

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

<p>Doug Burgum, in his capacity as North Dakota's Governor,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">vs.</p> <p>Alvin Jaeger, in his capacity as North Dakota's Secretary of State; the North Dakota Legislative Assembly, Chet Pollert, Chairman of Legislative Management; and the District 8 Republican Committee, Loren DeWitz, District Chairperson,</p> <p style="text-align: center;">Respondents.</p>	<p>SUPREME COURT NO.</p>
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PETITION FOR PRELIMINARY INJUNCTIVE RELIEF,
DECLARATORY JUDGMENT, WRIT OF INJUNCTION, AND
WRIT OF MANDAMUS

PETITION

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the late David Andahl meet the qualifications to hold the office of a member of the legislative assembly so that he may receive a certificate of election and become a member of the legislative assembly?
2. Is N.D.C.C. § 16.1-13-10 applicable to the vacancy created by David Andahl's death and subsequent receipt of the second-most votes at the November 3, 2020 election?
3. Does the Governor have the constitutional authority to fill the vacancy by appointment pursuant to N.D. Const. art. V, § 8 because no other method is provided by the North Dakota Constitution or by law?

STATEMENT OF ORIGINAL JURISDICTION

[¶1] The Governor asks the Court to exercise its original jurisdiction to decide the merits of this Petition. The Petition raises issues concerning the eligibility of a candidate for the state legislature to hold the office and the balance of powers between the executive and legislative branches of government. If the Secretary of State, Legislative Assembly, and District 8 Republican Committee are permitted to erroneously fill the District 8 legislative assembly seat under the guise of N.D.C.C. § 16.1-13-10, they would illegally usurp the Governor's constitutional right to fill the seat by appointment pursuant to N.D. Const. art. V, § 8. These issues are of paramount importance to the interests of the State and the citizens of North Dakota and warrant the Court's exercise of its original jurisdiction.

[¶2] The North Dakota Supreme Court has original jurisdiction to hear and rule on original and remedial writs as it deems necessary. N.D. Const. art. VI, § 2; N.D.C.C. § 27-02-04. The Court may exercise original jurisdiction over actions for declaratory judgment and writs of habeas corpus, mandamus, quo warranto, certiorari, and injunction, among others. *See North Dakota Legislative Assembly v. Burgum*, 2018 ND 189, ¶ 10, 916 N.W.2d 83 (declaratory judgment); N.D.C.C. § 27-02-04 (writs). The Court may exercise its original jurisdiction when the question presented is *publici juris* and affects the sovereignty of the State, the franchises or prerogatives of the State, or the liberties of its people. *Berg v. Jaeger*, 2020 ND 178, ¶ 7, 948 N.W.2d 4 (quoting *Riemers v. Jaeger*, 2018 ND 192, ¶ 5, 916 N.W.2d 113).

[¶3] Questions involving the eligibility of an individual to hold elective office in the state legislature are proper for this Court to consider when exercising its original jurisdiction. *See Onstad v. Jaeger*, 2020 ND 203, ¶ 1, 949 N.W.2d 214 (exercising original jurisdiction regarding eligibility of candidate for state legislature). Questions involving the

authority of the governor and legislative assembly are proper for this Court to consider when exercising its original jurisdiction. *See Peterson v. Olson*, 307 N.W.2d 528, 531 (N.D. 1981) (exercising original jurisdiction regarding the authority of the governor and legislative assembly). Questions concerning the governor's appointment powers are questions of a public nature and necessarily affect the state at large and, thus, are proper for this Court to consider when exercising its original jurisdiction. *See State ex rel. Vogel v. Garaas*, 261 N.W.2d 914, 917 (N.D. 1978) (exercising original jurisdiction regarding appointive process for filling a vacancy in the office of district court judge).

STATEMENT OF THE CASE AND RELIEF SOUGHT

[¶4] This is an action for declaratory relief pursuant to N.D.C.C. § 32-23-01, a writ of injunction under N.D.C.C. ch. 32-06, a writ of mandamus under N.D.C.C. ch. 32-34, and preliminary injunctive relief prior to a hearing pursuant to N.D.R.Ct. 5.2(c)(1). The Governor requests the following relief:

1. A declaration that the late David Andahl does not meet the qualifications to hold the office of a member of the legislative assembly and therefore may not receive a certificate of election and become a member of the legislative assembly.
2. A declaration that N.D.C.C. § 16.1-13-10 is inapplicable to the vacancy created by David Andahl's death and subsequent receipt of the second most votes at the November 3, 2020 election.
3. A declaration that no method is provided by the North Dakota Constitution or by North Dakota law to fill the vacancy except N.D. Const. art. V, § 8, and that the Governor has the constitutional authority to fill the vacancy by gubernatorial appointment pursuant to N.D. Const. art. V, § 8.
4. Preliminary injunctive relief and a writ of injunction enjoining the Secretary of State from issuing a certificate of election to the late David Andahl, and from issuing a certificate of appointment and oath of office to an appointee of the District 8 Republican Committee or the chairman of legislative management under the procedure provided at N.D.C.C. § 16.1-13-10; and enjoining the District 8 Republican Committee or the chairman of legislative management from selecting an individual to fill the vacancy under the procedure provided at N.D.C.C. § 16.1-13-10.

5. A writ of mandamus compelling the Secretary of State to attest the Governor's written appointment of an individual to fill the vacancy after certification of election results by the State Canvassing Board, and compelling the Secretary of State to issue a certificate of appointment and oath of office to the Governor's appointee after the certification of the results.

[¶5] Pursuant to N.D.R.Ct. 5.2(c)(1), the Governor requests immediate injunctive relief consistent with this Petition prior to a hearing, as the State Canvassing Board meets at 1:30 P.M. on Friday, November 13, 2020 to certify the results of the November 3, 2020 general election. (App. 3). The Secretary of State has represented that he intends to act consistent with the North Dakota Attorney General's Opinion, dated October 13, 2020, which will require him to issue a certificate of election to the late Mr. Andahl soon after the State Canvassing Board meets. For this reason, immediate injunctive relief is necessary to prevent the Secretary of State's issuance of a certificate of election to a deceased, and therefore ineligible, candidate for the state legislature. The Governor requests oral argument as soon as possible given the importance, procedural posture, and time-sensitive nature of this matter.

STATEMENT OF RELEVANT FACTS

[¶6] David Andahl won the primary election on June 9, 2020, securing a place on the November 3, 2020 general election ballot as a North Dakota Republican Party candidate for a District 8 State Representative seat. Tragically, Mr. Andahl passed away on October 5, 2020, just shy of a month away from the upcoming general election. The North Dakota Secretary of State determined it was too late to change the ballots as early voting had already commenced. (App. 4). As a result, Mr. Andahl remained on the ballot as a candidate for District 8 State Representative.

[¶7] According to unofficial results published by the North Dakota Secretary of State, Mr. Andahl received 35.53 percent of the total votes, second only to the other Republican

Party candidate on the ballot, Dave Nehring, who received 40.72 percent of the vote. (App. 8). The recipient with the third most votes was Democratic-NPL candidate Kathrin Volochenko, who received 11.42 percent of the total votes. *Id.*

[¶8] In anticipation of Mr. Andahl’s receipt of the first or second most votes in the recent election, the Secretary of State requested a North Dakota Attorney General opinion inquiring about a “situation where a qualified candidate for political office died after early voting was commenced and at a time when it is not possible to change the names or otherwise replace the candidate on the ballot prior to the general election.” 2020 N.D. Op. Att’y Gen. No. L-08 (2020).

[¶9] In a written opinion, dated October 13, 2020 (the “Attorney General’s Opinion”), the Attorney General ultimately opined if the late Mr. Andahl received sufficient votes to be elected, Mr. Andahl would be elected to the office of District 8 State Representative. *Id.* The Attorney General further opined that after the late Mr. Andahl’s “election,” his seat would then be deemed vacant, and such a vacancy would be filled pursuant to N.D.C.C. § 16.1-13-10. *Id.*

[¶10] Following review of the unofficial results of the November election and analysis of North Dakota law regarding filling the vacancy left by Mr. Andahl’s posthumous election victory, the Governor announced via press release that he intended to appoint a replacement to fill the vacancy in accordance with his constitutional authority. (App. 9-10). In his press release, the Governor accurately stated “the only legal and constitutionally viable way to fill the District 8 seat is through gubernatorial appointment.” *Id.*

[¶11] In response, Attorney General Wayne Stenehjem issued a statement that the Governor has no authority to appoint a replacement to fill a state House seat won by a

Republican candidate who died before the election. (App. 19). The Attorney General further stated “[d]espite the Governor’s efforts to sidestep the statutory processes and the state Constitution, I have today advised Secretary of State Jaeger to follow the [October 13, 2020] Opinion.” (App. 20).

[¶12] The Secretary of State has since confirmed he will follow the Attorney General’s Opinion. *Id.* Based on the Secretary of State’s representation, it is substantially certain the Secretary of State will adhere to the Attorney General’s advice, and intends to issue a certificate of election to the late David Andahl and an ultimate certificate of appointment to an appointee of the District 8 Republican Committee pursuant to N.D.C.C. § 16.1-13-10. *See id.*; 2020 N.D. Op. Att’y Gen. No. L-08 (2020).

[¶13] The Governor, therefore, seeks immediate redress to guide the parties to fill the vacancy consistent with the constitutional separation of powers between the executive and legislative branches and in accordance with North Dakota law.

LAW AND ARGUMENT

[¶14] The late David Andahl received the second most votes for District 8 State Representative at the November 3, 2020 general election, a number of votes which would have been sufficient to elect him to the legislature had he not passed away prior to the election. However, Mr. Andahl’s death prior to the election rendered him ineligible to be elected to a seat in the legislature under N.D. Const. art. IV, § 5 because he was not a “qualified elector” on election day. Under this Court’s long-standing precedent, the late Mr. Andahl’s receipt of the second most votes does not result in the third place finisher winning election to the legislature by default. Instead, it results in a vacancy in the office (the “Vacancy”).

[¶15] The North Dakota Constitution vests each branch of the State government – legislative, executive, and judicial – with certain enumerated governmental powers. One of the powers granted to the Legislative Assembly is the power to **make laws** to fill vacancies in either house of the legislative assembly. N.D. Const. art. IV, § 11 provides that “[t]he legislative assembly **may provide by law** a procedure to fill vacancies occurring in either house of the legislative assembly.” (emphasis added).

[¶16] One of the powers granted to the Governor under the North Dakota Constitution is the authority to “fill a vacancy in any office by appointment if no other method is provided by [the] constitution or by law.” N.D. Const. art. V, § 8. This “gap filling” provision found at N.D. Const. art. V, § 8 contemplates an office may become vacant without a set method to fill the vacancy. In those circumstances, the Governor may fill the vacancy by gubernatorial appointment.

[¶17] The North Dakota legislature has enacted no law providing a procedure to fill the Vacancy created by Mr. Andahl’s death. Therefore, no method for filling the Vacancy is provided by the North Dakota Constitution or by law, except the “gap filling” provision at N.D. Const. art. V, § 8. The Governor accordingly has the constitutional authority to fill the Vacancy by gubernatorial appointment pursuant to N.D. Const. art. V, § 8. The Governor requests relief from this Court to enforce his constitutional right to fill the Vacancy and defend that right from serious infringement.

I. The late David Andahl’s receipt of the second most votes at the election results in a vacancy in the office.

[¶18] The unofficial results of the November 3, 2020 election, which are to be certified by the State Canvassing Board on November 13, 2020, indicate the late Mr. Andahl received the second most votes for State Representative in District 8 (35.53%), followed

by Kathrin Volochenko receiving the next most votes (11.42%). Had Mr. Andahl not passed away, his receipt of the second most votes would have been sufficient to elect him to the state legislature. However, a deceased individual is ineligible to hold elective office in the state legislature under N.D. Const. art. IV, § 5, which requires that an individual be a “qualified elector” on the day of the election to be validly elected to the state legislature. Since Mr. Andahl is ineligible, the votes cast for him are ineffective to elect him to the state legislature and he cannot receive a certificate of election as a member of the legislative assembly. *See* N.D.C.C. § 16.1-13-09 (“Any person who receives as certificate of election as a member of the legislative assembly may resign such office although the person may not have entered upon the execution of the duties thereof nor taken the requisite oath of office.”). The late Mr. Andahl’s ineligibility to hold elected office in the state legislature on election day nullifies his “election”. However, this Court’s precedent indicates that the recipient of the third most votes at the election does not win by default, and the result of the late Mr. Andahl’s receipt of the second most votes at the election is a vacancy.

A. The late Mr. Andahl cannot meet the qualifications to hold office in the state legislature, and therefore his “election” is null and void.

[¶19] The North Dakota Constitution is clear that in order to be elected to the legislative assembly, an individual must be a “qualified elector” on the day of the election and must have been a resident of the state for one year immediately prior to that election. N.D. Const. art. IV, § 5. N.D. Const. art. IV, § 5 provides in full:

Section 5. Each individual elected or appointed to the legislative assembly **must be, on the day of the election** or appointment, **a qualified elector** in the district from which the member was selected and must have been a resident of the state for one year immediately prior to that election. An individual may not serve in the legislative assembly unless the individual lives in the district from which selected.

Id. (emphasis added). A “qualified elector” is an individual who is a citizen of the United States, eighteen years of age or older, and a resident of North Dakota. N.D. Const. art. II, § 1; N.D.C.C. § 16.1-01-04.

[¶20] If an individual is not a “qualified elector,” that individual is ineligible to hold office as a member of the legislative assembly. *See* N.D.C.C. § 44-01-01 (“Every elector is eligible to the office for which that person is an elector, except when otherwise specifically provided. No person is eligible who is not such an elector.”). Further, this Court has held the standard for “eligibility” to hold office turns on the ability of a candidate to satisfy the “requirement to take an oath of office and give an official bond.” *See Nielsen v. Neuharth* 331 N.W.2d 58, 60 (N.D. 1983). Mr. Andahl passed away prior to the November 3, 2020 election. Because of Mr. Andahl’s unfortunate passing, it cannot be disputed he was not a citizen of the United States or resident of North Dakota, and thus a “qualified elector,” on the date of the election. Further, Mr. Andahl is not able to take an oath of office or otherwise complete the requirements necessary to assume the legislative seat. Accordingly, the late Mr. Andahl is undoubtedly ineligible to hold office.

[¶21] This Court in *Jenness v. Clark*, explicitly held that “[a] person who is ineligible to hold a public office cannot be elected thereto, and his election is a nullity.” 21 N.D. 150, 129 N.W. 357 (1910). If a person ineligible to hold office receives the highest (or, in an election for the State House of Representatives, highest or second highest) number of votes, the election is nullified. *See id.* at n.1. *See also Woll v. Jensen*, 36 N.D. 250, 162 N.W. 403, 404 (1917) (holding that impact of first-place finisher’s disqualification in election for county superintendent of schools would be to render election a nullity). When an election is nullified, the election process is not completed and the seat remains unfilled. *State ex rel.*

Olson v. Bakken, 329 N.W.2d 575, 581 (N.D. 1983). An unfilled office is deemed vacant. See N.D.C.C. § 16.1-16-08 (“If the court declares that no one was elected or nominated and sets aside the election, the office must be deemed vacant and any certificate of election or nomination previously issued is annulled...”). Because Mr. Andahl was ineligible to hold office on the date of the November 3, 2020 election, he cannot be validly “elected”.

B. The recipient of the third most votes does not win by default, rendering the legislative seat vacant.

[¶22] This Court’s established precedent confirms that the third-place finisher in the November 3, 2020 race for two District 8 seats in the North Dakota House of Representatives cannot win a seat by default. Rather, votes for the late Mr. Andahl, who received sufficient votes to win the seat but for his disqualification, must be “counted against” Ms. Volochenko, who received the next most votes. See *Woll*, 162 N.W. at 404 (holding that impact of first-place finisher’s disqualification in election for county superintendent of schools would be to render election a nullity and second-place finisher could not win by default). This Court in *Woll v. Jensen* explained that votes for the disqualified person “must be considered as a protest against the qualified person,” that “no one should be deemed elected against the protest of that majority,” and that “no right to the office can be presumed in the defeated candidate.” *Id.*

[¶23] In other words, when an ineligible candidate receives sufficient votes to otherwise win the office, the election is a nullity, and the candidate who receives the next most votes does not win by default. For example, in *Casselton Reporter v. The Fargo Forum*, this Court considered an election for official county newspaper in which one of the candidates was found to be disqualified. 65 N.D. 681, 261 N.W. 549, 549-50 (1935). However, the disqualified candidate received the most votes at the election, and the losing candidate

contested the election results. *Id.* at 550. The Court held that while it could not declare the disqualified candidate the winner of the election due to a ballot error, the majority vote in the disqualified candidate's favor was "effective to prevent the election of the newspaper receiving the minority vote," so as to not disregard the intent of the electorate's preference. *Id.* at 552. The Court reasoned that "where a majority of the voters vote for a candidate whose disqualification is unknown, the minority candidate cannot claim to be elected upon the disqualification of the majority candidate." *Id.* at 550. The Court ultimately held that not only was the election null, but also that no candidate had been chosen by virtue of the election. *Id.* This Court in *Woll* explained that this same reasoning should apply when a candidate's disqualification is known to the voters. 162 N.W. at 404.

[¶24] Similar here, the votes cast for Mr. Andahl are not wasted votes. Rather, as is clear under this Court's precedent, the votes cast for Mr. Andahl should only be counted as votes "protesting" the third place finisher, ultimately preventing that person from taking office. In this circumstance, the third place finisher, Ms. Volochenko, who received an estimated 11.42 percent of the votes, cannot win the seat by default. Thus, because the late Mr. Andahl's election is null and void due to his ineligibility to hold office, and because the third place finisher cannot win by default, a vacancy exists.

II. The Governor has the constitutional authority to fill the vacancy created by the late Mr. Andahl's receipt of the second most votes.

A. The Legislative Assembly may provide by law a procedure to fill legislative vacancies under N.D. Const. art IV, § 11.

[¶25] N.D. Const. art. IV, § 11 provides that "[t]he legislative assembly **may provide by law** a procedure to fill vacancies occurring in either house of the legislative assembly." (emphasis added). This is a non-self-executing constitutional provision that grants the Legislative Assembly the power to pass laws codifying procedures for filling legislative

vacancies. This constitutional provision is inoperative on its own to permit the Legislative Assembly to fill vacancies except in accordance with any legislation enacted to give it effect. *See Garaas*, 261 N.W.2d at 918 (concluding that the constitutional requirement that a “judicial nominating committee shall be established by law” was not self-executing and was inoperative until a judicial nominating committee was established by law):

It is well-settled law that a constitutional provision becomes immediately operative only if it is a self-executing provision, and that it does not become operative without appropriate legislation to implement its objectives if it is a non-self-executing provision. A constitutional provision is self-executing if it establishes a sufficient rule by which its purpose can be accomplished without the need of legislation to give it effect. However, a constitutional provision is non-self-executing wherein it merely establishes general objectives, without setting forth rules by which those objectives can be accomplished such that the provision must remain inoperative until appropriate legislation is enacted to give it effect.

B. The North Dakota Legislative Assembly has not provided by law a procedure to fill the Vacancy caused by Mr. Andahl’s death.

[¶26] Statutory interpretation is a question of law. *Teigen v. State*, 2008 ND 88, ¶ 19, 749 N.W.2d 505. This Court’s primary goal in statutory construction is to ascertain the intent of the legislature, and it will first look to the plain language of the statute and give each word of the statute its ordinary meaning. *Riemers v. Jaeger*, 2018 ND 192, ¶ 11, 916 N.W.2d 113 (citing *State v. Meador*, 2010 ND 139, ¶ 11, 785 N.W.2d 886). If the language of a statute is clear and unambiguous “the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.” N.D.C.C. § 1–02–05.

[¶27] The North Dakota legislature has provided by law two procedures to fill legislative vacancies: (1) pre-election vacancy in a nomination following a primary election as contemplated in N.D.C.C. § 16.1-11-18; and (2) vacancy of a legislative seat as contemplated in N.D.C.C. § 16.1-13-10. As is explained below, it is clear from the plain

language of these statutes that neither codified method for filling legislative vacancies is applicable to the Vacancy resulting from Mr. Andahl's death.

C. **The procedure codified at N.D.C.C. § 16.1-11-18 is inapplicable to the Vacancy because Mr. Andahl died less than sixty-four days before the election.**

[¶28] Section 16.1-11-18, N.D.C.C., provides for a procedure to fill a vacancy in a slate of legislative candidates after the candidates have been nominated at the primary election, including a vacancy caused by death of a nominated candidate. N.D.C.C. § 16.1-11-18. This provision provides that the proper district executive committee may fill the pre-election vacancy, and provides for several additional requirements and procedures. *Id.*

[¶29] However, importantly, the final sentence of N.D.C.C. Section 16.1-11-18 provides “[v]acancies to be filled according to the provisions of this section may be filled not later than the sixty-fourth day prior to the election.” *Id.* This Court has made clear it will uphold time restrictions, such as the above-quoted restriction, as they are “a proper exercise of legislative control, binding upon [the] court, as well as upon the secretary of state.” *See State v. Hall*, 37 N.D. 259, 163 N.W. 1055, 1059–60 (1917).

[¶30] Mr. Andahl passed away October 5, 2020, which is clearly within the sixty-four day window preceding the recent November 3, 2020 election. Undoubtedly, Mr. Andahl's death, which would otherwise constitute a vacancy as contemplated in N.D.C.C. § 16.1-11-18, is expressly carved out of N.D.C.C. § 16.1-11-18. The plain language of Section 16.1-11-18 is clear that a legislative vacancy that arises during the prohibited time period is to be filled using a method other than that outlined in N.D.C.C. § 16.1-11-18. Accordingly, this procedure is inapplicable to fill the Vacancy left by Mr. Andahl's death.

D. The procedure codified at N.D.C.C. § 16.1-13-10 is inapplicable to the Vacancy because the late Mr. Andahl was not a member of the legislative assembly.

[¶31] The North Dakota Attorney General has opined that the procedure codified at N.D.C.C. § 16.1-13-10 is to be utilized to fill the Vacancy. However, it is obvious from the plain language of N.D.C.C. § 16.1-13-10 that it is inapplicable unless the vacancy arises after an individual is validly elected or appointed as a “member of the legislative assembly”.

[¶32] Section 16.1-13-10, N.D.C.C., provides a procedure to fill a vacancy in the office of a member of the legislative assembly. However, the plain language of this statute makes clear it is only applicable if an individual has already been validly elected or appointed “a member of the legislative assembly,” and, after assuming the office, “the former member[’s]” office becomes vacant. *See id.* (“If a vacancy in the **office of a member of the legislative assembly** occurs, the county auditor of the county **in which the former member resides or resided** shall notify the chairman of the legislative management of the vacancy”) (“Upon receiving notification of a vacancy, the chairman of legislative management shall notify the district committee of the political party **that the former member represented** in the district in which the vacancy exists.”) (“If **the former member** was elected”) (emphasis added).

[¶33] The late Mr. Andahl was ineligible on the date of the election to hold elective office in the state legislature. He, therefore, will never become a validly elected “member of the legislative assembly,” and no vacancy will occur in the office of a “former member” of the legislative assembly to trigger the application of N.D.C.C. § 16.1-13-10. The procedure contained in N.D.C.C. § 16.1-13-10 is therefore inapplicable to fill the Vacancy.

[¶34] This Court is not free to disregard N.D.C.C. § 16.1-13-10’s plain language “under the pretext of pursuing its spirit.” N.D.C.C. § 1–02–05. This Court has long held that when construing a statute “[i]t must be presumed that the Legislature intended all that it said, and that it said all that it intended to say.” *City of Dickinson v. Thress*, 69 N.D. 748, 290 N.W. 653, 657 (1940). That long-standing principle of statutory construction remains consistent today. *See Wilkinson v. Bd. of Univ.*, 2020 ND 179, ¶ 34, 947 N.W.2d 910 (“When engaging in statutory interpretation, this Court has consistently recognized that it must be presumed the legislature intended all that it said, said all that it intended to say, and meant what it has plainly expressed.”). The Court has also long held, “[i]t must be presumed, also, that [the legislature] made no mistake in expressing its purpose and intent.” *City of Dickinson*, at 657. *See also Estate of Christeson v. Gilstad*, 2013 ND 50, ¶ 14, 829 N.W.2d 453, 457 (“We must further presume that the legislature made no mistake in expressing its purpose and intent.”)

[¶35] The Court may not mold the language of a statute to cover a situation the statute does not in fact address. In *Christeson v. Gilstad*, the Court explained, “we will not correct an alleged legislative ‘oversight’ by rewriting unambiguous statutes to cover the situation at hand.” 2013 ND 50 at ¶ 14. The *Gilstad* Court further stated, “[t]his Court is not free to ‘amend’ or ‘clarify’ the clear language of the statute”, and “if changes are to be made in the statute, we leave that matter to the legislature, as ‘it is for the legislature to determine policy, not for the courts.’” *Id.* Though it is possible the legislature intended for Section 16.1-13-10, N.D.C.C., to cover this situation, it simply does not cover it based on the unambiguous language.

E. The Governor has constitutional authority to fill the Vacancy by gubernatorial appointment pursuant to N.D. Const. art. V, § 8.

[¶36] Although the North Dakota Century Code and North Dakota Constitution are otherwise silent as to the appropriate method to fill the Vacancy, the North Dakota Constitution squarely addresses the unique situation presented. Specifically, the North Dakota Constitution provides a “gap-filling” provision that governs the procedure to be followed to fill the Vacancy. N.D. Const. Art. V, § 8 provides in pertinent part:

The governor may fill a vacancy in any office by appointment if no other method is provided by this constitution or by law.

N.D. Const. Art. V, § 8.

[¶37] The Governor’s constitutional “gap-filling” appointment authority is consistent the Governor’s additional statutory powers and duties to ensure all offices are filled, the duties of all offices are performed, and to make appointments and fill vacancies as required by law. N.D.C.C. § 54-07-01 provides in pertinent part:

[¶38] In addition to the powers and duties prescribed by the constitution, the governor:

1. Shall see that all offices are filled, and the duties thereof performed, or in default thereof, shall apply such remedies as the law allows. If the remedy is imperfect, the governor shall acquaint the legislative assembly therewith at its next session.
2. Shall make appointments and fill vacancies as required by law.

N.D.C.C. § 54-07-01.

[¶39] As is analyzed in detail above, there is no specific method in the North Dakota Constitution or North Dakota Century Code to fill the Vacancy. This is the exact reason N.D. Const. art. V, § 8 exists. *See id.; State ex rel. Gunderson v. Byrne*, 59 N.D. 543, 231 N.W. 862, 862 (1930). Based on the plain language of N.D. Const. art. V, § 8, the Governor must fill the Vacancy by appointment. This appointment power is rooted in the North

Dakota Constitution, is consistent with North Dakota law, and is the only appropriate method by which to fill the Vacancy.

1. N.D. Const. art. V, § 8 has been used by North Dakota governors in similar circumstances.

[¶40] North Dakota governors have used N.D. Const. art. V, § 8 before to fill vacancies when there is no other specific method prescribed by the Constitution or law. For example, in *State ex rel. Gunderson v. Byrne*, this Court considered the question of how to fill the office of a district court judge. 231 N.W. at 863. A district court judge was duly elected to the office, was sworn into office, and passed away shortly after. *Id.* Following the judge’s death, then-Governor George Shafer appointed a replacement. *Id.* At the time, the only method provided by North Dakota law to fill a judgeship was for filling a vacant Supreme Court justice seat. *Id.* at 863. Because there was no method provided by law to fill the vacancy, the Supreme Court held:

There is no specific provision in the Constitution relating to the filling of a vacancy in the office of judge of the district court. Hence the filling of such vacancy is controlled by section 78 of the Constitution [now N.D. Const. art. V, § 8], which provides: ‘When any office shall from any cause become vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill such vacancy by appointment.’

Id. The *Byrne* Court listed multiple examples of instances where there was no method provided by law to fill a vacancy, one in another district court judge office and another in the office of railroad commissioner. Notably, the *Byrne* Court did not question the constitutional authority of the Governor, a member of the executive branch, to appoint a district court judge, a member of the judicial branch, pursuant to the “gap-filling” provision. *Id.* at 864. Following this Court’s ruling in *Byrne*, the legislature passed legislation specifying a method to fill a vacancy in the office of district court judge, so the

gap filling provision in N.D. Const. art. V, § 8 no longer applies. *Garaas*, 261 N.W.2d at 918; N.D.C.C. ch. 27-25.

2. The Attorney General’s 2002 Opinion to the North Dakota Potato Council correctly analyzed the need for the Governor to use N.D. Const. art. V, § 8 when no other method is provided by law.

[¶41] The Attorney General analyzed vacancy principles consistent with the above analysis when opining on the appropriate procedure to fill a vacancy in office when there is no other method for filling the vacancy provided by law. 2002 N.D. Op. Atty. Gen. No. L-60. In a 2002 opinion, the Attorney General considered a situation where the North Dakota Potato Council (the “Council”) sought to fill a seat on its council by election after a member’s term expired. *Id.* at *1. However, no ballots were returned after the election, rendering the seat open. *Id.* The Agriculture Commissioner asked the Attorney General to weigh in and inform the Council as to the appropriate procedure to fill the open seat. *Id.* The Attorney General determined the circumstances present did not constitute a “vacancy” as defined in the statute governing the Council that would trigger the ability for the Council to appoint a member to fill the open seat. *Id.*

[¶42] Ultimately, the Attorney General determined the North Dakota Century Code was silent as to a remedy when no votes were cast in the election and the incumbent’s term had expired. *Id.* at *4. Because the law did not otherwise provide a method for how to fill the vacancy, the Attorney General opined that N.D. Const. art. V, § 8 applied, and the Governor must appoint someone to fill the vacancy created in the Council’s office. *Id.* at *3.

3. The Hawaii Supreme Court’s Gill opinion provides a well-reasoned analysis of a strikingly-similar situation under similar law, and supports that gubernatorial appointment is the correct result here.

[¶43] While there is no precedent from this Court analyzing the use of N.D. Const. art. V, § 8 to fill a legislative seat, filling a vacant legislative seat by gubernatorial appointment is not a novel concept. In at least one similar instance, a court applied its state’s gubernatorial “gap filling” provision to declare a governor had the authority to appoint an individual to fill a legislative vacancy. In *State ex rel. Kanbara v. Gill*, incumbent state senator Kuriyama was running for re-election to fill one of four senate seats in Hawaii’s fourth senatorial district. 477 P.2d 625, 626 (Haw. 1970). Kuriyama and three other Democratic candidates were running unopposed for these four seats. *Id.* Kuriyama died on October 23, 1970. *Id.* The lieutenant governor, who was Hawaii’s chief election officer (the equivalent North Dakota’s secretary of state), determined a substitution candidate could not be placed on the general election ballot in a practical or effective manner. *Id.* The election was held on November 3, 1970. *Id.* Because of Kuriyama’s death, a vacancy was inevitably created in one of the fourth senatorial district’s senate seats. *Id.*

[¶44] On the day following the election, the attorney general issued an opinion expressing the procedures to be followed to fill the vacancy. *Id.* The attorney general determined the vacancy should be filled pursuant to Hawaii’s legislative vacancy statute, HRS § 17-3. *Id.* The lieutenant governor disagreed and issued a proclamation calling for a special election. *Id.* The attorney general filed suit seeking to enjoin the holding of a special election, contending HRS § 17-3 established the proper procedure for filling the legislative vacancy. *Id.* Alternatively, the attorney general argued HRS § 17-3 did not apply and the

governor had the authority to make an appointment under Haw. Const. art. III, § 6 because there was no other applicable statutory provision. *Id.*

[¶45] At the time, HRS § 17-3 was the only statutory provision dealing with the manner of filling vacancies in the Hawaii state senate. *Id.* HRS § 17-3 read in pertinent part:

§17-3 State senator. Whenever any vacancy in the membership of the state senate occurs, the term of which ends at the next succeeding general election, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party as the person he succeeds.

1970 Haw. Sess. Laws 67. In examining HRS § 17-3, the Hawaii Supreme Court explained:

[T]his provision was meant to apply only to those vacancies arising from the failure of an elected member of the Senate to serve his full term and not to those resulting from the death of a candidate. If HRS § 17-3 as amended were applied to the latter situation the Governor would be unable to comply with the statutory requirement that his ‘appointee shall be of the same political party as the person he succeeds.’ This is because candidates running for Senate offices from a given district do not declare for any particular seat. Thus, when there is an original vacancy, as in the present case, it becomes impossible to say whom the appointee ‘succeeds.’ For this reason it is clear that HRS § 17-3 as amended may not be used to fill the present vacancy.

Gill, 477 P.2d at 627.

[¶46] After determining HRS § 17-3 did not apply to fill a vacancy caused by a legislative candidate’s death, the court concluded Haw. Const. art. III, § 6, a “gap filling” provision similar to that of N.D. Const. art. V, § 8, resolved the issue. Haw. Const. art. III, § 6 stated: “Any vacancy in the legislature shall be filled for the unexpired term in such manner as may be prescribed by law, or, if no provision be made by law, by appointment by the governor for the unexpired term.” *Id.* Applying this “gap filling” provision, the court held:

In applying this constitutional provision we avoid the problem faced in HRS § 17-3 as amended since the Governor is authorized to make the appointment without restriction as to political party. . . . We hold, therefore, that since no statutory provision has been enacted prescribing the manner for filling the vacancy in the present case, it may be filled only by the

Governor, in accordance with article III, section 6 of the Hawaii Constitution.

Id.

[¶47] The facts presented in *Gill* are strikingly similar to the facts presented here. Both Mr. Andahl and Kuriyama died just weeks before their respective November 3 elections. In both instances, the state’s chief election officer determined the candidate’s name could not be replaced on the ballot, and in both instances, the candidate received enough votes to fill the respective legislative seat. Moreover, the applicable North Dakota and Hawaii legislative vacancy statutes and related constitutional provisions are substantively identical. North Dakota’s vacancy statute is substantively identical to Hawaii’s in that it applies only to vacancies arising from the failure of a validly elected **member** to serve his or her full term. *Compare* N.D.C.C. § 16.1-13-10 (stating district committee of the political party of “**the former member**” may fill vacancy “[i]f a vacancy **in the office of a member of the legislative assembly** occurs”) (emphasis added), *with* HRS 17-3 (providing procedure to fill vacancy “[w]henver any vacancy **in the membership of the state senate** occurs”) (emphasis added). North Dakota’s constitutional “gap filling” provision is also substantively identical to Hawaii’s in that it allows the governor to make appointments unless otherwise provided by law.

[¶48] The North Dakota Legislative Assembly has not enacted a statutory provision prescribing the method for filling a vacancy arising from the death of a legislative candidate within sixty-four days of an election. North Dakota’s legislative vacancy statute only contemplates filling vacancies arising from the death of seated **members** of the legislature. Therefore, like in *Gill*, no statutory provision applies to the present situation, and the vacant legislative seat must be filled by gubernatorial appointment. Given the similarities of *Gill*

and the present case, both in fact and applicable law, this Court should adopt the Hawaii Supreme Court's reasoning and determine N.D. Const. art. V, § 8 applies to fill the Vacancy.

4. The Governor is not statutorily barred from exercising his constitutional appointment power to fill the vacancy.

[¶49] Under N.D.C.C. § 44-02-03, “[a]ny vacancy in a state or district office, except in the office of a member of the legislative assembly, must be filled by appointment by the governor.” N.D.C.C. § 44-02-03. The plain language of N.D.C.C. § 44-02-03 does not prohibit a governor from exercising his constitutional appointment power to fill a legislative vacancy when no other method for filling the vacancy is prescribed by law. Rather, the plain language of N.D.C.C. § 44-02-03 provides that the Governor is required to exercise his appointment power to fill any other vacancy, but is not **required** to do so in the case of a vacancy in the office of a member of the legislative assembly. N.D.C.C. § 44-02-03. Thus, N.D.C.C. § 44-02-03 does not prohibit the Governor's ability to exercise his appointment power to fill the Vacancy.

[¶50] Ultimately, the analysis of the proper method in which to fill the Vacancy must result in an application of the “gap-filling” provision in N.D. Const. art. V, § 8. Any different result would require an interpretation of the legislative vacancy statutes discussed above that is inconsistent with their plain language. Further, any different result would undoubtedly conflict with the plain language of the North Dakota Constitution and would deprive the Governor of his constitutional right to effectuate appointments consistent with N.D. Const. art. V, § 8. Accordingly, this Court should declare the appropriate method to fill the vacancy is gubernatorial appointment under N.D. Const. art. V, § 8.

III. The Attorney General’s October 13, 2020 Opinion is not entitled to deference.

[¶51] “Although an administrative construction of a statute is ordinarily entitled to some deference if that interpretation does not contradict clear and unambiguous statutory language, the interpretation of a statute is a question of law that is fully reviewable by a court.” *Teigen*, 2008 ND 88, at ¶ 21 (internal citations omitted). Further, an attorney general’s opinion may be given deference **only if** the opinion is persuasive. *See N. Dakota Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, ¶ 19, 625 N.W.2d 551. Here, the Attorney General’s Opinion provides an incomplete and inaccurate analysis of the appropriate method to fill the Vacancy, contradicts existing Court precedent, contradicts the clear and unambiguous statutory language of N.D.C.C. § 16.1-13-10 and N.D. Const. art. V, § 8, and should therefore be given no deference by this Court.

A. The Attorney General inaccurately characterized the effect of votes for a deceased candidate under North Dakota law.

[¶52] The Attorney General begins his analysis of the effect of votes cast for a deceased candidate by explaining the “American” rule, which upholds voter intent and the popular will by treating votes for an ineligible candidate as votes in protest of the third place finisher taking office. 2020 N.D. Op. Atty Gen. No. L-08, p. 4 (2020). He also explains the “English” rule, which treats votes for an ineligible candidate as a null, or wasted vote, and results in the third-place finisher successfully winning the seat. *Id.* The Attorney General accurately determined North Dakota follows the “American” rule, but extended the effect of votes cast for a deceased candidate beyond the bounds of North Dakota law. *See id.*

[¶53] The Attorney General’s initial statement regarding the “American” rule view that a vote cast for an ineligible candidate serves as a protest to the election of, in this case, the candidate who received the third most votes, is supported by North Dakota law. *See Woll*,

162 N.W. at 404; *Casselton Reporter* 261 N.W. at 552. However, the Attorney General applied the “American” rule beyond the bounds of North Dakota precedent, and opined that “pursuant to state law and the ‘American’ rule, votes cast for a deceased candidate must be counted. In the event the deceased candidate receives the majority of votes, the candidate is elected.” 2020 N.D. Op. Att’y Gen. No. L-08, p. 5 (2020).

[¶54] As is clear under this Court’s precedent, votes for the late Mr. Andahl should *only* be counted as votes “protesting” the third place finisher, ultimately preventing that person, in this case Ms. Volochenko, from taking office. North Dakota law does not support extrapolating the effect of votes cast for the late Mr. Andahl to support a declaration that the late Mr. Andahl was “elected.” In fact, black-letter North Dakota law directly contradicts the Attorney General’s opinion that the late Mr. Andahl’s receipt of the majority of votes renders the deceased candidate elected. North Dakota law is clear that the “election” of an ineligible candidate, such as the late Mr. Andahl, is null and void, and results in a vacancy. *See Nielsen*, 331 N.W.2d at 60; *Bakken*, 329 N.W.2d at 581; N.D.C.C. § 16.1-16-08.

B. The Attorney General’s opinion that N.D.C.C. § 16.1-13-10 applies to fill the Vacancy contradicts clear and unambiguous statutory language.

[¶55] In his recent opinion, the North Dakota Attorney General determined N.D.C.C. § 16.1-13-10 is the appropriate method to fill the Vacancy, with minimal analysis. In total, the Attorney General’s analysis on the applicability of N.D.C.C. § 16.1-13-10 stated:

The North Dakota State Constitution provides that “[t]he legislative assembly may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly.” *The legislative assembly has done so, and the process is set forth in N.D.C.C. § 16.1-13-10.* Upon the application of state law and the “American” rule, it is my opinion that *this would be the appropriate method to fill a vacancy.*

2020 N.D. Op. Att’y Gen. No. L-08, p. 5 (2020) (emphasis added).

[¶56] Based on the analysis provided in this Petition, it is clear the plain language of North Dakota law does not support the application of N.D.C.C. § 16.1-13-10 to fill the Vacancy. Therefore, the Court should not defer to the Attorney General’s erroneous analysis. *See Peterson*, 2001 ND 81, at ¶ 19.

IV. The Governor has standing to bring this action for declaratory judgment, writ of injunction, and writ of mandamus, and the matter is ripe for this Court’s review.

[¶57] “To have standing plaintiffs must show they have ‘suffer[ed] some threatened or actual injury resulting from the putatively illegal action,’ and the ‘harm must not be a generalized grievance shared by all or a large class.’” *First Int’l Bank & Tr. v. Peterson*, 2011 ND 87, ¶ 9, 797 N.W.2d 316, 321 (quoting *Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau*, 2004 ND 60, ¶ 11, 676 N.W.2d 752).

[¶58] The Governor has suffered a threatened or actual injury ripe for this Court’s review. Courts have determined certain principles of standing and ripeness overlap, equating the issue of ripeness with the “actual or threatened injury” component of standing. *E.g.*, *Gabrynowicz v. Heitkamp*, 904 F. Supp. 1061, 1063 (D.N.D. 1995) (“Plaintiffs must have standing to bring the action and the matter must be ripe for adjudication. In this context, standing and ripeness overlap.”). “An issue is not ripe for review if it depends on future contingencies which, although they might occur, necessarily may not, thus making addressing the question premature.” *State v. Hagerty*, 1998 ND 122, ¶ 8, 580 N.W.2d 139, 143 (internal citation omitted). However, “[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.” *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308, 60 L. Ed. 2d 895 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593,

43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923)) (discussing the “case or controversy” injury requirement without distinguishing standing from ripeness).

[¶59] The issues presented in the Petition are ripe for determination and demonstrate a threatened or actual injury. The unofficial election results indicate Mr. Andahl received the second most votes for the District 8 Representative seat. After the Governor announced his intention to exercise his N.D. Const. art. V, § 8 appointment power to fill the Vacancy, the Secretary of State confirmed he will act consistent with the Attorney General’s Opinion. Consistent with this communicated intention, the Secretary of State would be required to issue a certificate of election in the name of the late Mr. Andahl soon after the State Canvassing Board meets on November 13, 2020. Subsequently, the Secretary of State would be required to issue a certificate of appointment to the individual nominated by the District 8 Republican Party under N.D.C.C. § 16.1-13-10(3).

[¶60] The impending and threatened actions specifically impact the Governor’s rights, in that they constitute grave infringements on the Governor’s constitutional right to exercise his appointment power to fill the Vacancy. Stated simply, in following the guidance of the Attorney General’s Opinion, the Secretary of State will deprive the Governor of his constitutional power under N.D. Const. art. V, § 8. The Governor “does not have to await the consummation of threatened injury to obtain preventive relief,” since the Secretary of State’s statements indicate the issuance of a certificate of election to the late Mr. Andahl and a certificate of appointment to the District 8 Republican Committee’s appointee is certainly impending. *See Babbitt*, 442 U.S. at 298. Thus, the Governor has suffered a threatened or actual injury ripe for this Court’s review, and the Governor, therefore, has standing to seek the relief outlined in this Petition.

REQUEST FOR RELIEF

V. **This Court should grant the Governor preliminary injunctive relief, declaratory judgment, a writ of injunction, and a writ mandamus.**

A. **The Governor requests declaratory relief pursuant to N.D.C.C. § 32-23-01.**

[¶61] When the North Dakota Supreme Court is a court of record deciding a matter, “the declaratory judgment procedure found in [Section] 32-23-01, NDCC, is available to it.” *State ex rel. Link v. Olson*, 286 N.W.2d 262, 268 (N.D. 1979). The Governor’s request for declaratory relief under N.D.C.C. § 32-23-01 is appropriate in this case to resolve questions of constitutional and statutory interpretation, specifically to resolve questions related to the Governor’s appointment power under N.D. Const. art V, § 8. *See id.* Section 32-23-01, N.D.C.C., provides:

A court of record within its jurisdiction shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree.

N.D.C.C. § 32-23-01.

[¶62] The Governor asks the Court to declare:

1. That the late David Andahl does not meet the qualifications to hold the office of a member of the legislative assembly and therefore may not receive a certificate of election and become a member of the legislative assembly.
2. That N.D.C.C. § 16.1-13-10 is inapplicable to the vacancy created by David Andahl’s death and subsequent receipt of the second-most votes at the November 3, 2020 election.
3. That no method is provided by the North Dakota Constitution or by North Dakota law to fill the vacancy except N.D. Const. art. V, § 8, and that the Governor has the constitutional authority to fill the vacancy by appointment pursuant to N.D. Const. art. V, § 8.

B. The Governor requests preliminary injunctive relief and a writ of injunction enjoining the Respondents from taking acts consistent with N.D.C.C. § 16.1-13-10 to fill the Vacancy.

[¶63] Attendant to his request for declaratory relief, the Governor seeks immediate preliminary injunctive relief and a writ of injunction enjoining the Secretary of State, Legislative Assembly, and District 8 Republican Committee from taking action to fill the Vacancy consistent with the legislative vacancy statute procedure for filling vacancies. The Court may grant preliminary injunctive relief to a petitioner without requiring a response or holding a hearing. N.D.R.Ct. 5.2(c)(1). “Under N.D.C.C. § 27-02-04, [the North Dakota Supreme] Court may issue a writ of injunction when exercising [its] original jurisdiction.” *Berg v. Jaeger*, 2020 ND 178, ¶ 28, 948 N.W.2d 4. “An injunction may be granted “[w]hen it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff.” *Id.* (citing N.D.C.C. § 32-06-02(1)). This Court has previously issued writs of injunction to enjoin the Secretary of State from performing his ministerial acts when the petitioner has established that he or she is entitled to relief. *See, e.g., Berg* at ¶¶ 28-31; *Petition of Teigen*, 221 N.W.2d 94, 100 (N.D. 1974).

[¶64] The Governor will suffer certain harm if the Respondents are not enjoined from taking official acts inconsistent with the Governor’s constitutional right to appoint an individual to fill the Vacancy. For the reasons articulated throughout this Petition, the Governor has established he is entitled to the relief demanded.

[¶65] The Secretary of State has publicly stated his intention to follow the Attorney General’s Opinion, which requires certifying the election of the late Mr. Andahl and issuing a certificate of appointment to the individual chosen by the District 8 Republican

Committee to fill the vacancy. The Secretary of State’s completion of these ministerial acts would produce injury to Petitioner by undermining and infringing upon his constitutional authority to appoint an individual to fill the Vacancy. Further, the Legislative Assembly has no authority to inform the District 8 Republican Committee of the Vacancy, and the District 8 Republican Committee has no authority to select an individual to fill the Vacancy. Therefore, a writ of injunction is appropriate.

C. **The Governor requests a writ of mandamus compelling the Secretary of State to take official acts consistent with the Governor’s rightful invocation of Article V, Section 8 appointment power to fill the Vacancy.**

[¶66] Also attendant to his request for declaratory relief, the Governor seeks a writ of mandamus compelling the Secretary of State to issue a certificate of appointment and oath of office to the Governor’s appointee after certification of the election results. “Under N.D.C.C. § 32-34-01, this Court may issue a writ of mandamus to compel performance of an act which the law specifically enjoins as a duty resulting from an office.” *Berg*, 2020 ND 178, ¶ 29, 948 N.W.2d 4. “The writ must be issued in all cases when there is not a plain, speedy, and adequate remedy in the ordinary course of law.” N.D.C.C. § 32-34-02.

[¶67] It is the Secretary of State’s official duty to “[k]eep a register of and attest the official acts of the governor” and “[a]ffix the great seal with the secretary of state’s attestation to commissions and other public instruments to which the official signature of the governor is required” N.D.C.C. § 54-09-02(2)-(3). Additionally, at the opening of each legislative session

the secretary of state shall certify to ... the chief clerk of the house of representatives the respective members to whom certificates of election have been issued or whose appointments have been filed with the secretary of state under applicable provisions of law since the preceding session of the legislative assembly.

N.D.C.C. § 54-03-03. “[T]he certifications and copies of the certificates of election or appointment are prima facie evidence of the right to membership in the respective branch of the legislative assembly of the person certified therein.” *Id.*

[¶68] Should this Court determine the Governor, and not the District 8 Republican Committee, has the authority to appoint an individual to fill the Vacancy, the Secretary of State is required to issue a certificate of appointment as part of his official duty to certify the Governor’s appointee and certify appointed members of the House of Representatives to the chief clerk. There is no other plain, speedy, and adequate remedy in the ordinary course of law other than mandamus to compel the Secretary of State to issue a certificate of appointment to the Governor’s appointee, an act which the law specifically requires as his official duty under § 54-09-02(3) and § 54-03-03, N.D.C.C. Therefore, the requested writ of mandamus is appropriate and necessary.

D. This Court should issue any additional or alternative writ it deems appropriate.

[¶69] If a petitioner for a writ sets forth a claim entitling them to relief, this Court has said it will consider the petition even though an alternative writ may be a more appropriate remedy. *Berg*, 2020 ND 178, ¶ 29, 948 N.W.2d 4. “[T]his court, in the exercise of its original jurisdiction, may frame its process as the exigencies require.” *Id.* Should the Court determine an alternative writ is more appropriate than those requested by the Governor, the Governor asks the Court to issue such a writ.

CONCLUSION

[¶70] This Court should declare the late Mr. Andahl’s “election” null and void, that Ms. Volochenko cannot win by default, and that the seat at issue is vacant. This Court should further declare no method exists to fill the Vacancy, and the Governor may invoke his

appointment power pursuant to N.D. Const. art. V, § 8 to fill the Vacancy. The Governor requests this Court immediately intervene to prevent the Secretary of State, Legislative Assembly, and District 8 Republican Committee from taking action to fill the Vacancy pursuant to N.D.C.C. § 16.1-13-10, and compel the Secretary of State to take actions consistent with the Governor’s constitutional right to fill the vacant seat by gubernatorial appointment.

Respectfully submitted this 12th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

[¶71] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 36 pages.

[¶72] Dated this 12th day of November, 2020.

/s/ Robert J. Pathroff
BY: Robert J. Pathroff (#07759)

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

<p>Doug Burgum, in his capacity as North Dakota's Governor,</p> <p style="text-align:center">Petitioner,</p> <p style="text-align:center">vs.</p> <p>Alvin Jaeger, in his capacity as North Dakota's Secretary of State; the North Dakota Legislative Assembly, Chet Pollert, Chairman of Legislative Management; and the District 8 Republican Committee, Loren DeWitz, District Chairperson,</p> <p style="text-align:center">Respondents.</p>	<p>SUPREME COURT NO.</p>
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PETITION FOR PRELIMINARY INJUNCTIVE RELIEF,
DECLARATORY JUDGMENT, WRIT OF INJUNCTION, AND
WRIT OF MANDAMUS

AFFIDAVIT OF SERVICE

ORAL ARGUMENT REQUESTED

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