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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

APPELLANT'S OPENING BRIEF AND OBJECTIONS TO MASTER'S FINDINGS

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AS 15.05.010. Voter Qualification.

A person may vote at any election who

(1) is a citizen of the United States;

(2) is 18 years of age or older;

(3) has been a resident of the state and of the house district in which the person seeks to vote for at least 30 days just before the election; and

(4) has registered before the election as required under AS 15.07 and is not registered to vote in another jurisdiction.

AS 15.05.020. Rules For Determining Residence of Voter.

For the purpose of determining residence for voting, the place of residence is governed by the following rules:

(1) A person may not be considered to have gained a residence solely by reason of presence nor may a person lose it solely by reason of absence while in the civil or military service of this state or of the United States or of absence because of marriage to a person engaged in the civil or military service of this state or the United States, while a student at an institution of learning, while in an institution or asylum at public expense, while confined in public prison, while engaged in the navigation of waters of this state or the United States or of the high seas, while residing upon an Indian or military reservation, or while residing in the Alaska Pioneers' Home or the Alaska Veterans' Home.

(2) The residence of a person is that place in which the person's habitation is fixed, and to which, whenever absent, the person has the intention to return. If a person resides in one place, but does business in another, the former is the person's place of residence. Temporary work sites do not constitute a dwelling place.

(3) A change of residence is made only by the act of removal joined with the intent to remain in another place. There can only be one residence.

(4) A person does not lose residence if the person leaves home and goes to another country, state, or place in this state for temporary purposes only and with the intent of returning.

(5) A person does not gain residence in any place to which the person comes without the present intention to establish a permanent dwelling at that place.

(6) A person loses residence in this state if the person votes in another state's election, either in person or by absentee ballot, and will not be eligible to vote in this state until again qualifying under AS 15.05.010 .

(7) The term of residence is computed by including the day on which the person's residence begins and excluding the day of election.

(8) The address of a voter as it appears on the official voter registration record is presumptive evidence of the person's voting residence. This presumption is negated only if the voter notifies the director in writing of a change of voting residence.

AS 15.07.050 Manner of registration; party affiliation.

(a) Registration may be made
(1) in person before a registration official or through a voter registration agency;

(2) by another individual on behalf of the voter if the voter has executed a written general power of attorney or a written special power of attorney authorizing that other individual to register the voter;

(3) by mail;

(4) by facsimile transmission, scanning, or another method of electronic transmission that the director approves; or

(5) by completing a permanent fund dividend application under AS 43.23.015.

(b) Except as provided in (c) of this section, only the voter or the individual authorized by the voter in a written power of attorney under (a) of this section may mark the voters choice of party affiliation on the voter registration application form.

(c) A person may supply a voter registration application form with a political party or group affiliation indicated to a voter only if the voter is already registered as affiliated with the political party or group indicated.

AS 15.07.090 Voting after change of name; reregistration; amendment or transfer of

registration.

(a) A voter whose name is changed by marriage or court order may vote under the previous name, but a voter who desires to use a new name shall vote a questioned ballot.

(b) A voter shall reregister if the voters registration is cancelled as provided in AS 15.07.130. The reregistration is effective for the next election that occurs at least 30 days after the date of reregistration.

(c) The director shall transfer the registration of a voter from one precinct to another within a house district when requested by the voter. The request shall be made 30 or more days before the election day. The director shall transfer the registration of a voter from one house district to another when requested by the voter. The voter must reside in the new house district for at least 30 days in order to vote.

(d) A person who claims to be a registered voter, but for whom no evidence of registration in the precinct can be found, shall be granted the right to vote in the same manner as that of a questioned voter and the ballot shall be treated in the same manner. The ballot shall be considered to be a questioned ballot and shall be so designated. The director or the directors representative shall determine whether the voter is registered in the house district before counting the ballot. A voter who has failed to obtain a transfer as provided in (c) of this section shall vote a questioned ballot in the precinct in which the voter resides.

AS 15.15.360. Rules For Counting Ballots.

(a) The election board shall count ballots according to the following rules:

(1) A voter may mark a ballot only by filling in, making "X" marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate, proposition, or question that the voter desires to designate.

(2) A failure to properly mark a ballot as to one or more candidates does not itself invalidate the entire ballot.

(3) If a voter marks fewer names than there are persons to be elected to the office, a vote shall be counted for each candidate properly marked.

(4) If a voter marks more names than there are persons to be elected to the office, the votes for candidates for that office may not be counted.

(5) The mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

(6) Improper marks on the ballot may not be counted and do not invalidate marks for candidates properly made.

(7) An erasure or correction invalidates only that section of the ballot in which it appears.

(8) A vote marked for the candidate for President or Vice-President of the United States is considered and counted as a vote for the election of the presidential electors.

(9) Write-in votes are not invalidated by writing in the name of a candidate whose name is printed on the ballot unless the election board determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot.

(10) In order to vote for a write-in candidate, the voter must write in the candidate's name in the space provided and fill in the oval opposite the candidate's name in accordance with (1) of this subsection.

(11) A vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.

(12) If the write-in vote is for governor and lieutenant governor, the vote shall be counted if the oval is filled in and the names, as they appear on the write-in declaration of candidacy, of the candidates for governor and lieutenant governor or the last names of the candidates for governor and lieutenant governor, or the name, as it appears on the write-in declaration of candidacy, of the candidate for governor or the last name of the candidate for governor is written in the space provided.

(b) The rules set out in this section are mandatory and there are no exceptions to them. A ballot may not be counted unless marked in compliance with these rules.

(c) [Repealed, Sec. 24 ch 113 SLA 2003].

AS 15.20.510. Provision For Appeal to Courts.

A candidate or any person who requested a recount who has reason to believe an error has been made in the recount (1) involving any question or proposition or the validity of any ballot may appeal to the superior court in accordance with applicable court rules governing appeals in civil matters, and (2) involving candidates for the legislature or Congress or the office of governor and lieutenant governor may appeal to the supreme court in accordance with rules as may be adopted by the court. Appeal shall be filed

within five days of the completion of the recount. Upon order of the court, the director shall furnish the record of the recount taken, including all ballots, registers, and other election material and papers pertaining to the election contest. The appeal shall be heard by the court sitting without a jury. The inquiry in the appeal shall extend to the questions whether or not the director has properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate or division on the question or proposition the vote should be attributed. The court shall enter judgment either setting aside, modifying, or affirming the action of the director on recount.

I. ISSUES PRESENTED

1. Whether a person who does not reside in the district should have had his vote rejected instead of counted in the race for the voters' representative in that district.

2. Whether it is sufficient for a candidate to establish that a voter is very unlikely to live at an address (such as a commercial address) in the district to rebut the presumption that a voter resides at her address in the Division's records.

3. Whether a qualified voter who has been properly registered in the district where he resides for more than 10 years should be disenfranchised solely because he filed an application for a Permanent Fund Dividend listing a physical address different from his residential address.

4. Whether the vote of a voter who "X'ed" or crossed out his vote for LeBon, and left the vote for Dodge untouched, should have been counted for Dodge.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Appellant Kathryn Dodge relies upon and incorporates herein the Statement of Facts and Statement of the Case which she presented in the Hearing Brief to the master appointed in this case.[1]

III. STANDARD OF REVIEW

An AS 15.20.510 appeal requires the Court to independently determine whether votes were cast in accordance with Alaska law.[2] The Court applies its independent

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[1] *See* Appellant's Hearing Brief at 1-8, a copy of which is attached for the Court's convenience.

judgment when interpreting statutes,[3] but in an appeal like this one, may rely upon the special master to resolve factual disputes by accepting and "review[ing] the evidence presented regarding the validity of each of the challenged ballots."[4]

We are not aware of any case in which the Supreme Court has deferred to the Division of Election's conclusion on issues of residency or ballot markings. This is likely because an AS 15.20.510 appeal is very different from typical administrative appeal for at least two reasons: (1) the speed and nature of the ballot review process is fundamentally unlike a typical administrative proceeding that allows full presentation of evidence and generates a record that can be reviewed and relied upon on appeal;[5] and (2)

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2 *Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987) (*citing Willis v. Thomas*, 600 P.2d 1079, 1082 (Alaska 1979)) ("Our obligation under AS 15.20.510 is to determine whether a vote was cast in compliance with the requirements of Alaska's election law.").

3 *Edgmon v. State*, 152 P.3d 1154, 1156-57 (Alaska 2007) (applying independent judgment to ballot markings and purported overvotes); *Lake & Peninsula Borough v. Oberlatz*, 329 P.3d 214, 221 (Alaska 2014).

4 *Willis*, 600 P.2d at 1082. Like several election appeals involving a special master, *Willis* is technically a hybrid election case in which the challenger both sued the Division under the election contest statute (AS 15.20.540) and appealed under subsection .510. *Id.* at 1081. The Supreme Court consolidated the two proceedings, appointing a superior court judge "as special master to hear evidence and arguments in the case." *Id.* The master later concluded (and the Court agreed) that all the issues in the case were properly considered under the election appeal statute that applies to this case. *Id.* at 1082. The Court also agreed that it was appropriate for the master to hear and review evidence in that capacity to resolve factual disputes. Although never explicitly stated, the Court generally deferred to the master's factual conclusions, but applied its own judgment to issues of law.

5 AS 15.20.510's instruction that an appeal be "heard by the court sitting without a jury" tacitly acknowledges that the court will need to resolve fact questions and dispenses with the need to have a jury to do so. Presumably the legislature would have directed the court to hear the case "on the record" or something similar rather than referring to a jury here if it intended for the court to rely exclusively on an administrative record prepared by the Division.

the ultimate determination about voter qualifications and ballot markings are legal questions that are so closely tied to fundamental and constitutional rights that the Court must make the ultimate decision based on all the relevant evidence, not defer to an administrative decisionmaker or rely on an artificially closed universe of information.

These unique problems explain the Court's flexible and holistic approach to election appeals and illustrate why the standard of review outlined above is appropriate. In the unique and expedited context of an AS 15.20.510 appeal, the Supreme Court has consistently relied upon the superior court—by appointment as a special master in an election appeal[6] or by using the record developed in a parallel election contest[7]—to ensure that (1) a neutral third party weighs and sifts all the available evidence to resolve disputed facts; [8] and (2) a complete record of all the information relevant to that determination is compiled and presented to the Court for a final determination on the ultimate question of whether a ballot was lawfully cast.[9] But it has ultimately reached its

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6 *Willis*, 600 P. 2d at 1081; *Finkelstein v. Stout*, 774 P. 2d 786 (Alaska 1989) (partially overruled on other grounds).

7 *Nageak v. Mallot*, 426 P.3d 930, 939 (Alaska 2018) ("In ruling on this recount appeal we have considered the record as presented by the parties, which includes all records and transcripts from the superior court trial on the election contest complaint.").

8 *Willis*, 600 P.2d at 1082 ("In his capacity as special master, he then reviewed the evidence presented regarding the validity of each of the challenged ballots.").

9 Oftentimes, the superior court judge and special master are one and the same because, for example, one of the candidates files a direct election contest lawsuit in superior court while also filing an appeal pursuant to AS 15.20.510. Other times, a candidate files only one action, but raises some issues that must be considered under the election contest statute and other issues that must be considered under the election appeal statute. In such cases, the Supreme Court appoints the superior court judge to simultaneously serve as special master, or simply treats the evidence presented in the election contest as "fair game" for the appeal. *See, supra*, notes 16 and 17.

own conclusions regarding the import of that evidence and the application of voting laws to the unique facts of each case.

IV. ARGUMENT

This recount appeal primarily presents two important related issues about who gets to choose the candidate to represent them in the Alaska State House. First, where it is established that a voter is unlikely to reside at a commercial address listed on her registration form, that should be sufficient to rebut the presumption of residency based on Division of Election (the "Division") records. Moreover, where it is established by demonstrable proof, such as an affidavit from the voter himself, that he does not live in the district, surely that person cannot vote to choose the representative for that district. Second, a voter who is a resident of the district, and who had been properly registered in the district for more than a decade, should have his vote counted despite having filed an application for a Permanent Fund Dividend ("PFD") that contains a physical address different from his voter residency address.

The Alaska Constitution and statutes require that, for a vote to be counted, a voter must be a resident of the applicable district for 30 days, and must have registered with the Division of Elections at least 30 days before the election.

In this case, the Division of Elections erroneously counted two votes cast by unqualified voters and rejected one vote by a qualified voter. It was established that one voter (Odom) did not (and does not currently) reside in the district. For a second voter

(Knapp), sufficient evidence was presented to rebut the presumption that she resided in the district. The Division nevertheless counted their votes.

Finally, it was established that another voter (Beconovich) resides in the district, had been properly registered in the district for more than a decade, but when the voter filed for a PFD, the Division changed his voter residency (without his knowledge or approval) based on his PFD application form. The Division nevertheless rejected his vote. All three decisions should be reversed.

A. Voter Residency: Odom and Knapp ballots.

1. Dodge was not required to bring an election contest suit to determine whether specific ballots should be counted.

A recount appeal under AS 15.20.510 is the appropriate vehicle to consider whether specific ballots such as Odom's and Knapp's were improperly counted because they were not residents of House District 1 ("HD1") at the time of the election, or for 30 days before the election.

a. Prior case law of this Court establishes that disputes concerning the eligibility of a voter or ballot are properly addressed in a recount appeal; this case is no different.

It is well established under Alaska case law that a recount appeal is an appropriate vehicle for determining if specific ballots were properly counted or rejected. The *Nageak* Court explained the difference between a recount appeal and an election contest.[10] Quoting *Willis v. Thomas,* the Court explained:

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[10] *Nageak*, 426 P.3d 930. *Nageak* involved both an election contest and a recount appeal.

> In an election contest where no fraud, corruption, or ineligibility of a [candidate] is alleged, the evidence presented must demonstrate the existence of malconduct sufficient to change the results of the election...In contrast, the inquiry in a recount appeal is whether specific votes or classes of votes were properly counted or rejected. The concept of malconduct does not enter into the question....[11]

The *Nageak* Court further explained:

> A recount appeal may necessarily involve going beyond the four corners of the ballot 'to ensure that a vote was cast in compliance with the requirements of Alaska's election laws.' But this inquiry is in service of the end question whether the vote should have been counted and not whether election officials committed malconduct sufficient to change the results of the election.[12]

Accordingly, under well-established case law, an election contest is appropriate only where the challenger is alleging fraud, corruption, or misconduct of election officials. Dodge does not claim that the Division of Elections committed fraud or similar misconduct here. To the contrary, Dodge has asserted that the Division incorrectly and improperly counted two ballots (Odom, Knapp) because the voters do not appear to be residents of HD1, and improperly rejected one ballot (Beconovich) even though the voter resides in HD1.

The Division's position here (erroneously followed by the master)—that the issues in this case should have been brought as an election contest—would undo *Nageak* and other well-established precedent of this Court. Adopting the Division's position risks turning every ballot dispute into an election contest instead of a recount appeal because it

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11 *Nageak*, 426 P.3d at 940, quoting *Willis v. Thomas*, 600 P.2d at 1081.

12 *Id.* (footnote omitted), quoting *Willis*, 600 P.2d at 1082.

equates any disagreement with the Division's decisions with an allegation of fraud, malconduct, or corruption.

2. A recount appeal is not limited to re-evaluating only evidence provided to the Director prior to the recount.

Plainly, the parties disagree whether all the evidence must be provided before a recount in order for this Court to consider it. Here, the special master expressly found that this legal question is determinative as to one voter: if the Odom affidavit is excluded, the master determined that his residence was uncertain. But if the affidavit is considered, the master determined he was not eligible to vote in HD1.[13]

Thus, this Court must determine whether its role under AS 15.20.510 is (1) simply to re-evaluate evidence presented to the Division before the recount, or (2) to consider evidence presented at the master's hearing *after* the recount to determine whether a voter whose ballot was timely challenged (before the recount) was eligible to vote.[14]

The appropriate standard to apply and the evidence to consider in a recount appeal (which in this case are closely related) are questions of law to which the Supreme Court applies its independent judgment "adopting the rule of law most persuasive in light of precedent, reason, and policy."[15]

This Court has never held that its authority is limited to reviewing whether the Division's decisions were reasonable or correct based on information that was available

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13 *See* master's Report ("Report") at 12-13.

14 To counsel's knowledge, this Court has never expressly answered this question.

15 *Nageak*, 426 P.3d at 940. As the Court noted there: "A recount appeal reviewing the Division's determination is under our direct appellate jurisdiction. We exercise independent judgment when interpreting statutes which do not implicate an agency's special expertise or determination of fundamental policies."

to the Director at the time of the recount. And no statute expressly contains such a limitation. The master cited no law in support of his recommendation that the court is limited to considering "only information in front of the Director at the time of the recount" when considering whether to count an absentee ballot or not.[16] *Finkelstein* does not support such a sweeping conclusion because there the Court was expressly dealing with "objections" (*i.e.*, challenges) to voters that were deemed not timely because they were not even raised until after the recount.[17] That is not this case; here it is undisputed that the voters in question were timely challenged.[18]

The master's recommended decision to nevertheless exclude determinative evidence is at odds with this Court's interpretation of its own broad authority and the scope of its review espoused in *Fischer v. Stout*.[19] There, the Court was asked to decide whether the Director had authority to establish a deadline for submitting challenges against specific voters. This Court considered its broad "obligation under AS 15.20.510 [] to determine whether a vote was cast in compliance with the requirements of Alaska's election law," which it determined could "not be discharged by a limited review of the Director's specific determinations, but must extend to a review of all ballots questioned on any basis."[20] It therefore declined to give any effect to the Director's deadline for challenges: "While imposition of the Director's deadline may well have been wise and

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16 Report at 12.
17 *Finkelstein v. Stout*, 774 P. 2d at 791 (Alaska 1989).
18 Report at 10.
19 *Fischer v. Stout*, 741 P.2d 217.
20 *Fischer*, 741 P.2d at 220.

expeditious, streamlining the recount and providing faster certification, *we will not imply from the legislative and administrative silence an intent to provide the Director with the authority to arbitrarily limit the scope of a recount.*"[21] Because Alaska statutes and regulations are similarly silent on whether evidence may be submitted to this Court even if it was not yet available at the time of the recount, this Court should similarly decline to exclude evidence that was obtained and presented to the master—evidence which conclusively proves the voter was not qualified or eligible to cast a potentially decisive vote in the HD1 race.

Excluding evidence that is presented at the master's hearing is neither reasonable nor supported by policy concerns. The Odom affidavit was provided to the Division 15 days before the master's hearing; the Division's position is effectively that it should have been provided an additional 5 days sooner. The master seemingly agreed, implying that doing so was necessary in order to provide "finality and prompt decisions in state and local elections."[22]

But, even were one to accept that this goal is apparent in the statutory scheme (which is not at all self-evident), evaluating evidence that was produced at the hearing prior to this Court's final decision would not frustrate that goal. The Court will render its decision in this case, for example, at the exact same time whether or not it considers the Odom affidavit. Indeed, that was presumably the point of the master's hearing—to accept and consider evidence that was not available at the time of the election or recount. If the

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21 *Id.* (emphasis added); *see also id.* at 221-24.

22 Report at 13.

evidentiary universe were limited to the existing record, this Court simply could have reviewed it and made its decision based on that. The fact that it did not, and has not done so in prior recount appeals, shows the master was wrong to exclude evidence presented at the evidentiary hearing.

The need to hold an evidentiary hearing at all is a product of the incomplete process below. Just as courts routinely order an administrative trial *de novo* when it is necessary to provide the parties to an administrative proceeding a fair opportunity to be heard, this Court has complete authority to hold a hearing and consider evidence where doing so is necessary to provide due process. In this case, there was no administrative hearing below. The Director did not even indicate when or how the parties were entitled to submit information to her for consideration. It is fundamentally unfair and inconsistent with due process not to hold any hearing (or even invite parties to submit evidence at any time) and then declare that the only time to present evidence was before the recount.

The master's decision not to consider the Odom affidavit is also inconsistent with his treatment of all other evidence presented at the hearing. *The master did not exclude any evidence—except the Odom affidavit—for being untimely.* The master stated that he "considered the testimony, exhibits, and the record submitted to the Court."[23] The master expressly considered and relied upon: (1) Exhibit 1002;[24] (2) the testimony of Robert Beconovich,[25] Kathryn Dodge, and Elaine Lawrence;[26] and (3) even the other exhibits

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23 *Id.* at 2.
24 *Id.* at 9 (Example PFD forms).
25 *Id.*

presented by the Division in support of its actions concerning Beconovich.[27] Clearly, the Odom affidavit—a determinative piece of evidence regarding his eligibility to vote in HD1—should have been considered as well, inasmuch as it was produced well in advance of the evidentiary hearing and at the hearing itself.

Finally, the Odom affidavit is also not inadmissible hearsay, as the master concluded.[28] The Division has vociferously argued this appeal should be considered an administrative proceeding (and the master apparently agreed). Consequently, the Division cannot object to the consideration of evidence that might otherwise be excluded as hearsay because hearsay is admissible in an administrative proceeding unless it was inherently unreliable and/or would jeopardize the fairness of the proceedings.[29] No such finding can be made with respect to the Odom affidavit. To the contrary, the master implicitly found the opposite was true: he found that Odom's affidavit was "a notarized statement" and "a clear statement of intent by Odom that he is not a resident of House District 1."[30] In contrast, as the master noted, the applicable statute (AS 15.05.020)

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26 *Id.* at 10.

27 *See id.* at 8-10.

28 *Id.* at 2.

29 *Button v. Haines Borough*, 208 P.3d 194, 201 (Alaska 2009); *Calvert v. State, Dep't of Labor & Workforce Dev., Employment Sec. Div.*, 251 P.3d 990, 1004 (Alaska 2011). *See* AS 44.62.460.

30 Report at 13. No amount of cross-examination would overcome Odom's clear statement that he is not a resident of HD1. Nor, frankly, is it reasonable to require a challenger to produce such a witness in person given the limits of the court's jurisdiction over an out of state voter and the hurried timeline in this type of proceeding. Indeed, flexible rules relating to the admission of evidence in administrative proceedings militates in favor of accepting written evidence as well as oral evidence. *See, e.g.,* AS 23.30.135(a); 8 AAC 45.120(e) and (k).

merely requires "a written statement by the voter declaring an intent to establish his or her voting residence."[31] Given the significance of this evidence and the fact that it was supplied to the Division and intervenor well in advance of the hearing and the proceeding in this court, the Court should consider the Odom affidavit to determine whether his vote was lawful.

3. The master applied incorrect legal standards to determine whether Odom and Knapp were residents of HD1.

a. The master erred by finding that two voters were eligible because it was not "physically impossible" that they resided at the auto body shop and mini-mall/industrial park where they were registered.

The standard applied by the master has not been applied previously and it is simply impossible to meet. If that standard is adopted, no challenger could succeed because he or she could never establish that it is "impossible" to live in any physical address that has "walls" and "sufficient room for a person to live in."[32] This is not the legal standard for voting in Alaska—nor should it be.

To the contrary, a voter should be required to provide *some* indicia of residency if the voter's claimed residency is implausible or unreasonable. This standard means that if there is evidence fairly putting in question whether it is reasonable or plausible that a person lives in a particular place, the voter (or another interested party, such as a candidate) should be required to produce some indicia of residency to confirm that the person does indeed live where they say they do. This burden could be carried simply by

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31 *Id.*

32 Report at 11.

contacting the voter to re-affirm his claimed address, or the interested candidate or party may produce an affirming affidavit, a utility bill, lease, or the like. An "indicia of residency" doesn't have to be much; but where the issue of a person's legitimate residency is fairly put into question, it is reasonable to require a voter to provide *some* confirmation of a residence at a particular place.[33]

This standard leads to a fairly simple analysis, and one that is much more reasonable than the Division's (and master's) "physically impossible to reside" standard. A voter claims to live at a particular address when he or she registers to vote. That claim is presumed correct unless and until someone properly challenges it and provides evidence sufficient to raise a legitimate question about whether it is "unreasonable," "implausible," or "fraudulent" to believe the person lives at that address.[34] If the claimed address is fairly put into question by such evidence, the Division (or a person wanting the vote to be counted) must provide *some* evidence (other than the voter registration form)

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[33] This does not mean that the Director has a duty to investigate, as the master found (*see* Report at 11), though it is not unreasonable to expect the Director to make some inquiries under the circumstances here.

[34] *Lake & Peninsula Borough Assembly v. Oberlatz*, 329 P.3d at 222; see also AS 15.20.203(c) and .207(c) and 15.15.210 and 215, all providing procedures by which a person may challenge any voter's qualifications if the person has good reason to do so. None of these statutes provide procedures for determining whether a person is qualified, but they would be largely meaningless if there were no plausible way for a challenger to present evidence and prove that a voter was not qualified to vote, or if the Division's records were the only factor to be considered in determining whether a voter was qualified.

supporting the conclusion that the voter actually resides there.[35] If they do so, the vote should be counted; if they don't or can't, the vote should be rejected.

The master's erroneous standard would mean that it is *de facto* impossible to challenge a voter's residency, thus leaving the election process open to manipulation and error because, effectively, the Division will be required to accept any claim of residency by any person who is willing to fill out the voter registration form, or who uses a business address to do so even if they have no legal claim to reside at that location.

The master's statement that voter residency concerns are "for another time and place and for other divisions of the State...to investigate" is simply wrong.[36] The purpose of the challenge process is precisely to identify people who may not be qualified to vote, and to provide a process for determining whether they are. In other words, this is precisely the appropriate process, time and place to resolve these questions.

b. The master erred by requiring "direct evidence" that the person did not live at their claimed address to rebut the presumption of residency.

The master repeatedly requested "direct evidence" of the voters' residency, apparently believing that either the voter himself was required to testify that he did not live at his or her registered address, or—possibly—that someone else should testify that Odom and Knapp did not live where they claimed.[37] Neither requirement would be appropriate. The former requirement would be nearly impossible to satisfy because a

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35 This would also result in a recount process below that would allow these issues ot be decided in an orderly (if nonetheless hurried) fashion: the two interested parties would present their evidence to the Director to decide, rather than the Director conducting an investigation herself.

36 Report at 13.

37 *See id. at 12-13.*

party would almost never be able to successfully challenge a voter's qualifications, rendering the statutory challenge process meaningless.[38] The latter standard is similarly unworkable because every case would boil down to testimony of one person versus the sworn statement of the voter, which would actually seem *less* likely to rebut the presumption of residency than the objective evidence presented in this case.[39]

In sum, despite the absence of "direct" testimony, Dodge has provided sufficient evidence to rebut the presumption that Odom and Knapp were qualified to vote in HD1 because the evidence showed that neither voter resided at the address each had submitted as his residence.

c. Had the master considered all the evidence presented at the hearing, the master would have rejected Odom's vote, since he found as a matter of fact that Odom was not a resident of HD1.

The master found as a factual matter that Dr. Odom was not a resident of HD1,[40] meaning that Odom was not qualified to vote in HD1. The master nevertheless ruled Odom's ballot should be counted because Odom's affidavit, provided after the recount but well in advance of the master's hearing, was "beyond the scope of a recount appeal."[41] The master further concluded that the Division could not have known the truth

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[38] We note, however, that Odom did willingly provide such evidence, in the form of an affidavit, in this case even though he was ultimately not willing to testify. It is hard to imagine a challenger getting better, more conclusive evidence than this under the circumstances.

[39] As to voter Knapp, the master erroneously found that Knapp could live in New Mexico and also at the commercial address in Alaska. Report at 12. Alaska statutes provide that a person may have only one residence. AS 15.05.020(3).

[40] *See* Report at 12-13.

[41] *Id.* at 12.

about Odom's residency (or considered the affidavit proving it) at the time of the recount; thus, the master incorrectly declined to consider Odom's affidavit. Had he considered the affidavit, the master agreed that Dr. Odom would not have been eligible to vote in HD1.[42]

It is undisputed that Odom's affidavit demonstrates that he was not qualified to vote in HD1. Odom stated that his "only residential address" in Fairbanks since at least February 2018 was in House District 4, not House District 1.[43] Thus, Odom was not a resident of HD1 at the time of the election or for 30 days before, as required by law.[44]

Furthermore, the statute governing recount appeals, AS 15.20.510, does not require the court to exclude *determinative* evidence. Here, the master found that the affidavit established that Odom was not a resident of HD1, but refused to consider it. In enacting AS 15.20.510, the legislature did not include any such restriction, or indicate that expedience and finality should prevail over the constitutional issue of whether a voter was qualified to vote in the district. In fact, there are no express statutory limitations on the evidence the court should consider in a recount appeal.[45]

Whether the court or a master involved in a recount appeal may consider evidence that was not available until after the recount is an open question. Although the Division has cited *Finkelstein* as authority to the contrary, *Finkelstein* concerned untimely *objections*, not the timing of determinative evidence relating to those objections.[46] In

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42 *Id.* at 13.
43 Ex. 1001. His residential address in Fairbanks, 1319 Summit Drive, is in HD4.
44 See *id.*
45 *See* AS 15.20.510.
46 *Finkelstein v. Stout*, 774 P. 2d at 791.

contrast, here, all of Dodge's objections were timely raised, and additional evidence in support of them was provided as it was obtained. Frankly, the fact that Dodge obtained and presented this evidence just 29 days after the election is remarkable; the Division simply seems to believe she should have provided it within 24 days. That position is unreasonable, and prioritizes *being* right over *getting* it right. The Division had not indicated that there was a deadline to submit evidence, nor has this Court imposed one. In fact, it would appear to fly in the face of holding an evidentiary hearing such as the one held in this matter, if the parties would have to rely in any event on the record at the time of the recount.

Particularly where, as here, the evidence proves that the voter was not qualified to vote in HD1, the Court should allow and consider this important evidence establishing that Odom's vote should have been rejected.

B. Voter Registration: Beconovich ballot.

1. The master erroneously concluded that certain aspects of Beconovich's voter registration are outside the scope of a recount appeal.

Dodge objects to the master's conclusion that the circumstances by which Robert Beconovich's voting address was erroneously changed to a location outside House District 1 are beyond the scope of this appeal and should have been raised in an election contest, not a recount appeal.[47] That conclusion is erroneous because voter registration

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[47] Report at 9 ("It is not within this court's scope to determine whether there is any irregularity with the forms . . .") ("To the extent the Appellant is challenging the manner in which the relevant statutes were applied (i.e., the automatic voter registration per PFD application) any such challenge is outside the scope of this recount appeal." [Noting in footnote that this action is not an election contest].)

issues involve whether a particular ballot should be counted, not whether "malconduct, fraud, or corruption on the part of an election official" occurred.[48] The master's error regarding the scope of review results in a cascade of errors identified below.

The Court has previously found that similar registration issues are appropriately considered in a recount appeal.[49] In *Willis v. Thomas*, this Court upheld the decision of a master to count the votes of two voters who were not registered because the registrars failed to send their registration applications to the Division of Elections.[50] The *Willis* Court also considered whether to count the questioned ballots cast by a group of voters whose registrations had been purged from the Division's records pursuant to AS 15.07.130. "After reviewing the election records, voter registration materials, *and evidence presented by the parties in this case*, the special master concluded that 'these individuals were purged consistent with the statutory norms and the practice of the Division of Elections.'"[51] *Willis* thus shows, in two different contexts, that an AS 15.20.510 recount appeal is precisely the proper vehicle to adjudicate the propriety of the Division's actions in connection with voter registration, and that it is appropriate to consider evidence beyond the Division-provided appellate record to do so.

In *Fischer v. Stout*, the Court confirmed that conclusion, ruling in an election recount appeal that where an arguably confusing form might have caused the voter accidentally to cancel his registration, the cancellation should be given no effect and the

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48 AS 15.20.540.
49 *Willis*, 600 P. 2d at 1082.
50 *Willis*, 600 P.2d at 1087.
51 *Id.* at 1084 (emphasis added).

ballot should have been counted. The court ruled that it could not say that the voter's intent to de-register was "unambiguous," and therefore ordered the vote counted.[52]

The master in this case thus erred in concluding that the question of *why* Beconovich's registration did not accurately reflect his residency was beyond the scope of the recount appeal. *Willis* and *Fischer* show the Division's actions relating to registration or deregistration—whether failing to mail registrations, adherence to purge statutes, or preparing confusing registration materials—are squarely within the scope of this recount appeal.

2. Beconovich did not clearly and unambiguously express his intent to change his voter address.

Beconovich did not ask the Division to change his voter registration, and he could not legally have made such a request since he has at all relevant times been a resident of House District 1 ("HD1" or the "District"). To the contrary, Beconovich was understandably surprised when election officials at the precinct where he had voted for more than a decade told him he was no longer registered to vote there.

The Division argues that it changed Beconovich's registered voting residence because Beconovich requested the change when he filled out his PFD application. The master agreed, erroneously finding "that Beconovich registered himself for a district other than House District 1 thus limiting him to voting within that new district."[53] This conclusion is incorrect because it suggests Beconovich could have lawfully voted in

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52 *Fischer,* 741 P. 2d at 224.

53 Report at 9.

House District 2 (where his mailing address and office are located), which is not true since he did not reside there. The master reached this erroneous conclusion in large part because, as discussed above, he determined that matters such as confusing election materials and errors in registration records are beyond the scope of review. When considering all the information appropriate under the correct scope of review, it is clear that Beconovich's vote should be counted because he was at all times a resident of HD1 and would have been registered there but for ambiguous voter registration forms that he never saw or approved being submitted to the Division.

b. The Initiative was intended to enfranchise more voters, not disenfranchise voters who were already lawfully registered in the house district where they resided.

In 2016, amendments to Alaska's voter registration statutes were enacted by initiative. The amendments provided, in part, that persons who were not registered to vote with the Division automatically would be registered if they filed an application with the Department of Revenue ("DOR") for a permanent fund dividend ("PFD"). According to the findings and intent of those amendments, the people of Alaska found, among other things:

> (1) the cornerstone of American democracy is the right to vote;
> (2) the state should not introduce *needless bureaucratic requirements that make it more difficult for qualified citizens to exercise their right to vote*;
> (3) the State of Alaska currently requires individuals who wish to receive a permanent fund dividend to submit an annual application to the State;
> (4) PFD applicants *who also wish* to register to vote, or *to update their voter registration*, must submit information to the State a second time, using a different form;

(5) the State can relieve qualified voters who apply for a PFD from the burden of having to complete additional paperwork; and

(6) the State *can use* PFD-application data to ensure voter-registration data are current.

The Permanent Fund Dividend Automatic Voter Registration Initiative (the "Initiative") (emphasis added).[54] The Initiative made substantive changes to the voter registration statutes, AS 15.07.050 *et seq.*, so that a person who applied for a PFD also automatically would be registered to vote, unless they opted out. *See id.*

The Division's application of the law in this case, however, turns the Initiative on its head: rather than allowing a long-time voter to cast a ballot, the Division is using the bureaucratic requirements it created to disenfranchise a qualified voter, Robert Beconovich, even though he *already* was registered to vote. In fact, Beconovich had been registered in HD1 for at least a decade. Beconovich resides in HD1 and was properly registered there prior to 2017; to paraphrase the Initiative, Beconovich did not "wish...to update [his] voter registration...,"[55] since he was already properly registered where he resided. Beconovich merely wanted to apply for a PFD. The PFD form asked for his mailing address and for his "street or physical address."[56] On the PFD form, Beconovich provided the physical address of his office where he receives his mail, rather than of his apartment where he resided.

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54 A copy of the PFD Initiative is included as an attachment to this Brief.

55 *See* Initiative, Sec. 1. Notably, the Initiative's findings state that the Division *can* use the data to ensure voter registration data are current, not that it *must* use it.

56 Ex. 1002.

In sum, contrary to the findings that underlie the Initiative, the Division's misapplication of the Initiative law introduces "bureaucratic requirements" that unwittingly (and unbeknownst to the voter) make it "more difficult" for qualified, registered voters to vote in the district where they reside. At least that is certainly the case for Beconovich. It is therefore inappropriate to insist that he was not a qualified voter in HD1 in the face of overwhelming evidence that he never intended to change his registered address, was not aware that it had been changed, and could not lawfully have voted in the district where the Division (and the master) believe he should have voted—because he was not a resident of that district.

c. The PFD application is unclear as to whether voter registration applies to eligible applicants or only those who are not already registered to vote.

According to the PFD application form, an applicant 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."[57] Nowhere does the form inform a person who is *already registered* to vote that his existing registration will be changed or that he will need to reply to a notice in the mail to avoid having his registered address changed.[58]

The Division points to the PFD certification language—specifically, the only use of the words "residential address" on the entire application—to support its position that

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57 Emphasis added.

58 Carol Thompson, a Division official who testified at hearing, focused on an "opt-out notice" that may have been mailed to Beconovich. The way the notice is referred to on the PFD application, however, is very different from Thompson's discussion of it because the PFD application refers to new registrations, not changing existing registrations. *See* Ex. 1002. The master's report failed to note that Thompson had testified. *See* below.

the form provides adequate notice that an applicant's voting residence will be changed.[59] That language is as follows (in relevant part):

> **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.[60]

This language does not refer to already-registered voters—it explicitly states that a person "will be automatically registered to vote" unless they "decline to be registered to vote" by replying to a future mailing. A person like Beconovich, who was already registered to vote, could reasonably conclude that the automatic registration only applies to new voters---indeed, this would be the more logical reading since the opt-out provision does not refer to currently registered voters at all. That conclusion also conforms to the popular understanding that the ballot measure was intended to make it easier to vote by registering new voters, not changing the addresses of existing voters (much less disenfranchising them in the process).

In sum, as was true in *Fischer*, the PFD application form is unclear and ambiguous, and the result should be the same as in *Fischer*: "A voter's franchise will not be withdrawn unless the voter's intent to have it withdrawn is clearly and unambiguously

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59 *See* Ex. 1002, discussed below.

60 Ex. 1002.

expressed. In this case we cannot say that Mr. [Beconovich's] intent was unambiguous. His vote should have been counted."[61]

d. The PFD registration form does not ask for the person's voting residence.

Thompson, one of the Division officials responsible for implementing the PFD-Vote registration law, testified accurately that the PFD registration form does not ask the PFD applicant for a residential address.[62] Rather it requests a "physical address" and "mailing address"—neither of which is by definition synonymous with a person's voting residence. Thompson confirmed that the PFD application does not request a voting address. Nonetheless, the master erroneously concluded that "[t]he language on the form is plain and simple, and states that the residential address the applicant identifies will be used as the applicant's residence for voter registration."[63] But this is not correct: the PFD application form does not ask for a "residential address" or state that registered voter's *existing* address will automatically be changed.

Significantly, Beconovich never saw—and did not submit—R. 0010 or R. 0011, the documents the Division relied on as evidence that Beconovich requested his voter registration address be changed to 104 Kutter Rd., an address outside HD1. Thompson testified that the Division created these documents based on information it received from the Permanent Fund Division. Beconovich never previously saw these documents, never

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61 *See Fischer*, 742 P.2d at 224 (original language paraphrased).

62 Evidentiary Hearing. [Note: Appellant, having only obtained a CD of the hearing on December 27, 2018, she is unable to provide precise cites. Rather, the references to the hearing and evidence presented there are based on counsel's notes from the hearing.]

63 *Id.*

signed them or agreed to them, and did not even know they were ever generated until this appeal. Those forms therefore do not reflect his actual or intended "Alaska residence address where [he] claim[s] residency." This prompt appears on the form the Division created for its own *internal* records. It does not, however, appear on the forms Beconovich provided to the Permanent Fund Division.

Rather, the form Beconovich actually saw and agreed to was a different form that was created by the Permanent Fund Division, not the Division of Elections. The form Beconovich actually saw is Ex. 1002.[64] That form, in addition to numerous yes/no questions and fields to be filled out, contains 12 separate bolded or bullet-pointed statements to be affirmed by the PFD applicant, including the two quoted previously.[65] That form states that the person would be registered to vote "at the residential address provided on this application."[66] But the form does not contain any field asking for a residential address. The form contains a field for "STREET OR PHYSICAL ADDRESS (REQUIRED BY LAW, NO PO BOXES, CHECK HERE IF SAME AS MAILING)," but this is not the same as a residential address. The laws of this state, including this Court's decisions in election residency cases, routinely distinguish between a person's voting residence and other physical addresses—addresses that often include places where the person may, colloquially speaking, reside.[67] *Lake & Peninsula Borough v. Oberlatz* demonstrates just how important accuracy in this language is: Robert Gillam "lives in a

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64 Ex. 1002.

65 *See* page 22-23 hereof.

66 *Id.*

67 *E.g.*, AS 15.05.020(2).

house in Anchorage, where his business has an office, for over six months per year."[68] John Gillam lives in Switzerland.[69] Sonny Peterson "spends the winter months with his family at a home he owns in Anchorage."[70] Yet all these people have their voting residence in the L&P Borough.[71] These voters could easily have provided Anchorage or Zug when prompted for their "physical address" on their PFD applications—that would not make Anchorage or Zug their residential address for voting purposes.

Beconovich's residential address is 1214 20th Ave, # C. Although 104 Kutter Road is a physical address, it is not his residential address. The Permanent Fund Division asked for a "physical address" (without reference to voting district since that is irrelevant for PFD eligibility purposes) and Beconovich gave one. The Division alone decided to treat that address as his voting address. Its insistence that this obviously qualified voter must be disenfranchised as a result of an ambiguous form is the antithesis of the Court's admonishment that qualified electors should not be disqualified through no fault of their own.[72] Because it is undisputed that Beconovich was otherwise qualified to vote in HD1, his vote should be counted.

e. Beconovich's re-registration outside of District 1 would not have occurred but for the Division's erroneous application of the law.

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68 *Lake & Peninsula Borough v. Oberlatz*, 329 P. 3d 214, 218 (Alaska 2014)

69 *Id.*

70 *Id.*

71 *Id.* at 222.

72 Courts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and "(w)here any reasonable construction of the statute can be found which will avoid such a result, the courts should and will favor it." *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978).

Despite the changes made by the Initiative, the Division's registration laws are quite clear: "The director shall transfer the registration of a voter from one house district to another *when requested by the voter*."[73] In this case, of course, Beconovich made no such request to the Director, so the Director has no cause or authority to make such a change.[74] More importantly, Beconovich could not lawfully have made such a request: "The voter must *reside in the new house district* for at least 30 days in order to vote."[75] As noted above, Beconovich did not (and does not) reside in the new house district, HD2, where the Division reregistered him. Beconovich has at all times (for at least the past decade) resided in an apartment on 20th Avenue in HD1.[76]

Since Beconovich did not move to a new house district, and did not request that the Director change his registration, the Division's automatic reregistration of him should be voided, and Beconovich's questioned ballot should be counted in HD1, where he resides and has resided for the past decade.

f. The master's report fails to make findings and conclusions regarding the Division's failure to provide Beconovich an opt-out notice.

The master's report does not make findings and conclusions regarding the Division's failure to provide Beconovich with an opt-out notice because it erroneously concluded that Division forms (Elections or Permanent Fund) and the impacts of PFD-voter registration process on Beconovich are beyond the scope of a recount appeal.

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73 AS 15.07.090(c) (emphasis added), involving "...change of name; reregistration; amendment or transfer of registration."

74 Evidentiary Hearing.

75 AS 15.07.090(c) (emphasis added).

76 Evidentiary Hearing.

It is undisputed that Beconovich did not personally receive any opt-out notice. Thus, in his case, there is not even the possibility that such a card served to "cure" the Division's decision to change his voting address without his knowledge.

Equally important, even were one sent, it is far from obvious that simply sending an "opt out" card (and receiving no response) could or should, under this Court's precedent, serve as "a clear expression of intent to change legal residence."[77] *Perhaps* a notice allowing a voter to "opt-in" to change his residence address (assuming he had in fact moved out of the district where he had previously been registered) would satisfy that requirement. It would also be consistent with the voter registration statutes (such as AS 15.07.090(c)) and with the Initiative's secondary goal of obtaining proper, updated information for a voter. But that is not what the Division chose to do. Instead, the Division chose a different "bureaucratic requirement," one that suits its interests rather than the voter's.

Beconovich testified that he did not receive the notice.[78] He testified that his mailing address is his law office.[79] His receptionist preserves his mail for him when he does not receive it himself. Beconovich relies upon his receptionist for service of legal

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77 *Finkelstein*, 774 P.2d at 788.

78 *Id.* The Division itself did not even send opt-out notices—instead it contracted with a vendor for that service. Evidentiary Hearing. The vendor did not testify nor were any of the vendor's business records offered into evidence. Thompson merely testified that, from her review of the Division's records, Beconovich was one of numerous persons to whom the Division asked the vendor to send an opt-out notice. *Id.*

79 The master found Beconovich's testimony was admissible to show conformity with an established practice under Evid. R. 406.

documents on a regular basis. He testified that she would not have thrown out the notice had it been received.[80]

There being no evidence the notice was mailed or received, the Division failed to satisfy an essential part of the statutory regime,[81] rendering the Division's re-registration of Beconovich outside of District 1 nugatory. He cannot be disenfranchised based on the Division's error.

3. The master's report fails to identify all testifying witnesses.

The master's report states the court heard testimony from Kathryn Dodge, Elaine Lawrence, and Robert Beconovich.[82] The report entirely omitted witness Carol Thompson, a Division of Election employee who testified regarding aspects of the PFD-voter registration program.[83]

C. The master's recommendation to disqualify a ballot with an X through the apparent mistaken vote for LeBon is not consistent with Alaska law.

The master erroneously concluded that the ballot marked STATE 003 should be rejected or counted for LeBon. This conclusion is plainly inconsistent with *Edgmon v. State*, where the Court provided the following analytical roadmap to determine whether a ballot contains an overvote:

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80 Evidentiary Hearing. Further, the mailbox rule provides that proof of a letter's mailing creates a presumption that it was received. *See, e.g. Hartsfield v. Carolina Casualty Insurance Co.*, 411 P. 2d 396 (Alaska 1966). Testimony from the putative recipient that the letter was not received rebuts the presumption. *Id.*, 411 P. 2d at 400. But it does more than that: "denial of receipt rebuts a prima facie case of mailing." *Id.*

81 AS 15.07.070(i)(2).

82 Report at 2.

83 *See* discussion in Part B.2.d above.

> 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. Because a mark meeting the requirements of subsection .360(a)(1) cannot be counted unless the voter's intent is clear, we begin by analyzing whether the second mark on each overvoted ballot clearly indicated the voter's intent to vote for a second candidate.[84]

Later the Court re-affirmed what is in effect a presumption against counting the second mark as an over-vote: "The statute requires that before a mark is counted as a vote, it must comply with the requirements under subsection .360(a)(1) and clearly indicate voter intent as required by subsection .360(a)(5). These terms are mandatory and require strict compliance."[85]

Here, the evidence does not "clearly indicate" the voter intended to vote for two candidates in House District 1. In common usage, an "X" is used to cross out, cancel, or eradicate something. In ballot marking cases, an "X" is commonly interpreted as an intent to retract a mistakenly cast vote. The Alaska Supreme Court has previously relied upon a decision by the Maine Supreme Court in which a voter had placed an "X" next to two candidates' names but scribbled over one "X." The Maine Court specifically concluded, "Scribbling out, making an X, or making an asterisk over a marked vote indicator are all common methods used by voters to retract a cast vote."[86] In short, the Maine Supreme Court cited by the Alaska Court believed that an "X" signified an intent

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84 *Edgmon v. State*, 152 P.3d 1154, 1156-57 (Alaska 2007).

85 *Id.* at 1157.

86 *In re Primary Election Ballot Disputes 2004*, 857 A.2d at 503 (emphasis added).

to retract a vote, not cast a second one in the same race. That is the appropriate interpretation here.

To conclude otherwise (and to agree with the master's interpretation), the Court would have to believe that by placing an "X" over the LeBon oval, the voter "clearly intended" to cast a second vote for LeBon (in addition to the correctly filled out oval for Dodge). That is not a reasonable conclusion. The voter cast all his or her other votes by filling in the ovals next to a candidate's name; he or she did not use an "X" to cast any other votes.[87] The only oval he or she put an "X" over was the filled-in oval next to LeBon's name. Because the voter has demonstrated his or her ability and intent to cast a vote by filling in ovals in every other race, it is unreasonable to conclude that the "X" through the filled-in oval next to LeBon's name was intended to cast a vote for him.[88]

If and to the extent these marks are ambiguous, common sense suggests that the "X" was intended to indicate that the voter did not intend to cast a vote for LeBon.[89] The vote should therefore be counted for Dodge, but if the Court determines it is too

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87 *Edgmon*, 152 P.3d at 1158. ("A review of the entire ballot therefore suggests that the voter understood the rules and used a completely shaded oval—not a trace of an edge of the oval—to indicate a vote.")

88 *In re Primary Election Ballot Disputes 2004*, 857 A.2d at 504 ("Given the voter's demonstrated ability to comply with the instructions and fully darken ovals when voting, we cannot reasonably interpret this mark as anything other than a stray marking.").

89 The ballot was also apparently cast absentee, so it would have been unreasonable for the person to destroy the ballot and request a new one (as voters who make unintentional marks are instructed to do; STATE 5). *See* STATE 1 (absentee ballot challenge form). Ms. Dodge observed the ballot review and counting, and also believes the ballot was cast absentee.

ambiguous to decipher, then it cannot be counted for LeBon either because "only marks clearly indicating an intent to vote [can] be counted as votes" in Alaska.

D. Dodge does not object to the master's conclusions on all other issues.

Appellant does not object to the master's determinations that other ballots not addressed elsewhere in this Brief were properly counted or rejected[90] and that two ballots that do not have proper identifying information were properly rejected on that basis.[91] Appellant therefore incorporates by reference her arguments presented to the master regarding these issues as if set forth here in full.[92]

V. CONCLUSION

In this important case, Dodge has presented more than sufficient evidence to overcome the presumption of residency as to Odom and Knapp. As to Odom, his affidavit plainly establishes (and the master found) that he was not a resident of HD1. Accordingly, these two votes should have been rejected. This Court should reject the Division's decision (and the master's recommendation) to the contrary, and direct that these two votes may not be counted.

Similarly, Dodge presented undisputed evidence that Beconovich was (and has been for more than a decade) a resident of HD1. Beconovich had been properly registered there with the Division until he filed for a PFD in 2017. The Division should not be permitted to disenfranchise this qualified voter merely based on an ambiguous

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90 Report at 4-6.

91 Report at 7-8.

92 *See* Appellant's Hearing Brief at 34-35, and Appellant's Reply Brief at 18-21.

process and bureaucratic convenience. Indeed, such a result would turn the PFD Initiative on its head, disenfranchising a qualified voter rather than enfranchising unregistered ones. This Court should reject the Division's decision (and the master's recommendation), and direct that this vote should be counted.

Finally, the Court should direct the Division to count the X'ed out overvote as a vote for Dodge.

Dated this 28th day of December 2018.

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ATTACHMENT

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I. PARTIES

Ms. Dodge and intervenor Barton LeBon are the two candidates for State Representative District 1. Kevin Meyer is party to this action in his capacity as Lieutenant Governor for the State of Alaska. Josephine Banke is party to this action in her capacity as Director of the Division of Elections for the State of Alaska.[1]

II. ISSUES TO BE DETERMINED BY THE SPECIAL MASTER

1. Whether voters Odom, Knapp, and Beconovich were residents of Alaska and of House District 1 for at least 30 days prior to the election on November 6, 218 as required by AS 15.05.010.
2. Whether, when they registered to vote prior to November 6, 2018, voters Odom and Knapp provided sufficient information for the Director to determine the location of each voter's residence within District 1, such that they could be lawfully registered in District 1 pursuant to AS 15.07.064.
3. Whether voter Beconovich clearly and unambiguously expressed his intent to the Director not to register to vote in District 1 as required to disenfranchise an otherwise qualified voter.
4. Whether various ballot marking constitute valid "marks" under AS 15.15.360.
5. Whether two ballots with incorrect identifiers should be accepted despite an express statutory requirement to reject them.

III. STATEMENT OF THE CASE

This is a case about an election that is still too close to call and the ballots and voters that will determine the outcome. The two candidates to represent House District 1 ("HD1") are currently separated by a single vote. Ms. Dodge has presented compelling evidence demonstrating that two individuals who cast ballots were not qualified to vote in the race. She will present further evidence that another individual was wrongfully

[1] If and to the extent it is necessary to substitute a new party in place of Ms. Bahnke, Appellant will stipulate or file the appropriate notice to do so.

disenfranchised because he did not unambiguously express his intent to change his voter residency address to one outside HD1. Finally, Dodge challenges the Division of Elections' decision to disqualify part of a ballot due to extra markings. For his part Mr. LeBon, has identified several ballots with markings he believes have been misinterpreted and two ballots he believes were improperly rejected. Collectively, the decision on these ballots will determine the outcome of the HD1 election.

A. The District Absentee and Questioned Review Boards

Many of the relevant facts are not disputed.[2] In the general election of November 6, 2018, Dodge and LeBon competed to represent House District 1 ("HD1") in the State House of Representatives. After the polls closed on election night, Dodge and LeBon were separated by just 79 votes, not including absentee and questioned ballots. As required by AS 15.20.203 and .207, the district absentee and questioned ballot review boards in Fairbanks carried out an initial review of the information provided by the voter on the outside of each absentee and questioned ballot envelope to determine whether each envelope should be opened and the ballot counted.[3] To make this determination,

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[2] The background facts in particular should not be disputed for the most part, and are provided primarily for context and to help explain the election review process generally and as it occurred in this case. In the interest of efficiency, Dodge will focus her evidence and proof on the material facts of each voter, rather than the background information summarized here. If and to the extent proof of the latter is deemed material to the master and the Court's determination, Dodge will provide same.

[3] A person who appears in person at a voting precinct can be required to cast a questioned ballot for a number of reasons, including, for example, when the person's name is not on the precinct register at the location where they attempt to vote or a lack of identification. To cast such a ballot, the voter fills out a paper ballot as normal, then seals it inside a pre-printed envelope with spaces on the outside for the voter to provide enough

Division of Elections ("DOE" or the "Division") staff and members of the two boards compared the information voters provided on the outside envelopes with information on file with the Division to determine whether each ballot was cast by a qualified voter.[4] Only ballots cast by residents of HD1 may be counted for that race; thus, staff and the boards compared the addresses provided on the ballot envelopes with each voter's registered address. If the addresses matched and were within House District 1, the person's vote for the HD1 race was generally counted as long as the envelope was otherwise properly filled out (*e.g.*, signed and witnessed as required). If the voter provided an address that did not match his or her registered address, the boards looked to see if the address provided on the envelope was inside HD1. If it was not, the person's vote in the HD1 race was not counted because the Division treats the address on the envelope as a representation by the voter that he or she does not reside in HD1.

Throughout this process, observers were entitled to challenge any ballot the observer believed was incorrectly accepted, rejected, or partially counted.[5] If a written challenge was filed, DOE staff in Fairbanks scanned and emailed the challenge form, ballot envelope and information supporting the initial determination to Division Director Josie Bahnke for a decision. Director Bahnke typically responded within an hour or so

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information for the ballot review boards to verify the voter's qualifications and registration. 6 AAC 25.640.

[4] By way of example, an example of an absentee envelope is at STATE 16, and a questioned ballot envelope at STATE 7. The corresponding information on file with the Division is at STATE 17 and 8.

[5] AS 15.20.203(e). The three voter challenges filed at that stage that are at issue in this case are STATE 6, 15, and 37.

by emailing a copy of the challenge form with her signature and direction on whether to reject or count the ballot, in full or in part, with minimal explanation. *See, e.g.*, STATE 6, 15, and 37.[6]

B. Ballots challenged during the absentee and questioned ballot review process

Three ballots at issue in Dodge's appeal were challenged during this absentee and questioned ballot review process:

(1) Absentee ballot Seq. No. 458, cast by David M. Odom (See STATE 37-69);

(2) Absentee ballot Seq. No 589, cast by Norma Jean Knapp (STATE 15-36);

(3) Questioned ballot, District 1-485, Seq. No. 3, cast by Robert M. Beconovich (STATE 6-14).

As to the first two ballots, observers pointed out that neither voter's registered address appeared to be a residential property: the first is a strip mall/office suite in an industrial park; the second, a car/glass repair shop on one of Fairbank's busiest commercial streets. Despite these concerns, the Division/absentee review board did not make further inquiries to determine whether the addresses were valid residences.[7] Instead, the Division/board (and the Director) accepted the two ballots based solely on the fact that the address

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[6] DOE staff and board members accepted these decisions as final. Contrary to the requirements of AS 15.20.203(c) and AS 15.20.205(c), we are not aware of any instance in which the absentee or questioned ballot review board took a vote on whether to accept and count a ballot, nor does the record contain evidence of any such votes. The boards never reached a decision that conflicted with the Director's.

[7] Curiously, the Division was willing to call some voters to clarify details on their ballots, such as birthdays or driver's license numbers. It is unclear why the Division chose to contact certain voters but not others to obtain additional information.

provided on the outside of each absentee ballot envelope matched the voter's registered address in HD1. The decision to accept those two ballots was challenged on the basis that the voters' alleged residential addresses within HD1 could not be verified as required by 6 AAC 25.580(1).

The third ballot was a questioned ballot cast by Beconovich at his usual precinct near his home in District 1. Beconovich is expected to testify that he appeared in person to vote on election day only to find he was not on the registered voter list at his usual precinct in HD1. Because he was not listed as registered at that precinct, he was required to vote a questioned ballot. Beconovich provided his long-time residential address (where he believed he was registered to vote, as he has been for many years) on the outside of the questioned ballot envelope and voted his ballot. When this ballot came up for review, the Division/questioned ballot review board categorized it as a "partial count" (counted for some races, but not HD1) because the address Beconovich provided on his questioned ballot envelope (1412 20th Avenue, in HD1) did not match the address on file with the Division (104 Kutter Road, which is in District 2). The Division therefore determined Beconovich had been a resident of District 2 and was therefore not qualified to vote in District 1. Observers, however, believed that Beconovich had not changed residences, and that the Division's records showing he lived in District 2 were inaccurate. Accordingly, the decision not to count his vote in the HD1 race was challenged on the basis that he was a resident of District 1 at the time of the election and never knowingly and intentionally notified the DOE otherwise.

Division staff emailed all three challenged ballots, challenge forms, and the Division's supporting materials to the Director for a decision. The Director denied each challenge without meaningful written explanation, but Division staff verbally explained that the challenges were denied because the Director relied exclusively on the addresses in DOE's records to verify each voter's residence.

The absentee and questioned ballot review process concluded on November 16. At the end of that process, Dodge and LeBon were separated by 5 votes out of over 5,300 ballots counted. The ballots, challenges, and other election material were then sent to Juneau to commence the state review process under AS 15.20.220.[8]

C. The State Review Board and Recount

The State Review Board ("SRB") reviewed and counted ballots cast on election day, early votes, absentees, and questioned ballots. AS 15.20.220. The SRB did not re-visit the Director's decisions regarding the voters identified above. It did, however, review accepted ballot to determine whether any markings were likely to have been mis-read by the AccuVote optical scanners. The SRB identified at least 7 such votes. After reviewing these markings, the Director ruled that six of these "marginally" marked ballots should be counted for Dodge and one should be counted for LeBon. As a result, the race was deemed a tie at 2,661 votes cast for each candidate.

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[8] All three ballots and envelopes (along with all other challenged ballots) were kept individually segregated from other ballots. This allows challenges to be reviewed at the next step of the process and on appeal. If any of those challenges are successful, the votes contained on those ballots can be added or subtracted from the total as appropriate.

A recount was held on November 30, 2018.[9] All accepted HD1 ballots were electronically re-counted under the supervision of the Director and Division staff. During this process, observers could flag any ballot for additional scrutiny, including so-called "marginal ballots": ballots with incomplete or extra markings that might cause the electronic scanners to reject or misread a ballot. The Director decided whether and how to count any markings on such ballots, including whether the ballot contained "marks" for multiple candidates in the same race, resulting in an "overvote" that by law cannot be counted for either candidate. Any observer who disagreed with the Director's decision was entitled to file a written challenge. Each of the marginal ballots at issue in this appeal were identified and challenged during this process. See STATE 1-3, 127-34.

Finally, the Director reviewed the challenged absentee and questioned ballots that she had already ruled on during the district review process in Fairbanks. Earlier in the day, Dodge presented the Director and LeBon with substantial additional evidence suggesting that voters Odom and Knapp did not live at the addresses on file with the Division. STATE 24-36 and 52-69. The Director accepted the information but later, when she commenced the review of challenged and absentee ballots, stated she would not consider the evidence to decide whether the voters were qualified to vote in HD1. Accordingly, the Director did not change her earlier decision on these voters.

The recount resulted in the counting of three additional votes: two for LeBon and one for Dodge. Thus, the final vote tabulation for HD1 was 2,663 for LeBon and to

[9] AS 15.15.460.

2,662 for Dodge. The Director certified this result later that day. Pursuant to AS 15.20.510, Dodge timely appealed the matter directly to the Supreme Court, who appointed the special master to hear evidence and recommend findings of fact and conclusions of law.

IV. APPLICABLE LEGAL STANDARDS

A. Standard of Review

An AS 15.20.510 appeal requires the Court to independently determine whether votes were cast in accordance with Alaska law.[10] The Court will apply its independent judgment when interpreting statutes,[11] but in an appeal like this one, relies upon the special master to resolve factual disputes by accepting and "review[ing] the evidence presented regarding the validity of each of the challenged ballots."[12] We are not aware of any case in which the special master (or the Court) has deferred to the Division of

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[10] *Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987) (*citing Willis v. Thomas*, 600 P.2d 1079, 1082 (Alaska 1979)) ("Our obligation under AS 15.20.510 is to determine whether a vote was cast in compliance with the requirements of Alaska's election law.").

[11] *Edgmon v. State*, 152 P.3d 1154, 1156-57 (Alaska 2007) (applying independent judgment to ballot markings and purported overvotes); *Lake and Peninsula Borough v. Oberlatz*, 329 P.3d 214, 221 (Alaska 2014).

[12] *Willis*, 600 P.2d at 1082. Like several election appeals involving a special master, *Willis* is technically a hybrid election case in which the challenger both sued the Division under the election contest statute (AS 15.20.540) and appealed under subsection .510. *Id.* at 1081. The Supreme Court consolidated the two proceedings, appointing a superior court judge "as special master to hear evidence and arguments in the case." *Id.* The master later concluded (and the Court agreed) that all the issues in the case were properly considered under the election appeal statute that applies to this case. *Id.* at 1082. The Court also agreed that it was appropriate for the master to hear and review evidence in that capacity to resolve factual disputes. Although never explicitly stated, the Court generally deferred to the master's factual conclusions, but applied its own judgment to issues of law.

ATTACHMENT

2

AN INITIATIVE TO
ALLOW QUALIFIED INDIVIDUALS TO REGISTER TO VOTE
WHEN SUBMITTING A PERMANENT FUND DIVIDEND APPLICATION.

A Bill By Initiative
For An Act Entitled

"An Act relating to the permanent fund dividend application and the registration of voters; and providing for an effective date."

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

***Section 1.** The uncodified law of the State of Alaska is amended by adding a section to read:

FINDINGS AND INTENT. (a) The People of the State of Alaska find:

(1) the cornerstone of American democracy is the right to vote;

(2) the state should not introduce needless bureaucratic requirements that make it more difficult for qualified citizens to exercise their right to vote;

(3) the State of Alaska currently requires individuals who wish to receive a permanent fund dividend to submit an annual application to the State;

(4) PFD applicants who also wish to register to vote, or to update their voter registration, must submit information to the State a second time, using a different form;

(5) the State can relieve qualified voters who apply for a PFD from the burden of having to complete additional paperwork; and

(6) the State can use PFD-application data to ensure voter-registration data are current.

***Section 2.** AS 15.07.050(a) is amended to read:

(a) Registration may be made

(1) in person before a registration official or through a voter registration agency;

(2) by another individual on behalf of the voter if the voter has executed a written general power of attorney or a written special power of attorney authorizing that other individual to register the voter;

(3) by mail; [OR]

(4) by facsimile transmission, scanning, or another method of electronic transmission that the director approves; or

(5) by completing a permanent fund dividend application under AS 43.23.015.

*Sec. 3. AS 15.07.060(e) is amended to read:

(e) For an applicant requesting initial registration by mail, [OR] by facsimile or other electronic transmission approved by the director under AS 15.07.050, or **completing a permanent fund dividend application,** the director shall verify the information provided in compliance with (a)(2) and (3) of this section through state agency records described in AS 15.07.055(e). If the applicant cannot comply with the requirement of (a)(2) of this section because the applicant has not been issued any of the listed numbers, the applicant may instead submit a copy of one of the following forms of identification: a driver's license, state identification card, current and valid photo identification, birth certificate, passport, or hunting or fishing license.

* Sec. 4. AS 15.07.070(f) is amended to read:

(f) Incomplete or inaccurate registration forms may not be accepted. A person who submitted an incomplete or inaccurate registration form may register by reexecuting and resubmitting a registration form in person, by mail, or by facsimile or other electronic transmission approved by the director under AS 15.07.050. The requirements of (c) or (d) of this section apply to a registration form resubmitted under this subsection. **Notwithstanding the foregoing, an application made under AS 43.23.015 that contains the information required by AS 15.07.060(a)(1)-(4) and (7)-(9), and an attestation that such information is true, shall not be deemed an incomplete registration form, and shall be accepted in accordance with AS 15.07.070(i).**

* Sec. 5. AS 15.07.070 is amended by adding a new subsection to read:

(i) The division shall register voters who submit an application to receive a permanent fund dividend in accordance with this subsection.

(1) The division shall cooperate with the Department of Revenue under AS 43.23.016 to ensure that the permanent fund dividend application form furnished by the Department of Revenue under AS 43.23.015 allows an applicant, a person who is designated in a power of attorney to act on behalf of an applicant, or a person acting on behalf of a physically disabled applicant to submit voter registration information required under AS 15.07.060(a)(1)-(4) and (7)-(9), and an attestation that such information is true. The director may require proof of identification of the applicant, if not already in the Department of Revenue's possession, as required by regulations adopted by the director under AS 44.62 (Administrative Procedure Act).

(2) Upon receipt of the registration information, the director shall, as soon as practicable and in accordance with a schedule established by the director by rule, notify by U.S. mail, and any other means authorized by the director, each applicant not already registered to vote at the address provided in the applicant's application

(A) of the processes to

(i) decline to be registered as a voter,

(ii) maintain an existing voter registration, or be newly registered, at a valid place of residence not the provided in the applicant's application, and

(iii) adopt a political party affiliation;

and

(B) that failure to respond to the notification shall constitute the applicant's consent to cancel any registration to vote in another jurisdiction.

(3) If an applicant does not decline to be registered as a voter within 30 calendar days after the director issues the notification, the application under AS 43.23.015 will constitute a completed registration form. The name of the applicant shall be placed on the master register if the director determines that the person is qualified to vote under AS 15.05.010, and the director shall forward to the applicant a registration card. If registration is denied, the applicant shall immediately be informed in writing that registration was denied and the reason for denial.

(4) Any person who is not eligible to vote and who becomes registered under this provision through human or mechanical error shall not be found on that basis to have had the intent to unlawfully register to vote.

*Sec. 6. AS 43.23.015(b) is amended to read:

(b) The department shall prescribe and furnish an application form for claiming a permanent fund dividend. The application must include

(1) notice of the penalties provided for under AS 43.23.035;

(2) [AND CONTAIN] a statement of eligibility and a certification of residency;

(3) the means for an applicant eligible to vote under AS 15.05, or a person authorized to act on behalf of the applicant, to furnish information required by AS 15.07.060(a)(1)-(4) and (7)-(9), and an attestation that such information is true.

*Sec. 7. AS 43.23.016 is repealed and reenacted to read:

Sec. 43.23.016. Voter registration. The commissioner shall establish by rule a schedule by which the commissioner will provide, and shall provide as soon as is practicable the director of elections with

(a) electronic records from the permanent fund dividend applications of the information required by AS 15.07.060(a)(1)-(4) and (7)-(9), and the attestation that such information is true, for each permanent fund dividend applicant who

(1) is a citizen of the United States, and

(2) is at least 18 years of age or will be within 90 days of the date of the application, and

(b) the mailing addresses for all permanent fund dividend applicants.

* **Sec. 8.** AS 43.23.017(a) is amended to read:

(a) **Except as provided in (c) of this section, information** [INFORMATION] on each permanent fund dividend application, except the applicant's name, is confidential. The department may only release information that is confidential under this section

(1) to a local, state, or federal government agency;

(2) in compliance with a court order;

(3) to the individual who or agency that files an application on behalf of another;

(4) to a banking institution to verify the direct deposit of a permanent fund dividend or correct an error in that deposit;

(5) as directed to do so by the applicant; [AND]

(6) to a contractor who has a contract with a person entitled to obtain the information under (1) - (5) of this section to receive, store, or manage the information on that person's behalf; a contractor receiving data under this paragraph may only use the data as directed by and for the purposes of the person entitled to obtain the information[.];

(7) to the division of elections, as required by AS 43.23.016.

***Sec. 9.** AS 43.23.017 is amended by adding a new subsection to read:

(c) Information submitted on a permanent fund dividend application that is used for the purpose of registering an applicant to vote under AS 43.23.016 shall be kept confidential by the division of elections as provided in AS 15.07.195.

***Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section to read:

It is the intention of the people of Alaska that, if any provision of this Act shall be held to be invalid by a court of competent jurisdiction, the remainder shall not be affected and shall be given effect to the fullest extent possible.

***Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to read:

This Act shall take effect 90 days after enactment.