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IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the
2016 STATE HOUSE DISTRICT 40
PRIMARY ELECTION

Supreme Court Nos.
S-16462/S-16492/S-16494
(Consolidated)

Division of Elections Recount;
3AN-16-09015CI

OPENING BRIEF OF ELECTION CHALLENGERS

Filed in the Supreme Court
of the State of Alaska, this
_____ day of October, 2016,

By: _____
Supreme Court Clerk

COMES NOW Appellant Benjamin N. Nageak (16462) and Appellees Benjamin N. Nageak, Rob Elkins, Robin D. Elkins, Laura Welles, and Luke Welles (16492) (hereinafter collectively referred to as “Election Challengers”), by and through counsel of record, Holmes Weddle & Barcott, P.C., and hereby submit their Opening Brief in Memorandum format as ordered by this Court.

I. INTRODUCTION

“The right to vote ‘is fundamental to our concept of democratic government.’”¹ The Alaska Supreme Court has recognized that “a true democracy must seek to make each citizen's vote as meaningful as every other vote to ensure the equality of all people under the law.”² As the Superior Court noted, “the health of a republic depends on maintaining the integrity of elections.”³ In order to ensure the integrity of this and future elections, as well as protect the rights of all voters, the Division should be directed to retabulate the vote in House District 40 and certify Nageak as the winner of the Democratic primary.

II. COURSE OF PROCEEDINGS

On September 16, 2016, Appellants filed an election contest pursuant to AS 15.20.540 with the Superior Court, and a recount appeal with this Court under AS 15.20.510. Both filings challenged the validity of the August 16, 2016 Primary

¹ *Miller v. Treadwell*, 245 P.3d 867, 868-869 (Alaska 2010).

² *Id.* 245 at 870 quoting *Dansereau v. Ulmer*, 903 P.2d 555 (1995).

³ Findings of Fact and Conclusions of Law, p. 2, citing *Hammond v. Hickel*, 588 P.2d 256, 272 (Alaska 1978).

Election and subsequent recount based on the numerous manifest errors that occurred.

The Superior Court rendered a decision on the election contest on October 6, 2016. The court found that the action of Lieutenant Governor Byron Mallott, in his official capacity as Lieutenant Governor for the State of Alaska, and Josephine Bahnke, in her official capacity as Director of the Division of Elections (hereinafter, collectively referred to as the “Division”) in providing two ballots to each of 51 voters in Shungnak violated clearly established constitutional rights as well as the requirements of statutory law and were election malconduct, that the election officials acted in reckless disregard of the law and their error changed the outcome of the election. The Superior Court found it was malconduct for the Division to have counted seven duplicate ballots from Kivalina. It therefore directed the Division to decrease candidate Westlake’s total by 12 votes and Nageak’s total by two votes, and to certify that candidate Nageak is the Democratic nominee for the State House in District 40.

That same day, the Division filed an appeal of the Superior Court’s decision. Previously, on September 20, 2016, this Court stayed the recount appeal pending the outcome of the case in Superior Court and ordered that any appeal resulting from the election contest be consolidated with the recount appeal. Therefore this matter is before this court both as an election recount and as appeal of the election contest.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court decision finding malconduct on the part of an election official sufficient to change the result of an election in the precinct of Shungnak is correct.

2. Whether malconduct on the part of an election official sufficient to change the result of an election occurred in the precinct of Kivalina.

3. Whether malconduct on the part of an election official sufficient to change the result of an election occurred in the precinct of Buckland, AK.

4. Whether the numerous serious violations of law in House District 40, not individually amounting to malconduct, were such that the cumulation of those irregularities supports a finding of malconduct.

5. Whether the Superior Court erred in discounting duplicate votes cast in the precincts of Shungnak and Kivalina given the constitutional right to associate.

6. Whether a mistake was made by an election official in counting the votes in the recount.

7. Whether ordering the Division to change the candidates' vote totals and certify Nageak as the winner of the House District 40 primary was the proper remedy.

IV. FACTS OF THE CASE

In the August 2016 primary in House District 40⁴ the Democratic candidates for the Alaska State House of Representatives were Benjamin N. Nageak (“Nageak”), and Dean Westlake (“Westlake”).⁵ The election results were certified by the Director of the Division on September 6, 2016, and those certified results were that Westlake received 819 votes and Nageak received 815 votes.⁶ Nageak requested a recount which occurred on September 12, 2016, which resulted in 825 votes for Westlake and 817 votes for Nageak.⁷

Responsibility for the supervision of elections rests with the Lt. Governor and the Director of the Division.⁸ The election was conducted by the Division, which hired election workers.⁹ There were 23 polling places, one at each of the

⁴ House District 40 covers the North Slope of Alaska, Northwest Alaska and a number of villages just south of the Brooks Range.

⁵ Since 2000, pursuant to *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), Alaska has allowed political parties to control who may vote in the party’s primary. The Alaska Republican Party allows only registered Republicans, Undeclared and Nonpartisan voters to vote in its primary. The other parties including the Democratic, Libertarian and the Alaska Independence Party allow any registered voter to vote in their combined primary. However, no voter may vote in both primaries pursuant to AS 15.25.060(a).

⁶ R. 1091

⁷ R. 1092

⁸ AS 15.10.105, AS 15.10.107.

⁹ Additionally, this case is distinguishable from *Hammond*, 588 P.2d 256. In that case, the Supreme Court makes reference to “volunteer workers.” However, the election workers are now paid employees pursuant to 6 AAC 25.035. This regulation was not effective until 1982, approximately four years after the decision issued in the *Hammond* case.

precincts in House District 40. The election workers are not volunteers, they are paid for their work on elections.¹⁰

The Division offered a variety of training options for election workers. Those training options included: in-person, telephonic, internet live stream, webcast on demand, and DVD.¹¹ In addition, the Division prepared a number of manuals and instructional materials for workers.¹² Although the Division pays election workers to attend trainings, in 11 of the 23 precincts in District 40 none of the poll workers reported receiving any training in 2016.¹³ There is no evidence that Division supervisors followed up to investigate why, or to offer additional training.¹⁴ All election workers must sign an oath that they will conduct the election consistent with law.¹⁵ The Division does not conduct any kind of evaluation of the performance of election workers.¹⁶

Election supplies were sent by the Division to all polling locations.¹⁷ Included was a Polling Place Elections Procedures Handbook which contained detailed information concerning the requirement that voters may cast only one ballot in the primary election, as well as information on how to provide special needs ballots to representatives of voters who are unable to come to the polling

¹⁰ 6 AAC 25.035

¹¹ Tr. 82 – 84.

¹² R. 62 – 63.

¹³ R. 516

¹⁴ Findings of Fact and Conclusions of Law, p. 17.

¹⁵ R. 497.

¹⁶ Tr. 97.

¹⁷ Tr. 476 – 477.

place.¹⁸ The materials also included a poster to be displayed in the polling place and a placard to be put on the registration table which instructed election workers and voters to select one primary ballot based on their eligibility.¹⁹ Finally, the materials contained a supply of party affiliation cards which election workers were to give to voters during registration so they would be provided the proper ballot.²⁰

There were significant errors in the conduct of the election in nearly all of the precincts in House District 40. Some of those errors standing alone were sufficient to change the outcome of the election. Other errors in aggregate cast significant doubt on the integrity of the Division and the outcome of the election.

Shungnak

In Shungnak, there were four election workers on Election Day.²¹ All signed the oath to conduct the election in accordance with law.²² At least one election worker worked in both the 2012 and 2014 primary elections and participated in training by the Division in 2014.²³ There is no record that any election worker from Shungnak participated in any training in 2016.²⁴ It is undisputed that the four election workers in Shungnak, provided every voter with

¹⁸ R. 894 – 934.

¹⁹ Tr. 59 – 60. Voters were to be given a choice to select either the Republican ballot or the Alaska Independence-Democrat-Libertarian (“ADL”) ballot.

²⁰ R. 656 – 660.

²¹ Findings of Fact and Conclusions of Law, p. 16.

²² *Id.* p. 17.

²³ *Id.*

²⁴ *Id.*

both the Republican and ADL ballots.²⁵ Fifty voters voted in person and one voted a questioned ballot, resulting in 102 being votes cast.²⁶

In prior primary elections in Shungnak, when voters were required to choose a single ballot between the Republican and ADL ballot, between seven and 18 voters did so.²⁷ In the last four elections prior to the 2016, an average of 12.75 (in the four prior primary elections), chose the Republican ballot and did not vote in the ADL primary.²⁸

The voters in the ADL primary in Shungnak in 2016 cast 47 votes for Westlake (94%) and three votes for Nageak (6%).²⁹ It is unknown how the questioned ballot voter voted as those results were reported with District-wide questioned ballots.³⁰

In addition to providing each voter with both primary ballots, the workers in Shungnak made a large number of other errors in their conduct of the election in that community.³¹ They failed to complete and sign the precinct register, they did not sign the precinct certification, or the absentee voting accountability report.³² The election workers failed to call in the results on election night as instructed,

²⁵ *Id.* p. 16.

²⁶ *Id.*

²⁷ Tr. 391.

²⁸ Findings of Fact and Conclusions of Law, p. 19.

²⁹ Tr. 392.

³⁰ Findings of Fact and Conclusions of Law, p. 20, n. 83.

³¹ R. 718 – 719.

³² *Id.*

and they failed to tally the votes using the tally book provided by the Division.³³ They failed to record the identification of all voters and they did not record if there were any touch screen voters.³⁴

The Division learned of the error of issuing of two ballots to all voters the day after the election when, after repeated calls, the Division was finally able to reach the election judge and obtain a report of the election results over the phone.³⁵

Kivalina

In Kivalina, seven voters insisted on voting both the Republican and ADL ballot, casting one in person ballot and one questioned ballot.³⁶ The election workers in Kivalina required one of the ballots given to each voter to be voted as a questioned ballot.³⁷ The seven questioned ballots from Kivalina were rejected as duplicates by the Regional Questioned Ballot Review Board in Nome.³⁸ The Statewide Review Board in Juneau did not change that determination.³⁹ Thus, they were not counted at either level and were not included in the certified election results prior to the recount.

Despite the decision of both review boards to reject the seven Kivalina questioned ballots as duplicates, the Director of the Division decided to count the

³³ R. 494, 718.

³⁴ R. 393, 396.

³⁵ R. 494.

³⁶ Tr. 170 – 171.

³⁷ Tr. 173.

³⁸ R. 566 – 573.

³⁹ Tr. 608.

questioned ballots during the recount.⁴⁰ She stated that since there was no way to tell which ballot the voter voted first, the questioned ballots would be treated like the ballots from Shungnak, i.e. they would be counted.⁴¹ In Kivalina in 2016, Westlake received 38 votes (63.33%) and Nageak received 22 votes (36.67%).⁴²

In addition to the double ballots, election workers in Kivalina failed to complete and sign the absentee voting accountability report.⁴³ The signatures on the precinct register did not match the number of ballots cast.⁴⁴ More people signed the register than voted.⁴⁵ The workers failed to return the tally book for the Republican ballots with the other precinct records.⁴⁶ The statewide review board had to recount the ballots.⁴⁷

Buckland

In Buckland, 12 special needs ballots were cast.⁴⁸ Special needs ballots are a form of absentee ballot that allow someone who is unable to go to the polls to vote.⁴⁹ AS 15.20.072 establishes the special needs voting procedure: that the voter selects a representative to go to the polling place, completes a form and upon verification of the information on the form by an election official, the

⁴⁰ Tr. 173.

⁴¹ *Id.*

⁴² R. 1092.

⁴³ R. 699 – 700.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Tr. 176.

⁴⁹ AS 15.20.072.

representative is given a ballot to take to the voter and the election official records when the ballot was issued. The voter votes the ballot, signs the form and the representative witnesses the voter sign the ballot.⁵⁰ The representative returns the ballot to the polling place, the election official verifies the required information is provided and records the date and time that the ballot is returned.⁵¹ Only ballots cast by 8:00 p.m. on Election Day may be counted.⁵²

Despite being paid and designated to work at the polling place, election workers in Buckland spent much of Election Day distributing and collecting ballots from 12 members of the community.⁵³ Election workers in Buckland apparently acted as the “representative,” assisting the voter in the casting of each of those special needs votes.⁵⁴ Election workers failed to record the date and time when the ballots were returned to the polling place.⁵⁵ These ballots were not returned to the regional office in Nome until August 22, 2016, six days after the election.⁵⁶

In addition, at least one in-person voter in Buckland was allowed to vote without an election official requiring them to sign the precinct register.⁵⁷ The Buckland election officials failed to complete and sign a questioned ballot

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² R. 915.

⁵³ Tr. 176.

⁵⁴ *Id.*

⁵⁵ Tr. 178.

⁵⁶ Tr. 422.

⁵⁷ R. 915.

register.⁵⁸ Election workers improperly signed the register for voters who did not vote in-person.⁵⁹ The workers did not tally the votes cast as required by the Division.⁶⁰ Finally, the number of paper ballots used could not be confirmed because the poll workers tore off all ballots, leaving no stubs for the State Review Board to either verify or review the ballots issued.⁶¹

In Buckland in the 2016 primary, Westlake received 43 votes (79.63%) and Nageak received 11 votes (20.37%).⁶²

Other Precincts in House District 40

In Browerville, election workers admitted that until approximately 5:00 p.m., they required registered Republicans who requested the ADL ballot to vote a questioned ballot.⁶³ It was not until voters complained that poll workers allowed those voters to select an ADL ballot without it being questioned.⁶⁴

In addition, it is undisputed that at least one convicted felon, whose rights have not been reinstated, appeared on the precinct register and voted in the primary.⁶⁵ The State has admitted that he was not eligible to vote due to his felony conviction.⁶⁶ The Director admitted that the Division has a faulty procedure in

⁵⁸ R. 691 – 692.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² R. 1092.

⁶³ R. 510.

⁶⁴ *Id.*

⁶⁵ R. 1078.

⁶⁶ *Id.*

place for obtaining the names of persons convicted of a felony involving moral turpitude.⁶⁷ Only those persons presently incarcerated on the date the Division reviews the precinct registers would be removed.⁶⁸ Thus, it is unknown how many convicted felons were permitted to vote in House District 40 during the primary election.

Election workers in Browerville also failed to complete the precinct register,⁶⁹ and failed to check the identification and eligibility of at least 20 voters.⁷⁰

In Ambler, election officials failed to timely return the ballots and election materials to Nome and Juneau for review and certification.⁷¹ Therefore, the election was certified when the only information available to the Division were the results from Ambler on election night.⁷² As such, the authenticity and results of the 36 ballots cast and final tally for House District 40 in Ambler could not be verified by the Regional and Statewide Review Boards.⁷³

In at least 17 other precincts, multiple irregularities were noted, including the following:

⁶⁷ Tr. 38 – 40.

⁶⁸ Tr. 39.

⁶⁹ R. 689 – 690.

⁷⁰ *Id.*

⁷¹ Tr. 128.

⁷² *Id.* This is especially concerning as the record reflects that there were numerous errors in almost every precinct in House District 40.

⁷³ Tr. 128.

1. Voters cast ballots without signing a precinct register;⁷⁴
2. Election workers failed to complete and sign the precinct registers;⁷⁵
3. Election workers failed to have questioned voters sign the questioned register;⁷⁶
4. Election workers failed to complete and sign the absentee voting accountability report;⁷⁷
5. Election workers failed to document the identification of multiple voters;⁷⁸
6. Election workers destroyed or failed to return ballot stubs so the number of ballots issued could not be verified;⁷⁹
7. Election workers telephoned inaccurate results into the regional office in Nome;⁸⁰
8. Election workers failed to properly tally votes or complete tally books;⁸¹
9. Election workers mismarked spoiled ballots;⁸² and/or
10. Election polling locations failed to have the requisite number of election workers.⁸³

⁷⁴ Tr. 681 – 731.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

11. Election workers failed to sign the certification of the ballot count.

V. STANDARD OF REVIEW

The Supreme Court of Alaska may consider election results in two ways: (1) by appeal of the recount pursuant to AS 15.20.510(2); or (2) by appeal of a Superior Court decision with regard to an election contest pursuant to AS 15.20.540.⁸⁴

Election contests are filed with the Superior Court, and are heard by this Court only upon appeal of the superior court's decision.⁸⁵ An election contest pursuant to AS 15.20.540(1) requires a showing of malconduct, fraud or corruption of election officials sufficient to change an election result.⁸⁶ The standard, set forth in *Hammond v. Hickel*, defines malconduct as “a significant deviation from statutorily or constitutionally prescribed norms” which introduces a bias into the vote, or constitutes a significant deviation from the norm.⁸⁷ Significant deviations in aggregate “will amount to malconduct if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law.”⁸⁸

⁸³ *Id.*

⁸⁴ *Cissna v. Stout*, 931 P.2d 363, 366 (Alaska 1996).

⁸⁵ *See, e.g., Id.* at 367, *see also, Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979).

⁸⁶ *Cissna*, 931 P.2d at 366-367.

⁸⁷ 588 P.2d at 258.

⁸⁸ *Id.* at 259.

Pursuant to AS 15.20.510, the Supreme Court has original jurisdiction over the appeal of the recount of the House District 40 election, as Nageak requested the recount and is a candidate for the legislature. A recount appeal considers “whether specific votes or classes of votes were correctly counted or rejected.”⁸⁹ However, recount appeals are not limited solely to the determination of facial validity of the ballots and this court may “search underlying records and election materials to ensure that a vote was cast in compliance with the requirements of Alaska's election laws.”⁹⁰ “The concept of malconduct does not enter into the question in an election contest, except insofar as particular acts or shortcomings of election officials may have resulted in the improper counting or rejecting of votes.”⁹¹

VI. ARGUMENT

Citing the United States Supreme Court’s decision in *Bush v. Gore*, the Alaska Supreme Court has recognized that each citizen’s constitutional rights are at issue when the state employs unfair and wrongful election procedures that result in a disparate impact across the community.⁹² This is because equal protection concerns more than allocating every citizen a right to vote. As the U.S. Supreme Court explained, “[e]qual protection applies as well to the manner of its

⁸⁹ *Cissna*, 931 P.2d at 367.

⁹⁰ *Id.*, see also, *Willis*, 600 P.2d at 1082.

⁹¹ *Willis*, 600 P.2d at 1081.

⁹² *Miller*, 245 P.3d at 870.

exercise.”⁹³ Thus, it is not enough that each individual has the right to vote – each individual’s vote must then be counted with equal weight. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”⁹⁴ “[A] debasement or dilution of the weight of a citizen’s vote,” is essentially a denial of that vote, just as effective [...] as [...] wholly prohibiting the free exercise of the franchise.”⁹⁵

In the August 2016 primary election, House District 40 experienced exactly that: a subset of voters was given greater weight and greater voice in the outcome of the election, resulting in a wholesale dilution of the votes of every other citizen in the District. Not only did the Division fail the people of House District 40 when its paid employees created this discrepancy, but the State condoned the resulting disenfranchisement as “honest mistakes.”⁹⁶ Rather than upholding the law, the Director chose to count every illegal vote, ignoring the dissent of two separate review boards, the Division’s own regulations, the law in the State of Alaska, and the effect such dilution would have on the voters of House District 40.⁹⁷

1. The Superior Court was correct in holding that misconduct on the part of election officials in the Shungnak was sufficient to change the result of the primary election.

⁹³ *Bush v. Gore*, 531 U.S. 98, 104 (2000).

⁹⁴ *Id.* at 104-105.

⁹⁵ *Id.* at 105.

⁹⁶ Tr. 26, *see also*, Findings of Fact and Conclusions of Law, p. 19.

⁹⁷ Findings of Fact and Conclusions of Law, p. 19.

The U.S. Supreme Court has recognized that under the First Amendment a political party has a right to exclude any non-party member from its candidate selection process.⁹⁸ The Alaska Republican Party has decided to limit those who may vote in its primary elections.⁹⁹ The Equal Protection Clause of the Fourteenth Amendment requires that election laws apply equally to all voters, so as to ensure that every citizen is afforded “an equally effective voice” in the election of members of his state legislature.¹⁰⁰ Thereby, it is well-established that allowing some voters to cast more than one ballot deprives other voters of these equal protection guarantees.¹⁰¹

AS 15.25.060(a), provides in part as follows:

A voter may vote only one primary election ballot. A voter may vote a political party ballot only if the voter is registered as affiliated with that party, is allowed to participate in the party primary under the party’s bylaws, or is registered as nonpartisan or undeclared rather than as affiliated with a particular political party and the party’s bylaws do not restrict participation by nonpartisan or undeclared voters in the party’s primary. For the purpose of determining which primary election ballot a voter may use, a voter’s party affiliation is considered to be the affiliation registered with the director as of the 30th day before the primary election.

⁹⁸ 530 U.S. at 582.

⁹⁹2014 *ARP Rules, Alaska Republican Party*, http://www.alaskagop.org/party_rules (last visited Oct. 7, 2016); see also AS 15.25.060(b).

¹⁰⁰ *Reynolds v. Sims*, 377 U.S. 533, 564–65 (1964).

¹⁰¹ *Baker v. Carr*, 369 U.S. 186, 208 (1962).

There is no dispute that 51 voters in Shungnak were permitted to cast two ballots each.¹⁰² It is also beyond dispute that that resulted in a violation of constitutional rights and the law. As the Superior Court found that the casting of two ballots by one voter “violated clearly established constitutional rights as well as the requirements of statutory law.”¹⁰³ It also deprived all the other voters in the primary of their equal voice in the election,¹⁰⁴ as the voters in Shungnak were allowed to vote twice, a significant departure from election norms. Substantial evidence supports this conclusion.

The evidence also established that election workers in Shungnak acted with reckless indifference to the norms established by law. They failed to participate in any training in 2016, did not review the manuals or other training materials sent to them, did not read the ballot choice poster and placard, did not attempt to understand the party affiliation cards, and failed to properly report to the regional office the results and failed to document their activities.¹⁰⁵ The evidence of conduct prior to the election (failure to participate in training, failure to review election materials in advance) during the election (failure to review the manual regarding how voters are to select a ballot, failure to review the Primary Election Ballot options posters and placard and the Party Affiliation Cards, the

¹⁰² Findings of Fact and Conclusions of Law, p. 16.

¹⁰³ Findings of Fact and Conclusions of Law, p. 18.

¹⁰⁴ *Id.* The record reflects there were at least 450 voters in House District 40 who elected a Republican ballot and were thereby not permitted to also vote in the ADL primary.

¹⁰⁵ *Id.*

giving of two ballots to every voter and the failure to record the identification of all voters and failing to list touch screen voters) and after the polls closed (not completing and signing the precinct register, not signing the precinct results certification, or the absentee voting accountability report, failing to call in the results on election night as instructed, failing to tally the votes using the tally book provided by the Division) the Shungnak poll workers acted with reckless indifference to the norms established by law.¹⁰⁶

The state argues that because all voters who cast an ADL ballot were legally entitled to select such a ballot, and did not vote more than once in that primary, this clear legal error did not change the outcome of the election.¹⁰⁷ This argument overlooks the fact that if voters had been required to choose a single ballot, as the law requires, fewer voters would have voted in the ADL primary.

Because voters may legally vote only one ballot, had the election been properly conducted the numbers of votes cast in the ADL primary would have been reduced. The Superior Court considered the evidence of two witnesses on this issue. It determined that the most reliable way to determine how many fewer votes would have been cast in the ADL primary is to average the number of voters who selected the Republican ballot in Shungnak over a number of elections.¹⁰⁸

¹⁰⁶ *Id.*

¹⁰⁷ Tr. 756.

¹⁰⁸ Findings of Fact and Conclusions of Law, p. 19 – 20, n. 82.

Twenty-five people eligible for the Republican ballot voted in the primary.¹⁰⁹ Expert evidence was offered by Randolph Ruedrich who has studied Alaska elections for three decades.¹¹⁰ He testified that based on a the number of Republican ballots voted in the four prior primary elections over eight years, that 12.75 voters would have chosen to cast the Republican ballot in Shungnak.¹¹¹ As a result 12.75 voters would not have voted in the ADL primary.

Since Westlake received 94% of the votes in Shungnak, his total would have been reduced by 11.985 votes and Nageak's total would have been reduced by 6% of 12.75 i.e. 0.765 votes

The Superior Court correctly adopted this expert approach, but modified the same to make the numbers whole. Since the current margin is eight (8) votes, the error in giving all voters both ballots changed the outcome of the election.

Thus in Shungnak, the error in giving all voters both ballots was a significant deviation from established norms, it was done with at least reckless indifference to the established norms and was sufficient to change the outcome of the election. The Superior Court's decision should be upheld.

¹⁰⁹ *Id.*

¹¹⁰ Tr. 328-331. The Superior Court was presented with testimony of another individual John Henry Heckendorn who has less experience, and presented only evidence relating to District 40 as an entity and did not testify concerning the effect of the improper double voting in Shungnak itself. The court found Mr. Ruedrich "more authoritative and reliable." Findings of Fact and Conclusions of Law, p. 19 – 20, n. 82.

¹¹¹ *Id.*

2. The Superior Court correctly found that malconduct on the part of election officials in the precinct of Kivalina resulted in a change in the final outcome of the election.

The decision to issue the double ballots in Kivalina was also a significant departure from election norms. It also raised constitutional issues. But the decision by the Director during the recount to count the seven questioned ballots in Kivalina was made with knowing non-compliance with the law and with reckless indifference to the norms.¹¹² The decision of the Superior Court not to count those seven ballots was correct and should be upheld.

But the other seven ballots cast by those voters should also not have been counted. The Superior Court incorrectly determined that the ballots cast at the polling place were the voters' first choice of ballots.¹¹³ However the reason given by the director as to why the seven questioned ballots should be counted was that "we couldn't determine which one the voter had voted first" There is no testimony from any election worker or any voter as to what ballot they cast first, i.e. evidence as to the intent of the voters.

This was not an error made by the poll workers -- the seven voters insisted on voting two ballots, thus acting illegally.¹¹⁴ This Court should not feel obligated to protect the voting rights of voters who insisted on breaking the law in casting two ballots.

¹¹² Tr. 173.

¹¹³ However, none of the seven voters or the Kivalina election workers testified, rather that decision rests only on hearsay evidence.

¹¹⁴ Tr. 170 – 171.

This court should find that all 14 of these votes cast by the seven voters in Kivalina should be rejected. Using the proportionate reduction method suggested in *Hammond*, reduction of 14 votes from Kivalina would mean that Westlake would receive 6.4437 votes fewer than tabulated in the recount. Nageak would receive 3.566 fewer votes.¹¹⁵ The net change would be 2.9 more votes for Nageak. While the Kivalina error alone does not make Nageak the winner, combined with the malconduct in either Shungnak or Buckland, this error changed the outcome of the election.

3. Malconduct on the part of election officials in the precinct of Buckland was sufficient to change the result of the primary election.

The Buckland special needs ballots were cast illegally and should not have been counted. AS 15.20.072(a) provides that “[a] qualified voter with a disability who, because of that disability, is unable to go to a polling place to vote may vote a special needs ballot.” The ballot must be returned to the election officials at the polling site “not later than 8:00 p.m. Alaska time on election day.”¹¹⁶

Twelve special needs ballots from Buckland were counted in the primary election even though they failed to comply with the requirements of AS 15.20.072.

¹¹⁵ In Kivalina, the results of the seven questioned ballots cast were established as 1 for Westlake, 1 for Nageak and the other 5 were Republican ballots. The other seven ballots cast by these same voters were commingled and so would be allocated based on the proportion of the total votes in the precinct. This would mean 5.443 fewer votes for Westlake and 2.55 fewer votes for Nageak. Thus, Westlake’s total would be reduced by 6.553 and Nageak’s total by 3.556.

¹¹⁶ AS 15.20.072(d) – (e).

AS 15.20.072 requires three people to complete the special need voting process, with an important distinction between the role of the election official and that of a personal representative. Those three participants are specified in the law and the legislative history is consistent with that intent. This provision was enacted in 2000. The legislative history is clear about the process:

On Feb 8, 2000 the House State Affairs Committee discussed HB 163 which included this provision. The sponsor's statement for the bill was read and it stated in part "Current law requires the personal representative to deliver an application to the voter, return the application to an election official, pickup the ballot and voting material, deliver the material to the voter and then return the voted ballot and material to the election official and multiple signatures on a complex form. The new process would allow the **personal representative** to deliver an application and voting material at one time and then return the voted ballot to an **election official**."

Gail Fenumiai from the Division of Election in response to a question said that Regional Election Supervisors act as guards for the integrity of the process by finding volunteer groups such as the League of Women Voters – who will serve as **personal representatives** for disabled persons. Generally it is family members who request special needs ballots.

Rep. James said "**the personal representative** picks up the ballot at a voting station and delivers it to the disabled person."¹¹⁷

On March 16, 2000 State Senate Affairs considered the bill. Ms Fenumiai Later she responded to a question regarding the process by saying "personal representatives need to identify themselves to the election official and sign the register, the **representative** takes the ballots to the disabled person. That person must write down identification on the envelope and sign the envelope."¹¹⁸

¹¹⁷ Hearing before the H. State Affairs Comm., 21st Leg. (February 8, 2000). (emphasis added).

¹¹⁸ Hearing before the S. State Affairs Comm., 21st Leg. (March 16, 2000). (emphasis added).

Nothing in the legislative history contemplates election workers would serve as both the personal representative and the election official. Rather, the Division's manuals also call describe a process by which the election official verifies the information provided by the representative, gives the ballot to the representative who takes the ballot to voter who votes it and then the representative returns the ballot.¹¹⁹

For paid election workers to leave the polls, personally issue, deliver, and witness the special needs ballots for the twelve special needs voters, with no representative of the voter in the process and then not record the date the ballots were issued or the date and time it was returned, involves two significant deviations from prescribed norms i.e. failing to comply with the law re the casting of special needs ballots and failing to record the date and time the ballots are returned.

This court has previously determined that having an attesting witness sign an absentee by mail ballot in the presence of the voter was designed to ensure the vote cast is that of the elector and that it was cast in circumstances free from coercion.¹²⁰ Moreover the requirement protects the integrity of the ballot process itself, noncompliance risks the frustrations of these fundamental principles.¹²¹

¹¹⁹ *Id.*

¹²⁰ *See, Finkelstein v. Stout*, 774 P.2d 786 (Alaska 1989).

¹²¹ *Id.*

Similarly, disregarding the process for casting special needs ballots risks the integrity of the ballot process.

The evidence also establishes that election officials in Buckland allowed at least one in person voter in Buckland was to vote without requiring them to sign the precinct register.¹²² The Buckland election officials failed to complete and sign a questioned ballot register.¹²³ The election officials tore off all ballots, leaving no stubs for the State Review Board to either verify or review the number of ballots issued.¹²⁴ This conduct is evidence of reckless indifference to the norms established by law. While the motives of the election worker might be laudable, they made a significant deviation by ignoring the law as to how a special needs ballot should be obtained, and by failing to document when the ballot was returned.

A proportionate reduction based on the percentages each candidate received from Buckland would result in a reduction of the votes for Westlake of 9.55 and for Nageak of 2.44, which translates a reduction in the current 8 vote margin of 7.11. While the Buckland error alone does not change the outcome of the election, combined with the malconduct in Shungnak or Kivalina, the outcome of the election would change.

4. Numerous serious violations of law across multiple precincts in House District 40, while not individually amounting to

¹²² R. 691 – 692.

¹²³ *Id.*

¹²⁴ *Id.*

malconduct, were such that the cumulation of those irregularities supports a finding of malconduct.

The Alaska Supreme Court has recognized that an election can be “so permeated with numerous serious violations of law, not individually amounting to malconduct, that substantial doubt will be cast on the outcome of the vote.”¹²⁵ In such a circumstance, the “cumulation of irregularities [...] support[s] a finding of malconduct.”¹²⁶ In its discussion of malconduct, the Court cites the Minnesota Supreme Court’s decision in *In re Contest of Election of Vetsch*, as an example of an election where the aggregate of irregularities was in effect an impeachment of the integrity of the vote.¹²⁷ While this case is not binding, its facts are eerily similar to those presented here as the court wrestled with the decision to discount votes due to the (many) failures of election workers in conducting that election. With particular significance to the matter at hand, the Minnesota Supreme Court explained:

“To hold that the courts' hands are tied unless there is an actual showing of fraud is to say that the election laws are of no effect and need not be followed. We realize full well that the disenfranchisement of a voter is a serious matter, but there is also an obligation to see that the will of the voters in other precincts whose ballots have, without a doubt, been honestly cast and counted is vindicated. A decision of this nature does not rest upon a single incident occurring during the election but upon the cumulative effect of the numerous serious violations which occurred. The purpose of the election laws is to assure honest elections. Such a wholesale flouting of the law cannot be tolerated when the result is to cast

¹²⁵ 588 P.2d at 259.

¹²⁶ *Id.*

¹²⁷ *Id.*

doubt and suspicion upon the election and impeach the integrity of the vote.”¹²⁸

Much like in *In re Contest of Election of Vetsch*, the primary election in House District 40 was fraught with a long list of irregularities, errors, and issues. The State at trial admitted as much in its opening statement, and witness after witness confirmed that across every single precinct, the election workers failed to conduct the election in accordance with Alaska law.¹²⁹ Beyond mere good faith mistakes, the workers ignored training and instructions and engaged in misconduct which resulted in widespread irregularities and disparities within and across each precinct.¹³⁰

The State has suggested that despite the wholesale failures of election workers across nearly every precinct, the election results should stand so as not to disenfranchise the voters in those precincts where illegal votes were cast. To do so, however, would disenfranchise the remainder of the District, and all of the other voters who participated without error. Like *In re Contest of Election of Vetsch*, the election workers in House District 40 have acted with a “wholesale flouting of the law,” casting doubt on the election, such that this court cannot in good faith, and should not, stand by the integrity of the result.¹³¹

¹²⁸ *In re Contest of Election of Vetsch*, 245 Minn. 229, 241 (1955).

¹²⁹ Tr. 22 – 30.

¹³⁰ Findings of Fact and Conclusions of Law, p. 17 – 18.

¹³¹ *In re Contest of Election of Vetsch*, 245 Minn. at 241.

As discussed above some individual episodes of malconduct occurred which are sufficient to change the outcome of the election. Other mistakes by themselves may not be sufficient but in the aggregate these errors are sufficient to change the result of the election.

In addition to the errors by precinct workers, errors on the statewide level have tainted the results of this election. Pursuant to AS 15.10.105(a), the Director of the Division of Elections is responsible for the, “supervision of central and regional election offices, the hiring, performance evaluation, promotion, termination, and all other matters relating to the employment and training of election personnel...”

The Director of the Division of Elections has the obligation to appoint at least three qualified voters to serve on an election board in each precinct under AS 15.10.120, and to provide for a comprehensive training program for that election board under AS 15.10.107.

The Director has failed in her responsibility to take reasonable steps to insure that voters who have been convicted of a crime are unable to vote.¹³² The Director has allowed the membership of statewide and regional review boards to violate the law. Insert statutes here – require that the boards include representatives of the party which received the second largest number of votes in the last governor’s election. Because the winner in the last race was not affiliated

¹³² AS 15.07.135(a).

with a party, the Libertarian Party is entitled to membership on the review boards. No members of the boards are Libertarians.¹³³

Due to the aforementioned and widespread failures, the primary election is permeated with serious violations of law including malconduct of a magnitude sufficient to change the outcome of the race and other violations which while individually not amounting to malconduct that substantial doubt has been cast on the outcome of the vote.

This matter is the rare circumstance where the election was “so permeated with numerous serious violations of law, [some] not individually amounting to malconduct, that substantial doubt will be cast on the outcome of the vote.”¹³⁴

5. The right to associate on the part of the Alaska Democratic Party does not change the Superior Court’s opinion, and that opinion should be upheld.

It is unclear what Intervenor Westlake’s point on appeal is. However, to the extent he attempts to argue that the Superior Court erred in not recognizing the right of the Democratic Party to freely associate with voters of its choice in the primary his argument must fail. The Superior Court indeed held that political parties have the free right to associate, but that does not provide that voters will be allowed more than one vote. The U.S. Supreme Court and the State have a way for the Democratic Party to control who votes its primary—they can, by party

¹³³ Tr. 126.

¹³⁴ 588 P.2d at 259.

rules limit access to their primary. However, as stated previously, the Equal Protection Clause of the Fourteenth Amendment requires that election laws apply equally to all voters, so as to ensure that every citizen is afforded “an equally effective voice” in the election of members of his state legislature.¹³⁵ Thereby, it is well-established that allowing some voters to cast more than one ballot deprives other voters of these equal protection guarantees.¹³⁶ If the Court were to accept Westlake’s argument, the other over 450 voters who selected the Republican ballot instead of the ADL ballot would be disenfranchised because of the clear violation of the equal protection clause as applied in this case, one voice, one vote.

6. Serious mistakes were made by the Director of the Division in counting the votes in the recount.

In connection with the recount appeal based on the above arguments, the Court can determined which votes should be counted regardless of whether malconduct fraud or corruption is established.

In this matter the Court should exclude the 51 double votes cast in Shungnak because the providing of two ballots to all voters is a clear violation of the law and constitutional rights. Alternatively, to minimize the disenfranchisement the Court could adopt the logic of the Superior Court and reduce the candidates’ totals from that precinct based on the evidence that 12.75 voters would not have voted in the ADL primary.

¹³⁵ *Reynolds v. Sims*, 377 U.S. 533, 564–65 (1964).

¹³⁶ *Baker v. Carr*, 369 U.S. 186, 208 (1962).

With respect to Kivalina, the Court should reject all 14 ballots as they were obtained not as a result of any error on the part of the precinct workers but because the voters obtained the ballots illegally.

The Court should reject all of the 12 special needs ballots from Buckland because there is nothing in the law, regulations or procedures of the Division which allow poll workers to leave the polls during an election to gather selected ballots. The law provides a way for disabled voters to obtain a ballot by the use of a personal representative with oversight by election officials and requires the date a ballot is returned to be noted by an election official. That procedure protects the integrity of the voting.

7. Ordering the Division to change the candidates' vote totals and certify Nageak as the winner of the House District 40 primary was the proper remedy.

There is an eight (8) vote margin between the two Democratic candidates for State House District 40. Any one of the foregoing irregularities could have impacted the vote, as the margin is so narrow. If voters had not been allowed to cast two ballots in Shungnak alone, the outcome of the election would have been different. This is not unlike the case of *Finkelstein v. Stout*, wherein there was a nine (9) vote margin, and the court remanded the matter to the Director to retabulate the votes to correct the irregularities and the illegalities.¹³⁷

Obviously other options exist to address the Shungnak error—all 50 votes in the ADL primary could be excluded and that would result in a change in the margin of 44 votes, i.e. 47 less votes for Westlake and 3 less votes for Nageak. If the 25 voters eligible to vote in the Republican primary were excluded, Westlake's total would have been reduced by 13.5 votes and Nageak by 1.5.

In this case, because the error occurred in a primary where there were two ballots with other candidates on them it would be difficult, if not impossible, to redo the Primary Election with the same factors in play. Thus while a new election is a possibility it may not be the best result.

In *Edgmon v. State*, this court directed that five ballots be counted and that determined the outcome of that disputed primary election.¹³⁸ Based on that precedent, this Court can determine which of the contested ballots should be counted and direct the Division to determine the effect of the change the court orders

VII. CONCLUSION

Election Challengers respectfully request that this Court uphold the decision of the Superior Court that the double voting in Shungnak was malconduct, and that malconduct alone resulted in a change in the outcome of the election. Likewise, to uphold the decision that malconduct occurred in Kivalina

and must be remedied by reducing the vote totals according. In doing so, this Court should affirm that the election must be retabulated.

In addition to the foregoing, Election Challengers ask this court to also find that the other seven ballots cast by those voters in Kivalina who voted illegally should not be counted. Also, that the special needs ballots cast in Buckland were cast in violation of the law and should not be counted. Finally, to review the decision that the numerous errors in the aggregate amount to that special circumstance contemplated in law which casts such doubt on the election itself, that malconduct *per se* has occurred. Election Challengers ask this to ensure the integrity of this and future election, as well as protect the rights of all voters.

Finally, Election Challengers maintain that they should be awarded their attorneys' fees and costs incurred as a result of bringing these actions.¹³⁹

DATED this 9th day of October, 2016, at Anchorage, Alaska.

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¹³⁹ Findings of Fact and Conclusions of Law, p. 7.