IN THE SUPREME COURT OF THE STATE OF ALASKA

Kathryn Dodge,	)	
	)	
Appellant,	)	
	)	
v.	)	Supreme Court No. **S-17301**
	)	
Lt. Governor Kevin Meyer, and Division of Elections Director Gail Fenumiai,	)	
	)	
Appellees.	)	
	)	

Trial Court Case No. 3AN-18-00001RA

RESPONSE BRIEF OF APPELLEES LT. GOVERNOR KEVIN MEYER AND DIVISION OF ELECTIONS DIRECTOR GAIL FENUMIAI

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INTRODUCTION

The Special Master appointed by this Court prepared a well-reasoned recommendation in this recount appeal. He recommended that this Court consider only evidence available to the Director at the time of the recount and uphold the Director's vote counting decisions because she correctly applied the election statutes and this Court's authorities interpreting those laws. The Division asks this Court to accept the Special Master's recommendation and affirm the results of the recount; no persuasive reason has been presented by either candidate to change this Court's fundamental approach to recount appeals or the count decision on any of the nine challenged ballots.

ARGUMENT

I. Voter residency: The Director properly relied on the statutory presumption of residency in counting and declining to count ballots.

A. Ms. Dodge's proposed burden shifting standard is precluded by the plain terms of AS 15.05.020(8) and is inconsistent with this Court's precedent.

Ms. Dodge argues that the Special Master applied "incorrect legal standards" in deciding whether the Director properly counted the votes of Dr. Odom and Ms. Knapp. [At. Br. at 12-15] But her proposed burden-shifting standard lacks any support in statute or case law; indeed, it is flatly inconsistent with the statutory scheme and should be rejected.

Alaska Statute 15.05.020(8) provides that "[t]he 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."[1] This Court has found this presumption overcome in only two circumstances: (1) when it was physically impossible for the voter to reside at the address provided—i.e. when the address was a P.O. box or mail service[2]—and (2) when the voter provided written notification of a change of address to the Division of Elections either before the election or when submitting an absentee ballot.[3]

Ignoring the plain language of the statute and this Court's case law addressing questions of residency, Ms. Dodge proposes that "a voter should be required to provide *some* indicia of residency if the voter's claimed residency is implausible or unreasonable." [At. Br. 12-13] This approach would nullify the second sentence of AS 15.05.020(8); Ms. Dodge cannot rewrite the statute.

Nor does her statutory argument based on AS 15.20.203(c) and .207(c) have merit. She suggests that the procedures for challenging absentee and questioned ballots during the review process "would be largely meaningless if there was no plausible way for a challenger to present evidence and prove that a voter is not qualified to vote, or if the Division's records were the only factor to be considered in determining whether a voter was qualified." [At. Br. 13, fn. 34] But she misreads these statutes. Alaska Statute 15.20.203(c) provides:

> Any person present at the district absentee ballot counting review may challenge the name of an absentee voter when read from the voter's certificate on the envelope if the person has good reason to suspect that the challenged voter is not qualified to vote, is disqualified, or has voted at the

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1 AS 15.05.020(8) (emphasis added).

2 *See Fischer v. Stout*, 741 P.2d 217, 221 (Alaska 1987).

3 *See Id.*; *Cissna v. Stout*, 931 P.2d 363, 369 (Alaska 1996).

same election. The person making the challenge shall specify the basis of the challenge in writing. The district absentee ballot counting board by majority vote may refuse to accept and count the absentee ballot *of a person properly challenged on grounds listed in (b) of this section.*

(Emphasis added.) AS 15.20.207(c) provides the same process for the district questioned ballot counting review. The "grounds listed in (b)" of each statute do not include challenges based on claims that the voter is not properly resident in the district.[4] In other

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[4] AS 15.20.203(b) provides:

An absentee ballot may not be counted if

(1) the voter has failed to properly execute the certificate;

(2) an official or the witnesses authorized by law to attest the voter's certificate fail to execute the certificate, except that an absentee ballot cast in person and accepted by an absentee voting official or election supervisor may be counted despite failure of the absentee voting official or election supervisor to properly sign and date the voter's certificate as attesting official as required under AS 15.20.061(c);

(3) the ballot is not attested on or before the date of the election;

(4) the ballot, if postmarked, is not postmarked on or before the date of the election;

(5) after the day of election, the ballot was delivered by a means other than mail; or

(6) the voter voted

(A) in person and is a

(i) first-time voter who initially registered by mail or by facsimile or other electronic transmission approved by the director under AS 15.07.050, has not provided the identification required by AS 15.15.225(a), was not eligible for waiver of the identification requirement under AS 15.15.225(b), and has not provided the identifiers required in AS 15.07.060(a)(2) and (3) that can be verified through state agency records described in AS 15.07.055(e); or

(ii) voter other than one described in (i) of this subparagraph, did not provide identification described in AS 15.15.225(a), was not

words, the statute does not contemplate the kind of challenge raised by Ms. Dodge here. The statutory challenge process is not rendered "largely meaningless," or even undermined at all, if the Division applies the statutory presumption found in AS 15.05.020(8) rather than Ms. Dodge's proposed burden shifting scheme. In sum, no legal authority supports Ms. Dodge's proposed standard, and it must be rejected.

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personally known by the election official, and has not provided the identifiers required in AS 15.07.060(a)(2) and (3); or

(B) by mail or electronic transmission, is a first-time voter who initially registered by mail or by facsimile or other electronic transmission approved by the director under AS 15.07.050 to vote, has not met the identification requirements set out in AS 15.07.060, and does not submit with the ballot a copy of a

(i) driver's license, state identification card, current and valid photo identification, birth certificate, passport, or hunting or fishing license; or

(ii) current utility bill, bank statement, paycheck, government check, or other government document; an item described in this sub-subparagraph must show the name and current address of the voter.

AS 15.20.207(b) provides:

(b) A questioned ballot may not be counted if the voter

(1) has failed to properly execute the certificate;

(2) is a first-time voter who initially registered by mail or by facsimile or other electronic transmission approved by the director under AS 15.07.050, has not provided the identification required by AS 15.15.225(a), was not eligible for waiver of the identification requirement under AS 15.15.225(b), and has not provided the identifiers required in AS 15.07.060(a)(2) and (3) that can be verified through state agency records described in AS 15.07.055(e); or

(3) is a voter other than one described in (2) of this subsection, did not provide identification described in AS 15.15.225(a), was not personally known by the election official, and has not provided the identifiers required in AS 15.07.060(a)(2) and (3).

B. The Special Master properly declined to consider evidence that was not presented to the Director at or before the recount.

Ms. Dodge argues that this Court should consider evidence that was not available to the Director at the time of the recount, suggesting that the statutes contain no express limitation on the evidence that may be relied upon in a recount appeal. [At. Br. 8] But the recount appeal statute is not "silent" on the question of the scope of the appeal [*See* At. Br. 9], and its text does not support Ms. Dodge's argument. First, she overlooks the plain meaning of the word "appeal," which does not typically include presentation of new evidence. And AS 15.20.510 allows an appeal when a qualified person "has reason to believe an error has been made *in the recount* . . . ." [Emphasis added] The statute instructs the director to "furnish *the record of the recount taken*, including all ballots, registers, and other election material and papers pertaining to the election contest." [Emphasis added] And most critically, the statute explains that this Court's "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 . . . ." [Emphasis added] Nothing in the statute suggests that the legislature intended courts to consider post-recount evidence in a recount appeal.

Ms. Dodge incorrectly argues that this Court has never decided whether post-recount evidence can change the result in a recount appeal. And her reliance on *Fischer v. Stout* on this subject is misplaced. *Fischer* does not support her claim that this Court

should consider evidence not available to the Director. Rather, read in conjunction with *Finkelstein v. Stout*,[5] it establishes the opposite.

In *Fischer*, this Court declined to limit its review to ballots that had been challenged by a date, before the recount, that had been selected by the Director. This Court held broadly that its "obligation under AS 15.20.510 is to review any and all questioned ballots cast in the election at issue, regardless of *whether they were or were not specifically challenged below*."[6] Two years later, in *Finkelstein*, the Court rejected a challenge based on voter affidavits produced "[a]fter the election and the recount" on the ground that it "was untimely as it was raised after the recount was concluded."[7] Ms. Dodge argues that *Finkelstein* does not control here, because her objections to Dr. Odom's and Ms. Knapp's ballots were made before the recount. But because, under *Fischer*, the timing of the challenge does not preclude this Court's review, the decision in *Finkelstein* can only have been based on the timing of the evidence. In other words, *Fischer* arguably permits raising additional appellate ballot challenges after the recount, but *Finkelstein* limits review of those ballot counting decisions to evidence available to the Director at the time of the recount.

Similarly, in *Cissna v. Stout*, this Court expressly noted that a voter's reregistration that placed her at an address outside the relevant district "was received before the votes were counted and recounted," in holding that her vote was properly not

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5 *Finkelstein v. Stout*, 774 P.2d 786, 788 (Alaska 1989), *abrogated in part on other grounds by Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018).

6 *Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987) (emphasis added).

7 *Finkelstein* 774 P.2d at 788.

counted in that district.[8] Nothing in this Court's cases suggests that recount decisions can be overturned based on post-recount evidence.

Not only do the statute and case law support the Special Master's recommendation that the appeal be limited to evidence that was in front of the Director, that rule is good policy. Ms. Dodge's alternative approach risks turning every close election into a free-for-all investigation into the residency qualifications of every absentee or questioned voter and would potentially permit voters who could claim residency in more than one district to reconsider and retract their vote in light of the vote tallies after the recount.[9] The presumption of residency reflects legislative balancing—accepting the risk that some small percentage of voters will vote in the wrong house district in exchange for the important goals of enfranchising voters, including transient Alaskans, and certainty and finality in election results.

C. The Director properly counted both Dr. Odom's and Ms. Knapp's absentee ballots because the presumption of residency was not overcome.

Considering the evidence before her at the recount, the Director properly determined that both Dr. Odom and Ms. Knapp's ballots should be counted.[10] The statute

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8 *Cissna v. Stout*, 931 P.2d 363, 369 (Alaska 1996).

9 If this Court decides to consider evidence generated after the recount, it should adopt appellate rules as authorized in AS 15.20.510 establishing procedures and deadlines for taking post-recount evidence that are consistent with the need for prompt resolution of election disputes.

10 If this Court rejects Dr. Odom's ballot based on his affidavit, the Division respectfully asks the Court to make clear in its opinion that the Director made no error in the count decision at the recount. The Division requires clear direction for future close races about whether it applied the residency presumption statute correctly.

creates a strong presumption in favor of the residency information in the Division's records, and the evidence collected by the Dodge campaign was insufficient to rebut that presumption under either the statutory language or any of this Court's precedents. Given that this Court has expressly said that "even a park bench will be sufficient,"[11] evidence that a voter's residence address houses a commercial enterprise does not meet even Ms. Dodge's proposed standard that the presumption should be rebuttable by evidence showing that "voter's claimed residency is implausible or unreasonable." [At. Br. 12] The Director's decision to count these two absentee ballots should be upheld.

D. The Director properly excluded Robert Beconovich's questioned ballot because he changed his registration address.

Ms. Dodge argues that Robert Beconovich's registration should not have been updated to the address he gave when he applied for his 2017 and 2018 permanent fund dividends ("PFDs"). In other words, she does not challenge specifically the Division's failure to count his 2018 vote in House District 1; rather, she challenges the Division's much earlier implementation of the PFD voter registration law itself. She argues that the PFD registration statute was intended only to register new voters, not to update existing registrations with new addresses. According to Ms. Dodge, the Division acted improperly by updating Mr. Beconovich's registration with the address he gave on his PFD application in 2017. [At. Br. at 19-27]

Ms. Dodge is incorrect, both in her interpretation of the PFD registration statute itself and in her analysis of its application to Mr. Beconovich. The statute makes plain

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[11] *Fischer*, 741 P.2d at 221.

that the Division must not only register new eligible voters based on the information they provide on their PFD applications, but must also update the addresses on existing voter registrations to match those given by voters on their PFD applications. Section 1 of the Initiative notes that before the passage of the law, "PFD applicants who also wish[ed] to register to vote, *or to update their voter registration*, [were required to] submit information to the State a second time, using a different form."[12] The initiative immediately goes on to state the law's intent to "relieve qualified voters who apply for a PFD from the burden of having to complete additional paperwork."[13] Ms. Dodge cites this language, but she misreads it: the clearly stated intent is to streamline automatic new registrations *and* voter registration updates via a single form, the PFD application.

Alaska Statute 15.07.070(i) implements this intention. It instructs the Division to "register voters who submit an application" in accordance with the statute. And the language leaves no doubt that "registration" includes address updates. The Director must notify "each applicant not already registered to vote at the address provided in the applicant's [PFD] application . . . of the process to . . . maintain an existing voter registration . . . at a valid place of residence not provided in the applicant's application[.]"[14] In other words, the default is registration at the address provided on the PFD form; voters can opt out if they wish to maintain registration at a different address.

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12 Ballot Initiative 15PFVR at Section 1 (emphasis added).

13 *Id.*

14 AS 15.07.070(k)(1)(B).

The PFD application form also makes this clear. Applicants must certify their understanding that they "will be automatically registered to vote *at the residential address provided on this application.*"[15] Ms. Dodge argues that this language is confusing because the form asks for the registrant's "street or physical address" rather than "residential address." [At. Br. at 24] But "the residential address provided on this application" cannot possibly refer to anything other than that "street or physical address." The phrases are synonymous in common understanding, and they create no ambiguity in the context of the application as a whole.

Mr. Beconovich testified at the hearing before the Special Master that he did not move from his residential address in House District 1 and that he did not recall receiving the "opt out" notice that would have given him the opportunity to remain registered there. But like Mr. Odom's affidavit about his residence, this testimony was not available to the Director at the recount. The evidence available to the Director at the time showed that (1) Mr. Beconovich gave an address outside the district on his PFD applications in 2017 and 2018 [R. 10-11], (2) Mr. Beconovich's name appeared on the list of voters to whom opt-out notices were sent [Exhibit 2002], and (3) Mr. Beconovich did not opt out of having his registration updated [*See* R. 8]. The Director had no opportunity to consider Mr. Beconovich's apparent contradictory intent in making her recount determination.

More fundamentally though, the evidence about Mr. Beconovich's intent could not have changed the Director's decision. To have his vote counted in House District 1, he

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15 Exhibit 1002 (Emphasis added).

was required to be properly registered there thirty days before the election.[16] As explained above, the Division did not err in its implementation of the PFD registration law; it registered Mr. Beconovich at the address he provided on his PFD application as required by that statute. And the Division correctly applied the presumption of residency statute, AS 15.05.020(8), when it did not count his House District 1 vote.

II. Ballot markings: The Director's decisions on whether to count particular ballots based on their markings were correct.

A. The Director properly excluded the under-voted ballots on which the voters failed to make any mark within the provided oval.

Mr. LeBon asks this Court to count for him two ballots where the voters made no marks in the ovals provided, instead creating their own oval-like marks to the right of the candidates' names. [R. 128, 131; Intervenors' Br. at 13-15] Mr. LeBon does not seriously contend that these voters met the requirement of AS 15.15.360(a)(5) that a mark shall be counted as a vote "*only if* it is substantially inside *the oval provided*, or touching the oval so as to indicate clearly that the voter intended to the particular oval to be designated."[17] He argues instead that this statutory requirement should be considered "directory," rather than mandatory, and ignored in favor of apparent voter intent.

But AS 15.15.360(b) makes the ballot marking requirements "mandatory" with "no exceptions." And Mr. LeBon misconstrues this Court's authority on "directory" requirements; this Court has stated that the election statutes can be construed after the

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16 AS 15.07.070(d).

17 Emphasis added.

election as "directory only, *in support of the result*,"[18] and has urged adopting "any reasonable construction of [a] statute" that will favor voter enfranchisement.[19] Nothing about this language supports relaxing an unambiguous statutory requirement in order to undermine an election result.

Mr. LeBon dismisses the controlling authority in *Miller v. Treadwell*[20] as "distinguishable" because here, the voters on the two ballots in question "intended to fill in an oval next to the candidate's name," whereas the voters in *Miller* made no marks near the name at all. But the statute is clear that a voter must mark "*the oval provided*," not create a different mark nowhere near the provided oval. And this Court held in *Miller* that AS 15.15.360 cannot be "interpreted to excuse write in voters from marking ovals as required by law."[21] That result compels upholding the Director's decision here; even where voter intent is arguably clear, this Court has adhered to the plain language of the ballot marking statute.[22]

B. The Director's decisions regarding two ballots with extra markings were correct and should be upheld.

Both Ms. Dodge and Mr. LeBon challenge the Director's decision not to count a ballot on which the voter filled in both the oval for Ms. Dodge and the oval for Mr. LeBon, and also made an "X" through the oval for Mr. LeBon. [At. Br. 29-32;

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18 *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978) (quoting *Rich v. Walker*, 237 Ark. 586, 374 S.W.2d 476, 478 (1964)).

19 *Id.* (quoting *Reese v. Dempsey*, 153 P.2d 127, 132 (N.M. 1944).

20 *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010).

21 *Id.* at 878.

22 *Id.*

Intervenors' Br. 15-17] Ms. Dodge argues that "common sense suggests that the "X" was intended to indicate that the voter did not intend to cast a vote for LeBon." [At. Br. 31] And Mr. LeBon argues that "in including two valid marks for LeBon (i.e., a filled in oval and an "X"), and only a single valid mark for Dodge (i.e., a filled in oval), it is readily apparent that the voter made a mistake on the ballot, and . . . added the additional valid ballot mark (the "X) to indicate their selection for LeBon." [Intervenors' Br. at 17-18]

The very fact that both candidates believe that the ballot shows an intent to vote for them demonstrates its ambiguity. This Court has held that "ballots should be counted where they 'present clear evidence of the voters' intent.'"[23] Such clear evidence is not present here.

Ms. Dodge relies on a case from the Maine Supreme Court in which the voter placed an "X" next to two candidates' names, and then scribbled out one of the "Xs." She quotes that Court for the proposition that "[s]cribbling 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."[24] [At. Br. 30, emphasis added by Dodge] From this language—and this Court's citation of the case in *Edgmon*—Dodge argues that the Maine Court "believed that an "X" signified an intent to retract a vote, not cast a second one in the same race." [At. Br. 30-31] But, in fact, as Dodge herself acknowledges, the Maine voter used an "X" to *cast a vote*. Although the voter in this case used a filled-in oval to cast a vote, it is

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23 *Edgmon*, 152 P.3d 1154, 1157 (Alaska 2007) (quoting *Willis v. Thomas*, 600 P.2d 1079, 1085 (Alaska 1979)).

24 *In re Primary Election Ballot Disputes 2004*, 857 A.2d 494, 503 (Me. 2004).

undisputed that the voter did that for both candidates in this race. And their additional drawing of an "X" over the oval next to Mr. LeBon's name could represent either a desire to retract that vote *or* an attempt to clarify that Mr. LeBon was the preferred candidate. There is simply no way to know. The Director correctly decided that this was an over-voted ballot and the voter's intent could not be determined.

Finally, before the Special Master Mr. LeBon challenged the Director's decision to count for Ms. Dodge a ballot where the oval next to Ms. Dodge's name was completely filled in, but there was a small mark around the upper edge of the oval next to Mr. LeBon's name. [Intervenors' Br. 15] Although his brief to this Court notes that there were two over-voted ballots, he offers no argument regarding the ballot that was counted for Dodge and thus appears to have waived this challenge. In any event, this Court's decision in *Edgmon* is controlling. There the Court considered two ballots that appear to have been marked exactly as this ballot was and held that they should have been counted.[25] The Director's decision to apply this Court's precedent should be upheld.

III. Incorrect identifiers: The Director properly excluded the two ballots with mis-matched voter identifiers.

Mr. LeBon's argument regarding the voters who used incorrect identifiers is very similar to his argument about the "undervoted" ballots with no marks on the ovals. In effect, he argues that another mandatory statutory voting requirement—this time the one to provide a correct voter identifier on the absentee ballot envelope—should be ignored to avoid disenfranchising the voter. [Intervenors' Br. at 11-12] But the statutes that apply

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25 *Edgmon*, 152 P.3d at 1158.

in both situations are not optional or "directory," they are mandatory, and the Division correctly enforced them uniformly as to all voters.

Mr. LeBon does not dispute that AS 15.20.081(f) and its implementing regulation, 6 AAC 25.510, unambiguously require a voter to provide an accurate piece of information sufficient to establish identity on the ballot envelope certificate. And Mr. LeBon cites the related statute, AS 15.20.203(b)(1), requiring the Director to reject an absentee ballot if "the voter has failed to properly execute the certificate."

Despite these statutes and the regulation, Mr. LeBon argues that the two ballots should be reviewed in tandem and the placement of each voter's identifier on the other voter's envelope be considered "substantial compliance." No authority supports this position, and although Mr. LeBon is technically correct that no case has addressed this precise issue, *Finkelstein v. Stout* strongly suggests the opposite conclusion. There, this Court held that the requirement that an absentee ballot be cast in the presence of two non-official witnesses was mandatory, and that non-compliant ballots had to be rejected.[26]

The requirement that an absentee voter provide an accurate identifier is of a very similar character; both are requirements designed to confirm voter identity. This type of requirement is necessary for the functioning of the absentee ballot system. As this Court explained with respect to the witnessing requirement, "[W]here the vote violates provisions designed to insure the integrity of the electoral process, the public has a

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[26] *Finkelstein v. Stout*, 774 P.2d 786, 791-92 (Alaska 1989), *abrogated in part on other grounds by Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018).

supervening interest—that of fundamentally sound elections—which is protected by not counting illegal votes, regardless of the source of their illegality."[27]

Excusing voters from the basic identification requirements simply because in this case, the Division happened to discover the apparent source of the non-compliance would not only require disregarding plain statutory and regulatory language, it would also set unfortunate precedent. Election officials cannot reasonably be expected to research every identifier error in an attempt to discover mistakes like this one. The only fair and practical approach is to evaluate each ballot individually for compliance and to consistently hold each voter to the basic requirement of placing his or her own identifier on his or her own certificate.

CONCLUSION

For the foregoing reasons, the Court should follow the Special Master's recommendations and affirm the Director's ballot counting decisions and consequent certification of Barton LeBon as the winner of the House District 1 state representative election.

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27 *Id.* at 792.