a general appropriation bill is the type of authorization contemplated by the constitutional provision*, and (2) whether the constitutional provision applies to contracts awarded to the lowest bidder. We answer both in the affirmative.

Id. at 117. Unfortunately, the decision did not actually examine the question posed. Instead, it first resuscitated the expansive dicta from *Palmer* and announced that the Contract Clause is to be "strictly interpreted," presumably intending to mean that it should be *expansively* interpreted.

The decision then focused on the word "any," rather than the plain meaning of "authorized" in the provision:

> Article III, section 12 specifically prohibits a contract with the State if "authorized by *any* law" during the legislator's term. (Emphasis added.) Our constitutional framers obviously intended a broad prohibition. *Palmer*, 11 S.D. at 80–81, 75 N.W. at 819. This leaves little question that section 12 applies to a general appropriation bill as well as more specific legislative decisions.

Asphalt Surfacing, 385 N.W.2d at 117. Those three bare sentences, an *ipse dixit* without any chain of supporting logic, constitute the analysis.

To be fair, the decision was correct in concluding that a general appropriation bill qualifies as "any law" under the Contracts Clause. Just as clearly, however, that was *not* the right question. Rather, the issue was whether a general appropriation bill that merely appropriates funds to various departments and agencies—its only constitutionally permissible function under Article XII, Section 2—can accurately be said to have "authorized" a contract later funded by the state within the plain meaning of that constitutional term. As discussed, blanket appropriations in a general appropriation bill do not themselves clothe departments and agencies with the *legal authority* necessary to enter into specific contracts. Such authority

necessarily is conferred by other laws, including special appropriation laws. Blanket appropriations set forth in a general appropriation bill thus do not "authorize" contracts within the plain meaning of the Contracts Clause.

Ironically, *Asphalt Surfacing*—the most proximate source of the current confusion prompting the Governor's request—concludes with an accurate summary of the scope of the Contracts Clause:

> ... [A] present legislator may benefit from a contract with the State if the contract was not authorized during his term and he is the lowest responsible bidder. A former legislator, less than one year out of office, may benefit from a State contract if it was not authorized during his elected term. If a legislator has been out of office more than one year, neither the constitutional provision nor statute prohibit his contracting with the State.

Id. at 118 (emphasis supplied). The error of *Asphalt Surfacing* is its failure to consider the plain meaning of the term "authorized." Before that decision in 1986, this Court had never even suggested that one's presence in the Legislature during passage of the annual general appropriation bill would trigger the prohibition in the Contracts Clause.[3]

5. Pitts and Chief Justice Gilbertson's dissent

Fifteen years later, in *Pitts v Larson*, 2001 S.D. 151, 638 N.W.2d 254 (S.D. 2001), this Court addressed application of the Contracts Clause to

[3] Before the *Frazier* decision in 1987 that produced Justice Robertson's dissent, "the question of whether a legislator is prohibited from having any financial dealings with the state wherein he is paid in whole or in part from funds expended under a general appropriation bill" had never been addressed in Mississippi. *Cassibry v. State*, 404 So.2d 1360, 1367 (Miss. 1981). Thus, in *both* South Dakota and Mississippi, application of the Contracts Clause to a general appropriation bill was a judicial innovation that occurred in the 1980's.

Representative Carol Pitts, an educator employed by SDSU Cooperative Extension Service. The 2001 general appropriation bill (H.B. 1233), passed during her elected term, appropriated funds to SDSU-CES:

Cooperative Extension Service				
Personal Services	$5,833,102	$4,392,745	$169,769	$10,395,616
Operating Expenses	$457,844	$526,908	$375,413	$1,360,165
Total	$6,290,946	$4,919,653	$545,182	$11,755,781
F.T.E.				240.3

(App. 253).

The Attorney General warned Representative Pitts "that if she continued her employment with the State after July 1, 2001, the date on which the General Appropriation Bill was to take effect, her employment contract would be voided and she would not receive any compensation for her services." *Id.*, ¶5, 638 N.W.2d at 255. The State Auditor was instructed not to pay her salary. She then sought a writ of mandamus from this Court to salvage the paychecks she had earned working for the school.

In a 3-2 decision, this Court arrived in a similar place as in *Asphalt Surfacing*. Denying the writ, the plurality decision repeated the overbroad dicta with its genesis in *Palmer* and the pronouncement in *Asphalt Surfacing* that interpreting the Contracts Clause "strictly" (meaning *expansively*, though not necessarily accurately) was the paramount concern.[4]

[4] This Court's most recent decision briefly addressing the Contracts Clause, *In re Noem*, 2020 S.D. 58, ¶¶12-13, 950 N.W.2d 678, 681-82, also relied on *Pitts* and the "strict" (expansive) rule of construction prescribed in *Asphalt Surfacing*.

The key holding of *Pitts*, that the "broad prohibition" of the Contracts Clause "extends to any contract entered into with the State, including the General Appropriation Bill," actually is a *non sequitur*, because the general appropriation bill obviously is not a contract. *Id.* More fundamentally, *Pitts* is barren of textual analysis of the constitutional provision.

These flaws did not go unnoticed by Chief Justice Gilbertson, joined by Justice Amundson in dissent, who sought to redirect things to the proper textual analysis enunciated by Justice Whiting's concurrence in *Norbeck I* and this Court's recalibration in *Norbeck II*:

> In this instance the meaning of Article III § 12 is not necessarily clear from a reading of the text. For example, in *Norbeck I*, the majority of this Court interpreted the prohibitions in the above article in an expansive manner. However, a special concurrence by Presiding Judge Whiting interpreted the provision only to preclude a sitting legislator from voting to create a contract between that legislator and the state or to improve his or her payments under an existing contract which predated the commencement of legislative service.
>
> . . . Herein, Pitts originally contracted with the Board of Regents for her current employment in 1990. She was not elected to the Legislature until 2000. While Pitts did vote for the 2001 appropriations bill, that vote did not create her office or preclude commercial competition for the position. The annual renewal of her employment contract was with the Regents, and was not subject to legislative approval. The Legislature merely funded the contract by its annual appropriations bill.

Id., ¶¶ 25 & 33, 638 N.W.2d at 260-63 (Gilbertson, C.J., dissenting).

The South Dakota Legislature respectfully suggests that Chief Justice Gilbertson was correct. Deciphering meaning beyond the stated expenditure amounts in a general appropriation bill is not possible. Typically, the first

section merely recites the constitutional language required by Article XII, Section 2. The remainder of the bill consists of tables disbursing blanket sums in categories to various departments and agencies.

The legal authority to contract cannot be determined and is not conferred by these dollar amounts. One must look elsewhere—to other laws passed by the Legislature—to find authorization to enter into contracts. As this Court clarified in *Norbeck II*, "[t]he validity of the contract is in no manner dependent upon the sources from which state funds may be derived to liquidate the indebtedness created by the contract." 144 N.W. at 659.

E. Enactment of conflict of interest laws more stringent than constitutional limitations falls within the purview of the Legislature.

That is not to say that the Legislature cannot choose to enact greater restrictions for its part-time, citizen legislators than those imposed by the constitution. *See, e.g., Lindberg v. Benson*, 70 N.W.2d 42, 44 (N.D. 1955); *Conflicts of Interest of State Legislators*, 76 Harv. L. Rev. 1209, 1209-10 (1963). South Dakota has adopted laws addressing contractual conflicts of interest, though most do not presently apply to legislators. *See* SDCL 3-16-7 to 8; SDCL 5-18A-17 to 17.6. The Legislature also has enacted a code of conduct addressing conflicts of interest. *See* Official Directory and Rules of the South Dakota Legislature, Joint Rule 1B-2 (2023).

Legislation that may prove overreaching is much easier to correct than an expansive construction of a constitutional limitation exceeding the reach

of the plain meaning of its text. *See Damon v. Cornett*, 781 S.W.2d 597, 600 (Tex. 1989). As this Court emphasized a century ago in holding that the constitutional prohibition against increasing salaries of public officers was not intended to limit legislative authority to provide for their expenses:

> Constitutional provisions are presumed to have been more carefully and deliberately framed than is the case with statutes; hence it is sometimes said that less latitude should be indulged by courts in their construction, *but, on the other hand, courts are not at liberty to declare an act void because they deem it opposed to the spirit of the Constitution.*
>
> . . . It is now about 32 years since the state Constitution became operative, and conditions since 1889 have changed; *many things may be considered advisable or necessary now that were not thought of at that time. It may now be believed that the habit or custom of providing for expenses in a lump sum is unwise and liable to abuse. No matter what the members of this court may think as to the wisdom of such legislation, it must be evidence to all that it is not a judicial question; it is purely a question of policy with which courts are not concerned.*

State v. Reeves, 184 N.W. 993, 996-1000 (S.D. 1921) (emphasis supplied). Put simply, "[w]hat the representatives of the people have not been forbidden to do by the organic law, that they may do." *Id.*

III. APPLICATION TO THE GOVERNOR'S QUESTIONS

Based on the above, the South Dakota Legislature respectfully suggests the following advisory guidance to the Governor's queries.

> **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?**

Proposed guidance: The Contracts Clause ordinarily would not prohibit such a payment. Under its plain meaning, it applies only to

contracts authorized by a law enacted by the Legislature when a legislative member during that term has either a direct or indirect interest in the contract. The law in question must have provided the legal authority for the state or county to enter into the contract with the vendor that employs the legislator, not simply funding. Where that is the case, the situation detailed above still may not always implicate the Contracts Clause because in some factual circumstances, mere employment with the vendor, without any link to his or her compensation, may not qualify as a sufficient indirect interest in a particular contract. *See Jones v. Howell*, 827 So.2d 691, 699-700 (Miss. 2002).

May a vendor of the state receive a state payment if that vendor is a publicly traded company, and a legislator owns any shares of stock in such vendor?

Proposed guidance: The Contracts Clause ordinarily would not prohibit such a payment. Under its plain meaning, it applies only to contracts authorized by a law enacted by the Legislature when a legislative member during that term has either a direct or indirect interest in the contract. The law in question must have provided the legal authority for the state or county to enter into the contract with the vendor in which the legislator owns stock, not simply the funding.

Where that is the case, the situation detailed above may implicate the Contracts Clause in many factual circumstances, because owning a substantial stake in a publicly traded corporation may be an indirect interest in a particular contract.

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?

Proposed guidance: The *Contracts* Clause would not bar such employment in most circumstances, although a legislator may be prohibited from holding some state positions by the *Appointments* Clause. The Contracts Clause would not be implicated unless the legal authority to enter into a particular employment contract with the state or a county, not simply the funding, was provided by a law enacted by the Legislature during the legislature's term. By its express terms, of course, the Contracts Clause has no application to contracts with cities or school districts. As a result, a legislator's mere employment with a county, city, or school district or by a department or entity funded by the state, such as a University educator whose employment contract was approved by the Board of Regents, would not violate the Contracts Clause in most circumstances.

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

Proposed guidance: Yes. It is questionable whether the expectancy of retirement benefits is a "contract" in which a legislator (or former legislator within one year) has an interest within the meaning of the Contracts Clause. *See Campbell v. Kelly*, 202 S.E.2d 369, 381 (W.Va. 1974). But in any event, any such "contract" would not have been authorized by a law enacted by the Legislature during his or her term.

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

Proposed guidance: If the contract was authorized by a law enacted during the legislator's term, the subcontract likely would be prohibited by the Contracts Clause because in most circumstances it would constitute an indirect interest in the contract. However, a general appropriation bill that merely provides funding to state departments and agencies does not itself clothe them with the legal authority to enter into specific contracts. By constitutional imperative, such authority is conferred by other laws. Blanket appropriations set forth in a general appropriation bill do not "authorize" contracts within the plain meaning of the Contracts Clause.

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

Proposed guidance: Yes. Even if such reimbursements were deemed a "contract" in which a legislator has an interest, any such "contract" would not have been authorized by a law enacted by the Legislature during his or her term. *See Jones*, 827 So.2d at 699-700; *Georgia Dep't of Med. Assistance v. Allgood*, 320 S.E.2d 155, 158-59 (Ga. 1984).

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

Proposed guidance: Yes. Even if one considered such reimbursements a "contract" in which a legislator (or former legislator within one year) has an

interest, any such "contract" would not have been authorized by a law enacted by the Legislature during his or her term.

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?

Proposed guidance: Yes. Even if one considered such items to be a "contract" in which a legislator (or former legislator within one year) has an interest, any such "contract" would not have been authorized by a law enacted by the Legislature during his or her term.

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

Proposed guidance: By its plain terms, the Contracts Clause applies to legislators. It does not apply to a legislator's spouse, dependents, or family members. If the framers intended it to apply to anyone other than legislators, they would have said so. It is the role of the Legislature to enact any additional conflict of interest laws or rules to address such situations as a matter of public policy.

It is conceivable that the interest of a legislator's spouse in a contract authorized by a law passed by the Legislature during the legislator's term may amount to an "indirect" interest in that contract by the legislator within the meaning of the Contract Clause in certain factual circumstances. Such a determination is situation-specific.

But a spouse's mere employment with the state, county, or related entity surely does not run afoul of the Contracts Clause. "There has been no case cited to us from any jurisdiction which suggests a possible conflict of interest because a Legislator's spouse is employed by the state, as one of a large class." *Frazier*, 504 So.2d at 698; *see also* S.D. Const., Art. XXI, § 5; SDCL 25-2-4; *Field v. Field*, 2020 S.D. 51, ¶17, 949 N.W.2d 221, 224 (spouses are entitled to maintain separate property and do with it as they see fit); *Scherer v. Scherer*, 2015 S.D. 32, ¶6, 864 N.W.2d 490, 493 (outside context of divorce, support, and homestead, marriage does not vest in one spouse an interest in other's separate property").

CONCLUSION

WHEREFORE, the South Dakota Legislature very respectfully requests that this Honorable Court take up the questions framed by the Governor and provide advisory guidance according to the plain meaning of the text of Article III, Section 12 of the South Dakota Constitution.

Respectfully submitted this 12th day of December, 2023.

JOHNSON, JANKLOW & ABDALLAH LLP

BY: *Ronald A. Parsons, Jr.*
Ronald A. Parsons, Jr.
101 S. Main Ave, Suite 100
Sioux Falls, SD 57104
(605) 338-4304
ron@janklowabdallah.com

Attorneys for the South Dakota Legislature