

**In the Supreme Court
State of North Dakota**

November 19, 2020

Supreme Court No. 20200298

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.

**CORRECTED BRIEF OF INTERVENOR DEMOCRATIC NON-PARTISAN
LEAGUE (DEM-NPL) DISTRICT 8 HOUSE OF REPRESENTATIVES
CANDIDATE KATHRIN VOLOCHENKO IN RESPONSE TO THE PETITION BY
NORTH DAKOTA GOVERNOR DOUG BURGUM FOR "PRELIMINARY
INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, WRIT OF INJUNCTION, AND
WRIT OF MANDAMUS"**

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STATEMENT OF ISSUES

- A. The “election” of David Andahl -- who was deceased at the time of the November 3, 2020 General Election -- is a “nullity” and the Legislative Assembly has not “provided by law” a procedure to address the manner in which the remaining second District 8 House of Representatives seat at issue in the election should be filled.....¶21

- B. By virtue of the Doctrine of Separation of Powers enshrined in the North Dakota Constitution the Governor – the head of the Executive Branch of state government -- is without authority to appoint any person to be a member of the Legislative Assembly – in the Legislative Branch of state government.....¶31

- C. After David Andahl’s “nullity” candidacy Governor Doug Burgum is precluded by the Separation of Powers Doctrine from appointing a replacement person to the second District 8 House of Representatives seat -- and where N.D.C.C. § 16.1-13-10 is unavailing to the Respondents because this statute is inapplicable under the factual circumstances of David Andahl’s pre-election death – the Supreme Court should rely upon the apposite decisional law recited herein as persuasive authority and the Court should thus order that all votes cast for a deceased person are a collective nullity which can have no effect on the result of the election¶37

STATEMENT OF THE CASE

[¶1] Invoking original jurisdiction of the North Dakota Supreme Court, Governor Doug Burgum has petitioned the Court for “preliminary injunctive relief, declaratory judgment, a writ of injunction, and (a) writ of mandamus” to preclude the Secretary of State, Legislative Assembly and District 8 Republican Committee” from filling the District 8 legislative seat following the pre-election death of Republican House Candidate David Andahl – so as to permit the Governor to himself fill that seat by appointment.

[¶2] Respondents North Dakota Secretary of State Al Jaeger, Legislative Management Chairman Chet Pollert, and District 8 Republican Committee Chairperson Loren DeWitz in turn embrace the October 13, 2020 Letter [2020-L-08] of Republican North Dakota Attorney General Wayne Stenehjem, pursuant to which Stenehjem concludes that votes cast for decedent David Andahl should be counted, that a “vacancy” in the office should be declared, and that Legislative Management should be permitted to appoint a successor pursuant to N.D.C.C. § 16.1-13-10.

[¶3] On the basis of the attendant facts and those legal authorities which are presented herein, it is the position of Intervenor Democratic Non-Partisan League (Dem-NPL) Party District 8 House of Representatives Candidate Kathrin Volochenko that **the respective positions adopted in this original jurisdiction case by both the Petitioner and the Respondents are incorrect. It is the further position of Intervenor Kathrin Volochenko and that – upon the facts and legal authorities set forth hereafter -- the Supreme Court should enter a declaration that all votes cast for decedent David Andahl are a collective “nullity” and thus should not be counted. The necessary**

consequence to that adjudication would be that Volochenko be declared by the Court to have prevailed in the November 3, 2020 General Election, and this she should be seated as a member of the House of Representatives representing District 8 in the Sixty-Seventh Legislative Assembly.

[¶4] On November 17, 2020, Dem-NPL Party District 8 House of Representatives Candidate Kathrin Volochenko sought Intervenor status in the above-captioned original jurisdiction case before the Supreme Court pursuant to the authorities of N.D.R.App.P. 27, N.D.R.Civ.P. Rule 24(a)(2), and N.D.R.Civ.P. 19(a)(1).

[¶5] Rule 24(a)(2) of the North Dakota Rules of Civil Procedure provides as follows:

RULE 24. INTERVENTION

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

[¶6] Under N.D.R.Civ.P. 19(a)(1), “[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party” if the person meets the following requirements, in part:

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may:

(i) as a practical matter impair or impede the person’s ability to protect the interest;

[¶7] Furthermore, joinder of Kathrin Volochenko in this case will not deprive the Court of subject matter jurisdiction. N.D.R.Civ.P. 19(a)(1). Ms. Volochenko was a Dem-NPL

Party candidate for the House of Representatives in District 8, and she resides in North Dakota

[¶8] On the evening of November 17, 2020, the Supreme Court granted Intervenor status to Kathrin Volochenko.

STATEMENT OF RELEVANT FACTS

[¶9] The history of the 2020 election cycle, relative to the two available District 8 House seats, begins with the Primary Election, which took place on June 9, 2020. In that primary, four candidates competed for the two Republican nominations, Dave Nehring, David Andahl, Jeff Delzer and Bob Wheeler., with Nehring and Andahl ending up being the top two vote-getters, thereby receiving the Republican nominations for the two House seats.¹

[¶10] The Dem-NPL Party presented two unopposed candidates for the two House seats, Kathrin Volochenko and Linda Babb, with Volochenko and Babb thus proceeding to the General Election field as the two House candidate representatives from their party.²

[¶11] Tragically, twenty-eight (28) days before the November 3, 2020 General Election, on October 5, 2020, Republican House candidate David Andahl died after having suffered from COVID-19.³

¹ North Dakota Secretary of State web link:

<https://results.sos.nd.gov/ResultsSW.aspx?text=Race&type=LG&map=DIST&eid=312>

² *Id.*

³ See, the Forum News Service Article, published October 6, 2020, under the headline, “Candidate in high-profile House Race died of COVID-19”, included at **Intervenor Appx. pages 013-015.**

[¶12] At once, great media attention was paid to David Andahl's death by North Dakota regional and statewide weekly and daily newspapers, radio and television stations, and news services, such as the Associated Press -- specifically to the District 8 House of Representatives seat electoral situation which had been created by David Andahl's passing. See, the dozens of newspaper and other media articles relating to the death of David Andahl and the fact that his name would remain on the District 8 ballot for the November 3, 2020, General Election.⁴

[¶13] However, even though David Andahl had died, an aggressive partisan campaign was mounted immediately to solicit votes from District 8 electors for the deceased man -- and this campaign continued over the course of the four (4) weeks remaining before the November 3, 2020 General Election.

[¶14] In one notable such example, Rick Berg, Chairman of the North Dakota Republican Party, published the following letter in the Bismarck Tribune and other newspapers throughout the state, including those which served the geographic area in and around District 8:

My name is Rick Berg, and I have the current distinction of serving as the chairman of the North Dakota Republican Party. Together, we advocate for limited government and expanded freedoms across our state -- including here in District 8.

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

⁴ See, generally, the summary and copies of some 33 media stories, included at **Intervenor Appx. at pages 01-119**.

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.

See, the letter to the editor authored by North Dakota Republican Party Chairman Rick Berg, published October 24, 2020, in the Bismarck Tribune, included at **Intervenor Appx. 073.**

[¶15] Other partisan exhortations directed to District 8 electors to cast their votes for the deceased David Andahl came on Social Media, such as a post on the official District 8 Facebook page which urged under a picture of Republican Attorney General Wayne Stenehjem as follows:

“AG Stenehjem’s opinion on the District 8 election. **Please vote for both Daves to keep our two Republican seats.**” (*bold, underlined emphasis added*). 5

“ND District 8 Republicans” official Facebook Page, October 13, 2020, a copy of which post is included at **Intervenor Appx. 119.**

[¶16] The situation prompted great discussion inside and without District 8, attracted the attention of political commentators, and it attracted the attention of pundits such as Forum Communications columnist Rob Port, who observed in an opinion piece published on October 6, 2020:

5 Dave Nehring was the other Republican candidate who was nominated in the June 2020 Primary Election. See, the North Dakota Secretary of State web link: <https://results.sos.nd.gov/ResultsSW.aspx?text=Race&type=LG&map=DIST&eid=312> .

Andahl cannot be removed from the ballot. The ballots have been printed. Many people have already voted, nearly 27,000 statewide, as I write this Tuesday morning.

By my reading of the law, the NDGOP has two options. They could stage a write-in campaign for a new candidate. The risk is that write-in campaigns are tricky and, again, at least some people in District 8 have probably already voted. House races in North Dakota are for two seats in each district. Andahl was one of four candidates in this race (the other Republican, Dave Nehring, Democrats Linda Babb, and Kathrin Volochenko) and the top two on election day win.

With Andahl still on the ballot, a write-in campaign could split the Republican vote in the district and give one of the Democrats a win. That's not an appealing prospect for the NDGOP.

The other option, the most likely course of action, is to urge voters to cast a ballot for Andahl anyway. If he wins, the law says the local NDGOP district leaders would pick his replacement. A draft message calling on voters to do exactly this has already been circulated by incumbent District 8 Senator Howard Anderson (and shared with me by a local source).*(bold, underlined emphasis added).*

Column by Forum Communications columnist Rob Port, published October 6, 2020, at **Appx. 011**.

[¶17] Even Republican North Dakota Secretary of State Alvin Jaeger – under whose authority all public elections take place in this state – was actively promoting the concept of District 8 electors casting their ballots for the deceased Dave Andahl, as Jaeger stated in a media interview published in the Fargo Forum on October 6, 2020:

Early voting in North Dakota has already begun, and Secretary of State Al Jaeger said that it's too late to replace Andahl on the November ballot. "There's no way to remove him," Jaeger said. "**At this point he can't be replaced on the ballot, but people can still vote for him.**" Republican candidate Dave Nehring and Democratic candidates Linda Babb and Kathrin Volochenko will also appear on the ballot for the District 8 seat, but Jaeger said he and his office are looking into the protocol for how to handle a potential Andahl win this Nov. 3. *(bold, underlined emphasis added).*

Fargo Forum article published October 6, 2020, under the headline, “Candidate in high-profile North Dakota House race died of COVID-19 a copy of which being included at **Intervenor Appx. 014.**

[¶18] Looking toward the possibility that decedent David Andahl would receive either the first or second most votes in the forthcoming election, Secretary of State Alvin Jaeger requested a North Dakota Attorney General opinion addressing the “situation where a qualified candidate for political office died after early voting was commenced and at a time when it is not possible to change the names or otherwise replace the candidate on the ballot prior to the general election.” See, Attorney General Opinion 2020-L-08, at page 1.

[¶19] On October 13, 2020, Attorney General Stenehjem filed his Letter Opinion, expressing the legal opinion that if decedent David Andahl were to receive received a sufficient number of votes to be elected – although deceased, Andahl would be “elected” to the office of District 8 State Representative. *Id.* at pages 2-5. Attorney General Stenehjem further expressed the opinion that after the late Mr. Andahl’s “election,” his seat would then be deemed vacant, by virtue of his deceased status, and such a vacancy would be filled pursuant to N.D.C.C. § 16.1-13-10. *Id.* at pages 2-5.

[¶20] Election day finally arrived on November 3, 2020, and Republican Dave Nehring and decedent David Andahl were the top two vote getters (in that order) in the four-person field vying for the two District 8 House of Representatives seats, while Dem-NPL Party candidates Kathrin Volochenko and Linda Babb finished third and fourth, respectively, in the election.⁶

⁶ North Dakota Secretary of State web link:
<https://results.sos.nd.gov/resultsSW.aspx?text=Race&type=LG&map=DIST>

[¶20] In response to the statutory effect of Attorney General Opinion 2020-L-08 under N.D.C.C. § 54-12-01, which provides that an answer to a question of law provided by an Attorney General opinion governs the actions of public officials until such time as the question presented is decided by the courts, Petitioner North Dakota Governor Doug Burgum commenced the instant original jurisdiction proceedings in the Supreme Court with the filing of his Petition on November 12, 2020. 7

ARGUMENT

A. The “election” of David Andahl -- who was deceased at the time of the November 3, 2020 General Election -- is a “nullity” and the Legislative Assembly has not “provided by law” a procedure to address the manner in which the remaining second District 8 House of Representatives seat at issue in the election should be filled.

i. Decedent David Andahl’s “election” was a “nullity”.

[¶21] Quoting from the syllabus of its much earlier decision in *Jenness v. Clark*, 129 N.W. 357 (N.D. 1910), the North Dakota Supreme Court in *Nielsen v. Neuharth*, 331 N.W.2d 58, 60 (N.D. 1983) reaffirmed the foundational principle that, “**(a) person who is ineligible to hold a public office cannot be elected thereto, and his election is a nullity. . . .**” (*bold, underlined emphasis added*).

[¶22] Clearly, this holding refers specifically to the “election” of an ineligible

7 In a recent development, on the evening of November 18, 2018, the District 8 Republican District Committee acted to purportedly nominate former Republican House of Representatives member Jeff Delzer to be a District 8 member of the House of Representatives.

<https://www.kfyrtv.com/2020/11/19/delzer-chosen-by-gop-to-fill-andahls-seat/>

candidate being a “nullity” as to that individual candidate’s candidacy personally. 8

[¶23] In the present context, wherein four candidates participated in a contested election seeking two available House of Representatives seats in District 8, neither the Petitioner – nor the Respondents – take the position that the entire November 3, 2020 General Election relative to these two House seats was a “nullity” in its entirety. Surely, the Petitioner and the Respondents do not challenge the fact that the other Republican House candidate – Dave Nehring – may be certified as prevailing in the election as the leading vote getter in the election.

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

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

[¶25] Additionally, a “qualified elector” is an individual who is a citizen of the United States, eighteen years of age or older, and a resident of North Dakota. N.D. Const. art. II, § 1; N.D.C.C. § 16.1-01-04.

8 *Jenness v. Clark* involved only two individuals and a single county superintendent of schools office, and so where there are references to “(t)he election being a nullity”, the Court certainly was addressing the circumstances of a single unqualified candidate. *Jenness v. Clark*, 129 N.W. at 358

[¶26] Under these principles of North Dakota statutory, constitutional and decisional law, it is beyond question that the tragic death of Republican District 8 House of Representatives candidate David Andahl on October 5, 2020, rendered his “election” to be a “nullity”. *Nielsen v. Neuharth, supra*, 331 N.W.2d at 60, quoting from *Jenness v. Clark*, 129 N.W. 357.

- ii. **The Legislative Assembly has not “provided by law” a procedure to address the manner in which the remaining second District 8 House of Representatives seat at issue in the election should be filled.**

[¶27] It is true that under N.D. Const. art. IV, § 11, “[t]he legislative assembly may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly.”

[¶28] However, as is correctly noted in the Petition at ¶25 thereof, at best, N.D. Const. art. IV, § 11 is a “non-self-executing constitutional provision that grants the Legislative Assembly the power to pass laws codifying procedures for filling legislative vacancies. This constitutional provision is inoperative on its own to permit the Legislative Assembly to fill *vacancies* except in accordance with any legislation enacted to give it effect.”

[¶29] The Petitioner further accurately states that the North Dakota Legislative Assembly has provided by law two procedures to fill legislative *vacancies*: (1) pre-election vacancy in a nomination following a primary election as contemplated in N.D.C.C. § 16.1-11-18; and (2) vacancy of a legislative seat as contemplated in

N.D.C.C. § 16.1-13-10” 9 – neither of which provides a procedure applicable to the circumstances of the instant case, where a deceased person whose “candidacy” and putative “election” is unquestionably a “nullity” by virtue of his demise.

[¶30] On the basis of the foregoing, therefore, it is clear that the Legislative Assembly has not “provided by law” a procedure to address the manner in which the remaining second District 8 House of Representatives seat at issue in the election should be filled, given the facts of this case.

B. By virtue of the Doctrine of Separation of Powers enshrined in the North Dakota Constitution the Governor – the head of the Executive Branch of state government -- is without authority to appoint any person to be a member of the Legislative Assembly – in the Legislative Branch of state government.

9 The Petitioner also presents correct analysis as to why the Attorney General is in error in his conclusion that N.D.C.C. § 16.1-13-10 is applicable to provide a solution for how the remaining second District 8 House of Representatives seat at issue in the election should be filled. See, the Petition, at ¶¶31-33, where the Petitioner explains as follows: “[¶31] The North Dakota Attorney General has opined that the procedure codified at N.D.C.C. § 16.1-13-10 is to be utilized to fill the Vacancy. However, it is obvious from the plain language of N.D.C.C. § 16.1-13-10 that it is inapplicable unless the vacancy arises after an individual is validly elected or appointed as a “member of the legislative assembly”. [¶32] Section 16.1-13-10, N.D.C.C., provides a procedure to fill a vacancy in the office of a member of the legislative assembly. However, the plain language of this statute makes clear it is only applicable if an individual has already been validly elected or appointed “a member of the legislative assembly,” and, after assuming the office, “the former member[’s]” office becomes vacant. See *id.* (“If a vacancy in the **office of a member of the legislative assembly** occurs, the county auditor of the county **in which the former member resides or resided** shall notify the chairman of the legislative management of the vacancy”) (“Upon receiving notification of a vacancy, the chairman of legislative management shall notify the district committee of the political party **that the former member represented** in the district in which the vacancy exists.”) (“If **the former member was elected**”) (emphasis added). [¶33] The late Mr. Andahl was ineligible on the date of the election to hold elective office in the state legislature. He, therefore, will never become a validly elected “member of the legislative assembly,” and no vacancy will occur in the office of a “former member” of the legislative assembly to trigger the application of N.D.C.C. § 16.1-13-10. The procedure contained in N.D.C.C. § 16.1-13-10 is therefore inapplicable to fill the Vacancy.” (*bold, emphasis added*).

[¶31] In his Petition in this case, **Governor Burgum mistakenly conflates and confuses a constitutional provision which relates exclusively to the Governor’s executive branch authority** – as the Governor erroneously asserts that “the North Dakota Constitution squarely addresses the unique situation presented. Specifically, the North Dakota Constitution provides a “gap-filling” provision that governs the procedure to be followed to fill the Vacancy. N.D. Const. Art. V, § 8 provides in pertinent part:

The governor may fill a vacancy in any office by appointment if no other method is provided by this constitution or by law. N.D. Const. Art. V, § 8.”

[¶33] Indeed, Article V of the North Dakota is entitled “**EXECUTIVE BRANCH**”. (bold capitalization in original). In Section 1 of Article V, it is provided expressly that, “(t)he executive power shall be vested in a governor, who shall reside at the seat of government”¹⁰

[¶34] The Governor then compounds his faulty argument by further stating, at ¶37 of the Petition, that “(t)he Governor’s constitutional “gap-filling” appointment authority is consistent the Governor’s additional statutory powers and duties to ensure all offices are filled, the duties of all offices are performed, and to make appointments and fill vacancies as required by law. N.D.C.C. § 54-07-01 provides in pertinent part:

In addition to the powers and duties prescribed by the constitution, the governor:

10 In contrast, provisions of the North Dakota Constitution relating to the “Legislative Branch” of state government are reposed in Article IV of the Constitution.

1. Shall see that all offices are filled, and the duties thereof performed, or in default thereof, shall apply such remedies as the law allows. **If the remedy is imperfect, the governor shall acquaint the legislative assembly therewith at its next session.**
2. Shall make appointments and fill vacancies as required by law. (*bold, underlined emphasis added here by Intervenor*).¹¹

[¶35] The most recent and comprehensive delineation of the Separation of Powers Doctrine emanating from the North Dakota Constitution is found in *North Dakota Legislative Assembly v. Burgum*, 2018 ND 189, ¶¶40-42, 916 N.W.2d 83, 100-101 (N.D. 2018), where Justice Tufte explained as follows:

[¶40] The North Dakota Constitution creates three branches of government and vests each branch with a distinct type of power. N.D. Const. art. III, § 1 (“[T]he legislative power of this state shall be vested in a legislative assembly”); N.D. Const. art. 17 V, § 1 (“The executive power is vested in the governor”); N.D. Const. art. VI, § 1 (“The judicial power of the state is vested in a unified judicial system”). By 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.” *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987). Long 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. *State v. Hanson*, 558 N.W.2d 611, 614 (N.D. 1996) (citing *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902)); see also *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”).

[¶41] To reinforce this structural separation of powers and further prevent

¹¹ Right in Subparagraph 1 of N.D.C.C. §54-07-01 is a direct acknowledgement of the constitutionally separate and distinct nature of the Governor’s “cap filling” power under N.D. Const. Art. V, § 8, a provision within the “EXECUTIVE BRANCH” Article V of the North Dakota Constitution. Clearly, this “gap filling” executive power reposed in the Governor does not extend to making appointments to “fill gaps” in the membership of the Legislative Assembly – a completely separate branch of state government governed by Article IV of the North Dakota Constitution.

concentration of unchecked power in the individual officers or agents of the three branches, the Constitution provides that no sitting member of the legislature may hold any full-time appointive state office, N.D. Const. art. IV, § 6, nor may any judge or justice hold any office not judicial in nature, N.D. Const. art. VI, § 10.

[¶42] The essential structural division of power into three branches created by our Constitution parallels that of our sister states and also that of the U.S. Constitution. Accordingly, we may find the decisions from the U.S. Supreme Court and the highest courts of our sister states persuasive, but ultimately we are charged with interpreting the North Dakota Constitution and its distinct provisions. We have sometimes navigated our own path in defining the contours of separation of powers and non-delegation doctrine, see *Glaspell v. City of Jamestown*, 11 N.D. 86, 88 N.W. 1023 (1902) (disagreeing with several state supreme courts on non-delegation question).

2018 ND 189 at ¶¶40-42

[¶36] Given this Separation of Powers Doctrine analysis, it is manifest that the Governor is without constitutional authority to “gap fill” across separate branches of government by appointing any person to the District 8 House of Representatives seat as to which David Andahl’s candidacy – truncated as it was by his tragic death – was nevertheless a “nullity”. *Nielsen v. Neuharth*, 331 N.W.2d 58, 60 (N.D. 1983), quoting from *Jeness v. Clark*, 129 N.W. 357 (N.D. 1910).

C. After David Andahl’s “nullity” candidacy Governor Doug Burgum is precluded by the Separation of Powers Doctrine from appointing a replacement person to the second District 8 House of Representatives seat -- and where N.D.C.C. § 16.1-13-10 is unavailing to the Respondents because this statute is inapplicable under the factual circumstances of David Andahl’s pre-election death – the Supreme Court should rely upon the apposite decisional law recited herein as persuasive authority and the Court should thus order that all votes cast for a deceased person are a collective nullity which can have no effect on the result of the election.

[¶37] In his Letter Opinion 2020-L-08 filed on October 13, 2020, Attorney General Wayne Stenehjem draws a distinction between the so-called “American Rule”, and the so-called “English Rule”. Attorney General Opinion 2020-L-08, at page 2. 12

[¶38] With due respect to the Attorney General, Intervenor Kathrin Volochenko respectfully submits that Stenehjem’s rigid, binary description of the “American Rule” vs. the “English Rule” is not an accurate description of the decisional law which addresses circumstances such as those which exist in the instant case – where Ms. Volochenko maintains application of Stenehjem’s version of the “American Rule” would be unjust and represent bad public policy.

[¶39] As explained above, Republican District 8 House candidate David Andahl tragically passed away on October 5, 2020 – just over four weeks before the November 3, 2020 General Election.

[¶40] At once, great media attention was paid to David Andahl’s death by North Dakota regional and statewide weekly and daily newspapers, radio and television stations, and news services, such as the Associated Press -- specifically to the District 8 House of Representatives seat electoral situation which had been created by David Andahl’s passing. See, the dozens of newspaper and other media articles relating to the death of David Andahl

12 Under the “American Rule” in its form as described by Stenehjem, “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.” Rule Attorney General Opinion 2020-L-08, at page 2. In contrast, the Attorney General describes the “English Rule” as one in which a vote for a “candidate who has died is ineligible to serve and therefore a vote for a deceased candidate is a wasted vote and a nullity.”

and the fact that his name would remain on the District 8 ballot for the November 3, 2020, General Election.¹³

[¶41] However, even though David Andahl had died, an aggressive partisan campaign was mounted immediately to solicit votes from District 8 electors for the deceased man -- and this campaign continued over the course of the four (4) weeks remaining before the November 3, 2020 General Election.

[¶42] North Dakota Republican Party Chairman Rick Berg wrote letters to the editor urging District 8 voters to cast their ballots for the deceased David Andahl, saying, “(p)lease cast your vote for David Andahl and we will ensure that his seat is appropriately filled after the election. May God bless his memory.”¹⁴

[¶43] Appellate courts from other jurisdictions have addressed situations such as this -- where a candidate has died, **but the candidate’s name remained on the ballot on election day with the electorate having had full knowledge of the candidate’s death and electors having been widely encouraged to cast their ballots for the dead person**-- and these courts have held that the fairest and most just approach was to determine that the candidate in the same election who had obtained the next highest number of votes below the deceased “prevailing” candidate had prevailed in the election. See, e.g., *State ex. Rel.*

¹³ See, generally, the summary and copies of some 33 media stories, included at **Intervenor Appx. pages 001 through 119.**

¹⁴ See, the letter to the editor authored by North Dakota Republican Party Chairman Rick Berg, published October 24, 2020, in the Bismarck Tribune, included at **Intervenor Appx. 073.**

Bancroft v. Frear, 128 N.W. 1068, 1072-1076 (Wis. 1910)[“(T)he electors cannot create a vacancy by voting for a man known to be dead when the votes are cast.”]15; *Madden v. Election Commissioners*, 146 N.E. 280 (Mass. 1925); *State ex. Rel. Wolff v. Guerink*, 109 P.2d 1094 (Mont. 1941); *Blaine v. Alameda County*, 35 P.2d 517, 518-519 (Cal. 1934); and *Dunagan v. Jones*, 76 S.W.2d 219 (Tex. Civ. App. 1934).

[¶44] In *State ex. Rel. Bancroft v. Frear*, *supra*, after surveying multiple reported decisions of the day, the Wisconsin Supreme Court explained eloquently as follows:

The great weight of authority, English and American, is to the effect that votes knowingly cast for a candidate who cannot possibly exercise the functions of the office if elected, are thrown away, and it seems to us that this should be so. Elections are held for the purpose of selecting officers, not for the purpose of creating a vacancy to the end that the place may be filled by appointment or even by a new election. The function of the voter is to express an affirmative choice of some person; not to content himself with merely expressing his disapproval of certain candidates. If a vote for a man known by the voter to be dead can be counted, then a vote for a stick or a stone or for "the man in the moon," as is said in the English cases, should be counted. It is true that in this country the majority rules, but the majority should not pursue a policy of mere negation. (bold, underlined emphasis added).

128 N.W. at 1073

[¶45] As in the instant case, in *State ex. Rel. Bancroft v. Frear* there had been a great deal of publicity surrounding the death of the deceased candidate “published in newspapers throughout the state” whereby, the Wisconsin Supreme Court found the degree of publicity

15 Citing *State ex. Rel. Bancroft v. Frear*, *supra*, and *Fields v. Nicholson*, 150 N.E. 53 (Ind. 1926) many years later, the Tennessee Supreme Court stated in *Stambaugh v. Price*, 532 S.W.2d 929, 931 (Tenn. 1976), “(a)ppellant cites respectable authority for the proposition that votes knowingly cast for a candidate who cannot possibly exercise the functions of the office, if elected, are thrown away. . . . We have no quarrel with the rule . . .”.

and campaigning to have electors vote for the dead candidate to be significant, and the Court stated:

Thus, through the medium of the press and by means of telegrams and circular letters, the members of the faction in the party to which Tucker in his lifetime belonged were advised to vote for him notwithstanding his death. We think the court would be justified in assuming that a great majority of the electors of Wisconsin read one or more newspapers. Since the advent of rural free delivery the daily newspaper finds its way into the country districts with very little loss of time in transmission. News is disseminated rapidly. **With the newspapers publishing the fact of Mr. Tucker's death, and the well-known tragic circumstances under which it occurred, and the members of the wing of the party with which he affiliated vigorously calling on its supporters to vote for him regardless of that fact, it may fairly be assumed that the electorate of Wisconsin was very generally informed of his death on election day. Certainly we think a court should find on the admitted facts that enough votes were cast for Mr. Tucker by electors who knew he was dead when they cast them to give him a plurality over the relator;** or, in other words, that at least 5,287 of the 63,482 persons who voted for him knew he was dead when they so voted. (*bold, underlined emphasis added*).

128 N.W. at 1073-1074

[¶46] In another similar case, the Montana Supreme Court held as follows in *State ex. Rel.*

Wolff v. Guerkink, 109 P.2d 1094, 1099-1100 (Mont. 1941):

It is our opinion that a voter at the polls, unless he votes for some person, is not voting at all. A ballot cast, which does not express the preference of the voter for some person to fill the office is a nullity, cannot be counted and cannot be given any effect in determining the result of the election, as to that office.

One who has died is no longer a person. He has ceased to exist. He can no longer function in any capacity in the affairs of this world. There is no such person. He has passed into history. His name can be used only in referring to things of the past and in revival in memory of his activities and events occurring during his lifetime. His influence may still be felt, but that all relates back to his activities while living. Therefore, the votes cast for J. P. Gallagher, who was dead and who had been dead for twenty-four days on the day of election, were not cast for anyone; they were not votes cast for any person; and we hold that all of the 400 votes so cast were an absolute nullity and can have no effect on the result of the election.

The logical, reasonable, sensible rule which we follow is stated in 18 Am. Jur. 353, section 264, as follows: "Many cases, however, applying the so-called 'English doctrine,' draw a distinction in this connection and hold that the voters who, knowing that a person is dead or ineligible to office by reason of any disqualification, give their ballots for him are deemed to throw away their votes and to mean not to vote for anyone for that office, so that the eligible candidate receiving the next highest vote is elected."

Among the cases where the distinction referred to in the above quotation is drawn, we refer to the case of *State ex rel. Bancroft v. Frear*, 144 Wis. 79, 128 N.W. 1068, 140 Am. St. Rep. 992, and the case of *Madden v. Board of Election Commissioners*, 251 Mass. 95, 146 N.E. 280, two leading cases, in both of which the same conclusion we have reached is announced. (*bold, underlined emphasis added*).

109 P.2d at 1099-1100

[¶47] The Florida Supreme Court held similarly in *McQuagge v. Conrad*, 65 So 2d 851, 852-853 (Fla. 1953), as it stated:

As heretofore pointed out, it is assumed that every elector in Bay County knew of the death of D. G. McQuagge. Knowledge of the voters is material and "**when votes are cast for a person known by the voters to be deceased, [such votes] they shall be treated as void and thrown away and are not to be counted in determining the result of the election as regards other candidates.**" (emphasis supplied.) See the annotation and authorities cited in 133 A.L.R. pages 329, 330, 331, 333, 339, 340 et seq. (*bold, underlined emphasis added*).

65 So 2d at 853

[¶48] The California Supreme Court held in the same manner in *Blaine v. Supervisors of Alameda County*, 35 P.2d 517, 518-519 (Cal. 1934) 16, explaining as follows:

It seems to be thoroughly settled that votes invalid for any reason are not to be considered in determining the number of votes cast. To this general effect see *Murdoch v. Strange*, 99 Md. 89 [57 Atl. 628, 629, 3 Ann. Cas. 66]; *Catlett v. Knoxville etc. Ry. Co.*, 120 Tenn. 699 [113 S. W. 559, 562, 563]; *State v. Clausen*,

16 *Blaine v. Supervisors of Alameda County*, 35 P.2d 517, 518-519 (Cal. 1934) was overruled by a statute [California Election Code § 17113], which itself was repealed back in 1995.

72 Wash. 409 [130 Pac. 479, 45 L. R. A. (N. S.) 714]. **In the first case cited, it was held that if the ballot contains the name of one who is known to be ineligible, the ballot cannot be counted, because the object of the ballot then would be not to elect but to prevent the election.** A case which seems to be squarely in point is *Madden v. Board of Election Commrs.*, 251 Mass. 95 [146 N. E. 280, 281]. It was held in that case that "one who has died before election cannot be a candidate for an office or elected to an office. **Valid votes for election to an office cannot be cast for one who is no longer alive. It is equivalent to throwing away a vote knowingly" to cast it for one who has died.** "It is of no more effect than to deposit a blank ballot or one marked with a fictitious or historic name. This is not a doubtful question." This same thought is expressed in *State v. Frear*, 144 Wis. 79 [128 N. W. 1068, 1072, 140 Am. St. Rep. 992], **where it is said that in those cases in which "votes were cast for a candidate known to be dead or disqualified or for a fictitious person", the great current of authority is "to the effect that such ballots are ineffectual for any person, and cannot be counted in determining the result of the election"**; and, further, that "votes knowingly cast for a candidate who cannot possibly exercise the functions of the office if elected are thrown away, and it seems to us that this should be so". (*bold, underlined emphasis added*).

35 P.2d at 518-519

[¶49] Both the Petitioner Governor and the Respondents rely upon two factually inapposite decisions of the North Dakota Supreme Court 17 for the proposition that, "votes cast for Mr. Andahl are not wasted votes. . . . (rather) the votes cast for Mr. Andahl

17 See, *Jeness v. Clark*, 21 N.D. 150, 129 N.W. 357 (1910); *Woll v. Jensen*, 162 N.W. 403 (N.D. 1917); and *Cassleton Reporter v. An Alleged Newspaper Called the "The Fargo Forum"*, 261 N.W. 549 (N.D. 1935). Significantly, none of these three decisions involved circumstances of a multiple-candidate election and a candidate who **died** before an election, but whose supporters nevertheless campaigned to exhort the electorate to knowingly cast ballots for the deceased – who ended up receiving the second-most number of votes in a contest for two House of Representatives seats. Indeed, none of these three cases involved the circumstances of a deceased candidate at all. *Jeness* involved unspecified reasons for post-election ineligibility of the lead vote-getter in a **two-candidate race** for the office of Oliver County Superintendent of Schools. Similarly, *Woll* also involved post-election ineligibility of the lead vote-getter in a **two-candidate race** for the office of Morton County Superintendent of Schools. Finally, *Cassleton Reporter* involved two *inanimate* entities – two newspapers vying in an election to be elected as the "official" newspaper of Cass County– where one of the newspapers was post-election determined to be ineligible to be elected to that status.

should only be counted as votes “protesting” the third place finisher, ultimately preventing that person from taking office.”

[¶50] Significantly, none of these three decisions involved circumstances of a multiple-candidate election and a candidate who died before an election, but whose supporters nevertheless campaigned to exhort the electorate to knowingly cast ballots for the deceased – who ended up receiving the second-most number of votes in a contest for two House of Representatives seats.

[¶51] Intervenor Kathrin Volochenko respectfully submits that where: (1) the unfortunate death of David Andahl occurred just over four weeks before the election; (2) the District 8 electorate was inescapably aware of David Andahl’s passing from numerous general interest media and social media reports, and from a concerted partisan campaign from the Chairman of the North Dakota Republican Party down to the District 8 Republican organization exhorting District 8 electors to cast their ballots for a dead person; and (3) District 8 Republicans clearly made a cynical strategic choice to decline to undertake a write-in campaign for another candidate of their choice during the four weeks which remained before the election because they were confident that they could broadly advocate for District 8 electors’ ballots to be cast for a deceased person and nevertheless have those votes counted without the risk of spitting Republican votes between a write-in candidate and decedent David Andahl – the North Dakota Supreme Court should follow the persuasive legal authority in the form of the decisional law from other jurisdictions cited herein, which is directly in point with the factual circumstances of the instant case, and

expresses far better public policy than that being advocated by the Petitioner Governor and the Respondents..

CONCLUSION

[¶52] At this point there appear to be four positions taken by parties and Amicus in this case: (1) The Petitioner, who ignores Article IV, section 5, of the ND Constitution, arguing that the head of the executive branch should be allowed to unilaterally contravene the Sewparation of Powers Doctrine by take a legislative seat away from Intervenor Kathrin Volochenko, the second-place-finishing eligible candidate seeking one of two seats; (2) the Attorney General, who insists that the Governor does not have the legal authority he claims to have, and two *amici* , one claiming the governor has the authority but only if there is a vacancy, and the other, claiming only the legislature has authority to fill a “vacancy.”

[¶53] Prior to receiving this brief, the Supreme Court has received no analysis of whether a “vacancy” exists at all. On the basis of the foregoing, Intervenor Kathrin Volochenko respectfully submits that no “vacancy” exists at all. Rather, there has been the “nullity” candidacy of decedent David Andahl and the collective “nullity” of the votes which David Andahl received – votes which, on the basis of the facts and persuasive decisional legal authorities cited above herein, should not be counted.

[¶54] Voters do many things with their ballots that are unpredictable and indecipherable. Some vote for “cheese pizza” or “Abraham Lincoln” or “Tim Tebow.”

(<https://www.kansas.com/news/politics-government/election/article117319973.html>) 18

Were “Abraham Lincoln,” for example, to receive the second-most votes in District 8’s legislative race, it would be absurd for this Court to say the Republican Party organization in Washburn gets to choose who fills Abraham Lincoln’s seat.

[¶55] There were three eligible candidates on the ballot seeking two available seats, and two of those people received votes. Those two people should fill the seats the voters were filling on that day.

[¶56] Reduced to the essence, therefore, it is the position of Intervenor Democratic Non-Partisan League (Dem-NPL) Party District 8 House of Representatives Candidate Kathrin Volochenko that the respective positions adopted in this original jurisdiction case by the Petitioner, the Respondents, and the two *amici curiae* are incorrect.

[¶57] It is the further position of Intervenor Kathrin Volochenko and that – upon the facts and legal authorities set forth herein -- the Supreme Court should enter a declaration that all votes cast for decedent David Andal are a collective “nullity” and thus should not be counted.

[¶58] The necessary consequence to that adjudication would be that Volochenko be declared by the Court to have prevailed in the November 3, 2020 General Election, and

18 See, also, From Mickey Mouse To Oprah: What Chicagoans Write In On Election Day, by Monica Eng, February 16, 2019 at

<https://www.wbez.org/stories/from-mickey-mouse-to-oprah-what-chicagoans-write-in-on-election-day/eca51e10-1408-4c3e-8519-f6aa02b97290> (noting “Richard Daley” and “John F. Kennedy” and “Thomas Jefferson” have also received votes in Chicago elections.)

this she should be seated as a member of the House of Representatives representing District 8 in the forthcoming Sixty-Seventh Legislative Assembly.

Dated this 19th day of November, 2020,

/s/ David C. Thompson

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COUNSEL FOR INTERVENOR

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, the following documents:

**BRIEF OF INTERVENOR DEMOCRATIC NON-PARTISAN LEAGUE (DEM-NPL)
DISTRICT 8 HOUSE OF REPRESENTATIVES CANDIDATE KATHRIN
VOLOCHENKO IN RESPONSE TO THE PETITION BY NORTH DAKOTA
GOVERNOR DOUG BURGUM FOR “PRELIMINARY INJUNCTIVE RELIEF,
DECLARATORY JUDGMENT, WRIT OF INJUNCTION, AND WRIT OF
MANDAMUS”**

was filed electronically with the Clerk of Court through SUPREME COURT ELECTRONIC FILING PORTAL, and a copy of the above listed documents were mailed electronically by the filing portal to the following:

Nicholas Mark Suurma nsurma@vogellaw.com; Matthew Arnold Sagsveen msagsve@nd.gov;
Robert James Pathroff rpathroff@vogellaw.com; Megan J. Gordon mgordon@vogellaw.com ;
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Dated this 19th day of November, 2020.

/s/ David C. Thompson

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COUNSEL FOR INTERVENOR

**In the Supreme Court
State Of North Dakota**

November 17, 2020

Supreme Court No. 20200298

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 District 8 Republican
Committee, Loren DeWitz, District Chairperson,

Respondents.

**DECLARATION OF SERVICE BY ELECTRONIC MEANS PURSUANT TO
RULE 25 OF THE NORTH DAKOTA RULES OF APPELLATE PROCEDURE**

[¶1] Pursuant to Rule 25(d) of the North Dakota Rules of Appellate Procedure, I hereby certify that I today served the documents identified hereafter by electronic means in compliance with Rule 25(a)(2)(c) of the North Dakota Rules of Appellate Procedure upon the following counsel at the following e-mail addresses
Nicholas Mark Suurma nsurma@vogellaw.com; Matthew Arnold Sagsveen

msagsve@nd.gov; Robert James Pathroff rpathroff@vogellaw.com; Megan J.

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**CORRECTED BRIEF OF INTERVENOR DEMOCRATIC NON-PARTISAN
LEAGUE (DEM-NPL) DISTRICT 8 HOUSE OF REPRESENTATIVES
CANDIDATE KATHRIN VOLOCHENKO IN RESPONSE TO THE PETITION BY
NORTH DAKOTA GOVERNOR DOUG BURGUM FOR “PRELIMINARY
INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, WRIT OF INJUNCTION, AND
WRIT OF MANDAMUS”**

AND

THE APPENDIX OF INTERVENOR KATHRIN VOLOCHENKO

Dated this 19th day of November, 2020,

/s/ David C. Thompson

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COUNSEL FOR INTERVENOR

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, the following documents:

**DECLARATION OF SERVICE BY ELECTRONIC MEANS PURSUANT TO RULE 25
OF THE NORTH DAKOTA RULES OF APPELLATE PROCEDURE**

was filed electronically with the Clerk of Court through SUPREME COURT ELECTRONIC FILING PORTAL, and a copy of the above listed documents were mailed electronically by the filing portal to the following:

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Dated this 19th day of November, 2020.

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