

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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

Petitioner,

v.

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 Ct. No. 20200298**

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**BRIEF OF RESPONDENTS ALVIN JAEGER AND THE NORTH DAKOTA  
LEGISLATIVE ASSEMBLY IN OPPOSITION TO PETITION FOR  
DECLARATORY JUDGMENT, WRIT OF INJUNCTION, AND WRIT OF  
MANDAMUS**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF ISSUES

[¶1] Whether the Court can grant the relief requested against a future Legislative Assembly.

[¶2] Whether, due to separation of powers, this Court and the Governor lack the power to determine the qualifications of members of the Legislative Assembly, or to direct the seating of a particular legislative member.

[¶3] Whether the Governor's delayed assertion of a constitutional right of appointment, if recognized, would disenfranchise qualified electors and should be barred by laches.

[¶4] Whether N.D.C.C. § 16.1-13-10 unambiguously provides a method for filling a vacancy in the office of a member of the Legislative Assembly.

## STATEMENT OF CASE

[¶5] Petitioner, Governor Doug Burgum ("Governor"), filed the subject Petition For Preliminary Injunctive Relief, Declaratory Judgment, Writ Of Injunction, And Writ Of Mandamus ("Petition"), seeking to force Alvin Jaeger, in his capacity as North Dakota's Secretary of State ("Secretary"), the North Dakota Legislative Assembly ("Legislative Assembly"), and the other named Respondents, to take various actions to recognize and effectuate the Governor's attempted appointment of Wade Boeshans ("Boeshans") to a District 8 seat in the North Dakota House of Representatives. The seat will be vacant on December 1, 2020, when the newly elected members begin their terms.

[¶6] David Andahl ("Andahl") received sufficient votes in the November 3, 2020 general election to be elected to the District 8 seat. However, due to Andahl's tragic death 29 days before the election, he is not qualified to hold the office and cannot be seated. By misinterpreting applicable statutes and constitutional provisions, and by disregarding clear legislative history, the Governor incorrectly asserts that he has the power to fill the vacancy by appointment.

## STATEMENT OF FACTS

### **I. The June 9, 2020 primary election and November 3, 2020 general election.**

[¶7] Prior to April 6, 2020, four Republican Party candidates: Andahl, Jeff Delzer, Dave Nehring, and Bob Wheeler, submitted to the Secretary the required documents to have their names included on the June 9, 2020 primary election ballot for two legislative District 8 seats in the North Dakota House of Representatives. Respondents Alvin Jaeger and The North Dakota Legislative Assembly Supplemental Appendix (“Jaeger Supp. App.”) at 5. David Nehring received the most votes in the primary, followed closely by Andahl. Id. Because it was a political party primary contest to select two candidates, both candidates were declared nominated to represent the Republican Party on the ballot for Legislative District 8 in the November 3, 2020 general election. Id.

[¶8] After the primary election results were certified by the State Canvassing Board on June 19, 2020, the two nominated Republican Party candidates were placed on the ballot along with the two nominated candidates from the Democratic-NPL Party, which were Linda Babb and Kathrin Volochenko. Id. From those four candidates, the voters would decide in the November 3, 2020 general election who would be elected to the two State Representative seats for Legislative District 8. Id. at 5-6.

[¶9] Tragically, Andahl died on October 5, 2020, which was 29 days before the November 3, 2020 general election. Id. at 6. The Secretary was informed of Andahl’s death on the same day he died: October 5, 2020. Id. As of the date of Andahl’s death, 5,569 voters in Legislative District 8 had requested an absentee ballot for the general election (2,335 from Burleigh County and 3,234 from McLean County). Id. Of the ballots that were sent by that date, 1,031 voters living in District 8 had already marked and returned their ballot (402 from Burleigh County and 629 from McLean County). Id. According to North Dakota Century Code Section

16.1-07-10, “After submission to the appropriate election officer, a marked absent voter's ballot may not be returned to the voter for any reason other than to complete any missing information required on the affidavit on the back of the return envelope.” N.D.C.C. § 16.1-07-10; see also Jaeger Supp. App. 6. Further, since Andahl died after the sixty-fourth day prior to the election, the provisions to fill a vacancy in a nomination for a party office in N.D.C.C. § 16.1-11-18 did not apply. Jaeger Supp. App. 6. That section allows for a replacement candidate if a death occurred between the primary election and the filing deadline for candidates, but specifically states, “[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.” N.D.C.C. § 16.1-11-18; see also Jaeger Supp. App. 6. Thus, at the time of Andahl’s death, only 29 days before the November 3, 2020 general election, it was too late to remove Andahl’s name from or to replace him with another candidate on the ballot. Jaeger Supp. App. 6.

[¶10] On October 8, 2020, the Secretary sent a letter to the Attorney General, requesting an opinion on the following questions:

- “What will be the result or effect of votes that are cast for the deceased candidate?”
- “If the deceased candidate receives a number of votes that would be sufficient to elect the candidate, may the candidate be declared to have been elected, and if so, would a vacancy then be deemed to exist?”
- “If a vacancy does exist, what would be the process for filling the vacant position?”

Jaeger Supp. App. 6-7, 9.

[¶11] In response to the Secretary’s letter, on October 13, 2020 the Attorney General issued Letter Opinion 2020-L-08, wherein the Attorney General applied the “American” rule, to determine that the votes for Andahl should be counted like any other votes as part of the election process, and if Andahl is determined to have received the highest or second highest

number of votes, the result is a vacancy in office since Andahl has died and is not qualified to hold office. Jaeger Supp. App. 7, 10-14.

The “American” rule holds that 1) the purpose of an election is to carry out the will of the people; 2) votes for a deceased or disqualified candidate represent a choice by qualified voters among the options presented on the ballot; 3) to disregard such votes, especially when they constitute a majority or plurality of the voters, is to frustrate the popular will; so therefore 4) votes for deceased and disqualified candidates should be counted like any other votes, and if the “candidate” in question would have won the election, the result is a vacancy in the office.

Id. at 11. The Court’s attention is directed to the Attorney General Opinion (2020-L-08) as to the analysis of the applicability of the “American” rule, with which the Secretary and the Legislative Assembly agree and which is incorporated by reference. Id. at 10-14. The content of the Attorney General’s opinion, which applies the “American” rule and rejects the “English” rule<sup>1</sup>, is based on the overwhelming weight of legal authority. See generally 1999 Wash. Op. Att’y Gen. 5; Evans v. State Election Board of Okla., 804 P.2d 1125 (Ok. 1990); Banks v. Zippert, 470 So. 2d 1147 (Ala. 1985); West Virginia ex rel. Jackson v. County Court of McDowell Cty., 166 S.E.2d 554 (W.Va. 1969); Tellez v. Superior Court In and For Pima Cty., 450 P.2d 106 (Ariz. 1969); Ingersoll v. Lamb, 333 P.2d 982 (Nev. 1959); Derringe v. Donovan, 162 A. 439,477 (Pa. 1932); Merrill v. Dade Cty. Canvassing Bd., 300 So.2d 28, 30 (Fla. Dist. Ct. App. 1974). The North Dakota Supreme Court rejected the “English” rule that holds “where the disqualification is known, the party receiving the minority vote will be entitled to the office, [because] the voters have willfully thrown away their votes and that the office should not go begging on that account.” Woll

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<sup>1</sup> The “English” rule holds that a candidate who has died is ineligible to serve and therefore a vote for a deceased candidate is a wasted vote and a nullity. 1999 Wash. Op. Att’y Gen. 5.



v. Jensen, 36 N.D. 250, 162 N.W. 403, 404 (1917). In his Petition, the Governor does not appear to dispute that the votes for Andahl should have been counted and a vacancy declared. The parties in this case only dispute how the vacancy caused by Andahl's death should be filled. The Attorney General further determined in his Opinion that the proper process to fill the vacancy is set forth in N.D.C.C. § 16.1-13-10. Jaeger Supp. App. 14.

[¶12] The general election was held on November 3, 2020. Jaeger Supp. App. 7. Six days after the election, on November 9, 2020, Burleigh and McLean Counties held their County Canvassing Board meetings along with the rest of the state's 53 counties. Id. Burleigh County certified to the Secretary the following results: 1) 3,560 votes - Dave Nehring; 2) 3,161 votes - David Andahl; 3) 939 votes - Kathrin Volochenko; 4) 844 votes- Linda Babb; and 5) 126 votes- Scattered Write-in. McLean County certified to the Secretary the following results: 1) 3,234 votes - Nehring; 2) 2,768 votes - Andahl; 3) 966 votes- Volochenko; 4) 807 votes - Babb; and 5) 286 votes - Scattered Write-in. Id.

[¶13] On the morning of Wednesday, November 4, 2020, the day after the election, the Governor issued a press release stating he was appointing an individual to fill a vacancy in the seat for the District 8 representative "after extensive research" and "after careful review of the North Dakota Constitution, North Dakota Century Code, relevant case law, legislative history and attorney general opinions." That morning, the Governor also provided some recipients of the press release a lengthy legal analysis purporting to show the Governor's appointment was constitutionally mandated. Jaeger Supp. App. 161-168.

[¶14] On Friday, November 13, 2020, the State Canvassing Board met and certified the following vote totals for the Legislative District 8 State Representative contest: 1) 6,794 votes – Nehring; 2) 5,929 votes – Andahl; 3) 1,905 votes – Volochenko; 4) 1,651 votes –

Babb; and 5) 412 votes - Scattered Write-in. Id.

[¶15] Based on the foregoing, Andahl received the second highest number of votes in the Legislative District 8 State Representative contest, and therefore would have been elected to one of the two seats. Id. at 8. However, because of Andahl’s death, the Secretary does not intend to prepare a certificate of election for Andahl. Id.

[¶16] It should be noted, while a vacancy in the office of a member of the House of Representatives is certain to occur as a result of Andahl’s death, the vacancy has not yet occurred. According to Article IV, Section 7 of the North Dakota Constitution, “[t]he terms of members of the legislative assembly begin on the first day of December following their election.” Thus, the term of the office at issue in this case is not set to begin until December 1, 2020. The four-year terms of the two current members representing District 8 in the House of Representatives (Jeff Delzer and Vernon Laning), have not ended yet. N.D.C.C. § 54-03-01.13; N.D. Const. art. IV, § 7. Their terms will end on November 30, 2020, and only then will there be a vacancy in one of the seats. See id.

[¶17] There is no dispute that Andahl will be unqualified for office and that the office will become vacant on December 1, 2020. In anticipation of the certain future vacancy, and in accordance with North Dakota Century Code Section 16.1-13-10, the Burleigh County Auditor notified the Chairman of the Legislative Management of Andahl’s death. Jaeger Supp. App. 100. Also in accordance with North Dakota Century Code Section 16.1-13-10, the Chairman of the Legislative Management notified the District 8 Republican Party (“District 8”) of Andahl’s death, indicating by letter that the district committee must hold a meeting within 21 days to select an individual to fill the vacancy, and if the district committee does not make an appointment to fill the vacancy within 21 days, the Chairman of the

Legislative Management is required to make the appointment. *Id.* at 101.

**II. Until the morning after the November 3, 2020 general election, voters were informed that a vote for Andahl constituted a vote for the District 8 executive committee to select the District 8 representative.**

[¶18] In the Appendix, the Governor included multiple newspaper articles regarding the subject of his Petition. App. 4-7, 9-22. However, only one of the newspaper articles in the Appendix predates the November 3, 2020 general election and discloses any information available to the electorate in advance of the election. The Governor included in the Appendix a Bismarck Tribune article dated October 5, 2020, which quotes the Secretary stating, “At this point, the election is going forward, there’s nothing else we can do right now, and as far as what happens down the road, we’re busy researching that since we only found out about it about an hour ago.” App. 5. This one pre-election newspaper article provided to the Court by the Governor, reporting on the immediate aftermath and initial uncertainty following news of Andahl’s death, is not representative of all of the information provided to the electorate prior to the November 3, 2020 general election.

[¶19] Prior to the election, there was in fact widespread media coverage of Andahl’s death, of the Attorney General Opinion (2020-L-08), of the plans to count votes for Andahl, and of the plans to fill a vacancy consistent with the Attorney General Opinion. The Court’s attention is directed to the numerous newspaper articles and political advertisements included in the Jaeger Supp. App., all of which predate the November 3, 2020 general election. Jaeger Supp. App. 15-31, 33-66, 71-82, 86-99, 102-104. The articles and advertisements inform voters that candidate Andahl had died, that the Attorney General had issued an opinion, and that in accordance with that opinion, if Andahl receives the highest or second highest number of votes, the District 8 executive committee would appoint a replacement to fill the resulting

vacancy. Id.

[¶20] For example, an October 13, 2020 Bismarck Tribune article describes the Attorney General Opinion, quotes the Secretary of State as saying the Opinion provides "clarity to everybody, to the entire process and the voters," and states the District 8 Chairman was continuing to campaign for Andahl in hopes of a Republican win. On October 22, 2020 and October 24, 2020 respectively, the Leader-News and the Bismarck Tribune published a letter from Rick Berg ("Berg"), chairman of the North Dakota Republican Party, urging voters to cast their votes for Andahl, and explaining the process that would take place if Andahl won the election, stating in relevant part:

Recently, we have mourned the loss of a great conservative leader – and candidate for the North Dakota House of Representatives – David Andahl.

As we pray for his family and his memory, many of you have also inquired about what will happen in this all-important election with his untimely passing. Ballots have already been cast, so the guidance we have received from the North Dakota Secretary of State is that David Andahl's name will remain on the ballot and votes for him will be counted. Should David Andahl win first or second place, he will be elected. His seat would then be vacated by the county auditor.

Once this vacancy occurs, the District 8 Republican Party Executive Committee must appoint a replacement. At that time, we will ensure that the District 8 Republicans have the support and resources they need to send another great leader to the North Dakota House.

Please cast your vote for David Andahl – and all of our great Republican candidates – and we will ensure that his seat is appropriately filled after the election. May God bless his memory.

Jaeger Supp. App. 67-70.

[¶21] The District 8 Facebook page also informed voters of Andahl's death, of the Attorney General Opinion (2020-L-08), and of the expected effect of their votes for Andahl. An October 10, 2020 post on the District 8 Facebook page written by Berg offers prayers and

condolences regarding the death of Andahl and provides a link to Andahl's obituary. Jaeger Supp. App. 32. An October 30, 2020 post on the District 8 Facebook page by District 8 Chair Loren DeWitz links to a newspaper article regarding the Attorney General Opinion (2020-L-08) and states in relevant part:

District 8 has been receiving questions asking what is the process for replacing a House seat if a majority of voters cast their ballot for David Andahl.

District 8 must follow the ND law requiring such a replacement. Nothing can happen until the County Canvassing Board meets on November 9th to certify the election results. If Andahl prevails, the county auditor can then declare the office vacant and give us official notice.

The ND Attorney General opinion and the District 8 Bylaws make it clear that the District 8 Executive Committee, that was elected at the 2019 District Organizational Meeting, fills any vacancy. The appointed person will need to stand for election in two years.

District 8 does not have the authority to call a special election, only the state or county officials have that authority. We need to have the replacement selected prior to the Legislative Organizational Session on December 1st. We cannot ignore the Attorney Generals' opinion or disregard our By-laws.

Jaeger Supp. App. 83-85.

[¶22] Before the election, voters in District 8 received unvarying, clear information from public officials and the media regarding the effect of a vote cast for Andahl, and the information was consistent with the Attorney General Opinion (2020-L-08). Despite the issuance of an Attorney General Opinion on October 13, 2020, and significant public messaging to voters that the procedures discussed in the Attorney General's Opinion would be followed, and without ever consulting with the Attorney General, the Governor remained silent on the issue prior to the election. The Governor took no legal action prior to the election challenging the Attorney General Opinion (2020-L-08). Further, the Governor took no steps to inform voters that he disagreed with the process they had been told would be used to fill

the vacancy. The Governor did not disclose to District 8 voters that he would unilaterally attempt to change the meaning of their votes for Andahl or that he would seize for himself the district residents' ability to select an individual to represent their interests in the Legislative Assembly. Voters cast their ballots in the November 3, 2020 general election believing that if Andahl won, the District 8 executive committee would appoint a replacement to fill the resulting vacancy. On the basis of that information, enough voters cast their ballots for Andahl that he received the second highest number of votes. Jaeger Supp. App. 7. However, the Governor waited until the morning after the election, November 4, 2020, to issue a press release, for the first time announcing that he disagrees with the Attorney General Opinion and is appointing Boeshans to the seat. App. 161-168. Also, although the Governor's Petition (at ¶¶30-31) asserts the Governor has standing and the case at hand is ripe for adjudication because "the Secretary of State will deprive the Governor of his constitutional power" if the Secretary "follow[s] the guidance of the Attorney General's Opinion," and the "Governor does not have to await the consummation of threatened injury to obtain preventive relief," the Governor waited until November 12, 2020 – 30 days after the Secretary was quoted in the media as supporting the Attorney General's Opinion - to file the current Petition with this Court.

### **STANDARD OF REVIEW**

[¶23] In his Petition, the Governor seeks a declaratory judgment, writ of injunction, and writ of mandamus.<sup>2</sup> Under N.D.C.C. § 32-23-01, "[a] court of record within its jurisdiction shall have power to declare rights, status, and other legal relations whether or not further

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<sup>2</sup> The Governor also sought a preliminary injunction, but this Court denied the requested preliminary injunction in its Order issued November 13, 2020.

relief is or could be claimed.” “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.’” Berg, 2020 ND 178, ¶ 28, 948 N.W.2d 4 (quoting N.D.C.C. § 32-06-02(1)). ‘A petitioner for a writ of mandamus must show a clear legal right to performance of the act sought to be compelled and must establish no plain, speedy, and adequate remedy exists in the ordinary course of law.’ Berg, 2020 ND 178, ¶ 9, 948 N.W.2d 4 (quoting Riemers v. Jaeger, 2018 ND 192, ¶ 7, 916 N.W.2d 113).

## LAW AND ARGUMENT

### **I. The Court cannot grant the relief requested against a future Legislative Assembly.**

[¶24] The Governor’s Petition should be denied if the Court cannot grant the relief requested. See Berg, 2020 ND 178, ¶¶ 9, 28, 948 N.W.2d 40. The Petition seeks remedies apparently against the current 66<sup>th</sup> Legislative Assembly, but that body is powerless to take action with respect to the seating of a member of the 67<sup>th</sup> Legislative Assembly.

[¶25] The vacancy that will result from Andahl’s death has not occurred yet. The term of the office at issue in this case is not set to begin until December 1, 2020. N.D. Const. Art. IV, § 7. The two current members representing District 8 in the House of Representatives, Jeff Delzer and Vernon Laning, are still serving their terms along with the other members of the House of Representatives in the 66<sup>th</sup> Legislative Assembly. N.D.C.C. § 54-03-01.13; N.D. Const. art. IV, § 7. Their terms will end on November 30, 2020. See id. The House of Representatives in the 67<sup>th</sup> Legislative Assembly, not the 66<sup>th</sup> Legislative Assembly, will actually seat the person who fills the vacancy caused by Andahl’s death, but the 67<sup>th</sup>

Legislative Assembly will not begin until December. N.D. Const. art. IV, § 7.

[¶26] The Governor has commenced his legal action ostensibly against the 66<sup>th</sup> Legislative Assembly, not the 67<sup>th</sup> Legislative Assembly, which has not yet convened. Section 12 of Article IV of the North Dakota Constitution declares, “[e]ach house [of the Legislative Assembly] is the judge of the qualifications of its members....”. The newly elected members of the House of Representatives in the 67<sup>th</sup> Legislative Assembly have not even begun their terms yet. They have not yet determined the qualifications of the individual to fill the vacancy caused by Anhdahl’s death, and cannot do so until at least December 1, 2020.

[¶27] It should be noted, while the Attorney General represents the Legislative Assembly in this legal proceeding, his client consultation could only be with the current 66<sup>th</sup> Legislative Assembly. The Attorney General cannot consult with, and cannot represent the 67<sup>th</sup> Legislative Assembly, as it has not yet convened. The intentions of the House of Representatives in the 67<sup>th</sup> Legislative Assembly, and its determination of the qualifications of the person who will fill the vacancy, are unknown and cannot yet be properly considered in this litigation. This Court should not issue an order binding a future Legislative Assembly that has not had any opportunity to make constitutional determinations or present its legal position to the Court through counsel.

**II. Due to separation of powers, neither this Court nor the Governor has the power to determine the qualifications of members of the Legislative Assembly, or to direct the seating of a particular legislative member.**

[¶28] Due to the constitutional separation of powers among the three branches of government, neither this Court nor the Governor has the power determine the qualification of members of the Legislative Assembly, or to direct the seating of a particular legislative



member, the exact relief the Governor requests. The North Dakota Constitution creates three branches of government, and distinct powers to each. N. D. Legislative Assembly v. Burgum, 2018 ND 189, ¶ 40, 916 N.W.2d 83 (citing N.D. Const. art. III, § 1, which states “the legislative power of this state shall be vested in a legislative assembly...”; N.D. Const. art. V, § 1, which states, “[t]he executive power is vested in the governor...”; N.D. Const. art. VI, § 1, which states, “[t]he judicial power of the state is vested in a unified judicial system...”). The North Dakota Supreme Court has explained, “[b]y vesting each branch with a distinct form of power, the Constitution keeps those powers separate. The three branches are ‘coequal,’ N.D. Const. art. XI, § 26, each ‘supreme in its own sphere.’” Burgum, 2018 ND 189, ¶ 40, 916 N.W.2d 83 (citing State ex rel. Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987)). Further, the North Dakota Supreme Court has explained, “[l]ong before the express formalization of separation of powers in Article XI, § 26, this Court recognized that the Constitution's apportionment of power among three branches implicitly excluded each branch from exercising the powers of the others.” Burgum, 2018 ND 189, ¶ 40, 916 N.W.2d 83 (citing State v. Hanson, 558 N.W.2d 611, 614 (N.D. 1996); Glaspell v. City of Jamestown, 11 N.D. 86, 88 N.W. 1023 (1902); Miller v. French, 530 U.S. 327, 341 (2000) (explaining that separation of powers doctrine “prohibits one branch from encroaching on the central prerogatives of another”)).

**A. This case is not justiciable because only the Legislative Assembly has the power to determine the qualifications of its members and direct the seating of a particular member.**

[¶29] The North Dakota Constitution and statutes make clear the judicial branch does not have the power to rule on the qualifications of members of the Legislative Assembly although courts may rule on election contests. The present action is not an election contest., which is

governed by N.D.C.C. ch. 16.1-16. The requisite condition for commencing an election contest is not met or even alleged in the present action. Moreover, the Petitioner in this case, the Governor, does not have standing to bring an election contest under N.D.C.C. ch. 16.1-16. According to N.D.C.C. § 16.1-16-02, only “[a] defeated candidate or ten qualified electors may contest the... election of any person....” The Governor is not a defeated candidate and has not been joined in this action by at least nine other qualified electors. Further, none of the requisite procedures for an election contest, such as serving and filing a complaint, conducting a civil trial in the district court, or appealing to this Court have been followed in this case. See N.D.C.C. §§ 16.1-16-03; 16.1-16-04; 16.1-16-06; 16.1-16-08; 16.1-16-09. In his Petition, the Governor seeks a declaratory judgment, writ of injunction, and writ of mandamus, all with the end goal of seating of the Governor’s ostensible appointee in the House of Representatives. In that regard, the Governor’s Petition requests this Court to exercise power over the House of Representatives that the Court simply does not have.

[¶30] Section 12 of Article IV of the North Dakota Constitution declares, “[e]ach house [of the Legislative Assembly] is the judge of the qualifications of its members, but election contests are subject to judicial review as provided by law.” This longstanding principle is rooted in the separation of powers doctrine and codified in statute. According to N.D.C.C. § 54-03-07:

If the qualifications of any member of either house of the legislative assembly are challenged, the right of that member to a seat must be determined by the house in which that person claims a seat as a member, except an election contest must be determined in accordance with chapter 16.1-16.

The North Dakota Constitution and the statutes of this state therefore make clear that, with the exception of election contests, determinations of qualification of members of the Legislative Assembly are matters for the legislative branch to determine, not the judicial branch.

[¶31] This is a principle that the North Dakota Supreme Court has consistently upheld. In State ex rel. Schmeding v. District Court of Sixth Judicial Dist In & For Morton Cty., 67 N.D. 196, 271 N.W. 137, 143 (1937), this Court stated, “[i]t is well settled that the courts should not assume authority to take any steps in legislative contests unless clearly authorized, and then only to the extent specifically given.” “Neither house, nor the two houses together, ‘can abridge the power vested in each house separately of a final decision as to the qualifications of one of its members, or transfer that power to any other tribunal or officer.’” Id. at 141 (citations omitted); State ex rel. Andrews v. Quam, 72 N.D. 344, 7 N.W.2d 738 (1943) (Where, in a writ of election to fill a vacancy in the House of Representatives, it was alleged that the governor failed to give a sufficient time for expression of the voters’ opinion, the remedy was with the House of Representatives and not with the courts)).

[¶32] The legal posture of the present case is similar to that in Timm v. Schoenwald, 400 N.W.2d 260 (N.D. 1987). In Timm, it was disputed which of two candidates should be deemed the duly elected candidate for the office of State Senator from the Fifth Legislative District in Ward County, and thus which of the two should be issued a certificate of election by the Secretary of State. The North Dakota Supreme Court determined that courts lacked jurisdiction over the dispute, explaining:

In the instant action Timm requested the district court to determine that he was the duly elected candidate from the Fifth Legislative District, to direct the appropriate officials to annul Schoenwald's certificate of election, and to direct the appropriate officials to issue him a certificate of election.

Alternatively, Timm requested the district court to determine that the Senate seat was vacant and to order a new election in Precinct 6–A.

The legal posture of this case and the relief requested specifically address Schoenwald's right to hold a legislative office rather than challenge the entire election process. Because of that legal posture, we do not believe that Chapter 16.1–16, N.D.C.C., provides the district court with jurisdiction to hear this action.

Id. at 264. In the present case, the Governor seeks to have this Court order Respondents to take the required steps culminating in seating the Governor's chosen appointee, rather than seating the appointee of the District 8 district committee pursuant to N.D.C.C. § 16.1-13-10. As the foregoing authorities make clear, this is not a dispute that can be settled in the courts. As there is no election contest, the sole authority to determine which of the appointees is qualified to serve rests with the House of Representatives.

[¶33] In a concurring opinion in Dist. One Republican Comm. v. Dist. One Democrat Comm., Justice Vande Walle explained:

In view of the historical precedents which are continued in this constitutional provision, we should conclude the judicial branch of government has jurisdiction to entertain contests of election only when the legislature has authorized us to do so by direct and unequivocal action. Cf. Timm v. Schoenwald, 400 N.W.2d 260 (N.D.1987). Where substantial doubt exists as to whether or not the legislature intended the judicial branch to have jurisdiction to hear election contests we should not rationalize a basis upon which to conclude that we have jurisdiction. Chapter 16.1–16 is not direct and unequivocal.

466 N.W.2d 820, 833 (N.D. 1991). The Legislative Assembly has not directly or unequivocally authorized the Court to consider the present Petition, which is a disagreement as to the qualifications of the governor's ostensible appointee to be seated in the House of Representatives, an issue solely within the power of the House of Representatives to determine. This case is not justiciable and the Petition should be denied on that ground alone.

**B. The Governor has no power to determine the qualifications of members of the Legislative Assembly or to direct the seating of a particular legislative member, and therefore his Petition should be denied.**

[¶34] The Governor’s primary argument in his Petition is that, while the North Dakota Legislative Assembly has the power to provide a procedure by law to fill the vacancy caused by Andahl’s death (N.D. Const. art. IV, § 11), the legislature purportedly left a legislative “gap” that allegedly does not account for the death of a winning candidate less than sixty-four days before the election. The Governor asserts he is empowered by the supposed “gap-filling” provision in N.D. Const. art. V, § 8 to make an appointment to fill the vacancy. However, the Governor’s argument misconstrues North Dakota constitutional and statutory law. There is no legislative “gap” in this case. As discussed in more detail below, the Legislative Assembly passed N.D.C.C. § 16.1-13-10, which provides the procedure for filling the vacancy that will result from Andahl’s death. Further, even if the mythical legislative “gap” did exist, North Dakota constitutional and statutory law make clear that N.D. Const. art. V, § 8 does not give catch-all “gap-filling” powers to the Governor to fill by appointment vacancies in the legislative branch of government.

[¶35] Prior to 2000, the North Dakota Constitution provided only a ministerial role for the Governor when it came to filling vacancies in the legislative branch, namely issuing writs of election, and even that ministerial role has since been removed. In the North Dakota Constitution’s original form in 1889, the Governor had a similar power of appointment to fill vacancies as the Governor has today. Section 78 (now N.D. Const. art. V, § 8) stated “[w]hen 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.” However, like Section 8 of Article V today, Section 78 of the 1889 Constitution

did not empower the Governor to fill vacancies in the Legislative Assembly. Section 44 of the Constitution (now N.D. Const. art. IV, § 11) stated, “[t]he Governor shall issue writs of election to fill such vacancies as may occur in either House of the Legislative Assembly.” With respect to filling vacancies in “either House of the Legislative Assembly”, the Governor’s power was limited merely to directing an election to be held on a specified date. See State ex rel. Andrews v. Quam, 72 N.D. 344, 345 7 N.W.2d 738, 738–39 (N.D. 1943). The Governor did not in 1889, and has not at any time since, had the power to appoint members of his choosing to the Legislative Assembly in order to fill vacancies.

[¶36] In the year 2000, voters passed a measure placed on the ballot by the Legislative Assembly, to amend N.D. Const. art. IV, § 11 to state the Legislative Assembly “may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly.” See 1999 N.D. Sess. Laws ch. 571. This removed the Governor’s ministerial duty to issue writs of election, without adding any new power of appointment. In response to the constitutional change, Senate Bill (SB) 2230, (2001 N.D. Leg) was enacted in 2001 to establish the relevant portion of N.D.C.C. § 16.1-13-10. Prior to the adoption of SB 2230, the former version of the statute required the relevant county auditor to notify the governor of a vacancy in a legislative seat, and the governor was required to engage in the ministerial act of calling a special election to fill the vacancy. According to the legislative history of SB 2230, legislators expressed an intention to give legislative districts control over the selection of individuals to fill legislative vacancies. Jaeger Supp. App. 129-160. The legislative history also includes statements by legislators expressing an intention to remove the governor and executive branch completely from the process of filling vacancies in legislative offices, stating, “This belongs in the legislative branch, not the executive branch” and this bill “keeps

process within the legislative branch”. Id. at 132. The legislative history of SB 2230 specifically references the 2000 constitutional amendment, noting “[t]here was a measure adopted by the people that says it is up to the legislature to find a procedure to fill a vacancy. The people already have decided to take the governor out of the picture.” Id. at 140. When the specific question was asked about whether Section 16.1-13-10 applies in the case of a candidate who dies before the election, the bill’s sponsor replied “you just follow the bill.” Id. at 141. There is nothing in the legislative history of N.D.C.C. § 16.1-13-10 or N.D. Const. art. IV, § 11 to suggest legislators or voters intended or even contemplated giving the Governor a new power to appoint members of the Legislative Assembly. See Jaeger Supp. App. 105-128, 129-60.

[¶37] Consistent with the Constitution and N.D.C.C. § 16.1-13-10, N.D.C.C. § 44-02-03 states, “[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.” (Emphasis added). This statute explicitly excludes legislative vacancies from the Governor's appointment power. The statute originated as early as 1895 (See Section 365 of the 1895 Compiled Laws of North Dakota), at which time the Constitution also excluded legislative vacancies from the Governor's appointment power. This is further evidence the Legislative Assembly has been consistent since the 19th century in its decision not to give the Governor the power to select legislators to represent the residents of the state.

[¶38] The Governor argues Section 44-02-03 allows - but does not require - him to fill vacancies in the Legislative Assembly. That construction is absurd in light of the other constitutional and statutory provisions carving out such vacancies from the Governor's appointment power, and this Court has said it will "presume the legislature did not intend an

absurd or ludicrous result..." Riemers v. Jaeger, 2018 ND 192, ¶ 11, 916 N.W.2d 113. The absurdity of the Governor's construction also is evinced by the constitutional power of each house of the Legislative Assembly to judge the qualifications of its members. N.D. Const. art. IV, § 12. When, as in this case, a Governor attempts to appoint a member of one of the houses of the Legislative Assembly, the house is empowered by the constitution to refuse to seat the ostensible appointee. Even if one argued the existence of tension between the Governor's appointment power and the power of the House of Representatives to determine the qualifications of its own members, the relevant provision in Article IV is much more specific to the issue at hand than the relevant provision in Article V and therefore would control.

[¶39] The Governor's argument that he may appoint a member of the House of Representatives also is an attempt to usurp legislative powers into the executive branch. As N.D. Const. art. IV, § 12 gives the legislative branch of government the power to determine who is qualified to be seated in each house, subject only to the judicial branch's rulings on election contests under N.D.C.C. Ch. 16.1-16, the Governor's purported appointment of a District 8 representative constitutes the exercise of legislative authority. This is a clear contravention of the separation of powers doctrine.

[¶40] The Governor's power of appointment has never authorized him to fill vacancies in offices of members of the Legislative Assembly, nor has any Governor ever before tried to appoint a legislator. The Governor's reliance on N.D. Const. art. IV, § 11 is misplaced as the constitutional and legislative history establishes the drafters of the original Constitution, the people of North Dakota, and legislators never delegated nor intended to delegate such appointment responsibility to the Governor. Allowing the Governor to fill the seat of the District 8 representative would violate the separation of powers doctrine and would lead to



the absurd result of permitting the Governor to appoint an individual whom the House of Representatives could refuse to seat.

**III. The Governor's delayed assertion of a constitutional right of appointment, if recognized, would disenfranchise qualified electors and is barred by laches.**

[¶41] The qualified electors of North Dakota have a constitutionally protected right to vote for their representatives in the Legislative Assembly. N.D. Const. art. II, §§ 1, 3; art. IV, § 2. Inherent in that right is the right to know the meaning or impact of one's vote before it is cast. Through the Petition, the Governor is attempting to change the meaning of the votes of thousands of voters in District 8 without any notice until the morning after the votes were cast. His requested relief would usurp the voters' will and replace the voters' intended outcome with the Governor's lately disclosed desired outcome. This attempted disenfranchisement of voters by a public official responsible for protecting the rights of residents of North Dakota is unconstitutional and for the reasons below is barred by laches.

[¶42] After Andahl died on October 5, 2020, the election rule announced to the qualified electors impacted by his death was that a vote for Andahl would still matter. On October 8, 2020, the Secretary promptly requested an opinion from the Attorney General asking what the effect would be of votes cast for a deceased candidate, and the process that would apply to fill his seat in the event a sufficient number of votes were cast for Andahl. *Id.* at 6-7, 9. On October 13, 2020, the Attorney General promptly answered the Secretary's questions, indicating the votes cast for the deceased candidate would still be counted, and the process for filling his seat was that set forth in N.D.C.C. § 16.1-13-10. *Id.* at 10-14.

[¶43] After the issuance of the Attorney General's opinion, and through the date of the election, the Republican Party and the news media consistently communicated to qualified electors impacted by Andahl's death regarding the process set forth in Section 16.1-13-10.

Jaeger Supp. App. 15-31, 33-66, 71-82, 86-99, 102-104. The qualified electors were told that, if Andahl received a sufficient number of votes, the District 8 committee would meet to select an individual to fill the vacancy resulting from his death. See id. Qualified electors heard and understood the message that a vote for Andahl would effectively constitute a vote to allow the district party's executive committee to fill the vacancy, resulting in a landslide victory – 5,929 qualified electors in District 8 cast a vote for Andahl in the November 2020 election, while the candidate with the third highest votes, Kathrin Volochenko, only received 1,905 votes. Id. at 7.

[¶44] During the entire time between Andahl's death on October 5, 2020 and the November 3, 2020 general election, the Governor stood silent regarding the constitutional right of appointment he now asserts in his Petition. Although the Governor's press release clearly stated extensive legal effort had been expended on this issue prior to November 4, 2020, and the accompanying legal analysis was evidence of the work undertaken on the Governor's behalf prior to that date, the Governor never told the public he was contemplating asserting a right to appoint the District 8 representative until right after all the District 8 votes had been cast. App. at 9-10, Jaeger Supp. App. 161-168. The Governor said nothing about his asserted constitutional right when the Attorney General issued his opinion and the Secretary of State said the opinion clarified the process for everyone. He remained silent when his party communicated to qualified electors about what would happen if Andahl received a sufficient number of votes. He said nothing, and took no action, to communicate to qualified electors that he unilaterally would decide what their votes for Andahl meant. Despite his work on the issue, the Governor provided no notice he would make District 8 residents' their votes for Andahl mean something different than what

had been communicated to them by the Attorney General, the Republican Party, and the news media. Prior to the election, the Governor said nothing and took no action with respect to the Secretary, the Attorney General, his own party, or most importantly the qualified electors, regarding the Governor's asserted right of appointment.

[¶45] The Governor's continued silence while qualified electors were informed what the rule of law would be if they voted for Andahl should bar the present Petition. If this Court grants the Governor his requested relief, it will result in the disenfranchisement of 5,929 qualified North Dakota electors who voted for Andahl. Under these circumstances, the Court should conclude that the Governor's continued silence, and failure to timely assert his alleged constitutional right of appointment, trigger the doctrine of laches.

[¶46] Generally, "[l]aches is a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay." Williams Cnty. Soc. Servs. Bd. v. Falcon, 367 N.W.2d 170, 174 (N.D. 1985). The focus is not just on the lapse of time in commencing an action, but also on the delay in asserting one's rights when the failure to do so prejudices others. See, e.g., Siana Oil & Gas Co., LLC v. Dublin Co., 2018 ND 164, ¶ 24, 915 N.W.2d 134 ("Laches does not arise from a delay or lapse of time alone, but is a delay in enforcing one's rights which works a disadvantage to another"). The doctrine applies when the party invoking it can prove "he was prejudiced because his position has become so changed during the delay that he cannot be restored to the status quo." Id. "Cases involving laches must stand or fall on their own facts and circumstances." Id.

[¶47] In the context of elections, the doctrine of laches takes on special significance where a party's failure to assert a claim or right impacts the rules that the electorate believes

will govern an election. See, e.g., Clark v. Pawlenty, 755 N.W.2d 293, 301 (Minn. 2009) (“In the context of elections, consideration of prejudice includes prejudice to the electorate in general.”); Arizona Libertarian Party v. Reagan, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (addressing laches in the election context and indicating “a court considers prejudice to the courts, candidates, citizens who signed petitions, election officials, and **voters**”) (emphasis added).

[¶48] The focus on election-context laches is “whether a reasonable valid excuse demonstrates that the petitioner could not have acted more expeditiously.” Carlson v. Ritchie, 830 N.W.2d 887, 891-92 (Minn. 2013) (internal quotation marks and citation omitted). “This standard, which requires that petitioners act with reasonable diligence in asserting known rights, appropriately promotes certainty and the orderly administration of elections.” Id. at 892. Consequently, the doctrine of laches can apply in the election context when the delay in asserting an alleged right is “measured in days.” Ademiluyi v. Maryland State Bd. of Elections, 181 A.3d 716, 720 (Md. 2018) (quoting Baker v. O’Malley, 92 A.3d 588, 593 (Md. Ct. Spec. App. 2014)); see also Voters Organized for the Integrity of Elections v. Baltimore City Elections Bd., 214 F. Supp. 3d 448, 454 (D. Md. 2016) (“Diligence in the compressed timeline applicable to elections is measured differently from how it might be measured in other contexts”). Indeed, courts have applied laches to bar election-related challenges even when arguably brought within an applicable limitations period. Ademiluyi, 181 A.3d at 720 (citing Ross v. State Bd. of Elections, 876 A.2d 692, 703 & n.8, 705–06 (Md. 2005)). The urgency of an election and the “possible disenfranchisement of . . . voters” are important considerations when applying laches in the election context. Liddy v. Lamone, 919 A.2d 1276, 1287 (Md. 2007). The Governor

offers no excuse for his delay in notifying the public and District 8 electors of his contemplation of using his appointment powers or his intention to do so. Nor does he offer any excuse for his delay in filing the Petition past the point at which his argument suggests the issue became ripe.

[¶49] If the Court recognizes the Governor’s alleged constitutional right to appoint a person of his own choosing to fill the vacancy resulting from Andahl’s death, the result will not just be **possible** disenfranchisement of voters, but the **actual** disenfranchisement of 5,929 qualified electors in District 8. This Court has previously emphasized the paramount importance of the right to vote because other basic rights flow from it:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

State ex rel. Olson v. Bakken, 329 N.W.2d 575, 579 (N.D. 1983) (internal quotation marks and citations omitted). Consequently, all three branches of government (including the executive branch and Governor) “in [their] respective roles must affirmatively act or react within the laws and **vigilantly guard against any action or lack of action by any official** which will prevent eligible votes, validly cast, from being counted.” Id. (emphasis added).

[¶50] For all the reasons stated in this brief, the Governor’s assertion that he has a right to fill a vacancy in a legislative seat is erroneous. However, regardless of the legal merits of his argument, the Governor had an obligation to inform voters before the election that he believed the rule of law argued by the Secretary and Legislative Assembly, announced by the Attorney General, and thereafter disseminated by the Republican Party and the news

media to qualified electors in District 8 was inaccurate. Cf. id. at 580 (“The law and equity does not favor disenfranchising voters who have complied with the law when the disenfranchisement occurs merely because of mistake, error, negligence, or misconduct on the part of election officials.”). Instead of vigilantly guarding the electorate’s right to vote, the Governor now attacks that very right and seeks to disenfranchise thousands of qualified electors while he stood silent in the critical weeks before the election.

[¶51] The Governor does not argue and cannot demonstrate a reasonably valid excuse for why he could not have acted more expeditiously. His assertions of standing and ripeness in the Petition, if accepted, indicate he could have initiated this action as early as October 13, 2020, and at least given voters knowledge of his intentions. His belated assertion of a right of appointment does not promote certainty and the orderly administration of elections, but actively seeks to undermine it by disenfranchising the electorate. Qualified electors can no longer change how they voted. They will suffer prejudice at the hands of a public official who was supposed to vigilantly guard their right to vote, not attack it after an election has already taken place. The Court should find that the doctrine of laches bars the Governor’s current Petition under these circumstances.

**IV. N.D.C.C. § 16.1-13-10 unambiguously provides a method for filling a vacancy in the office of a member of the Legislative Assembly.**

[¶52] For the reasons discussed above, the Petition should be denied and this Court need not reach the statutory question raised by the Governor with respect to N.D.C.C. § 16.1-13-10. However, if the Court reaches the statutory argument, it also fails. One of the fundamental flaws in the Governor’s argument is the assumption that no other method is provided by law to fill the vacancy created by Andahl’s death. North Dakota Century Code Section 16.1-13-10 unambiguously applies and provides the method to fill the vacancy. Section 8 of Article

V of the North Dakota Constitution is only triggered when “no other method is provided by... law” to fill a vacancy, not when the Governor disagrees with the method. As explained below, the Governor actually challenges the statute’s method, not whether a method exists.

[¶53] Section 16.1-13-10 of the North Dakota Century Code broadly applies whenever there is any “vacancy in the **office** of a member of the legislative assembly.” (Emphasis added). The condition precedent that triggers application of the statute is a vacancy in the “office”. The statute’s reference to a “member of the legislative assembly” is merely descriptive of the office itself. Thus, the condition precedent that determines whether a “method is provided by . . . law” – a vacancy in the office – is present here and conceded by the Governor. Indeed, Section 8 of Article V is never triggered itself unless there is a “vacancy” in an “office.” If the condition triggering the application of Section 16.1-13-10 is not present, then one of the multiple conditions required to trigger the application of Section 8 of Article V is not present. There is no plain reading of Section 8 of Article V and Section 16.1-13-10 which results in the Governor being authorized to appoint a member of the Legislative Assembly. Either Section 16.1-13-10 must be applied because there is a vacancy in the office of a member of the Legislative Assembly, or else neither Section 16.1-13-10 nor Section 8 of Article V may be applied because there is no vacancy in such office. To construe the two provisions otherwise would neglect the plain meaning of the condition precedent.

[¶54] The Governor attacks the method provided by law for filling a vacancy in the “office” by discussing a particular person’s eligibility or status as a member, specifically Andahl’s. In fact, his attack on the method necessarily depends upon his conclusion that Andahl is ineligible to be a member or former member of the legislative assembly. See Petition at 19 (“He [Andahl], 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.”) However, whether there is a vacancy in the office itself is not at all dependent upon an analysis of the qualifications of a particular member, alleged non-member, former member, or potential future member, of the office. The limited question relevant to addressing the Governor’s argument is whether a “method is provided by . . . law” for filling a vacancy. N.D. Const. art. V, § 8. The answer to that question only requires an inquiry into whether there is a vacancy in the office. The Governor, the Secretary, and the Legislative Assembly agree there is.

[¶55] The Governor assumes the “former member” referred to in Section 16.1-13-10 must be Andahl, and then argues in circular fashion that the statute does not provide a method to fill the vacancy because Andahl is not a “former member.” However, the statute clearly provides a method for filling a vacancy in the office itself. Subsection 1 sets forth the initial three-step process for filling a vacancy in the office. First, the county auditor notifies the chairman of the legislative management of a vacancy in the office. N.D.C.C. § 16.1-13-10(1). Second, the chairman of the legislative management notifies “the district committee of the political party that the former member represented in the district in which the vacancy exists.” *Id.* Third, the district committee can hold a meeting within twenty-one days to fill the vacancy in the office. *Id.*

[¶56] Subsection 1 further addresses two potential contingent scenarios where the chairman of legislative management (which could be a member of either party) may appoint a resident of the district to fill the vacancy in the office. The chairman of legislative management may act when either (1) the “former member” was elected as an independent candidate, or (2) the district committee fails to make an appointment within the designated time allowed. *Id.*



Subsection 2 then sets forth a sequential step in the process that may or may not occur depending upon whether enough qualified electors in the affected legislative district are dissatisfied with the appointment and decide to take action. If qualified electors in the legislative district “equal in number to four percent of the resident population of the legislative district” present a petition to the Secretary of State “within thirty days following an appointment being made according to subsection 1,” a special election must be held. N.D.C.C. § 16.1-13-10(2). The fact that the petition follows an appointment demonstrates the legislature’s intent to permit a special election to trump any appointment made under subsection 1 if enough electors are dissatisfied with it. See id. (indicating “a special election is required to be called to fill the vacancy” if “the petition contains the required number of signatures”)

[¶57] If the Court grants the Governor’s requested relief, this specific and detailed sequential method provided by law would never run its course. Among other problems, this result would deny the residents of District 8 a remedy if they are dissatisfied with the legislative appointment because they arguably could not hold a special election to replace the gubernatorial appointee. By executive fiat, the Governor wants his attack on the method – not whether there is a method – to override both a legislative appointment and the statutory right of qualified electors to a special election, before the full method provided by law takes place.

[¶58] Further, if the Court concludes that Section 16.1-13-10 provides no method for filling a vacancy in the office, and the appointment power is vested in the governor, it means that a future Republican governor can fill the legislative seat of a deceased Democratic candidate who wins the most protest votes in an election with no input from either party, or that a future Democratic governor can fill the legislative seat of a deceased Republican candidate who wins

the most protest votes in an election with no input from either party. Significantly, it also means the qualified electors of the district never get a chance to express their dissatisfaction with the gubernatorial appointment by requesting a special election, a part of the method provided by law that has not yet occurred in this current case.

[¶59] The Secretary and the Legislative Assembly assert that N.D.C.C. § 16.1-13-10 is unambiguous and applies to fill the vacancy caused by the death of Andahl. However, even if the Court finds some ambiguity in the statute due to the references to a “former member”, the alleged ambiguity could only affect **how** the statute applies, not **whether** the statute applies. The statute unambiguously applies “[i]f a vacancy in the office of a member of the legislative assembly occurs...”, and there is such a vacancy in this case. N.D.C.C. § 16.1-13-10(1).

[¶60] Additionally, if the court finds an ambiguity in the language of Section 16.1-13-10 exists, precedent indicates the court will look to the legislative history of the statute. As detailed above, the legislative history clearly illustrates the Governor has no role in filling a vacancy in a seat of the member of the House of Representatives.

[¶61] Under the statute, the vacancy triggers the county auditor of the county in which the “former member resides or resided” to notify the chairman of the legislative management of the vacancy. Id.; see also Jaeger Supp. App. 100. The vacancy also triggers the chairman of the legislative management to “notify the district committee of the political party that the former member represented in the district” of the vacancy, and the district committee selects an individual to fill the vacancy. N.D.C.C. § 16.1-13-10(1); see also Jaeger Supp. App. 101. The references to a “former member” do not affect the issue of whether the statute applies. The references only affect the specific procedure to be followed and individuals and

parties involved.

[¶62] Additionally, even if an ambiguity exists in N.D.C.C. § 16.1-13-10, which is denied, the Governor’s interpretation conflicts with the legislative history of Section 16.1-13-10. The North Dakota Supreme Court has explained.

Our primary goal in interpreting that statutory language is to ascertain the intention of the legislation. Reopelle, 2008 ND 98, ¶ 13, 748 N.W.2d 722. We initially seek to ascertain that intention from the language of the statute itself, giving the words in the statute their plain, ordinary, and commonly understood meaning. N.D.C.C. § 1-02-02; Reopelle, at ¶ 13. Statutes are construed as a whole to harmonize them and give meaning to each word and phrase, if possible. N.D.C.C. § 1-02-07; Reopelle, at ¶ 13. In enacting a statute, “[w]e presume the legislature did not intend an absurd or ludicrous result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted.” State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60. If a statute is ambiguous, extrinsic aids may be used to construe the statute to determine the intention of the legislation, including... the legislative history.... N.D.C.C. § 1-02-39; Reopelle, at ¶ 13. A statute is ambiguous if it is susceptible to different but rational meanings. Reopelle, at ¶ 13.

Zimmerman v. N. Dakota Workforce Safety & Ins. Fund, 2010 ND 42, ¶ 7, 779 N.W.2d 372.

[¶63] As discussed in more detail above, the relevant portion of Section 16.1-13-10 was enacted as part of Senate Bill (SB) 2230 (2001), and the legislative history makes clear that the intent was not to give any appointment power to the Governor. Rather, the intent was to create a new process for filling vacancies in offices of members of the Legislative Assembly, and to eliminate the Governor's former ministerial role of calling for a special election in that process. In the legislative history for Section 16.1-13-10, Representative Klemin asked for clarification on “what happens” when a candidate “dies before the election”, and the bill’s sponsor, Senator Traynor, replied “you just follow the bill.” Jaeger Supp. App. at 141.

[¶64] In sum, this Court should not entertain the Governor’s attack on the method provided

by law for filling a vacancy in the office of a member of the legislative assembly. To the extent any alleged ambiguity exists in Section 16.1-13-10, the legislative history reveals that gubernatorial appointment was specifically not the intended outcome. This Court need only determine that a vacancy in the office will exist, and that Section 16.1-13-10 provides a method for filling that vacancy. In order to reject the Governor's challenge in this case, it is simply enough to recognize there is a method provided by law for filling a vacancy in the office, and that therefore Section 8 of Article V of the North Dakota Constitution does not apply.

### CONCLUSION

[¶65] For the foregoing reasons, the Secretary and the Legislative Assembly respectfully request the Court deny the Governor's Petition in its entirety.

Dated this 19<sup>th</sup> day of November, 2020.

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Dakota's Governor,

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v.

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Pollert, Chairman of Legislative  
Management; and the District 8  
Republican Committee, Loren DeWitz,  
District Chairperson,

Respondents.

**CERTIFICATE OF COMPLIANCE**

**Supreme Ct. No. 20200298**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Response Brief of Respondents Alvin Jaeger and the North Dakota Legislative Assembly 36 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Times New Roman 12 point font.

Dated this 19<sup>th</sup> day of November, 2020.

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**CERTIFICATE OF SERVICE**

**Supreme Ct. No. 20200298**

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[¶1] I hereby certify that on November 19, 2020, the following documents: **BRIEF OF RESPONDENTS ALVIN JAEGER AND THE NORTH DAKOTA LEGISLATIVE ASSEMBLY IN OPPOSITION TO PETITION FOR DECLARATORY JUDGMENT, WRIT OF INJUNCTION, AND WRIT OF MANDAMUS, CERTIFICATE OF COMPLIANCE and RESPONDENTS ALVIN JAEGER AND THE NORTH DAKOTA LEGISLATIVE ASSEMBLY SUPPLEMENTAL APPENDIX** were filed electronically with the Supreme Court through the E-Filing Portal and served upon:

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