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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

**Supreme Court No. 20200292**
**Burleigh County Civil No. 08-2020-CV-01474**

| | |
|---|---|
| Somerset Court, LLC, and Kari Riggin, | ) |
| | ) |
| Plaintiffs and Appellants, | ) |
| | ) |
| vs. | ) |
| | ) |
| Doug Burgum, Governor for the State of North Dakota, in his official capacity, the North Dakota Health Department, Dirk Wilke, North Dakota State Health Officer, in her Official capacity, | ) |
| | ) |
| Defendants and Appellees. | ) |

# APPELLANT'S AMENDED BRIEF

On Appeal from Order Denying Plaintiff's Motion for Declaratory Judgment or Summary Judgment and Granting Defendants' Request for Dismissal dated September 1, 2020 [Docket No. 122] and the subsequent Judgment of Dismissal, dated September 9, 2020 [Docket No. 128], the Honorable Daniel J. Borgen Presiding, Burleigh County District Court, South Central Judicial District

## APPLELLANTS HEREBY REQUEST ORAL ARGUMENT

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## III. STATEMENT OF ISSUES

**ISSUE 1: The executive orders at issue are beyond the Governor's statutory powers.**

**ISSUE 2: The executive orders at issue involve fundamental rights requiring the application of the strict scrutiny standard of review.**

**ISSUE 3: Declaratory judgment should have been issued as a matter of law and enforced by an appropriate writ.**

## IV. STATEMENT OF THE CASE

¶1 This matter was initiated by a Complaint on April 22, 2020. A. 10. Eight exhibits and two affidavits were filed with the complaint supporting the motion for declaratory judgment. A. 22-51.

¶2 On April 28, 2020, the court entered an Order Denying the Request for a Temporary Restraining Order. A. 52. On May 4, 2020, the plaintiffs filed an Amended Complaint. A. 58. Due to the issuance of an additional executive order, another exhibit was filed with the new executive order. A. 72.

¶3 A Second Amended Complaint was filed on May 11, 2020, A. 76, which included reference to the North Dakota Legislative Council Analysis of Executive Order 2020-06.4 Regarding Regulation of Businesses, May 2020, Exhibit 10, A. 93. On May 12, 2020, the plaintiffs filed a motion for declaratory judgment A. Docket No. 36, and filed the additional executive orders issued by the governor, A. 101-108.

¶4 On May 18, 2020, the District Court issued an order granting the state's motion to convert the plaintiffs' motion from declaratory judgment to a motion for summary judgment, and issuing a new briefing schedule, A. 128.

¶5 On May 13, 2020, the plaintiffs made a motion for Rule 47.1 certification. Docket No. 50. On May 18, 2020, the state filed its Answer to Amended Complaint, A. 129, with various exhibits, A. 136. On June 12, 2020, the lower court issued an Order Granting Plaintiffs Motion to Amend the Complaint. A. 165. On June 18, 2020, the state filed its Answer to Second Amended Complaint, A. 167.

¶6 On August 31, 2020, the District Court issued its Order Denying Plaintiff's Motion For Declaratory Judgment or Summary Judgment and Granting Defendant's

Request for Dismissal of Action, A. 172. On September 9, 2020, the lower court issued its Order for Judgment of Dismissal, A. 177, and Judgment of Dismissal was entered on September 9, 2020, A. 178. Notice of Entry of judgment was issued on September 9, 2020, A. 179, and the Notice of Appeal was filed in November 6, 2020, A. 180.

## V. STATEMENT OF THE FACTS

¶7 This case involves numerous executive orders that the Governor issued relating to the COVID19 pandemic. Many of these executive orders restricted not only activities of Somerset, an assisted living facility, but also the in-house salon owned by Somerset but administered by an independent contractor who is a licensed cosmetologist.

¶8 Somerset is a retirement center in which the residence rent apartments and at their choice are provided meals and various entertainment activities supplied by Somerset. The residents are free to come as they please, and are all ambulatory. Although they have the option of doing their own hair in their own rooms, the residents also have the option of using the salon and paying the cosmetologist for her services.

¶9 The cosmetologist, Kari Riggin, is fully licensed as a cosmetologist. In addition, once the pandemic hit, Riggin was required to follow all the protocols adopted by the health departments and executive orders issued by the Governor relating to safety and hygiene. Indeed, Riggin was required to follow the very same protocols that residential aides and everybody else who worked at Somerset was required to follow. In addition, Riggin did not have any outside business or outside customers, and provided services exclusively to the residence of Somerset. As shown by the affidavit of the manager of Somerset, Somerset considered continuation of the salon appropriate not only as a matter of health, but also to the great benefit of the residents of Somerset. According to

Somerset, having the resident's hair done at the salon which is designed to do so safely as opposed in the resident's room, using the shower or the sink, is substantially safer for the resident.

¶10 Through the issuance of the Governor's executive order, Riggin's employment and means of livelihood was taken away from her.

## ARGUMENT

¶11 The Plaintiffs Somerset Court, LLC, and Kari Riggin made a motion for declaratory relating to the power of the Governor to issue executive orders relating to shutting down the state and more specifically prohibiting Somerset Court and Kari Riggin from engaging in their business and profession and placing limitations as to their business and profession. Somerset asserts that the Governor's executive orders go beyond the Governor's statutory authority, improperly invade legislative prerogative, and unconstitutionally deny the plaintiffs their state and federal constitutional rights to conduct business, to engage in employment, and earn a living. To this end, we provide the text of the North Dakota constitutional provision which provided the right to engage in one's occupation"

> **Section 7.** Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor.

ND CONST. Art. I, Sections 1 & 7.

¶12 Somerset Court LLC is a limited liability corporation organized under the State of North Dakota that owns and operates Somerset Court, a licensed assisted living facility. The residents of Somerset Court rent apartments at Somerset Court;

they are ambulatory, self-sufficient, and normally (except for the present lock-down) come and go as they please. The residents at Somerset are in actuality tenants who rent apartments and receive, if they so choose, various services provided at Somerset, including distribution of medication through a nurse and med aides, dining at its own in-house dining facility, entertainment and activities, transportation, and an in-house hair salon owned by Somerset Court but operated by Kari Riggin, an independent contractor and licensed cosmetologist who works exclusively at Somerset Court and does not at this time have any other outside clients or any other location or salon.

¶13 The in-house hair salon is owned by Somerset and is operated by Kari Riggin, an independent contractor and licensed cosmetologist who works exclusively at Somerset Court and does not have any other outside clients or any other location or salon. Ms. Riggin is not employed anywhere else and sees no other clients at ANY other location. She is in-house, exclusive to Somerset, and has access to Somerset's owned salon. Once the coronavirus outbreak occurred, she has limited the salon to one person at a time and has applied all other protocols as required by the health department and the Governor's executive orders. (Prior to the lock-down she was allowed to see other clients at this location; that is not occurring now.)

¶14 Doug Burgum is the Governor for the State of North Dakota. In response to the coronavirus epidemic, Governor Burgum has issued several executive orders that directly affect Somerset Court and its in-house salon. The North Dakota State Health Department is an executive branch department charged with implementing the Governor's executive orders and North Dakota state laws and regulations. The state health officer is in charge of the North Dakota Department of Health. In addition to

overseeing the Department of Health, the state health officer implements state laws governing the department within the guidance of the Governor and regulations adopted by the State Health Council.

## II. JURISDICTION AND VENUE

¶15 The district courts of North Dakota have general jurisdiction (27-05-06) relating to providing declaratory (32-23-01 and 32-23-02) and injunctive relief (Ch. 32-05 and 32-06), including an action involving state entities and state officials. The district court also has the general power to issue writs against the Governor and any other person who implements executive orders, state statutes, or state rules and regulations, including the power to issue a writ of mandamus (Ch. 32-34) and a writ of prohibition (Ch. 32-35). Rule 65 of the North Dakota Rules of Civil Procedure relate to the process in obtaining injunctive relief.

¶16 In actions against any state entity, venue is properly placed in Burleigh County (28-04-03, subd. 2).

## III. EXECUTIVE ORDERS AS APPLIED TO SOMERSET SALON

¶17 On March 13, 2020, Governor Burgum issued an executive order declaring "a state of emergency in North Dakota in response to the public health crisis resulting from the novel coronavirus." Executive Order 2020-03 (3-13-20) **EXHIBIT 11 [Doc. No. 31]**. On March 19, 2020, Governor Burgum issued an executive order closing restaurants and other drinking and dining establishments, as well as various recreational and health facilities. Executive Order 2020-06 (3-19-20) **EXHIBIT 12 [Doc. No. 32]**. On March 27, 2020, Governor Burgum issued Executive Order 2020-06.1 **EXHIBIT 13 [Doc. No. 33]** relating to the operations of certain businesses in

North Dakota during the coronavirus pandemic which specifically provided the following as to salons and cosmetologists:

> 3. Effective at 12:00 a.m. Saturday, March 28, all licensed cosmetologists, including estheticians and manicurists, and all salons operated by licensed cosmetologists, including esthetician and manicurist salons or services and licensed barbers and barber shops are directed to close and cease operations; this requirement will continue until Monday, April 6, 2020.

Executive Order 2020-06.1 (3-27-20). The Order was been extended through April 20 and then through April 30 by two additional executive orders. Governor's Executive Order 2020-06.2 (4-1-20) **[Doc. No. 3]** Executive Order 2020-06.3 (4-6-20) **[Doc. No. 4]**.

¶18 These executive orders provided as its basis the following rationale:

> **WHEREAS**, in order to reduce the spread of COVID-19, to protect and save lives, it is necessary and reasonable to accelerate the social distancing recommendations issued by the United States Centers for Disease Control and the North Dakota Department of Health; and
>
> **WHEREAS,** based on the rapidly changing circumstances in this state, it is necessary to limit the movement of individuals in the state, and control the occupancy and use of buildings and premises, as well as non-essential congregate settings to respond to the threats to public health and safety of all citizens, in response to the COVID-19 crisis.

Executive Order 2020-06.1 (3-27-20), Executive Order 2020-06.2 (4-1-20), Executive Order 2020-06.3 (4-6-20). In addition, on April 6, 2020, Governor Burgum issued an executive order terminating visitation at North Dakota long-term care facilities, including skilled nursing facilities and basic care facilities, and restricted all nonessential personnel and volunteers from long-term care facilities until further notice. Executive Order 2020-22 (4-6-20) **EXHIBIT 14 [Doc. No. 34]**. On April 29, 2020, Governor Burgum issued an executive order allowing salons to reopen on May 1, 2020, under the condition that salons adopt and rigorously follow the North Dakota

Smart restart standards for all industries as well as the standards that apply to hair salons. Executive Order 2020-06.4 (4-29-20).

¶19 The stated rationale of the executive orders that closed the salons was to "accelerate social distancing." However, in regards to Assisted-Living Facilities-Independent Living Facilities (ALF-IF) that provide Activities of Daily Living (ADL), this prohibition is unsupported by the rationale provided because the same amount of close quarters – if not more – to the resident will nonetheless occur while providing the activity of daily living (ADL's)—that include the cleaning and washing hair, and setting and fluffing and curling the hair after the wash. As a matter of fact, in regards to the application of this prohibition at Somerset, the person running the salon is more educated and experienced in hair washing and hairstyling (more so than any other employee at Somerset) and as such there would be a reduction of time with the residents if we use her instead of our less-experienced (as it applies to hair washing and styling) resident aides. Instead of using the salon – which is safer for the resident and safer for the the person providing the service to the resident – the health department insisted that the salon not be used, that the more experience cosmetologists not be used, and their resident aides wash and style the hair of residence in the residents own apartments. This unreasonable directive created the absurd result of placing the residents more at risk in regard to their physical well-being because the salon was designed to safely wash hair using chairs and sinks designed just for that purpose, and placed the employees of Somerset (and the residents) at more risk in regards to catching our spreading the virus by forcing this service to be done by the employee in the resident's apartment. Kari Riggin continued

to operate the Salon until April 14, 2020, when the salon was shut down by the Minot Police Department and Kari Riggin was issued a citation under Section 37-17.1-05, "Violation of a Governor's Declaration," for an infraction, a crime punishable by up to a $1000 fine. Under Section 12.1-32.01(7), it is possible for Kari Riggin to be charged with a Class B Misdemeanor if she is subsequently charged and therefore "has been convicted previously at least twice of the same offense classified as an infraction." As a direct result of the Governor's executive order and its enforcement by the Minot Police Department, Kari Riggin was denied and prevented from engaging in her employment from April 14, 2020, until April 30, 2020. Moreover, Kari Riggin could again be subject to restrictions if another wave of coronavirus infections occurs and the Governor decides to issue another executive order prohibiting salons or cosmetologists from conducting business or engaging in their employment and licensed profession.

¶20 The executive orders issued by the Governor are overbroad, unreasonable, arbitrary, capricious, and produced an absurd result given the following facts:

> A) All cosmetologists, regardless of circumstances, were unilaterally ordered to cease and desist all performance of the products of their profession at any location and without exception in the entire state of North Dakota;
>
> B) no cosmetologist was permitted to perform the tasks of their licensed profession for more than 4 weeks – in spite of efforts by Somerset Court and others (such as the Long-Term Care Association) to get the Governor [and] the Department of Health and Human Services to take action on this matter; although this issue was discussed at weekly meetings, each such meeting ended with consideration of the matter being tabled until the following week;
>
> C) the hair salon owned by Somerset and operated by Kari Riggin is an in-house salon;
>
> D) the Somerset salon is operated by Kari Riggin an independent contractor and licensed cosmetologist;

E) Kari Riggin works exclusively at Somerset Court and does not have any other outside clients or any other location or salon. In other words, Ms. Riggin is not employed anywhere else and sees no other customers at ANY other location. She is in-house, exclusive to Somerset; she provides services only to Somerset Court residents.

F) Once the coronavirus outbreak occurred, Kari Riggin has limited the salon to one person at a time and has applied all other protocols as required by the health department and the Governor's executive orders.

¶21 Using the Somerset Salon for activities of daily living (with or without cosmetology services) is actually safer for the staff and residents, and as such the executive order issued by the Governor is overbroad, unreasonable, arbitrary, capricious, and produced an absurd result.

¶22 The residents of Somerset Court were being directly harmed by the Governor's Executive Order; they were not able to receive one of the very important activities of daily living, which is the washing and grooming of their hair, as well as other grooming services such as coloring or permanents. Specifically, Executive Order 2020-06.2 and Governor's Executive Order 2020-06.3, caused the following direct harm to the residents of Somerset Court:

A) unnecessarily prohibits the use of the very room designed to safely wash and groom the residents' hair, at a location where only one resident receives these services at one time, and all protocols are followed before another resident is provided any such salon services;

B) unnecessarily puts the staff and residents at additional health risk by forcing the staff to provide these hair and grooming services in the residents' rooms, subjecting the staff to added health risks and the residents to injury since the apartments are not designed for the washing and grooming of hair by a third person;

C) unnecessarily prevents Somerset to act reasonably and appropriately in regards to the running and operation of its residential assisted living – independent living facility; and

D) unnecessarily limiting the residents' ability to receive essential daily activities of living, and in many cases holding the residents hostage in their rooms because they are not willing to come down to meals or participate in activities and other services provided at the assisted living – independent living facility because they are embarrassed about their looks.

¶23 In order to try to get the Governor to amend his order, Somerset advised the Health Department (verbally and then in writing on April 21, 2020), of the following:

> Although our residents are ambulatory and independent, many of them are unable to wash or set their own hair, or for that matter have their hair washed in the sinks in their apartments (due to physical limitation, height, mobility, angle needed to wash hair, etc.). We are also concerned about health risks that might occur if our resident aides forced to go into each of the various apartments to provide this Activity of Daily Living (ADL). In our view, going into the actual apartment and then going into all the other apartments creates a greater risk to our residents and employees than using the salon one person at a time, and then taking all protocols presently in place, including thoroughly cleaning the chair, sink, floor and counters of the salon before another resident is allowed to use this location.
>
> In addition, the salon itself is much safer for the resident because the chair and sink are designed to be used just for this very purpose of washing the resident's hair.
>
> Lastly, we note that many of our residents are so concerned about their looks that they are no longer coming down to eat with the other residents, or partaking in any of the various activities that we provide at Somerset. As a direct result of the salon not being operational, these residents have literally sequestered themselves in their rooms – not because of any health concerns but because they are embarrassed to be seen with their hair not made up. This has seriously impacted their quality of life and frankly seems counterproductive and unnecessary given all the other precautions and other activities that they are otherwise able to attend.

This impact can be described by Director Melissa Van Deventer as follows:

> Immediately following our recent salon closure, we received numerous complaints and worries from residents. Many were saddened because this is one of the very few things they have to look forward to due to the restrictions on Assisted Living residents during this pandemic. Our residents have missed their appointments and it has had a great effect on their mental and emotional well-being as well. Many of them do not want to be seen without their hair looking styled, curled and clean. Often, they will miss out on small group activities or a walk to the mailbox just because they are afraid someone might

see them. As a result of not having regular hair services, we have learned that the residents' hygiene is affected as well as their mental health. If requested by the Court, we can provide those names, but we do not feel it is appropriate to list them here due to confidentially and HIPAA rules.

¶24 Following the issuance of Executive Order 2020-06.2 and Governor's Executive Order 2020-06.3, Somerset has taken many steps to obtain relief from the Order from the Governor and the state health department, including the following:

A) Directors of Somerset Court Dave Caldwell and Melissa Van Deventer have had many conversations with state representatives of the Department of Health indicating that the Executive Order should not apply to non-cosmetology activities at the Somerset Salon, which will apply all other protocols;

B) Directors of Somerset Court Dave Caldwell and Melissa Van Deventer have had many conversations with state representatives of the Department of Health indicating that the Executive Order should not apply to Somerset Salon or to the Somerset Salon cosmetologist because she works exclusively at Somerset Court and does not have any other outside clients or any other location or salon. In other words, Ms. Riggin is not employed anywhere else and sees no other customers at ANY other location. She is in-house, exclusive to Somerset; she provides services only to Somerset Court residents;

C) On Saturday, March 28, 2020, Somerset Court directors were informed that the Governor's Executive Order is effective, and all salons were ordered to be closed.

D) On Monday, March 30, 2020, Somerset directors received an email stating that the salon closure does not apply to assisted-living facilities.

E) On Wednesday, April 1, 2020, Somerset directors received an email stating that the salon closure does apply to assisted-living.

F) On April 7, 2020, Somerset Director Van Deventer received a telephone call from Joan Connell, North Dakota Department of Health, concerned that the Somerset salon was still open. Dr. Connell was advised that the salon was open, that this is the safest location to provide any hair services to the residents, and performing such services in the residence apartments would cause higher risk to the staff and the residents. Dr. Connell was also advised that all other protocols were being implemented by the cosmetologist, and that only one resident was allowed at a time into the salon, and then following receipt of such services the entire area was sanitized in accordance with all protocols before another resident was allowed to receive hair and grooming services. Based on everything that was going on and based on everything that

was being said – including Dr. Connell's words to the effect that 'we would need to come up with a plan to appease all sides of this" – the Somerset directors decided to maintain the status quo and left the salon open.

G) On April 9, 2020, the North Dakota medical health team involved with long-term care facilities held its weekly on-line meeting in which the issue of operating the salon was raised. Although indicating that cosmetologists are not allowed to provide salon services under the Governor's order, the question of whether Somerset salon could use the location was deferred. An unofficial transcript of this meeting **EXHIBIT 3 [Doc. No. 5]**.

H) On April 14, 2020, Dr. Joan Connell of the North Dakota Department of Health called and talked to the Somerset Director Melissa Van Deventer and asked if Somerset had come to a resolution on the salon situation. Dr. Connell was advised by Melissa Van Deventer that they had not yet come to a solution; Dr. Connell stated that she was going to send out an email to try to find out the answer. Dr. Connell issued an email attempting to determine the answer to various individuals, and Shelley Peterson of the North Dakota Long-Term Care Association replied and stated that there would be an answer at the meeting on April 16, 2020.

I) On April 14, 2020, Minot Police Department entered Somerset Court and issued a ticket (infraction) to Kari Riggin, Somerset Court's cosmetologist, for failing to comply with the Governor's Executive Order. That matter is pending.

J) On April 16, 2020. The North Dakota medical health team involved with long-term care facilities held another weekly on-line meeting in which the topic of salons in assisted-living facilities and independent living facilities was addressed. The panel again stated that the Governor's order applies to all salons, including those at assisted-living facilities or independent living facilities. But again, no answer was provided in regards to using the salon for non-cosmetology purposes. An unofficial transcript of this meeting **EXHIBIT 4 [Doc. No. 6]**. The team's summary of the meeting **EXHIBIT 5 [Doc. No. 7]**. Significantly, the team has not obtained a modification or revision of the Governor's order so that it does not apply to in-house cosmetologists at assisted-living facilities or independent living facilities; the team has also been unable to indicate whether the salon can be used for non-cosmetology/activities of daily living services.

K) On April 21, 2020, in order to attempt to resolve this issue and obtain clarification and modification of the order issued by the Governor, the Somerset directors issued a three-page memo to the state health department providing the rationale for using the Somerset salon location for non-cosmetology activities of daily living, as well as standard salon services normally provided by a licensed cosmetologist. The Somerset Memo

**EXHIBIT 6 [Doc. No. 8]**. This memo was also carbon copied to Shelley Peterson, President, North Dakota Long-Term Care Association.

L) On April 21, 2020, in response to the memo sent to the state health department and cc'd to the North Dakota Long-Term Care Association, the President of the Association Shelley Peterson replied that "we share your concern and have a request in for a change in the order too. As well as two Medical directors have sent letters." Ms. Peterson recently provided those two letters, **EXHIBIT 7 [Doc. No. 9]** Trinity Health Letter and **EXHIBIT 8 [Doc. No. 10]** McKenzie County Healthcare Systems, Inc. 4-9-20**.** Although one of the letters is undated, the letter from McKenzie County Healthcare Systems, Inc. is address to the Governor's office on April 9, 2020. As noted above, we raised the very same issue on April 9, 2020, at the long-term care state health department on-line meeting.

¶25 The Governor has made numerous changes in previous orders revising them as needed in order to suit the facts and situation as changes occur or when it is determined that the order issued is no longer necessary or ill-advised. Despite all these attempts to resolve the issue, through the Governor's office as well as to the North Dakota Department of Health, Somerset continued to be prohibited from operating its in-house salon for the benefit of its residents, despite the fact that using the location for non-cosmetology activities of daily living would be safer for the residents and staff, and that given the application of all of the various protocols use of the salon should have been allowed under the facts of this case, the Governor's order is overly broad as it applies to Somerset and its salon. The Executive Order is without sufficient justification or rationale and should be declared unreasonable, arbitrary, capricious, and having produced an absurd result. On April 29, 2020, the Governor issued Executive Order 2020-06.4, lifting the prior executive orders relating to salons and cosmetologists conducting business, effective at 8 am on May 1, 2020. Executive Order 2020-06.4 **EXHIBIT 9 [Doc. No. 27]**. Executive Order 2020-06.4 provides as follows as to salons:

2. On or after 8:00 a.m. May 1, 2020, salons operated by cosmetologists, nail technicians, estheticians, barbers and tanning studios may reopen under the following conditions: the ND Smart Restart: *Standards For All Industries* and the ND Smart Restart Industry specific standards: *Hair Salons, Nail Salons, Waxing Studios and Other Cosmetology Related Services*, must be adopted and rigorously followed.

Despite this expiration of the restrictions placed on Somerset and Kari Riggin, Somerset and Kari Riggin remain subject to the restrictions in the newest executive order, the specific restrictions of the ND Smart Restart protocols, as well as any subsequent executive orders that may be issued by the Governor, thus making this action not moot but instead capable of evading review because the Governor could reissue at any time another executive order that contains the same restrictions as the previous executive order.

## V. THE EXECUTIVE ORDERS EXCEED THE AUTHORITY OF THE GOVERNOR

### A. Discussion on the Limits of Executive Power

¶26 It is quite possible for the attorneys for the Governor to assert — and attempt to apply — President Lincoln's own words provided to Congress in December 1862 in support of the proposition that the Governor has in times of emergency the power to issue the executive orders:

> The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise -- with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.[1]

[1] These words to Congress related to President Lincoln proposing both emancipation and financial retribution to the slaves. The next three sentences are as follows:

> Fellow-citizens, we cannot escape history. We of this Congress and this administration, will be remembered in spite of ourselves. No personal significance, or insignificance, can spare one or another of us. The fiery trial

The question then becomes, "Can the executive, when faced with an emergency situation, take actions beyond the power vested to him and fail to follow the statutory and constitutional restrictions that that have been legally placed upon him?"

¶27 For those who may find justification in these words provided by our Sixteenth President, I remind them that we are a nation of laws, not of men. There have been many emergencies throughout our history—and yet the one steadfast thread that bound up both the union and the nation is the rule of law; the requirement that those provided power must yield it in accordance with the power which has been granted, in accordance with the constitution and the statues that provide that power to the person wielding it. So too the scope and range of such powers must be in accordance to the separation of powers and the interrelated balance of powers created by the creation of three branches of government that prohibits one person (or one branch) from controlling all the others. This is especially true in a democracy. *See generally* Boughey, *A Judge's Guide to Constitutional Interpretation*, 66 Temple L. Rev. 1269, 1286-1287 (1993) and Boughey, *The North Dakota Constitution: Content & Methods of Interpretation*, 63 N.D. L. Rev. 157, 275-77 (1987).

¶28 Our American systems of government was produced by rejecting the yoke of King George, and in so doing our Founders were careful not to replace the previous king by some other king – of any type. To be a nation of laws, it is essential that those laws be applied; both in the calm days of peace and repose, and particularly in those days in which the stormy present seems to justify setting aside the law and doing

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> through which we pass, will light us down, in honor or dishonor, to the latest generation.

Abraham Lincoln, *Annual Message to Congress* (12-1-1862).

what is perceived as necessary. If we are to remain a nation of laws, each branch of government when exercising its awesome power must pause and ask, "By what right do I do this? Is this power vested in me, or in another? Do I have the legal right to do what I am doing, or instead must stand back and allow other persons or entities to do that which is required to be done?"

¶29 The essential questions relating to the basis of the power exercised by the Governor are not mere political altruisms or lofty ideals: The steadfast observance to the dictates of the law protects not only the people and the body politic, but also the person exercising that power. Following the law as written increases the prospect of the person exercising that power making the right decision, and lessens the chance that the actions taken are overbroad, or worse yet, beyond the authority provided. Thus, limiting oneself to the powers actually provided within the law protects the rights and interests of the not only the people, but also the person exercising that power.

¶30 An action which is done without authority is void, and each person negatively affected by such *ultra vires* actions is provided the ways and the means in which to correct any wayward use of power and through the courts prohibit any further use of such powers that have extended beyond the circumference of the constitutionally constrained and statutorily delegated criteria.

**B. Discussion on the Obligation of Courts to Decide This Issue**

¶31 The concept of judicial review necessarily includes the power of the judiciary, regardless of the doctrine of separation of powers, to review and decide whether any government official from any of the three branches has by any governmental action

acted arbitrarily, unreasonably, or capriciously, or has produced an absurd result. *Little v. Traynor*, 1997 ND 128, 565 N.W.2d 766. By the same token, it is the province of the courts to review the actions of any government authority and determine if those actions have a basis in law, or constitute a violation of the law. It is up to the judiciary to act if a Governor – through the issuance of an executive order, or by any other means – has overstepped his or her lawful authority, violated a person or business's constitutional rights, or created an absurd result. An abdication of this judicial authority and responsibility would destroy the intent and the rationale for three separate branches of government. Yes, the three branches are separate; but they also provide, by design, certain checks and balances, and one of those checks and balances is the judiciary's role in determining if the other two branches have acted reasonably and not arbitrarily or capriciously, and have not produced an absurd result. Although the judiciary has great discretion in deciding whether an act of another branch of government is indeed in violation of these standards, it most certainly has – since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) – the authority and responsibility to review the actions of the other two branches.

¶32 The Governor is not a king, at least not in a democracy that has three branches of government. The Governor's powers are not limitless and are necessarily restricted not only by the Constitution and statutory law, but also by the judiciary itself through the proper application of its judicial powers. Within this domain, it is the judiciary's responsibility to do more than simply state, "I am unwilling to second-guess the Governor." The role of the judiciary is indeed to 'second-guess' any decisions by any governmental authority brought to its attention through an action questioning that

exact decision. Yes, the standard applied is a heavy one, and it is necessary for the proponent of the review to show that the governmental action is indeed invalid or improper. Unless a constitutional right is involved, the burden is on the person presenting the issue to demonstrate that that is the case, but that person must be allowed to present the issue, and the courts are obligated to decide the issue. And in those situations where the governmental action restricts or denies a constitutionally protected right, the burden is on that governmental entity to demonstrate a compelling state interests and that the denial or restriction is fashioned with the least effect on those constitutional rights.

**ISSUE 1: The Executive Orders at Issue Are Beyond the Governor's Statutory Powers.**

¶33 As discussed in the Legislative Council analysis, it is clear that the Governor exceeded his powers in issuing the executive orders regarding regulation of businesses.[2]

¶34 On or about May 5, 2020, the North Dakota Legislative Council issued a document entitled Analysis of Executive Order 2020-06.4 Regarding Regulation of Businesses. This document is **EXHIBIT 10 [Doc. No. 29]**. The North Dakota Legislative Council is an agency of the legislative branch that provides legislative services to legislators, other state agencies, and the public. In addition to conducting research and analysis, the Legislative Counsel provides legal advice and counsel on legislative matters to legislators and legislative committees. In its analysis of

[2] Although the Legislative Council analysis is focused on the remaining Executive Order 2020-06.4, the same analysis applies equally to the prior executive orders that restricted Somerset, including Executive Order 2020-06.2 and Governor's Executive Order 2020-06.3, as well as the ND Smart Restart protocols, which continue to apply to Somerset.

Executive Order 2020-06.4, the Legislative Council staff stated that the following limitations apply to a Governor in regard to issuing executive orders:

> The authority of a Governor to issue legally enforceable executive orders may be limited by state and federal law. To be legally enforceable, a gubernatorial executive order may not be preempted by federal law, may not constitute legislation, or contravene enacted legislation, and must stem from a provision of the constitution or a statute.
>
> Under Section 1 of Article III and Section 13 of Article IV of the Constitution of North Dakota, all legislative power, except that reserved to the people, is vested in the Legislative Assembly. An executive order that legislature contravenes enacted legislation would violate the separation of powers doctrine. Additionally, if an executive order is contrary to enacted legislation, the executive order affectively would constitute a veto without giving the legislative assembly an opportunity to override the veto. This likely would violate the veto provisions of Section 9 of Article V of the Constitution of North Dakota.

North Dakota Legislative Council, Analysis of Executive Order 2020-06.4 Regarding Regulation of Businesses 3 (5-5-20).

¶35 The Legislative Council analysis went on to reach the following conclusions:

> . . . Although the executive order is not clear on this matter, the two powers most likely the basis for the issuance of Executive Order 2020-06.4 are sections 37-17.1-05(6)(a) and 37-17.1-05(6)(g), authorizing suspension of regulatory statutes and restrictions on ingress and egress.
>
> **Suspension of Regulatory Statutes**
>
> The Governor's authority under section 37-17.1-05(6)(a) is limited to suspending the provisions of a regulatory statute; therefore, Executive Order 2020-06.4, which restricts or limits the manner in which a private business may conduct business during a state-declared disaster or emergency is not suspending a regulatory statute, but is more likely an unauthorized enactment or amendment of a regulatory statute or rule.
>
> . . .
>
> **Restrictions on Ingress or Egress**
>
> Section 37-17.1-05(6)(g) limits the Governor's authority to impose restrictions on private businesses relating to either the ingress or egress of people within the business or business premises or related to the occupancy of the business, such as business capacity or the hours of operation. An executive order imposing a business restriction unrelated to the ingress and egress of the people in the business or on the business premises likely would exceed the authority granted to the Governor under Section 37-17.1-05(6)(g).

North Dakota Legislative Council, Analysis of Executive Order 2020-06.4 Regarding Regulation of Businesses at 3-4 (5-5-20). The Legislative Council analysis went on to assert that the criminal penalties imposed for violations of the executive order may be unconstitutionally vague and therefore void. *Ibid*. at 5. Lastly, the Legislative Council analysis described the authority placed with the State Department of Health, local boards of health, and occupational and professional licensing boards as to the power to issue valid rules and regulations in regards to emergency administrative rulemaking. *Ibid*. at 5-7.

¶36 North Dakota case law makes it clear that the enunciation of police powers is specifically provided to the legislature, and that the Governor is instead responsible "to see that the states businesses well administered and that its laws are faithfully executed." Article V, Section 7.[3] In *Johnson v. Elkin*, the North Dakota Supreme

[3] The listing of the governor's powers under the North Dakota Constitution is found in Article 5, Section 7, which provides the following – and does not include the power to legislate unilaterally, adopt rules and regulations, or for that matter issue emergency orders:

> **Section 7.** The governor is the chief executive of the state. The governor shall have the responsibility to see that the state's business is well administered and that its laws are faithfully executed.
>
> The governor is commander-in-chief of the state's military forces, except when they are called into the service of the United States, and the governor may mobilize them to execute the laws and maintain order.
>
> The governor shall prescribe the duties of the lieutenant governor in addition to those prescribed in this article.
>
> The governor may call special sessions of the legislative assembly.
>
> The governor shall present information on the condition of the state, together with any recommended legislation, to every regular and special session of the legislative assembly.

Court ruled that "[a]ny occupation or profession may be subject to the police power [and that the] only question is whether the regulation, as to entry into the occupation or profession or otherwise, is reasonable and, within constitutional limits, promotes the order, safety, health, morals, and general welfare of society." *Johnson v. Elkin,* 263 N.W.2d 123, 130 (N.D. 1978), citing *State ex rel. City of Minot v. Gronna*, 79 N.D. 673, 59 N.W.2d 514. The Court in *Johnson v. Elkin* also cited favorably its previous decision in *State v. Cromwell*:

> State v. Cromwell, supra, recognizes a right to engage in ordinary occupations without regulation, but it modifies a general statement by a recognition that such a right is limited by the "police power" which it defines as "the power to impose such restrictions on private rights as are practically necessary for the general welfare of all."

*Johnson v. Elkin*, 263 N.W.2d 123, 129 (N.D. 1978), citing *State v. Cromwell*, 72 N.D. 565, 9 N.W.2d 914, 919 (1943).

¶37 According to *Cromwell*, the police power is "inherent in every sovereignty" and is a power that "the legislature may, within constitutional limitations," exercise. *State v. Cromwell*, 72 N.D. 565, 9 N.W.2d 914, 919-20 (1943) (emphasis added). The *Cromwell* Court went on to state that "the power to regulate a business does not necessarily include the power to exclude persons from engaging in it." *Ibid* at 920. This is particularly true given the North Dakota constitutional right to engage in one's

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> The governor shall transact and supervise all necessary business of the state with the United States, the other states, and the officers and officials of this state.
>
> The governor may grant reprieves, commutations, and pardons. The governor may delegate this power in a manner provided by law.

business and profession found at Article 1, Section 7. The *Cromwell* Court clearly had this in mind when the Court stated the following:

> "* * * the right of a citizen to pursue any of the ordinary vocations, on his own property and with his own means can neither be denied nor unduly abridged by the legislature, for the preservation of such right is the principal purpose of the Constitution itself. In such cases, the limit of legislative power is regulation, and that power must be cautiously and sparingly exercised, unless the business is of such character as places it within the category of social and economic ills."

*State v. Cromwell*, 72 N.D. 565, 9 N.W.2d 914, 920 (1943)(emphasis added), *quoting* Cooley, 2 CONSTITUTIONAL LIMITATIONS 1329 (8th edition post-1903). (It should not go unnoticed that Professor Thomas Cooley was the person who supposedly provided our constitutional framers with the first draft of the proposed North Dakota Constitution and, not insignificantly, spoke at the convention. See Boughey, *supra*, 63 N.D.L.Rev. at 244-247.) The *Cromwell* Court went on to state, once again, that it is left to the legislature to decide such matters of policy:

> Whether and in what manner of business shall be regulated are matters of policy for the legislative department of government to determine. [Citation omitted.] And the wisdom, necessity and expediency of legislation are matters for legislative and not judicial consideration.

*State v. Cromwell*, 72 N.D. 565, 577, 9 N.W.2d 914, 920 (1943)(emphasis added). This most certainly may be one of the reasons for the Legislative Council – in its analysis of Executive Order 2020-06.4 – to repeatedly refer to separation of power issues and narrowly construed the Governor's emergency powers to that which has been statutorily granted by the legislature. See **EXHIBIT 10 [Doc. No. 29]** at 2, 3, 4, and particularly the limitations listed at page 3 paragraph corresponding to footnotes 7 & 8.

**ISSUE 2: The Executive Orders at Issue Involve Fundamental Rights Requiring the Application of the Strict Scrutiny Standard of Review**

¶38 Under the North Dakota Constitution, engaging in one's profession is a constitutional right:

> **Article I Declaration of Rights**
>
> **Section 1.** All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.
>
> **Section 7.** Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor.

ND CONST. Art. I, Sections 1 & 7.

¶39 Where a fundamental constitutional right is being limited by the acts of the government, a higher standard is employed by the courts in regards to whether the limitation or restriction on the right can be countenanced. In such situations, the court should apply strict scrutiny in its determination whether the government action should stand. The North Dakota Supreme Court recently described strict scrutiny analysis in *Larimore Public School District No. 44 v. Aamodt*:

> Legislative classifications are subject to different levels of judicial scrutiny, and the level applied depends on the right infringed by the challenged classification. **[**State v. Leppert**,** 2003 ND 15, ¶ 7, 656 N.W.2d 718.]. We have applied three levels of judicial scrutiny to equal protection claims:
>
> > We apply strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification "unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose." When an "important

> substantive right" is involved, we apply an intermediate standard of review which requires a "'close correspondence between statutory classification and legislative goals.'" When no suspect class, fundamental right, or important substantive right is involved, we apply a rational basis standard and sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose.

*Larimore Public School District No. 44 v. Aamodt*, 2018 ND 71 ¶34, 908 N.W.2d 442, 455, citing *Gange v. Clerk of Burleigh Cty. Dist. Court***,** 429 N.W.2d 429, 433 (N.D. 1988) (citations omitted).

¶40 Where strict scrutiny is not applied, then the Court on occasion applies an intermediate level of review:

> [O]n several occasions, this Court has recognized the right to recover for personal injuries is an important substantive right subject to the intermediate standard of equal protection analysis. [Citations omitted.] We conclude the intermediate level of scrutiny applies to our analysis of the damage cap in N.D.C.C. § 32-12.1-03(2) and requires a close correspondence between the statutory classification and legislative goals. That test approximates the substantive-due process test that historically has been used by this Court and also governs substantive-due process claims.

*Larimore Public School District No. 44 v. Aamodt*, 2018 ND 71 ¶37, 908 N.W.2d 442, 456-57. See also *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 2014 ND 197 (N.D. 2014)(separate opinion of C.J. VandeWalle and J. Kapsner).

¶41 Because engaging in one's profession is a fundamental right under the North Dakota Constitution and the United States Constitution, this Court should apply strict scrutiny, or in the alternative, at the very least, determine that the right to engage in one's profession is a significant right and as such, it is appropriate to apply intermediate scrutiny.

¶42 In regards to the similar right under the federal constitution, we refer the Court to the United States Supreme Court's recent acknowledgment of this constitutional right to engage in one's employment: "[T]he Privileges and Immunities Clause

protects the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling.'" *McBurney v. Young,* 569 U.S. 221, 227 (2013), *quoting*, *Hicklin v. Orbeck,* 437 U.S. 518, 524 (1978).

¶43 Perhaps there is some irony in the fact that one of the most articulate expositions of the right to engage in one's employment may be found in the *Slaughter-house Cases,* the 1873 decision in which the majority determined that the 14th Amendment privileges and immunities clause did not apply to the States. In that famous 5-4 decision Justice Field described the origin and foundations in English, French, and American law for the proposition that engaging in one's profession is a long-standing fundamental right:

> Of the statutes, the benefits of which was thus claimed, the statute of James I against monopolies was one of the most important. And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men 'with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men.'
>
> If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that State of the civil law as the basis of her jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens. But were this otherwise, the fourteenth amendment secures the like protection to all citizens in that State against any abridgment of their common rights, as in other States. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift

> of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.

*Slaughter-house Cases*, 83 U.S. 36, 105-106 (1873)(J. Field, dissenting) (emphasis added).

¶44 There can be no doubt that the right to engage in one's own occupation is a fundamental right fully recognized within our federal constitution, and that any restrictions that the state places on this right must be analyzed accordingly. Any denial of the right to practice one's profession is subject to strict scrutiny analysis, and any governmental restriction on that right – particularly the complete denial of that right – must be considered a dreadful deviation of the essential right of "Life, Liberty, and the pursuit of Happiness," find sustenance through one's own labors, and allow the worker to be "worthy of his hire." *Declaration of Independence* (1776) & *Luke* 10:7.

**ISSUE 3: Declaratory Judgment Should Be Issued as a Matter of Law and Enforced by an Appropriate Writ**

¶45 In a situation where a Governor has issued executive orders that go beyond the powers granted to him or her through statute or where the Governor has improperly limited the constitutional rights of individuals and businesses to engage in their profession, the courts should – as a matter of law – declare such actions unfounded and therefore prohibited by law, and if necessary enforce such legal conclusion by the issuance of a preliminary injunction or an appropriate writ.

**Conclusion**

¶46 For the reasons stated above, the plaintiffs request that this Court reverse the district court's denial declaratory judgment and remand this case for further proceedings consistent with the Court's opinion. The Appellants hereby request oral argument and state that the issue of the Governors' authority to issue executive orders in relation to the present pandemic is a matter of great interest to the public at large and involves significant issues involving the interrelationship and appropriate powers provided under statute and the North Dakota Constitution of the legislative and executive branches of our state government. We respectfully suggest that oral argument would be helpful to the Court by allowing the Court to delve into the argument raised by counsel that relate to the important issues raised in this case, as well as inquire of issues or points perhaps not articulated in the briefs.

¶47 Dated this 10th day of February, 2021.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

¶48 I certify that this Brief complies with the page number rule of N.D.R.App.P. 32 in that the brief is 38 pages excluding this page with the certification.

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**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

**Supreme Court No. 20200292**
**Burleigh County Civil No. 08-2020-CV-01474**

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| Somerset Court, LLC, and Kari Riggin, | ) |
| | ) |
| Plaintiffs and Appellants, | ) |
| | ) |
| vs. | ) |
| | ) |
| Doug Burgum, Governor for the State of North Dakota, in his official capacity, the North Dakota Health Department, Dirk Wilke, North Dakota State Health Officer, in her Official capacity, | ) |
| | ) |
| Defendants and Appellees. | ) |

## CERTIFICATE OF SERVICE

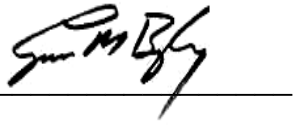
¶1 I hereby certify that the following document (s):

1. Appellants' Brief 1-6-21 CORRECTED 2-10-21;

was served upon the above-named Defendants and Appellees by filing and serving true and correct copies of the above-listed document on the 10th day of February, 2021, via email to:

| | |
|---|---|
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¶2 Dated this 10th day of February, 2021.



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20200292
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 10, 2021
STATE OF NORTH DAKOTA

# IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

**Supreme Court No. 20200292**
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## CERTIFICATE OF SERVICE

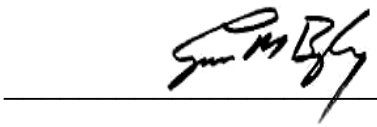
¶1 I hereby certify that the following document (s):

1. Appellants' Amended Brief – title page and signature page only.

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| | |
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| Matthew Sagsveen | masagsve@nd.gov |
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¶2 Dated this 10th day of February, 2021.



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