

IN THE SUPREME COURT FOR THE STATE OF ALASKA

Kathryn Dodge,)
)
Appellant/Cross-Appellee,)
)
vs.)
)
Lt. Governor Kevin Meyer, in his)
official capacity as Lt. Governor for)
the State of Alaska, and Josephine)
Bahnke, in her official capacity as)
Director of The Division of Elections,)
)
Appellees.)
)
vs.)
) Supreme Court No.S-17301/17311
Barton Lebon and the Alaska) Trial Ct. Case No.: 3AN-18-00001RA
Republican Party,)
)
Intervenors/Cross-Appellants)
)
_____)

INTERVENORS' OPENING BRIEF

Dated this 20th day of December, 2018.

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AUTHORITIES PRINCIPALLY RELIED UPON

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AS 15.05.010. Voter Qualification.

A person may vote at any election who

- (1) is a citizen of the United States;
- (2) is 18 years of age or older;
- (3) has been a resident of the state and of the house district in which the person seeks to vote for at least 30 days just before the election; and
- (4) has registered before the election as required under AS 15.07 and is not registered to vote in another jurisdiction.

AS 15.05.020(2). Rules For Determining Residence of Voter.

(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.

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, Sec. 38 ch 116 SLA 1972].

(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.

(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.

AS 15.20.010. Persons Who May Vote Absentee.

At any election a qualified voter may vote an absentee ballot for any reason.

AS 15.20.030. Preparation of Ballots, Envelopes, and Other Material.

The director shall provide ballots for use as absentee ballots in all districts. The director shall provide a secrecy sleeve in which the voter shall initially place the marked ballot, and shall provide an envelope with the prescribed voter's certificate on it, in which the secrecy sleeve with ballot enclosed shall be placed. The director shall prescribe the form of and prepare the voter's certificate, envelopes, and other material used in absentee voting. The voter's certificate shall include a declaration, for use when required, that the voter is a qualified voter in all respects, a blank for the voter's signature, a certification that the affiant properly executed the marking of the ballot and gave the voter's identity, blanks for the attesting official or witness, and a place for recording the date the envelope was sealed and witnessed. The envelope with the voter's certificate must include a notice that false statements made by the voter or by the attesting official or witness on the certificate are punishable by law.

AS 15.20.081. General Rules for Absentee Voting.

(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.

AS 15.20.203. Procedure For District Absentee Ballot Counting Review.

(b) An absentee ballot may not be counted if

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

AS 15.20.480. Procedure For Recount.

In conducting the recount, the director shall review all ballots, whether the ballots were counted at the precinct or by computer or by the district absentee counting board or the questioned ballot counting board, to determine which ballots, or part of ballots, were properly marked and which ballots are to be counted in the recount, and shall check the accuracy of the original count, the precinct certificate, and the review. The director shall count absentee ballots received before the completion of the recount. For administrative purposes, the director may join and include two or more applications in a single review and count of votes. The rules in AS 15.15.360 governing the counting of ballots shall be followed in the recount when a ballot is challenged on the basis of a question regarding the voter's intent to vote for the candidate, proposition, or question. The ballots and other election material must remain in the custody of the director during the recount, and the

highest degree of care shall be exercised to protect the ballots against alteration or mutilation. The recount shall be completed within 10 days. The director may employ additional personnel necessary to assist in the recount.

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.

D. JURISDICTIONAL STATEMENT

Pursuant to AS 15.20.510, this matter arises out of the House District 1 Recount which took place in Juneau, Alaska on November 30, 2018. Following the Recount, the State of Alaska Division of Elections certified the election results with Barton LeBon the prevailing candidate by one vote. Therefore, this appeal serves as a final review and disposes of all claims.

E. LIST OF ALL PARTIES

1. Appellant/Cross-Appellee Kathryn Dodge was a candidate for State Representative House District 1.

2. Appellee Kevin Meyer is the current Lieutenant Governor of the State of Alaska.

3. Appellee Josephine Bahnke was at all times relevant the Director of the Division of Elections for the State of Alaska.

4. Intervenor/Cross-Appellant Alaska Republican Party had representatives present at the subject Recount who challenged certain ballots.

5. Intervenor/Cross-Appellant Barton LeBon is the certified winner for State Representative House District 1.

F. STATEMENT OF ISSUES FOR REVIEW

While Intervenor/Cross-Appellants maintain that the Division Director properly certified LeBon as the winner for State Representative House District 1, they maintain that errors occurred as challenged by Intervenor/Cross-Appellants, but the same do not disturb the certified election results. Those issues for review include:

1. The Director erroneously excluded one ballot as an overvote that should have counted for LeBon.

2. The Director erroneously included a ballot counted for Dodge that should have been excluded as an overvote.

3. The Director erroneously excluded two absentee ballots where the voters had substantially complied.

4. The Director erroneously excluded two ballots where voter intent was clear as the voter cast his or her vote by creating an oval on the right side of the ballot.

G. STATEMENT OF THE CASE

In the general election of November 6, 2018 (hereinafter, “election”), Appellant/Cross-Appellee Kathryn Dodge (“Dodge”) and Intervenor/Cross-Appellant Barton LeBon (“LeBon”) vied for the seat to represent District 1 in the State House of Representatives (“HD1”). After close of the polls on election night, it became clear to election officials that there was a close race in HD1 which would necessitate additional inquiry and scrutiny in advance of certification. The State Review Board (“SRB”) conducted a review of every ballot from HD1¹ to verify the precinct reports with the election materials returned. During the SRB’s review, the ballots from each precinct were individually inspected and hand counted to confirm the vote tabulations, to ensure that each voted ballot was counted accurately, and to inspect each ballot to determine voter intent. The SRB’s review included the following: (1) inspection and hand count of

¹ The SRB members were convened to review all ballots cast in the 2018 general election. For purposes of this Motion and the underlying Appeal, only the review of HD1 is discussed herein.

each ballot; (2) hand count of all ballot stubs and ballot envelopes; (3) inspection and hand count of all signatures on each precinct's voter register; (4) review of each voter's voter history report; (5) review of each precinct's AccuVote card generated on election night; and (6) inspection and hand count of all questioned ballots returned.

After a comprehensive multi-day review, the results of the election were certified by the Director of the Division of Elections ("Director") on November 26, 2018. The official election summaries were printed and signed by all members of the SRB pursuant to their oath. The official results certified a tie between candidates Dodge and LeBon for the seat in HD1 with a count of 2,661 votes cast each.

As the HD1 race was certified as a tie, pursuant to Alaska law, a recount was conducted on November 30, 2018 ("Recount"). At that time, the ballots cast for HD1 were recounted by SRB members under the supervision of the Division Director, with assistance from the regional directors for Anchorage and Fairbanks and Division staff. The SRB members reviewed and recounted the HD1 ballots, via the Division's central optical scanners, to verify the votes cast and counted for each candidate in each precinct. One precinct was selected at random for a verifying hand count following the scan count of each precinct.

During the course of the Recount, representatives for Dodge and LeBon observed and lodged their respective challenges to ballots. The Division Director issued a decision on each challenge, determining at Recount what ballots, parts of ballots, or marks for candidates on ballots were valid, and to which candidate each vote should be attributed. Representatives for both candidates challenged multiple ballots.

In the course of the Recount, the Division Director determined that three votes had been improperly rejected, resulting in two additional votes for LeBon and one additional vote for Dodge. As a result of such determinations, after the Recount, the final vote tabulation for HD1 was 2,663 to 2,662, with LeBon leading by a one-vote margin.

After the Recount, the Director certified the election results premised on the Recount totals, demonstrating LeBon to be the prevailing candidate of the HD1 race by one vote.

With her application to the Alaska Supreme Court for an AS 15.20.510 recount appeal (“Appeal”), Dodge seeks: (1) judicial review of the November 30, 2018, Recount concerning ballots cast for the HD1 election; (2) to contest the certification of the results of the Recount by the Division Director; and (3) to modify the action of the Division Director in determining at Recount what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate a vote should be attributed.

Dodge alleges multiple errors at Recount, including: (1) one regular ballot rejected as an over-vote due to non-compliant voter markings on the face of the ballot; (2) two absentee ballots accepted despite alleged underlying residency issues for such voters; and (3) one absentee ballot rejected due to underlying residency issues for such voter. Accordingly, Dodge petitioned for judicial review regarding whether or not the Division Director properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate each vote should be attributed.

On December 7, 2018, Intervenors and Cross-Appellants moved to intervene, granted December 10, 2018, due to their interest in the subject matter of this Appeal (i.e., the outcome of the election), and serious need to participate to protect such interest.

Thereafter, at the direction of the Supreme Court, LeBon and ARP filed a cross-appeal (“Cross-Appeal”) for the purpose of identifying additional ballot challenges for judicial review in this action. LeBon and ARP allege additional errors at Recount for contemporaneous consideration with the errors identified by Dodge, including: (1) one regular ballot accepted despite non-compliant voter markings on the face of the ballot which should have constituted an over-vote; (2) two absentee ballots rejected due to underlying issues with the voter identification numbers, despite substantial compliance; and (3) two regular ballots rejected as blank due to non-compliant voter markings, despite voter intent being readily apparent from the face of the ballot. However, LeBon and ARP maintain that such errors do not disturb the election results and that the Division’s Director acted properly in certifying the same. Accordingly, the Cross-Appeal requests that the actions at Recount be upheld, and the Division Director’s certification of the election results pursuant to the Recount be affirmed.

The Supreme Court appointed Superior Court Judge Eric A. Aarseth as discovery master to hear evidence and consider the questions raised by the parties’ respective statements of points on appeal. Following the hearing on December 20, 2018, Judge Aarseth issued a report of his findings of fact and conclusions of law with respect to those questions. Accordingly, after hearing additional evidence² Judge Aarseth ultimately recommended that this Court affirm the determination of the Director and that the race be certified as it was following the November 30, 2018 Recount.

² It is of note that there is a significant dispute as to the admissibility of any evidence which was not available to the Director at the time of the Recount, i.e. it was discovered and/or developed following the certification of the Recount results.

H. STANDARD OF REVIEW

Pursuant to AS 15.20.510, the Supreme Court has original jurisdiction over the appeal of the recount of the House District 1 election. Such appeal involves direct appellate jurisdiction, original to the Supreme Court.³ The Court will “exercise its independent judgment when interpreting statutes which do not implicate an agency’s special expertise or determination of fundamental policies.”⁴

Whether specific votes or classes of votes were correctly counted or rejected are questions of law, which shall be reviewed *de novo*, “adopting the rule of law most persuasive in light of precedent, reason, and policy.”⁵ Underlying factual findings and determinations are reviewed for clear error, which “exists when [the Court’s] review of the record leaves [it] with the definite and firm conviction that” a mistake was made.⁶

The scope of review pursuant to a recount appeal is set forth by statute.⁷ The Court is empowered to review the Division Director’s decisions at recount, and the inquiry extends to whether specific votes or classes of votes were correctly counted or rejected.⁸ The purpose is for the appellate court to review the decisions of the Director at recount regarding the counting or rejection of votes, to ensure compliance with the

³ *Cissna v. Stout*, 931 P.2d 363 (Alaska 1996); *Nageak v. Mallott*, 426 P.3d 930 (2018).

⁴ *Id.*

⁵ *Nageak*, 426 P.3d at 940 (citing *Comsult LLC v. Girdwood Mining Co.*, 397 P.3d 318, 320 (Alaska 2017); *Girdwood Mining Co. v. Comsult LLC*, 329 P.3d 194, 197 (Alaska 2014)).

⁶ *Nageak*, 426 P.3d at 940 (citing *Ranes & Shine, LLC v. MacDonald Miller Alaska, Inc.*, 355 P.3d 503, 508 (Alaska 2015); *Gilbert M. v. State*, 139 P.3d 581, 586 (Alaska 2006)).

⁷ AS 15.20.510.

⁸ *Cissna*, 931 P.2d at 367-71; see also *Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979).

procedures set forth in AS 15.20.480 and pertinent Alaska election law.⁹ An appeal may be taken by a person “who has reason to believe an error has been made in the recount” and “[t]he court shall enter judgment either setting aside, modifying, or affirming the action of the director on recount.”¹⁰ On appeal, the Court is instructed to look at “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.”¹¹ Issues the Court has considered on recount appeals include “the validity of punch cards and a variety of marks on ballots, the proper procedures for absentee voting and consequences for failure to follow those procedures, and registration requirements.”¹² However, the basis for the recount appeal is for the court to review the Director’s determinations regarding the validity of ballots and ballot marks, and which ballots should be counted and for whom.¹³

While the recount appeal involves a review of the Director's recount decisions under AS 15.20.480, the Court itself is not limited to determining the facial validity of the

⁹ AS 15.20.480: In conducting the recount, the director shall review all ballots, [...] to determine which ballots, or part of ballots, were properly marked and which ballots are to be counted in the recount, and shall check the accuracy of the original count, the precinct certificate, and the review. The director shall count absentee ballots received before the completion of the recount. [...] The rules in AS 15.15.360 [which details the type of marks on ballots which are valid] governing the counting of ballots shall be followed in the recount when a ballot is challenged on the basis of a question regarding the voter's intent to vote for the candidate [...]. The ballots and other election material must remain in the custody of the director during the recount, and the highest degree of care shall be exercised to protect the ballots against alteration or mutilation.

¹⁰ AS 15.20.510.

¹¹ *Id.*

¹² *Id.*; see *Finkelstein v. Stout*, 774 P.2d 786 (Alaska 1989) (residency, registration, absentee ballots); *Fischer v. Stout*, 741 P.2d 217 (Alaska 1987) (punch card ballots, residency, registration, absentee votes); *Hickel v. Thomas*, 588 P.2d 273 (Alaska 1978) (marks in boxes, punch card ballots); *Willis*, 600 P.2d 1079 (registration, absentee votes); *Carr v. Thomas*, 586 P.2d 622 (Alaska 1978) (punch card ballots); *Edgmon v. State, Office of Lieutenant Governor, Div. of Elections*, 152 P.3d 1154 (Alaska 2007) (the court must assess voter intent from ballot markings).

¹³ *Willis*, 600 P.2d at 1082; AS 15.20.510.

ballots.¹⁴ Rather, the Court has the authority to “search underlying records and election materials to ensure that a vote was cast in compliance with the requirements of Alaska's election laws.”¹⁵

Those who seek to disrupt an election result bear a heavy burden. Alaska law weighs sharply in favor of upholding election results, as “every reasonable presumption will be indulged in favor of the validity of an election.”¹⁶ Accordingly, where the record is unclear or the evidence is uncertain on any point, the appellant has failed to meet their burden, and the certified election result must stand.

Here, the ballot issues identified by Appellant/Cross-Apellee Dodge were properly considered and determined by the Division Director. Further, despite the errors identified in the Cross-Appeal, the Division Director properly certified the elections results pursuant to the Recount. The election results should be affirmed.

I. ARGUMENT

a. Public policy interest in upholding elections and against disenfranchising voters.

The overriding principle in a recount appeal “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.”¹⁷ A qualified voter has a well-established constitutional right to cast their vote, and have their vote counted. “The right of the

¹⁴ *Cissna*, 931 P.2d at 367; *Willis*, 600 P.2d at 1082.

¹⁵ *Id.*

¹⁶ *Turkington v. City of Kachemak*, 380 P.2d 593, 595 (Alaska 1963).

¹⁷ *Carr v. Thomas*, 586 P.2d at 626.

citizen to cast his ballot and thus participate in the selection of those who control his government is one of the fundamental prerogatives of citizenship and should not be impaired or destroyed by strained statutory constructions.”¹⁸

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.¹⁹

Accordingly, a violation of a voting requirement does not necessarily justify rejecting a ballot cast, as the Court has recognized that election statutes are “directory” when considered post-election,

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

“Even where statutory terms have been construed as mandatory, it has been held that the right to vote is a superseding mandate.”²¹ A voter’s interest in having their vote counted, despite an error or mistake in marking or casting the same, is strong, especially where the voter is not at fault for such error or mistake. Even “[a] voter who has voted

¹⁸ *Id.*

¹⁹ *Finkelstein*, 774 P.2d at 790 (*quoting Willis*, 600 P.2d at 1083 n.9).

²⁰ *Carr v. Thomas*, 586 P.2d at 626.

²¹ *Id.*

illegally has an interest in having his or her vote counted.”²² “Courts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own” and “[w]here any reasonable construction of the statute can be found which will avoid such a result, the courts should and will favor it.”²³ However, “where 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.”²⁴

The Court has applied a clear rule when it comes to discarding votes cast: “[i]f in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms.”²⁵ Thus, the Legislature has set forth certain issues which automatically invalidate a ballot (e.g., an absentee ballot may not be counted if the ballot is not postmarked on or before the date of the election).²⁶

Given Alaska precedent, the Division has developed review and recount policies and procedures which favor of counting votes cast, not discarding them, to ensure that each valid vote is counted. Accordingly, ballots cast which do not violate provisions designed to insure the integrity of the electoral process should be counted.

b. Voter identifiers and substantial compliance.

²² *Finkelstein*, 774 P.2d at 791–92.

²³ *Carr v. Thomas*, 586 P.2d at 626; *Miller v. Treadwell*, 245 P.3d at 869.

²⁴ *Finkelstein*, 774 P.2d at 791–92.

²⁵ *Carr v. Thomas*, 586 P.2d at 626–27.

²⁶ AS 15.20.203(b)(4).

A person may vote at any election who (1) is a citizen of the United States; (2) is 18 years of age or older; (3) has been a resident of the state and of the house district in which the person seeks to vote for at least 30 days just before the election; and (4) has registered before the election as required under AS 15.07 and is not registered to vote in another jurisdiction.²⁷

At any election a qualified voter may vote an absentee ballot for any reason.²⁸ A qualified voter may apply in person, by mail, or by facsimile, scanning, or other electronic transmission to the director for an absentee ballot, and the application must include the address to which the absentee ballot is to be returned, the applicant's full Alaska residence address, and the applicant's signature.²⁹ Absentee ballots must be returned in a special envelope which contains an oath that the voter is a qualified voter in all respects.³⁰ An absentee ballot may not be counted if the voter has failed to properly execute the certificate.³¹

Two challenges lodged by LeBon and ARP concerned absentee ballots which were rejected due to underlying issues with the voter identification numbers. These absentee ballots were cast by apparent relatives who had their ballots mailed to the same address, P.O. Box 146, Browns Valley, CA 95918-0146.³² The ballots were originally

²⁷ AS 15.05.010.

²⁸ AS 15.20.010.

²⁹ AS 15.20.081(a).

³⁰ AS 15.20.030; *Fischer v. Stout*, 741 P.2d at 222.

³¹ AS 15.20.203(b)(1).

³² STATE 000121 – 000126. This is a matter of first impression, because there is no guidance as to whether the ballots must be considered in isolation or if the ballots can be considered in tandem for a total review of all evidence.

rejected by the Division due to the fact that the voter identification provided on the absentee envelopes were each incorrect. However, upon review of the ballots, it is evident that the identifier for Peter M. Richardson is actually the identifier for Linda J. Gervais-Richardson, and likewise, the identifier for Linda J. Gervais-Richardson is actually the identifier for Peter M. Richardson. Of particular import is the fact that these ballots were witnessed by the same individual, on the same date of October 24, 2018 at Brownsville, California.

While the face of each ballot alone appears to lack a valid identifier, consideration of the ballots in conjunction with one another indicates the proper person voted, but made an inadvertent mistake in completing the information on the envelope. The ballots should not have been rejected due to such inadvertent mistake, particularly as when viewed together it is clear that both individuals were properly registered and qualified voters, and resided in HD1. As previously discussed, election statutes are to be considered directory post-election.³³ “The right of the citizen to cast his ballot and thus participate in the selection of those who control his government is one of the fundamental prerogatives of citizenship and should not be impaired or destroyed by strained statutory constriction.”³⁴ As here, these voters’ rights to have their votes counted despite this inadvertent mistake that is facially obvious is paramount, and the same should not have been rejected and the ballots counted.³⁵

³³ *Carr*, 586 P.2d at 626.

³⁴ *Nageak*, 426 P.3d at 941 (citing *Id.* (quoting *Sanchez v. Bravo*, 251 S.W.2d 935, 938 (Tex. Civ. App. 1952)).

³⁵ *See, e.g., Finkelstein*, 774 P.2d at 791-92.

c. Ballot markings and voter intent.

Pursuant to AS 15.20.510, during the Recount, the Director's statutory charge includes that of determining "which marks for candidates on ballots are valid, and to which candidate [...] the vote should be attributed."

During the Recount, two ballots were rejected by the Director due to the fact that, rather than fill in the oval on the left-hand side of the ballot, the voter created and filled an oval on the right-hand side of the candidate's name.³⁶ Voter intent was readily apparent as the voter only indicated one candidate in each race and filled the oval in full on the right-hand side.³⁷ The Court has found that voter intent is paramount, and the election law must be interpreted "to preserve a voter's clear choice rather than disenfranchise that voter."³⁸ While the Court has held that a voter must mark an oval in some fashion, and a blank oval will invalidate a vote, the instant case is distinguishable.³⁹ Here, it is clear that the voter intended to fill in an oval next to a candidate's name and indeed did so indicating how his or her vote should be cast.

Where intent to select a single candidate is clear, the voter should not be disenfranchised where at this stage the election law governing markings is to be considered directory.⁴⁰ The rule requiring marks to touch the official oval to the left of a candidate's name is directory here, and in the event of evidence indicating clear voter intent, a voter's ballot should not be rejected for failure to place their mark in the perfect

³⁶ STATE 000127 – 000132.

³⁷ *Id.*

³⁸ *Miller v. Treadwell*, 245 P.3d at 870.

³⁹ *Id.* 245 P.3d at 877-8.

⁴⁰ *Finkelstein*, 774 P.2d at 790 (*quoting Willis*, 600 P.2d at 1083 n.9).

position.⁴¹ A violation of a voting requirement does not necessarily justify rejecting a ballot cast, as the Court has recognized that election statutes are “directory” when considered post-election.⁴²

Viewing the ballots in their entirety provides clear evidence of intent to vote for each candidate on the ballot whose name was marked. Examination of each ballot as a whole shows uniformity in the voters’ mark type and location for every race. The voters marked every race on the ballot with a circle drawn over the name of the chosen candidate, and each circle was placed to the right, equidistant from each official oval. The marks were uniform across the ballots and appeared in the same position across each race. The reasonable conclusion to draw is that each voter intended the drawn an oval on the candidate name to indicate their selection for that candidate for each race. The only alternative would be to assume that these voters possibly did not intend for such marks to be their selections, which would necessitate an unreasonable conclusion (i.e., that each of these voters presented at their designated polling places on election day, waited in line to vote, registered and received their ballots, only to choose to leave every race therein blank).

The fact that the voters completed their ballots in a uniform manner evidences a lack of knowledge or ability to fill out the ballot in compliance with the election rules.⁴³

⁴¹ Notably, in reviewing the Division’s directions on valid and invalid ballot marks, set forth herein at page 9 of Intervenor’s Exhibit 3000, a small oval drawn over a candidate’s name is not explicitly listed as an invalid mark which invalidates the section in which it appears.

⁴² *Carr v. Thomas*, 586 P.2d at 626.

⁴³ Moreover, while the in-person ballots are commingled without voter identification, the fact that each of these two voters placed their marks uniformly, equidistant to the right of the correct placement suggests a visual impairment without proper assistance at

In stark contrast to the ballots in the previous subsections, the intent for these two ballots is clear. The Court has found that voter intent is paramount, and the election law must be interpreted “to preserve a voter’s clear choice rather than disenfranchise that voter.”⁴⁴ LeBon/ARP maintain that, viewing each ballot in its entirety, there is no ambiguity as to the voters’ intent to cast their votes for LeBon. Accordingly, the Division Director should have accepted the ballots as properly voted with definitive voter intent and allocate the vote to LeBon.

During the Recount, there were also two ballots raised that were over-voted, meaning that the voter marked a ballot pursuant to AS 15.13.60 in multiple locations next to multiple candidates and thus such vote must be rejected.⁴⁵ A person cannot vote for two candidates, thus, if there is a valid mark next to two candidates, voter intent cannot be discerned and the ballot must be rejected as a blank “no vote.” Indeed, the directions to a voter on how to vote are clear, and if any error is made, voters are direct to request a new ballot.⁴⁶ When marks touch the oval that is provided for multiple candidates, there is no way for this Court to discern, nor would it be proper to attempt to discern, who the vote was cast and the ballot must be rejected as an invalid over-vote.

The Division maintains a directory list of valid and invalid ballot marks, which indicates which marks will be accepted as a valid vote for such candidate, and which

the polling place. As many rural polling locations lack alternative and accessible election equipment to assist disabled voters in marking their ballots, to reject these ballots which were clearly marked in a uniform manner with apparent voter intent would risk disenfranchising a specific subset of voters where assistance in complying with the directory election rules was not available.

⁴⁴ *Miller v. Treadwell*, 245 P.3d at 870.

⁴⁵ STATE 000003, STATE 000134.

⁴⁶ STATE 000005.

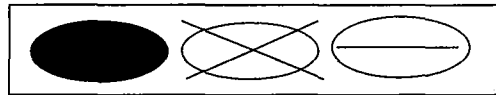
marks will “invalidate the section of the ballot in which they appear.”⁴⁷ For the examples of valid marks, the directions state:

Only the following ballot marks are valid:

Solid marks, diagonal, or vertical marks. “X” marks, stars, circles, asterisks, checks or plus signs.

The Division directions further provide pictorial examples of valid marks which would successfully indicate a voter’s selection, and invalid marks that will be rejected.⁴⁸

For valid marks, the examples include the following:



The examples provided are not enumerated in any hierarchical order, nor is there any indication that any one mark would be “more” indicative of a voter’s choice over any other mark. All examples are categorized as “valid.”

One in-person voter filled in the official ovals next to both of the HD1 candidates’ names, and also included an “X” on top of the oval for LeBon. Pursuant to the Division’s directions on valid and invalid markings, marking a ballot by: (1) filling in the official oval to the left of a candidate’s name, or (2) placing an “X” over the official oval to the left of a candidate’s name, are each valid marks designating a voter’s selection of that candidate.⁴⁹ Had the voter filled in one oval or marked an “X” over one oval, the ballot would have contained a single valid mark and not been questioned during the

⁴⁷Intervenors Exhibit 3000, p. 9..

⁴⁸ *Id.*

⁴⁹ *Id.*

counting process. In fact, had the voter filled in one oval and marked an “X” over the top of the same oval, the Division optical machine would have still counted the ballot as validly marked. However, as here, the voter over voted the ballot by filling in the ovals for both HD1 candidates and marking an “X” over the oval for LeBon. As such, the ballot was rejected as an improper over-vote, and the Division Director determined that the voter intent was unclear.

Dodge argues that the marking of an “X” over one oval indicates the voter’s intent to eradicate that selection.⁵⁰ The argument ignores the fact that an “X” is indeed a valid designation of a voter’s selection and an “X” over an oval is included in the list of valid ballot mark examples maintained by the Division.⁵¹ Further, Dodge’s argument cherry-picks examples related to common usage, as it is equally common for an “X” to be used to mark one’s selection and to indicate a choice or applicable item in a list (e.g. placing an “X” in a checkbox on an insurance or medical form, certification of method of service on a legal form, etc.).

LeBon/ARP maintain that, in including two valid marks for LeBon (i.e., a filled in oval and an “X”), and only a single valid mark for Dodge (i.e., a filled in oval), it is readily apparent that the voter made a mistake on the ballot, and instead of requesting a

⁵⁰ Dodge cites part of the Merriam-Webster’s Dictionary definition for “X” in support of her assumption that this voter intended to “X”-out and cancel a mistake, though Dodge conveniently omits part of the definition:

X (verb):

1: to mark with an x;

2: to cancel or obliterate with a series of x’s.

⁵¹ Merriam-Webster’s Dictionary also includes a “legal definition” of “X”:

1: a mark used in place of a signature when the maker is incapable of signing his or her name;

2: a mark used in indicating a choice or applicable item.

new ballot, added the additional valid ballot mark (the “X”) to indicate their selection for LeBon. If either a filled in oval or an “X” would have been counted as a valid selection, using both valid marks simultaneously over the same oval reiterates the same selection and indicates that the voter attempted to distinguish the dual filled-in ovals with an additional valid mark for LeBon.

While LeBon/ARP maintain that voter intent is reasonably apparent for the selection of LeBon, they concede that the use of multiple overlapping markings for the HD1 race creates ambiguity as to voter intent. As each party has presented a viable and divergent explanation for use of the “X,” it is clear that the Division Director properly determined that the ballot was over voted and lacking in definitive voter intent to allocate the vote to either candidate. Accordingly, the decision to reject the over-voted ballot should be affirmed.

d. Voter residence.

As set forth above, a person may vote at any election who (1) is a citizen of the United States; (2) is 18 years of age or older; (3) has been a resident of the state and of the house district in which the person seeks to vote for at least 30 days just before the election; and (4) has registered before the election as required under AS 15.07 and is not registered to vote in another jurisdiction.⁵²

Voters in state and local elections must be residents of the election district in which they vote.⁵³ A person's residence is that fixed place of habitation to which the

⁵² AS 15.05.010.

⁵³ Alaska Const. art. V, § 1; AS 15.05.010(4).

individual intends to return if absent.⁵⁴ It need not be a house or apartment, nor must it have mail service.⁵⁵ A residence need only be some specific locale within the district at which habitation can be specifically fixed.⁵⁶ Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient.⁵⁷

Pursuant to AS 15.05.020(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.

Pursuant to *Cissna v. Stout*:

As a practical matter, certain persons who move to a new district, but do not reregister or notify the election officials in writing of a change in residency, may have their votes counted in the district of their prior residency simply because election officials do not know that their residency has changed. In the interest of administrative efficiency, AS 15.05.020[8] 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. The statute is limited, however, to the circumstance where the officials have no notification of a move to another district. Attorney General's Opinion No. 7 accounts for this limited circumstance.⁵⁸

Accordingly, even where a voter resides in the election district, their vote is properly rejected where they failed to update their official voter residence address.⁵⁹

⁵⁴ AS 15.05.020(2).

⁵⁵ *Fischer v. Stout*, 741 P.2d at 221.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Cissna*, 931 P.2d at 369.

⁵⁹ AS 15.05.010; *Fischer v. Stout*, 741 P.2d 217.

Dodge has challenged three ballot determinations based on issues of voter residency. In support of the same, Dodge now seeks to introduce affidavits of certain voters, post-certification, attesting that the addresses registered with the Division are not their accurate residential addresses. Not only were the affidavits regarding residence not available for consideration at the time of the election certification and Recount, the statements set forth therein directly conflict with the other evidence of residency which was provided by these voters, made available to the Division, and reviewed by the Director in making her determination at Recount. The production of such conflicting statements does not provide clear evidence related to voter residence, but merely creates uncertainty and ambiguity with respect to voter intent and residence.

Dodge argues that the Division failed to take “objective” evidence of residence into consideration. However, objective evidence of residency was indeed considered by the Division Director in her determination on ballot validity. This evidence included the address listed in the voters’ voter registration, their application for a HD1 absentee ballot, and the signed absentee ballot envelopes certifying under penalty of perjury that the information included therein, including their residence address, was accurate at the time of casting their ballot. Dodge’s objection is not that no objective evidence was considered, but that she would like to cherry-pick which objective evidence is given the greatest weight.

Alaska case precedent is clear with respect to a voter’s self-declaration of residence for purposes of their assignment of voting district: the location need not be a

house or apartment, and can even be a park bench.⁶⁰ Dodge objected to the inclusion of Ms. Knapp's ballot based solely on speculation related to the property listed as Ms. Knapp's residence. Dodge's objections to Ms. Knapp's designated residence being a commercial property are unfounded, and fail to align with well-established principles of Alaska election law.⁶¹ For purposes of the Director's decisions at Recount and pursuant to this Appeal, residence need only be some specific locale within the district at which habitation can be specifically fixed.⁶² The voter designated the address, received her ballot at such address, marked her ballot, signed her ballot envelope certifying under penalty of perjury that the information included therein, including her address, was accurate at the time, and returned the ballot for counting. Dodge has failed to set forth any testimony or other evidence that the address provided and registered with the Division was not Ms. Knapp's designated or intended residence for purposes of this election. There is no indication under the circumstances that Ms. Knapp is not a qualified voter pursuant to AS 15.05.010, and Dodge has provided no basis, beyond speculation related to property zoning, to justify disenfranchising Ms. Knapp and rejecting her vote cast. The ballot was properly accepted for counting.

At Recount, Dodge's challenge to Dr. Odom's residence was founded on her assumption that the address was incorrect and that Dr. Odom likely did not live at the same, as it was a commercial structure. However, Dr. Odom has for several years

⁶⁰ *Fischer*, 741 P.2d 217.

⁶¹ *Id.*

⁶² *Id.* That is, one can in fact physically inhabit a commercial structure, though they cannot physically inhabit a P.O. Box.

maintained his “residency” on his voter application and information as: 3514 International St., Fairbanks, Alaska.⁶³ He, like Ms. Knapp, designated the address, received his ballot at such address, marked his ballot, signed his ballot envelope certifying under penalty of perjury that the information included therein, including his address, was accurate at the time, and returned the ballot for counting. Therefore, the ballot was properly accepted for counting.

Consistent with prior decisions of the Court, a voter’s intention is paramount.⁶⁴ The fact that Mr. Odom and Ms. Knapp properly registered in HD1 prior to the election, and verified their HD1 address in requesting and submitting their HD1 ballots, establishes that these voters clearly intended to cast their votes with respect to the HD1 election.⁶⁵ The Director reviewed all existing and available objective evidence which had been produced to the Division as of the date of the Recount, and properly accepted the ballots of Dr. Odom and Ms. Knapp, in accordance with prevailing case precedent concerning these voters’ residences.

Moreover, in registering, requesting their ballots, and signing under penalty of perjury, voters set forth a statement as to their true and correct address. Now, Dodge

⁶³ While testimony developed after the Recount is not relevant and should not be considered, it is of note that during the recent evidentiary hearing, counsel asserted that they made no efforts to subpoena the testimony of Dr. Odom, nor was there any showing of an inability to do so. Thus, the affidavit is nothing more than hearsay, which was ruled such during the course of the evidentiary hearing. Particularly as there was no way to cross examine Dr. Odom with regard to any discrepancy between his multiple sworn statements.

⁶⁴ *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010); *Edgmon v. State, Office of Lieutenant Governor, Div. of Elections*, 152 P.3d 1154, 1157 (Alaska 2007)

⁶⁵ See *Finkelstein*, 774 P.2d 786 (the Court determined that voters properly registered in an election district who submitted absentee ballots listing no permanent Alaska residence should have been counted, as there was already sufficient evidence of residency in such district, and the voters’ intent to indicate a new legal residence outside the district was unclear).

seeks to introduce subsequent statements, produced after the election, certification, and recount, indicating that these registered addresses are not correct.

With regard to Mr. Beconovich, the record demonstrates that for the years 2017 and 2018 he elected to change his voter registration through the permanent fund dividend application.⁶⁶ As is evidenced in sworn testimony from the State, Mr. Beconovich was mailed an opt-out notice to his purported residency address which was indeed (likely not coincidentally) forwarded to his address at 104 Kutter Road, where he registered to vote in 2017 and 2018. It is not sufficient that the voter would only provide the Division with information regarding a purported change in residency, post-certification and after the Director's inquiry is complete, and more importantly, after the results of the vote totals are made public.

Pursuant to the Court's decision in *Willis v. Thomas*,⁶⁷ "Alaska's election laws require that a person be properly registered in the district in which the vote is to be cast at least thirty days before the election."⁶⁸ Voter registration requirements are strictly construed, and ballots from those who fail to re-register to reflect changes to their registration information in advance of the election should be held invalid.⁶⁹ Mr. Beconovich had an obligation to register in HD1 at least 30 days prior to the general

⁶⁶ See Affidavit of Carol Thompson, dated December 17, 2018, lodged with the State's Hearing Brief of the same date (while the Affidavit was not offered and admitted as an exhibit at the evidentiary hearing, Ms. Thompson appeared and provided live testimony pursuant to the content therein). At the evidentiary hearing on December 20, 2018, Mr. Beconovich testified that there is no reason he should not be held responsible for those explanations and agreements that he certified to when providing his residency on his permanent fund dividend application and later failing to opt out.

⁶⁷ 600 P.2d 1079 (1979).

⁶⁸ *Id.* at 1086 (there are limits to the extent to which defects in registration can be ignored or "cured" after the fact).

⁶⁹ *Id.*; see also *Hammond v. Hickel*, 588 P.2d 256, 271 (Alaska 1978).

election of November 6, 2018.⁷⁰ The registration requirement is critical, and the burden is on the voter to ensure that they provide a complete, accurate, and current address in advance of the election to cast a valid ballot for the election district in which they reside.⁷¹ Failure to do so is no fault of election officials, and as such, it is proper for such ballot to be rejected and not counted.⁷² Accordingly, as Mr. Beconovich has self-declared his residency address as 104 Kutter Road, the same was accepted as his residency and his ballot was properly rejected by the Division.

J. CONCLUSION

In accordance with the foregoing and on advice from the appointed special master, LeBon and ARP respectfully request that the Division Director's certification of the election results pursuant to the Recount be affirmed.

⁷⁰ AS 15.07.070.

⁷¹ *Id.*

⁷² *Willis*, 600 P.2d at 1086.