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

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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 the Alaska Supreme Court to review the Division Director'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.

The Court has scheduled an evidentiary hearing, but evidence that was not available to the Director at the 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. The Court should therefore disregard any evidence that was not available at the recount, and because the Director's decisions about all of the ballots at issue were correct, the Court should uphold the recount result.

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FACTS AND PROCEEDINGS

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 in an individual envelope with the voter's identifying information.[3] In a few locations—such as the Division's regional offices—"early voting" is available before Election Day.[4] At early voting locations, election workers can verify the qualifications of voters from anywhere

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1 AS 15.15.010.

2 AS 15.07.010.

3 AS 15.15.200.

4 As 15.20.064.

in the state and provide ballots for all forty districts. An early voting 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]

After the polls close, poll workers feed the regular ballots into a counting machine or count them by hand, and 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

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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 ballots. 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 and 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. Two candidates sought to represent House District 1 in the Alaska House of Representatives: Kathryn Dodge and Barton LeBon. House District 1 is located in Fairbanks and has eight precincts where residents can vote in person on Election Day.

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

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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.

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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 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]

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 Supreme Court appointed this Court to serve as Special Master and make a report containing recommended findings of fact and conclusions of law in this appeal.

NATURE OF RECOUNT APPEAL

"A recount appeal is a direct review by this court of the recount decision."[15] "The inquiry in a recount appeal is whether specific votes or classes of votes were correctly counted or rejected."[16]

Evidence that was not available to the Director at the time of the 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.[17] A recount appeal is

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

16 *Id.* at 367.

17 *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

an *appeal*—i.e., an appellate review of the Director's decisions at the recount: such 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*" (emphasis added).[18] Just as evidence not available to a trial court cannot justify reversing a decision on appeal, evidence not available to the Director cannot justify overturning her decisions in a recount appeal.

Thus, although at the hearing the appellants may muster additional evidence that was not available to the Director at the recount, any such evidence is not relevant to the Court's review of the Director's decisions for purposes of a recount appeal. Such evidence might be relevant had the appellants chosen to bring an election contest alleging fraud or malconduct sufficient to change the results of the election,[19] but such evidence is not relevant to an appeal reviewing the Director's decisions at the recount.

That does not mean that the Court is "limited to determining the facial validity of the ballots."[20] 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

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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).

18 AS 15.20.510.

19 *See* AS 15.20.540(1) & (3) (election contest statute requiring a showing of "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election" or "any corrupt practice as defined by law sufficient to change the results of the election").

20 *Id.*

laws."[21] But unlike in an election contest—which is not an appellate proceeding and which can be more wide-ranging—in a recount appeal the Court's inquiry "is in service of the end question whether the vote should have been counted and not whether election officials committed malconduct sufficient to change the results of the election."[22]

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.'"[23] Thus, the Supreme 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.[24]

Violations of mandatory requirements, however, do invalidate votes. "[W]here the vote violates provisions designed to insure the integrity of the electoral process, the

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

22 *Nageak v. Mallott*, 426 P.3d 930, 940 (Alaska 2018); *see also Cissna v. Stout*, 931 P.2d 363, 366–67 (Alaska 1996) ("[A]n election contest requires a showing of malconduct, fraud or corruption of election officials, ineligibility of a candidate, or a corrupt practice sufficient to change an election result. We do not consider these issues in a recount appeal.").

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

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

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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."[25]

STANDARD OF REVIEW

The Alaska Supreme Court's recount appeal cases do not make explicit what standard of review the Court uses when reviewing vote-counting decisions in a recount appeal, though the Court has noted that it applies its independent judgment to questions of statutory interpretation.[26] But the Division has expertise in election matters and is sometimes entitled to some deference, such as when interpreting its own regulations[27] or ambiguous statutes.[28] 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. Thus, the Court could appropriately defer to the Division on close vote-counting calls.

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25 *Finkelstein*, 774 P.2d at 791–92.

26 *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).

27 *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).

28 *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.").

ARGUMENT

The nine ballots challenged by the two candidates fall into three categories. Four of the ballots involve atypical markings, and the Court should reject these challenges because the Director properly applied the ballot-marking statute while also considering voter intent. Two of the 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 treated these ballots like all other ballots with missing or incorrect identifiers. Finally, two absentee ballots and one questioned ballot involve residency-based voter eligibility issues, and the Court should reject these challenges because the Director properly applied the statutory residency presumption in determining these voters' residence for voting purposes.

I. Under- and over-votes: 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.

The rules for counting ballots are laid out in AS 15.15.360, which 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."[29] AS 15.15.360(a)(5) further explains that "[t]he mark specified in (1) of this subsection shall be counted only if it is substantially inside

[29] AS 15.15.360(a)(1).

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the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated." 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,"[30] but "[i]mproper marks on the ballot may not be counted and do not invalidate marks for candidates properly made."[31] "An erasure or correction invalidates only that section of the ballot in which it appears."[32] Finally, AS 15.15.360(b) provides that "[t]he 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."

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.

The Alaska Supreme Court has "consistently emphasized the importance of voter intent in ballot disputes,"[33] and—although 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

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30 AS 15.15.360(a)(4).

31 AS 15.15.360(a)(6).

32 AS 15.15.360(a)(7).

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

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.[34]

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 mark in the corresponding oval.[35] Thus, although voter intent is important, it does not trump the "mandatory" statutory requirements of AS 15.15.360(a)(1)-(8).[36]

Applying the statutory rules as interpreted by Alaska Supreme 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 has challenged 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.[37] [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."[38]

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

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

36 *See* AS 15.15.360(b).

37 Intervenors' Cross Appeal at ¶ 18.

38 *Id.*

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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."[39] 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" the oval—and thus are not "in compliance with" AS 15.15.360(a)'s "mandatory" rules.[40] Just as the Alaska Supreme 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 undervoted ballots because they were "not compliant with the statute."[41]

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 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.[42] [R. 134] But this vote was properly counted under the Alaska Supreme 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.

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39 Emphasis added.

40 *See* AS 15.15.360(b).

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

42 Intervenors' Cross Appeal at ¶ 14.

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In *Edgmon v. State*, the Supreme 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."[43] 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 same race."[44] 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.[45]

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."[46] [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.

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

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

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

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

46 *Id.*

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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."[47]

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 Alaska Supreme Court's 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."[48]

In *Edgmon v. State*, the Alaska Supreme 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.'"[49] 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

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47 Original Application at ¶ 10.

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

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

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.[50]

II. 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 are family members residing 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

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50 *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.")

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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 registration number" or "Alaska driver's license number" or one of three alternative pieces of information sufficient to establish identity.[51]

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 very 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. The Director appropriately treated these ballots like all other ballots with missing or incorrect identifiers and did not count them.

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51 *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.").

III. Voter residence issues: The Director properly counted the absentee ballots of two voters whose presumptive residences were unrebutted.

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] But the Director properly counted these ballots because the statutory presumption of residency created by their attestations of residence—signed under penalty of perjury—was not overcome.

The Supreme 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."[52] Given these principles, it would be inappropriate for the Director to disenfranchise a voter based on inconclusive speculation about residency.

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 to return."[53] "If a person resides in one place, but does business in another, the former is the person's place of residence."[54] But the Supreme 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."[55]

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52 *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010) (quoting *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978) and *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995)).

53 AS 15.05.020(2).

54 *Id.*

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

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"Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient."[56] 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."[57]

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 is negated only if the voter notifies the director in writing of a change of voting residence.[58]

The Supreme Court has said that this language "expressly creates a presumption that a voter has not changed residence."[59] And where the "voter's intent to indicate a new

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56 *Id.*

57 *Id.*

58 AS 15.05.020(8).

59 *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.

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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."[60]

The Supreme 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.[61] The Court also rejected the ballots of voters who attested to residence addresses outside the district when filling out their absentee ballot envelopes.[62] 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 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.[63]

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

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60 *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).

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

62 *Id.*

63 *Id.* at 221-22.

ballot envelopes or other forms.[64] 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."[65] 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."[66]

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."[67] The Court also accepted the ballots of voters who signed registration affidavits after the recount stating that they were 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."[68]

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

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

65 *Id.*

66 *Id.*

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

68 *Id.*

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impossible for the voter to reside at the registered address,[69] or (2) the voter notified the Division of Elections of a change of address in writing before the election.[70]

A. The Director properly counted Dr. David Odom's absentee ballot.

Ms. Dodge challenges the Director's decision to count the absentee ballot of Dr. David Odom, arguing that he does not actually live in House District 1. [R. 37] But because it was not impossible for Dr. Odom to reside at his registered address nor did he notify the Division of Elections of a change of address in writing before the election, the Director properly relied on the presumption of residency in counting his vote.

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 duly updated its registration record for Dr. Odom to reflect 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

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

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

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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) allows the Director to presume that a voter resides where he says he does. And the Supreme 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."[71] This is part of the reality of administering elections, which the Legislature recognized in creating the presumption in AS 15.05.020(8).

Neither of the two circumstances that have led the Supreme Court to conclude that the statutory presumption of residency was overcome is present for Dr. Odom: 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.

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

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 apartment" and "need not have mail service"; it "need only be some specific locale within the district at which habitation can be specifically fixed."[72] For example, although "Elmendorf Air Force Base" is not the address of a dwelling, the Supreme Court accepted the ballots of voters who listed this as their residence.[73] 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."[74] 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."[75] No such physical impossibility is present here. Given the Supreme Court's statements, 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

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

73 *Id.* at 221.

74 *Id.*

75 *Id.* at n.7.

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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 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 Supreme 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."[76]

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.

B. The Director properly counted Norma Jean Knapp's absentee ballot.

Ms. Dodge similarly challenges the Director's decision to count Norma Jean Knapp's absentee ballot, arguing that she does not actually live 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

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

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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]

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 Supreme 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 Elections 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 not notified the Division of a change of address. The Court should uphold the Director's decision to count Ms. Knapp's ballot because the presumption of residency was not rebutted.

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IV. PFD voter registration: 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. But the Director properly excluded it because he claimed in writing—before the election—to reside outside of House District 1. [R. 6]

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 Permanent Fund Dividend (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.[77] 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.[78] An applicant must also certify his understanding that "if what I say is not true, it is a criminal offense," and "if I deliberately

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[77] *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").

[78] *See* 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.

misrepresent or recklessly disregard a fact, I am liable for civil penalties."[79] 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."[80] 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.[81] 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.[82] [R. 10] Mr. Beconovich was one of the voters who received an opt-out notice in the mail.[83]

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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79 *Id.*

80 *Id.*

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

82 *See* AS 43.23.100.

83 *See* Affidavit of Carol Thompson and attached exhibit (showing example opt out notice and confirming that Division records include Robert Beconovich among those voters to whom the notice was sent).

that he "never intended to change his voting residence." [R. 6] But the Director rejected the challenge and again declined to count the ballot at the recount.

The Director properly declined to count Mr. Beconovich's ballot because the Division of Elections had written notice that Mr. Beconovich claimed in writing to reside outside of House District 1. "[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."[84] Again, the Director lacks the resources to investigate voters' living situations, so AS 15.05.020(8) allows 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. A voter who does not wish to have his registration changed should not claim residence in a different location.

After the recount, Ms. Dodge emailed the Director an affidavit from Mr. Beconovich asserting that 104 Kutter Rd. is his office—not his residence—and that he has resided on 20th Avenue 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.[85] The Court should uphold the Director's decision not to count Mr. Beconovich's ballot because he was not registered to vote in House District 1.

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

85 *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).

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CONCLUSION

For the foregoing reasons, the Court should recommend that the Alaska Supreme Court uphold the Director's ballot counting decisions and consequent certification of Barton LeBon as the winner of the House District 1 state representative election.

DATED: December 17, 2018.

KEVIN G. CLARKSON
ATTORNEY GENERAL

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Certificate of Service and Typeface
This is to certify that on this date, a copy of the foregoing is being served electronically and via U.S. mail to:

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I further certify, pursuant to App. R. 513.5, that the font used in the aforementioned document is Times New Roman 13.

12-17-18

Kyle Emili Date
Law Office Assistant

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IN THE SUPREME COURT OF THE STATE OF ALASKA

KATHRYN DODGE Appellants, v. LT. GOVERNOR KEVIN MEYER, and DIVISION OF ELECTIONS DIRECTOR JOSEPHINE BAHNKE Appellees.	)	Supreme Court No.: S-17301

AFFIDAVIT OF CAROL THOMPSON

STATE OF ALASKA)
) s.s.
THIRD JUDICIAL DISTRICT)

1. My name is Carol Thompson. I am the Absentee and Petition Manager for the Alaska Division of Elections. I have confirmed all information in this affidavit by review of the records of the Division of Elections and if called to testify, would testify as follows.

2. Alaska voters approved a new PFD voter registration law in 2016 by ballot initiative. It provides that eligible Alaskans will be automatically registered to vote (or have their registrations updated) when they apply for their PFDs.

3. I was one of the Division of Elections' staff members responsible for implementing the PFD law.

4. 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.

5. Consistent with this law, when voter Robert Beconovich stated in 2017 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 Division of Elections and was used to update his voter registration record.

6. Because he had previously been registered at an address on 20th Avenue, Mr. Beconovich was sent an "opt-out" notice. A true and correct copy of an example of this notice is attached hereto as EXHIBIT A.

7. I reviewed the records of the Division and confirmed that Mr. Beconovich was among the voters who were sent this opt-out notice on or about October 30, 2017. A screenshot of the portion of the relevant spreadsheet from the Division's records is attached hereto as EXHIBIT B.

8. Because Mr. Beconovich did not return the opt-out notice, he was registered at 104 Kutter Rd. for the 2018 election. He did not notify the Division of a different address until after the election and the recount.

Carol Thompson

SUBSCRIBED AND SWORN TO before me December 17, 2017.

Notary Public in and for Alaska
My Commission Expires: With Office

Official Seal
State of Alaska
Notary Public
Grace L. Sy

Division of Elections
PO Box 110017
Juneau, AK 99811-0017

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DIV OF ELECTIONS

RETURN SERVICE REQUESTED

Insert Barcode HERE

Attention Recipient
Please Read! If the person whose name is on this card does not receive mail at this address, please write RETURN TO SENDER and place back in the mail.

---------- **Fold Here** ----------

State of Alaska, Division of Elections – Notice of Automatic Voter Registration

The information you provided on your Permanent Fund Dividend (PFD) application will be used to update your existing voter registration record unless you select to opt-out of this automatic update process.

Opt-out of Voter Registration Record Update

☐ **NO, I DO NOT** want my PFD application information to be used to update my existing voter registration record.

Provide ONE identifier below:
(Alaska Driver's License #, State ID #, Last 4 of SSN or Date of Birth)

_____

Signature: I swear or affirm that I am the person to whom this card was issued, I have told the truth in this form and I want to opt-out of automatic voter registration record update.

X _____

[Merge Name]

If you choose to use your PFD application information to update your voter registration record, you may maintain your residence address as confidential if you have a different mailing address. Contact our staff using the information below to place your registration in this status.

Director's Office
Phone: (907) 465-4611
Toll Free: (866) 952-8683
TTY: (907) 465-3020

Online Voter Registration System:
https://voterregistration.alaska.gov
Website: www.elections.alaska.gov
Email: elections@alaska.gov

Language Assistance
1-866-954-8683
Yup'ik, Siberian Yupik, Inupiaq, Koyukon Athabaskan, Gwich'in Athabaskan, Tagalog, and Spanish

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DIVISION OF ELECTIONS
PO BOX 120002
JUNEAU AK 99812-9983

Dear Alaskan,

In 2016, Alaskan voters approved Ballot Measure 1 (15PFVR), which automatically updates the voter registration record of eligible individuals when they apply for a Permanent Fund Dividend (PFD).

You are receiving this notice because you will have your voter registration record updated using the information you provided on your PFD application unless you decline by returning this card. With this automatic update process, your voter registration record will reflect the residence address you submitted on your PFD application.

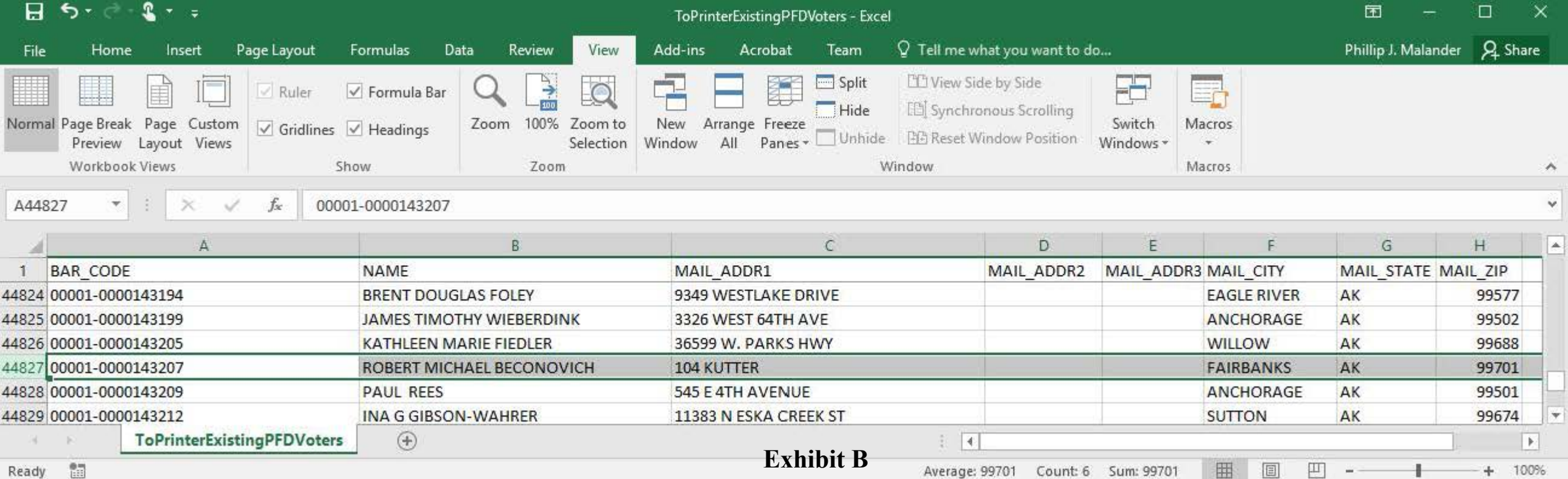
You have the following options:

- **Take no action.** No response is necessary if you want the information provided on your PFD application to be used for your voter registration record. Not responding to this notice indicates your consent to cancel any registration to vote in another jurisdiction.

- **Use this card to opt-out** and decline to update your existing voter registration record. You must check the box on the reverse side, provide an identifier and return the card to the Division of Elections.

- **Update your political affiliation** by contacting the Division of Elections. The political affiliation on existing voter records will not be changed. Please note that your political affiliation may determine which primary ballot you may vote. You can find out more information about Alaska's political parties and groups and can also change your political affiliation by going to our website, www.elections.alaska.gov.

To opt-out of this automatic update, please complete, fold, tape and return this card to the Division of Elections by **[date].**


ToPrinterExistingPFDVoters - Excel
File Home Insert Page Layout Formulas Data Review View Add-ins Acrobat Team Tell me what you want to do... Phillip J. Malander Share
Normal Page Break Preview Page Layout Custom Views Workbook Views
Ruler Formula Bar Gridlines Headings Show
Zoom 100% Zoom to Selection Zoom
New Window Arrange All Freeze Panes Split Hide Unhide View Side by Side Synchronous Scrolling Reset Window Position Switch Windows Window
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1 BAR_CODE NAME MAIL_ADDR1 MAIL_ADDR2 MAIL_ADDR3 MAIL_CITY MAIL_STATE MAIL_ZIP
44824 00001-0000143194 BRENT DOUGLAS FOLEY 9349 WESTLAKE DRIVE EAGLE RIVER AK 99577
44825 00001-0000143199 JAMES TIMOTHY WIEBERDINK 3326 WEST 64TH AVE ANCHORAGE AK 99502
44826 00001-0000143205 KATHLEEN MARIE FIEDLER 36599 W. PARKS HWY WILLOW AK 99688
44827 00001-0000143207 ROBERT MICHAEL BECONOVICH 104 KUTTER FAIRBANKS AK 99701
44828 00001-0000143209 PAUL REES 545 E 4TH AVENUE ANCHORAGE AK 99501
44829 00001-0000143212 INA G GIBSON-WAHRER 11383 N ESKA CREEK ST SUTTON AK 99674
ToPrinterExistingPFDVoters
Ready
Average: 99701 Count: 6 Sum: 99701
100%

Exhibit B