

**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.	)

**APPELLANTS' SECOND CORRECTED REPLY 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

**APPELLANTS HEREBY REQUEST ORAL ARGUMENT**

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## ARGUMENT

¶1 In reply to the governor’s brief, we assert the following in regards to a proper interpretation of Section 37-70.1-05, and then delve into the issue of whether a governor has any inherent powers relating to the issuance of executive orders above and beyond those powers provided by the legislature in Section 37-17.1-05.

¶2 **Discussion as to Section 37-17.1-05** Under Section 37-17.1-05, where there is a disaster or emergency, the legislature has granted the governor certain specific powers. Essential to the question at hand is whether the specific powers actually grant to the governor the power to terminate the operation of businesses, restrict the operations of specific businesses short of shutting down the business, or create legislative enactments, rules, or regulations applicable to certain businesses. It is appropriate to provide this Court with a subdivision-by-subdivision analysis of Section 37-17.1-05:

Under **subdivision 1 of Section 37-17.1-05**, the governor is responsible to minimize or avert the adverse effects of a disaster or emergency. This is not a grant of power, but a duty assigned to the governor.

Under **subdivision 2 of Section 37-17.1-05**, the governor is given the power to ‘issue executive orders and proclamations, and amend or resend them.’ This grant of power does not include the right to legislate. The power is to grant executive orders, which by definition does not include legislative powers.<sup>1</sup>

**Subdivision 3 of Section 37-17.1-05**, provides the process in which an executive order may be issued, continued, and terminated by the legislature.

Before the governor may exercise any disaster or emergency powers under this statute, the governor must first declare a disaster or emergency by executive order or proclamation. The state of emergency continues until the governor determines that the threat of an emergency has passed and the emergency conditions no longer exist. And although the governor has the right to consider the state of emergency continuing, the legislative assembly is provided the power to terminate this determination of a state of emergency at any time by concurrent resolution. This subdivision provides the process for the governor to declare a disaster or emergency by executive order, the right of the governor to consider the disaster or emergency to be continuing, the right of the legislature to terminate the emergency, and the process in dissemination of the executive order. Subdivision 3 relates to the process and does not constitute a grant of authority for the governor to terminate businesses, restrict businesses, or create legislative enactments, rules, or regulations that apply to private persons or private businesses.

Under **subdivision 4 of Section 37-17.1-05**, an executive order issued by the governor declaring a disaster or emergency activates the state and local operation plans and serves as authority for the deployment and use of any forces or plans in the distribution of materials and use the facilities. It is important to note that this subdivision results in the activation of the state and local operational plan by the issuance of an executive order, but in no way grants to the governor the right to develop his or her own plan, or otherwise through the Executive Order separately terminate or restrict private

businesses, or legislate or create rules and regulations applicable to private persons or private businesses.

Under **subdivision 5 of Section 37-17.1-05**, the governor is designated ‘commander in chief of the emergency management organization and of all other forces available for emergency duty.’ It is important to note that this provision provides that the governor is the commander in chief of the management organization and other forces available for emergency duty, and is not the commander-in-chief of all private persons or private businesses.

Under **subdivision 6 of Section 37-17.1-05**, the governor is provided certain additional powers, which includes the power at **subdivision 6(a)** to **suspend** the provisions of **any regulatory statute** prescribing the procedures for conduct **of state business**, or the **orders, rules, or regulations of any state agency** if compliance with those provisions would prevent, hinder, or delay necessary action in managing a disaster or emergency. It is important to note that this subdivision allows the governor the power to suspend regulatory statutes as well as the orders, rules, and regulations of any state agency. This subdivision does not grant to the governor any power to terminate, restrict, or limit private persons or private businesses.

Under **subdivision 6(b) of Section 37-17.1-05**, the governor is given the power to utilize all available resources of the state government and political subdivisions necessary to manage the disaster or emergency. This subdivision does not grant to the governor any power to terminate, restrict, or limit private persons or private businesses.

Under **subdivision 6(c) of Section 37-17.1-05**, the governor is given the power to transfer the direction, personnel, or functions **of state departments and agencies**. This subdivision does not grant the governor any power to terminate, restrict, or limit private persons or private businesses.

Under **subdivision 6(d) of Section 37-17.1-05**, the governor is allowed to ‘commandeer or utilize any private property if the governor finds this necessary to manage the disaster or emergency.’ In the unlikely event that this court concludes that this subdivision allows the governor to commandeer all private businesses in the state or certain types of businesses in the state, we assert that any such taking of private property must be with specificity and that any such commandeering of by the property must include an explicit declaration as to which specific property is being commandeered or taken, the reason for the taking, and an appropriate process for reimbursement for such taking. We do not believe that this provision may be used as a grant of authority to take over all businesses of a certain type, such as salons, nor do we believe that this provision can be properly employed to terminate the likelihood of all cosmetologists in the state.

Under **subdivision, 6(e) of Section 37-17.1-05**, the governor is granted the power to direct and compel the evacuation of any stricken or threatened area within the state if this action is necessary for the preservation of life, or other mitigation, response, or recovery. In regards to the instant Executive Order and the issue at hand, we note that the governor did not director compel the evacuation of any long-term care facility or any specific

business contained within that facility, including any salon that separately does business in that facility. Would not be appropriate to use this subdivision as a basis for terminating, restricting, or limiting private persons or private businesses. A fair reading of the word evacuation would not include such additional powers.

Under **subdivision 6(f) of Section 37-17.1-05**, the governor is granted the power to prescribe routes, modes of transportation, and destinations in connection with an evacuation. This subdivision has no applicability to the issues at hand.

Under **subdivision 6(g) of Section 37-17.1-05**, the governor is granted the power to control ingress and egress in a designated emergency area, movement of persons within the area, and occupancy of the premises therein. We acknowledge that it is possible for this court to conclude that the subdivision can serve as a basis for eliminating ingress and egress into long-term care facilities, such as denying visitors to enter such facilities during the emergency. However, we do not believe that this subdivision can serve as a basis for terminating, limiting, or restricting a specific type of private business or a private person who runs a business when that person is subjected to all the necessary controls and health restrictions that every other person in the facility is subjected. In other words, where the cosmetologist who is running the salon is subjected to the very same health restrictions that all other individuals who work at the facility are subjected, and all other persons who work at the facility are allowed to continue with their employment as a nurse's

aide, for example, then application of this subdivision is unreasonable and more importantly must be subjected to strict scrutiny since the result would be taking away one's livelihood.

Under **subdivision 6(h) of Section 37-17.1-05**, the governor is granted the power to limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles, not including ammunition.

Under **subdivision 6(i) of Section 37-17.1-05**, the governor is granted the power to make provision for temporary emergency housing.

Under **subdivision 6(j) of Section 37-17.1-05**, the governor is granted the power to make provisions for critical shortages of fuel and other commodities.

Under **subdivision 6(k) of Section 37-17.1-05**, the governor is granted the power to designate members of the Highway Patrol, National Guard, or other trained in law enforcement as peace officers. None of these three subdivisions relate to the issue at hand.

Lastly, under **subdivision 7 of Section 37-17.1-05**, the legislature has made any willful violation of any provision of an executive order or proclamation issued by the governor a crime, with that person being guilty of an infraction.”

¶4 For the reasons stated above, we do not believe that Section 37-17.1-05 grants to the governor the power to terminate, restrict, or limit a private person from being a cosmetologist or running her business at a long-term care facility in which she is



subject to all the same health protocols and restrictions to which all others who work at the facility are subjected.

¶5 **Discussion as to a Governor's Inherent Powers** Assuming *arguendo* that Section 37-17.1-05 does not grant a governor the authority to terminate, limit, or restrict Kari Riggins' livelihood and occupation as a cosmetologist who runs a salon in a long-term care facility, it is therefore necessary to this Court to determine whether the governor – separate from any of the above listed constitutional provisions and separate from Section 37-17.1-05 – has inherent authority as Governor of the State of North Dakota to issue an executive order which terminated Kari Riggins' business and prohibited her from exercising her chosen profession. The corollary issue is of course can a governor through executive order make it a crime to practice your chosen profession – and make it a crime for a person to continue in that profession when that person is compliant with all other rules, regulations, and health standards which apply to that person and business, and facility where the business is being conducted.

¶6 There is no question that the governor has the authority under statute following the declaration of a disaster or emergency to **suspend** the provisions of **any regulatory statute** prescribing the procedures **for conducting state business**, or the orders, rules, or regulations of **any state agency**, if compliance with those provisions would prevent, hinder, or delay necessary action in managing a disaster or emergency. Obviously, this language cannot be used as a basis for the governor through executive order adopting procedures for conducting private businesses.

Moreover, as will also be noted above, the power to suspend does not include within it the power to create legislation, rules, or regulations.

¶7 **Separation of Powers** It is axiomatic that executive power relates to executive acts, such as enforcing the laws, granting pardons, and other executive functions. It is the legislature that writes the laws, and the administrative agencies that promulgate rules and regulations as allowed through legislative enactments. Although each branch of government may have the right to develop and adopt its own internal rules and regulations, as this court has done in regards to the various rules of said one appellate procedure, the concept of separation of powers prohibits the governor from infringing on the traditional roles of either the legislative or judicial branch, by executive order or otherwise.

¶8 **Historic Antecedents to Article V's Listing of the Governor's Powers and the Previous Provision Relating to Executive Orders Which is NOT Part of the Current Constitution** As noted above, the governor's powers are listed in Article V, Section 7, of our present North Dakota Constitution. It is important to note that this section, Section 7, is derived almost entirely from the Constitution created at the North Dakota constitutional convention of 1972.<sup>1</sup> It is just as important to note that the preceding section proposed by the convention of 1972 specifically provided authority for the governor to issue executive orders in relation to any reorganization that he or she would impose upon the executive branch through executive orders.

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<sup>1</sup> As students of North Dakota history are well aware, the citizens of North Dakota did not adopt this version created by the North Dakota Constitutional Convention of 1972 *en mass*, but instead slowly but surely adopted much of the proposed 1972 constitution article by article, including Article V relating to the executive branch.

Two points are significant in this regard: *first*, one of the major objections to the prior section, which during the convention is Section 6 of the proposed Constitution, related specifically to the concern that the governor should not be allowed to legislate; and second, although the convention's Section 6 survived and became part of the proposed Constitution, following defeat of the 1972 propose state constitution the legislature proposed a new Article V that did not include the previous Section 6, the offending section that provided the governor constitutional powers through executive orders. In other words, although the constitutional provision allowing the governor to reorganize the executive branch through executive orders survived the constitutional convention, it did not survive the legislative process in which much of Article V from the convention was adopted, and more specifically Section 7 which is at issue in this matter.

¶9 To put this another way, and interpreting Article V Section 7 of our present Constitution is appropriate to take into account the objections at the 1972 convention to including a constitutional provision for executive orders, even though the use of such executive orders was strictly limited to the executive branch and reorganizing the executive branch by the governor.

¶10 The debates of the 1972 convention are replete with concerns relating to the possible misuse of executive orders by the governor, and more specifically the inappropriateness of the use of Executive Orders to legislate. A review of the historic record follows:

10.1 Article V of our current constitution was drafted at the 1972 North Dakota Constitutional Convention. The Article V language proposed at the

1972 Constitutional Convention included not only section 7 (then section 8) but also a section (6) that granted the governor the power to reorganize the executive branch through executive orders. The discussion as to executive orders is significant because even though section 6 was adopted at the 1972 convention and the revised Article V was not accepted by the people, the provisions of Article V that were subsequently proposed by the Legislature and adopted by the people discarded the 1972 section 6 relating to executive powers. Because our current section 7 relating to the general powers of the governor was drafted at the 1972 convention in conjunction with section 6 relating to executive orders, the discussions relating to section 6 and section 7 provide a clear indication as to the drafters' views on separation of powers and the proper restriction of executive orders only to the governor's power to reorganize the executive branch.

10.2 Under the 1972 proposal section 6 allowed the governor to use executive orders to reorganize the executive departments, other than Constitutionally elected office. See generally Debates of the North Dakota Constitutional Convention of 1972 at 788-800, 1045-47, 1145-52, 1253-54, 1435-42, and 1794-96. Delegate David Nething noted that “[t]he matter of executive order North Dakota state government is relatively new [and] “we had but one expert appear on the subject, that being the governor himself [who explained] how at times he has used it [and it] has been a good way . . . to reorganize some of the departments.” *Ibid.* at 792. Throughout the debates all the delegates agreed that the power of the governor relating to executive

orders would be limited to reorganizing executive departments by executive order. *Ibid.* at 792-98, and particularly at 792. Delegate Hill, one of the proponents of the use of executive orders, noted, “[i]n effect, the way this is proposed we’re saying, as regards to reorganization, the governor can make law by executive order if the Legislature does not disapprove it after they’ve had the opportunity to consider it.” *Ibid.* at 795.

10.3 Despite the fact that everyone agreed that the executive order could be used only for the governor to reorganize executive departments, many delegates – particularly Delegate William Pierce of Bismarck – raised the concern that the governor should not be allowed through executive order to Legislate: “I would only like to point out that this is a radical departure from the other sections of the Constitution that provide how laws should be made, which states that they shall receive affirmative vote by both houses of the Legislature. Now I am very bothered by the new method of laws being enacted. . . . I do not believe that we should create a new method of enacting laws, whatever they may be, other than by an affirmative passage by a majority of the members elected to the Legislature.” *Ibid.* at 797-98. Because of these concerns, the offending section – then designated as 1(b) – was sent back to committee for further review. *Ibid.* at 800. All of these above discussions as to this section occurred on January 27, 1972.

10.4 Five days later, on February 1, 1972, a rewritten version of section 1(b) was proposed which allowed the governor by executive order to “make changes in the allocation of functions, powers, and duties among and within

the executive departments, other than those departments headed by constitutionally elective officers.” *Ibid.* at 1047. When discussed on February 2, Delegate William Pierce once again noted his unchanged position: “With all due respect to the semanticist who rearranged him the language, I have the same objection that I had before; that we are permitting, by this language, the governor to change the law and we are evolving a new way of enacting law, not requiring the approval of the Legislature, but simply if they fail to disapprove it. . . . I have no idea what these orders might be. They might be very fine. They might be excellent. But they could be bad, too. But I simply don’t think that’s a proper way to enact a law. We had the Legislature for that purpose. That’s why I oppose it.” *Ibid.* at 1145-46. Delegate Carroll Baker of Minot agreed, renewing his “previous plea to this body to approach this in the proper fashion. If you want to have an executive order, provide for the executive order in the governor’s powers and provide that the Legislature shall write the rules for the exercise of that executive order. In that way, it could be used properly. In the [present] way, it is simply a further complication that can do nothing but – can make nothing but trouble.” *Ibid.* at 1146. Delegate Earl Rundle of New England also opposed the measure as written, asserting that through this provision “[n]ow the governor may veto the legislative acts. Now were going to turn around and let the legislator Legislature veto the governor’s acts. And I think this is exactly like hitting a horse backwards on the body, which doesn’t work very well.” *Ibid.* at 1148. Delegate Rundle went on to state that the governor “may get a little frustrated

someday because he can't kick out the Attorney General, whom he doesn't like; but you've been frustrated in this body, too – I assume most of us have – and I think that this is not only a novel, but not a very wise, approach. I oppose the measure.” *Ibid.* at 1148. (The writer of this brief reaches no conclusion as to whether this comment made in 1972 refers to the then relationship between the governor and the attorney general – or instead relates to ‘the stormy present’ and was prescient by fifty years.)

10.5 In regard to delegate Robert Burke’s concern that the proposed language would give the governor authority to repeal laws by executive order, one of the proponents of the provision (Delegate David Nething) asserted that “you’ll find the only particular statute involved would be the allocation of functions, powers and duties among and within the executive departments. That’s the only statutes that are involved at all.” *Ibid.* at 1149. The revised provision was adopted by a vote of 77 ayes and 18 nays. *Ibid.* at 1152. The final language was modified slightly, *ibid.* at 1435-42, and on February 17, 1972, the convention adopted the proposed constitution which included at Section 6 of Article V the language relating to executive orders. *Ibid.* at 1794-95 – Section 7 of the 1972 proposed constitution related to the State Planning Council and Section 8 listed the powers and duties of the governor (which subsequently became Section 7 of our current constitution).

¶11 Nor was the discussion bereft of humor. The discussion as to the governor’s power to issue executive orders was certainly not without humor. Delegate Earl Rundle of New England asserted, “I feel that we need this proposition exactly

like Custer needed more Indians.” Debates at 793. Delegate Edward Lander, in response to another delegate’s view that executive orders would have the force of law is not “a big deal” responded by saying, “The world’s greatest despot describe certain laws as ‘trivial.’” *Ibid.* at 799. Delegate Lloyd Omdahl soon thereafter confessed, “After ten years of being on the inside [of the] executive branch of the government, I can tell you stories about duplication that will make your hair stand up.” *Ibid.* at 800. After noting that this statement was probably “an inappropriate statement” and that he gets “a better reaction out of that than quoting Scripture,” Delegate George Sinner wondered aloud – and on the record – if delegate Omdahl’s statement “referred to singular.” *Ibid.*

¶12 Although the delegates who had those concerns did not succeed in removing the offending proposed provision from the proposed Constitution created by 1972 constitutional convention, many years later, when the legislature in 1995 proposed a new article V, the offending provision previously Section 6, was not included in the proposal to the citizens of North Dakota. The people of North Dakota adopted the new Article V – and the language of Section 7 which was derived from the work of the 1972 Constitutional Convention – on June 11, 1996.

¶13 A motion has been made to allow for the additional length of this brief.

¶14 Dated this 24<sup>th</sup> day of February, 2021.

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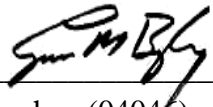
¶1 I hereby certify that the following document (s):

- 1. Appellants Somerset Court, LLC, and Kari Riggin’s Second Corrected Reply Brief.

was served upon the above-named Plaintiff and Appellee by filing and serving true and correct copies of the above-listed document on the 19<sup>th</sup> day of February, 2021, via email to:

James Nicolai	jnicolai@nd.gov
Matthew Sagsveen	masagsve@nd.gov (courtesy)

¶2 Dated this 24<sup>th</sup> day of February, 2021.




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**CORRECTED  
CERTIFICATE OF SERVICE**

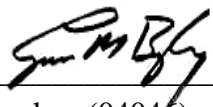
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¶2 Dated this 8<sup>th</sup> day of March, 2021.



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