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FILED  
STATE OF ALASKA  
APPELLATE COURTS  
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4 **EMERGENCY**

5 IN THE SUPREME COURT OF THE STATE OF ALASKA

6 BENJAMIN N. NAGEAK, )  
7 )  
8 Appellant, )  
9 v. )  
10 LT. GOVERNOR BYRON MALLOTT, )  
11 in his official capacity as Lt. Governor for )  
12 the Division of Alaska, and JOSEPHINE )  
13 BAHNKE, in her official capacity as )  
14 Director of the Division of Elections, )  
15 Appellees, )  
16 and )  
17 DEAN WESTLAKE, )  
Intervenor-Appellee. )

Supreme Court No.: S-16462

18 **STATE'S MOTION TO LIFT STAY AND ISSUE**  
19 **AN EXPEDITED SCHEDULING ORDER**

20 **I. Introduction**

21 Appellees Lieutenant Governor Byron Mallott and Director of Elections

22 Josie Bahnke ("the Division") request that the Court lift the stay it issued in this case on  
23 September 20, 2016 and set a single expedited briefing schedule for both this case and the  
24 likely upcoming appeal of an election contest. The Division asks for briefing deadlines  
25 that will permit the Court to issue a final order by October 14, 2016. This expedited  
26

1  
2 schedule is necessary because the Division of Elections has determined that the general  
3 election in House District 40 can proceed largely undisrupted only if these cases proceed  
4 to a final appellate order from this Court by October 14 telling the Division whose name  
5 to put on the general election ballot. *See* Appendix A ¶ 9. This motion is filed under  
6 Appellate Rules 503(b) and 504 and is supported by the affidavit of counsel and  
7 Appendix A.  
8

9 **II. Background**

10 These cases arose on Friday, September 16, when appellant Representative  
11 Benjamin Nageak filed a recount appeal in this Court<sup>1</sup> and—along with other plaintiffs—  
12 also filed an election contest in the superior court<sup>2</sup> (3AN-16-09015 CI). Both cases  
13 challenge the outcome of the 2016 Democratic Primary in House District 40 and raise  
14 claims based largely on the same factual issues. The Division asked this Court to stay the  
15 recount appeal pending a superior court decision in the election contest, and the Court did  
16 so.  
17

18 Trial for the election contest will begin Tuesday, September 27. The Division  
19 understands that the superior court will issue a decision no later than Friday, October 7.  
20

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21 <sup>1</sup> AS 15.20.510; *see also Willis v. Thomas*, 600 P.2d 1079 (Alaska 1979)  
22 (distinguishing between an election contest and recount appeal and stating that in a  
23 recount appeal, the inquiry is whether specific votes of classes of votes were properly  
counted or rejected).

24 <sup>2</sup> *See* AS 15.20.540; *see also Willis v. Thomas*, 600 P.2d 1079 (Alaska 1979)  
25 (distinguishing between an election contest and recount appeal and stating that in an  
26 election contest where no fraud, corruption, or ineligibility of a party is alleged, the  
evidence of malconduct sufficient to change the results of the election must be shown).

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For the reasons discussed below, the Division must have a decision from this Court on the merits of both the election contest and the recount appeal no later than Friday, October 14.

The Division needs a decision by October 14 to allow voting to begin as required by statute. The Division must have ballots in place at the voting locations that allow early voting, absentee in-person voting, and special needs voting by October 24, 2016. This deadline is found in AS 15.20.061 (entitling qualified voters to vote an absentee in-person ballot “on or after the 15th day before an election”), AS 15.20.064 (entitling a qualified voter to vote early “[f]or 15 days before an election”), and AS 15.20.072 (entitling a qualified “special needs” voter to vote an absentee ballot “on or after the 15th day before an election”). Voting locations that will have these House District 40 ballots are statewide: Anchorage, Fairbanks, Juneau, Nome, Wasilla, and Prudhoe Bay; and within House District 40: Allakaket, Coldfoot, Barrow, Kotzebue, Kaktovik, Ambler, Buckland, Deering, Noatak, Noorvik, Shungnak, Selawik, Kivalina, and Point Lay.

To assure that ballots are received by October 24 in these locations, the Division must send them by October 17, 2016. Appendix A, ¶ 9(b). To assure that these ballots are sent by Monday, October 17, 2016, the Division is preparing ballots with the name of Dean Westlake, the certified winner in House District 40. *Id.* ¶ 7. In addition, the Division intends to print, well before that date, 10,600 copies of each of the possible substitute ballots for House District 40, one version with the name of Benjamin Nageak and another version with the names of both Democratic candidates—Benjamin Nageak

1  
2 and Dean Westlake. *Id.* ¶ 9(c). The Division must know which version of the ballot it  
3 should send to the early and absentee in-person locations by the end of the day on Friday,  
4 October 14, 2016, so that election workers can package the ballots over that weekend to  
5 be ready for shipment on Monday. *Id.*  
6

7 The Court already has before it the recount appeal—the above-captioned case—  
8 and the Division now asks the Court to lift the stay in this case to set the briefing  
9 schedule. The Court does not yet have an appeal for the election contest, of course,  
10 because the superior court has not yet heard the case. But in the interest of giving the  
11 parties enough time to brief both appeals and the Court enough time to decide them, the  
12 Division asks the Court to order any party who intends to appeal the trial court decision  
13 to file the appeal before or on the date that the appellant’s brief is due in this case, along  
14 with briefing of the points on appeal. This will allow consolidated briefing for both cases,  
15 on a timeline that will avoid disruption to the general election.  
16

17 **III. Nature of emergency and time by which a decision is needed**

18 Because this timeline is so compressed as to leave little time to react as events  
19 unfold, the Division asks the Court to set a schedule for the appeal now—including  
20 deadlines for filing a notice of appeal, briefs, and oral argument. Ideally, the Court should  
21 set the schedule before the superior court issues its decision. The Division does not know  
22 the precise date that this will happen, but it is unlikely to occur before September 30 and  
23 very likely to occur no later than the end of the day on October 7. Therefore, ideally, the  
24 Court could issue a scheduling order by Friday, September 30 or shortly thereafter.  
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The Division suggests an order that includes schedules for two alternative situations:

**1. Schedule if the trial court issues an order on October 7:**

- |                                 |   |
|---------------------------------|---|
| Monday, October 10 at 8:30 a.m. | Appellant's Brief (either a combined brief for the recount appeal and the election contest, filed by Rep. Nageak and the other plaintiffs, or a brief by Rep. Nageak for the recount appeal and a brief by the Division for the election contest) |
| Tuesday, October 11 at 5 p.m.   | Corresponding appellee brief or briefs  |
| Wednesday, October 12 at 5 p.m. | Corresponding reply brief or briefs   |
| Thursday, October 13            | Oral argument   |
| Friday, October 14, end of day  | Court order   |

**2. Schedule if the trial court issues an order before October 7:**

- |  |   |
|--|---|
| The third day after issuance, 8:30 a.m.  | Appellant's Brief (either a combined brief for the recount appeal and the election contest, filed by Rep. Nageak and the other plaintiffs, or a brief by Rep. Nageak for the recount appeal and a brief by the Division for the election contest) |
| The next day at 5 p.m.   | Corresponding appellee brief or briefs  |
| The next day at 5 p.m.   | Corresponding reply brief or briefs   |
| Oral argument at the Court's convenience and a final order no later than Friday, October 14. |   |

Because of the Division's need for a decision by October 14, the second schedule should be understood not to exclude weekends.

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**IV. Telephone numbers and addresses of counsel**

Counsel for appellant Benjamin Nageak:

Timothy A. McKeever  
Stacey C. Stone  
Holmes Weddle & Barcott, P.C.  
701 W. 8th Avenue, Suite 700  
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(907) 274-0666

Counsel for appellees Lieutenant Governor Byron Mallott and Director of the  
Division of Elections Josephine Bahnke:

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Joanne Grace  
Libby Bakalar  
Margaret Paton-Walsh  
Alaska Department of Law  
1031 West Fourth Avenue, Suite 200  
Anchorage, AK 99501  
(907) 269-5275

Counsel for intervenor Dean Westlake:

Thomas P. Amodio  
Reeves Amodio, LLC  
510 L Street, Suite 300  
Anchorage, AK 99501  
(907) 222-7104

DATED: September 26, 2016

JAHNA LINDEMUTH  
ATTORNEY GENERAL

By:   
Laura Fox (0905015)  
Joanne Grace (8606035)  
Assistant Attorneys General

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

BENJAMIN N. NAGEAK, ROB )  
ELKINS, ROBIN D. ELKINS, LAURA )  
WELLES and LUKE WELLES, )

Plaintiffs, )

v. )

BYRON MALLOT, in his capacity as )  
Lieutenant Governor, and JOSEPHINE )  
BAHNKE, in her capacity as Director )  
of the Division of Elections, )

Defendants. )

Case No. 3AN-16-09015 CI

AFFIDAVIT OF JOSEPHINE BAHNKE

STATE OF ALASKA )  
FIRST JUDICIAL DISTRICT ) ss

Josephine Bahnke, on oath duly sworn, hereby states as follows:

1. I am employed by the State of Alaska, Division of Elections ("Division"),  
as the Director of the Division of Elections.

2. I have personal knowledge of all matters set out in this affidavit.

3. I am aware that the result of the primary election for House District 40,  
held on August 16, 2016, is being challenged in this case and that the Court may  
overturn the Division's determination of the winner of that race.

4. The Division's determination of the winner is based on the following:

a. On September 6, 2016, the State Ballot Review Board certified

1  
2 Dean Westlake as the winner of the House District 40 primary, with 819 votes. The  
3 incumbent Benjamin Nageak had 815 votes.

4           b.     On September 12, 2016, the Division conducted a recount for  
5 House District 40. The result of the recount was 825 votes for Dean Westlake and 817  
6 votes for Benjamin Nageak.

7           5.     This case was filed on September 16, 2016.

8           6.     The general election will be on November 8, 2016.

9           7.     Ballots for the general election currently are being printed with the name  
10 of Dean Westlake as the Democratic candidate for House District 40, in accordance  
11 with the Division's recount.

12           8.     Should the Court determine that the ballots should be changed, the  
13 Division can substitute ballots for House District 40 with either (1) the name of  
14 Benjamin Nageak or (2) the names of both Democratic candidates—Benjamin Nageak  
15 and Dean Westlake. The Division can make these substitutions only if it has notice of  
16 the final court decision by Friday, October 14, 2016, at the latest.

17           9.     The Division needs a final court decision *including any decision on*  
18 *appeal rendered by the Alaska Supreme Court*—by October 14 for the following  
19 reasons:  
20

21           a.     Early voting, absentee in-person, and special needs voting must  
22 begin on October 24, 2016, according to the timelines found in AS 15.20.061 (entitling  
23 qualified voters to vote an absentee in-person ballot “on or after the 15<sup>th</sup> day before an  
24 election”), AS 15.20.064 (entitling a qualified voter to vote early “[f]or 15 days before  
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1  
2 an election”), and AS 15.20.072 (entitling a qualified “special needs” voter to vote an  
3 absentee ballot “on or after the 15<sup>th</sup> day before an election”).

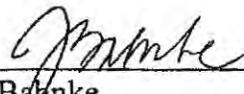
4           b. To assure that ballots are received by October 24 in the locations  
5 that allow early voting, absentee in-person, and special needs voting, the Division must  
6 send them by October 17, 2016. Voting locations that will have these House District 40  
7 ballots are statewide: Anchorage, Fairbanks, Juneau, Nome, Wasilla, and Prudhoe Bay;  
8 and within House District 40: Allakaket, Coldfoot, Barrow, Kotzebue, Kaktovik,  
9 Ambler, Buckland, Deering, Noatak, Noorvik, Shungnak, Selawik, Kivalina, and Point  
10 Lay. A week is the smallest window that the Division believes will assure delivery to  
11 these locations by the statutory date for early and absentee in-person voting, based on its  
12 experience in many elections.

13  
14           c. To assure that these ballots are sent by Monday, October 17, 2016,  
15 the Division intends to print, well before that date, 10,600 copies of each of the possible  
16 substitute ballots for House District 40, one version with the name of Benjamin Nageak  
17 and another version with the names of both Democratic candidates—Benjamin Nageak  
18 and Dean Westlake. But the Division must know which version of the ballot it should  
19 send to the early and absentee in-person locations by the end of the day on Friday,  
20 October 14, 2016, so that workers can package the ballots to be ready for shipment on  
21 Monday.  
22

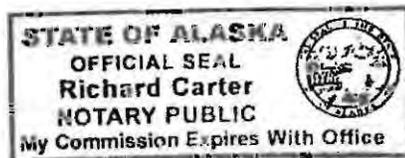
23  
24           10. Ballots to uniformed and overseas voters must be transmitted not later  
25 than September 24, 2016 under the federal Uniformed and Overseas Citizens Absentee  
26 Voting Act (UOCAVA) and its associated amendments under the Military and Overseas

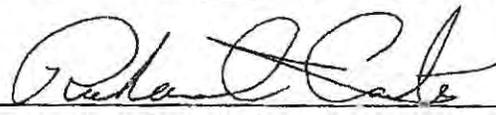
1  
2 Voter Empowerment Act (MOVE) (see 52 U.S.C. § 1973ff et seq.) (requiring the  
3 Division to transmit ballots to all military and overseas voters 45 days before an election  
4 at which a federal race will appear on the ballot). Additionally, special advance ballots  
5 must be transmitted by this date under state law, AS 15.20.081(l) (requiring the director  
6 to transmit ballots not later than 45 days before the election to voters who have  
7 requested a special advance ballot under that statute). Because September 24 falls on a  
8 Saturday, the Division intends to transmit ballots to this group of voters on Friday,  
9 September 23, 2016. The ballots for this group of voters in House District 40 will have  
10 Dean Westlake's name on them, as certified by the Division at the election and in the  
11 recount. The Division will send a notice with these ballots explaining that if the court  
12 orders it, substitute ballots will be provided to these voters for the House District 40  
13 race.  
14  
15

16 11. This timeline is based on significant discussion with my staff about how  
17 to provide the court with the most time possible to consider and decide this case and still  
18 provide ballots to voters according to statutory deadlines.  
19

20   
21 \_\_\_\_\_  
22 Josephine Bahnke

23 SWORN TO AND SUBSCRIBED before me this 21<sup>st</sup> day of September, 2016.



27   
28 \_\_\_\_\_  
29 Notary public in and for Alaska  
30 My commission expires: with office

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5 margaret.paton-walsh@alaska.gov

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6 **EMERGENCY**

7 IN THE SUPREME COURT OF THE STATE OF ALASKA

8 BENJAMIN N. NAGEAK, )

9 Appellant, )

10 v. )

11 LT. GOVERNOR BYRON MALLOTT, )

12 in his official capacity as Lt. Governor for )

13 the Division of Alaska, and JOSEPHINE )

14 BAHNKE, in her official capacity as )

15 Director of the Division of Elections, )

16 Appellees, )

17 and )

18 DEAN WESTLAKE, )

19 Intervenor-Appellee. )

Supreme Court No.: S-16462

20 **AFFIDAVIT OF COUNSEL**

21 STATE OF ALASKA )

22 ) ss.

23 JUDICIAL DISTRICT )

24 Laura Fox, being first duly sworn upon oath, deposes and says:

25 1. I am one of the assistant attorneys general responsible for this appeal.

26 2. This appeal—a recount appeal for a house race in the primary election—is stayed pending a superior court decision in a related election contest case. The parties

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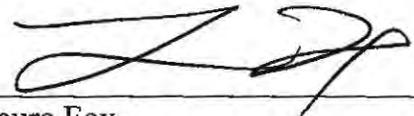
intend to brief both this appeal and any appeal of the election contest together, in consolidated briefs.

3. Trial in the election contest is scheduled to begin on Tuesday, September 27, 2016. The trial court is expected to issue a decision by October 7.

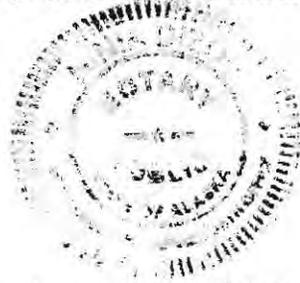
4. To allow the Division of Elections to distribute ballots for the general election in time for the general election, the Division needs a final order from this Court by October 14.

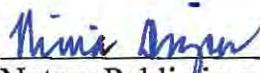
5. To assure that this Court receives briefing in time to decide these appeals, the Division requests that it set a briefing schedule now. If the superior court issues a decision late on Friday, October 7, for example, this Court may not even get notice of the decision until Monday, October 10, which would make briefing, argument, and a decision by Friday, October 14 extremely difficult.

6. My co-counsel contacted opposing counsel, Tim McKeever, and intervenor's counsel, Tom Amodio, about this motion by email on Sunday, September 25, 2016.

  
\_\_\_\_\_  
Laura Fox  
Alaska Bar No. 0905015

SUBSCRIBED AND SWORN to before me September 26, 2016.



  
\_\_\_\_\_  
Notary Public in and for Alaska  
My commission expires: with Office

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DEPUTY CLERK

Supreme Court No.: S-16462

17 [PROPOSED] ORDER LIFTING STAY  
18 AND SETTING BRIEFING SCHEDULE

19 IT IS HEREBY ORDERED that

20 The stay in this case is lifted.

21 Any party who intends to appeal the related election contest, *Nageak v. Mallot*,  
22 3AN-16-09015CI, must file the appeal by the date the appellant's brief is due in this  
23 case—as indicated below—and must file briefing for the election contest appeal also  
24 according to the schedule below.  
25  
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**1. Schedule if the trial court issues an order on October 7:**

Monday, October 10 at 8:30 a.m.	Appellant's Brief (either a combined brief for the recount appeal and the election contest, filed by Rep. Nageak and the other plaintiffs, or a brief by Rep. Nageak for the recount appeal and a brief by the Division for the election contest)
Tuesday, October 11 at 5 p.m.	Corresponding appellee brief or briefs
Wednesday, October 12 at 5 p.m.	Corresponding reply brief or briefs
Thursday, October 13	Oral argument
Friday, October 14, end of day	Court order

**2. Schedule if the trial court issues an order before October 7:**

The third day after issuance, 8:30 a.m.	Appellant's Brief (either a combined brief for the recount appeal and the election contest, filed by Rep. Nageak and the other plaintiffs, or a brief by Rep. Nageak for the recount appeal and a brief by the Division for the election contest)
The next day at 5 p.m.	Corresponding appellee brief or briefs
The next day at 5 p.m.	Corresponding reply brief or briefs
Oral argument at the Court's convenience and a final order no later than Friday, October 14.	
The second schedule should be understood not to exclude weekends.	

DATED: \_\_\_\_\_, 2016.

\_\_\_\_\_  
Supreme Court Justice

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4 IN THE SUPREME COURT OF THE STATE OF ALASKA

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BY DEPUTY CLERK

Supreme Court No.: S-16462

17 **CERTIFICATE OF SERVICE**

18 I hereby certify that on this date, true and correct copies of the *[Emergency]*  
19 *State's Motion to Lift Stay and Issue an Expedited Scheduling Order, Affidavit of*  
20 *Counsel, [Proposed] Order Lifting Stay and Setting Briefing Schedule,* and this  
21 *Certificate of Service* were served by U.S. Mail and electronic mail to the following:  
22

23 Timothy A. McKeever  
24 Stacey C. Stone  
25 Holmes Weddle & Barcott, PC  
26 701 West Eighth Avenue, Suite 700  
Anchorage, AK 99501  
Email: Tmckeever@hwb-law.com  
SStone@hwb-law.com

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I further certify, pursuant to App. R. 513.5, that the aforementioned documents were prepared in 13 point proportionately spaced Times New Roman typeface.

*Ninia Dizon*      *September 26, 2016*  
Ninia Dizon  
Law Office Assistant

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