

No. _____

In the
Supreme Court of the United States

KARI LEANNE RIGGIN,
Petitioner,
v.

STATE OF NORTH DAKOTA,
Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of North Dakota**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE 1: Whether Kari Riggin's federal constitutional rights to conduct business, engage in employment, and earn a living were denied by the state governor's executive orders shutting down all salons and cosmetologists.

ISSUE 2: Whether Kari Riggin's federal constitutional rights to conduct business, engage in employment, and earn a living were denied by the state governor's use of executive orders to legislate where state law provides him only the power to suspend statutes.

PARTIES TO THE PROCEEDING

Petitioner Kari Riggin is a North Dakota cosmetologist who runs a salon and was charged with an infraction for violating an executive order issued by the governor of the State in North Dakota shutting down all salons and prohibiting cosmetologists from practicing their profession due to the COVID-19 pandemic.¹ The State of North Dakota charged Riggin with an infraction for violating the governor's executive order.

¹ The Northwest Legal Foundation has assisted Riggin in this matter. The Northwest Legal Foundation was established in 1988 for the purpose of stopping government abuse of citizens' rights, specifically focusing on property rights. Robert Hale, a founding member and executive director of the Northwest Legal Foundation, has personally or through the Foundation asserted property rights or limited government in numerous actions, including *Hale v. State of North Dakota*, 2012 ND 148, ¶ 35, 818 N.W.2d 684, 696, cert. denied 133 S.Ct. 847 (Jan. 7, 2013); *Gowan v. Ward County Commission*, 2009 ND 72, 764 N.W.2d 425, cert. denied 558 U.S. 879 (Oct. 5, 2009); *Behm v. Montana-Dakota Utilities Co.*, 2019 ND 139, 927 N.W.2d 865, cert. denied ___ U.S. ___ (Nov. 18, 2019), *Behm v. Montana-Dakota Utilities Co.*, 2020 ND 234, 951 NW. 2d 208, cert denied 593 U.S. ___ (May 24, 2021); *City of Seattle v. McCoy*, 101 Wash.App. 815, 4 P.3d 159, Wash.App. Div. 1, July 17, 2000; *Richmond v. Thompson*, 130 Wash.2d 368, 922 P.2d 1343, Wash., September 26, 1996; *Postema v. Snohomish County*, 83 Wash.App. 574, 586-587, 922 P.2d 176, 183, Wash.App. Div. 1, September 09, 1996; *Cobb v. Snohomish County*, 64 Wash.App. 451, 829 P.2d 169, Wash.App. Div. 1 (1991); *R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989).

PROCEEDING BELOW

The petition relates to the decision of the North Dakota Supreme Court, *State of North Dakota v. Kari Leanne Riggan*, 2021 ND 87, 959 N.W.2d 855. The decision was issued on May 20, 2021, and judgment was entered on the same date. The North Dakota Supreme Court docket number is 20200293.

The state district court issued its decision denying the Riggan's motion to dismiss on September 30, 2020. The district court docket number is Ward County number 51-2020-CR-00818. The decision issued by the district court is not reported. Judgment on the conditional plea was entered on October 22, 2020.

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PETITION FOR CERTIORARI

Kari Riggin hereby petitions this Court to issue a writ of certiorari directed to the North Dakota Supreme Court.

OPINION BELOW

State of North Dakota v. Kari Leanne Riggin, 2021 ND 87, 959 N.W.2d 855.

JURISDICTION

This Court has jurisdiction under 28 USC section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause, the Privileges and Immunities Clause, the Fifth Amendment of the U.S. Constitution, and the 14th Amendment as applying these constitutional rights to the States.

STATEMENT OF THE CASE

The governor of the state of North Dakota issued numerous executive orders relating to the COVID pandemic from March 13, 2020 until April 29, 2020. Several of these orders prohibited Kari Riggin from practicing her profession as a cosmetologist or running a salon. Riggin was charged in criminal court for violating the governor's executive orders. Following the district court's decision refusing to dismiss the charge, Riggin entered a Rule 11 conditional plea of

guilty to an infraction² – reserving her right to appeal the matter as to the power of the governor to issue these executive orders and as to the violation of her state and federal constitutional rights – and paid a fine. The matter was appealed to the North Dakota Supreme Court, where Riggin asserted that the governor did not have the statutory power to issue the executive orders and even if he had that power the executive orders violated her state and federal constitutional rights. The North Dakota Supreme Court rejected these arguments and affirmed the district court decision. *State of North Dakota v. Kari Leanne Riggin*, 2021 ND 87, 959 N.W.2d 855.

REASONS FOR GRANTING CERTIORARI

This Court has previously ruled that an individual has a fundamental constitutional right to engage in a profession or occupation. Although it may be appropriate to limit certain professions and

² The criminal sanction for an infraction is as follows:

12.1-32-01. Classification of offenses - Penalties.

Offenses are divided into seven classes, which are denominated and subject to maximum penalties, as follows:

...

7. Infraction, for which a maximum fine of one thousand dollars may be imposed. Any person convicted of an infraction who, within one year before commission of the infraction of which the person was convicted, has been convicted previously at least twice of the same offense classified as an infraction may be sentenced as though convicted of a class B misdemeanor. If the prosecution contends that the infraction is punishable as a class B misdemeanor, the complaint must specify the offense is a misdemeanor.

activities by reasonable restrictions, such as those relating to health and safety requirements, it is not appropriate for a state through its governor by executive order to entirely prohibit a person from engaging in his or her profession, particularly when least restrictive alternatives exist as to restricting the manner of performing such a profession. In addition, the governor does not have the power to legislate through executive orders due to the fact that state law only gives him the power to suspend statutes. The executive orders at issue involve fundamental rights requiring the application of the strict scrutiny standard of review.

In response to the COVID-19 pandemic, the governor of North Dakota issued the following executive orders between March 13, 2020 and April 6, 2020:

Executive Order 2020-03 (3-13-20) **A.38-41**
Executive Order 2020-06 (3-19-20) **A.42-45**
Executive Order 2020-06.1 (3-27-20) **A.46-49**
Executive Order 2020-06.2 (4-1-20) **A.50-53**
Executive Order 2020-22 (4-6-20) **A.54-56**

On March 13, 2020, the governor declared a state of emergency. **A.39** On March 19, 2020, the governor shut down all restaurants, bars, recreational facilities, health clubs, theaters, and other businesses. **A.43.** However, this executive order did not apply to cosmetologists or salons. On March 27, 2020, the governor added to the list of businesses previously shut down all licensed cosmetologists and all salons operated by licensed cosmetologists, ordering such businesses to close and cease operations until April 6,

2020. **A.48.** On April 1, 2020, the governor extended the prohibition of operating the previously listed businesses until April 20, 2020, and added to the list all licensed barbers and barbershops. **A.51-52.** On April 6, 2020, the governor terminated visitation at all North Dakota long-term care facilities, including skilled nursing facilities and basic care facilities, prohibiting access to long-term care facilities by any nonessential personnel or volunteers until further notice. **A.55.**

On April 14, 2020, Kari Riggan was operating the in-house, residents-only salon at Somerset Court. The Minot police entered the closed facility, determined that Riggan was operating a salon and providing cosmetology services, and issued a citation to Riggan for violation of the governor's executive order, alleging a violation of Section 37-17.1-05 of the North Dakota Century Code. **A.57.** The officer filed with the state district court an affidavit of probable cause which states that the officer personally observed Riggan tending to one of her customers despite the governor's executive order. **A.58-61.** Riggan made a motion to dismiss the charges being beyond the authority of the governor as well as improperly taking away her profession. On April 15, 2020, the governor extended the previous executive order's restrictions through April 30, 2020. Executive Order 2020-06.3 4-15-20. **A. 63-65.** On April 29, 2020, the governor issued an executive order allowing salons operated by cosmetologists to reopen on May 1, 2020, ordering that all salons abide by the conditions and restrictions developed by the state regarding such businesses. Executive Order 2020-06.4 4-29-20 **A. 69-70.**

On June 29, 2020, Riggan brought a motion before the state district court to dismiss the charge against her based on state and federal constitutional grounds, and a hearing on the motion was held on September 9, 2020. On September 30, 2020, the district court, the Hon. Richard Hagar, issued an order denying defendant's motion to dismiss, concluding that the governor had the authority to shut down cosmetologists and salons through his executive orders. 9-30-20 **A.16-29**.

On October 8, 2020, the parties filed a conditional plea agreement in which Riggan reserved the right to appeal and pled guilty to the infraction, receiving a fine of \$100. Rule 11 Conditional Plea Agreement (10-8-20) **A.32-35**. An order for judgment in accordance with the conditional plea agreement was filed on October 15, 2020. Order for Judgment Regarding Rule 11 Conditional Plea Agreement (10-15-20) **A.36-37**. Judgment was entered on October 22, 2020. Judgment Regarding Rule 11 Conditional Plea Agreement (10-22-20) **A.30-31**. This matter was appealed to the North Dakota Supreme Court on November 11, 2020.³ The North Dakota Supreme Court

³ A parallel civil action asking for declaratory and injunctive relief was brought Kari Riggan and the owner of the residential facility, Robert Hale, but was dismissed by a different state court judge; this civil action was appealed to the North Dakota Supreme Court, which affirmed the dismissal due to the fact that the plaintiffs had no standing in civil court because the executive order was no longer in effect and therefore the conclusion of the district court that the case was now moot was affirmed. Burleigh County Civil No. 08-2020-CV-01474, Supreme Court No. 20200292. *Somerset Court, LLC and Kari Riggan v. Doug Burgum, et al.*, 2021 ND 58, 956 N.W.2d 392.

affirmed the district court's refusal to dismiss the case on May 20, 2021. *State of North Dakota v. Kari Leanne Riggin*, 2021 ND 87, 959 N.W.2d 855. **A.1-15** Judgment was entered on the same date. **A.73.**

According to the affidavit of probable cause, which is taken as true for purposes of the motion to dismiss, Kari Riggin operated an in-house salon at Somerset Court in Minot, North Dakota. On April 14, 2020, the Minot Police Department received a report that the salon was operating in violation of the governor's executive order. The officer arrived on the scene, was taken to the salon, and observed Riggin rendering her services and actively tending to one of her customers. The officer was informed that Riggin was not an employee of Somerset but an independent contractor. The manager of Somerset explained the importance of health and hygiene for the residents and the necessity of these services to ensure proper health and hygiene for the residents. The manager also informed the officer that Somerset and Riggin were complying with all of the safety regulations applicable to the governor's executive orders and that Riggin is complying to the same rules and regulations that were being applied to the residential assistants, nurses, and others who work at Somerset. **A.58-61.**

Riggin provided proof of a valid cosmetology license and the license for the salon, and advised the officer that she was providing services of cutting hair, washing hair, and styling hair. She advised the officer that she only worked a couple days a week, serving anywhere from 5 to 8 customers per day. She admitted that she was aware of the governor's executive order but

considered her services important to the overall health and well-being of the residents. **A.58-61.**

Riggin was cited for violation of the governor's declaration and ordered by the police officer to cease all operations until the executive order has been lifted or revisions made to the order. **A.57.**

Riggin made a motion to dismiss the charge arguing that the governor did not have the power to issue the executive orders relating to shutting down Somerset Court and preventing Riggin from engaging in their business and profession and placing limitations as to their business and profession for the following reasons:

- 1) the statute at issue does not provide the Governor with the power to issue the executive orders that he issued;
- 2) the executive order is unconstitutional due to separation of powers;
- 3) the executive order is unconstitutionally vague and overbroad; and
- 4) the executive order unconstitutionally denies Riggin her state and federal constitutional rights to conduct business, to engage in employment, and earn a living.

Somerset Court LLC owns and operates Somerset Court, a licensed assisted living facility. The residents of Somerset Court rent apartments at Somerset Court; residents are ambulatory, self-sufficient, and come and go as they please. The residents at Somerset are in actuality tenants who

rent apartments and receive, if they so choose, various services provided by Somerset, including distribution of medication through a nurse and med aides, dining at its own in-house dining facility, entertainment and activities, transportation, and an in-house hair salon owned by Somerset Court but operated by Kari Riggin, an independent contractor and licensed cosmetologist who at the time worked exclusively at Somerset Court and did not have any outside clients. Riggin also did not operate at any other location or salon.

ARGUMENT

This Court recently acknowledged the constitutional right to engage in one's employment: "[T]he Privileges and Immunities Clause protects the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling.'" *McBurney v. Young*, 569 U.S. 221, 227 (2013), quoting, *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978).

One of the most articulate expositions of the right to engage in one's employment may be found in the *Slaughter-House Cases*, the 1873 decision in which the majority determined that the 14th Amendment privileges and immunities clause did not apply to the States. In that famous 5-4 decision Justice Field described the origin and foundations in English, French, and American law for the proposition that engaging in one's profession is a long-standing fundamental right:

Of the statutes, the benefits of which was thus claimed, the *statute of James I* against

monopolies *was one of the most important.* And when the Colonies separated from the mother country *no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country*, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men 'with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men.'

If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that *the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since*, and that law prevailed in Louisiana at the time of her cession to the United States. *Since then, notwithstanding the existence in that State of the civil law as the basis of her jurisprudence, freedom of*

pursuit has been always recognized as the common right of her citizens. But were this otherwise, the fourteenth amendment secures the like protection to all citizens in that State against any abridgment of their common rights, as in other States. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.

Slaughter-House Cases, 83 U.S. 36, 105-106 (1873) (J. Field, dissenting) (emphasis added).

There can be no doubt that the right to engage in one's own occupation is a fundamental right fully recognized within our federal constitution,⁴ and that

⁴ In addition to her federal constitutional rights, Riggin asserted her state constitutional right under Article I Section 1 and more particularly section 7 to continue her profession:

Section 1. All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness;

any restrictions that a state places on this right must be analyzed accordingly. Any denial of the right to practice one's profession should be subject to strict scrutiny analysis.

Because engaging in one's profession is a fundamental right, this Court should apply strict scrutiny. Where a fundamental constitutional right is being limited by the acts of the government, a higher standard is employed by the courts in regards to whether the limitation or restriction on the right can be countenanced. In such situations, this Court should apply strict scrutiny in its determination whether the government action should stand. The North Dakota Supreme Court recently described strict

and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Section 7. Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor.

ND CONST. Art. I, Sections 1 & 7. Riggan argued below that she should be "free to obtain employment wherever possible" and this right was infringed by the issuance of the governor's executive orders. The North Dakota Supreme Court nonetheless refused to find a state constitutional right to continue in one's profession. *State of North Dakota v. Kari Leanne Riggan*, 2021 ND 87, 959 N.W.2d 855. **A.1-15.**

scrutiny analysis in *Larimore Public School District No. 44 v. Aamodt*:

Legislative classifications are subject to different levels of judicial scrutiny, and the level applied depends on the right infringed by the challenged classification. [State v. Leppert, 2003 ND 15, ¶ 7, 656 N.W.2d 718.]. We have applied three levels of judicial scrutiny to equal protection claims:

We apply strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification "unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose." When an "important substantive right" is involved, we apply an intermediate standard of review which requires a "close correspondence between statutory classification and legislative goals." When no suspect class, fundamental right, or important substantive right is involved, we apply a rational basis standard and sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose.

Larimore Public School District No. 44 v. Aamodt, 2018 ND 71 ¶34, 908 N.W.2d 442, 455, citing *Gange v.*

Clerk of Burleigh Cty. Dist. Court, 429 N.W.2d 429, 433 (N.D. 1988) (citations omitted).⁵

Kari also asserted that the governor only had the power to *suspend* laws, and did not have the power to *legislate* through executive orders. The listing of the governor's powers under the North Dakota Constitution is found in Article V, Section 7, which provides the power to suspend laws but the power to legislate. Moreover Section 37-17.1-05, does not provide the Governor the power to pass his own laws through executive orders, only suspend them. The executive orders issued by the governor therefore also violated the law relating to separation of powers. By the same token, the state law that provides the governor powers in disasters and emergencies – Section 37-17.1-05 – does not provide the power to

⁵ Where strict scrutiny is not applied, then courts, such as the North Dakota Supreme Court, on occasion apply an intermediate level of review:

[O]n several occasions, this Court has recognized the right to recover for personal injuries is an important substantive right subject to the intermediate standard of equal protection analysis. [Citations omitted.] We conclude the intermediate level of scrutiny applies to our analysis of the damage cap in N.D.C.C. § 32-12.1-03(2) and requires a close correspondence between the statutory classification and legislative goals. That test approximates the substantive-due process test that historically has been used by this Court and also governs substantive-due process claims.

Larimore Public School District No. 44 v. Aamodt, 2018 ND 71 ¶37, 908 N.W.2d 442, 456-57. See also *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 2014 ND 197 (N.D. 2014)(separate opinion of C.J. VandeWalle and J. Kapsner).

prohibit a person from engaging in an otherwise lawful business or occupation.

CONCLUSION

Somerset Court LLC and Kari Riggin respectfully request that the Court reverse the North Dakota Supreme Court's decision and vacate the judgment of the district court finding Kari Riggin guilty of an infraction for violating the North Dakota governor's executive order.

Dated this 18th day of October, 2021.

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