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IN THE SUPREME COURT FOR THE STATE OF ALASKA

KATHRYN DODGE, Appellant, vs. LT. GOVERNOR KEVIN MEYER, et al., Appellees, vs. BARTON LeBON and ALASKA REPUBLICAN PARTY, Intervenors/Cross-Appellants.	Supreme Court No. S-17301/17311 Trial Court Case # 3AN-18-00001RA

HEARING REPLY BRIEF

CERTIFICATE OF TYPEFACE

Patrick W. Munson, of Boyd, Chandler, Falconer & Munson, LLP, certifies that this Hearing Brief is printed in Times New Roman typeface 13 font.

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Appellant Dodge offers this consolidated reply to the hearing briefs submitted by the Attorney General and Intervenor LeBon. The combined arguments address the following questions raised by the parties' hearing briefs:

1) Whether the court may consider evidence not presented to the Director;

2) Whether the registration residency presumption can be rebutted by evidence other than "impossibility" or a written statement from the voter herself;

3) Whether a registered voter who fills out a PFD application should be disenfranchised because he provided a mailing address on a PFD form that does not request a "residential address" or "voting address" or expressly inform the person that the information provided will be used to change his existing registration;

4) Whether the court may consider "voter intent" when a voter has failed to even minimally comply with statutory requirements for marking a ballot;

5) Whether an X over a filled in oval is sufficient intent to cross out or "x out" a vote for that candidate, thereby cancelling it; and

6) Whether an absentee ballot can be counted when the identifiers do not confirm the voter's identity.

The Division and LeBon have not (yet) contested the factual accuracy of residency evidence proffered by Dodge. Rather, they urge the court to ignore this evidence and to apply an unrealistic and incorrect standard to questions of voter residency. The Division's position that only evidence available to the director can be used to answer this question is contrary to the Court's obligation of ensuring fidelity to Alaska's election laws through a recount appeal. Under the rebuttable presumption approach articulated in Dodge's hearing brief, the court can---and should---weigh evidence presented and reach its own conclusion on whether Odom and Knapp lawfully cast votes for the HD1 race.

On the other hand, the Division has offered evidence (despite its protests that new evidence cannot be considered on appeal) supporting its contentions regarding

Beconovich's residency and qualifications to vote. The court must therefore hear additional evidence on this voter prior to making a decision.

1. The Division's position that the Court considers only evidence that was available to the Director is not supported by Alaska election law.

The Division advocates for a completely deferential standard of review under the guise of an evidentiary limitation. It urges the court to consider only the evidence that was available to the Director when making her decision because any other information "cannot have informed the Director's vote-counting decisions, and thus cannot reasonably provide a basis for overturning those decisions in a recount appeal."[1] This standard has never been applied in Alaska.[2]

The question is not—and has never been in an election appeal—whether the Director made the right decision based on what she knew at the time. Not a single recount appeal case even approximately stands for that proposition. Rather, in every case, the Court has asked whether a vote should have been counted, not whether the director had substantial evidence to support a decision or made a reasonable determination based on the evidence available at the time.[3] The question is whether a vote should have been counted. This is a tremendous distinction. The Division's request to limit evidence to that which the Director could have considered prior to the recount is a

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[1] Division of Election's Hearing Brief (hereafter, "Division's Br."), p. 6.

[2] *See, e.g., Willis v. Thomas*, 600 P.2d 1079, 1082 (Alaska 1979); *Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987).

[3] *Nageak v. Mallot*, 426 P.3d 930, 940 (Alaska 2018).

backdoor effort to apply a completely deferential standard of review and to water down the inquiry on the ultimate question of whether votes were lawful and should be counted.

That effort must be denied because it is not supported by Alaska statute or court precedent. Alaska Statute 15.20.510 does not say the appeal will be decided "on the record." The legislature is perfectly capable of including such a limitation when it intends to do so.[4] It did not do so here, and no such limitation can be assumed given the broad mandate and sweeping authority granted to the court in AS 15.20.510 and the court's consistent focus on the ultimate question of whether a vote was legally cast.[5]

There are sound legal and policy reasons supporting the legislature's decision not to limit an AS 15.20.510 proceeding in the way the Division recommends. The Division argues that presenting evidence in this appeal that was not presented to the Director would be no different than presenting new evidence to the supreme court when it is hearing an appeal of a trial verdict.[6] But this is not an appeal from a trial court. As the court well knows, the cornerstone of a trial court proceeding is that it provides litigants

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[4] *See, e.g.,* AS 29.45.210(d) ("An appellant or the assessor may appeal a determination of the board of equalization to the superior court as provided by rules of court applicable to appeals from the decisions of administrative agencies. Appeals are heard on the record established at the hearing before the board of equalization.")

[5] The statute states the court will hear the case "sitting without a jury to determine whether the director "properly determined" whether to count various ballots and parts of ballots. "Properly determined" means deciding whether the Director's decision was ultimately right or wrong---not whether she had some justification for making it at the time. The legislature's rejection of a jury requirement is notable because it would be completely unnecessary if an AS 15.20.510 appeal were intended to be as similar to a typical administrative appeal as the Division contends.

[6] Division's Br., p. 7.

ample opportunity to conduct discovery, present evidence, and interrogate the evidence presented by other parties, all in front a neutral arbiter.

None of that occurred here. This is no fault of the Division; it's simply a reality of the process provided for challenging votes in the midst of an ongoing election and ballot counting effort. There simply isn't time or opportunity to carry out a process that affords both sides time to marshal evidence and present their case. Nor is doing so necessary to determining the outcome of probably 99% of elections.

The legislature recognized this by providing what can only be described as a perfunctory administrative process for resolving voter challenges during an election. As a practical matter, the act of filing a challenge becomes little more than an opportunity to flag an issue for additional review later if it is determined to be relevant to the outcome of an election. The Division/boards take a brief opportunity to double check their own records, but the review is necessarily brief and one-sided because the challenger cannot force the board to stop counting while he goes out to gather evidence. Instead, the Division supplies all the information to the board (or in this case, the Director),[7] to make a decision. The challenge is closer to a formal preservation of an issue for later review rather than a substantive opportunity to present evidence. The impromptu nature of the challenge review is hardly rectified at the recount stage by the Director re-considering her own decision; the same person evaluating the same universe of one-sided information does not afford a level of due process that satisfies even basic standards for an

[7] *See* Appellant's Hearing Brief (hereafter, "Apt.'s Br."), pp 6-7.

administrative adjudication, much less a superior court trial, or would justify deference from a reviewing court.[8]

This is exactly why an AS 15.20.510 "appeal" is not limited to the record, and more closely resembles an administrative trial *de novo.* The rules and statutes governing such administrative appeals explicitly contemplate presentation of evidence that was not available or presented to the agency precisely because administrative agencies lack courts' expertise in affording parties due process, managing litigation, and admitting and weighing evidence.[9] Trial *de novo* and supplementation of the record are the necessary judicial backstops to overcome these very shortcomings.[10] In the very limited postures that trial *de novo* is not available in administrative appeals, it is stated clearly in statute.[11]

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[8] *State v. Lundgren Pacific Const. Co., Inc.*, 603 P. 2d 889, 895 (Alaska 1979) (quoting *Roberts v. United States*, 357 F.2d 938 (Ct. Cl. 1966)) ("[N]o man can review his own decision with the requisite degree of quasi-judicial detachment and impartiality.").

[9] *See* Alaska R. App. P. 609(b); AS 44.62.570(d).

[10] *See generally Lundgren Pacific Const. Co., Inc.*, 603 P. 2d 889. As explained in Appellant's Hearing Brief, the Supreme Court's practice of providing a full hearing in election appeals is consistent with the authority of any court hearing an administrative appeal to grant a trial *de novo* in whole or part if, in its discretion, doing so is necessary to ensure due process. Alaska R. App. P. 609(b)(1). Although Rule 609 speaks of authority of the superior court, it would be absurd to conclude that the supreme court, when hearing an administrative appeal, has less authority than a superior court performing that role. Again, Appellate Rule 607 specifies that "[t]hese rules supersede all other procedural methods specified in Alaska statutes for appeals from administrative agencies to the courts of Alaska."

[11] *See, e.g.*, AS 29.45.210(d) ("Appeals are heard on the record established at the hearing before the board of equalization.").

Given the limited proceeding below,[12] it can hardly be reasonably questioned that due process requires the court to accept and consider all the evidence that is relevant to the ultimate question of whether voters were eligible to cast ballots, not merely review whether the Director made a reasonable decision based on what she knew at the time. The Supreme Court has consistently allowed the parties a real opportunity to present evidence directly to a special master after the election when the process can be done deliberately, fairly, and consistent with due process.

The Division offers an excerpt of a sentence from *Finkelstein v. Stout* to support its position that the court should only consider information that was available to the Director.[13] *Finkelstein* stands for nothing of the sort. Rather, the master declined to reject the ballots because the objection to the voters in question was not even raised until after the recount was concluded. It was therefore not timely, and the voters' ballots had already been comingled with unquestioned ballots.[14]

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[12] When, for example, does the Division contend a hearing even occurred?

[13] Division's Br., n.17. (*citing Finkelstein v. Stout*, 774 P. 2d 786, 791 (Alaska 1989) (abrogated in part on other grounds).

[14] The court's ruling was therefore also a practical one considering its understandable reluctance to cancel ballots that cannot be identified because they have already been commingled. The problem was not that the director had not reviewed the evidence Finkelstein proffered, but that Finkelstein's failure to timely raise the objection both failed to preserve the issue and substantively interfered with the court's ability to perform its obligation under AS 15.20.510 because the ballots were comingled. The comingling, which presumably would not have occurred had the objection been timely raised, prejudiced the Court's ability to determine which precise ballots were cast in accordance with Alaska election laws. Here, presenting evidence that was not available to the director would not cause similar problems. Unlike in *Finkelstein*, the ballots can be just as easily included or excluded, as appropriate, as they could have by the director.

This case is therefore distinct from *Finkelstein* because Dodge raised the issue of these three voters' residency exactly when and how she was required to do so by statute: at the district level absentee and questioned ballot review boards.[15] She did not waive them at the recount, and in fact presented additional evidence to further support two of them.[16] *Finkelstein* requires nothing more. The Division and LeBon do not argue that Dodge's objections to the Division's determinations on these voters were untimely. The voters' ballots are not commingled, and there is no obstacle to the court's ability to adjust the vote count after determining whether the ballots were lawfully cast.[17]

Although a different posture, *Oberlatz* remains more instructive.[18] Five voters' qualifications were challenged on the allegation that they did not reside in the Lake and Peninsula Borough. After reviewing the voters' addresses in public records and hearing testimony about their residencies, the canvassing committee sustained challenges to all

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[15] Apt.'s Br., pp. 4-5; AS 15.20.203(c) and .207(c).

[16] Apt.'s Br., p. 7.

[17] The remainder of *Finkelstein* works firmly against the Division's position that this "appeal" focuses on the director's decision. *Finkelstein* shows the Court's general indifference to the Director's decisions. A special master was appointed in that case specifically to review evidence submitted in connection with all the challenges presented by the parties. After receiving the master's report, the Supreme Court methodically listed each set of ballot challenges, the Special Master's decision regarding same, and its own conclusion regarding the evidence or legal question at issue in each challenge. The Court did not even mention the Director's decisions except to note whether the Master's decision was consistent or conflicted with it, or if the decision illuminated a fact in the case (for example, that the votes had been commingled as a result of the director's decision to count them). So while *Finkelstein* and the other cases contain references to the "Director's decision," these references hardly show the kind of deference and limited review that the Division urges the court to apply in this case.

[18] *Lake & Peninsula Borough v. Oberlatz*, 329 P. 3d 214 (Alaska 2014).

five voters' ballots. The voters appealed that decision to the borough assembly (which denied the appeals) and then to superior court. On appeal, the superior court conducted a trial *de novo* under Appellate Rule 609(b)(1) to resolve the residency question.[19]

Given the abbreviated nature of the prior proceedings, the lack of a complete evidentiary record, or any formal opportunity to present or challenge evidence prior to the recount, that is the correct way to proceed in this case as well. The court should reject the Division's effort to artificially narrow the scope of review and the evidence available to the court to make an informed decision.

2. The Division's absolutist position on the residency presumption is unreasonable and contrary to law.

Before analyzing the presumption proposed by the Division, it is useful to set our lawyer caps aside for a moment and think about what information is before the court. On one hand, we have two people (one in California and the other who has not been definitively located) requesting absentee ballots while claiming to live at a car repair shop and an industrial mall suite in Fairbanks. On the other are affidavits, property records, business records and pictures suggesting that nobody resides in these buildings. It's not definitive proof, but certainly makes any reasonable person question if these voters do, in fact, live there. And perhaps they do, but given the state of the evidence before us (even without considering the Odom affidavit), is it not fair to make somebody, anybody, provide the slightest bit of evidence corroborating the voters' claims to live in these

[19] *Id.*

buildings before we grant one of the most important rights our state affords its residents?[20]

Putting our lawyer caps back on, the Division argues that the court should nevertheless count the votes cast by two individuals who have claimed to live in HD1 because it is "not impossible for the voter[s] to reside at the registered address" and the voters have not "notified the Division of Elections of a change of address in writing before the election."[21] This is not the standard to exercise the right to vote in Alaska. Alaska's Constitution, Art. V, §1 states that "a voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote." The Division must be able to verify that qualification before accepting an absentee ballot.[22] In most cases, it is perfectly reasonable for the Division to rely on the voter's self-proclaimed address to do so. But where it is presented with evidence that casts doubt

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[20] To be perfectly clear, Appellant is not suggesting that either voter deliberately mislead the Division in order to be allowed to vote in HD1. Appellant understands that people commonly provide mailing addresses or misunderstand the requirement to register at a "residential address". And either one of those things may have happened here. But if that is what happened, the voters must provide some other indication of residence within HD1 in order to vote there. Appellant also understands the Division puts a great deal of faith in various documents' attestations that the information is provided "under penalty of perjury". However, that attestation does not overcome actual facts. Nor would such an attestation make any difference to a person who simply misunderstands what address they are required to provide. And as a practical matter, the division well knows that people provide incorrect addresses all the time notwithstanding the certification of accuracy. Its blind devotion and reliance upon that certification to the exclusion of all objective evidence is simply not reasonable.

[21] Division's Br., pp. 21-22.

[22] 6 AAC 25.580(1).

on the reasonableness of that reliance, the Division may not simply insist that the vote will count because it is "not impossible" for the voter to reside where he or she claims. Alaska's constitution requires a person *be* "a thirty day resident of the election district"; not that she claim to be.

Dodge does not argue that a car repair shop or office cannot be a residence. As the other parties are fond of pointing out, even a park bench can qualify as a residence. But pointing out that someone could live in a building or a park bench misses the point: residency is not established by listing an address on a form; it is established by having a "place in which the person's habitation is fixed, and to which, whenever absent, the person has the intention to return."[23]

While they may vary, *some* indicia of habitation must exist if a person wishes to claim a location as a residence. Dyer—a homeless plaintiff in the case cited by the Alaska Supreme Court for the proposition that a park bench may serve as a residence—testified that he sleeps at one of several park benches most nights and considers the park his "home base".[24] Appellant firmly agrees this would qualify a similarly situated person as a resident of HD1 under AS 15.05.020 because the conclusion that the person had a fixed place of habitation within the District would be grounded in some fact ("indicia of residency" in the Supreme Court's words) other than a voter registration form. Appellant

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[23] AS 15.05.020(2).

[24] *Pitts v. Black*, 608 F. Supp. 696, 698 (S.D.N.Y. 1984) (*cited at Fischer v. Stout*, 741 P.2d 217, 221 (Alaska 1987)).

merely wants the same standard applied to a person who claims to live somewhere that the evidence shows is an implausible residence.

This reasonable approach is precisely what other states have done when voters are shown to have registered at a business address.[25] It's also similar to what the superior court, after granting trial *de novo* in an administrative appeal of a canvassing board's determination several voters residency, did in *Oberlatz*.

Dodge is not suggesting that ballots from voters who register at an address that appears to be a business should be categorically rejected, or even that the Division should inquire into every registration request it receives to make sure the registrant resides there. For efficiency purposes, the Division may very well decide to keep presuming that street addresses are a voter's residence. But where, as here, a challenge is properly filed and the weight of the evidence suggests it is implausible that the voter lives where he or she claims, it is not unreasonable to require that voter to present *some* additional indicia of residency to verify his or her claimed address. Right now, no such evidence exists as to Odom and Knapp. All Dodge asks is for the court to give the evidence a fair look.

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[25] *Barrett v. Parks*, 180 S.W.2d 665, 667-668 (Missouri 1944) (where saloon owner had room and bed above saloon and often slept there, business could also be place of residence); *McClendon v. Bel*, 797 So.2d 700 (La. App. 1 Cir. 2000) (voter can register with business address when he maintained an apartment above business premises); *see also Teel v. Darnell,* 2008 WL 474185 (US District Court, E.D. Tennessee Feb. 20, 2008) (upholding statute requiring voters to demonstrate that they actually live at business address when a business address is used for voter registration); *Clark v. McCann*, 196 Cal.Rptr.3d 547, 553 (Cal.App.4th 2015) (excluding ballot of voter who registered with business address); *Benca v. Martin*, 500 S.W.3d 742 (Arkansas 2016) (use of business addresses on petition causes 2087 signatures to be disqualified).

The Division's remaining arguments attempt to bolster its exclusive reliance on the presumption of residency by explaining that AS 15.05.020(8) allows them to assume a voter's registration has not changed unless the voter notifies them otherwise.[26] Appellant acknowledged in her opening brief that this presumption of continuity is precisely AS 15.05.020(8)'s purpose. But this assumes the voter ever lived at the residence in the first place. Subsection 8 should not be interpreted as a carte blanche authorization for the Division to blindly accept any address a person provides.

The Court, and the statute itself, demonstrate that the presumption codified in AS 15.05.020(8) is an "administrative efficiency", not an absolute.[27] The Division concedes that the presumption may be negated by circumstances other than the voter notifying the director in writing of a change of voting residence. It further concedes that the presumption is rebutted when the address cannot possibly be the person's residence, but insists those are the only circumstances that can rebut the presumption.[28] But the plain language of the statute shows this absolutist position is wrong. A person loses residency (and their qualifications to vote) "if the person votes in another state's election".[29] Yet

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[26] Division's Br., pp. 19-21.

[27] *Cissna v. Stout*, 931 P. 2d 363, 368-69 (Alaska 1996) ("Taken to its logical extreme, Cissna's interpretation allows someone who lived in a district for two months, but moved from that district to a permanent residence in another district twenty years ago, to vote in the election district in which he or she resided two decades earlier. Such an interpretation contradicts Article V, section 1 of the Alaska Constitution and would render meaningless the residency requirements set forth in AS 15.05.010.").

[28] Division's Br., p. 20; *Fischer,* 741 P. 2d at 221.

[29] AS 15.05.020(6).

the act of voting, in itself, neither provides notice to the Director nor evidences physical impossibility regarding a person's residence. Under the Division's position, however, even voting in another state would not be sufficient to rebut the residency presumption: A person could vote in another state and in Alaska as long as the person does not notify the director in writing of a change of voting residence or list an address where it is "physically impossible" for her to live. The Division's interpretation of AS 15.05.020(8) would therefore render meaningless AS 15.05.020(6) (at least), and therefore cannot be correct.[30]

Nor does the presumption justify the Division's apparent willingness to accept that unqualified people will sometimes cast ballots that are counted because election officials do not know the voters are not qualified.[31] Citing *Cissna*, the Division notes that the imperfect registration process means that "[a]s a practical matter, certain persons who move to a new district, but do not reregister or notify the election officials in writing of a change in residency, may have their votes counted in the district of their prior residency simply because election officials do not know that their residency has changed."[32] The Division unfortunately mistakes the Court's observation—perhaps lamentation—of a practical limitation as an election norm. The Court was simply acknowledging the fact that voters will not always provide the information election workers need to determine

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[30] There would also be little point codifying the fact that voting elsewhere terminates residency if it were impossible for a court to consider evidence of the act after the fact.

[31] Division's Br., p. 21.

[32] *Cissna*, 931 P. 2d at 369.

eligibility; it was not offering a justification to ignore evidence that is presented. Quite the opposite: the court also noted a voter risks having a ballot partially rejected if she fails to appraise the Division of her true residence and votes outside her lawful district.[33] This warning only make sense if evidence of a person's actual residency—not just her reported one—determines whether a ballot was lawfully cast. That the facts might go undiscovered until the ballot review process does not mean that, when discovered, those facts should be ignored.

In short, the Court's observation that the Division will never have perfect information is not a reason to decline to address specific, identified imperfections presented by a candidate. If that does not happen during the chaotic and imperfect election process itself, the court's role on appeal is to provide an orderly (if still hurried) process by which any remaining challenges can be adjudicated directly by the Supreme Court as required by AS 15.20.510.

This approach is entirely consistent with the principles all sides espouse on the importance of counting every lawful vote. Appellant is not urging some overly technical reading of election statutes in order to disqualify otherwise qualified voters. She is asking the court to apply one of the only election laws that is so fundamental that it is enshrined in the constitution itself: that a person be a resident of Alaska and of the district in which they wish to vote. Residency—eligibility to vote—is not a technicality like

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[33] *Id.*

having multiple witnesses observe an absentee ballot signature.[34] Thus, contrary to Intervenor's assertion, a person who has voted illegally—in violation of the constitution—does not have an interest in having her vote counted. Rather, the voters of HD1 have a paramount interest in having their election decided by people who live there.

3. The Director lacked authority to change Beconovich's registered voting address absent his request, which he did not submit.

There are two basic problems with the Division's position on Mr. Beconovich. First, the Division's interpretation of the PFD statutes is unreasonable and has the effect of disenfranchising him. The second is that he never unambiguously expressed any intent to register outside of District 1.

The Division claims that the PFD voter registration law "provides that eligible Alaskans will automatically be registered to vote (or have their registrations updated) when they apply for their PFDs."[35] The cited statutes (AS 15.07.050(a)(5) and 15.07.070(i), cross-referencing subsections (j) – (m)) do indeed provide for new registrations, but nowhere does the law instruct or authorize the Division to change an already-registered voter's registered address. Absent such statutory authorization, or a direct request from Beconovich (see, *e.g.*, AS 15.07.090(c) and AS 15.05.020(8), both allowing the Director to change voter residency records if asked to do so by the voter), the Director lacked authority to change his place of voting residence.

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[34] *Finkelstein,* 774 P. 2d at 791.

[35] Division's Br., p. 27.

The Division justifies making these unilateral changes by claiming that Beconovich agreed to them when he filed for his PFD.[36] It claims the PFD application and Certification form required him to provide his "residential address" and certify that he understood this address would be used to "register him to vote."[37] But the 2018 PFD application and Certification form does not, in fact, ask for an applicant's "residential address." Rather, it requests a "physical address" and a "mailing address".[38] Neither of these is by definition synonymous with a voter's "residence", and the form does not clearly inform voters that either address will be treated as such. Nor does it inform applicants that the form will be used to change their existing voter registration information if they are already registered.

"In the absence of a clear expression of intent to change a legal residence the residence cannot be considered to have been changed."[39] Beconovich is expected to testify that he did not intend to change his residence and the form the Division relies on to claim otherwise is sufficiently unclear that it cannot serve as a clear expression of intent to change his residence. He is also expected to testify that he did not receive a so-

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[36] *Id.* at p. 28.

[37] *Id.*

[38] See Attachment 3 (cited at page 27, note 78 of the Division's Brief). This attachment includes several PFD forms, none of which refer to a "voting address" or ask for a person's "residence" as that term is used in AS 15.05.020.

[39] *Finkelstein*, 774 P. 2d at 788; *Fischer*, 741 P.2d at 224 ("A voter's franchise will not be withdrawn unless the voter's intent to have it withdrawn is clearly and unambiguously expressed. In this case we cannot say that Mr. Wallace's intent was unambiguous. His vote should have been counted.").

called opt out card. This testimony puts into controversy whether the notice was, in fact, mailed,[40] and would rebut the presumption of delivery created by the mailbox rule even if the Division can prove that it was, in fact, mailed.[41] A screenshot of a list of names that were apparently "sent to the printer" so that opt out cards could be printed and mailed is not evidence that the card was actually mailed, much less that Beconovich received it, as the Division claims.[42] Nor does silence qualify as a clear expression of intent under the circumstances even if he had received it.[43]

Under these circumstances, it is fundamentally inappropriate to disenfranchise Beconovich because he never knowingly and intentionally requested the Division change his registered address and the Division lacks authority to do so absent his express consent. Moreover, the evidence will demonstrate that Beconovich is, and was for the 30 days prior to the election, a resident of HD1. As such, the presumption of residency created by the Division's records is rebutted, and the court may count his lawfully cast ballot.

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[40] *Hartsfield v. Carolina Casualty Insurance Co.*, 411 P. 2d 396 (Alaska 1966) (denial of receipt rebuts a *prima facie* case of mailing and creates an issue of fact for resolution by the trier of fact).

[41] *Schikore v. Bankamerica Supplemental Retirement*, 269 F. 3d 956, 961 (9th Cir. 2001).

[42] Division's Br., p. 28.

[43] AS 15.07.070(k) does not authorize the Director to unilaterally change a voter's registration information; it only authorizes the Director to communicate with the voter about various processes, including sending an opt out notice. But again, this does not actually authorize the Director to take any action other than communicate with the voter.

4. The Court does not have discretion to excuse a voter's failure to minimally comply with statutory ballot marking requirements.

Dodge concurs with the Division's conclusion that the two ballots with no markings inside the "oval provided" on the ballot cannot be counted.[44] The Court is expressly prohibited from creating any "exceptions" to this rule. Because the ballot markings are neither substantially inside the oval provided, nor touching the oval at all, the court does not have discretion to consider whether the voter intended to vote for a particular candidate. These ballots were properly excluded.

5. If the court cannot affirmatively conclude that the X is intended to be a vote for LeBon, then it does not count as a mark.

In connection with the ballot the Division rejected as an overvote, Appellant's Hearing Brief relies upon the Court's precedent that, under AS 15.15.360(a)(1) and .360(a)(5), a marking on a ballot is not a "mark" unless it can be affirmatively concluded that the marking shows intent to vote for a candidate.[45] The Division argues that the X on the ballot in question is ambiguous. If that is true, the X on this ballot does not clearly indicate an intent to vote for LeBon, subsection (a)(5) is not satisfied, the X does not constitute a "mark", and the ballot is not overvoted.

That said, Appellant maintains that the X sufficiently expresses this voter's intent to cancel the mark for LeBon that the uncancelled oval should be counted as a vote for

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[44] Division's Br., p. 13; AS 15.15.360(a)(5).

[45] *Edgmon v. State,* 152 P. 3d 1154 , 1156-1157 (Alaska 2007) ("Reading [AS 15.15.360(a)(1) and .360(a)(5)] together, an overvote occurs if the voter has voted for two candidates with "marks" as defined by subsection .360(a)(1) that clearly indicate the voter's intent to vote for more than one candidate.").

Dodge. Appellant also notes that this ballot is identified as an absentee ballot.[46] Thus, Intervenor's argument that the ballot should not be counted because the proper remedy for a mismarked ballot is to request a new ballot is misplaced.[47] An absentee voter cannot practically request a substitute ballot and is left to her own devise to figure out how to indicate her preferred candidate. The marking of an X though the oval of the candidate the person does not want to vote for is an established and recognized practice for cancelling a vote.

6. An absentee ballot cannot be counted when the identifiers do not confirm the voter's identity.

A process for verification is pointless if it is set aside when the verification fails, which is what intervenors ask of the Court. Alaska Statute 15.20.081(f) affirmatively requires the director to confirm the identify of an absentee voter (in addition to the qualifications and registration requirements). This heighted verification requirement can be satisfied numerous ways including, for example, by the voter providing a copy of a driver's license or other state-issued ID.[48] A voter who provides verification information that does not actually verify the person's identity fails to satisfy this basic requirement. That the person provides information corresponding to a spouse is irrelevant – for quite some time now the law has recognized that a wife has a legal existence separate from that

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[46] *See* STATE 000001, 000002 (using Division-provided absentee ballot challenge forms) and Apt.'s Br., p. 33 n.69.

[47] Intervenor's Hearing Brief, p. 14 (*citing* STATE 000005).

[48] AS 15.20.081(f)(1).

of her husband. Undersigned counsel cannot purchase alcohol at Brown Jug using his wife's state-issued driver's license. Ensuring electoral integrity is at least as important as preventing unlawful sales of alcohol.

LeBon tries to evade this basic conclusion by arguing that post-election voter identification statutes and regulations are directory rather than mandatory. But this is not an instance where adherence to the law would "permit a wholesale disfranchisement of qualified electors through no fault of their own".[49] No election official can be blamed for the voters' failure to provide verifiable identifiers.

Finkelstein shows that providing correct identifiers is mandatory and the failure to do so requires the ballots be excluded. The Court carefully dissected the mandatory/directory dichotomy in the context of absentee ballots deficiencies.[50] One of the questions before the court was whether to count absentee ballots that did not fully comply with AS 15.20.081(d) (not subsection (f), as here). In short, 32 absentee ballots were not properly witnessed. The Court, upon concluding that AS 15.20.081(d) is mandatory not directory, overruled the master by ordering the 32 ballots *not* be counted, observing that AS 15.20.081(d) "is designed to insure that the vote cast is that of the elector and that it was cast in circumstances free from coercion. Moreover, this requirement protects the integrity of the ballot process itself. Noncompliance with the

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[49] *Carr v. Thomas*, 586 P. 2d 622, 626 (Alaska 1978).

[50] *Finkelstein,* 774 P. 2d at 788-792.

requirements of AS 15.20.081(d) risks the frustration of these fundamental principles."[51] AS 15.20.081(f) may not guard against coercion, but otherwise serves the same vital purpose as subsection (d): (1) it is designed to insure that the vote cast is that of the elector, (2) this requirement protects the integrity of the ballot process itself, and (3) noncompliance with the requirements of AS 15.20.081(f) risks the frustration of these fundamental principles. Furthermore, the voters' failure to comply with AS 15.20.081(f) was not the result of any action or omission by election officials. Even if it had been, identity verification requirements for absentee voting are mandatory, and the failure to satisfy them renders the votes unlawful. These ballots may therefore not be counted.

CONCLUSION

Ms. Dodge's proposed standards, scope of review, and evidentiary requirements are not only consistent with statute and Supreme Court precedent, they provide a reasonable and workable method for the Division and candidates to efficiently make it through the election process while nevertheless preserving issues for review by the court *if necessary*. Her position with respect to each ballot marking and the absentee ballots cast with incorrect identifiers is likewise consistent with Alaska law, and common sense. The master should therefore disqualify the ballots for Odom and Knapp, count the ballot by Beconovich and the purported "overvote", and disqualify all other ballots.

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[51] *Id.* at 791 ("The fact that the ballots in the present case were not cast in the presence of two non-official witnesses is due in part to the failure of the voter instructions on the voter oath form to state explicitly the requirement that the vote be cast in the presence of the witnesses.").

Dated this 19th day of December 2018.

BOYD, CHANDLER, FALCONER
& MUNSON, LLP
Co-counsel for Appellant

By: _____
For: Patrick W. Munson
AK Bar No. 1205019

REEVES AMODIO, LLC
Co-counsel for Appellant

By: _____
For: Thomas P. Amodio
AK Bar No. 8511142

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018,
a true and accurate copy of the foregoing was
sent via first class, regular U.S. Mail, and email to:

LAURA FOX
MARGARET PATON-WALSH
KATHERINE DEMAREST
Office of the Attorney General
1031 W 4th Ave., Ste. 200
Anchorage, AK 99501

STACEY C. STONE
Holmes Weddle & Barcott, P.C.
701 W. 8th Avenue, Suite 700
Anchorage, AK 99501

BY: _____

A courtesy copy of the forgoing was sent to
the chambers of the Hon. Eric A. Aarseth,
sitting as master in the above-captioned matter.

Alaska Permanent Fund Dividend

2018 Adult Application A

(Adults 18 years and older or emancipated on date of application)

THIS FORM WAS DISTRIBUTED AFTER THE APPLICATION DEADLINE BY JDIO

04001

SOCIAL SECURITY NUMBER ___-___-___

Failure to provide a SSN will subject your dividend to 28% backup withholding by the IRS.

DATE OF BIRTH ___ ___ ___ (Month / Day / Year)

○ MALE ○ FEMALE

FIRST NAME | M.I. | LAST NAME

MAILING ADDRESS | APT # | CITY | STATE | ZIP CODE

STREET OR PHYSICAL ADDRESS (REQUIRED BY LAW, NO PO BOXES, CHECK HERE ☐ IF SAME AS MAILING) | | | |

DAYTIME TELEPHONE ( ) - | E-MAIL ADDRESS (TO RECEIVE DIVISION COMMUNICATIONS)

By default, you will receive an email with instructions to access your 1099-MISC

CHECK HERE FOR PAPER 1099 ☐

Shade circles like this: ● Not like this: ☒

	YES	NO
1. Did you receive a 2017 dividend? *Answer YES even if your dividend was assigned or garnisheed. If NO,* ***complete Question 11*** *on the back of this form AND attach a* ***completed Adult Supplemental Schedule.***	○	○
2. Are you physically present in Alaska today? Answer NO if you are completing this application or mailing this application from some place other than within Alaska. *If NO,* ***complete Question 8*** *on the back of this form and attach* ***Parts B & C of the Adult Supplemental Schedule.***	○	○

ABSENCES - Failure to disclose reportable absences constitutes fraud.

	YES	NO
3. A. During 2017, were you gone from Alaska more than 90 days total? *If YES,* ***complete Question 8*** *on the back of this form AND attach* ***Parts B & C of the Adult Supplemental Schedule.***	○	○
B. During 2017, were you gone from Alaska more than 180 days total? *If YES,* ***complete Questions 8 through 10*** *on the back of this form AND attach* ***Parts B & C of the Adult Supplemental Schedule.***	○	○
4. Are you a United States citizen? *If U.S. National non-naturalized choose NO and* ***complete Question 13.*** *If NO,* ***complete Questions 12 and 13*** *on the back of this form.*	○	○
5. At any time since December 31, 2016, were you on active duty as a member of the **U.S. Armed Forces** or activated as a member of the U.S. Guard or Reserve? *Civilians, non-activated Alaska National Guard members and Alaska Reservists, answer NO.*	○	○
6. Do you want to place 50% of your dividend in the UA College Savings Plan?	○	○
7. A. Do you want your dividend deposited directly into your bank account? *If YES, deposit into:*	○	○

B. ○ Same account as last year **OR**

C. ○ New account listed below

Financial Institution Name

Financial Institution Routing Number

Account Number

Account Type (Select one)

○ Checking

○ Savings

List two adult Alaska residents who can verify your residency

Full Name

Mailing Address

City, State, Zip Code | Daytime Phone #

Full Name

Mailing Address

City, State, Zip Code | Daytime Phone #

Read the Following Statements and Sign Below

NOTE: "Date of Application" means the date on which an application for a dividend is timely filed or delivered per 15 AAC 23.993 (b)(1)&(2).

I certify that on the date of application:

- I am now and intend to remain an Alaska resident indefinitely.
- I have not claimed residency in another state, territory, or country.
- I was an Alaska resident for all of 2017.
- I was physically present in the state of Alaska for at least 72 consecutive hours in 2016 or 2017.

I understand that if what I say is not true, it is a criminal offense and if I am convicted, in addition to any criminal penalties:

- I will lose this and all future dividends.
- I will be required to pay back all dividends I have been paid.

I understand that if I am a United States citizen and otherwise eligible to vote*:

- I will be automatically registered to vote at the residential address provided on this application.
- I will have the option to decline to be registered to vote by replying to an official letter I receive in the mail from Alaska's Division of Elections.

* Any questions regarding the automatic voter registration should be directed to the Division of Elections at (907) 465-4611

I understand that if I deliberately misrepresent or recklessly disregard a fact, I am liable for civil penalties:

- I could lose this dividend and my next five dividends.
- I may have to pay a fine of up to $3,000.

Release of Information: I authorize the release of confidential records to the Alaska Department of Revenue necessary to verify my eligibility for the Permanent Fund Dividend, including but not limited to confidential records from financial, private, and education institutions; state, federal, or other public agencies, including but not limited to Internal Revenue Service, Social Security Administration, and the Alaska DHSS, Division of Public Assistance and Alaska Office of Children's Services; any other state or country, including but not limited to state and local taxes, employment, education, or public assistance benefits. I understand that this information may be used in administrative and/or criminal proceedings. I agree that a copy of this authorization is as valid as the original.

I certify that the information I am supplying on and with this form is true and correct.

Your Signature | Date

By submitting this application with or without signature I am consenting to registration with the U.S. Selective Service System, if so required by law.

Your application must be received by the PFD Division or postmarked by March 31, 2018

NAME (First, MI, Last)

THIS FORM WAS DISTRIBUTED AFTER THE APPLICATION DEADLINE BY JDIO

04002

Read Each Question Carefully.

Answer Question 8 if you answered NO to Question 2 or YES to Questions 3A or 3B.

8. If you left Alaska before January 1, 2017, enter the date you actually departed. List all dates you were absent from Alaska in 2017 through the date of this application. If you are still absent, leave the end date blank. For each type of absence, write the absence reason code in the space provided and list the dates on separate lines. All absence reason codes are explained below. If you had more absences than the number of lines provided below, list on an attachment.

Code (A-R)	Absence Begin Date Month - Day - Year	Absence End Date Month - Day - Year	Why were you absent?

Absence Codes

A. Accompanied an **eligible Alaska resident** as the resident's spouse or disabled dependent. Complete Question 11.

B. Enrolled and attended school as a full-time student receiving postsecondary education (beyond grade 12). *Download the Education Verification form at www.pfd.alaska.gov. See Q for secondary education.*

C. Served on active duty as a member of the U.S. Armed Forces. Attach a copy of your orders.

D. Received continuous medical treatment under a licensed physician's care. *Download the Medical Treatment Verification form at www.pfd.alaska.gov.*

E. Served as a member of Alaska's congressional delegation or staff.

F. Served as a volunteer in the federal Peace Corps program. Attach proof.

G. Trained or competed as a member of the U.S. Olympic team. Attach proof.

H. As a requirement of employment by the State of Alaska. Attach proof.

I. Vacationed.

J. Sought employment or was employed for a reason other than B, C, E, H or Q. Attach explanation.

K. Other reasons, including business. Attach explanation.

L. Cared for a parent, spouse, sibling, child, or stepchild with a critical life-threatening illness that required the ill individual to leave Alaska for treatment.

M. Settled the estate of a deceased parent, spouse, sibling, child, or stepchild.

N. Provided care for a terminally ill family member. *Download the Physician's Statement for Terminally Ill Care form at www.pfd.alaska.gov.*

P. Employed aboard a vessel of the U.S. Merchant Marine.

Q. Enrolled and attended school as a full-time student receiving secondary education (grades 7 through 12). *Download the Education Verification form at www.pfd.alaska.gov. See B for postsecondary education.*

R. Participated for educational purposes in a student fellowship sponsored by the United States Department of Education or by the United States Department of State. Attach proof.

Answer Questions 9 and 10 if you answered YES to 3B.

9. Have you ever lived in Alaska as a resident for at least 180 days? *If YES, list the dates of that most recent period before the first absence listed in Question 8.* YES ○ NO ○

From (Month-Day-Year) Through (Month-Day-Year)

10. Were you in Alaska for at least 72 consecutive hours during 2016 or 2017? YES ○ NO ○

If YES, when were you most recently in Alaska?

2016 ○ 2017 ○ *Attach documentation showing you were in Alaska.*

Answer Question 11 if you answered NO to Question 1.

11. *If married, provide spouse information. Your spouse must file a separate application if applying.*

First Name M.I. Last Name

Spouse's Social Security Number

Spouse's Date of Birth (Month-Day-Year)

Answer Questions 12 & 13 if you answered NO to Question 4.

12. What is your alien registration number?

A- EXPIRATION DATE (mm/dd/yyyy) / /

13. What was your legal immigration status on December 31, 2016?

○ Resident ○ Asylee

○ Refugee ○ U.S. National (non-naturalized)

○ VISA VISA TYPE EXPIRATION DATE (mm/dd/yyyy) / /

If this is the first time you are applying for a dividend, attach a copy of the front and back of your visa or alien registration card.

Veterans Information

Note: Providing this information is voluntary. By participating in this program we will release your name, address, branch and dates of service to the Dept. of Military and Veterans Affairs, who will release it to veterans service organizations. These organizations are not required to keep your information confidential.

Service branch? Army ○ Air Force ○ Coast Guard ○ Marines ○ Alaska Territorial Guard ○ Navy ○

Dates of service? _____

04403

For PFD Division Use Only
PFD ALN: 20180

Alaska Department of Revenue
Permanent Fund Dividend Division

2018 Adult Certification Form

Printed Name		Daytime Telephone Number
Social Security Number	Date of Birth	Message Telephone Number
Mailing Address		Email Address
City	State	Zip Code

Read the following statements carefully and sign below. **Do not change anything.** If you do, we may deny your application.

NOTE: "Date of application" means the date on which an application for a dividend is timely filed or delivered per 15 AAC 23.993 (b) (1) & (2).

I certify that on the date of application:
- I was and intended to remain an Alaska resident indefinitely.
- I did not claim residency in another state, territory, or country.
- I was an Alaska resident for all of 2017.
- I was physically present in the state of Alaska for at least 72 consecutive hours in 2016 or 2017.
- If an application was filed on my behalf, the information reported on the application is true and accurate.

I understand that if what I say is not true, it is a criminal offense and if I am convicted, in addition to any criminal penalties:
- I will lose this dividend and all future dividends.
- I will be required to pay back all dividends that I have been paid.

I understand that if I am a United States citizen and otherwise eligible to vote*:
- I will be automatically registered to vote at the residential address provided on this application.
- I will have the option to decline to be registered to vote by replying to an official letter I receive in the mail from Alaska's Division of Elections.

*Any questions regarding the automatic voter registration should be directed to the Division of Elections at (907) 465-4611.

I understand that if I deliberately misrepresent or recklessly disregard a fact, I am liable for civil penalities:
- I could lose this dividend and my next five dividends.
- I may have to pay a fine of up to $3,000.

By submitting this application, I am consenting to registration with the U.S. Selective Service System, if so required by law.

Release of Information: I authorize the release of confidential records to the Alaska Department of Revenue necessary to verify my eligibility for the Permanent Fund Dividend, including but not limited to confidential records from financial, private, and education institutions; state, federal, or other public agencies, including but not limited to Internal Revenue Service, Social Security Administration, and the Alaska DHSS, Division of Public Assistance and Alaska Office of Children's Services; any other state or country, including but not limited to state and local taxes, employment, education, or public assistance benefits. I understand that this information may be used in administrative and/or criminal proceedings. I agree that a copy of this authorization is as valid as the original.

I certify that the information supplied on and with my application was true and correct.

Your Signature	Date

04414

Alaska Department of Revenue
Permanent Fund Dividend Division

Address Change Form

Use this form to change your address with the Permanent Fund Dividend (PFD) Division. The PFD Division will apply this address change to current year records and any other prior year records that have not been paid or closed. Attach a letter if you want this address change applied differently. You must be an adult (18 or older) or emancipated to change an address. **All sections required. Requests with incomplete or incorrect information will not be processed.**

Whose address are you changing? Include your name if changing your own address.

First Name	MI	Last Name	Last four digits SSN	Date of Birth (MM/DD/YY)	*ALN - Division Use Only*
First Name	MI	Last Name	Last four digits SSN	Date of Birth (MM/DD/YY)	*ALN - Division Use Only*
First Name	MI	Last Name	Last four digits SSN	Date of Birth (MM/DD/YY)	*ALN - Division Use Only*
First Name	MI	Last Name	Last four digits SSN	Date of Birth (MM/DD/YY)	*ALN - Division Use Only*
First Name	MI	Last Name	Last four digits SSN	Date of Birth (MM/DD/YY)	*ALN - Division Use Only*

Provide NEW MAILING address

Street/PO Box	Apt #		
City	State	Zip Code	
Country (if not USA)	Postal Code (if not USA)		

Provide NEW PHYSICAL address

Street	Apt #		
City	State	Zip Code	
Country (if not USA)	Postal Code (if not USA)		

Provide OLD MAILING address

Provide OLD PHYSICAL address

For security purposes, the information that is currently on the record is required. If unsure of the address currently on the record, provide identification at one of PFD's offices or have this Address Change notarized. See back of form.

Street/PO Box	Apt #		
City	State	Zip Code	
Country (if not USA)	Postal Code (if not USA)		

Street	Apt #		
City	State	Zip Code	
Country (if not USA)	Postal Code (if not USA)		

I certify that I am authorized to change the address of the person(s) listed above. **If applicant is a child, the adult who sponsored the application must sign. If signing on behalf of another adult, provide proof of legal authority to sign on their behalf. Unauthorized requests will not be processed.**

SIGNATURE IS REQUIRED FOR ALL ADULTS 18 AND OVER	*Adult Signature*	Date	Daytime Telephone Number
	Printed name of the person who signed	Social Security Number	Date of Birth
	Adult Signature	Date	Daytime Telephone Number
	Printed name of the person who signed	Social Security Number	Date of Birth

Phone number	Email Address

Send this completed form to: Permanent Fund Dividend Division, PO Box 110462, Juneau, AK 99811-0462
Phone (907) 465-2326, Fax (907) 465-3470

04414

14815

The information that is currently on the Permanent Fund Dividend record is required. If you do not know the current address information and are unable to provide picture identification at one of PFD's offices, have your signature witnessed by a Notary Public below.

Notary

State of _____

_____, being by me duly sworn, personally appeared before me and
Requestor's Name

signed this document. _____
Requestor's Signature

Subscribed and sworn to before me by _____ this _____ day of
Name

_____, 20____.

Notary Seal

_____
Notary Public

My commission expires: _____

Alaska Postmasters may provide notary requirements

PFD Representative

_____ appeared before me with picture identification.
Requestor's Name

_____ _____
Signature of PFD Representative *Date*

_____
Printed name of PFD Representative