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IN THE SUPREME COURT FOR THE STATE OF ALASKA

SUNNY GUERIN, ELIZABETH ASISAUN
TOOVAK, and VERA LINCOLN,

Appellants,

v.

KEVIN MEYER, in his official capacity as
Lieutenant Governor of the State of Alaska;
GAIL FENUMIAI, in her official capacity as
the Director of the Alaska Division of
Elections, and the STATE OF ALASKA,
DIVISION OF ELECTIONS,

Appellees,

and

ALASKANS FOR NICK BEGICH,

Intervenor.

Supreme Court Case No. **S-18457**

Trial Court No. 3AN-22-06795 CI

MEMORANDUM ON APPEAL

Alaska's seat in the U.S. House of Representatives has been vacant since the March 18, 2022 death of Congressman Don Young. Under Alaska law, filling that seat requires Appellees Kevin Meyer, Gail Fenumiai, and the State of Alaska, Division of

Elections (“DOE” or the “Election”), to effectuate a special primary election and special general election. The Division chose to schedule the resulting 2022 Special Primary Election on June 11, 2022, and the 2022 Special Election on August 16, 2022, and to select other procedural deadlines to facilitate these elections, including a June 26, 2022 deadline for candidates to withdraw from the 2022 Special Election, and a June 28, 2022 deadline for ballot printing to begin. Thus, under Alaska’s new ranked-choice voting system, the four candidates who received the greatest number of votes in the 2022 Special Primary Election, and who will appear on the ballot for the 2022 Special Election must be identified by June 28, 2022.

On June 21, 2022—well in advance of both the drop-out and printing deadlines set by the department—a top-four candidate withdrew from the special election, intending to cede his place on the ballot to the candidate with the fifth-greatest number of votes in the primary. Under the plain language of the Division’s controlling statutes, this is what should have occurred. Yet, the Division proclaimed its intention not to do so, claiming that it was excluded from compliance by a statutory deadline which is inapplicable to special elections, and incompatible with the timeline the Division set for this special election. This torturous statutory interpretation was blessed by the superior court. If this error goes uncorrected, voters will be unable to fully realize the promise of ranked-choice voting that they consented to in ratifying Ballot Measure 2; voters will be deprived of their constitutional and statutory right to make their voices heard by ranking four candidates in order of preference; and public confidence in the integrity of Alaska’s election system will be substantially undermined. In contrast, in the event the superior court’s decision is reversed, the Division will not be prejudiced

in any way, and the election will be able to timely proceed. This Court should reverse the superior court's grant of declaratory judgment to Appellees and clarify that the 64-day time limit contained in AS 15.25.100(c) does not bar the Division from placing the candidate who received the fifth-highest number of votes in the 2022 Special Primary Election on the ballot for the 2022 Special Election.

I. TIMELINE AND PROCEDURE

Appellants reiterate and incorporate by reference the statement of facts set forth in their June 23, 2022 Motion for Summary Judgment, and the procedural posture of this case as reflected in the totality of the documents filed in the proceedings below.

II. STANDARD OF REVIEW

This Court exercises “independent judgment when interpreting statutes which do not implicate an agency's special expertise or determination of fundamental policies.”¹ The Court reviews “questions of law de novo, ‘adopting the rule of law most persuasive in light of precedent, reason, and policy.’”²

III. DISCUSSION

Given the expedited nature of this appellant proceeding and the Alaska Supreme Court's extremely limited period in which to issue a decision, Plaintiffs predominately rely upon the record on appeal accepted and enumerated by this Court in its June 24, 2022 Opening Notice, limiting arguments in this memorandum on appeal to those raised by or

¹ *Nageak v. Mallott*, 426 P.3d 930, 940 (Alaska 2018); *Keane v. Local Boundary Comm'n*, 893 P.2d 1239, 1241 (Alaska 1995).

² *Comsult LLC v. Girdwood Mining Co.*, 397 P.3d 318, 320 (Alaska 2017) (quoting *Girdwood Mining Co. v. Comsult LLC*, 329 P.3d 194, 197 (Alaska 2014)).

relied upon by the Superior Court in reaching its June 24, 2022 Order regarding the above-captioned case.

A. Appellants' Interpretation of the Division's Governing Statutes Is Supported by Reason, Common Sense, and Legislative History.

Throughout the lower court proceedings in this case, both the Division and the court misconstrued well-established principles of statutory interpretation as well as the obligations and requirements imposed upon the Division as the administrator of Alaska elections. Contrary to the lower court's assertions, Appellants are not asking the Division to re-write the Alaska Statutes; Appellants merely seek the application of these statutes in a manner that is consistent with Title 15 of the Alaska Statutes, common sense, the preservation of the public's interest, and its faith in the integrity of the electoral process.

As Appellants reiterated during oral argument, statutory interpretation is an act of precision, and must be approached carefully, with each word given meaning. The Court presumes "that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous."³ Therefore, the *only* provision of AS 15.25.100(c) which is eliminated or superseded, consistent with AS 15.40.220, by the separate timeline applicable to special elections, is the 64-day general election deadline. The remainder of the statute, which governs "conduct" during the election process must be followed, as a matter of law.

Further buttressing this conclusion is the fact that the Division's interpretation of AS 15.25.100(c) is inconsistent with its interpretation of other provisions containing general election deadlines that the Division chose not to apply in the 2022 Special

³ *Id.*

Election. During oral argument, the Division argued that it did not have to comply with the deadline contained in AS 15.25.040 because that deadline was a specific calendar day. While Plaintiffs acknowledge the difference between the two, there is no statute that authorizes the Division to unilaterally determine that general election deadlines expressed by date do not apply to special elections while those expressed as time periods do. Given the 90-day window in which a special election must occur, a span of time deadline is just as likely to be unreasonable as a specified date. Similarly, the Division argued that AS 15.07.140, which requires the director to prepare the list of registered voters no later than 120 days before any general election, would actually require preparation of the list of registered voters no later than 120 days from the general rather than the special election. Essentially, even in its own argument the Division interpreted the “general election” to refer to, in fact, a “general election.” The Division’s attempt to suggest that not only the courts but the public will need to decipher the special election time periods, or spans of time that apply to general elections and those that do not places an undue burden on the voters and even upon legal counsel interpreting the statutes for purposes of compliance.

Likewise, the fact that the 64-day deadline is mentioned in a statute addressing the content of election pamphlets has no bearing on whether such deadline was intended to, or should, apply to special elections, except to demonstrate that the 64-day deadline does not apply to special elections like the one at issue.⁴ Ironically, perhaps had a voter pamphlet been required in this election, the public and the candidates would have had notice of the election procedures applicable to the 2022 Special Election.

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⁴ AS 15.58.010.

B. The Division's Intent to Exclude Sweeney from the Ballot Violates the Fundamental Right to Vote Under the Alaska Constitution.

The Division's decision to place only the top three candidates on the ballot not only directly violates Alaska Statute, it also usurps "[t]he right of the citizen[s] to cast [their] ballot[s] and thus participate in the selection of those who control [their] government...", which is according to the Alaska Supreme Court, "one of the fundamental prerogatives of citizenship."⁵ The gravity of the violation of the voter's right to select their chosen candidate arising from the Division's misinterpretation of Alaska Statute triggers strict scrutiny by the Alaska Supreme Court. Unlike *Sonneman v. State*,⁶ where the resulting bias to candidates from an unlawful Division determination was merely positional, Sweeney will be completely foreclosed from appearing on the ballot despite the express language of the statute, the intent of the voters, and the expectations of both the voters and the candidates. The burden the Division's position takes on Plaintiffs and all Alaska voters is severe, limiting the right to vote to certain candidates despite the letter and intent of the law.

In light of the nature of the interest and the burden at issue, the Division must demonstrate a compelling interest to exclude Sweeney from the ballot and apply general election timelines to the expedited special election. This burden cannot be met as no such interest exists. The placement of Tara Sweeney's ("Sweeney") name on the ballot can be done and done without disturbing the finality and integrity of the election or in any way harming voters or the voting process. On the other hand, failing to place Sweeney's name on the ballot will directly undermine the integrity of the election, the expectations of

⁵ *Miller v. Treadwell*, 245 P.3d 867, 868–69 (Alaska 2010).

⁶ 969 P.2d 632 (Alaska 1998).

the voters, and even the expectations of the candidates, including Al Gross. At oral argument below, the superior court expressed disbelief that voter confusion is an appropriate consideration in evaluating Division action. To the contrary, this is a factor that is of utmost importance—the Division is tasked with the orderly and efficient administration of state and federal elections. If, as here, voter confusion is apparent as a direct and proximate result of Division action, and the Division has the ability to take immediate and reasonable action to correct such harm through compliance with its unambiguous statutory prerogatives, it must do so.

IV. CONCLUSION

When Alaska voters ratified the ranked-choice voting system via ballot initiative, they uniformly understood that, in general elections for congressional seats, they would have the ability to rank in order of preference on election day the four qualified candidates who had received the greatest number of votes in the primary election. By statute, this guarantee applies with equal force to the tightened timeline created by the DOE to conduct a special election to fill the vacant congressional seat existing after the untimely death of Don Young. Therefore, where Al Gross withdrew from candidacy in the 2022 Special General Election in advance of the DOE's deadline to do so, DOE must comply with its governing statutes and place the candidate with the fifth-highest number of votes in the 2022 Special Primary Election on the ballot for the 2022 Special General Election.

By its own repeated admission, no logistical bar exists to DOE doing so. DOE has not yet formally announced which candidates will be on the ballot in the 2022 Special General Election—beyond its proclamation that Sweeney will not be one of them—and has not yet printed a single ballot for such election. DOE simply does not wish to concede

that the deadlines it set for its own special election could not comply with the 64-day deadline set by AS 15.25.100. In the event DOE does not comply with its statutory mandates and ensure that there are four candidates on the ballot at the 2022 Special General Election, the integrity of the ranked-choice voting system will be compromised, and the guarantee of Alaska voters on election day to vote by ranking the top four candidates from the primary election in order of preference will be eviscerated. For these reasons, and those articulated above, this Court reverse the decision of the superior court approving of and adopting Appellees' erroneous interpretation of AS 15.25.100(c).

DATED this 24th day of June, 2022.

BIRCH HORTON BITTNER & CHEROT

By: /s/ Holly C. Wells

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CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that on June 24, 2022, a true and correct copy of Sunny Guerin,
Elizabeth Asisaun Toovak, and Vera Lincoln's Memorandum on Appeal, and this

Certificate of Service and Typeface were served by email upon the following trial counsel of record:

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I further certify that pursuant to Appellate Rule 513.5(c)(2), the foregoing has been prepared in a proportionally spaced 12.5-point Arial typeface.

DATED at Anchorage, Alaska, this 24th day of June, 2022.

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