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IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the 2016 STATE HOUSE DISTRICT 40 PRIMARY ELECTION	Supreme Court Nos. S-16462/S-16492/S-16494 (Consolidated)

Division of Elections Recount;
3AN-16-09015CI

REPLY BRIEF OF ELECTION CHALLENGERS

Filed in the Supreme Court
of the State of Alaska, this
_____ day of October, 2016,

By: _____
Supreme Court Clerk

Benjamin Nageak, Rob Elkins, Robin D. Elkins, Laura Welles and Luke Welles (hereinafter collectively referred to as "Election Challengers"), by and through counsel of record, Holmes Weddle & Barcott, P.C., hereby submit their Reply to the Opening Briefs filed by both the Division of Elections (hereinafter the "Division") and Intervenor, Dean Westlake. Election Challengers maintain that the Superior Court correctly determined in the election contest matter below that the conduct of the August 16, 2016 Primary Election was affected by malconduct on the part of the Division.

ARGUMENT

1. Standard of Review

In its brief, the Division improperly urges this Court to reverse the findings of Fact made by the Superior Court. This Court may only review findings of fact for **clear error**.[1] Clear error **only exists** if, "after a thorough review of the record, [the Court] come[s] to a definite and firm conviction that a mistake has been made."[2] "All factual findings are reviewed in the light most favorable to the prevailing party below."[3] As both the Division and Intervenor have failed to demonstrate that the Court made any mistake in its findings of fact, those findings

[1] *Romero v. Cox*, 166 P.3d 4, 7 – 8 (Alaska 2007) (emphasis added).
[2] *Id. quoting Soules v. Ramstack*, 95 P.3d 933, 936 (Alaska 2004) (internal quotations omitted).
[3] *Id. quoting N. Pac. Processors, Inc. v. City & Borough of Yakutat*, 113 P.3d 575, 579 (Alaska 2005) (internal quotations omitted).

must be upheld on review. Furthermore, as we are now in an appeal phase, all facts must be reviewed in the light most favorable to Election Challengers.

2. Election Contest vs. Election Recount

It is true that this matter involves both an election contest and a recount, however, there is no reason for this Court to deviate from its precedent with regard to deciding the same. An election contest pursuant to AS 15.20.540(1) requires a showing of malconduct, fraud or corruption of election officials sufficient to change an election result.[4] A recount appeal considers "whether specific votes or classes of votes were correctly counted or rejected."[5]

3. Errors in the Conduct of an Election Can Result in Misconduct

The Division argues that strong public policies require plaintiffs in an election contest meet a heavy burden and that every reasonable presumption must be indulged in favor of the validity of an election.[6]

The Division argues that elections are primarily conducted by "volunteer workers" and that factors like the size of the Division and cultural backgrounds present problems.[7] In fact, election workers are now paid for their work.[8]

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[4] *Cissna v. Stout*, 931 P.2d 363, 366-367.
[5] *Id.* 931 P.2d at 367.
[6] However, as the Superior Court found below that malconduct had occurred based on its findings of fact, the burden has now shifted and all facts must be reviewed in favor of Election Challengers. *See, e.g. Romero*, 166 P.3d at 8.
[7] State's Opening Brief, p. 21.

Precedent makes clear that election malconduct sufficient to change the outcome of an election can indeed be found and must be remedied. *Hammond v. Hickel* established the analytical framework that is to be employed when considering an election contest.[9] Malconduct can be established in two ways. First if "bias has been introduced into the vote...malconduct exists if the bias can be shown to be the result of significant deviation from lawfully prescribed norms."[10] Or, second, "significant deviations which impact randomly on voter behavior will amount to malconduct if the significant deviations from prescribed norms by election workers are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law."[11]

The law requires that any malconduct on the part of election workers must be of sufficient magnitude to change the results of the election.[12] In *Hammond*, this Court went on to say that the method to determine the magnitude of the

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[8] This case is distinguishable from *Hammond v. Hickel*, 588 P.2d at 259 (Alaska 1978) in one respect. In that case, the Supreme Court makes reference to "volunteer workers." However, Alaska election workers are now paid employees pursuant to 6 AAC 25.035. This regulation was not effective until 1982, approximately four years after the decision issued in the *Hammond* case.
[9] 588 P.2d 256.
[10] 588 P.2d at 259.
[11] *Id.*
[12] *Id.*

misconduct will depend on whether malconduct injected a bias into the vote.[13] This Court prescribed four remedies in order to consider the same:

1. If the bias has tended to favor one candidate over another and the number of votes affected by the malconduct can be ascertained with precision, all such votes will be awarded to the disfavored candidate to determine if the result of the election would be changed.[14]
2. If the number of votes affected by the bias cannot be ascertained with precision, a new election may be ordered, depending upon the nature of the bias and the margin of votes separating the candidates.[15]
3. Where the malconduct has not injected any bias into the vote, but instead affects individual votes in a random fashion, those votes should be either counted or disregarded, if they can be identified, and the results tabulated accordingly.[16]
4. [I]f the malconduct has a random impact on votes and those votes cannot be precisely identified, we hold that the contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received

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[13] 588 P.2d at 260.
[14] *Id.*
[15] *Id.*
[16] *Id.*

by each candidate in the precinct or district where the contaminated votes were cast.[17]

The Superior Court found that the "actions of election workers in Shungnak in issuing every voter both ballots violated clearly established constitutional rights as well as the requirements of statutory law."[18] The Superior Court thus found that such actions rose to the level of election malconduct.[19] The Superior Court went on to find that this malconduct biased the outcome of the vote.[20] As every voter in the precinct voted two ballots illegally, the votes can be ascertained and under *Hammond*, all votes could have been shifted and rightly awarded Nageak. However, out of an apparent excess of caution and in an effort to disrupt as a few ballots as possible while still maintaining the integrity of the election, the Superior Court opted for the fourth remedy provided in *Hammond*, and on the basis of expert testimony which the court found to be credible, the Superior Court utilized an average in order to deduct contaminated votes 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.[21] Therefore, if this Court were to

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[17] *Id.*
[18] Findings of Fact and Conclusions of Law, p. 18, R. 254.
[19] *Id.*
[20] *Id.* This on the basis that the precinct in question lopsidedly favored Westlake.
[21] *Id.*

take any action with regard to the Shungnak votes, it should deduct those votes entirely.

4. As Determined by the Superior Court Allowing the Voters in Shungnak to Cast Two Ballots was Malconduct of a Magnitude Sufficient to Change the Outcome of the Election

The Division argues that the action of the election workers in Shungnak where every voter was given two ballots was "an honest mistake" and was not a significant deviation from statutory or constitutional prescribed norms. This argument is baseless. They contend that the requirement that election workers issue only one ballot is not an essential element of an election.[22] In stark contradiction AS 15.25.060(b), plainly states, "[a] voter may vote **only** one primary election ballot."[23] The Division boldly argues contrary to precedent that every statute is merely directory in nature. However, as it impacted the weight of votes, violating this law did indeed obstruct "the ascertainment of the result," and allowing voters to only vote one vote is "essential to the validity of an election."[24]

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[22] Under *Finkelstein v. Stout*, 744 P.2d 786, 790 (Alaska 1989), after an election a provision affecting an "essential element of the election" remains mandatory.

[23] (Emphasis added). The Division in its brief manipulates the plain language of the statute, and attempts to take advantage of the fact that there was not a Republican on the ballot for the House seat in District 40, a fact which is wholly irrelevant to whether or not violations of the constitutional equal protection guarantees and State law were violated. Especially as, in fact, these voters' votes did carry more weight, as other voters who properly selected the "R" ballot in House District 40 were not allowed to vote an "ADL" ballot.

[24] *Finkelstein,* 744 P.2d at 790 (citations omitted).

In its analysis the Division ignores the fact that the August 16 Primary Election was not limited just to a Democratic primary in House District 40. Rather, candidates were on the two ballots for the U.S. Senate, the U.S. House, State Senate and State House. Alaska law requires a voter to select one of two ballots and prohibits a voter from voting both ballots.[25] Voters presented with choice of ballot must choose one ballot, and that choice requires a determination by many voters (Republican, Undeclared, Nonpartisan) of which of the two available ballots they will select.[26]

Alaska law makes the need to select a ballot an essential element of any primary election. A voter may wish to vote for a U.S. Senate candidate for particular reasons, and if so the ballot choice they make, determines what other races they can vote in. A candidate seeking to vote for a particular candidate for State House must forego voting for preferred candidates in other races which may not appear on the ballot she/he chooses. In Shugnak, where the voter was not required to choose a ballot but instead given both ballots, a fundamental aspect of the election was lost.

The Division's argument that the necessary element of choosing a ballot is only essential to the Republican primary overlooks the fact that in Shungnak 95 of

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[25] AS 15.25.060(b).
[26] *Id.*

156 registered voters were eligible to vote in the Republican primary. By law Republicans, Undeclareds and Nonpartisans were required to select a ballot before they could cast that ballot, and those voters should have been asked to select a ballot even if they wanted to vote in the ADL primary.

The Division argues that constitutional rights were not affected by the decision of the Shungnak election workers to allow every voter to vote both ballots. But of course on August 16 the Division did not conduct two primary elections—it only conducted one—voters associated with all parties and who are nonpartisan and undeclared could vote. At that single election, voters were supposed to be given a choice of ballots. The same election workers issued the ballots, the same machines were used to vote and tabulate votes, the same workers counted the votes, reviewed the questioned and absentee ballots. When a voter is allowed to cast two ballots, that is one more ballot than the law allows, and one more ballot other voters in the district get to vote.[27] That voter has a bigger voice in the outcome of the election and the election workers in Shungnak therefore

[27] The only reasonable remedy is to discard the Shungnak ballots in order to minimize disenfranchisement of voters. Failure to do so disenfranchises the other over 450 voters in House District 40 who selected the "R" ballot but properly did not cast an "ADL" ballot. Furthermore, if everyone was allowed to vote in the ADL primary, those voters eligible to select an "R" ballot would carry more weight in any election, as they would vote two ballots.

violated the U.S. Constitution.[28] The U.S. Supreme Court has found that a fundamental nature of elections, "lies in the equal weight accorded to each vote and the equal dignity owed to each voter."[29]

The Superior Court found that "election workers in Shungnak acted in reckless disregard of the requirements of law."[30] The election workers in Shungnak, administering the primary election, violated the law and the constitution by failing to require voters to choose which ballot they wanted, and by allowing voters to vote two ballots. This was a very significant departure from statutory and constitutional norms done with reckless indifference to the law.

5. The Record Supports the Finding that the Shungnak Workers acted with Reckless Indifference to the Norms Established by Law

The evidence presented shows there were four election workers in Shungnak.[31] At least one had worked the elections in 2012 and 2014, and had participated in training in 2014.[32] The Division provided all election workers with numerous opportunities for paid training prior to the 2016 election.[33] None of the

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[28] The Division implies that in some fashion the Republican Party is to blame for the ballot choice requirement. In fact is it the U.S. Constitution which gives any political party the right to limit who participates in the selection of their candidates.

[29] *Bush v. Gore*, 531 U.S. 98, 104 (Alaska 2000).

[30] Findings of Fact and Conclusions of Law, p. 18, R. 2654.

[31] R. 463-464.

[32] Tr. 158.

[33] R. 512.

Shungnak election workers received any training in 2016.[34] The Division provides election workers with supplies including: a) an election workers manual which discussed how voters were to select a single ballot;[35] b) a DVD of the training session which demonstrated how voters were to select a single ballot;[36] c) a poster to go on the wall of the polling place instructing on ballot eligibility;[37] d) a table placard instructing on ballot eligibility;[38] and e) party affiliation cards to ensure voters received the right ballot.[39] All the election workers signed an oath to conduct the election according to law.[40] The evidence established numerous other errors committed by the Shungnak workers.[41]

The election workers acted in reckless disregard of the requirements of law and the Superior Court correctly found that the Division shares in the responsibility for the local officials' conduct. [42]

In response to the above evidence, the Division complains that it is hard to find good election workers. That may be true and perhaps the problems could be eased by greater pay, better training and/or more careful supervision. But it does

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[34] Tr. 94, R.516.
[35] Tr. 62-67.
[36] Tr. 82.
[37] Tr. 60.
[38] *Id.*
[39] *Id.*, R. 660 & 1121.
[40] R. 497.
[41] Tr. 155, R. 494, 718-719.
[42] R. 254.

not excuse the fact that the Shungnak workers took an oath to conduct the election in accordance with law and then completely failed to do so. The actions of these workers and their supervisors at the Division demonstrate clearly a reckless indifference for the norms established by law.

The Division argues that the Court should impose a higher standard than has ever previously been applied in Alaska. It argues for a standard such as "willful intent to defraud" or "egregious conduct." As the Division points out, this Court has referenced various cases which applied somewhat different standards, but in *Hammond* this Court articulated the standard for malconduct, "reckless indifference to the norms established by law."[43] There is no reason to adopt a higher standard to shield election workers.

The Division seems to seek virtual immunity for actions of its workers. While the job they do is important, for that very reason it is important that they do it carefully and correctly. As this court found in *Finkelstein,* certain aspects of the election process are so important that they remain mandatory even after an election.[44] If errors are presumed to be in good faith and this Court overturns the lower court's decision, there is no incentive on the part of the Division to correct those errors, and the integrity of elections is substantially eroded.

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[43] 588 P.2d 266
[44] 744 P.2d 786

6. Adequate Evidence Exist that the Malconduct was Sufficient to Change the Outcome of the Election

The Division confabulates two different arguments into one—first, that the evidence presented and relied upon by the Superior Court is inadequate to show that the malconduct was sufficient the change the outcome of the election, and second, that the Superior Court erred in actually using that data to craft its remedy.

The Superior Court correctly concluded that had voters been required to choose one ballot, fewer votes would have been cast using the ADL ballot. The election results before the court show that in every primary from 2006 to 2014 there have always been Republican ballots cast in Shungnak. For the Division to argue that there is no evidence that anyone in Shungnak would have cast a Republican ballot is to ignore reality and is disingenuous at best. [45]

In the 2008 primary, 65 voters (47.45% of registered voters) voted in Shungnak.[46] There was a primary for the US Senate on both ballots. 38 voters voted the ADL ballot and 15 cast a Republican ballot.[47]

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[45] In fact the undisputed evidence is that 50 voters in Shungnak did cast a Republican ballot in the 2016 primary. R. 1088-92.

[46] R. 948.

[47] The Division keeps no record of which voter receives which ballot. The minimum number of voters casting a party ballot can be determined by reviewing votes cast in statewide races which appear on only one ballot. Apparently, 12 voters in that election chose not to vote for any candidates and only voted on ballot measures.

In 2010, there was a U.S. Senate race with primaries on both ballots. Senator Murkowski was seeking reelection.[48] A total of 51 voters (35.17% of registered voters) voted in Shungnak.[49] Eighteen voters selected the Republican ballot 32 voters selected the ADL ballot. This was the lowest turnout of any of the elections after 2006. Yet, 18 voters in the primary selected the Republican ballot.

In 2012, there was no U.S. Senate race and no Governor's race. Sixty-two voters (42.47% of registered voters) voted in Shugnak.[50] Fifty-three voters selected the ADL ballot and 7 voters selected the Republican ballot. The only federal race on the ballot was for the U.S. House, and there was no serious campaign against Congressman Young.[51]

In 2014, there was a hotly contested senate race.[52] Senator Begich was seeking to retain the seat and made a major effort to encourage rural voters to vote. Three Republicans were seeking to run against Senator Begich. A serious campaign was waged against Congressman Young and both Westlake and Nageak were seeking the Democratic nomination for the House seat in House District 40.

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[48] Senator Murkowski was well known in rural Alaska because of her prior service in the Senate, as well as her father's prior service in the Senate and as Governor.
[49] R. 956.
[50] R. 962.
[51] *Id.*
[52] R. 962-965.

Sixty-nine voters (43.67% of registered voters) voted in Shungnak.[53] Fifty-six voters cast an ADL ballot and 11 voters cast a Republican ballot.[54]

In those elections since 2006 where there was a U.S. Senate race (2008, 2010, 2014)15, 18 and 11 voters respectively elected to cast a Republican ballot.[55] In the two elections where there was no U.S. Senate race (2006, 2012) 8 and 7 voters respectively elected to cast Republican ballot.[56] As can be seen, the highest number of Republican ballots was cast in 2010 when the turnout was only 35% of registered voters.[57] This evidence establishes that more voters vote a Republican ballot in those years when there is a U.S. Senate race.

In 2016, 51 voters (31.45% of registered voters) in Shungnak voted.[58] There was U.S. Senate race on the ballot with an incumbent Senator who was highly motivated to avoid a repeat of the 2010 race where she lost the primary and had to run a write-in campaign to maintain her seat in the Senate. Therefore, she was seeking a big turnout in the Republican primary. With this low turnout, it is likely that the number of voters selecting a Republican ballot would be higher

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[53] R. 966.
[54] R. 966 – 971.
[55] R. 948-955, 956-961, 966-971.
[56] R. 943-7, 962-5.
[57] 956-961
[58] R. 972. The number in the record reports an inflated turnout due to the double voting.

similar to when it was the only other election with such a modest turnout, i.e. 2010.[59]

The Division asserts that turnout is an important factor in predicting how many voters would select a Republican ballot in fact favors upholding the Superior Court's decision. The above evidence demonstrates that in low turnout primary elections in Shungnak **a larger** number of voters select the Republican ballot than in high turnout elections. The turnout in Shungnak in 2016 was the lowest in a decade.

In 2016 there was a U.S. Senate race and there was low voter turnout. Both of those factors contributed to a larger number of voters in Shungnak selecting the Republican ballot. Therefore in can be predicted that had they been required to choose a ballot, a relatively larger number would have done so in 2016. The average of 12.75 relied upon by the Superior Court is a valid number.

This was the crux of the testimony offered by expert witness Randolph Ruedrich, who has studied voter behavior and turnout for over 30 years. He explained that in Shungnak the best predictor of future performance is past performance of the same voter sample. Mr. Ruedrich was found by the superior court to be more authoritative and reliable.[60] The criticism the Division now raises

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[59] As previously indicated, turnout in 2010 was 35.17%.
[60] Findings of Fact and Conclusions of Law, p. 19, n. 82.

to his conclusions was never presented to the Superior Court. No other evidence or analysis was offered about what the voters in **Shungnak** had done and would do.

Only two experts, Mr. Ruedrich and John-Henry Heckendorn, testified concerning the effect of the actions of the Shungnak election workers. [61] Mr. Heckendorn is the campaign manager for Westlake and has an obvious interest in the outcome of the case.[62] He used data that he admitted on the stand was incorrect.[63] He attempted to persuade the judge that because his candidate ran a more effective campaign in 2016 than he did in 2014, and that this race was more important to voters. But the turnout in 2016 in Shungnak was lower – not higher than in 2014. And this witness never offered any analysis of the critical issue in

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[61] On p. 41, the Division claims it was denied the chance to obtain its own expert. This is not correct. The issue of what impact the Shungnak error would have on the election was known to the Division as early as August 31. R. 978. The double ballots in Shungnak were raised as an issue in the complaint. Mr. Ruedrich began testifying on the second date of the trial. He was deposed on the afternoon of that day. The Division knew his opinion and his background. He testified further on day three of a five-day trial The Division was able to cross-examine Mr. Ruedrich about his testimony. The Division had ample opportunity to call experts had it wanted to do so. But the Division never offered any testimony, expert or otherwise, about how many voters would have voted a Republican ballot in Shungnak in the 2016 Primary Election if they had been forced to choose a ballot. To the extent the Division is dissatisfied with the testimony presented to the Superior Court, it should have addressed the dissatisfaction at the trial.

[62] Tr. 658.

[63] Tr. 683.

this matter, i.e. how many voters in Shungnak would have selected a Republican ballot in the 2016 primary if they had to choose.

The Division also incorrectly argues that the 2012 election is the most similar to this race. In 2012, there was no U.S. Senate race. Indeed it is the only election since 2006 where there was not a U.S. Senate race. As Mr. Ruedrich testified that in years when there is a U.S. Senate race the number of people voting the Republican ballot in Shungnak is significantly higher.[64] In 2008 it was 23%, 2010 it was 35%, but in the non-U.S. Senate race year of 2012 it was only 11%.[65] Federal issues are significantly more important in rural communities where the residents are primarily Alaska native, as things such as management of subsistence resources, health care, and land ownership are dictated by the Federal law and the Federal government. So it is logical that Federal races would be of more interest to rural residents.

7. The provisions of the Voting Rights Act raised by the Intervenor do not have any implication on the present matter

Intervenor Westlake has suggested in his brief that despite the fact that all Shungnak voters were permitted to cast both a Republican and an ADL ballot, that the federal Voting Rights Act requires that these illegally cast votes be counted because 95% of the population in Shungnak is of Alaska Native descent. This

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[64] Tr. 395.
[65] *Id.*

argument is a red herring, and constitutes a meritless distraction from the actual issues at hand. The errors that occurred in this matter have nothing to do with race, and the rejection of pro rata votes in Shungnak has no relation to the race of the voters.

In fact, there is not basis or tracking method which would allow the Court to determine the race of the voter who cast each ballot.

Moreover, the population across all of the precincts in House District 40 is predominantly Alaska Native. Thus, one can assume that any rejection of votes would result in a greater number of Alaska Native votes excluded. This is not a case where a disproportionate number of Alaska Native votes are rejected in comparison to the total population of the district. There is no reason to believe, and Intervenor has offered no evidence other than its blanket assumption, that a pro rata rejection of illegally cast votes in Shungnak would result in a disproportionate effect on Alaska Natives, greater than their representative percentage in the population. Looking at House District 40 as a whole, the number of Alaska Native votes counted far outweighs those rejected, and all other races represented, and there is no evidence that Alaska Natives were targeted for exclusion.

Finally, this argument purports a theory where no error, no matter how egregious, could possibly result in the rejection of any votes in Shungnak, due

solely to the racial makeup of the precinct. Such a circumstance would base the decision made by the Court directly on race, requesting that Court make special rules and exceptions solely on the racial makeup of the communities involved. This result is contrary to the public policy which underlies the Voting Rights Act.

8. Recount Appeal

The Division argues that all recount appeal points are waived because they were not specifically raised at the recount. It cites to no binding legal authority which requires all objections to be raised at the recount.[66]

The argument that because the Nageak representative asked about why the Kivalina seven ballots were not be counted was somehow a waiver of an objection is strained at best. The observer was merely trying to determine if those ballots would be counted and certainly never insisted that they be counted over the objections of the Regional Review Board and the Statewide Review Board

With regard to the Shungnak ballots, the Division's position is that while the election worker broke the law in giving these voters both ballots, they all must be counted. The Division is overly literal and would require the legislature to

[66] The Division argues that *Finkelstein* requires all objections to be raised at the recount. In fact, that case merely excluded post-recount evidence of the alleged validity of ballots. Here, the illegally cast ballots were well-known to the officials and the evidence of such was apparent on the records at the recount. The Division knew at the time of the recount that the Shungnak and Kivalina voters voted two ballots. The flaws with the Buckland ballots are evident on the envelopes. R. 470-81.

anticipate all manner of unanticipated illegal behavior and specifically address it. That argument places form over substance, makes a mockery of the law and undermines the integrity of the election.

9. Remedies

The Division, whose workers created this unprecedented situation, now is unable to suggest a remedy to correct its errors.

Initially, the Division argues that the courts cannot fashion an appropriate remedy. The Division argues that the Superior Court's proposed remedy is improper as it involves disregarding ballots. Of course the courts have regularly disqualified votes in numerous cases, including but not limited to: *Cissna v. Stout,* [67] *Fischer v. Stout,*[68]and *Finkelstein v Stout.*[69] Votes which were illegal or improper should not be included in the final vote tally, as those ballots were cast in violation of the law and this court has frequently determined that invalid ballots should not be counted in prior cases.[70] Those cases have not required new elections. There is no compelling reason why this case cannot be resolved by the court deciding certain ballots should not be counted because they were improperly cast, and therefore, directing that the Division retabulate the properly cast ballots.

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[67] 931 P.2d 383.
[68] 741 P.2d 217.
[69] 774 P.2d 756.
[70] *See, e.g., Id.*

The Division points out that a special election cannot recreate the Primary. It would be a hollow choice as there are no other candidates seeking election, i.e. no reason for voters to choose one party ballot over another. Placing both names on the general election ballot also cannot serve as a replacement primary, because the requirement of ballot selection is not present. If a special election were ordered, the Division cannot avoid the need for both a primary to select a candidate and a general election.[71]

Perhaps the worst remedy proposed by the Division, is for the Division to completely abandon its legal responsibilities to conduct elections and to declare that no candidate has been nominated leaving the choice to a small group of party insiders. That would disenfranchise all the voters who voted in the House District 40 Primary Election and would be a drastic departure from the Division's oft expressed reluctance to disenfranchise voters (even those who voted illegally). While this solution allows the Division to wash its hands of the problem it created, it cannot be the solution to an election challenge where malconduct has been found.

[71] For example, as a write-in election is always possible for someone who does not prevail in a primary election.

CONCLUSION

The Superior Court's decision with regard to the Shungnak problem is appropriate and should be affirmed by this Court. The finding of malconduct sufficient to change the outcome of the election is consistent with the law and the evidence. The Superior Court's decision to disregard the Kivalina ballots, is also correct but does not go far enough. All 14 ballots cast by Kivalina double voters should be disqualified. The Buckland special needs ballots lack the evidence required by law to substantiate the integrity of the vote and should be disqualified. Finally, this Court can find the evidence presented with regard to errors on the part of multiple election officials in multiple precincts establishes malconduct.

The most appropriate remedy is to disqualify all illegally cast ballots, either in their entirety or proportionately and direct a new tally to determine the winner of the 2016 primary in District 40.

DATED this 10th day of October, 2016, at Anchorage, Alaska.

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