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IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of

**2016 STATE HOUSE DISTRICT 40
PRIMARY ELECTION.**

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

Division of Elections Recount;
3AN-16-0901 CI

REPLY BRIEF OF INTERVENOR DEAN WESTLAKE

On August 16, 2016, 1,642 voters cast their votes in House District (“HD”) 40, an area, roughly the size of Montana, covering 138,000 square miles stretching from the Bering Sea to Canada along Alaska’s North Slope.¹ These voters cast their votes in the Democratic primary race for the District’s one seat in the State House. The voters elected Dean Westlake by 8 votes, 825 votes to 817 for Ben Nageak.

Nageak asks this Court (and the superior court agreed) to toss out fully one-quarter of the votes cast in a rural Alaskan village, Shungnak, where 50 voters, most, if not all, of

¹ Indeed, were it a state, House District 40 would be the fifth largest state in the Union.

whom were Alaska Natives, cast their ballots at the polls. In fact, since only half of these 50 voters were not eligible to vote in a primary other than the Democratic one, the percentage of votes from Shungnak that Nageak seeks to have thrown out is roughly 50%. Although the superior court agreed with Nageak, this Court should not disenfranchise nearly half of the voters in a rural Alaskan village, and instead should find that all 50 votes were validly cast in the *Democratic* primary, and uphold the State's certification of Westlake as the winner.

All of the Shungnak voters were qualified to vote under State law, and all were entitled to vote in the Democratic primary. *See* Westlake's Brief at 7-8. Further, there was no double voting in Shungnak, and no voting for more than one candidate in the HD 40 race. *See id.* at 8-11; *see also* State's Brief at 28-29. Thus, the fact that election workers mistakenly allowed the voters in Shungnak to vote both a Democratic ballot and a Republican one was not a significant deviation from statutory norms under the circumstances here. *See* State's Brief at 24-27.

Furthermore, the mistake did not violate the *Republicans'* constitutional rights (equal protection or associational), because the "over-voting," if any, in the Republican primary has not been challenged by anyone, and in any event would not have affected the result in either of the races on the Republican ballot, for U.S. Senate or U.S. Congress. Since any alleged "over-voting" here occurred in the *Democratic* primary, the *Republicans'* constitutional complaints are without merit. *See also* State's Brief at 27-29.

Westlake also joins in the thorough, persuasive analyses that the State so ably provides throughout its Brief. *See, e.g.* State’s Brief at 20-48. The State has shown that Nageak’s election challenge is without merit, and that its determination of Westlake as the winner of the HD 40 race should be upheld. *See id.*

Thus, this Court should find that Nageak has not met his heavy burden to prove that there was malconduct here, despite the superior court’s decision to the contrary. In addition, or in the alternative, if the Court finds that he has proved election worker malconduct, the Court should hold that Nageak has failed to prove that the misconduct was sufficient to change the election result. *See* Westlake’s Brief at 16-17; *see also* State’s Brief at 43-48. The Court therefore should uphold the State’s determination of Westlake as the winner over Nageak.

However, even if this Court finds that Nageak has met his heavy burden here, the Court nevertheless must reverse the superior court’s decision to overturn the certified election result. The trial court’s application of the proportionate reduction formula to actually reduce the candidates’ vote totals, thereby changing the results of the election, is contrary to well established Alaska case law. This Court has repeatedly held that, where the use of a proportional reduction formula of improperly cast votes shows that the result would be different, a new election must be held. *Finkelstein v. Stout*, 774 P.2d 786, 793 (Alaska 1989) (“If application of the proportional reduction formula would change the result [of the election]..., a new election should be held promptly”); *Fischer v. Stout*, 741

P.2d 217, 226 (Alaska 1987) (holding that the proportionate reduction rule or technique is not “to be used to actually reduce the candidate’s official total.... [T]he technique has to be used only as an analytical tool to aid in the determination of whether the contaminated ballot actually would effect [sic] the result of an election,” and finding that it was error for the Director of the Division to use “a proportionate reduction formula to actually change the official vote totals of each candidate”).

As a matter of law, therefore, the trial court here erred by ordering the certified results of the election to be reversed and substituting its judgment for the will of the voters. *See id.* For this reason alone, this Court must reverse the trial court’s decision that ordered the Division to declare Nageak the winner of the HD 40 race.

In conclusion, this Court should uphold the State’s certification of Westlake as winner of the HD 40 race or, alternatively, order the Division to set aside the Democratic primary result in HD 40 and allow the Alaska Democratic Party, under AS 15.25.100, to fill the vacancy.² *See also* State’s Brief at 67-68.

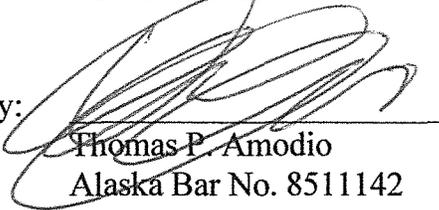
² If the Court were to set aside the Democratic primary result in HD 40, other possible but less desirable alternatives include: 1) ordering the Division to hold a special election or 2) ordering the Division to place the names of both Nageak and Westlake on the general election ballot. However, as the State astutely observed, because the Nageak-Westlake contest is only on the ADL ballot, neither of these alternatives remedies the “problem” of which Nageak complains, *i.e.*, that the Shungnak voters were not made to choose one ballot, either the Republican or the ADL ballot. *See* State’s Brief at 64-67.

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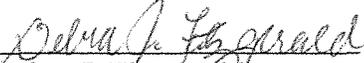
Dated this 10th day of October, 2016.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was
Emailed, mailed and/or faxed to
the following this 10th day of October, 2016.

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