

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

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Doug Burgum, in his capacity as North  
Dakota's Governor,

Petitioner,

vs.

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,

Respondents.

**SUPREME COURT NO. 20200298**

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PETITION FOR PRELIMINARY INJUNCTIVE RELIEF,  
DECLARATORY JUDGMENT, WRIT OF INJUNCTION, AND  
WRIT OF MANDAMUS

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**AMICUS CURIAE BRIEF OF TYLER YEARGAIN  
IN SUPPORT OF PETITION OF DOUG BURGUM**

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**TABLE OF CONTENTS**

I. STATEMENT OF INTEREST AND IDENTITY .....4

II. RULE 29(C)(4) STATEMENT .....4

III. ARGUMENT.....5

    A. STATE GOVERNORS’ INHERENT AUTHORITY TO FILL VACANCIES  
    PLAINLY EXTENDS TO LEGISLATIVE VACANCIES ..... 5

    B. ARTICLE IV, SECTION 11, OF THE NORTH DAKOTA CONSTITUTION  
    IMPLICITLY AND NECESSARILY REQUIRES ENABLING LEGISLATION ..... 10

IV. CONCLUSION.....12

CERTIFICATE OF SERVICE .....12

CERTIFICATE OF COMPLIANCE.....13

## TABLE OF AUTHORITIES

### CONSTITUTIONAL PROVISIONS

Colo. Const. art. II, § 5.....	10
Kan. Const. art. II, § 9.....	10
Mont. Const. art. VII, § 7 (1889).....	6
N.D. Const. art. IV, § 11.....	4, 10
N.D. Const. art. V, § 8.....	4, 5
Or. Const. art. IV, § 3.....	10
Utah Const. art. VI, § 13.....	10
Utah Const. art. VII, § 9.....	5
Vt. Const. ch. 2, § 13.....	10
Wash. Const. art. III, § 13.....	6
Wyo. Const. art. III, § 51.....	10

### STATUTES

Idaho Code Ann. § 59-912.....	6
N.D. Cent. Code § 16.1-13-10.....	9, 12
N.D.C.C. § 16.1-13-10.....	4, 5

### OTHER AUTHORITIES

<i>Drew Wrigley to Be Next North Dakota Lieutenant Governor</i> , Grand Forks Herald (Nov. 4, 2010), <a href="https://www.grandforksherald.com/news/2140239-drew-wrigley-be-next-north-dakota-lieutenant-governor">https://www.grandforksherald.com/news/2140239-drew-wrigley-be-next-north-dakota-lieutenant-governor</a> .....	9
<i>Governor Names Mrs. Fern Jensen as Representative</i> , Independent-Record (Helena, Mont.), June 25, 1967, at 3.....	8
<i>In Re Method of Filling Vacancy in Office of State Senator</i> , 15 Or. Op. Att’y Gen. No. 63 (1930).....	11
Letter from Nicholas Spaeth, N.D. Att’y Gen., to George Sinner, Governor of N.D. (Mar. 25, 1987), <a href="https://attorneygeneral.nd.gov/sites/ag/files/Legal-Opinions/032587-Sinner_0.pdf">https://attorneygeneral.nd.gov/sites/ag/files/Legal-Opinions/032587-Sinner_0.pdf</a> .....	9
Mont. Op. Att’y Gen. No. 32-19 (Sept. 6, 1968).....	7
<i>New Lieutenant Governor Has Lots of Experience</i> , Bismarck Tribune, Apr. 23, 1987.....	9
Richard Kenneth Prien, <i>The Background of the Wyoming Constitution 66–68</i> (Aug. 1956) (M.A. thesis, University of Wyoming).....	6
Thomas Mooney, <i>Legislative Vacancies Up to Gov. Babcock</i> , Missoulian, May 14, 1967.....	8
Tyler Yeargain, <i>Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant-Gubernatorial Succession</i> , 84 Albany L. Rev. (forthcoming Summer 2021).....	8
Tyler Yeargain, <i>The Legal History of State Legislative Vacancies and Temporary Appointments</i> , 28 J.L. & Pol’y 564, 620–22 (2020).....	7, 11
Tyler Yeargain, <i>Third Wheeling in the Two-Party System: How Same-Party Replacement Systems Impede the Replacement of Independent and Third-Party Legislators</i> , 123 W. Va. L. Rev. (forthcoming Fall 2020).....	7, 10

## I. STATEMENT OF INTEREST AND IDENTITY

[¶1] I respectfully submit this brief as *amicus curiae*, supporting the Governor’s position that, if N.D.C.C. § 16.1-13-10 is inapplicable to David Andahl’s death, he is entitled to fill the vacancy himself pursuant to his authority under N.D. Const. art. V, § 8. I am an attorney licensed in the State of Florida (Bar No. 1019411) and I serve as the Associate Director of the Yale Center for Environmental Law and Policy. I am also a scholar on the constitutional and legal issues surrounding legislative vacancies—and especially on the legal history of how legislative vacancies are filled. To that end, I have published law review articles with the *Journal of Law and Policy* and the *Texas A&M Law Review*, and I have forthcoming publications with the *West Virginia Law Review* and the *University of New Hampshire Law Review*, on the subject of legislative vacancies and appointments. As a scholar in this area, I have an academic interest in how legal questions concerning legislative appointments are resolved, including, in this context, the interpretation of N.D. Const. art. IV, § 11.

[¶2] I write to provide the Court with relevant information surrounding how Article IV, Section 11 of the North Dakota Constitution should be understood. Specifically, I submit this brief with an interest in illustrating the context in which similar constitutional provisions were adopted in other states.

## II. RULE 29(C)(4) STATEMENT

[¶3] This brief was authored by me—not the counsel for any other party. No other party, party’s counsel, or any person other than myself contributed money to fund preparing or submitting this brief.

### III. ARGUMENT

[¶4] As an initial matter, I do not submit this brief to express an opinion as to whether a vacancy has occurred, nor to whether N.D.C.C. § 16.1-13-10 is applicable to David Andahl’s death. Instead, my contribution to the Court will focus on whether the Governor has the constitutional authority to fill the vacancy by appointment pursuant to Article V, Section 8 of the North Dakota Constitution, based on analogous contexts in other states.

[¶5] If the Court determines that N.D.C.C. § 16.1-13-10 is inapplicable to David Andahl’s death and subsequently reaches the question of whether the Governor has the power to fill the vacancy, it should answer that question in the affirmative. The Governor’s inherent authority to fill vacancies under Article V, Section 8, plainly applies to legislative vacancies because: (A) state governors’ inherent authority to fill vacancies extends to legislative vacancies, as several examples from other western states demonstrates and (B) the provision of the North Dakota Constitution conferring the power to determine how legislative vacancies are filled on the legislature necessarily requires enabling legislation to apply. Each is addressed in turn.

#### **A. STATE GOVERNORS’ INHERENT AUTHORITY TO FILL VACANCIES PLAINLY EXTENDS TO LEGISLATIVE VACANCIES**

[¶6] First, the Governor of North Dakota possesses inherent power to 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. The Governor of North Dakota is not alone among state governors in possessing this power.

[¶7] Several other western states, including Idaho, Montana, South Dakota, Utah, and Washington, have similar provisions. *See* Utah Const. art. VII, § 9 (“When any

State or district office shall become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill the same by granting a commission, which shall expire at the next election, and upon qualification of the person elected to such office.”); Wash. Const. art. III, § 13 (“[W]hen at any time a vacancy shall have occurred in any other state office, for the filling of which vacancy no provision is made elsewhere in this Constitution, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.”); Idaho Code Ann. § 59-912 (“When any office becomes vacant, and no mode is provided by law for filling such vacancy, the governor must fill such vacancy by appointment.”); *see generally* Mont. Const. art. VII, § 7 (1889) (“The Governor shall nominate, and by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for.”). These provisions have shared origins and their similar phrasing represents the common borrowing that took place in nineteenth century constitutional conventions. *See, e.g.*, Richard Kenneth Prien, *The Background of the Wyoming Constitution 66–68* (Aug. 1956) (M.A. thesis, University of Wyoming).<sup>1</sup>

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<sup>1</sup> In Sections 2 through 13 of Article IV of the Wyoming Constitution, which pertains to the Executive, “Wyoming follows those of North Dakota’s Sections 73 through 84. . . . Section 7 of Wyoming’s constitution stipulates that, ‘When any office from any cause becomes vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill the same by appointment.’ ‘When any office shall from any cause becomes vacant,’ provides North Dakota’s Section 78, ‘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.’ South Dakota’s clause dealing with the subject (Section 8) is the same as North Dakota’s[.]” *Id.*

[¶8] In both Idaho and Montana, Governors have relied on their inherent authority under the aforementioned provisions to fill legislative vacancies where no state statute provided for the filling of the vacancy.

[¶9] In 1923, when faced with an untimely legislative vacancy, Idaho state legislators quickly repealed the state statute requiring special elections to fill state legislative vacancies. However, either as a result of the rushed effort or as a mistake, they did not *replace* the statute with anything, instead relying on the Governor’s inherent power to appoint. From 1923 to 1971, state legislative vacancies in Idaho were filled by the Governor, *solely* on the basis of his inherent authority under Idaho law to fill vacancies. Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & Pol’y 564, 620–22 (2020). No gubernatorial appointment made during this half-century was ever challenged. *See id.*

[¶10] Similarly, in 1932, Montana voters approved a constitutional amendment allowing county commissions to fill state legislative vacancies, rather than requiring special elections. *Id.* at 591. However, in 1966, Montana voters approved *another* constitutional amendment, which repealed this provision outright, leaving nothing in its place—likely by accident. *See* Tyler Yeargain, *Third Wheeling in the Two-Party System: How Same-Party Replacement Systems Impede the Replacement of Independent and Third-Party Legislators*, 123 W. Va. L. Rev. (forthcoming Fall 2020) (manuscript at 16–17 n.79). At the next legislative session, the legislature responded to the repeal of the constitutional amendment by drafting a statute that was materially identical to the (accidentally) repealed constitutional provision. *See* Mont. Op. Att’y Gen. No. 32-19 (Sept. 6, 1968) (“Section 45 of Article V, was repealed by Chapter 273, Laws of 1965,

and adopted at the general election of November 8, 1966. That section was replaced by section 43-215, R.C.M. 1947. The only difference in the two provisions is that the present statute provides for appointment by the county commissioners in case of **any** legislative vacancy.”) (emphasis in original). The statute, however, did not apply to a legislative vacancy that occurred *during* the legislative session itself. Accordingly, acting on unofficial legal advice, the Governor relied on his inherent appointment authority to fill several legislative vacancies. *See Governor Names Mrs. Fern Jensen as Representative*, Independent-Record (Helena, Mont.), June 25, 1967, at 3; Thomas Mooney, *Legislative Vacancies Up to Gov. Babcock*, Missoulian, May 14, 1967, at 16. None of Governor Babcock’s appointments was challenged.

[¶11] While these historical examples relate to how *any* vacancy is filled, the principles are nonetheless persuasive for filling a specific vacancy in this context. While it may seem inapposite to hold that the Governor’s inherent power to fill vacancies extends to legislative vacancies, as opposed to merely applying to lower-level officials, such a holding would reflect a widely accepted practice across the United States. Moreover, this power has extended to filling, among other positions, vacancies in the Lieutenant Governor’s office. In 1987, Governor George Sinner relied on his inherent appointment power to fill the vacancy caused by Lieutenant Governor Ruth Meiers’s death. Similarly, in 2010, Governor Jack Dalrymple relied on this power to fill the vacancy caused by his own ascension to the governorship. *See* Tyler Yeargain, *Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant-Gubernatorial Succession*, 84 Albany L. Rev. (forthcoming Summer 2021) (annual State Constitutional Commentary); *see also* *Drew Wrigley to Be Next North Dakota Lieutenant Governor*,



Grand Forks Herald (Nov. 4, 2010), <https://www.grandforksherald.com/news/2140239-drew-wrigley-be-next-north-dakota-lieutenant-governor>; *New Lieutenant Governor Has Lots of Experience*, Bismarck Tribune, Apr. 23, 1987, at 7B.<sup>2</sup>

[¶12] Governors’ inherent ability to fill vacancies where there is no constitutional or statutory means of otherwise filling the vacancies theoretically extends to legislative vacancies in other contexts, as well. Most states, like North Dakota, that fill legislative vacancies with appointments affix a same-party appointment requirement. However, in virtually all of these states, the same-party requirement would be virtually inapplicable if the legislator was elected as an independent or as a member of a minor political party. Some states, like North Dakota, have provided a specific procedure for filling a vacancy caused by an independent state legislator, demonstrating the legislature’s capacity to promulgate a comprehensive system of legislative appointments—and specifically, a system that accounts for even the unlikeliest of scenarios. *See* N.D. Cent. Code § 16.1-13-10(1) (“If the former member was elected as an independent candidate or if the district committee does not make an appointment within twenty-one days after receiving the notice from the chairman of the legislative management, the chairman of the legislative management shall appoint a resident of the district to fill the vacancy.”).

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<sup>2</sup> North Dakota has no explicit provision for filling lieutenant-gubernatorial vacancies, no legal challenge was raised to either Omdahl’s or Wrigley’s appointments, and no decision by the Court or opinion by the Attorney General has suggested that the Governor’s inherent power to appoint *doesn’t* apply to lieutenant-gubernatorial vacancies. *See Yeargain, Recasting the Second Fiddle* (manuscript at 37). The only outstanding legal question occurred in 1987, and concerned who, during the vacancy, acted as governor in the event of a temporary gubernatorial vacancy. *See* Letter from Nicholas Spaeth, N.D. Att’y Gen., to George Sinner, Governor of N.D. (Mar. 25, 1987), [https://attorneygeneral.nd.gov/sites/ag/files/Legal-Opinions/032587-Sinner\\_0.pdf](https://attorneygeneral.nd.gov/sites/ag/files/Legal-Opinions/032587-Sinner_0.pdf).

[¶13] But in the states that have not adopted specific procedures to fill legislative vacancies where the legislator was elected as an independent or as a candidate of a minor party, the existing same-party appointment requirements are, in many cases, flatly inapplicable. For example, a state that involves a political party's committees in the appointment process, like North Dakota, faces a challenge when a legislator is elected as an independent (in which case there is no party committee) or as a member of a minor party that *lacks* functional party organs. In those cases, the only way to fill such vacancies would presumably be through gubernatorial appointment. *See* Yeargain, *Third Wheeling in the Two-Party System* (manuscript at 16).

**B. ARTICLE IV, SECTION 11, OF THE NORTH DAKOTA CONSTITUTION IMPLICITLY AND NECESSARILY REQUIRES ENABLING LEGISLATION**

[¶14] Under Article IV, Section 11, of the North Dakota Constitution, “The legislative assembly may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly.”

[¶15] This sort of provision, like the Governor's inherent power to fill vacancies, is fairly common among states that similarly fill legislative vacancies with appointments as opposed to special elections. *See, e.g.*, Colo. Const. art. II, § 5; Kan. Const. art. II, § 9; Or. Const. art. IV, § 3; Utah Const. art. VI, § 13; Vt. Const. ch. 2, § 13; Wyo. Const. art. III, § 51.

[¶16] While most states that ratified constitutional amendments granting legislatures the power to determine how legislative vacancies were filled swiftly followed up on those amendments with enabling legislation, not all did so. *See* Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & Pol'y, at 589–95.

[¶17] Oregon, for example, ratified its constitutional amendment—which granted the legislature the power to determine how legislative vacancies were filled by statute—in 1930, but did not adopt enabling legislation until 1935. During that time, several legislative vacancies occurred. When confronted with the question of how to fill the vacancies, the Attorney General issued a formal opinion noting that, until the legislature adopted enabling legislation, the default mechanism for filling legislative vacancies—specifically, calling special elections—remained in place. *In Re Method of Filling Vacancy in Office of State Senator*, 15 Or. Op. Att’y Gen. No. 63 (1930).

[¶18] Similarly, following the 1946 ratification of a Kansas constitutional amendment materially similar to North Dakota’s, a state representative died in office, creating a vacancy. The available evidence strongly suggests that the Governor delayed calling a special election to allow the legislature adequate time to draft enabling legislation to allow for a temporary appointment. After the legislature did so, the late representative’s political party nominated a successor, who was in turn formally appointed by the Governor. *Yeargain, The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & Pol’y at 622.

[¶19] Again, while these historical examples are reflective of how *all* legislative vacancies, as opposed to how *some* vacancies, should be filled, the underlying principle is nonetheless persuasive: A constitutional provision granting the legislature the power to determine how legislative vacancies ought to be filled prescribes no procedure itself for filling vacancies and is therefore dependent on the legislature passing enabling legislation to do so.

#### IV. CONCLUSION

[¶20] I respectfully request this Court to grant the Governor’s petition should it determine that N.D.C.C. § 16.1-13-10 is inapplicable to David Andahl’s death.

Respectfully submitted  
this 17th day of November, 2020.

*/s/ Tyler Yeargain*

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#### CERTIFICATE OF SERVICE

[¶21] The undersigned hereby certifies that, on November 17, 2020, the AMICUS CURIAE BRIEF OF TYLER YEARGAIN IN SUPPORT OF PETITION OF DOUG BURGUM was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to counsel of record and the unrepresented party as follows:

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Dated this 17th day of November, 2020.

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### **CERTIFICATE OF COMPLIANCE**

[¶22] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 13 pages.

Dated this 17th day of November, 2020.

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