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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

BENJAMIN NAGEAK, ROB ELKINS, ROBIN D. ELKINS, LAURA WELLES and LUKE WELLES,

Plaintiffs,

v.

LT. GOVERNOR BYRON MALLOTT, 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,

Defendants.

Case No.: 3AN-16-09015CI

TRIAL BRIEF

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INTRODUCTION

Some human error is to be expected in an election, particularly given Alaska's vast size and the large number of people needed to conduct one. That is why plaintiffs who want to disrupt an election result carry the heavy burden of proving "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election."[1] The plaintiffs in this case cannot carry that heavy burden. The poll workers they criticize are local residents who were just trying to help with the election, assist voters with special needs, and serve their communities. The errors the plaintiffs identify are not "malconduct" nor are they sufficient to change the result of the election.

BACKGROUND

The State of Alaska runs the primary election for the nomination of candidates by political parties.[2] The Democratic Party permits any registered voter, no matter the party affiliation, to vote in its primary. Other recognized political parties have the same rule. By contrast, the Republican Party permits only voters registered as Republican, Undeclared or Non-Partisan to vote in its primary. Because of these party rules, there are two primary ballots: (1) a Republican ballot and (2) a combined party ballot—sometimes called the "ADL ballot"[3]—that lists all parties' candidates except the Republican Party's. A Republican, Undeclared or Non-Partisan voter may vote either ballot. All other voters may only vote the combined party ballot.

The 2016 primary election was held on August 16. In House District 40, no one sought the Republican Party nomination for state office, so that ballot included only candidates for federal office. The combined party ballot offered Democratic and Libertarian candidates for federal office; one unopposed Democratic candidate for State Senate; and Democratic candidates Ben Nageak and Dean Westlake for State House.

On September 6, the Division of Elections certified Mr. Westlake as the winner

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1 AS 15.20.540(1).

2 AS 15.25.010.

3 The other recognized parties in Alaska are the "Alaska Independence Party," the "Democratic Party," and the "Libertarian Party"—hence the acronym "ADL."

of the House District 40 Democratic primary for State House. Rep. Nageak requested a recount, which resulted in an eight-vote margin of victory for Mr. Westlake, 825 to 817. On September 16, Rep. Nageak filed a recount appeal in the Alaska Supreme Court under AS 15.20.510 and an election contest in this Court under AS 15.20.540-.560. The Supreme Court stayed the recount appeal pending the outcome of this case.[4]

ARGUMENT

I. Legal standard for an election contest

Plaintiffs in election contests "carry a heavy burden."[5] They must show more than just that errors occurred—they must prove "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election."[6]

Strong public policies support this heavy burden. The "general rule" is that "every reasonable presumption will be indulged in favor of the validity of an election,"[7] because "the public has an important interest in the stability and finality of election results."[8] Perfection in the conduct of an election is not possible, particularly given that "Alaska elections are primarily conducted by many volunteer workers," and "[u]niquc problems are presented in the vast area encompassed as well as the varied cultural backgrounds and primary languages of voters."[9]

Because perfection is not possible and the courts strongly favor upholding election results, the election contest standard "parallels the 'directory' view": election statutes "are directory" and "they therefore establish a desirable rather than a mandatory norm."[10] In a post-election challenge, all statutory requirements are directory only

> 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

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4 *See* Order in *Nageak v. Mallot et al.*, S-16462 (Sept. 20, 2016).

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

6 AS 15.20.540(1).

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

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

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

10 *See Boucher v. Bomhoff*, 495 P.2d 77, 80 (Alaska 1972).

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> 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.[11]

"Even where statutory terms have been construed as mandatory . . . the right to vote is a superseding mandate."[12] The Court "must thus appraise mandate as against mandate, if there be a conflict," and "[c]ertainly, the more controlling one is that the voter shall, ordinarily, have his vote recognized" 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."[13] "In the absence of fraud, election statutes generally will be liberally construed to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disfranchisement, and to uphold the will of the electorate."[14]

Given these strong public policies, mere good faith mistakes by poll workers are not grounds for an election contest. Rather, a plaintiff must show that a deviation from the law rises to the level of "malconduct." To determine whether a plaintiff has proven malconduct, "each alleged deviation from a statutorily or constitutionally prescribed norm" must be separately analyzed "to determine if it is 'significant' and to ascertain if it involves an element of scienter."[15] A "significant deviation" from the law may be "malconduct" if it "introduces a bias into the vote," but if no bias can be shown, even a significant deviation "will not amount to malconduct unless a knowing noncompliance with the law or a reckless indifference to norms established by law is demonstrated."[16]

Only after a plaintiff has first proven a deviation from legal requirements that is both "significant" enough and imbued with enough "scienter" to constitute "malconduct" must the court consider whether the deviation was sufficient to change

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11 *Finkelstein v. Stout*, 774 P.2d 786, 790 (Alaska 1989) (quoting *Willis v. Thomas*, 600 P.2d 1079, 1083 n.9 (Alaska 1979)).

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

13 *Id.*

14 *Id.* (quoting *Brown v. Grzeskowiak*, 101 N.E.2d 639, 646 (Ind. 1951)).

15 *Hammond*, 588 P.2d at 259.

16 *Id.*

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the election result.[17] If the malconduct did not introduce a bias into the vote and the affected votes cannot be precisely identified, "the contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast" to determine whether the problem was sufficient to change the result.[18]

II. The plaintiffs cannot meet their "heavy burden" for an election contest.

A. Count I: Lack of three election board members in a precinct

Count I alleges that at least one precinct did not have three election board members. Complaint ¶¶ 18-21. But the plaintiffs cannot meet their burden because this is not "malconduct," nor could it have changed the election result.

In a post-election challenge, the requirement of three election board members is directory, not mandatory,[19] so inexact compliance is not "significant" enough to be "malconduct." The policies discussed above would be undermined if an election could be voided just because one person in a remote precinct did not come to work. If the polls do not open despite understaffing, entire communities would be disenfranchised.

Even if fewer than three election board members were a "significant" deviation from the law, the plaintiffs cannot prove the "element of scienter" necessary to demonstrate "malconduct,"[20] nor can they show any effect on the result. They have provided no evidence of problems arising from insufficient staffing, and their assertion that "the integrity of the election is in question" does not sustain their heavy burden.[21]

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17 *Id.*

18 *Id.*

19 *See Carr*, 586 P.2d at 626 ("In determining whether an election provision is to be regarded as mandatory or directory, great emphasis is placed on whether the challenge is prior or subsequent to the election.").

20 *See Hammond*, 588 P.2d at 259 ("We believe that each alleged deviation from a statutorily or constitutionally prescribed norm must be analyzed individually to determine if it is 'significant' and to ascertain if it involves an element of scienter.").

21 *Cf. id.* at 261 (mishandling of ballots was "malconduct" but election contest failed because "there was no evidence that the ballots had been disturbed or tampered

B. Count II: Allegedly invalid special needs ballots

Count II alleges that it is "impossible to determine" if certain special needs ballots were cast before voting closed. Complaint ¶¶ 22-25. This claim is about twelve special needs ballot envelopes from Buckland, some of which do not list the voter's political party or dates of issuance or return. This claim fails because no law requires this information. The plaintiffs have the burden to prove these votes were invalid; the Division does not have the burden to prove they were not.

The absence of non-required information on a ballot envelope is not a reason to invalidate a special needs voter's vote. Special needs ballots are cast by voters who cannot go to the polls due to disability; they request and receive ballots through representatives.[22] The governing statute lists information that must be recorded for such ballots—for example, the representative's name and address.[23] For envelopes, the voter and representative must sign and date the voter's certificate and the voter must "provide the information on the envelope that would be required for absentee voting if the voter voted in person,"[24] i.e., a signed and dated voter certificate.[25]

Special needs ballots must be received before 8 p.m. on Election Day,[26] but the absence of a notation on an envelope recording the receipt of a ballot does not prove untimeliness. "The burden of proving ballot illegality in general and particularly that the ballot in question was not cast on or before election day is on the challenger."[27] The Division is unaware of any evidence that these ballots were not timely received.

The plaintiffs may allege other problems with the Buckland special needs ballots, but they have no evidence of any wrongdoing, much less of "malconduct, fraud, or

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with" so the court "fail[ed] to understand how the malconduct connected with this particular incident could contribute in any way to change the result of the election").

22 AS 15.20.072.

23 AS 15.20.072(c).

24 AS 15.20.072(d).

25 AS 15.20.061(c).

26 AS 15.20.072(e).

27 *Finkelstein*, 774 P.2d at 788.

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corruption." In fact, the actions of these helpers "arose from commendable intentions" and their "purpose and effect" "was to allow properly registered Alaskan voters, who otherwise might have been unable to register their political preferences, to vote."[28]

C. Count III: Voters allegedly not allowed to choose ballot

Count III alleges that some Republican voters were "improperly challenged" when they sought to vote the combined party ballot. Complaint ¶¶ 26-29. But the evidence will show that no voters were improperly denied the combined party ballot, and that these alleged issues could not have changed the election result.

The Division understands that two of the plaintiffs, Luke and Laura Welles, are registered Republicans in Browerville who voted the combined party ballot but were mistakenly asked to do so via the questioned ballot process. Because these voters voted the ballot of their choice and their votes were counted, this makes no difference.

Another plaintiff, Rich Thorne, is a registered Republican in Bettles who claims to have been handed a Republican ballot rather than being offered a choice. Mr. Thorne is the former Mayor of Bettles and is well acquainted with the poll worker who gave him a ballot; he could have simply requested a combined party ballot if he preferred one. The poll worker's alleged assumption that Mr. Thorne wanted the Republican ballot was not "malconduct," nor would this be sufficient to change the election result.

Finally, William Oviok, a registered Democrat in Barrow, claims to have been denied a combined party ballot. But Mr. Oviok is a convicted felon constitutionally prohibited from voting, so denying him the combined party ballot was harmless.[29]

D. Count IV: Four ballots misplaced during review board

Count IV alleges that four questioned ballots were "wrongfully comingled" with other ballots. Complaint ¶¶ 30-33. But the evidence will show that only ballots determined to be valid were counted, so this made no difference.

Ballots designated "full count" are those that the regional absentee and

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[28] *Cf. Hammond*, 588 P.2d at 268.

[29] *See* Alaska Const. art. V, § 2 ("No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored.").

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questioned ballot review has determined should be counted. The evidence will show that at the review in Nome, four full-count *absentee* ballots were mistakenly placed in an envelope containing full-count *questioned* ballots. Thus, the review showed that the questioned ballot count was four too many and the absentee ballot count was four too few. To correct this, officials took four ballots from the full-count questioned ballot envelope and placed them with the full-count absentee ballots so that each group of ballots—full-count questioned and full-count absentee—contained the correct total number of ballots. Because all ballots in both groups were full-count ballots—i.e., ballots already determined to be fully valid—that transfer had no effect on the vote totals. Thus, the election officials' treatment of these four ballots was neither "malconduct" nor could it have had any possible effect on the result of the election.

E. Count V: Voters who cast two primary ballots

Count V alleges that some voters were permitted to cast both a Republican and a combined party ballot. Complaint ¶¶ 34. The plaintffs frame this as a constitutional claim, but given the remedies they seek, it is an election contest claim to which election contest standards apply.[30] The error they cite was not "malconduct" because everyone who voted in the Democratic primary was entitled to do so, and no one voted in more than one party's State House primary. Nor was the error sufficient to change the result.

Seven of the ballots at issue were questioned ballots cast in Kivalina by voters who had also voted the other primary ballot. But counting these makes no difference to the result of the race because five are Republican ballots with no votes for the house race, one ballot was voted for Mr. Westlake and the other was voted for Rep. Nageak.

The rest of the ballots at issue in Count V were cast in Shungnak. It is undisputed that due to poll worker error, all 50 in-person voters and one special needs voter in Shungnak received and voted both the combined party ballot and the Republican

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[30] *See Walleri v. City of Fairbanks*, 964 P.2d 463, 466 (Alaska 1998) ("Whether a cause of action should be deemed an election contest . . . turns on the remedy sought. If granting the remedy would defeat the public interest in the stability and finality of election results, it is appropriate to deem the cause of action an election contest.").

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ballot.[31] Of the 50 in-person voters, 22 were Democrat, 4 were Republican, 3 were Alaskan Independence Party, 14 were Undeclared, and 7 were Non-Partisan. Because of party rules, all 50 were eligible to vote the combined party ballot, but only 25 were eligible to vote the Republican ballot. Because the ballots were all comingled, the Division cannot associate ballots with the voters who cast them. The Division counted all of the ballots to avoid disenfranchising voters because of a poll worker's error.

The evidence will show that the Shungnak error was an honest mistake that does not amount to "malconduct." First, the error was not a "significant deviation" because every voter who voted in the Democratic primary could validly do so, and no voter voted in more than one party's State House primary. "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.'"[32] While it is true that by statute, each voter should only vote one primary ballot,[33] that is a mandatory requirement only looking forward. In a post-election challenge, all statutory requirements "should be held directory only, in support of the result," with just a few exceptions, like where the requirements "affect an essential element of the election."[34]

Simply allowing voters to vote in more than one party's primary does not "affect an essential element of the election" because this occurs in every primary: voters who choose the combined party ballot may vote in more than one party's primary by, for example, voting for a Libertarian candidate for U.S. Senate and a Democratic candidate for State House. Nor do the other potential problems with giving voters two primary ballots "affect an essential element of" the State House race between Rep. Nageak and

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[31] Special needs ballots are combined with absentee ballots, so there is no way to tell who the special needs voter voted for on the combined party ballot and the 47-3 split in Shungnak votes therefore does not include this vote.

[32] *Carr*, 586 P.2d at 626 (quoting *Reese v. Dempsey*, 153 P.2d 127, 132 (N.M. 1944)).

[33] AS 15.25.060(b).

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

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Mr. Westlake. It may be an "essential element" of a primary that no voter may vote in more than one primary for the same office—by, for example, voting for both Democratic and Republican candidates for State House. But that did not occur in Shungnak for the State House race because the Republican ballot contained no State House candidates. And it may be an "essential element" of a primary that no voter may vote in a primary that they are not eligible for—by, for example, voting in a Republican primary as a registered Democrat. But that did not occur in Shungnak for the State House race because every voter was eligible to vote the combined party ballot. The races on the Republican ballot had wide margins and are not at issue in this case.

Second, even if the Shungnak poll worker's error were a "significant deviation," absent bias, it "will not amount to malconduct unless a knowing noncompliance with the law or a reckless indifference to norms established by law is demonstrated."[35] A "bias" in this context is something that influences voting decisions, like misleading ballot proposition language.[36] The Shungnak poll worker did nothing that would have influenced votes. And the plaintiffs cannot prove the "knowing noncompliance" or "reckless indifference" necessary for a malconduct finding because, in fact, the Shungnak poll worker made an honest mistake.

Finally, even if the Shungnak error were "malconduct," the plaintiffs cannot prove it was "sufficient to change the result of the election." The Division does not expect any of the 25 Shungnak voters who were eligible to vote the Republican ballot to testify that they would have picked that ballot. Absent such testimony, the Court should not accept the plaintiffs' invitation to guess which ballot these voters would have chosen, with the goal of invalidating their votes and disrupting the election result. Instead, the Court should err on the side of counting votes and upholding the results.

Absent Shungnak voter testimony, if the Court wishes to speculate about what might have happened without the poll worker mistake, the best evidence shows that the

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35 *Hammond*, 588 P.2d at 259.

36 *See Boucher*, 495 P.2d at 81 (concluding that "inherently misleading" prefatory language introduced a bias into the election result).

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result would have been the same because most Shungnak voters would have chosen the combined party ballot. The Republican ballot offered only federal races that were not expected to be close, while the combined party ballot had a hotly contested and locally relevant State House race. Voters therefore had more reason to choose the combined party ballot. The most recent analogous primary election was in 2012, when the House District 40 Republican ballot had only an uncontested state senate race and a congressional primary with no significant challenge to U.S. Representative Don Young; but the combined party ballot had four candidates vying for the Democratic Party's State House nomination. In that election, 85.48% of Shungnak voters chose the combined party ballot. If the same percentage held true this year, 7.41 Shungnak voters (14.52% of 51) would have chosen the Republican ballot and would not have voted the combined party ballot. Subtracting 7.41 votes to reduce Rep. Nageak's and Mr. Westlake's vote totals in proportion to the overall vote split in Shungnak[37] (which was 6% Nageak to 94% Westlake) narrows the margin between the candidates, but still results in a one-vote lead for Mr. Westlake. Thus, the plaintiffs cannot prove that the poll worker's mistake would have changed the result.

III. Remedies

If the Court decides that the plaintiffs have met their election contest burden, it will also have to determine an appropriate remedy. A new election is an "extreme remedy"[38] that would not actually fix the problem identified in Shungnak. The problem there was that some voters were not forced to choose between the Republican and combined party ballots. But if the Court orders a new election, the voters will be in exactly the same position, because they will be presented only one ballot with one race. So any concerns raised by the absence of a forced choice would not be remedied.

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37 *Cf. Hammond*, 588 P.2d at 259 (instructing that "the contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast" to determine the effect on the result).

38 *Id.*

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CONCLUSION

The Court should uphold the results of the House District 40 primary.

DATED: September 27, 2016.

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