

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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

Petitioner,

Case No. 20200298

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.

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**AMICUS CURIAE BRIEF OF JONATHAN T. GARAAS  
IN SUPPORT OF THE NORTH DAKOTA LEGISLATIVE ASSEMBLY,  
CHET POLLERT, CHAIRMAN OF LEGISLATIVE MANAGEMENT**

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

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GARAAS LAW FIRM

Jonathan T. Garaas

*Pro se*

Office and Post Office Address

DeMores Office Park

1314 23rd Street South

Fargo, North Dakota 58103

E-mail address: garaaslawfirm@ideaone.net

North Dakota Bar ID# 03080

Telephone: 701-293-7211

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[¶1] **STATEMENT OF INTEREST AND IDENTITY**

[¶2] I respectfully submit this brief as *amicus curiae* supporting the anticipated position(s) of the North Dakota Legislative Assembly as may be presented by Chet Pollert, Chairman of Legislative Management, and to prevent the North Dakota Supreme Court from violating its time-honored position of not giving “advisory opinions”. See ¶ 13, below.

[¶3] The undersigned represents that he is an attorney licensed in the State of North Dakota since 1973, and when asked by a family friend what happens when a candidate dies before the election, performed a couple of minutes research and determined to give a permissible friendly/attorney’s advisory opinion to that friend that no controversy presently exists under North Dakota law. Further, the Governor has no power to appoint – no vacancy yet exists.

[¶4] **RULE 29(a)(4) STATEMENT**

[¶5] The undersigned attorney authored this brief in whole, with the assistance of David Garaas, another North Dakota licensed attorney, when each had a couple of hours to squander while socially distancing in our office. No one has contributed money for the preparation or submission of this *amicus curiae* brief.

[¶6] **SUMMARY OF ARGUMENT**

[¶7] The Governor has no power to appoint – no vacancy yet exists. Further, the North Dakota Supreme Court should not issue “advisory opinions”.

[¶8] **ARGUMENT**

[¶9] According to the “Official 2016 General Election Results” issued by the North Dakota Secretary of State, and published on its website, both Jeff Delzer and Vernon Lanning were elected to be State Representatives from District 8 of North Dakota Legislative Assembly.

Under North Dakota law, Representatives Delzer and Lanning have four (4) year terms [N.D.C.C. § 54-03-01.13] that will presumptively expire on November 30, 2020, pursuant to Article IV, § 8, of the North Dakota Constitution: “The terms of members of the legislative assembly begin on the first day of December following their election.”<sup>1</sup> At the present time, no vacancy is known to exist as Representatives Delzer and Lanning still serve, and each has the right to serve through November 30, 2020.

[¶10] Due to the death of David Andahl on October 5, 2020 (David Andahl is not an incumbent, and will never qualify for office due to his death), there will be a vacancy no earlier than December 1, 2020. The vacancy will first arise when David Andahl fails to qualify for the office he was elected to after his death on October 5, 2020. Under N.D.C.C. § 44-01-04, “(i)f any person elected to any state, district, county, or other political subdivision office fails to qualify and enter upon the duties of such office within the time fixed by law, such office must be deemed vacant and must be filled by appointment as provided by law.” When David Andahl fails to fulfill statutory duties [N.D.C.C. § 44-01-05; N.D.C.C. § 44-02-01] prior to December 1, 2020, only then is “such office .. deemed vacant”. Under N.D.C.C. § 44-02-01(9), the death of Mr. Andahl on October 5, 2020, causes him to “cease to possess any of the qualifications of office prescribed by law” *which includes (a) an obligation to a qualified elector on November 3, 2020, (b) a one (1) year resident of District 8 on November 3, 2020, and (c) alive.* Article IV, § 5 of the North Dakota

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<sup>1</sup> Due to the Constitutional provision identifying December 1 as the start of the four (4) year term, N.D.C.C. § 44-01-03 does not apply. The referenced statute provides, “(e)xcept when otherwise specially provided, all state and district officers shall qualify on the first day of January next succeeding their election and on said first day of January shall enter upon the discharge of the duties of their respective offices ..”

Constitution is determinative (**emphasis** added):

**“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.”**

David Andahl fails to meet such constitutional standards currently, and due to death, he cannot fulfill statutory duties, to include oaths and filing of statements of interest after issuance of the certificate of election before the end of the current terms of Representatives Delzer and Lanning.

[¶11] In summary, the death of David Andahl does not cause the vacancy, but rather, the inability of any elected person to fulfill statutory requirements as of December 1, 2020 – the date a vacancy first occurs controls the procedure to be followed.

[¶12] The North Dakota Legislative Assembly has dictated what happens on December 1, 2020. N.D.C.C. § 16.1-13-10. On December 1, 2020, when the vacancy first occurs, the Governor has no role, nor authority to fill the vacancy – the North Dakota Legislative Assembly has dictated a different course of action.

[¶13] The North Dakota Supreme Court was prematurely involved, and is being asked to give an advisory opinion in a matter controlled by law. There is no justiciable controversy before December 1, 2020, when the vacancy will first arise – at that time, the incumbent’s term is up, and no elected person qualifies. Advisory opinions are ill-advised, especially when there is no controversy until the occurrence of related events prior to the Court’s determination (such as the required “vacancy”). State v. Hanson, 2006 ND 139, ¶7, 717

N.W.2d 541; see also, Johnston Land Company, LLC v. Sorenson, 2018 ND 183, ¶ 7, 915 N.W.2d 664. This is a political case between two (2) different branches of government with the law clear as to the result; the third branch should bow out.

[¶14] Respectfully submitted this 18<sup>th</sup> day of November, 2020.

Garaas Law Firm

/s/ Jonathan T. Garaas

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Jonathan T. Garaas

*Pro se*

1314 23<sup>rd</sup> Street South

Fargo, North Dakota 58103

E-mail address: garaaslawfirm@ideaone.net

Telephone: (701) 293-7211

North Dakota Bar ID #03080

The above-signed attorney certifies, pursuant to N.D.R.App.P. 29(a)(4), that the brief does not exceed 2,600 words.