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and the Alaska Republican Party

IN THE SUPREME COURT OF THE STATE OF ALASKA

KATHRYN DODGE,

Appellant,

v.

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.

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APPELLATE COURTS
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STATE OF ALASKA

Supreme Court No.: S-17301

MOTION TO INTERVENE

COME NOW Intervenors Barton LeBon and the Alaska Republican Party, by and through their attorneys, Holmes Weddle & Barcott, P.C., and pursuant to Alaska R. Civ. P. 24, hereby move to intervene in the above-captioned action as a matter of right or as a matter of discretion. This motion is supported by the following memorandum of points and authorities. A proposed order is lodged herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

With her application to the Alaska Supreme Court for an AS 15.20.510 recount appeal and election contest (hereinafter, "Appeal"), Appellant Kathryn Dodge ("Dodge") seeks: (1) judicial review of the November 30, 2018, election recount ("Recount") concerning ballots cast for the State of Alaska House of Representatives District 1 ("HD1") general election (hereinafter, the "election"); (2) to contest the certification of the results of the Recount by the Director of the Division of Elections ("Director"), which certified that candidate Barton LeBon ("LeBon") won the election by one vote; and (3) to modify the action of the 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.

Although LeBon is not named as a party, as the winning candidate, he has a paramount interest in the subject matter and the right under well-established precedent to appear and participate in this Appeal.¹ Further, as LeBon was the Republican candidate running for election to HD1 with the support and endorsement of the Alaska Republican Party ("ARP" or the "Party"), ARP has an analogous interest in the subject matter of this Appeal. ARP's claims shares common issues of law and fact with the

¹ See *Finkelstein v. Stout*, 774 P.2d 786, 787 (Alaska 1989) (W.E. "Brad" Bradley was certified the winner of the election and intervened as of right to protect his interest in the subsequent election contest); *Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018) (Dean Westlake was certified the winner of the election and intervened as of right to protect his interest in the subsequent election contest); *Cissna v. Stout*, 931 P.2d 363, (footnote continued...)

Appellees to this Appeal, as they both seek to uphold the Director's decisions and the certification of the election at Recount. Accordingly, intervention is well-founded under Alaska R. Civ. P. 24, and LeBon and ARP should be added as full parties to this Appeal to appear and participate in all forthcoming briefing and proceedings.

II. FACTUAL BACKGROUND

In the general election of November 6, 2018, Dodge and LeBon vied for the seat to represent HD1 in the State House of Representatives. 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 HD1² 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 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)

(continued from previous page)

364 (Alaska 1996) (Ann Spohnholz was certified the winner of the election and intervened as of right to protect his interest in the subsequent election contest).

² 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.

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 2018 general election were certified by the 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. At that time, the ballots cast for HD1 were recounted by SRB members under the supervision of the Director with assistance from the regional directors for Anchorage and Fairbanks and Division staff, 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 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 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.

III. LEGAL AUTHORITY AND ANALYSIS

a. Alaska R. Civ. P. 24(a). Intervention of Right.

Alaska R. Civ. P. 24(a) provides that anyone with an interest in the subject matter of the action “shall be permitted to intervene” as a matter of right. If the requirements of Rule 24(a) are met, a court does not have discretion to deny intervention.³

A four-part test is employed to determine when a court is required to grant intervention as a matter of right.⁴ The test’s four requirements are as follows: (1) the motion to intervene must be timely; (2) the party moving for intervention must show an interest in the subject matter of the action; (3) the moving party must show that the interest may be impaired as a consequence of the action; and (4) it must be shown that the interest is not adequately represented by an existing party.⁵ When applying this

³ *Brown v. Cook Inlet Region, Inc.*, 569 P.2d 1321, 1322 (Alaska 1977).

⁴ *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984) (citation omitted).

⁵ *Id.*; see also Alaska R. Civ. P. 24(a).

test, courts are to “liberally construe” its requirements in favor of granting intervenors access to the process.⁶

Application of Rule 24(a), and this four-part test, to the facts underlying the present appeal make evident that LeBon can satisfy the four factors and should be permitted to intervene as a matter of right. First, this Motion to Intervene is timely, as Appellant’s application was filed on December 5, 2018.

Second, LeBon can demonstrate that he has an interest in the subject matter of this Appeal. LeBon was certified the winning candidate defeating candidate Dodge for the HD1 seat. Accordingly, LeBon has a sufficient “interest” to intervene to protect his interest in the election Recount certification, and such interest may be seriously impaired as a consequence of this action. Because the primary purpose of Appellant’s application is to invalidate the Recount certification, contest the determinations of the Director at Recount, and overturn the results of the election, there is no dispute that LeBon, the prevailing candidate, has sufficient interest in this action to intervene as a matter of right.

Third, LeBon can demonstrate that his interest will be impaired by this Appeal. Should Appellant succeed in obtaining the relief sought in her application, the certification of the results of the Recount would be invalidated and the vote tabulations modified. As a single vote separates the candidates in the final vote count, any change

⁶ *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 911-12 (Alaska 2000).

to the ballots counted would likely change the results of the election and possibly nullify LeBon's victory.⁷ Accordingly, the third factor is met.

Finally, LeBon can demonstrate that his interests are not adequately represented by any existing party. Appellant has filed this Appeal against the current Lt. Governor and the Director. Accordingly, at present, those are the only parties to the case that can defend the Recount and election certification. With respect to the certified election results, these parties have no interest in which candidate is deemed the winner of the HD1 seat. The Director has merely acted in her official capacity by presiding over the Recount, making determinations on challenged and questioned ballots pursuant to precedent election laws and Division election policies, and certifying the final results pursuant to the Recount. The Director and Lt. Governor has no duty or interest to defend LeBon's victory in this election, but rather to defend the Recount process and determinations made therein. While Appellees and LeBon share a common goal (i.e., upholding the Recount and the Director decisions which triggered the Appeal), they seek to accomplish the same pursuant to divergent interests. As the impending motion practice and oral argument will seriously affect LeBon's interests, in this situation, it is

⁷ In the event that review is to occur, there are multiple ballots not referenced in the Appeal that will require review. *See Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987) ("Our obligation under AS 15.20.510 is to determine whether a 'vote was cast in compliance with the requirements of Alaska's election law.' That obligation [...] must extend to a review of all ballots questioned on any basis, [...] regardless of whether they were or were not specifically challenged [by the application for appeal].").

clear that the individual with an affirmative interest in maintaining the final results, LeBon, should be allowed to litigate on his own behalf.⁸

In short, prior case law makes evident that LeBon has a direct interest in the subject matter of this Appeal and the serious need to participate to protect his interests in the outcome of the election. Furthermore, where, as here, it is evident that the party requesting intervention has an unrepresented interest in the action, it is an abuse of discretion for a court to deny the party's motion to intervene.⁹ Accordingly, the Motion to Intervene as it pertains to LeBon should be granted as a matter of right.

b. Alaska R. Civ. P. 24(b). Permissive Intervention.

Permissive intervention is proper "when an applicant's claim or defense and the main action have a question of law or fact in common," and where allowing such participation would not "unduly delay or prejudice the adjudication of the rights of the original parties."¹⁰ While additional parties can provide for additional questions, briefs, objections, arguments, and motions, where one seeking intervention: (1) has distinct interests in the action which are related but not identical to the interests of the original parties, and (2) seeks to present new issues significant to the adjudication of the main action but distinct from those presented by the original parties, permissive intervention is proper.¹¹

⁸ *Weidner*, 684 P.2d at 113-14.

⁹ *Laborers Local No. 942 v. Lampkin*, 956 P.2d 422, 439 (Alaska 1998).

¹⁰ *Keane v. Local Boundary Comm'n*, 893 P.2d 1239, 1250 (Alaska 1995); *see also* Alaska R.Civ.P. 24(b).

¹¹ *Id.*; *see also Weidner*, 684 P.2d at 113-14.

In endorsing LeBon for the HD1 seat, ARP's claims share common issues of law and fact with the Appellees (i.e., they all want to uphold the certified results of the Recount). However, ARP raises additional arguments and interests that are not accounted for by the present parties. Specifically, ARP had representatives at the Recount who challenged ballots on behalf of the Party, and such challenges should extend to the benefit of LeBon.¹²

Furthermore, as the application was just filed December 5, 2018, within days of this Motion, intervention would not unduly delay the proceedings or prejudice the original parties.

IV. CONCLUSION

Each Intervenor has a direct interest in the outcome of Appellant's application to this Court, and as set forth herein, Intervenors' respective interests will not be adequately defended unless they are allowed to participate as parties.

In accordance with the foregoing, Intervenors respectfully request that the Motion to Intervene be granted. The Court should grant LeBon, as the prevailing candidate in the State of Alaska House District 1 general election, the right to intervene and participate as a full party in this action pursuant to Alaska R. Civ. P. 24(a). Further, the Court should, in the exercise of its discretion, allow ARP to intervene and

¹² In the event that permissive intervention is denied, this should be considered notice that any ballots challenged by ARP are reserved for consideration in this Appeal.

participate as a full party in this action pursuant to Alaska R. Civ. P. 24(b) and the paramount interest of ARP in the subject matter of this action.

DATED this 7th day of December, 2018, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.
Attorneys for Intervenor

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2018, a true and correct copy of the foregoing was sent VIA hand delivery to:

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Appellees.

Supreme Court No.: S-17301

[PROPOSED] ORDER GRANTING
MOTION TO INTERVENE

This Court, having considered Intervenors' Motion to Intervene, HEREBY
ORDERS:

Barton LeBon is hereby joined as a party in the above-captioned appeal; and

The Alaska Republican Party is hereby joined as a party in the above-captioned
appeal.

ORDER GRANTING MOTION TO INTERVENE
Dodge v. Meyer, et. al.

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Supreme Ct No.: S-17301

DATED this ____ day of _____, 2018, at Anchorage, Alaska.

HON. _____
Supreme Court Judge

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