20230158
FILED JUNE 19, 2023
CLERK OF THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Board of Trustees of The North Dakota Public Employees' Retirement System, Petitioner, v. North Dakota Legislative Assembly, Respondent.	**Supreme Ct. No. 20230158** **District Ct. No. N/A**

NORTH DAKOTA LEGISLATIVE ASSEMBLY'S RESPONSE TO VERIFIED PETITION FOR PRELIMINARY INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND WRIT OF INJUNCTION

State of North Dakota
Drew H. Wrigley
Attorney General

By: Philip Axt
Solicitor General
State Bar No. 09585
Email: pjaxt@nd.gov

Office of the Attorney General
500 North 9th Street
Bismarck, ND 58501
Telephone: (701) 328-2210

Counsel for North Dakota Legislative Assembly

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Paragraph(s)**

United States Constitution

North Dakota Constitution

Statutes and Acts

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

[¶1] Whether the exercise of original jurisdiction is warranted.

[¶2] Whether N.D.C.C. § 54-52-03 and Section 41 of S.B. 2015 violate the dual-office provision of Article IV, Section 6, of the North Dakota Constitution.

[¶3] Whether N.D.C.C. § 54-52-03 and Section 41 of S.B. 2015 violate the separation of powers doctrine under the North Dakota Constitution.

[¶4] Whether N.D.C.C. § 54-52-03 and Section 41 of S.B. 2015 violate the common law rule against incompatibility of office.

[¶5] Whether Section 41 of S.B. 2015 violates the single subject rule of Article IV, Section 13, of the North Dakota Constitution.

STATEMENT OF THE CASE

[¶6] After 5 p.m. on May 31, 2023, the Board of Trustees of the North Dakota Public Employees' Retirement System (the "Board") served its petition ("Pet.") and motion for preliminary injunction, asking this Court to immediately enjoin—prior to any hearing—the implementation of Section 41 of S.B. 2015, which had an effective date of June 1.

[¶7] On June 5, 2023, the North Dakota Attorney General, on behalf of the North Dakota Legislative Assembly (the "Legislature"), filed an opposition to the Board's motion for a preliminary injunction, asking the Court to consider the questions presented with the benefits of full merits briefing and argument.

[¶8] On June 10, 2023, the Court denied the Board's motion for a preliminary injunction.

[¶9] Oral argument in this matter is currently scheduled for June 28, 2023.

SUMMARY OF ARGUMENT

[¶10] **Original Jurisdiction**. Certain questions raised by the Board's petition regarding the Legislature's appointment powers under our State Constitution—specifically, the

separation of powers questions—involve matters of substantial public importance that would be proper for the Court to consider under its original jurisdiction.

[¶11] **Dual-Office Provision.** Neither N.D.C.C. § 54-52-03 nor Section 41 of S.B. 2015 violate the dual-office provision of N.D. Const. art. IV, § 6, because the NDPERS Board is not a "full-time" state office. To the contrary, that board meets once a month and is compensated on a per diem basis. The Board's argument to the contrary on this point improperly tries to read "full-time" out of Article IV, Section 6.

[¶12] **Separation of Powers**. Neither N.D.C.C. § 54-52-03 nor Section 41 of S.B. 2015 violate the separation of powers doctrine. While it has long been established in this State that the appointment power for State offices resides with the Legislature unless expressly assigned elsewhere, the question of whether, and to what extent, the Legislature can appoint legislators to sit on State boards appears to be a matter of first impression in this Court, and one that could have a substantial impact on State government operations. This is a question of State constitutional law for which Federal caselaw is of limited persuasive value, and the text and history of our State Constitution point to the conclusion that, in North Dakota, the legislative and executive branches are not hermetically sealed. Instead, legislators can accept limited appointments to non-full-time State administrative boards so long as their participation does not amount to a usurpation of the executive power. And regarding the appointments to the NDPERS Board that are challenged here, there is no usurpation of the executive power where the legislators constitute a minority of the board, the chairman is appointed by the Governor, the legislators cannot bring the board to a halt or direct any action unsupported by other members of the board, and there is no evidence that the intent of the Legislature was one of usurpation rather than cooperation.

[¶13] **Incompatibility of Office**. Neither N.D.C.C. § 54-52-03 nor Section 41 of S.B. 2015 violate the common law rule against incompatibility of office for the simple reason that, in North Dakota, the common law cannot displace statutory law. The Board's argument to the contrary fails to recognize our clear hierarchy of legal authorities and is the equivalent of arguing that a constitutional amendment is null and void because it conflicts with a pre-existing statute. But even setting that infirmity aside, it is not categorically incompatible for a legislator to sit on the NDPERS Board.

[¶14] **Single Subject Rule**. Section 41 of S.B. 2015 does not violate the single subject rule of N.D. Const. art. IV, § 13, because S.B. 2015 is a comprehensive statute relating to the administration of State government, a topic to which the composition of the NDPERS Board is germane. Indeed, over 20 of the act's 68 sections pertain to the oversight and administration of NDPERS. In seeking to pluck one provision out of that statutory scheme, the Board ignores longstanding precedent from this Court establishing that the rule should not be applied in a strict or technical manner, but should instead be read broadly where, as here, the provisions are reasonably connected to the subject matter of the act.

STATEMENT OF RELEVANT FACTS

[¶15] Respectfully, the Board's statement of facts (Pet. ¶¶10-20) is of limited relevance to the constitutional claims at issue in this case. That section of the Board's petition largely describes apparent dissatisfaction with NDPERS' unfunded liabilities, its actuarial reserves and contributions, and its performance relative to other states. But the Board's grievances regarding NDPERS' unfunded liabilities are not what is before this Court, nor would they appear to be appropriate for this Court's exercise of original jurisdiction. Instead, it is submitted that the facts relevant to this case are as follows:

[¶16] In 1984, the people of North Dakota amended the dual-office provision in our State Constitution, replacing and re-writing a provision that used the phrase "any civil office" with a provision that uses the phrase "any full-time office." *Compare* N.D. Const. art. IV, § 17 (as effective Dec. 6, 1984)[1] *with* 1984 Amendments to N.D. Const. art. IV (S.L. 1985, ch. 706, H.C.R. 3018) (effective Dec. 1, 1986).[2] In 2012, the dual-office provision was again amended, with the term "full-time" added in another location. *See* 2012 Amendments to N.D. Const. art. IV, § 6 (S.L. 2013, ch. 515, H.C.R. 3047).[3] The dual-office provision of our Constitution remains as last amended in 2012.

[¶17] In 2015, the composition of the NDPERS Board was statutorily amended so that two of its nine members would be individual legislators appointed by the Legislature. *See* N.D. 64th Legislative Assembly, S.B. 2022, § 5 (2015).[4]

[¶18] In 2023, the composition of the NDPERS Board was again amended so that four of its eleven members are individual legislators appointed by the Legislature, effective as of June 1, 2023. *See* N.D. 68th Legislative Assembly, S.B. 2015, § 41 (2023) (E26-E27).

[¶19] On May 31, 2023, the Board served its petition in the instant action, challenging the appointment of any individual legislators whatsoever to the NDPERS Board.

LAW AND ARGUMENT

[¶20] The Board challenges N.D.C.C. § 54-52-03 and Section 41 of S.B. 2015 on four grounds: (1) the dual-office provision of Article IV, Section 6 (Pet. ¶¶22-26); (2) separation

---

[1] Available at: https://ndconst.org/date/1984-12-06 (accessed June 12, 2023).
[2] Available at: https://www.ndlegis.gov/assembly/sessionlaws/1985/pdf/CAA.pdf#page=3 (accessed June 12, 2023).
[3] Available at: https://www.ndlegis.gov/assembly/63-2013/session-laws/documents/caa.pdf#page=1 (accessed June 12, 2023).
[4] Available at: https://ndlegis.gov/assembly/64-2015/documents/15-8155-07000.pdf (accessed June 12, 2023).

of powers (Pet. ¶¶27-33); (3) the common law rule against incompatibility of office (Pet. ¶¶34-39); and (4) the single subject rule of Article IV, Section 13 (Pet. ¶¶40-45).

[¶21] "When attacking the constitutionality of a statute, the scales are weighed in favor of the statute. The challenger must overcome a strong presumption of constitutionality." *State v. Tweed*, 491 N.W.2d 412, 418 (N.D. 1992). "This presumption is conclusive, unless it is clearly shown that the enactment is prohibited by the Constitution." *Id.* (citation omitted). "Any doubt must be resolved in favor of the constitutionality of the statute." *Id*. And the Court "shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide." N.D. Const. art. VI, § 4.

[¶22] In other words, the Board "must 'bring up the heavy artillery'" before it can nullify either N.D.C.C. § 54-52-03 or Section 41 of S.B. 2015. *State v. Kensmoe*, 2001 ND 190, ¶19, 636 N.W.2d 183 (citation omitted). It has not done so.

[¶23] It is not disputed that certain of the Board's challenges—specifically, the separation of powers challenges—raise important and substantial questions of public interest that would warrant the Court's exercise of original jurisdiction. However, a more thorough examination of the text and history of our State Constitution leads naturally to the conclusion that it is permissible for individual legislators to accept the type of limited appointment to the NDPERS Board that is challenged here.

[¶24] The other challenges raised by the Board may be more readily dispatched based on our State Constitution's plain text and this Court's long-established precedent.

I. The Exercise of Original Jurisdiction Would Be Warranted.

[¶25] The Court exercises its original jurisdiction "in cases *publici juris* and those affecting the sovereignty of the state." *North Dakota Legis. Assembly v. Burgum*, 2018 ND 189, ¶4, 916 N.W.2d 83; *see also* N.D. Const. art. VI, § 2; N.D.C.C. § 27-02-04. That

includes "challenges relating to the very foundation upon which the executive and legislative branches of government rest." *Burgum*, 2018 ND 189, ¶5, 916 N.W.2d 83.

[¶26] The Board's argument (Pet. ¶¶7-9) that this case raises questions of public importance and falls within the spectrum of cases warranting original jurisdiction is not disputed. Although "[e]ven upon proper showing, original jurisdiction is always discretionary, and the Court determines for itself whether a matter is within its original jurisdiction." *Burgum*, 2018 ND 189, ¶4, 916 N.W.2d 83.[5]

II. Neither N.D.C.C. § 54-52-03 nor Section 41 of S.B. 2015 Violate Article IV, Section 6, of the North Dakota Constitution.

[¶27] Article IV, Section 6, of our State Constitution provides: "While serving in the legislative assembly, no member may hold any *full-time* appointive state office …." (emphasis added). As such, in order for legislators' appointments to violate Article IV, Section 6, the NDPERS Board must be a "full-time" office. But it is not.

[¶28] The Board's argument on this point (Pet. ¶¶22-26) largely glides over the phrase "full-time," with little more than the conclusory assertion that the NDPERS Board is

[5] A note on the Legislative Assembly's governmental immunity. As a general matter, "public policy demands that the State retain immunity for the exercise of discretionary acts in its official capacity, including legislative … functions." *Kouba v. State*, 2004 ND 186, ¶11, 687 N.W.2d 466. This would normally preclude suing the Legislative Assembly based merely on claims a duly enacted statute is unconstitutional. *E.g.,* 72 Am. Jur. 2d States, Etc. § 104 (June 2023 update) ("declaratory relief is generally not available against a state legislature"). For this lawsuit, seeking declaratory and injunctive relief, it would've arguably been better practice to name as defendants the State officials responsible for implementing the challenged actions—potentially the legislators appointed to the board or the legislative leaders statutorily tasked with making their appointments. *E.g*., 72 Am. Jur. 2d States, Etc. § 114 (June 2023 update) ("When a plaintiff mounts a constitutional challenge against a particular state statute, the proper defendant is typically the state official charged with enforcing the statute."). Nonetheless, to avoid the trivialities of requiring the Board to amend its petition to name different defendants, and to expeditiously address the important constitutional questions raised, the claim to immunity for the Legislative Assembly is waived in this instance for resolving this specific dispute only.

"clearly [] full time" (Pet. ¶24) because it "serves on a regular and continuing basis" (Pet. ¶22). But "regular and continuous" is not the same thing as "full-time."

[¶29] Members of the NDPERS Board are compensated on a per-diem basis, N.D.C.C. § 54-52-03(7), and the board meets once a month.[6] *See also* E121-122[7] (Goplin Decl.) (attesting that in fiscal year 2022 no member of the NDPERS Board requested per diem compensation more than 12 times). Moreover, a board member may concurrently be "in the employ" of other State institutions or political subdivisions. *See* N.D.C.C. § 54-52-03.

[¶30] The Court "must give effect and meaning to every provision" of our State Constitution. *Thompson v. Jaeger*, 2010 ND 174, ¶7, 788 N.W.2d 586. And the Court generally gives terms "their plain, ordinary, and commonly understood meaning." *Id*.

[¶31] It does not appear that the Court has yet defined the term "full-time" in the context of Article IV, Section 6; however, the ordinary and common understanding of that term—both now and when it was twice amended into our Constitution—means something much more than a board meeting once a month. Instead, "full-time" is, and has been, commonly understood to mean roughly 40 hours per week on a sustained basis. *See Kaspari v. Kaspari*, 2022 ND 204, ¶22, 982 N.W.2d 291 ("hours typically associated with full-time employment" are 35-40 hours per week); *Fleck v. Fleck*, 2010 ND 24, ¶14, N.W.2d 572 (referring to "full-time" as "40 hours per week"); *Wastvedt v. State*, 371 N.W.2d 330, 333 (N.D. 1985) (referring to "full-time" as "35 hours per week").[8]

---

[6] NDPERS, Board Meeting Schedule and Agendas, https://www.ndpers.nd.gov/about/ndpers-board-trustees/board-meeting-schedule-and-agendas (accessed June 4, 2023).

[7] For consistency in exhibit pagination, the exhibits provided with this brief are paginated sequentially to those that were attached to the Board's petition. Because the Board's exhibits end at E120, the exhibits for this brief start at E121.

[8] *See also, e.g.*, *Mayo Found. for Med. Educ. and Research v. United States*, 562 U.S. 44, 50 (2011) (affirming IRS rule that defines "full-time employee" as "any employee

[¶32] Of note, it appears that only one of our sister states—Louisiana—has an analogous dual-office provision that prohibits legislators from holding a "full-time" appointive state office. *See* Nat'l Conference of State Legislatures, Dual Office-Holding Restrictions (updated Sep. 3, 2021), https://www.ncsl.org/ethics/dual-office-holding-restrictions (accessed June 12, 2023) (citing La. Stat. Ann. § 42:63(C)). And that state has defined "full-time" in this context to mean "at least seven hours per day of work and at least thirty-five hours per week of work." La. Stat. Ann. § 42:62(4).

[¶33] Simply put, the Board errs by seeking to have the Court read "full-time" out of our Constitution's dual-office provision. The term must be given meaning. *Thompson*, 2010 ND 174, ¶7, 788 N.W.2d 586. And because membership on the NDPERS Board is not a "full-time" office under any common understanding of that term, a legislator can be appointed to that board without violating Article IV, Section 6, of our State Constitution. The Board's arguments to the contrary on this point are without significant merit.

III. Neither N.D.C.C. § 54-52-03 nor Section 41 of S.B. 2015 Violate the Separation of Powers Under the North Dakota Constitution

[¶34] The Board's separation of powers argument—that the Legislative Assembly cannot appoint any of its members to any State administrative board (Pet. ¶¶27-33)—is a sweeping challenge with the potential to significantly disrupt State government operations.

---

normally scheduled to work 40 hours or more per week"); 29 U.S.C. § 207(a)(1) (Fair Labor Standards Act requirement for time-and-a-half compensation if covered employee works more than 40 hours per week); 26 U.S.C. § 4980H(c)(4) (Affordable Care Act definition of "full-time employee" as "employed on average at least 30 hours of service per week"); 8 U.S.C. § 1186b (immigration statute defining "full-time" as "a position that requires at least 35 hours of service per week"); U.S. Bureau of Labor Statistics, Concepts and Definitions, https://www.bls.gov/cps/definitions.htm (accessed June 8, 2023) ("Full-time workers are those who usually work 35 or more hours per week.").

[¶35] Based on a review of information compiled by the Governor's office, 41 of the State's 150 standing boards and commissions have positions assigned to individual legislators. *See* E123-127 (Appendix: Standing State Boards and Commissions). Notably, legislators do not constitute a majority on any of those boards or commissions. *Id*.

[¶36] Whether the appointment of individual legislators to State boards violates the separation of powers is a question of State constitutional law. *See Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) ("The [U.S.] Constitution does not impose on the States any particular plan for the distribution of governmental powers."); *see also Burgum,* 2018 ND 189, ¶42, 916 N.W.2d 83 (our State has "sometimes navigated our own path in defining the contours of [the] separation of powers … doctrine").

[¶37] As will be shown, the specific text and history of our State Constitution permit the appointment of individual legislators to State boards and commissions so long as the appointment does not amount to usurpation of the executive power. And the appointments to the NDPERS Board challenged here do not amount to such a usurpation.

1. In North Dakota, the Appointment Power Resides in the Legislature Unless Expressly Assigned Elsewhere.

[¶38] As an initial matter, the Board errs by making the broad assertion (Pet. ¶30) that Article V, Section 8, of our State Constitution gives the Governor sole appointment power over State boards and commissions. This contention can be easily dismissed.

[¶39] On its face, our State Constitution gives the Governor appointment power for State offices "if no other method is provided by this constitution or by law." N.D. Const. art. V, § 8. Of course, N.D.C.C. § 54-52-03 and S.B. 2015 are other methods provided by law.

[¶40] This diverges from the Federal Constitution's allocation of the appointment power, a fact which this Court has recognized since the earliest days of our Statehood. *See State*

v. Frazier, 47 N.D. 314, 182 N.W. 545, 548 (1921) (as distinct from the Federal Constitution, in our State "the power of appointment to office … resides in the Legislature"—like "all governmental sovereign power is vested in the Legislature"—unless "expressly withheld from the Legislature by constitutional restrictions") (citing and summarizing *State v. Boucher*, 3 N.D. 389, 396, 56 N.W. 142 (1893)). And North Dakota is not alone in this regard. *See Marine Forests Soc'y v. California Coastal Comm'n*, 113 P.3d 1062, 1085-86 (Cal. 2005) ("in the great majority of our sister states … the power to appoint executive officers is not an exclusively executive function").

[¶41] As such, the Board's broad contention that it violates the separation of powers for the Legislature to make any appointments to a State board is unsupported by our State Constitution and squarely foreclosed by this Court's long-held precedent.

[¶42] However, the fact our Legislature retains a power of appointment for State boards does not answer the question of whether, and to what extent, the Legislature can appoint legislators to sit on those boards. That question is the subject of this brief's next section.

2. The Appointment of Legislators to Non-Full-Time Administrative Boards Is Permissible Absent Usurpation of the Executive Power.

[¶43] The question of whether, and to what extent, the Legislature can appoint individual legislators to sit on administrative boards or commissions appears to be a matter of first impression in this Court, and adequately addressing it requires examining the specific text and history of our State Constitution. *Cf.* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temple L. Rev. 1205, 1240-41 (1993) (noting different state approaches to the question are shaped by the states' textual and historical differences).

[¶44] This again is an area where Federal caselaw is of limited persuasive value. *See Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State") (quoting *Dreyer v. People of State of Illinois*, 187 U.S. 71, 84 (1902)). It is also an area where decisions from states with different constitutional language may have limited persuasive value. *Cf. J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 336 N.W.2d 679, 694 (Wis. Ct. App. 1983) (for legislator appointments to a state commission, caselaw from states with different separation of powers provisions afforded "little weight").

[¶45] Our State's analogue of a separation of powers provision was formally amended into our Constitution in 1982, and provides only that the "legislative, executive, and judicial branches are coequal branches of government." N.D. Const. art. 11, § 26; *see also State v. Hanson,* 558 N.W.2d 611, 614 (N.D. 1996) (noting the provision "appears to formalize a separation of powers"). Nonetheless, long before that provision was formally amended into our Constitution, this Court recognized that the structural division of our government into three branches "implicitly excluded each branch from exercising the powers of the others." *Burgum*, 2018 ND 189, ¶40, 916 N.W.2d 83.

[¶46] In this case, however, the specific language of our Constitution is important. When our Constitution was amended to formally add a separation of powers clause, the people could've chosen to clearly and categorically prohibit legislators from serving on State boards and commissions. *Cf. In re Request for Advisory Op. from House of Representatives*

(Coastal Res. Mgmt. Council), 961 A.2d 930, 933-36 (R.I. 2008) (describing how, in 2004, the Rhode Island constitution was amended from one that permitted legislator appointment to executive agencies to one that clearly and categorically does not). But they didn't.

[¶47] Instead, just a few years later, the people chose to amend our Constitution's dual office provision, discussed above, to insert the phrase "full-time," thereby changing a provision that prohibited sitting legislators from holding a "civil office" to one that now prohibits them from holding a "full-time office."[9] That provision was amended again in 2012 to add the phrase "full-time" in yet another spot.[10] The pertinent question, then, is how does our State's separation of powers doctrine apply to legislative appointments to State boards and commissions in light of those constitutional amendments.

[¶48] When interpreting constitutional amendments, this Court "look[s] first to the historical context," including "what it displaced." *State v. Hagerty*, 1998 ND 122, ¶17, 580 N.W.2d 139 (citations omitted). The Court "must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions." *Thompson,* 2010 ND 174, ¶7, 788 N.W.2d 586 (citation omitted). The Court also applies principles of statutory construction, *id*., and generally "a significant change in language is presumed to entail a change in meaning." 73 Am. Jur. 2d Statutes § 206 (June 2023 update).

---

[9] *Compare* N.D. Const. art. IV, § 17 (as effective Dec. 6, 1984), available at https://ndconst.org/date/1984-12-06 (accessed June 12, 2023) *with* 1984 Amendments to N.D. Const. art. IV (S.L. 1985, ch. 706, H.C.R. 3018) (effective Dec. 1, 1986), available at https://www.ndlegis.gov/assembly/sessionlaws/1985/pdf/CAA.pdf#page=3 (accessed June 12, 2023).

[10] *See* 2012 Amendments to N.D. Const. art. IV, § 6 (S.L. 2013, ch. 515, H.C.R. 3047), available at https://www.ndlegis.gov/assembly/63-2013/session-laws/documents/caa.pdf #page=1 (accessed June 12, 2023).

[¶49] The change from "civil office" to "full-time office" was a meaningful change. Prior to that change, this Court, like courts all around the country, had construed "civil office" in this context to preclude legislators from holding any office that "exercises … the powers of civil government." *Baird v. Lefor*, 52 N.D. 155, 201 N.W. 997, 999 (1924) (court-appointed receiver not a "civil office"); *State v. Clausen*, 182 P. 610, 613 (Wash. 1919) (commission with power to compel witnesses and hold hearings a "civil office"); *Mulnix v. Elliott*, 156 P. 216, 218 (Colo. 1916) (committee that didn't exercise "a single executive function" not a "civil office"); *see also, e.g.*, 67 C.J.S. Officers § 8 (May 2023 update) ("A civil office … pertains to the exercise of the powers or authority of civil government.").

[¶50] Consequently, the decision to replace the term "civil office" with "full-time office" in our Constitution's dual office provision must be understood as permitting legislators to hold non-full-time offices that exercise some limited powers of civil government. That is the best way to give that change in language meaning. And while this is a departure from the Federal government, it is a departure required by different constitutional text. *Compare* N.D. Const. art. IV, § 6 *with* U.S. Const. art. I, § 6, cl. 2 ("no Person holding *any Office* under the United States, shall be a Member of either House") (emphasis added).

[¶51] That construction can be reconciled with our State's separation of powers doctrine—which the Court has stated in robust terms, *e.g.*, *Burgum*, 2018 ND 189, ¶40, 916 N.W.2d 83[11]—by recognizing that where our Constitution permits members of one

[11] In *Burgum*, the Court cited Federalist No. 48 (Madison) when discussing the importance of the separation of powers doctrine to our system of government. 2018 ND 189, ¶10, 916 N.W.2d 83. But apropos to the question at hand, the Court's attention may also be drawn to Federalist No. 47 (Madison), wherein James Madison explained that Montesquieu—the "oracle" on separation of powers—"did not mean that these departments ought to have no PARTIAL AGENCY in … the acts of each other." The problem, Madison explained, is "where the WHOLE power of one department is exercised by the same hands which

branch to exercise a limited power of another, it is not a violation of the separation of powers, but one of the checks and balances upon which our system of government is built.

[¶52] For example, voting on legislation in the Legislative Assembly is undoubtedly the central prerogative of the legislative branch, yet there is no violation of the separation of powers when the Lieutenant Governor—an executive officer—casts a tie-breaking vote, because that limited (though very substantial) power has been written into Article V, Section 12, of our State Constitution. So too here: where Article IV, Section 6, of our State Constitution was amended to permit legislators to hold non-full-time appointive State offices, such appointments do not necessarily violate the separation of powers.

[¶53] However, it is not contended that all legislative appointments to a State board would be permissible, or that such appointments could never rise to the level of violating the separation of powers doctrine. The critical question is whether the appointment in question constitutes a usurpation of the executive power. *See* 16A Am. Jur. 2d Constitutional Law § 242 (May 2023 update) ("The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch but whether the power exercised so encroaches upon another branch's power as to usurp … its constitutionally defined function."). And the question of when a legislative appointment would constitute such a usurpation is the subject of the next section.

---

possess the WHOLE power of another." Madison then takes the reader on a tour of founding era America, noting "[i]f we look into the constitutions of the several States … there is not a single instance in which the several departments of power have been kept absolutely separate and distinct[,]" including a state wherein "[t]he speakers of the two legislative branches are vice-presidents in the executive department." Federalist No. 47 (Jan. 30, 1788), available at https://www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0047 (accessed June 13, 2023).

3. The Limited Appointment of Legislators to the NDPERS Board Challenged Here Is Not a Usurpation of the Executive Power.

[¶54] "Authority has been usurped, for purposes of the constitutional separation of powers doctrine, when one branch of government interfere[s] significantly with the operations of another branch." 16A Am. Jur. 2d Constitutional Law § 242 (May 2023 update); *see also, e.g.,* 16 C.J.S. Constitutional Law § 279 (May 2023 update) (similar).

[¶55] Because the question of usurpation in this context appears to be a matter of first impression for this Court, decisions from our sister states may provide a useful roadmap. *See Burgum*, 2018 ND 189, ¶¶42-43, 916 N.W.2d 83 (noting that our sister states may be looked to as persuasive authority on separation of powers principles).

[¶56] In *Burgum*, the Court looked to *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633 (S.C. 1982), as persuasive authority "consistent with the separation of powers decisions interpreting the North Dakota Constitution." 2018 ND 189, ¶¶50, 59-60, 916 N.W.2d 83. Relevant to this dispute, the Court may wish to again look to *McLeod*, where it was stated that "[t]he separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions … where such service falls in the realm of cooperation … and there is no attempt to usurp functions of the executive." 295 S.E.2d at 636, 638 (usurpation did occur when 12-man committee composed entirely of legislators held veto power over executive spending).

[¶57] Other cases from South Carolina have further fleshed out their test for usurpation of the executive power, holding that a legislative appointment to executive boards does not violate the separation of powers doctrine where: "(1) the legislators [are] a numerical minority, and (2) the body [] represent[s] a cooperative effort to make available to the executive department the special knowledge and expertise of designated legislators." *South*

Carolina Pub. Int. Found. v. South Carolina Transp. Infrastructure Bank, 744 S.E.2d 521, 527 (S.C. 2013) (citation omitted) (rejecting separation of powers challenge where legislators comprised a minority of the state board).

[¶58] In a similar vein, Kansas has held that the question of usurpation for legislative appointments should consider: [1] whether the power exercised is "exclusively executive or legislative[,] or [] a blend of the two"; [2] whether the legislature's degree of control is "a coercive influence or a mere cooperative venture"; [3] whether the legislature' intent is "to cooperate with the executive by furnishing some special expertise" or to "establish[] its superiority over the executive"; and [4] "the practical result of the blending of powers as shown by actual experience over a period of time." *Parcell v. State*, 620 P.2d 834, 836-37 (Kan. 1980) (quoting *State ex rel. v. Bennett*, 547 P.2d 786 (Kan. 1976)) (certifying that commission with legislative appointments did not violate separation of powers, and noting favorably that its chairperson was appointed by the governor).

[¶59] As another example, Oklahoma applied the factors set out by Kansas to strike down a 6-person commission that included legislators, not because of the presence of legislators in the abstract, but because that commission "consists entirely of sitting legislators. No executive officer sits on the [commission] to control the power or effect that the six legislators have .... These six legislators can halt the entire issuance of the grant anticipation notes even if the executive branch desires to move their approval." *In re Okla. Dep't of Transp.*, 64 P.3d 546, 551-52 (Okla. 2002) (commission entirely staffed by legislators "constitute[d] a usurpation by the Legislature of the powers of the executive").

[¶60] The reasoning of those decisions is consistent with this Court's discussion of separation of powers in *Burgum*, 2018 ND 189, 916 N.W.2d 83. In that decision, the Court

invoked the separation of powers doctrine to strike down a statute that gave the budget section—comprised entirely of legislators—extensive control over executive expenditures, explaining that "encroaches upon the role of the executive." *Id*. at ¶61. The same holding would follow under the reasoning of the above-cited decisions.

[¶61] With those examples from our sister states as guideposts, the appointment of individual legislators to the NDPERS Board clearly does not violate the separation of powers doctrine. For the appointments challenged here, the legislators constitute a minority of the board,[12] the chairman of the board is appointed by the Governor,[13] the individual legislators cannot bring the board to a halt or direct actions unsupported by other members of the board,[14] and there is no evidence that the intent of the Legislature was one of usurpation rather than cooperation. Wherever the line for usurpation of the executive power may be drawn in the abstract, the appointments challenged here do not cross it.

[¶62] In short, the challenged NDPERS Board appointments do not amount to usurpation of the executive power, and, because our State's constitutional text and history permit legislators to hold non-full-time appointive offices, they do not violate our Constitution.[15]

---

[12] *See* S.B. 2015, § 41 (E26-E27) (only four members of the 11-member board are appointed by the Legislature).

[13] *Id.* ("The governor shall appoint one citizen member to serve as chairman of the board").

[14] *Id.* (both the quorum and the votes required for board action can be met without the involvement or support of any of the four individual legislator appointees).

[15] The Board's citation to *State ex rel. Lyons v. Guy*, 107 N.W.2d 211 (N.D. 1961) (Pet. ¶33), does not change this conclusion and is inapposite for multiple reasons. For one, that decision involved our Constitution's earlier formulation of the dual-office provision, which applied to "any civil office." 107 N.W.2d at 215. For another, the decision did not involve legislative appointments to administrative boards, but instead addressed whether a legislator in office when the compensation of the Governor was increased could later hold the office of Governor—and the Court held that he could. *Id*. at 219.

IV. Neither N.D.C.C. § 54-52-03 nor Section 41 of S.B. 2015 Violate the Common Law Rule Against Incompatibility of Office.

[¶63] The Board dedicates a sizable portion of its petition to arguing that N.D.C.C. § 54-52-03 and Section 41 of S.B. 2015 should be struck down because they violate a common law rule against the incompatibility of office. Pet. ¶¶34-39. This argument is why the Board makes repeated reference to fiduciary duties, contending there is an inherent incompatibility between "a legislator who must act for the welfare of the state as a whole, and a trustee who must act in the exclusive interest of [plan] participants." Pet. ¶37.

[¶64] But the Board's argument here can be given short shrift. "In this state there is no common law in any case in which the law is declared by the code." N.D.C.C. § 1-01-06. "[S]tatutory enactments take precedence over and govern conflicting common law doctrines." *Reese v. Reese-Young,* 2020 ND 35, ¶20, 938 N.W.2d 405 (citation omitted).

[¶65] As such, the Board's incompatibility of office argument—seeking to strike a statute because it allegedly conflicts with the common law—mistakes the hierarchy of legal authorities in this State, and is the equivalent of arguing a constitutional amendment is null and void because it conflicts with an existing statute. *Cf.* N.D.C.C. § 1-01-03 (ranking constitutional, statutory, and common law expressions of law). The legislative appointments to the NDPERS Board challenged here are a product of statutory law, so if those appointments conflict with common law, the common law must give way. Thus, even if the Board could establish an incompatibility, the point is immaterial.[16]

[16] Additionally, much of the caselaw cited by the Board is an inapt detour into a different area of the law. Neither *Bosworth v. Hagerty*, 99 N.W.2d 334 (S.D. 1959), nor *Norbeck & Nicholson v. State*, 142 N.W. 847 (S.D. 1913), involve common law claims of incompatibility of office (discussed at Pet. ¶37—with *Bosworth* incorrectly cited as a decision by this Court). Both cases dealt with the unenforceability of contracts where State officers violated constitutional or statutory prohibitions against self-dealing. *Bosworth*, 99 N.W. at 162-63; *Norbeck*, 142 N.W. at 851-52. The Board doesn't allege self-dealing here.

[¶66] Moreover, even though the point is irrelevant to the challenges raised, the positions of individual State legislator and NDPERS Board member are not inherently incompatible.

[¶67] "[T]he courts have hesitated to form a general definition of what constitutes incompatibility. Each case is discussed and decided upon its particular facts." *State v. Lee*, 78 N.D. 489, 492, 50 N.W.2d 124, 126 (1951). Positions are incompatible where their duties and functions involve such a degree of "contrariety and antagonism" that it would be "inherently inconsistent and repugnant" for one person to discharge the duties of both. *Id*. at 126, 129 (justice of the peace and clerk of court not inherently incompatible).

[¶68] The Board appears to make the remarkable assertion that the Legislature's interests are antagonistic to those of NDPERS, and that the Legislature as an institution is adverse to NDPERS due to the State's budgetary concerns. *See* Pet. ¶37. But a difference of opinion on proper earnings assumption rates (Pet. ¶37) does not an inherent incompatibility make. The Legislature does not benefit if NDPERS falters; quite the opposite. Moreover, the Legislature as an institution is not on the NDPERS Board, individual legislators are, and the Board has made no showing that any specific individual legislator cannot and could not reasonably act in the best interests of both.

[¶69] But again, the alleged incompatibility of the two positions is immaterial for the challenges made. In this State, the common law cannot displace positive statutory law, and that is both the start and the end of this inquiry.

V. Section 41 of S.B. 2015 Does Not Violate the Single Subject Rule of Article IV, Section 13, of the North Dakota Constitution.

[¶70] Lastly, the Board argues (Pet. ¶¶40-45) that Section 41 should be excised from S.B. 2015 because it violates the single subject rule of our Constitution, which provides: "No bill may embrace more than one subject, which must be expressed in its title." N.D. Const.

art. IV, § 13. However, the Board's argument on this point is out of step with how the Court has long construed that provision.

[¶71] For well over a century, this Court has construed the single subject rule loosely, rejecting challenges where a provision is "reasonably germane" to the act's general subject or purpose. *See SunBehm Gas, Inc. v. Conrad*, 310 N.W.2d 766, 773 (N.D. 1981) (compiling examples and upholding an act imposing a tax, administering the tax, establishing credits for the tax, and appropriating funds to accomplish purposes of the tax); *Great N. Ry. Co. v. Duncan*, 42 N.D. 346, 176 N.W. 992, 997 (1919) ("The constitutional provision in question does not require legislation by piecemeal."); *see also* Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. Contemp. Legal Issues 579, 612-13 (2004) ("[t]he North Dakota Supreme Court has applied the single subject rule broadly") (compiling examples).

[¶72] The Board asserts that S.B. 2015 is "clearly an appropriation bill" because its title begins by indicating that "it provides an appropriation for …" (Pet. ¶40). Ergo, the Board argues, Section 41's modification of the NDPERS Board—an amendment to N.D.C.C. § 54-52-03—is not "reasonably connected with the subject expressed in the title" (Pet. ¶42), and therefore it must be struck from the act.

[¶73] But the problem with the Board's argument is that S.B. 2015 is not merely an appropriations bill. It is a more comprehensive bill pertaining to State government operations, and of NDPERS particularly. Notably, of its 68 sections, over 20 relate to NDPERS. *See* S.B. 2015 (E1-E39), §§36-50, 56-57, 59, 66-68. And S.B. 2015's title does not hide the ball. Contrary to the Board's suggestion, the title also plainly states that,

beyond appropriations, it is an act "to amend and reenact" multiple sections of the Century Code relating to State government operations, including "section 54-52-03." *See* E1.

[¶74] "An act is not invalidated simply because the title may enumerate a plurality of subjects, when all of these subjects taken together are but one subject." *State ex rel. Sandaker v. Olson*, 260 N.W. 586, 592 (N.D. 1935). Instead, as this Court has explained, when the title of an act embraces a broad subject, "it is perfectly proper and germane for the body of the act to contain provisions for [1] inspecting and grading, [2] the creation of markets, [3] the granting of licenses, [4] the fees and charges for such licenses[,] … [4] ***for the officers and deputies to be appointed***[,] and [5] the compensation of such." *State ex rel. Gaulke v. Turner*, 37 N.D. 635, 164 N. W. 924, 924 (1917) (emphasis added) (rejecting challenge to broad act that regulated the marketing of agricultural products).

[¶75] Notably, the Board does not cite a single decision of this Court that struck down a statute on the single subject rule. *See* Pet. ¶¶40-45 (citing *State v. Colohan*, 69 N.D. 316, 286 N.W. 888, 893 (1939) (rejecting single subject rule challenge); *State ex rel. Sandaker v. Olson*, 65 N.D. 561, 260 N.W. 586, 592 (1935) (same); *Eaton v. Guarantee Co*., 11 N.D. 79, 88 N.W. 1029, 1029 (1902) (same); *State ex rel. Gaulke v. Turner*, 37 N.D. 635, 164 N.W. 924, 924 (1917) (same); *State v. Steen*, 60 N.D. 627, 236 N.W. 251, 253-54 (1931) (same); *Lapland v. Stearns*, 79 N.D. 62, 67-68, 54 N.W.2d 748, 752 (1952) (same)).

[¶76] Indeed, examples of this Court striking down a statutory provision based on the single subject rule appear to be antiquated and rare. For example, in 1910, the single subject rule was invoked to strike down part of an act. In that instance, the act's title referred "only to the nomination of candidates for office," and contained no "intimation … or warning" that the act's body also included a provision amending an existing voter

registration law. *Fitzmaurice v. Willis*, 20 N.D. 372, 127 N.W. 95, 97 (1910). That problem is not present here, because, as noted above, S.B. 2015's title plainly discloses the act is to "amend and reenact … section 54-52-03." *See* E1.

[¶77] The Board also argues (Pet. ¶44) that Section 41 should be struck under the single subject rule because it was defeated as a standalone bill prior to being passed as part of S.B. 2015. But this argument is a non-sequitur. Legislating involves ongoing compromise. *E.g.*, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S.Ct. 1532, 1539 (2021) ("[o]ften legislation becomes possible only because of [] compromises"). Moreover, this Court does not look to legislative history "when the statutory language is unambiguous." *Meier v. N.D. Dept. of Human Servs.*, 2012 ND 134, ¶9, 818 N.W.2d 774. The Board makes no argument of ambiguity here, and the fact that additional negotiation may have been needed to reach an agreement on reorganizing the NDPERS Board does not *ipso facto* mean that its prior rejection renders SB 2015 violative of the single subject rule.

[¶78] Finally, the Board's point (Pet. ¶44) that the inclusion of Section 41 "did not go unnoticed" and "featured heavily in floor debates" cuts against it. A purpose for the single subject rule is to "prevent legislation not fully understood by members of the legislature" and "surprises" to the public. *State v. McEnroe*, 68 N.D. 615, 283 N.W. 57, 61 (1938). It would seem hard to argue that the inclusion of Section 41 came as a surprise to anyone—legislators or the public alike—if it featured heavily in floor debates.[17]

[17] Curiously, the Board cites the floor remarks of Senator Dever in support of its argument (Pet. ¶44). In those remarks, Senator Dever stated that while he opposed modifying the NDPERS Board, "if I am asked to serve on that PERS Board … I will do it." Presumably the Board is not accusing Senator Dever of agreeing to serve on a board he believed was being unconstitutionally modified. *See* Remarks of Senator Dever, North Dakota Senate Floor Session (Apr. 29, 2023) (available at http://video.ndlegis.gov/Dispatcher.aspx?

[¶79] It is also worth observing that the presumption of constitutionality—requiring the Court to resolve any doubt in favor of upholding an act—applies with particular force in the context of the single subject rule. *See, e.g., Wilson v. City of Fargo,* 48 N.D. 447, 186 N.W. 263, 263-65 (1921) (upholding, over dissent, an act which on a "casual glance … might give the impression" of multiple subjects, while noting that "to doubt the constitutionality of a law is to resolve such doubt in favor of its validity") (citation omitted).

[¶80] Consequently, Section 41 of S.B. 2015 does not run afoul of how this Court has long construed the single subject rule, and the Board's attempt to excise that one provision from an act relating to State government operations should be denied.

CONCLUSION

[¶81] For the foregoing reasons, it is respectfully requested that the Court deny the Board's petition for a writ of injunction and declaratory relief.

Dated this 19th day of June, 2023.

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ *Philip Axt*
Philip Axt
Solicitor General
State Bar No. 09585
Email: pjaxt@nd.gov

Office of the Attorney General
500 North 9th Street
Bismarck, ND 58501
Telephone: (701) 328-2210

Counsel for North Dakota Legislative Assembly

page=pb2/powerbrowser.aspx&wowzaplaystart=3791000&ContentEntityId=30720&MediaStart=2023-04-30T00:50:02-06:00) (accessed June 9, 2023).

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Board of Trustees of The North Dakota Public Employees' Retirement System, Petitioner, v. North Dakota Legislative Assembly, Respondent.	**Supreme Ct. No. 20230158** **District Ct. No. N/A**

CERTIFICATE OF COMPLIANCE

[¶1] In compliance with Rule 32(d) of the North Dakota Rules of Appellate Procedure, the undersigned hereby certifies that the following document

NORTH DAKOTA LEGISLATIVE ASSEMBLY'S RESPONSE TO VERIFIED PETITION FOR PRELIMINARY INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND WRIT OF INJUNCTION

contains 31 pages (including cover page, table of contents, table of authorities, and signature block), and was prepared with a plain, roman style typeface in a 12-point font.

Dated this 19th day of June, 2023.

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ *Philip Axt*
Philip Axt
Solicitor General
State Bar No. 09585
Email: pjaxt@nd.gov

Office of the Attorney General
500 North 9th Street
Bismarck, ND 58501
Telephone: (701) 328-2210

Counsel for North Dakota Legislative Assembly

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Board of Trustees of The North Dakota Public Employees' Retirement System, Petitioner, v. North Dakota Legislative Assembly, Respondent.	**Supreme Ct. No. 20230158** **District Ct. No. N/A**

CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that on June 19, 2023, the following documents:

NORTH DAKOTA LEGISLATIVE ASSEMBLY'S RESPONSE TO VERIFIED PETITION FOR PRELIMINARY INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND WRIT OF INJUNCTION; and

EXHIBITS IN SUPPORT OF NORTH DAKOTA LEGISLATIVE ASSEMBLY'S RESPONSE TO VERIFIED PETITION FOR PRELIMINARY INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND WRIT OF INJUNCTION

were filed electronically with the Clerk of Supreme Court through the North Dakota Supreme Court E-Filing Portal and were served upon counsel for the parties to the action electronically through the North Dakota Supreme Court E-Filing Portal as follows:

Christopher Rausch at chris@nodaklaw.com
Elizabeth A. Elsberry at betsy@nodaklaw.com
Robert D. Klausner at bob@robertdklausner.com
Sean M. Sendra at sean@robertdklausner.com
Lindsey M. Garber at lindsey@robertdklausner.com

Dated this 19th day of June, 2023.

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ *Philip Axt*

Philip Axt
Solicitor General
State Bar No. 09585
Email: pjaxt@nd.gov

Office of the Attorney General
500 North 9th Street
Bismarck, ND 58501
Telephone: (701) 328-2210

Counsel for North Dakota Legislative Assembly