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IN THE SUPREME COURT OF THE STATE OF ALASKA

BENJAMIN N. NAGEAK,)
)
Appellant,)
)
v.)
)
LT. GOVERNOR BYRON MALLOTT,)
in his official capacity as Lt. Governor for)
the State of Alaska, and JOSEPHINE)
BAHNKE, in her official capacity as)
Director of the Division of Elections,)
)
Appellees.)

Supreme Court No.: S-16462

**EMERGENCY
MOTION FOR STAY AND/OR REFERRAL TO SUPERIOR COURT**

I. Introduction

The appellee, Mr. Nageak, has simultaneously filed a recount appeal in this Court and an election contest in the superior court, both of which challenge the outcome of the 2016 Democratic Primary in House District 40. These two cases are currently separate and have been filed in separate courts, but they will both require expedited litigation of essentially the same set of disputed factual issues. The appellees, Lieutenant Governor Byron Mallott and Director of the Division of Elections Josephine Bahnke, therefore ask this Court to either (1) stay this recount appeal pending a superior court decision in Mr. Nageak's superior court election contest, and then consolidate this case

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2 with any resulting appeal from that decision; (2) refer this case to the same superior
3 court judge¹ assigned to Mr. Nageak's election contest so that the two cases may be
4 consolidated for superior court consideration; or (3) instruct the parties on how to
5 litigate these cases in some other efficient, non-duplicative manner. This motion is filed
6 under Appellate Rules 503(b) and 504 and is supported by the attached affidavit of
7 counsel and Appendix A, the complaint in Mr. Nageak's superior court election contest
8 case.

9
10 **II. Telephone numbers and addresses of counsel**

11 Counsel for appellant Benjamin Nageak:

12 Timothy A. McKeever
13 Stacey C. Stone
14 Holmes Weddle & Barcott, P.C.
15 701 W. 8th Avenue, Suite 700
16 Anchorage, AK 99502
17 (907) 274-0666

18 Counsel for appellees Lieutenant Governor Byron Mallott and Director of the

19 Division of Elections Josephine Bahnke:

20 Laura Fox
21 Joanne Grace
22 Libby Bakalar
23 Margaret Paton-Walsh
24 Alaska Department of Law
25 1031 West Fourth Avenue, Suite 200
26 Anchorage, AK 99501
(907) 269-5275

¹ To undersigned counsel's knowledge, no judge has yet been assigned; the defendants also are considering, but have not yet decided, whether to request a change of venue.

1
2 Counsel for proposed intervenor-appellee Dean Westlake:

3 Thomas P. Amodio
4 Reeves Amodio LLC
5 500 L Street, Suite 300
6 Anchorage, AK 99501
7 (907) 222-7100

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18 **III. Background**

19 The 2016 Primary election was held on August 16, 2016. On September 6, the
20 Division of Elections certified Dean Westlake as the winner of the House District 40
21 Democratic primary. The margin of victory was *only four votes*—819 to 815.
22 Mr. Nageak requested a recount, which resulted in a doubling of the margin of victory
23 for Mr. Westlake to eight votes, 825 to 817. On September 16, Mr. Nageak filed a
24 recount appeal with this Court under AS 15.20.510. He simultaneously filed a complaint
25 in the Superior Court for the Third Judicial District at Anchorage, which although it
26 does not expressly indicate that it is an election contest under AS 15.20.540-.560, seeks
remedies provided for in the election contest statutes. [Appendix A]

19 **IV. Nature of emergency and time by which a decision is needed**

20 Because this case is a dispute about the outcome of the 2016 Democratic Primary
21 in House District 40, resolving this case is necessary to determine whose name should
22 appear on the general election ballot as the Democratic candidate for that district. The
23 general election is scheduled to be held on November 8, 2016. Not only is the general
24 election itself fast approaching, but many pre-election deadlines, such as the deadlines
25 for printing and mailing ballots to absentee voters, are even sooner.

1
2 This recount appeal and Mr. Nageak's superior court election contest both raise
3 disputed factual issues that will take some time to litigate, even on an expedited basis.
4 The parties need a quick decision on this motion to give them an orderly framework for
5 litigating these cases and achieving a final outcome as expeditiously as possible so that
6 the general election will be disrupted as little as possible.
7

8 A decision on this motion is therefore requested by September 21, 2016.

9 The grounds advanced in support of this motion have not been submitted to the
10 trial court because this case is a recount appeal under AS 15.20.510 and, as such,
11 originates in this court rather than the trial court.
12

13 **V. Argument**

14 Because this recount appeal raises factual issues that would not normally be
15 resolved by an appellate court in the first instance, and because Mr. Nageak has
16 simultaneously filed an election contest in the superior court raising largely the same set
17 of factual issues, the Court should give the parties guidance on how to litigate these two
18 cases in a reasonable, non-duplicative manner.

19 A recount appeal may involve more than just the facial validity of ballots,² and
20 few, if any, of Mr. Nageak's points on appeal can be resolved by simply examining the
21 ballots without the need for any other factual information. For example, the points on
22 appeal allege that election officials in the regional office misplaced some ballots and
23 improperly substituted other ballots for them. [Points on Appeal at ¶ 5] The Court has
24

25 ² See *Willis v. Thomas*, 600 P.2d 1079, 1081-82 (Alaska 1979) (rejecting
26 argument that a recount appeal must be limited solely to determining the facial validity
of ballots).

1
2 before it no factual record establishing whether this is true. The points on appeal further
3 allege that seven voters in Kivalina and fifty voters in Shungnak voted two ballots.

4 [Points on Appeal at ¶¶ 2-3] Although the parties likely agree on some of the underlying
5 facts about these incidents, the Court nonetheless has before it no record establishing
6 how and why these incidents occurred. The Court will need some such factual record in
7 order to decide whether the challenged ballots should have been counted or rejected.
8

9 Mr. Nageak has raised other issues in this case that are not proper recount appeal
10 issues and may only be litigated in the superior court elections contest case. For
11 example, the points on appeal allege that “[v]oters in several precincts were
12 improperly, illegally and unconstitutionally deprived of the primary ballot of their
13 choice.” [Points on Appeal at ¶ 6] And the points on appeal allege that “[n]umerous
14 other violations of the law occurred.” [Points on Appeal at ¶ 7] These are not proper
15 recount appeal issues because they do not concern whether any particular ballots should
16 be counted or rejected.³ The election contest case is the proper avenue for these claims.
17

18 Mr. Nageak’s election contest complaint filed in the superior court raises
19 essentially the same set of factual issues raised in this recount appeal. Paragraph 9 of
20 Mr. Nageak’s election contest complaint raises the same issue about Shungnak as
21 Paragraph 3 of his recount appeal. Paragraph 10 of the election contest complaint raises
22

23
24 ³ See *Cissna v. Stout*, 931 P.2d 363, 371 (Alaska 1996) (“Cissna argues that
25 election officials improperly prevented Stephanie Butler from voting. The reason or
26 reasons for denying Ms. Butler the opportunity to vote are irrelevant to our resolution of
the ballot recount. Because she never cast a ballot, no ballot can be counted or rejected,
as contemplated in AS 15.20.510. The Butler claim is not now justiciable before this
court.”).

1
2 the same issue about Kivalina as Paragraph 2 of the recount appeal. Paragraph 11 and
3 12 of the election contest complaint appear to raise the same issue about voter ballot
4 choice as Paragraph 6 of the recount appeal. Paragraphs 13 and 14 of the election
5 contest complaint appear to raise the same issue about special needs ballots as
6 Paragraph 4 of the recount appeal. And Paragraph 17 of the election contest complaint
7 raises the same issue about misplaced ballots as Paragraph 5 of the recount appeal.
8

9 Accordingly, the Court should give the parties guidance on how to litigate the
10 overlapping factual issues necessary for resolving these two cases. Litigating the cases
11 independently would be duplicative and would cause unnecessary delay. In the past, this
12 Court has referred recount appeals to the superior court for the taking of evidence when
13 necessary.⁴ The Court should consider doing something similar in this case.
14

15 VI. Conclusion

16 For these reasons, the Court should either (1) stay this recount appeal pending a
17 superior court decision in Mr. Nageak's superior court election contest, and then
18 consolidate this case with any resulting appeal from that decision; (2) refer this case to
19 the same superior court judge assigned to Mr. Nageak's election contest so that the two
20 cases may be consolidated for superior court consideration; or (3) instruct the parties on
21 how to litigate these cases in some other efficient, non-duplicative manner.
22

23
24 ⁴ See, e.g., *id.* at 1081 (noting that a superior court judge was "appointed as special
25 master to hear evidence and arguments" in recount appeal, and that the recount appeal
26 was consolidated with a separately filed election contest in the superior court);
Finkelstein v. Stout, 774 P.2d 786, 787 (Alaska 1989) (noting that this Court referred a
recount appeal to a superior court judge as special master).

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Dated: September 19, 2016.

JAHNA LINDEMUTH
ATTORNEY GENERAL

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

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Counsel for Plaintiff

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,

vs.

LT. GOVERNOR BYRON MALLOT, in
his official capacity as Lt. Governor for the
State of Alaska, and JOSEPHINE
BAHNKE, in her official capacity as
Director of the Division of Elections,

Defendants.

Case No. _____

COMPLAINT

COMES NOW Plaintiffs Benjamin N. Nageak, Rob Elkins, Robin D. Elkins,
Laura Welles and Luke Welles by and through their attorneys, Holmes, Weddle &
Barcott, P.C. and for their complaint against Defendant Lt. Governor Byron Mallot
and Josephine Bahnke, in their official capacities by stating and alleging as follows:

I. JURISDICTION AND VENUE

1. The Alaska Superior Court has jurisdiction under and by virtue of Alaska Stat. § 15.20.550 and other applicable law. The Third Judicial District at Anchorage is an appropriate venue under Alaska R. Civ. P. 3(c) and 4(d)(8).

II. PARTIES

2. Plaintiff Benjamin N. Nageak, a registered Democrat, appeared on the Primary Election Day ballot for reelection to the Alaska State House District 40, and at the conclusion of the most recent recount was behind his challenger by eight votes.

3. The remaining plaintiffs are qualified voters pursuant to AS 15.20.540

4. Defendant Byron Mallot is the Lt. Governor of the State of Alaska. He is vested with the executive power of the State and is responsible for the faithful execution of the election.

5. Josephine Bahnke is the Director of the Alaska Division of Elections, which administers the elections.

III. FACTS

6. The Primary Election took place in the State of Alaska on August 16, 2016.

7. There were several errors and in the conduct of the election that likely changed the results of the election.

8. In the District 40 Precinct of Point Lay, there was only one election worker present in violation of Alaska State Law. In other voting locations only two election workers were present during voting hours.

9. In Shungnak, the poll workers provided every voter with both the Republican and Democrat ballots and of the 50 votes that were cast, all 50 voters were apparently voted both the Republican and Democrat ballot. The voters were not required to cast questioned ballots

10. In the District 40 Precinct of Kivalina, seven voters were allowed to vote both the Republican and Democrat ballot but were required to cast questioned ballots. While those questioned ballots were originally not counted by the regional and statewide review boards, they were counted during the recount.

11. In the District 40 Precinct of Browerville, voters were registered Republicans were required to vote questioned ballots if they asked to vote the Democrat ballot.

12. In the District 40 Precinct of Bettles, one voter was identified by an election worker as a Republican and handed a ballot, not given the choice of which ballot to vote.

13. In the District 40 Precinct of Buckland, there were numerous issues with special needs ballots. Only one voter indicated a party preference on the application, but all of the voters received the Democrat ballot, in spite of the fact that some of these voters are non-declared and eligible to vote a Republican ballot.

14. In addition to the foregoing, the voters, the representatives and the election workers failed to properly complete the envelopes needed to establish the validity of these ballots and some information on the envelopes appears to have been modified, or revised. A single person claims to have acted as the representative for 10 of the special

needs voters. The date the special needs ballots were issued was not listed, and likewise the date/time the ballots were returned. The date the signature of the representative signed the ballot was obscured on 11 of the 12 ballots. These special needs ballots were not cast in accordance with the requirements of the Division of Elections.

15. The special needs ballots were not returned to Nome until six days after the election.

16. The Precinct of Buckland had more special needs ballots voted than Palmer or Wasilla despite the population disparity.

17. In Nome, during the regional absentee and questioned ballot review board session, there was an issue when four absentee ballots were misplaced. The workers in Nome conferred with Division officials in Juneau in private, and upon their return they indicated they had been instructed to randomly select four questioned ballots and count them as absentee ballots.

**IV. COUNT I - VIOLATION OF ALASKA STATUTE §
15.10.120**

18. Plaintiff realleges and incorporates by reference the allegations set forth above.

19. AS 15.10.120 provides that there shall be appointed in each precinct an election board composed of at least three qualified voters.

20. In at least one precinct, the election supervisor failed to ensure there were at least three qualified voters comprising the election board.

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21. With only one election board worker, the integrity of the election is at question and thus, plaintiff is entitled to relief.

**V. COUNT II – VIOLATION OF ALASKA STATUTE §
15.15.080**

22. Plaintiff realleges and incorporates by reference the allegations set forth above.

23. Pursuant to State law the polls shall be open from 7:00 AM until 8:00 PM.

24. During the time that the polls are open, special needs ballots are likewise required to be returned during those hours.

25. In at least one precinct, the date of issuance of special needs ballots was not recorded and the date and time the ballot were returned was not recorded this making it impossible to determine if the ballots were cast prior to the close of voting. .

**VI. COUNT III – VIOLATION OF ALASKA STATUTE §
15.15.210**

26. Plaintiff realleges and incorporates by reference the allegations set forth above.

27. A voter may only be questioned as not qualified to vote under AS 15.05.

28. Election workers improperly challenged the right of fully Republican voters who sought to vote the other ballot thus depriving voters of their right to vote for the candidate of their choice. .

29. Plaintiff is entitled to relief based on the disenfranchisement of one class of voters.

**VII. COUNT IV – VIOLATION OF ALASKA STATUTE §
15.15.215**

30. Plaintiff realleges and incorporates by reference the allegations set forth above.

31. Pursuant to AS 15.20.207 and AS 15.15.215, the questioned ballots are to be kept separate.

32. In at least one case, ballots were misplaced and/or lost.

33. As a result of the missing ballots, four questioned ballots were taken from the questioned group and wrongfully comingled with other ballots, thus improperly allowing votes which may be invalid to be counted.

**VIII. VIOLATION OF THE 14TH AMENDMENT TO THE
UNITED STATES CONSTITUTION**

34. By allowing certain voters to cast more than one ballot and allowing those multiple ballots to be counted and by failing to otherwise properly conduct the election the Division of Elections has deprive other voters in District 40 of the equal protection guaranteed by the 14th Amendment to the United States Constitution

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Benjamin N. Nageak and qualified voters pray for the following relief:

1. An order directing that the votes properly and legally cast in the August 16, 2016 primary election in House District 40 be properly tabulated and the correct result be certified.

2. In the alternative for an order declaring that because of the many manifest errors in the conduct of the August 16, 2016 primary election in House District 40, that

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the true winner cannot be determined and ordering that a new election conducted in accordance with law be conducted.

3. Costs and attorneys' fees pursuant to any applicable statute or authority;
and

4. Any other relief this Court deems just and appropriate.

Dated this 16th day of September, 2016, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.
Counsel for Appellant

By: [Signature]
Timothy A. McKeever
Alaska Bar No. 7611146
Stacey C. Stone
Alaska Bar No. 1005030

CERTIFICATE OF SERVICE

The undersigned certifies that on this 16th day of September, 2016, a true and correct copy of the foregoing document was served via:

- E-Mail
- U.S. Mail
- Facsimile
- Hand-Delivery

to:

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By: [Signature]
Legal Assistant/Secretary
Holmes Weddle & Barcott, P.C.

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IN THE SUPREME COURT OF THE STATE OF ALASKA

BENJAMIN N. NAGEAK,)
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LT. GOVERNOR BYRON MALLOTT,)
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in his official capacity as Lt. Governor for)
11 the State of Alaska, and JOSEPHINE)
12 BAHNKE, in her official capacity as)
13 Director of the Division of Elections,)
)
Appellees.)

Supreme Court No.: S-16462

AFFIDAVIT OF COUNSEL

STATE OF ALASKA)
) ss.
JUDICIAL DISTRICT)

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

1. I am one of the assistant attorneys general responsible for this appeal.
2. Resolving this case is necessary to determine whose name should appear on the general election ballot as the Democratic candidate for House District 40.
3. The general election is scheduled to be held on November 8, 2016.
4. Many pre-election deadlines, such as the deadlines for printing and mailing ballots to absentee voters, are approaching even sooner.

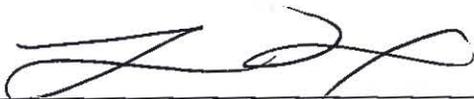
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5. The sooner this case and Mr. Nageak's election contest are resolved, the less the election will be disrupted, the less voters will be confused, and the less the Division of Elections will have to incur additional administrative burdens and expenses.

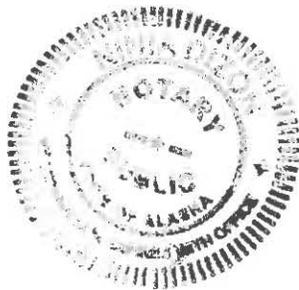
6. The parties need a decision on this motion to provide guidance on how this case and Mr. Nageak's election contest can be litigated to completion as quickly and efficiently as possible.

7. I spoke with opposing counsel, Tim McKeever, about this motion during a meeting on the morning of September 19, 2016. He indicated that his client does not oppose emergency consideration of this motion.



Laura Fox
Alaska Bar No. 0905015

SUBSCRIBED AND SWORN to before me September 19, 2016.





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

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IN THE SUPREME COURT OF THE STATE OF ALASKA

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

Supreme Court No.: S-16462

**[PROPOSED] ORDER GRANTING EMERGENCY MOTION FOR STAY
AND/OR REFERRAL TO SUPERIOR COURT**

IT IS HEREBY ORDERED that

__ This recount appeal is stayed pending a superior court decision in the election
contest case, and will be consolidated with any appeal from that decision.

__ This recount appeal is referred to the superior court judge assigned to the
election contest case, and the cases should be consolidated for consideration.

__ This case and the election contest case shall be litigated in accordance with the
following instructions: _____.

Dated: _____ 2016.

Supreme Court Justice