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 Josephine Bahnke,	)	
	)	
Appellees.	)	
	)	

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

BRIEF OF APPELLEES LT. GOVERNOR KEVIN MEYER AND DIVISION OF ELECTIONS DIRECTOR JOSEPHINE BAHNKE

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ALASKA STATUTES:

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 15.07.070. Procedure for registration

(a) The director may adopt regulations under AS 44.62 (Administrative Procedure Act) relating to the registration of voters consistent with the requirements of this section and federal law, including 42 U.S.C. 1973gg (National Voter Registration Act of 1993).

(b) To register by mail or by facsimile, scanning, or other electronic transmission approved by the director under AS 15.07.050, the director, the area election supervisor, or a voter registration agency shall furnish, at no cost to the voter, forms prepared by the director on which the registration information required under AS 15.07.060 shall be inserted by the voter, by a person on behalf of the voter if that person is designated to act on behalf of the voter in a power of attorney, or by a person on behalf of the voter if the voter is physically incapacitated. The director may require proof of identification of the applicant as required by regulations adopted by the director under AS 44.62 (Administrative Procedure Act). Upon receipt and approval of the completed registration forms, the director or the election supervisor shall forward to the voter an acknowledgment, and the voter's name shall immediately be placed on the master register. If the registration is denied, the voter shall immediately be informed in writing that registration was denied and the reason for denial. When identifying information has been provided by the voter as required by this chapter, the election supervisor shall forward to the voter a registration card.

(c) The names of persons submitting completed registration forms by mail that are postmarked at least 30 days before the next election, or submitting completed registration forms by facsimile or other electronic transmission approved by the director under AS 15.07.050 that are received at least 30 days before the next election, shall be placed on the official registration list for that election. If a registration form received by mail less than 30 days before an election does not have a legible and dated postmark, the name of the person submitting the form shall be placed on the official registration list for that election if the form was signed and dated by the person at least 30 days before the election and if the form is received by the director or election supervisor at least 25 days before the election. The name of a person submitting a completed registration form by mail or by facsimile or other electronic transmission that does not meet the applicable requirements of this subsection may not be placed on the official registration list for that election but shall be placed on the master register after that election.

(d) Qualified voters may register in person before a registration official or through a voter registration agency at any time throughout the year, except that a person registering within 30 days preceding an election is not eligible to vote at that election. Upon receipt and approval of the registration forms, the director or the election supervisor shall forward to the voter an acknowledgment in the form of a registration card, and the voter's name shall immediately be placed on the master register. Names of persons registering 30 or more days before an election shall be placed on the official registration list for that election.

(e) Repealed.

(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).

(g) The director shall provide voter registration forms prepared under (b) of this section to voter registration agencies designated under AS 15.07.055 for distribution to the public.

(h) The director shall design the form of the voter's certificate appearing on the envelope that is used for voting an absentee in-person or questioned ballot so that all information required for registration by AS 15.07.060(a) may be obtained from a voter who votes an absentee in-person or questioned ballot. If the voter voting an absentee in-person or questioned ballot has completed all information on the voter registration portion of the absentee in-person or questioned ballot voter's certificate, the director shall place the name of the voter on the official registration list.

(i) The division shall register voters who submit an application to receive a permanent fund dividend in accordance with (j)-(m) of this section.

(j) The division shall cooperate with the Department of Revenue under AS 43.23.100 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).

(k) 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 United States 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

(1) of the process to

(A) decline to be registered as a voter,

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

(C) adopt a political party affiliation; and

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

(l) 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.

(m) 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.

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) to (12) Repealed by SLA 2011, ch. 10, § 3, eff. Aug. 15, 2011.

(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 by SLA 2003, ch. 113, § 24.

(d) Write-in votes shall be counted according to the following rules:

(1) writing in the name of a candidate whose name is printed on the ballot does not invalidate a write-in vote unless the director determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot;

(2) 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 (a)(1) of this section;

(3) 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 of the candidate, as it appears on the write-in declaration of candidacy, or the last name of the candidate is written in the space provided;

(4) 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 of the candidates for governor and lieutenant governor, as they appear on the write-in declaration of candidacy, or the last names of the candidates for governor and lieutenant governor, or the name of the candidate for governor, as it appears on the write-in declaration of candidacy, or the last name of the candidate for governor is written in the space provided;

(5) in counting votes for a write-in candidate, the director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

AS 15.20.081. Absentee voting in general; applying for absentee ballot by mail or electronic transmission

(a) A qualified voter may apply in person, by mail, or by facsimile, scanning, or other electronic transmission to the director for an absentee ballot under this section. Another individual may apply for an absentee ballot on behalf of a qualified voter if that individual is designated to act on behalf of the voter in a written general power of attorney or a written special power of attorney that authorizes the other individual to apply for an absentee ballot on behalf of the voter. The application must include the address or, if the application requests delivery of an absentee ballot by electronic transmission, the telephone electronic transmission number, to which the absentee ballot is to be returned, the applicant's full Alaska residence address, and the applicant's signature. However, a person residing outside the United States and applying to vote absentee in federal elections in accordance with AS 15.05.011 need not include an Alaska

residence address in the application. A person may supply to a voter an absentee ballot application form with a political party or group affiliation indicated only if the voter is already registered as affiliated with the political party or group indicated. Only the voter or the individual designated by the voter in a written power of attorney under this subsection may mark the voter's choice of primary ballot on an application. A person supplying an absentee ballot application form may not design or mark the application in a manner that suggests choice of one ballot over another, except that ballot choices may be listed on an application as authorized by the division. The application must be made on a form prescribed or approved by the director. The voter or registration official shall submit the application directly to the division of elections. For purposes of this subsection, "directly to the division of elections" means that an application may not be submitted to any intermediary that could control or delay the submission of the application to the division or gather data on the applicant from the application form. However, nothing in this subsection is intended to prohibit a voter from giving a completed absentee ballot application to a friend, relative, or associate for transfer to the United States Postal Service or a private commercial delivery service for delivery to the division.

(b) An application requesting delivery of an absentee ballot to the applicant by mail must be received by the division of elections not less than 10 days before the election for which the absentee ballot is sought. An application for an absentee ballot for a state election from a qualified voter requesting delivery of an absentee ballot to the applicant by electronic transmission must be received by the division of elections not later than 5:00 p.m. Alaska time on the day before the election for which the absentee ballot is sought. An absentee ballot application submitted by mail under this section must permit the person to register to vote under AS 15.07.070 and to request an absentee ballot for each state election held within that calendar year for which the voter is eligible to vote. An absentee ballot application submitted by electronic transmission under this section may not include a provision that permits a person to register to vote under AS 15.07.070.

(c) After receipt of an application, the director shall send the absentee ballot and other absentee voting material to the applicant by the most expeditious mail service. However, if the application requests that an absentee ballot for a state election be sent by electronic transmission, the director shall send the absentee ballot and other absentee voting material to the applicant by electronic transmission. Except as provided in (k) of this section, the absentee ballot and other absentee voting material shall be sent as soon as they are ready for distribution. If the absentee ballot and other absentee voting material are mailed to the applicant, the return envelope sent with the ballot and other materials shall be addressed to the election supervisor in the district in which the voter is a resident.

(d) Upon receipt of an absentee ballot by mail, the voter, in the presence of a notary public, commissioned officer of the armed forces including the National Guard, district judge or magistrate, United States postal official, registration official, or other person qualified to administer oaths, may proceed to mark the ballot in secret, to place the ballot in the secrecy sleeve, to place the secrecy sleeve in the envelope provided, and to sign the voter's certificate on the envelope in the presence of an official listed in this subsection

who shall sign as attesting official and shall date the signature. If none of the officials listed in this subsection is reasonably accessible, an absentee voter shall sign the voter's certificate in the presence of an individual who is 18 years of age or older, who shall sign as a witness and attest to the date on which the voter signed the certificate in the individual's presence, and, in addition, the voter shall certify, as prescribed in AS 09.63.020, under penalty of perjury, that the statements in the voter's certification are true.

(e) An absentee ballot must be marked on or before the date of the election. Except as provided in (h) of this section, a voter who returns the absentee ballot by mail, whether provided to the voter by mail or by electronic transmission, shall use a mail service at least equal to first class and mail the ballot not later than the day of the election to the election supervisor for the house district in which the voter seeks to vote. Except as provided in AS 15.20.480, the ballot may not be counted unless it is received by the close of business on the 10th day after the election. If the ballot is postmarked, it must be postmarked on or before election day. After the day of the election, ballots may not be accepted unless received by mail.

(f) The director shall require a voter casting an absentee ballot by mail to provide proof of identification or other information to aid in the establishment of the voter's identity as prescribed by regulations adopted under AS 44.62 (Administrative Procedure Act). If the voter 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 and has not met the identification requirements set out in AS 15.07.060, the voter must provide one of the following forms of proof of identification:

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

(2) a copy of a current utility bill, bank statement, paycheck, government check, or other government document; an item provided under this paragraph must show the name and current address of the voter.

(g) The director shall maintain a record of the name of each voter to whom an absentee ballot is sent under this section. The record must list the date on which the ballot is mailed or provided by electronic transmission and the date on which the ballot is received by the election supervisor and the dates on which the ballot was executed and postmarked.

(h) Except as provided in AS 15.20.480, an absentee ballot returned by mail from outside the United States or from an overseas voter qualifying under AS 15.05.011 that has been marked and mailed not later than election day may not be counted unless the ballot is received by the election supervisor not later than the close of business on the

(1) 10th day following a primary election or special election under AS 15.40.140; or

(2) 15th day following a general election, special runoff election, or special election, other than a special election described in (1) of this subsection.

(i) Repealed by SLA 2013, ch. 73, § 44, eff. Jan. 1, 2014.

(j) The director shall adopt regulations under AS 44.62 (Administrative Procedure Act) specifying the information required to be included on an absentee ballot application form. The regulations must require that an absentee ballot application form

(1) contain only that information required under regulations adopted by the director;

(2) conceal the personal information of the individual requesting delivery of an absentee ballot while the application is in the custody of the United States Postal Service or other person delivering the application to the division;

(3) specify that the form is to be returned by the voter directly to the division, and not to another person providing the form; and

(4) if not prepared by the division, be approved by the director before distribution to the public.

(k) In accordance with 42 U.S.C. 1973ff-1(a)(8)(A), if an application is received at least 45 days before an election and is from an absent uniformed services voter or an overseas voter, the director shall send an absentee ballot and other voting material to the applicant not later than 45 days before the election.

(l) If an application is received at least 45 days before an election and is from a voter who notifies the director in writing that the voter expects to be living, working, or traveling outside the United States at the time of the election or expects to be living, working, or traveling in a remote area of the state where distance, terrain, or other natural conditions deny the voter reasonable access to a polling place at the time of the election, the director shall send an absentee ballot and other voting material to the applicant not later than 45 days before the election.

AS 15.20.203. Procedure for district absentee ballot counting review

(a) The district absentee ballot counting board shall examine each absentee ballot envelope and shall determine whether the absentee voter is qualified to vote at the election and whether the absentee ballot has been properly cast.

(b) 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 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.

(c) 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 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.

(d) The election supervisor shall place all rejected absentee ballots in a separate envelope with the statements of challenge. The envelope shall be labeled "rejected absentee ballots" and shall be forwarded to the director with the election certificates and other returns.

(e) If an absentee ballot is not rejected, the envelope shall be opened and the secrecy sleeve containing the absentee ballot shall be placed in a container and mixed with other secrecy sleeves.

(f) The secrecy sleeves shall be drawn from the container, the absentee ballots shall be removed from the secrecy sleeves, and the absentee ballots counted at the times specified in AS 15.20.201 and according to the rules for determining properly marked ballots in AS 15.15.360.

(g) Upon completion of the absentee ballot review, the election supervisor shall prepare an election certificate for execution by the district absentee ballot counting board and shall forward the original certificate and other returns to the director no later than the 16th day following the election.

(h) The director shall prepare and mail to each absentee voter whose absentee ballot was rejected under this section a summary of the reason that the challenge to the absentee ballot was upheld and the absentee ballot was rejected.

(i) The director shall mail the materials described in (h) of this section to the voter not later than

(1) 10 days after completion of the review of ballots by the state review board for a primary election, or for a special election under AS 15.40.140 that is followed by a special runoff election;

(2) 60 days after certification of the results of a general election, special runoff election, or special election other than a special election described in (1) of this subsection.

(j) The director shall make available through a free access system to each absentee voter a system to check to see whether the voter's ballot was counted and, if not counted, the reason why the ballot was not counted. The director shall make this information available through the free access system not less than

(1) 10 days after certification of the results of a primary election, or a special election under AS 15.40.140 that is followed by a special runoff election; and

(2) 30 days after certification of the results of a general or special election, other than a special election described in (1) of this subsection.

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.

AS 15.20.540. Grounds for election contest

A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds:

(1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election;

(2) when the person certified as elected or nominated is not qualified as required by law;

(3) any corrupt practice as defined by law sufficient to change the results of the election.

AS 15.20.550. Jurisdiction and time for contest

The action may be brought in the superior court within 10 days after the completion of the state review.

AS 15.20.560. Judgment of court

The judge shall pronounce judgment on which candidate was elected or nominated and whether the question or proposition was accepted or rejected. The director shall issue a new election certificate to correctly reflect the judgment of the court. If the court decides that the election resulted in a tie vote, the director shall immediately proceed to determine

the election by lot as is provided by law. If the court decides that no candidate was duly elected or nominated, the judgment shall be that the contested election be set aside. The provisions of this section and AS 15.20.540 and 15.20.550 are not intended to limit or interfere with the power of the legislature to judge the election and qualifications of its members.

ALASKA REGULATIONS:

6 AAC 25.510. Identification required for by mail and special needs voting.

(a) A voter shall provide at least one form of identification specified under (b) of this section at the time the voter

(1) applies for an absentee ballot by mail; or

(2) repealed 8/23/2001;

(3) executes the voter's certificate in voting an absentee ballot by mail or special needs;

(4) repealed 8/22/2004.

(b) The form of identification provided by the voter must be at least one of the following: the voter's

(1) voter registration number;

(2) social security number or the last four digits of the social security number;

(3) date of birth;

(4) Alaska driver's license number; or

(5) Alaska State identification number.

(c) Repealed 8/22/2004.

PARTIES

The appellant is Kathryn Dodge. The cross-appellant is Barton LeBon. The appellees are Lieutenant Governor Kevin Meyer and the Director of the Division of Elections, in their official capacities (collectively, the "Division"). At the time of the recount in question, the Director was Josephine Bahnke. The current interim Director is Lauri Wilson.

INTRODUCTION

This case challenges the result of the 2018 general election race for the House District 1 seat in the Alaska House of Representatives. After an automatic recount, candidate Barton LeBon was certified the winner by a one-vote margin. Losing candidate Kathryn Dodge then filed this recount appeal, asking this Court to review the Division's count/no-count decisions on four ballots. Mr. LeBon and the Alaska Republican Party cross-appealed, asking the Court to review the Director's calls on five additional ballots and to uphold the recount result.

This Court appointed a Special Master to recommend findings of fact and conclusions of law. After holding an evidentiary hearing, the Special Master recommended that only evidence available to the Director at the recount should be considered in this recount appeal and recommended upholding the Director's decisions on all nine challenged ballots. Appellees now ask this Court to follow that recommendation and affirm the recount result.

ISSUES PRESENTED

1. *Scope of recount appeal.* Is a recount appeal an appeal of the Director's decisions at the recount and thus limited to the information and records available to the Director at the recount, or may the appellant present new, post-recount evidence—in this case, evidence about voter residency—in support of overturning the Director's decisions?

2. *Voter residency*

    a. *David Odom.* Did the Director properly count the ballot of a voter who was registered to vote in the district and did not notify the Division that he did not actually reside in the district until after the recount?

    b. *Norma Jean Knapp.* Did the Director properly count the ballot of a voter who was registered to vote in the district and who has never notified the Division that she does not actually reside in the district?

    c. *Robert Beconovich.* Did the Director properly reject the ballot of a voter who was not registered in the district because his registration was automatically changed when he filed for his PFD using an address outside the district and he did not opt out of that change?

3. *Ballot markings*

    a. *Undervote: No mark.* Did the Director properly reject as undervoted two ballots on which the voters made no mark in the ovals provided?

b. *Stray mark.* Did the Director properly count as a vote for Ms. Dodge a ballot on which the voter filled in the oval for Ms. Dodge and made a stray mark in the oval for Mr. LeBon?

c. *Overvote: "X."* Did the Director properly reject as overvoted a ballot on which the voter filled out both candidates' ovals and made an additional "X" over the oval for Mr. LeBon?

4. *Incorrect identifiers.* Did the Director properly reject the absentee ballots of two voters whose ballot envelopes bear incorrect voter identifiers (each bears the other voter's identifier)?

STATEMENT OF THE CASE

I. The Alaska Division of Elections

The Alaska Division of Elections is responsible for conducting state and federal elections in Alaska.[1] Although it administers elections, the Division remains neutral and objective as to their outcome. Its core mandate is to ensure that every eligible Alaskan has a meaningful opportunity to vote and to have that vote counted.

II. Voting procedures

A voter may cast a ballot in several different ways either before or on Election Day. Ballots cast by some voting methods are immediately commingled with those of other voters, and ballots cast by other methods are isolated in individual envelopes with voter information and signatures for later review.

A voter may cast a regular ballot in person at a precinct on Election Day if her name is on the precinct register and she appears otherwise qualified.[2] A regular ballot is commingled with other ballots in the ballot box and is never isolated with the voter's identifying information.[3] In a few locations, "early voting" is available before Election Day.[4] At early voting locations, election workers can verify the qualifications of voters from anywhere in the state and provide ballots for all forty districts. An early voting

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1 AS 15.15.010.

2 AS 15.07.010.

3 AS 15.15.200.

4 AS 15.20.064.

ballot, when cast, is immediately commingled with other ballots like a regular ballot on Election Day.[5]

A voter whose name is not on the precinct register, or whose name or residence has recently changed, may vote a "questioned" ballot.[6] Poll workers are instructed to issue a questioned ballot whenever they are in doubt about a voter's qualifications. The voter's ballot is placed in a questioned ballot envelope marked with the voter's identifying information for later review.

A voter may also vote "absentee," either in person, by mail, or by electronic transmission.[7] When this is done by mail, the Division sends the voter a ballot and the voter mails it back in an absentee ballot envelope marked with identifying information.[8] Absentee-in-person ballots are obtained from an absentee voting official or an election supervisor at a Division office,[9] and are also placed in envelopes with identifying information and the signatures of the voter and the official.[10]

At the polls, regular ballots are either fed into a counting machine or counted by hand, and the precinct workers report their precinct results to the Division of Elections. These results include only regular ballots cast at the precinct; they do not include any of the ballots isolated in individual envelopes, such as questioned and absentee ballots.

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5 AS 15.20.064(c).

6 AS 15.07.010.

7 AS 15.20.081(a); AS 15.20.061; AS 15.20.066.

8 AS 15.20.081(e).

9 AS 15.20.061.

10 AS 15.20.045(c).

Absentee and questioned ballots are sent to the regional office, and the regional supervisor convenes regional absentee and questioned ballot review boards to review questioned and absentee ballot envelopes for voter eligibility.[11]

The bi-partisan statewide review board then meets in Juneau to audit the election results. This board receives all the election materials from all regions and reviews them to assure their accuracy. Among other materials, the board has access to precinct registers, register covers with election worker and voter names on them, election results tapes from machines, memory cards, questioned ballot registers, absentee ballot reports, reports of early votes, questioned ballot reports, and ballot stubs.

III. The 2018 general election for the House District 1 seat

The 2018 general election was held on November 6, 2018. Kathryn Dodge and Barton LeBon sought to represent House District 1, located in Fairbanks, in the Alaska House of Representatives. The Division originally certified the race as a tie between the two candidates with each receiving 2,661 votes.[12] This triggered an automatic recount by statute.[13] The Division held the recount in Juneau on November 30. Representatives for both candidates and their respective political parties were present and had the opportunity to challenge the Division's vote-counting decisions. During the recount, the Division

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11 *See* AS 15.20.190; AS 15.20.201-207.

12 *See* Alaska Division of Elections, *2018 General Election Official Results*, http://www.elections.alaska.gov/results/18GENR/data/results18.pdf (November 26, 2018); Alaska Division of Elections, *Election Officials Certify House District 1 Race as a Tie*, http://www.elections.alaska.gov/doc/info/HD1RaceIsTie.pdf (November 26, 2018).

13 AS 15.15.460.

identified one additional vote for Ms. Dodge and two for Mr. LeBon, so it certified Mr. LeBon as the winner by a vote of 2,663 to 2,662.[14]

IV. This recount appeal

On December 5, Ms. Dodge filed this recount appeal asking that four of the Division's count decisions be reviewed; Mr. LeBon cross-appealed on December 10 raising five additional ballot challenges. The Court appointed Superior Court Judge Eric Aarseth to serve as Special Master and make a report containing recommended findings of fact and conclusions of law.

On December 20, Judge Aarseth held a hearing. He noted the Division's and Intervenors' arguments that no new evidence beyond that available to the Director can be considered in the scope of recount appeal. But he accepted evidence in case this Court chose to consider a broader record. The Appellant presented an Affidavit of David Odem dated December 5, 2018[15] and the testimony of Kathryn Dodge and Elaine Lawrence regarding their research into the residency of two voters—David Odem and Norma Jean Knapp. In addition, the Appellant presented Robert Beconovich's testimony regarding his PFD voter registration, and the Division presented responsive testimony about its procedures regarding Mr. Beconovich's registration.

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[14] *See* Alaska Division of Elections, *House District 1 Candidate Barton LeBon Prevails By One Vote During Recount*, http://www.elections.alaska.gov/doc/info/HD1RecountResults.pdf (November 30, 2018).

[15] Exhibit 1001. The Special Master did not consider the Affidavit because it was not part of the "record of the recount."

At the close of the hearing, Judge Aarseth made oral rulings, recommending that this Court affirm the Director's decisions on all nine challenged ballots. He reduced those rulings to writing in a December 21 Order.

STANDARD OF REVIEW

The Court's recount appeal cases do not make explicit what standard of review the Court uses when reviewing the Director's vote-counting decisions in a recount appeal, though the Court applies its independent judgment to questions of law, including statutory interpretation.[16] But the Division has expertise in election matters and is sometimes entitled to some deference, such as when interpreting its own regulations[17] or ambiguous statutes.[18] And in *Willis v. Thomas*, the Court's discussion seems to suggest a measure of deference to the Director's vote-counting decisions—in that case, the Court observed that "a distinction must be drawn somewhere between those marks that are sufficiently inside the box and those that are too far outside," and the Court found no error in the Division's decision about where to draw that distinction. This Court could appropriately defer to the Division on close vote-counting calls.

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16 *See, e.g., Edgmon v. State, Office of Lieutenant Governor, Div. of Elections*, 152 P.3d 1154, 1156 (Alaska 2007); *Cissna v. Stout*, 931 P.2d 363, 366 (Alaska 1996); *Nageak v. Mallott*, 426 P.3d 930, 940 (Alaska 2018).

17 *See Alpine Energy, LLC v. Matanuska Elec. Ass'n*, 369 P.3d 245, 251 (Alaska 2016) (explaining that a deferential standard of review applies to an agency's interpretation of its own regulations where agency expertise is implicated).

18 *See Falke v. State*, 717 P.2d 369, 374 n.9 (Alaska 1986) ("The state notes that where election officials are faced with applying ambiguous statutes, we have given considerable deference to the division's expertise in the conduct of elections.").

When vote-counting decisions are at issue, "the overriding principle 'is that the voter shall, ordinarily, have his vote recognized and the candidate be given the office to which he is elected if the votes are cast and returned under such circumstances that it can be said it represents the voice of the majority of the voters participating.'"[19] Thus, the Court has explained that not every technical mistake or violation of an election statute or regulation warrants declining to count a vote after it is cast:

> All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to affect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void.[20]

Violations of mandatory requirements, however, do invalidate votes. "[W]here the vote violates provisions designed to insure the integrity of the electoral process, the public has a supervening interest—that of fundamentally sound elections—which is protected by not counting illegal votes, regardless of the source of their illegality."[21]

ARGUMENT

A recount appeal is distinct from an election contest and constitutes an appellate review of the Director's recount decisions. It is not a de novo proceeding at which new evidence not available to the Director—like evidence of improper voting—can be used to overturn the Director's ballot-counting decisions. Such broader evidence can be

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19 *Id.* (quoting *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978)).

20 *Id.* (quoting *Finkelstein v. Stout*, 774 P.2d 786, 790 (Alaska 1989)).

21 *Finkelstein*, 774 P.2d at 791–92.

considered in an election contest, a separate statutory procedure involving a high burden of proof reflecting the legislature's prioritization of the stability and finality of election results. If such outside evidence could be presented in a recount appeal, without the same high burden of proof, a plaintiff would rarely have reason to bring an election contest.

In this recount appeal, the nine ballots challenged by the two candidates fall into three categories. Three of the ballots involve residency-based voter eligibility questions. The Court should reject these challenges because the Director properly applied the statutory presumption that these voters reside at the addresses reflected in their voter registration records. Four of the ballots have atypical markings, and the Court should reject these challenges because the Director properly applied the ballot-marking statute while also considering voter intent. Finally, two ballots were those of absentee voters who put incorrect voter identifiers on their attestation envelopes, and the Court should reject these challenges because the Director properly applied the mandatory requirement that an absentee voter provide a correct identifier. The Special Master recommended upholding the Director's decisions in all three categories.

I. A recount appeal is distinct from an election contest and constitutes an appellate review of the Director's recount decisions.

"A recount appeal is a direct review by this court of the recount decision."[22] "The inquiry in a recount appeal is whether specific votes or classes of votes were correctly counted or rejected."[23] Evidence that was not available to the Director at the time of the

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22 *Cissna v. Stout*, 931 P.2d 363, 364–65 (Alaska 1996).

23 *Id.* at 367.

recount cannot have informed the Director's vote-counting decisions, and thus cannot reasonably provide a basis for overturning those decisions in a recount appeal.[24]

By statute, the nature of a recount appeal is that of an *appeal*—i.e., an inquiry into whether the Director made mistakes at the recount. A person "who has reason to believe an error has been made *in the recount*" may file a recount appeal.[25] The Director cannot err "in the recount" by failing to take into account evidence that is not available. Just as evidence not before a trial court cannot justify reversing a decision on appeal, evidence not before the Director cannot justify overturning her decisions in a recount appeal. Accordingly, the recount appeal statute directs the Division to provide the Court with "the record of the recount taken," because that is what the Court should consider.[26]

That does not mean that the Court in a recount appeal is "limited solely to determining the facial validity of the ballots."[27] Instead, the Court can "search underlying records and election materials to ensure that a vote was cast in compliance with the requirements of Alaska's election laws."[28] At the recount, the Director has access to information beyond the ballots, including absentee and questioned ballot envelopes, as well as the voters' registration applications, voting, and registration histories. What the

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24 *See Finkelstein v. Stout*, 774 P.2d 786, 788 (Alaska 1989) (holding that objections to twenty-one votes where voters "signed registration affidavits stating that they were not residents of the district at the time of the election" were untimely because they were raised after the recount was concluded), *abrogated in part on other grounds by Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018).

25 AS 15.20.510 (emphasis added).

26 *Id.*

27 *Willis v. Thomas*, 600 P.2d 1079, 1082 (Alaska 1979).

28 *Id.*

Director does *not* have—what is *not* part of the "underlying records and election materials" the Court should consider—is evidence produced *after* the recount has concluded.

Such new evidence would be relevant and admissible in the context of an election contest—a separate proceeding governed by separate statutes and initiated in the superior court.[29] Election contest plaintiffs "carry a heavy burden"[30]: they must show more than just that errors occurred—they must prove "malconduct, fraud, or corruption on the part of an election official" or "any corrupt practice as defined by law" that is "sufficient to change the result of the election."[31] Allegations of fraudulent voting changing the result, if proved, could satisfy this standard.[32] The standard of proof for an election contest is high because election results should not be disrupted lightly—the "general rule" is that "every reasonable presumption will be indulged in favor of the validity of an election,"[33] because "the public has an important interest in the stability and finality of election results."[34]

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29 *See* AS 15.20.540-.560.

30 *Grimm v. Wagoner*, 77 P.3d 423, 432 (Alaska 2003).

31 AS 15.20.540.

32 A series of "corrupt practices" related to elections are set forth in AS 15.56, including "voter misconduct in the second degree," which a voter commits if he "intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title," AS 15.56.040(a)(3), and "voter misconduct in the second degree," which a voter commits if he "knowingly makes a material false statement while applying for voter registration or reregistration," AS 15.56.050(a)(2).

33 *Turkington v. City of Kachemak*, 380 P.2d 593, 595 (Alaska 1963).

34 *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995).

If the legislature had intended for a recount appeal to be simply another form of wide-ranging election contest, the legislature would not have provided entirely separate and distinct statutes for these two types of cases.[35] By contrast to the election contest statute, the recount appeal statute describes an "appeal," and directs that it either initiate in this Court (i.e., in an appellate court) or—for the subset of such appeals that begin in superior court—that it be considered "in accordance with applicable court rules governing appeals in civil matters."[36] The statute plainly contemplates an appellate proceeding, distinct from an election contest.

Policy concerns support maintaining a meaningful distinction between a recount appeal and an election contest. The wide-ranging approach Ms. Dodge advocates would transform recount appeals into essentially disguised election contests, but without the high burden of proof that prevents such cases from easily disrupting the finality of election results. A plaintiff who merely wants the Court to double-check the Director's recount decisions can bring a recount appeal, but a plaintiff who wants to present new evidence about alleged election-related problems—for instance, voters fraudulently claiming residency—should bring an election contest subject to the applicable high standards. Otherwise, every close election will result in a pseudo "appeal" involving fact finding reaching far beyond the Division's records to disrupt an election result without the protection afforded by the high election contest standard.

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35 *Compare* AS 15.20.540-.560 (election contest statute) *with* AS 15.20.510 (recount appeal statute).

36 AS 15.20.510.

At the hearing before Judge Aarseth, Ms. Dodge presented new evidence about some voters' residency that post-dated the recount, specifically, an affidavit of David Odem stating that he was not a resident of House District 1. Ms. Dodge argued that the Court had considered such new evidence in prior recount appeals. [Dodge Hearing Br. 8-12]

Some prior recount appeal cases were indeed broader in scope because they were consolidated with election contests, which originate in the superior court and naturally require taking new evidence.[37] In *Cissna v. Stout*, the Court observed that "[p]rior cases may have blurred the line between issues appropriately considered in a recount appeal and in election contests," opining that "[i]n large part any confusion results from the consolidation of recount appeals and election contests for review."[38] Despite this line-blurring, "an election contest and a recount appeal are distinct proceedings."[39] This case does not include an election contest.

This Court has not relied on post-recount evidence to overturn recount decisions in any pure recount appeal. In *Carr v. Thomas*, for example, the Court considered a recount

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37 *See Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979) ("Because neither statute specifies exactly what the difference between the two actions is, appellant Willis filed both an election contest in the superior court under AS 15.20.540 and a direct appeal of the recount to this court under AS 15.20.510. The election contest case was consolidated with this direct appeal before Judge Ripley."); *Hickel v. Thomas*, 588 P.2d 273 (Alaska 1978) (recount appeal companion case to election contest *Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978)); *Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018 ("We consolidated the appeal from the superior court in the election contest with the recount appeal from the Division.").

38 931 P.2d 363, 371 (Alaska 1996).

39 *Willis*, 600 P.2d at 1081.

appeal that presented a single legal question: should the Division count votes cast by questioned voters via punch-card ballots rather than standard paper ballots?[40] Although the Court mentioned an affidavit by the Division Director, this affidavit was simply background on how the punch-card ballots were used, not new information on any disputed factual issue, and certainly not information unknown to the Director at the time of the recount.[41]

In *Fischer v. Stout*, the Court based its ballot-counting decisions on Division records such as ballots, ballot applications, and ballot envelopes, apparently without an evidentiary hearing or referral to a master.[42] The Court mentioned one voter's claims about her attempts to register—which could suggest that the Court heard the voter's testimony—but the Court then said that "election officials found this evidence insufficient" to count the voter's vote, clarifying that the "evidence" the Court was referring to had been available to the election officials at the recount.[43] The Court also mentioned "inconclusive and unconvincing" evidence about another voter's residence, and "records" that "conclusively show[ed]" yet another voter's residence, but the Court never said that this evidence post-dated the recount—on the contrary, the context suggests that the Court was referring to the Division's own records.[44]

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40 *Carr v. Thomas*, 586 P.2d 622, 624 (Alaska 1978).

41 *Id.*

42 *Fischer v. Stout*, 741 P.2d 217, 220-25 (Alaska 1987).

43 *Id.* at 224.

44 *Id.*

In *Finkelstein v. Stout*, the Court referred a recount appeal to a special master who prepared a report. But the Court's opinion did not mention the master holding an evidentiary hearing, nor did any of the Court's decisions on the challenged ballots appear to rely on post-recount evidence.[45] On the contrary, the Court affirmatively rejected such evidence. Confronted with "[p]ost-election affidavits demonstrating non-residency" for twenty-one voters, the Court held that "this objection was untimely as it was raised after the recount was concluded."[46]

Finally, in *Cissna v. Stout*, the Court's opinion largely concerned the legal question of whether the Director properly rejected the ballots of voters who certified in writing on their absentee ballot envelopes that they resided at addresses outside the district.[47] In looking at one additional challenge, the Court considered affidavits on the issue of whether the Division was at fault for the voter's untimely ballot, but ultimately concluded that the untimely ballot had to be rejected regardless of fault.[48] The Court did not use post-recount evidence to overturn a count/no-count decision by the Division.

In sum, noting in this Court's past treatment of pure recount appeals like this one supports relying on post-recount evidence to overturn recount decisions. Precedent does not support the wide-ranging post-election residency inquiry that Ms. Dodge seeks.

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45 *Finkelstein v. Stout*, 774 P.2d at 787-92.

46 *Id.* at 788.

47 *Cissna v. Stout*, 931 P.2d 363, 367-70 (Alaska 1996).

48 *Id.* at 370.

Perfection in an election is not possible, particularly given that "[u]nique problems are presented in the vast area encompassed as well as the varied cultural backgrounds and primary languages of voters."[49] In *Cissna v. Stout*, this Court observed that "[a]s a practical matter," the votes of nonresidents may sometimes be counted "simply because election officials do not know that their residency has changed."[50] As the Special Master correctly recognized in his recommendation to this Court, this reality reflects "balancing decisions" by the legislature "between perfection in the election process versus finality and a prompt decision."[51]

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

Ms. Dodge challenges the Director's decision to count two ballots, arguing that these voters do not truly reside in House District 1. [R. 15, 37] She also challenges the Director's decision to reject a third ballot, arguing that that voter *does* truly reside in the district. [R. 6-11] But the Director properly applied the statutory presumption that these three voters reside at the addresses reflected in their voter registration records, and the Court should not overturn those decisions based on post-recount evidence.

A. The Division's official voter registration record is presumptive evidence of the person's voting residence.

According to AS 15.05.020, a voter's residence is "that place in which the person's habitation is fixed, and to which, whenever absent, the person has the intention

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49 *Hammond v. Hickel*, 588 P.2d 256, 259 (Alaska 1978).

50 *Cissna*, 931 P.2d at 369.

51 Order Recommending Director's Decision on House District 1 Recount be Affirmed at 13 (Dec. 21, 2018).

to return."[52] "If a person resides in one place, but does business in another, the former is the person's place of residence."[53] But the Court has clarified that a residence "need not be a house or apartment" and "need not have mail service"; it "need only be some specific locale within the district at which habitation can be specifically fixed."[54] "Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient."[55] A "post office box or private mail service address," however, "is clearly not a voter's fixed place of habitation" because "human beings are of insufficiently diminutive stature to dwell comfortably within such a space."[56]

Alaska's voter registration form requires a voter to specify "the Alaska residence address where you claim residency" and attest—under penalty of perjury—that the information provided on the form is true and correct. [*See, e.g.*, R. 23] The Division of Elections uses this address in the voter's official voter registration record. If a voter later attests in writing to a different residence address, such as when requesting an absentee ballot, the Division updates the voter's registration accordingly. [*See, e.g.*, R. 41]

Alaska Statute 15.05.020(8) creates a presumption that a voter resides at the address listed in his or her official voter registration record:

> 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

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52 AS 15.05.020(2).

53 *Id.*

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

55 *Id.*

56 *Id.*

> is negated *only if the voter notifies the director in writing of a change of voting residence.*[57]

The Court has said that this language "expressly creates a presumption that a voter has not changed residence."[58] And where the "voter's intent to indicate a new legal residence" is "unclear," the voter's residence for voting purposes remains the same as the registration record: "In the absence of a clear expression of intent to change a legal residence the residence cannot be considered to have been changed."[59]

The Court has considered several recount appeals at which certain voters' residences in a district were challenged. But the Court has not lightly rejected votes on the grounds that the statutory presumption of residence was overcome.

In *Fischer v. Stout*, the Court rejected the absentee ballots of voters who registered using private mail service addresses, observing that it is not physically possible for a voter to reside within a mailbox.[60] The Court also rejected the ballots of voters who attested to residence addresses outside the district when filling out their absentee ballot envelopes.[61] But the Court accepted another voter's absentee ballot despite allegations that she had registered using a non-existent address, concluding that "no evidence was

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57 AS 15.05.020(8) (emphasis added).

58 *Willis v. Thomas*, 600 P.2d 1079, 1085 (Alaska 1979). The second sentence of this provision was changed after *Willis* such that the presumption can be overcome by a "writing" rather than an "affidavit" as previously required, but the first sentence creating the presumption remained unchanged. *See id.* for prior statutory language.

59 *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).

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

61 *Id.*

produced indicating that [the voter] did not reside at her listed address at the time of registering, nor did [the voter] provide the affidavit required to rebut the presumption of residency" under the residency statute.[62]

In *Cissna v. Stout*—as in *Fischer*—the Court again rejected the ballots of voters who attested to residence addresses outside the district when filling out their absentee ballot envelopes or other forms.[63] But in doing so, the Court observed that "[a]s a practical matter," the votes of nonresidents may sometimes be counted "simply because election officials do not know that their residency has changed."[64] The Court held that the residency statute "allows the election official, in the absence of any written notification of change in residency, to presume that a voter still is a legal resident of the district in which he or she is registered."[65]

Finally, in *Finkelstein v. Stout*, the Court accepted the ballots of voters whose absentee ballot oaths suggested no permanent Alaska residence, concluding that each "voter's intent to indicate a new legal residence outside of the district was unclear" and that "[i]n the absence of a clear expression of intent to change a legal residence the residence cannot be considered to have been changed."[66] The Court also accepted the ballots of voters who signed registration affidavits after the recount stating that they were

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62 *Id.* at 221-22.

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

64 *Id.*

65 *Id.*

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

not residents of the district at the time of the election, concluding that "this objection was untimely as it was raised after the recount was concluded."[67]

In sum, the Court has rejected votes on the grounds that the statutory presumption of residence was overcome only when either (1) it was physically impossible for the voter to reside at the registered address,[68] or (2) the voter notified the Division of Elections of a change of address in writing before the election.[69]

The Division's position is not, as Ms. Dodge argues, that "no amount of objective evidence can overcome the presumption" that a voter resides where registered. [Dodge Hearing Br. 20] But the statutory presumption of residence cannot be overcome by speculation that an address does not seem like a typical residence. Although there may be other ways to overcome the presumption, it would be inappropriate for the Director to disenfranchise a voter based on evidence that does not conclusively prove non-residency.

"[T]he burden of proving a vote should not be counted is on the challenger to that vote."[70] And the Court has repeatedly emphasized the "bedrock principle" that the right to vote "is one of the fundamental prerogatives of citizenship" and that it is "fundamental to our concept of democratic government" and of "profound importance."[71] Given the importance of the right to vote, discarding votes based on the outward appearance of a

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67 *Id.*

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

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

70 *Edgmon*, 152 P.3d at 1159.

71 *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010) (quoting *Carr*, 586 P.2d at 626 and *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995)).

residence address or singling out a few voters for extra residence-based scrutiny risks wrongly disenfranchising voters and could raise equal protection concerns.[72]

Ms. Dodge relies on *Lake and Peninsula Borough Assembly v. Oberlatz*, which concerned voter residence, [Dodge Hearing Br. 22-24]. But that case was before the Court in an entirely different procedural posture and does not support her push for additional residence scrutiny. In *Oberlatz*, a borough's canvassing committee rejected the ballots of voters it concluded were non-residents.[73] The voters then brought a separate original action in superior court claiming that the rejection of their votes had violated the constitution and other laws.[74] But they did not seek to disturb the election results—rather, they sought injunctive and declaratory relief reinstating them as registered voters in the borough.[75] The superior court concluded that the voters were residents, and the borough appealed.[76] Given this very different procedural posture, *Oberlatz* does not inform what kind of voter residency inquiry is appropriate in the context of a recount appeal.

Moreover, given the limited scope of the borough's appeal in *Oberlatz*, the Court "express[ed] no opinion on the propriety of the legal standards the superior court used" to determine residency and instead "review[ed] only the superior court's factual findings for

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72 *Cf. Bush v. Gore*, 531 U.S. 98, 105 (2000) (concluding that different standards applied to different ballots in recount violated equal protection); *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 42 (Alaska 2001) (explaining the sliding-scale equal protection analysis under the Alaska Constitution).

73 *Lake and Peninsula Borough Assembly v. Oberlatz*, 329 P.3d 214, 218 (Alaska 2014).

74 *Id.* at 219.

75 *Id.*

76 *Id.*

clear error."[77] Thus, the Court's opinion cannot be considered an endorsement of the residency standards the superior court used.

Furthermore, those standards do not support Ms. Dodge's position. The superior court applied the presumption of residency under AS 15.05.020(8) and said that "the party challenging residence bears the burden of overcoming that presumption; the challenger must prove the voter does not intend to remain in the place the voter wishes to vote."[78] This is consistent with the Division's position. Moreover, in reviewing the superior court's factual findings, the Court noted that "business ownership in a particular location does not disqualify a person from claiming that location as home."[79] And the Court upheld findings that the voters in question were borough residents despite their extremely minimal presence there. For example, one lived in Switzerland and had spent less than three weeks in the borough over the preceding three years. But his storage of personal effects at a family home in the borough was considered sufficient to establish his residency there for voting purposes.[80]

Consistent with this authority, when counting votes the Division properly relies on a strong statutory presumption that a voter resides at the address in the Division's records.

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77 *Id.* at 222.

78 *Id.* at 221 n.17.

79 *Id.* at 223.

80 *Id.* at 218 & 223.

C. The Director properly counted David Odom's absentee ballot because the presumption of residency was not overcome before the recount.

The first of the three residency challenges raised by Ms. Dodge involves Dr. David Odem. Because it was not impossible for Dr. Odom to reside at his registered address and because he did not notify the Division of a change of address in writing before the election, the Director properly relied on the presumption of residency in counting his vote. The written affidavit he submitted five days after the recount is beyond the scope of a recount appeal.

When Dr. Odom applied for an absentee ballot for the 2018 general election, he filled out a form instructing him to provide the "Alaska Residence Address Where You Claim Residency—You MUST provide an Alaska residence address." [R. 41] Dr. Odom listed 3514 International St. as his residence address. [R. 41] He then signed an oath stating "I swear or affirm, under penalty of perjury, that: The information on this form is true, accurate, and complete to the best of my knowledge and I am eligible to vote in the requested jurisdiction." [R. 41] The Division's registration record for Dr. Odom correctly reflected this residence address. [R. 39]

At the absentee ballot review, Dr. Odom's ballot was challenged on the grounds that his "registered address is a business address and therefore not an eligible address for a registered address." [R. 37] At the later recount, Ms. Dodge asserted that 3514 International St. "doesn't exist," though she noted that "there is a suite in a strip mall that displays the address." [R. 52] She then argued that it is a business address and "Dr. Odom does not reside there" because the owner of the strip mall does not claim a residential tax

exemption and "[t]here is no indication that a person would be expected to inhabit this office suite." [R. 53] She further noted that Dr. Odom practices medicine in California and has a medical license that lists an address in California. [R. 53]

The Director properly counted Dr. Odom's ballot. This inconclusive information was not enough to rebut the statutory presumption of residency that flowed from Dr. Odom's attestation—under penalty of perjury—that this address was his residence. The Director lacks the resources to investigate voters' living situations, so AS 15.05.020(8) instructs the Director to presume that a voter resides where he says he does. And the Court has accepted that "[a]s a practical matter," this presumption means that the votes of people who have moved away from a district may sometimes be counted "simply because election officials do not know that their residency has changed."[81] This is part of the reality of administering elections, which the Legislature recognized in creating the presumption in AS 15.05.020(8).

This Court has concluded in only two circumstances that the statutory presumption of residency was overcome. Dr. Odem's situation presents neither; it was not physically impossible for him to reside at the address he provided, nor did he notify the Division of Elections of a change of address in writing before the election.

First, it was not physically impossible for Dr. Odom to reside at 3514 International St. The fact that this address may not outwardly appear to be a dwelling does not matter because "even a park bench" can be a residence—a residence "need not be a house or

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

apartment" and "need not have mail service"; it "need only be some specific locale within the district at which habitation can be specifically fixed."[82] For example, although "Elmendorf Air Force Base" is not the address of a dwelling, the Court accepted the ballots of voters who listed this as their residence.[83] Even presented with allegations that a voter registered using a non-existent address, the Court accepted the vote despite observing that "[o]ne may not, of course, reside in a nonexistent locale."[84] The only time the Court rejected votes based on the characteristics of the registered address was when it was only a mailbox, as the Court noted that "human beings are of insufficiently diminutive stature to dwell comfortably within such a space."[85] No such physical impossibility is present here. Many people reside in locations that are not traditional "residences." Given this Court's authority on the subject, the Director cannot decline to count a vote simply because an address does not appear to be a typical residence.

Second, Dr. Odom did not notify the Division of Elections of a change of address in writing at any point before the election, or even before the recount. Instead, several days *after* the recount, Ms. Dodge emailed the Director an affidavit signed by Dr. Odom swearing under oath that he did not reside at 3514 International St. "at any time in 2018, including for the 30 days prior to the election," despite his having signed an oath in 2018 under penalty of perjury that this was his Alaska residence address. [R. 41] But that

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82 *Fischer v. Stout*, 741 P.2d 217, 221-22 (Alaska 1987).

83 *Id.* at 221.

84 *Id.*

85 *Id.* at n.7.

evidence was not available to the Director until *after* the recount, could not possibly have informed the Director's decisions at the recount, and thus cannot provide a basis for overturning those decisions in a recount appeal. The Director simply cannot consider a voter affidavit that is not available to her. As in *Finkelstein v. Stout*—in which the Court accepted ballots despite affidavits the voters signed after the recount stating that they had not been residents of the district at the time of the election—this information "was untimely as it was raised after the recount was concluded."[86]

The Court should uphold the Director's decision to count Dr. Odom's ballot because the presumption of residency was not rebutted before the recount.

D. The Director properly counted Norma Jean Knapp's absentee ballot because the presumption of residency was never overcome.

Ms. Dodge similarly challenges the Director's decision to count Norma Jean Knapp's absentee ballot, arguing that she does not actually reside in House District 1. [R. 15] The analysis for Ms. Knapp parallels that for Dr. Odom, with the same conclusion.

When Ms. Knapp applied for an absentee ballot, she filled out the same form as Dr. Odom, instructing her to provide the "Alaska Residence Address Where You Claim Residency." [R. 19] Ms. Knapp listed 1804 S. Cushman St. as her residence and—like Dr. Odom—attested under penalty of perjury that this information was correct and that she was eligible to vote in the requested jurisdiction. [R. 19] The Division's registration record for Ms. Knapp reflects this residence address. [R. 17]

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

At the absentee ballot review, Ms. Knapp's ballot was challenged on the grounds that her "self-declared address is a business (a car lot)." [R. 15] At the later recount, Ms. Dodge asserted that the address is that of "an auto collision and repair shop" and that the property is "zoned 'commercial,' without any mention of residential use." [R. 24] She argued that the address "is extremely unlikely to be the voter's residence" because the property owner does not claim a residential tax exemption and "there is no evidence that there is an apartment or sleeping quarters" there. [R. 24-25]

The Director properly counted Ms. Knapp's ballot because this equivocal information was not enough to rebut the statutory presumption of residency that flowed from Ms. Knapp's attestation—under penalty of perjury—that this was her residence. [R. 19] Neither of the two circumstances that have led the Court to conclude that the presumption of residency was overcome is present for Ms. Knapp.

First, for the same reasons discussed above with regard to Dr. Odom, it was not physically impossible for Ms. Knapp to reside at 1804 S. Cushman St. Second, Ms. Knapp did not notify the Division of a change of address in writing at any point before the election, or even before the recount. Indeed, unlike Dr. Odom, Ms. Knapp still has never said she has a different address. The Court should uphold the Director's decision to count Ms. Knapp's ballot because the presumption of residency was not rebutted.

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

Finally, Ms. Dodge challenges the Director's decision to exclude the questioned ballot of Robert Beconovich. [R. 6] But the Director properly excluded it because as part of his Permanent Fund Dividend (PFD) applications in 2017 and 2018, he claimed in writing to reside outside of House District 1. [R. 10-11]

Mr. Beconovich was previously registered to vote at an address on 20th Avenue within House District 1. [R. 12] But when he applied for a PFD in 2017 and again in 2018, he claimed that his Alaska residence address was 104 Kutter Rd., which is outside the district. [R. 10-11] Under Alaska's PFD voter registration law, this residence information updated Mr. Beconovich's voter record.

Voters enacted the PFD voter registration law in 2016 by ballot initiative, and it provides that eligible Alaskans will be automatically registered to vote (or have their registrations updated) when they apply for their PFDs.[87] Alaska's PFD application requires an applicant to list a residential address and to certify that the information in the application is true and accurate.[88] An applicant must also certify his understanding that "if what I say is not true, it is a criminal offense," and "if I deliberately misrepresent or

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87 *See* AS 15.07.050(a)(5) (providing that voter registration may be made "by completing a permanent fund dividend application"); AS 15.07.070(i) (instructing the Division of Elections to "register voters who submit an application to receive a permanent fund dividend").

88 *See* Exhibit 1002 & Alaska Department of Revenue, Permanent Fund Dividend Division, 2018 Adult Certification Form, https://pfd.alaska.gov/LinkClick.aspx?fileticket=2R4LPj55Xgs%3d&portalid=6&timestamp=1544636957806.

recklessly disregard a fact, I am liable for civil penalties."[89] And he must further certify his understanding 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."[90] The Division of Elections must notify any voter whose address on his PFD application is different than his voter record address that the PFD information will be used to update his voter registration unless he opts out within thirty days.[91] Consistent with this law, when Mr. Beconovich claimed on his PFD application that his residence was 104 Kutter Rd. and certified his understanding that this information would be used to register him to vote, this information was provided to the Director of Elections and used to update his voter registration record.[92] [R. 10] Mr. Beconovich was one of the voters who was sent an opt-out notice in the mail.[93]

Because he was no longer registered in House District 1, when Mr. Beconovich attempted to vote in House District 1 he was required to cast a questioned ballot. [R. 7] At the questioned ballot review, his vote in this race was not counted because he was registered outside House District 1. [R. 6] This decision was challenged on the grounds

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89 *Id.*

90 *Id.*

91 AS 15.07.070(j)-(l) (instructing the Division of Elections to sent notice by mail and provide a 30-day opt-out opportunity).

92 *See* AS 43.23.100.

93 *See* Exhibits 2000 and 2001 and testimony of Carol Thompson (example opt out notice and confirmation that Division records include Robert Beconovich among those voters to whom the opt-out notice was sent).

that the Dodge campaign believed he "never intended to change his voting residence." [R. 6] The Director rejected the challenge.

The Director properly declined to count Mr. Beconovich's ballot because Mr. Beconovich registered himself outside of the district when he applied for his PFD. "[W]hen election officials have written notice of a change in residency, this notice suffices to rebut the presumption of voter residency at the district where that voter previously registered."[94] Again, the Director lacks the resources to investigate voters' living situations, so AS 15.05.020(8) instructs the Director to presume that a voter resides where he says he does, and to change the voter's registration when the voter says his residence has changed. Mr. Beconovich's apparent failure to appreciate the effect of his PFD application—despite clear notice that he would be registered to vote at the address he gave—does not change the effect of the statutes.

Mr. Beconovich testified telephonically before the Special Master that he has resided on 20th Avenue in House District 1 for many years. But again, that information was not available to the Director until *after* the recount, could not possibly have informed her vote-counting decision, and thus cannot provide a basis for overturning that decision.[95] Moreover, even this information were considered, it would not be enough. To be entitled to vote in House District 1, Mr. Beconovich was required not only to reside

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

95 *See id.* at 788 (holding that objections to twenty-one votes where voters "signed registration affidavits stating that they were not residents of the district at the time of the election" were untimely because they were raised after the recount was concluded).

there, but be registered to vote there for thirty days prior to the election.[96] He was not, and the Court should uphold the Director's decision not to count his ballot.

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

Both candidates challenge the Director's decision to count several ballots based on their markings, but the Court should uphold the Director's decisions.

Alaska Statute 15.15.360 provides that "[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."[97] The statute further explains that "[t]he 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."[98] And "[i]f 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,"[99] but "[i]mproper marks on the ballot may not be counted and do not invalidate marks for candidates properly made."[100] "An erasure or correction invalidates only that section of the ballot in which it appears."[101] Finally, AS 15.15.360(b) provides that "[t]he rules set out in this section are mandatory and there

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96 AS 15.07.070(d).

97 AS 15.15.360(a)(1).

98 AS 15.15.360(a)(5).

99 AS 15.15.360(a)(4).

100 AS 15.15.360(a)(6).

101 AS 15.15.360(a)(7).

are no exceptions to them. A ballot may not be counted unless marked in compliance with these rules."

When a voter fails to make a mark in the oval provided as described in AS 15.15.360(a)(1), a ballot is considered "undervoted." When a ballot has markings in more than one oval in a particular race, it is considered "overvoted,"—and thus not counted—unless the intent of the voter is clear, considering the entirety of the ballot.

This Court has "consistently emphasized the importance of voter intent in ballot disputes,"[102] and—while applying the ballot marking statute rigorously—has read the requirements with the voter's intent in mind. For example, in *Edgmon v. State*, the Court looked at each voter's entire ballot and concluded that even though the ballots appeared to have been overvoted in the race at issue, the extra markings were "improper marks" that did not suggest intent to vote for a candidate and therefore did not serve to invalidate the voter's votes in that race.[103]

However, the Court has also held that the apparent intent of the voter is not sufficient to overcome a complete failure to meet the ballot-marking requirements of AS 15.15.360(a)(1). In *Miller v. Treadwell*, the Court held that the Director properly refused to count the write-in votes of voters who had made their intent clear by writing their preferred candidate's name on the write-in line, but who had failed to make any

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102 *Edgmon v. State, Office of Lieutenant Governor, Division of Elections*, 152. P.3d 1154, 1157 (Alaska 2007).

103 *Id.* at 1158.

mark in the corresponding oval.[104] Thus, although voter intent is important, it does not trump the "mandatory" statutory requirements of AS 15.15.360(a)(1)-(8).[105]

Applying the statutory rules as interpreted by Court to the ballots at issue in this election makes clear that the Director's decisions were proper.

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

Mr. LeBon challenges the Director's decision to reject two ballots as undervoted where the voters made no marks in any of the ovals provided, instead creating their own oval-like marks to the right of the candidates' names.[106] [R. 128, 131] Mr. LeBon argues that "the voter's intention is readily apparent from the face of these two ballots" and "[t]herefore, these ballots were improperly rejected."[107]

But AS 15.15.360(a)(5) expressly requires 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."[108] And AS 15.15.360(b) says these rules are "mandatory" with "no exceptions."

Here, the voters' marks are not even near the oval provided—let alone "substantially inside" or "touching" it—and thus are not "in compliance with"

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104 *Miller v. Treadwell*, 245 P.3d 867, 877-78 (Alaska 2010).

105 *See* AS 15.15.360(b).

106 Intervenors' Cross Appeal at ¶ 18.

107 *Id.*

108 Emphasis added.

AS 15.15.360(a)'s "mandatory" rules.[109] Just as the Court rejected the votes of persons who wrote in a candidate's name but failed to mark the write-in oval—even though their intent was "readily apparent from the face of [their] ballots"—the Director here correctly rejected these two ballots because they were "not compliant with the statute."[110]

B. The Director properly counted the ballot with a stray mark in the oval for Mr. LeBon because the voter's intent was clear.

Mr. LeBon next challenges the Director's decision to count a ballot on which the voter completely filled out the oval for Ms. Dodge but also made a stray mark touching the oval for Mr. LeBon; he argues that this should have been excluded as an overvote.[111] [R. 134] But this vote was properly counted under the Court's interpretation of AS 15.15.360(a), which makes voter intent paramount once a voter has complied with the mandatory ballot-marking requirements.

In *Edgmon v. State*, the Court considered two ballots very similar to this one, "with a completely shaded oval next to Edgmon's name and a trace touching the edge of the oval next to Moses's name."[112] Like the voter at issue here, the voters in *Edgmon* had "completely shaded the oval for all other races on the ballot," meaning they "used a completely shaded oval—not a trace of an edge of the oval—to indicate a vote," and thus their "stray marks cannot be read to clearly indicate an intent to vote a second time in the

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109 *See* AS 15.15.360(b).

110 *Miller*, 245 P.3d at 878.

111 Intervenors' Cross Appeal at ¶ 14.

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

same race."[113] Applying the requirements of AS 15.15.360(a)(5) "that only marks clearly indicating an intent to vote be counted as votes," the Court declined to consider the traces to be additional attempts to vote, concluding that the ballots were not overvoted and should be counted for Edgmon.[114]

Edgmon controls the outcome here. Like those voters, this voter filled in the oval next to the preferred candidate's name for all other races, meaning this voter "used a completely shaded oval—not a trace of an edge of the oval—to indicate a vote."[115] [R. 134] Thus, the line tracing the top of the oval next to Mr. LeBon's name is not an additional valid mark, and the Director correctly counted this ballot for Ms. Dodge.

C. The Director properly excluded the over-voted ballot with an "X" through one of the ovals because the voter's intent was not clear.

Finally, Ms. Dodge challenges 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. [R. 1] Ms. Dodge argues that "[t]he crossed-out oval does not constitute a valid 'mark' in favor of LeBon under Alaska law and the voter's intent to vote for Ms. Dodge can be determined."[116]

In Ms. Dodge's view, the "X" through the oval next to Mr. LeBon's name "expresses a clear intent to retract a vote," rather than "an intent to cast a second vote in the race for House District 1," [R. 1; *see also* R. 140] and she points to the Court's

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113 *Id.*

114 *Id.*

115 *Id.*

116 Original Application at ¶ 10.

citation in *Edgmon v. State* to the Maine Supreme Court's observation 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."[117]

In *Edgmon v. State*, the Court noted that it has "consistently emphasized the importance of voter intent in ballot disputes," and held that "ballots should be counted where they 'present clear evidence of the voters' intent.'"[118] But here, the evidence of the voter's intent is not "clear."

Ms. Dodge surmises that the "X" through the oval next to Mr. LeBon's name was the voter's attempt to retract a vote for him. But another reasonable interpretation is that the X was the voter's attempt to mark her preference for him, after having filled in both ovals. Under AS 15.15.360(a)(1) an X is a valid mark for a candidate. A voter who has filled in the ovals for two candidates but who wishes to clarify her intent could scribble or cross out the vote she wishes to retract, but she could equally decide to make an additional—also valid—mark for the candidate she prefers. Because the "X" could express either a retraction or a wish to clarify that Mr. LeBon was her choice, the voter's intent is not clear, and the Director properly rejected the ballot as an overvote.[119]

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117 *Edgmon*, 152 P.3d at 1157.

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

119 *See e.g.*, *Willis v. Thomas*, 600 P.2d 1079, 1085 (Alaska 1979) ("Since there was no way to tell, the Lieutenant Governor properly concluded that the ballots should not be counted."); *Finkelstein v. Stout*, 774 P.2d 786, 792 (Alaska,1989) ("There is no consistent pattern on this ballot of the punchmarks being either high or low. The intent of the voter cannot be determined.").

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

Mr. LeBon challenges the Director's decision to exclude the absentee ballots of two voters who did not provide accurate voter identifiers on their ballot attestations. But the Director appropriately treated these ballots like all other ballots with missing or incorrect identifiers and did not count them.

The two voters in question reside in the same household in House District 1. [R. 135-36] They requested and received absentee ballots at the same out-of-state address. [R. 123, 126] When completing the attestations on the ballot envelopes, however, each used the other's voter identifier. Specifically, Peter R. signed the ballot attestation with Linda G-R.'s voter ID number; Linda G-R. signed the ballot attestation with Peter R.'s driver's license number. [CONFIDENTIAL R. 123, 126, 134, 135]

Alaska Statute 15.20.081(f) governs the identification requirement on an absentee ballot envelope. It provides that "[t]he director shall require a voter casting an absentee ballot by mail to provide proof of identification or other information to aid in the establishment of the voter's identity as prescribed by regulations adopted under AS 44.62 (Administrative Procedure Act)." The regulation implementing that statutory identification requirement is 6 AAC 25.510, which requires a voter who "executes the voter's certificate in voting an absentee ballot by mail" to provide his or her "voter

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Note that the Special Master recommended in the alternative that because an X "is considered an affirmative mark under AS 15.15.360," "the only other conclusion is for the vote to count for LeBon . . . ." The Division disagrees with this alternative ruling. No principled basis exists to discern voter intent from the voter's markings.

registration number" or "Alaska driver's license number" or one of three alternative pieces of information sufficient to establish identity.[120]

Mr. LeBon argues that the Director should correct for these voters' apparent mistake by counting their two ballots despite each having provided incorrect identification information. But the Director properly evaluated the compliance of each ballot individually with the plain requirement found in the regulation. No statute, regulation, or other authority allows the Director to consider ballots in pairs or groups in order to remedy a voter's noncompliance with the mandatory identification requirement. And the requirement is clear; a voter must provide his or her own identification information on his or her own envelope. A voter cannot provide that information on another person's envelope.

Mr. LeBon relies on a related statute, AS 15.20.203(b)(1), which instructs the Director that "[a]n absentee ballot may not be counted if . . . the voter has failed to properly execute the certificate," or if the certificate is not witnessed and attested and postmarked on time. [LeBon Hearing Br. 12 n.30] Contrary to Mr. LeBon's argument, this statute provides an alternative reason—in addition to the rules specifically referencing identification information on absentee ballot envelopes—why the Director was required to reject the two ballots. The voters' failure to include an accurate identifier is a "fail[ure] to properly execute the certificate." And the language of

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120 *See also* R. 087 (implementing the regulation by providing that an absentee ballot will not be counted where "[t]he identifier provided belongs to someone else or does not match the voter's VREMS record.").

AS 15.20.203(b)(1) is again mandatory, not discretionary. Discretionary language would read "the Director may reject an absentee ballot if . . . ." But the passive construction here—"an absentee ballot may not be counted" is mandatory on its face and leaves no discretion for the Director to count a ballot that lacks proper execution and witnessing.

Relying on caselaw, Mr. LeBon argues that the Director should have relaxed the rules for these two voters because "election statutes are to be considered directory post-election." [LeBon Hearing Br. 9-13] But Mr. LeBon misconstrues the Court's caselaw about mandatory and directory election laws.

The Court has indeed said that when construed post-election, election laws may be considered "directory only, in support of the result,"[121] but Mr. LeBon ignores the words "*in support* of the result." This Court does not *disrupt* election results by retroactively relaxing statutory and regulatory requirements and requiring the Division to count otherwise properly rejected ballots.

Not only that, but the general rule that election laws are considered "directory only, in support of the result" when considered post-election is subject to several important exceptions: this rule does not apply if the provision violated is "of a character to affect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result," or "affect[s] an essential element of the election," or if "it is expressly declared by the statute that the particular act is essential to the validity of an

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

election, or that its omission shall render it void."[122] Thus, laws that "protect the essence of free and intelligent voting" and "safeguard the integrity of the ballot process" are considered mandatory even post-election.[123] This Court explained: "[W]here the vote violates provisions designed to insure the integrity of the electoral process, the public has a supervening interest—that of fundamentally sound elections—which is protected by not counting illegal votes, regardless of the source of their illegality."[124]

The laws regarding voter identifiers safeguard the integrity of the ballot process and should be considered mandatory even post-election. Not only is the language of the applicable statutes and regulations phrased as mandatory, but the requirement that a voter provide a correct identifier is necessary for the functioning of the absentee ballot system. *Finkelstein v. Stout* is instructive—there, the 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.[125] The requirement that an absentee voter provide an accurate identifier is of a similar character.

Violations of such mandatory requirements justify rejecting votes regardless of the voters' fault for the violation. This Court in *Finkelstein* rejected the non-compliant ballots even though the voters' mistake was "due in part to the failure of the voter instructions on the voter oath form to state explicitly the requirement that the vote be cast in the presence

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122 *Id.*

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

124 *Id.*

125 *Id.*

of the witnesses."[126] And here, there is not even a suggestion that the mistake was caused by election officials rather than the voters themselves. The Director properly rejected these non-compliant absentee ballots.

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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126 *Id.*