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IN THE SUPREME COURT OF 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;
Case No.: 3AN-16-09015CI

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INTRODUCTION

This case challenges the result of the 2016 primary race between Benjamin Nageak and Dean Westlake, who vied for the Alaska Democratic Party's nomination to the House District 40 seat in the Alaska House of Representatives. That election result is presumptively valid and should stand. Every vote cast in the Nageak-Westlake race was valid because the Democratic primary is open to all voters. Although voters in Shungnak were mistakenly allowed to vote both the Republican primary ballot and the ballot listing all the other parties' candidates—an error only possible because the Alaska Republican Party has closed its primary—no voter voted more than once in any race, and thus no voter's voice received more weight than any other's. The Court should not throw out or alter the results of the open Democratic primary based on a mistake in the administration of the closed Republican primary.

Those who seek to disrupt an election result bear a heavy burden and must show not just mistakes, but "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election."[1] The superior court concluded that Rep. Nageak met that burden, but the court misinterpreted the election contest standard and credited plainly insufficient—and in some places, entirely absent—evidence. The court maligned the motives of poll workers based on unsupported inferences, and then actually altered the candidates' vote totals based on the misleading statistical analysis of a biased expert witness that collapses under any scrutiny. The

[1] AS 15.20.540(1).

superior court's decision thus rests on speculation and faulty calculations, not on the kind of solid foundation that would justify disrupting an election result.

If the record is unclear or the evidence is uncertain on any point, that means Rep. Nageak failed to meet his burden, which means the superior court's decision must be reversed and the election result must stand. The law tilts the scales sharply in favor of upholding election results—indeed, "every reasonable presumption will be indulged in favor of the validity of an election."[2] The law also tilts the scales sharply in favor of counting the votes of blameless voters—the Court has "consistently ruled" that it is "reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own."[3] The Division of Elections properly counted the votes from Shungnak and the other challenged votes, and the election result should be affirmed.

If nothing else, this Court must reverse the superior court's improper choice of remedy. The superior court contravened clear precedent when it altered the candidates' vote totals based on its guess about how the vote in Shungnak might have come out differently absent the poll worker mistake.[4] If the Court concludes that Rep. Nageak sustained his heavy burden and cast serious enough doubt on the election result to overcome the strong presumption in favor of upholding it, the result should be voided,

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

3 *Miller v. Treadwell*, 245 P.3d 867, 870 (Alaska 2010) (quoting *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978)).

4 *See Fischer v. Stout*, 741 P.2d 217, 226 (Alaska 1987) (holding that it was inappropriate to "us[e] a proportionate reduction formula to actually change the official vote totals of each candidate.").

not reimagined. Otherwise, the judicial branch would be deciding the election itself.

FACTS AND PROCEEDINGS

I. The Alaska Division of Elections

The Alaska Division of Elections is responsible for conducting state and federal elections in Alaska.[5] Although it administers elections, the Division remains neutral and objective as to their outcome. [Tr. 36] Its core mandate is to ensure that every eligible Alaskan has a meaningful opportunity to vote and to have that vote counted. [Tr. 35]

The Director's Office, located in Juneau, is responsible for all statewide matters and oversees the management of all regional offices.[6] The Division has four regional offices that handle election administration in different areas of Alaska. [*See* Tr. 49, 78, 438] The Region IV office—located in Nome—covers Northern, Western and Southwest Alaska, and the Aleutian chain. [Tr. 46, 215] The Region IV office is responsible for most of House District 40's precincts, although a few of House District 40's precincts are in Region III. [Tr. 215-16] House District 40 spans from Northwestern Alaska over most of the North Slope to the Canadian border and has twenty-three precincts where residents can vote in person on Election Day. [Tr. 62; R. 1256]

II. Voting procedures

A voter may cast a ballot in several different ways either before or on Election Day. [Tr. 41-43] Ballots cast by some voting methods are immediately commingled

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5 AS 15.15.010.

6 *See* https://www.elections.alaska.gov/csm.php (last visited Oct. 5, 2016).

with those of other voters, and ballots cast by other methods are isolated in individual envelopes with voter information and signatures for later review.[7]

A voter may vote in person at a precinct on Election Day.[8] [Tr. 43] A voter whose name is on the precinct register and seems otherwise qualified may cast a regular paper ballot.[9] [Tr. 43] Such a ballot is commingled with other ballots in the ballot box and is never placed in an individual envelope.[10] [Tr. 43] Alternatively, an in-person precinct voter may choose to vote via a touch screen (TSX) machine.[11] [Tr. 22]

A voter whose name is not on the precinct register, or whose name or residence has recently changed, may vote a "questioned" ballot.[12] [Tr. 67] Poll workers are instructed to issue a questioned ballot when they are in doubt about a voter's qualifications. [Tr. 67-68] The voter's ballot is placed in a questioned ballot envelope marked with the voter's identifying information for later review. [R. 1253]

A voter who cannot go to a polling place due to age, illness, or other disability may vote a "special needs" ballot.[13] [Tr. 69] A voter may request such a ballot to be

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7 *See* notes 4-13 *infra*.

8 AS 15.07.010.

9 *Id*.

10 AS 15.15.200.

11 Every precinct is required by federal law to have a TSX machine to assist hearing and visually impaired voters. [Tr. 22]

12 AS 15.07.010.

13 AS 15.20.072(a).

delivered through a representative, either before or on Election Day.[14] The voter's ballot is placed in a special needs ballot envelope marked with the voter's identifying information and the signatures of the voter and the representative. [R. 1252]

A voter may vote "absentee by mail."[15] The Division sends the voter a ballot and the voter mails it back in an absentee ballot envelope.[16] The absentee ballot envelope lists identifying information about the voter and the signatures of the voter and a witness. [R. 747, 1264] A voter also may vote "absentee by electronic transmission."[17]

A voter may vote "absentee in person" by obtaining a ballot from an absentee voting official or an election supervisor at any Division office.[18] The voter's ballot is placed in an absentee in-person ballot envelope with identifying information and the signatures of the voter and the official.[19] [R. 1264] Absentee voting officials supervise absentee in-person voting in areas where election supervisors do not have offices.[20] Region IV has eighty-five absentee voting officials. [Tr. 46]

In a few locations—such as the Division's regional offices—"early voting" is available before Election Day.[21] [Tr. 42] At early voting locations, election workers can

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14 AS 15.20.072(b), (d).

15 AS 15.20.081(a).

16 AS 15.20.081(e).

17 AS 15.20.066.

18 AS 15.20.061.

19 AS 15.20.045(c).

20 AS 15.20.045.

21 As 15.20.064.

verify the qualifications of voters from anywhere in the state, and have ballots for all forty districts available. [Tr. 42] An early voting ballot, when cast, is comingled with other ballots like a regular ballot on Election Day.[22]

III. Vote-counting and auditing procedures

Some precincts are "hand count" and others are "optical scan" (OS). [Tr. 62] In a hand count precinct, poll workers count by hand the ballots cast at the precinct after the polls close on Election Day. [Tr. 73-74, 108-09] In an OS precinct, voters feed their ballots into a machine that counts them. [Tr. 62-63, 108-09]

After the polls close, poll workers report their precinct results to the Division by phone or, in some OS precincts, by plugging the machine into a phone line. [Tr. 74, 109] These results include only regular ballots cast at the precinct; they do not include any of the types of ballots that are isolated in individual envelopes—i.e., questioned, special needs, and absentee ballots. [Tr. 74]

Poll workers then place the regular ballots, precinct registers, and other materials into a green bag and mail it to Juneau. [Tr. 74-75, 459] They place questioned ballots, special needs ballots, TSX memory cards, and other materials into a red bag and mail it to the regional office associated with their precinct. [Tr. 74-75, 458-59; *see* R. 1261] Poll workers are trained to mail these red and green bags on the day after Election Day. [Tr. 76, 458] Absentee voting officials also mail materials to the regional office, including absentee in-person ballots. [Tr. 48-49]

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[22] AS 15.20.064(c).

Absentee, special needs, and questioned ballots arrive at the regional office, where the regional supervisor logs them and convenes the regional absentee and questioned ballot review boards. [Tr. 459-60] These boards review questioned and absentee ballot envelopes for voter eligibility.[23] The board for Region IV works on call, meeting when the volume of ballots received is sufficient; for the 2016 primary election the board worked on five different days in the Region IV office in Nome. [Tr. 459-460] Some regions have two separate boards for questioned and absentee ballots, but Region IV has fewer voters, so the same people work on both boards. [Tr. 460]

The statewide review board then meets in Juneau to audit the election results. [Tr. 563] It receives all the election materials from all regions and reviews them to assure their accuracy. [Tr. 563] 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.[24] [Tr. 524-25]

IV. Political party primary ballots

A voter may register as a member of a recognized political party, such as the Alaska Republican Party or the Alaska Democratic Party.[25] Alternatively, a voter may

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[23] *See* AS 15.20.190; AS 15.20.201-207.

[24] Paper ballots come in pads of twenty-five that are stapled together with a numbered strip across the top. [Tr. 600-601] Poll workers pull ballots off the pad, leaving "stubs," which they return to the regional offices. [Tr. 601] The statewide review board can review pads and stubs to verify the number of ballots voted in each precinct. [Tr. 525, 548, 588, 600-601]

[25] AS 15.07.050.

register as "Non-Partisan,"[26] "Undeclared,"[27] or "Other."[28]

The Alaska Republican Party permits only voters registered as Republican, Undeclared or Non-Partisan to vote in its primary. [Tr. Tr. 236-38, 349-50] Other parties, including the Alaska Democratic Party, the Alaska Libertarian Party, and the Alaska Independence Party, permit any registered voter, no matter the party affiliation, to vote in their primaries. [Tr. 236-38]

The Division runs the primary election for the nomination of candidates by political parties.[29] Because of the Alaska Republican Party's closed primary rule, the Division creates two separate party ballots for the primary: (1) a Republican ballot and (2) a combined party ballot—sometimes called the "ADL ballot"[30]—that lists all parties' candidates except the Republican Party's.[31] [R. 1254, 1255]

By statute, each voter is permitted to vote one primary ballot—either the Republican ballot or the combined party ballot.[32] Republican, Undeclared and Non-Partisan voters are eligible to vote in all of the party primaries, so they may choose

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26 AS 15.07.075(1).

27 AS 15.07.075(2).

28 AS 15.07.075(3).

29 AS 15.25.010.

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

31 When there are ballot measures in the primary election, the Division also creates what is called a "measures only" ballot. In the 2016 primary, there were no ballot measures.

32 AS 15.25.060(b).

either the Republican or the combined party ballot. [Tr. 236-38] Other voters, such as registered Democrats, are not eligible to vote in the Republican primary, so they do not have a choice and may only vote the combined party ballot. [Tr. 237]

V. The 2016 primary election

The 2016 primary election was held on August 16, 2016.[33] [R. 972-75] In the primary, candidates had the opportunity to run for their political parties' nominations for seats in the Alaska House of Representatives, including the House District 40 seat held by incumbent Rep. Nageak.

No one sought the Alaska Republican Party's nomination for either State House or State Senate in House District 40, so the Republican primary ballot for that district included only candidates for U.S. Senate and U.S. Congress. [R. 1255]

Two candidates sought the Alaska Democratic Party's nomination for State House in House District 40: Rep. Nageak and challenger Dean Westlake. [R. 1254] The combined party ballot in House District 40 offered this race as well as Democratic and Libertarian candidates for U.S. Senate and U.S. Congress and one unopposed Democratic candidate for State Senate. [R. 1254]

In the House District 40 precinct of Shungnak, due to a poll worker mistake, all fifty in-person voters and one special needs voter received and voted both the combined party ballot and the Republican ballot. [Tr. 159-60, 169-70] Because the Shungnak voters' ballots were comingled in the ballot box, the Division could not associate

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[33] AS 15.25.020.

particular ballots with the voters who cast them and thus could not retroactively reject the voters' second ballots. [Tr. 152, 161] The Division counted all of the Shungnak ballots to avoid disenfranchising an entire community due to a poll worker mistake. [Tr. 161] In the Democratic primary for State House, forty-seven of the Shungnak in-person voters voted for Mr. Westlake and three voted for Rep. Nageak.[34] [R. 1092]

On September 6, 2016, the Division of Elections certified Mr. Westlake as the winner of the House District 40 Democratic primary for State House, by a vote of 819 to 815. [R. 975] Rep. Nageak requested a recount, which was held on September 12 and resulted in an eight-vote margin of victory for Mr. Westlake, 825 to 817. [R. 1092]

VI. Rep. Nageak's election contest and recount appeal

On September 16, Rep. Nageak filed a recount appeal with this Court under AS 15.20.510. Simultaneously, joined by four House District 40 voters, Rep. Nageak filed an election contest complaint in the superior court in Anchorage. [R. 58-64] Mr. Westlake intervened in both cases to defend the election result. [R. 190] This Court stayed the recount appeal pending the outcome of the election contest.[35]

Superior Court Judge Andrew Guidi set the election contest on for trial starting September 27. On September 23, Rep. Nageak's attorneys filed an amended complaint dropping him as a plaintiff and substituting eight new voter plaintiffs, including former chairman of the Alaska Republican Party Randolph Ruedrich. [R. 158-164; Tr. 328]

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[34] The special needs ballot from Shungnak was commingled with other ballots during the Nome absentee and questioned ballot review, so it is not known for which candidate that ballot was cast.

[35] Order of September 20, 2016.

When the other parties raised questions about whether the suit could continue without Rep. Nageak, his attorneys changed course and filed a "revised motion to amend" adding Rep. Nageak back in and claiming that the omission of his name from the first amended complaint had been "inadvertent," despite email exchanges between counsel demonstrating the contrary, and despite the extreme improbability of accidentally deleting Rep. Nageak's name from the complaint. [R. 113, 46, 54]

When the trial began on September 27, the court had not yet decided the motion to amend. Uncertain as to Rep. Nageak's intentions, the Division called him to testify telephonically. On direct examination, Rep. Nageak stated that he "thought he wasn't" a party in the lawsuit and that he did not want to be. [Tr. 253] Based partly on this testimony, the Division filed an opposition to the motion to amend later that day, arguing that Rep. Nageak's withdrawal left the court without jurisdiction. [R. 22-30] Also that afternoon, the court issued an order stating that the plaintiffs' motion to amend and Rep. Nageak's testimony "raise[d] the issue of whether Mr. Nageak is a party plaintiff." [R. 51] The order indicated that "[i]f Mr. Nageak's status as plaintiff remains disputed," he should be available to testify again. [R. 51] When Rep. Nageak testified the next day, he contradicted his earlier testimony, stating that he wanted to stay in the lawsuit, and did not know he had been dropped as a plaintiff. [Tr. 358, 360] The court ultimately resolved the issue by denying the motion to amend. [R. 350-51]

During the five-day trial the superior court heard testimony from the Director of the Division of Elections, the Division's regional supervisor for Region IV, a member

of the State Review Board, two voters, an absentee and questioned ballot review board observer, and two expert witnesses, Mr. Ruedrich and John-Henry Heckendorn, Mr. Westlake's campaign manager. [Tr. 2, 651]

On October 6, the superior court issued a decision in favor of Rep. Nageak, concluding that the Shungnak poll worker error constituted "malconduct" that "changed the outcome of the election." [R. 237-38] As a remedy, the court ordered the Division to "decrease Mr. Westlake's vote total by 11 votes and decrease Mr. Nageak's vote total by 1 vote" based on a proportional deduction. [R. 256, 262] The court also ordered the Division to exclude seven questioned ballots from Kivalina and decrease each candidate's total by one vote as a result. [R. 262] And the court directed the Division to "certify Mr. Nageak as the winner." [R. 262]

The Division has appealed from the superior court's adverse decision in the election contest, and this appeal has been consolidated with Rep. Nageak's pending recount appeal for consideration and decision.

ELECTION CONTEST VS. RECOUNT APPEAL

"[A]n election contest and a recount appeal are distinct proceedings,"[36] and Rep. Nageak has filed both, raising overlapping claims in the two cases.

The Court's cases have drawn two distinctions between claims that can be raised in a recount appeal versus in an election contest. First, a claim alleging malconduct, fraud, or corruption is solely an election contest claim: "issues of malconduct as

[36] *Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979).

contemplated in [the election contest statute] are not properly raised on recount appeal."[37] Second, a recount appeal claim must identify votes or classes of votes that can be counted or rejected. So, for example, a claim that a person was improperly prevented from voting is not justiciable in a recount appeal because that person never cast a ballot and thus no ballot could be counted or rejected.[38] An election contest, by contrast, need not necessarily center on particular ballots. So, for example, claims that a voter transportation assistance program and long lines at an absentee voting station interfered with an election are justiciable in an election contest.[39]

In *Cissna v. Stout*, the Court noted that "[p]rior cases may have blurred the line between issues appropriately considered in a recount appeal and in election contests," and the Court opined that "[i]n large part any confusion results from the consolidation of recount appeals and election contests for review."[40] But even after *Cissna*, the line is not crystal clear, which makes consolidation necessary to avoid duplicative litigation and inconsistent decisions. Although some claims clearly belong in an election contest—like allegations of malconduct that do not cast doubt on any given ballots—and some claims clearly belong in a recount appeal—like allegations that certain ballots

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37 *Cissna v. Stout*, 931 P.2d 363, 371 (Alaska 1996).

38 *See Cissna v. Stout*, 931 P.2d 363, 371 (Alaska 1996) ("Cissna argues that election officials improperly prevented Stephanie Butler from voting. The reason or reasons for denying Ms. Butler the opportunity to vote are irrelevant to our resolution of the ballot recount. Because she never cast a ballot, no ballot can be counted or rejected, as contemplated in AS 15.20.510. The Butler claim is not now justiciable before this court.").

39 *See Dansereau v. Ulmer*, 903 P.2d 555, 560-572 (Alaska 1995).

40 931 P.2d 363, 371 (Alaska 1996).

have been counted wrong based on their markings—others can be framed either way. What about, for instance, a claim that certain ballots should not be counted because of alleged malconduct associated with their casting? Because the distinction between the two types of actions remains unclear, parties must sometimes litigate on both fronts. This problem may not be unique to Alaska.[41]

One way the Court could more definitively distinguish between the two types of actions would be to hold that a recount appeal is solely a review of the Director's decisions on how to count identifiable votes at the recount.[42] A recount appeal could not involve, then, challenges to classes of ballots that are not segregated from other ballots—for example, challenges to ballots cast by voters whose IDs were not checked by poll workers, or challenges to absentee ballots based on information on their

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[41] *See* Steven F. Huefner, *Remedying Election Wrongs*, 44 Harv. J. on Legis. 265 (2007) (discussing the distinction and noting that "the dividing line between recounts and contests still remains less than clear in some jurisdictions").

[42] *Cf. Coleman v. Ritchie*, 762 N.W.2d 218, 225 (Minn. 2009) (observing that a recount is limited "to the determination of the number of votes validly cast for the office" and "only the ballots actually cast in the election and the summary statements certified by the election judges on election night are to be considered," whereas an election contest considers a broader range of issues); *Larson v. Locken*, 262 N.W.2d 752, 753 n.1 (S.D. 1978) (noting that "[a]n election contest differs from an appeal of a recount"; "a candidate can request a recount and dispute certain ballots" through a statutory procedure that provides that if a candidate: "protests the ruling of such board as to any ballot, such ballot shall be adequately identified by the board as an exhibit and segregated by the board as a disputed ballot."); *State ex rel. Booth v. Bd. of Ballot Comm'rs of Mingo Cty*., 196 S.E.2d 299, 309 (W. Va. 1972) (observing that "[a] contest and a recount" are "very distinct procedures under our election law"; noting that in a recount "only matters patent and intrinsic to the ballot and counting procedures are proper subjects for review and determination" whereas an election contest "may take evidence, consider and make determination of matters extrinsic to the election returns" and "determine the legality of votes cast").

envelopes. When conducting a recount, the Director has no way of isolating and rejecting ballots on such grounds. The ballots of in-person voters are comingled in the ballot box as soon as they are cast, and absentee ballots are removed from their envelopes and comingled if accepted by the regional review boards and not challenged by observers at that time.[43] At a recount, the Director just ensures that votes have been totaled up correctly and reviews ballots that have been challenged and segregated; she cannot accept or reject classes of ballots that are not segregated. So although a claim about ballots cast by voters whose IDs were not checked is a challenge to a particular class of ballots, it would not be justiciable in a recount appeal because it is beyond the scope of the Director's review and the votes cannot be subtracted. Under this view, the only possible result of a recount appeal could be to alter the vote totals in a race, perhaps changing the prevailing candidate, but never voiding an election. The only means by which the Court could void an election would be through an election contest, which requires a showing of malconduct.

This distinction has support in statute. The election contest statute contemplates that a court might void an election: "If the court decides that no candidate was duly

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[43] For this reason, the Supreme Court of Minnesota recently held that "Minnesota law provides no remedy for wrongly accepted absentee ballot return envelopes once those envelopes have been opened and the ballots inside deposited in the ballot box" and that "once an absentee ballot has been deposited in the ballot box and commingled with other ballots, only challenges based on the face of the ballot itself—such as identifying marks or voting for too many candidates—can be raised." *In re Contest of Gen. Election Held on Nov. 4, 2008, for Purpose of Electing a U.S. Senator from State of Minnesota*, 767 N.W.2d 453, 469 (Minn. 2009).

elected or nominated, the judgment shall be that the contested election be set aside."[44] The recount appeal statute, by contrast, focuses on reviewing the Director's decisions at a recount: 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).[45] At a recount, the Director is instructed to "review all ballots . . . to determine which ballots, or part of ballots, were properly marked and which ballots are to be counted in the recount," and "check the accuracy of the original count, the precinct certificate, and the review."[46] On appeal, the Court is instructed to look at "whether or not the director has properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate or division on the question or proposition the vote should be attributed."[47] This language supports limiting the scope of a recount appeal to vote tallying issues that are actually within the scope of the Director's recount, making all other issues—including any that could void an election—election contest issues.

This distinction would also make policy sense. Changing vote totals to correct tallying mistakes or resolve disagreements about ballot markings is less drastic than voiding an election and throwing out the votes of all of the participating voters. Thus, it makes sense that the latter remedy would only be available if a plaintiff meets the heavy

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44 AS 15.20.560.

45 AS 15.20.510.

46 AS 15.20.480.

47 AS 15.20.510.

burden for an election contest, which requires 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."[48] If any class of non-segregated ballots could be challenged in a recount appeal, voiding an election would need to be a possible remedy in a recount appeal too, because non-segregated votes cannot simply be subtracted from the results. So to reserve the drastic remedy of voiding an election for election contests, the Court would have to limit recount appeals to the counting of identifiable votes, not challenges to classes of votes that are not reviewed at a recount and cannot be separated.

But the Court has not applied such a distinction between election contests and recount appeals, so they remain overlapping actions. Although the earliest recount appeals were only about counting identifiable votes,[49] leaving other claims—even those challenging classes of ballots—to be considered in election contests,[50] later cases muddied the waters. First, *Willis v. Thomas* held that in a recount appeal, the Court can

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48 AS 15.20.540(1) & (3).

49 *See Hickel v. Thomas*, 588 P.2d 273 (Alaska 1978) (recount appeal companion case to *Hammond v. Hickel* election contest (588 P.2d 256 (Alaska 1978)), considering ballot marking issues like "[b]oxes completely filled in over prior mark" and "[p]unch card ballots marked with a pen or pencil rather than being punched"); *Carr v. Thomas*, 586 P.2d 622 (considering whether questioned ballots cast via punch card ballots could be counted).

50 *See Turkington v. City of Kachemak*, 380 P.2d 593 (election contest case considering claim that nonresident property owners should not have been allowed to vote); *Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978) (election contest case considering challenges to classes of ballots, including personal representative ballots from Prudhoe Bay, absentee ballots with inadequate postmarks, and absentee ballots with one witness signature on the envelope).

"search underlying records and election materials to ensure that a vote was cast in compliance with the requirements of Alaska's election laws."[51] But the Court also said a recount appeal should "be a full review of the [Director's] decisions" at the recount, seemingly instructing that such a case focus on the Director's recount.[52] Then, in *Fischer v. Stout*, the Court went further, saying its duty "may not be discharged by a limited review of the Director's specific determinations, but must extend to a review of all ballots questioned on any basis."[53] If the Court's review can extend beyond the Director's recount, it can extend to non-segregated classes of votes or ballots that cannot be subtracted. And indeed, in *Fischer* the Court decided that certain commingled ballots should not have been counted.[54] The Court then borrowed a pro-rata formula from the election contest case *Hammond v. Hickel* to simulate subtracting those votes in order to assess whether the result would change, further blurring the distinction between recount appeals and election contests.[55] Given the number of ballots in *Fischer*, the Court did not have to consider remedies.[56] But the Court had to consider remedies in *Finkelstein v. Stout*, and it held that a new election is necessary if a recount appeal concludes that co-mingled ballots should not have been counted and pro-rata subtraction would change the

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51 *Willis v. Thomas*, 600 P.2d at 1082.

52 *Id.* at 1082-87.

53 *Fischer v. Stout*, 741 P.2d at 220.

54 *Id.* at 226.

55 *Id.*

56 *Id.* at 226 n.15 ("Because the errors set forth herein did not [a]ffect the result of the election, we need not, at this time, determine the procedure to be employed if the election result is put in doubt by application of the proportionate reduction rule.").

result.[57] *Finkelstein* is the only recount appeal case in which this actually happened—later recount appeal cases did not have to confront this problem.[58] But after *Willis*, *Fischer*, and *Finkelstein*, it appears that a recount appeal can—like an election contest—go beyond the scope of a recount and potentially void an election.

Because Rep. Nageak has framed most of his claims as both election contest and recount appeal claims, the Court could take this opportunity to clarify the distinction between the two types of actions by categorizing each claim as one or the other.[59] If the Court does not do this, its task in reviewing the election contest version of the claims is to assess whether the Rep. Nageak has proven "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election."[60] And its task in reviewing the recount appeal version of the claims is to assess whether the Division should have counted the disputed votes and, if not, to subtract them, and if they cannot be subtracted, to determine whether they are sufficient to change the result.

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57 *Finkelstein v. Stout*, 774 P.2d 786, 793 (Alaska 1989).

58 *See Cissna v. Stout*, 931 P.2d 363 (affirming decisions of Director); *Edgmon v. State, Office of Lieutenant Governor, Div. of Elections*, 152 P.3d 1154 (Alaska 2007) (ordering Director to count specific ballots).

59 The Court could also exercise its rulemaking power to establish clearer procedures for a recount appeal. See AS 15.20.510 ("A candidate or any person who requested a recount who has reason to believe an error has been made in the recount … involving candidates for the legislature . . . may appeal to the supreme court i*n accordance with rules as may be adopted by the court.*") (emphasis added).

60 AS 15.20.540(1).

ARGUMENT

To resolve these consolidated cases, the Court must consider three overarching issues: First, whether the superior court erred in concluding that Rep. Nageak met his election contest burden of showing that the poll worker mistake in Shungnak was malconduct sufficient to change the result of the Democratic primary in House District 40; second, whether the Division properly conducted its recount of the race; and third, whether the superior court erred in ordering as a remedy that the Division change the candidates' vote totals and certify Rep. Nageak as the winner.

I. Election Contest: The superior court erred in concluding that Rep. Nageak met his election contest burden regarding the mistake in Shungnak.

The superior court erred in concluding that Rep. Nageak successfully met his burden for an election contest based on the Shungnak poll worker mistake. When the election contest standard is correctly applied to the evidence presented at trial, the Shungnak mistake—providing each voter with both primary ballots rather than making them choose—is an insufficient basis for upsetting the results of the House District 40 primary. The mistake, while unfortunate and perhaps even negligent, was not "malconduct." And even if the mistake were malconduct, the superior court's analysis of the mistake's effect was fatally flawed; proper calculations that account for critical elements missing from the court's analysis demonstrate that the mistake was not sufficient to change the result of the election.

A. Legal standards for an election contest and standards of review

Plaintiffs in election contests "carry a heavy burden."[61] 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."[62]

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,"[63] because "the public has an important interest in the stability and finality of election results."[64] Perfection in the conduct of an election is not possible, particularly given that "Alaska elections are primarily conducted by many volunteer workers," and "[u]nique problems are presented in the vast area encompassed as well as the varied cultural backgrounds and primary languages of voters."[65]

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."[66] 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 provisions affect an essential element of the election, or

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

62 AS 15.20.540(1).

63 *Turkington v. City of Kachemak*, 380 P.2d at 595.

64 *Dansereau v. Ulmer*, 903 P.2d at 559.

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

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

> 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.[67]

"Even where statutory terms have been construed as mandatory . . . the right to vote is a superseding mandate."[68] 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."[69] "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."[70]

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."[71] 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

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

68 *Carr v. Thomas*, 586 P.2d at 626.

69 *Id.*

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

71 *Hammond v. Hickel*, 588 P.2d at 259.

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."[72]

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 the election result.[73] 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.[74]

On appeal, this Court reviews factual findings for "clear error,"[75] and "reviews questions of law de novo, using its independent judgment to adopt 'the rule of law most persuasive in light of precedent, reason, and policy.'"[76]

B. The superior court erred in concluding that the Shungnak mistake was "malconduct."

The Shungnak poll workers made an honest mistake that does not rise to the level of "malconduct." Malconduct, as used in AS 15.20.540, means a significant deviation

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72 *Id*.

73 *Id*.

74 *Id*.

75 *Romero v. Cox*, 166 P.3d 4, 7 (Alaska 2007).

76 *J.P. v. Anchorage School Dist.*, 260 P.3d 285, 289 (Alaska 2011) (quoting *Jacob v. State, Dept. of Health & Soc. Servs., Office of Children's Servs.*, 177 P.3d 1181, 1184 (Alaska 2008)).

from statutorily or constitutionally prescribed norms if that deviation introduces a bias into the vote.[77] Without bias, significant deviations from prescribed norms that randomly impact voter behavior will amount to malconduct only if the election official's act is imbued with scienter.[78] The Shungnak workers' mistake violated a statute, but in a way that did not impact an essential element of the election; the mistake's effect was random; and, at most, the workers' conduct was negligent and did not involve the scienter necessary to constitute malconduct.

i. The Shungnak mistake was not a significant deviation from statutory or constitutionally prescribed norms.

Malconduct first requires a "significant deviation" from statutory or constitutionally prescribed norms.[79] The Shungnak mistake was neither.

a. The Shungnak mistake was not a significant deviation from statutory norms.

The Shungnak poll workers violated the statute that allows each voter to vote only one primary ballot,[80] but that requirement is mandatory only when 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, such as

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77 *Hammond v. Hickel*, 588 P.2d at 258 (citing *Boucher*, 495 P.2d at 80-81).

78 *Hammond v. Hickel*, 588 P.2d at 259.

79 *Id.* at 258.

80 AS 15.25.060(b) ("A voter may vote only one primary election ballot.").

requirements that "affect an essential element of the election."[81] Accordingly, the Court must consider whether the mistake affected an "essential element" of this election.

In the context of the Alaska Democratic Party primary in 2016, no "significant deviation"[82] from the law occurred as to any "essential element"[83] of the election: no one voted in more than one party's State House primary, and every voter who voted in the Democratic primary was eligible to do so. The Shungnak mistake—a failure to force voters to choose between the two primary ballots—did not affect any "essential element" of the Democratic primary.

It may be an "essential element" of a primary election that no voter may participate in the nomination of more than one party's candidate for the same office—for example, by voting for both Democratic and Republican primary 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. [R. 1255]

And forcing voters to choose between the Democratic and Republican primaries is not an "essential element" of the Democratic primary. In fact, voters are permitted to vote in primary races for more than one political party in every Democratic primary:

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81 *Finkelstein*, 774 P.2d at 790 (quoting *Willis v. Thomas*, 600 P.2d at 1083 n.9) ("[A]fter 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").

82 *See Hammond v. Hickel*, 588 P.2d at 259.

83 *See Finkelstein*, 774 P.2d at 790 (quoting *Willis v. Thomas*, 600 P.2d at 1083 n.9).

voters who vote the combined party ballot can, for example, vote for a Libertarian candidate for U.S. Senate and a Democratic candidate for State House. [*See* R. 1254] By remaining on the combined party ballot, the Alaska Democratic Party has chosen to allow voters to vote in multiple parties' primaries. If not for the fact that the Alaska Republican Party has a closed primary, its primary races would have appeared on the same ballot too. Thus, if not for the fact that the Alaska Republican Party has closed its primary, voters would have been able to vote in both the Nageak-Westlake race and the Republican primary races for federal offices, as the Shungnak voters did. Nothing about such a vote runs afoul of Alaska Democratic Party rules.

Forcing voters to choose between the Democratic and Republican primaries may be an "essential element" of the *Republican* primary. The Alaska Republican Party has chosen a closed primary and wants to make sure voters from other parties do not interfere in its candidate nomination process. [Tr. 349-50, 404-05, 351, 386-87] Twenty-five Shungnak voters were not registered as Republican, Undeclared, or Non-Partisan and were therefore ineligible to vote the Republican ballot under the party's rules. [Tr. 236-37; R. 1199-1213] But the races on the Republican ballot are not part of this election contest and the margins in those races were wide enough that the votes of the ineligible Shungnak voters could not have made any difference. [Tr. 417-18] And no ineligible cross-party voting occurred in the race between Rep. Nageak and Mr. Westlake, as all of the Shungnak voters were eligible to vote in that race under Alaska Democratic Party rules. [Tr. 170]

Thus, because the Shungnak mistake did not impact any essential element of Democratic primary—the election at issue here—it was not a significant deviation from statutory norms.

b. The Shungnak mistake was not a significant deviation from constitutional norms.

The superior court concluded that in addition to violating a statute, the actions of the election officials in Shungnak violated clearly established constitutional rights. [R. 252-253] In particular, the court cited the Alaska Republican Party's First Amendment right to exclude non-party members from its candidate selection process,[84] and the right to equal protection, which the court held was violated by allowing some voters to cast more than one primary ballot.[85] But neither of these principles was violated in the election that is contested here—the House District 40 Democratic primary.

First, the Alaska Republican Party's associational rights are irrelevant here. This election contest was brought by four voters and the defeated candidate in the Democratic primary race—not by the Alaska Republican Party—and the plaintiffs sought to overturn the result of that race, not to protect the Republican primary from interference by members of other parties. [*See* R. 58-64] But even if the Alaska Republican Party were formally involved and had alleged a harm to its associational right, that right was not actually harmed in House District 40, where the only Republican races were for federal offices and were not at all close. The twenty-five

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84 R. 252 (citing *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000).

85 R. 253 (citing *Baker v. Carr*, 369 U.S. 186, 208 (1962)).

Shungnak voters who were mistakenly allowed to vote a Republican ballot had no noticeable impact on the federal Republican primary races and did not interfere in the party's candidate nomination process.

Nor did the State House District 40 race violate the "one person, one vote" principle, as the superior court found. [R. 253] The "one person, one vote" principle prohibits granting one group of voters greater voting strength than another.[86] For example, this principle is violated when states' weighted voting systems arbitrarily grant a lesser voice to some voters based on their geographic location,[87] or when a state determines whether to count or reject similarly marked ballots based on standards that differ from county to county.[88] But counting the Shungnak ballots did not give that precinct's voters greater voting strength than any other voters in the House District 40 race. No Shungnak voter cast more than one vote in the Nageak-Westlake race; no Shungnak voter voted in more than one party's State House primary; and the Shungnak votes for all races were counted with exactly the same weight as all other votes.

There is no "one person, one piece of paper" rule, or "one person, one set of primary races" rule. The voters in Shungnak were mistakenly allowed to vote in more races than other voters. But even the two primary ballots themselves offer different

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86 *Bush v. Gore*, 531 U.S. 98, 104-105 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

87 *See, e.g., Moore v. Oglivie*, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.")

88 *Bush v. Gore*, 531 U.S. at 106.

numbers of races, and the ballots in different districts across the state offer different numbers of races. No constitutional principle is violated simply by different voters voting in different numbers of primary races.

Thus, the Shungnak mistake was not a "significant deviation" from either statutory or constitutional norms in the context of the Democratic primary.

ii. The Shungnak mistake did not introduce bias into the vote.

Even if the Shungnak mistake were a significant deviation from statutorily or constitutionally prescribed norms, it would not constitute malconduct under AS 15.20.540 unless the deviation either introduced bias or involved scienter.[89] The Shungnak mistake did not introduce bias because it did not influence voters' votes in any way. The superior court erred as a matter of law in applying the bias test.

"Bias" in this context means conduct that "tend[s] to favor one candidate [or ballot measure result] over another."[90] In *Boucher v. Bomhoff*, for example, the Court found that prefatory language on a constitutional referendum ballot was "inherently misleading" and thus created a significant bias toward an affirmative vote on the proposition.[91] But conduct does not introduce bias if it does not influence voting decisions and instead "impact[s] randomly on voter behavior."[92]

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89 *Hammond v. Hickel*, 588 P.2d at 258 (citing *Boucher*, 495 P.2d at 80-81).

90 *Hammond v. Hickel*, 588 P.2d at 260.

91 *Boucher*, 495 P.2d at 81.

92 *Hammond v. Hickel*, 588 P.2d at 259.

The Shungnak mistake did not influence voting decisions—it instead impacted voter behavior randomly. All Shungnak voters received both ballots. And they could not have been swayed in their decisions to vote for Rep. Nageak simply because a poll worker gave them two ballots. No evidence suggests that the poll workers did anything but neutrally present each voter with the two ballots.[93]

The superior court misapplied the bias test by concluding that the Shungnak poll workers' mistake introduced a bias simply because Shungnak was a precinct that strongly favored Mr. Westlake. [R. 253] The community's support for Mr. Westlake was pre-existing and was unrelated to the poll worker mistake. [*See* R. 970] If the overall vote split in a precinct were sufficient to show bias, bias could be readily shown in most cases: any mistake impacting randomly on a precinct would be found to introduce bias unless the precinct voted exactly 50-50 for each candidate. But *Boucher* appears to be the only election case in which this Court has found bias. Bias therefore refers to actions that would sway voters to cast a ballot in a particular way, as in *Boucher*. The superior court had before it no evidence of any such bias here.

A precinct's lopsided support for a candidate is relevant only to whether malconduct was "sufficient to change the result" of the election—the second prong of

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[93] Although presenting no actual evidence of bias, Rep. Nageak's attorney engaged in baseless speculation in his closing argument, suggesting that because Shungnak had voted 90% in favor of Mr. Westlake in the 2014 primary, "there's reason to believe that the election worker in Shungnak knew that this was a district that strongly favored Mr. Westlake, and that's where she decided to let everyone vote . . . both ballots." [Tr. 712-13] Rep. Nageak had presented no evidence that any election worker had this in mind, however, and this type of unfounded conjecture is insufficient to any burden of proof and certainly does not meet the heavy burden of an election contest.

the election contest standard—which the Court determines using a pro rata formula based on the precinct vote split.[94] A precinct's vote split is not part of the antecedent question of whether a mistake constitutes "malconduct" in the first place.

iii. The record does not support a finding that the Shungnak poll workers acted with reckless disregard for the law.

If the plaintiffs in an election contest do not establish bias in the vote, then even significant deviations from prescribed norms will not amount to malconduct unless the election official's act "is imbued with scienter"—specifically, "knowing noncompliance with the law or a reckless indifference to norms established by law."[95]

The superior court found that the Shungnak poll workers "acted in reckless disregard" of the law because they did not participate in advanced training offered by the Division for the 2016 election—even though the precinct chair had been trained for the 2014 election[96]—and because they did not review the materials sent to them. [R. 253] The record in fact contains no evidence about whether the poll workers reviewed the materials, but even if it did, the evidence the court cites could not establish "knowing noncompliance" or "reckless indifference" to the law. Although the superior court found that the poll workers "knowingly gave every voter two ballots," the

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94 *See Hammond v. Hickel*, 588 P.2d at 260 ("[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 by each candidate in the precinct or district where the contaminated votes were cast . . . to determine if the malconduct could have affected the result of the election.")

95 *Id.* at 259.

96 Tr. 158.

evidence presented did not even remotely suggest that the poll workers knew that they *should not* give every voter two ballots.

The superior court found it noteworthy that "[t]he Division did not present testimony from any of the Shungnak election workers." [R. 253] But the Division did not have the burden to prove that the Shungnak workers' mistake was *not* malconduct. To the contrary, Rep. Nageak "carr[ied] a heavy burden" to show malconduct,[97] according to the "general rule" that "every reasonable presumption will be indulged in favor of the validity of an election."[98] Thus, in this election contest, rather than to draw negative inferences about the workers' state of mind, the superior court should have assumed what was probably true—that for any number of possible reasons, the Shungnak workers did not carefully review the training materials and made an honest mistake in handing out two ballots.

This conclusion has support in the record. Poll workers are local residents hired to run the polls; they are not professional election officials or experts. [Tr. 441] In House District 40, which extends over nearly all of the North Slope, [R. 1256] the precincts are located in remote communities with small populations, making it challenging to recruit poll workers. [Tr. 441] One seasonal Division employee talks "to hundreds of people [to] try to convince them to be poll workers." [Tr. 523] And training poll workers to run elections is hard because "they have to be a lot of different things."

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97 *Grimm v. Wagoner*, 77 P.3d at 432.

98 *Turkington v. City of Kachemak*, 380 P.2d at 595.

[Tr. 523] Poll workers need to know how to "open the polling place, process voters, offer language assistance, [deal with] special types of voters, questioned ballots, special needs ballots," and know how to "close the polls, . . . tally the results, . . . phone them in, and return[] materials to the appropriate office." [Tr. 442] They are expected to be technically knowledgeable, to set up equipment and computers. [Tr. 523] They have to be able to lift sixty-five pounds, to transport equipment in and out of the polling place. [Tr. 523] And they need to appreciate bureaucracy and "be attentive to every single detail" [Tr. 523-24] even at the end of a very long day. "And it's not everyone's skill set to have [all these skills] at once." [Tr. 524] As a trainer put it, preparing for an election is like a one-day production with a huge cast of performers: the Division must give "hundreds[99] of poll workers a script . . . for a performance," with no "dress rehearsal," and "then on the day of the play you tell them that they have to be perfect." [Tr. 524] "[A]nd . . . not only that, but they only do it . . . once every two years." [Tr. 524]

The only suggestion that the Shungnak poll workers had ill motives was provided by Rep. Nageak's attorney, who asserted in argument that "the election worker in Shungnak knew that this was a district that strongly favored Mr. Westlake, and that's where she decided to let everyone vote . . . both ballots, and did not require the voters to select one ballot or the other." [Tr. 712-13] But this story came straight from the imagination of Rep. Nageak's attorney. Without any support whatever, he simply manufactured an inflammatory tale about the mindset of a person that Rep. Nageak's

[99] In truth, the Division hires approximately 2200 additional employees to run an election. [Tr. 210]

attorneys had not interviewed, deposed, or called as a witness. Spinning a tale cannot satisfy a heavy burden to prove scienter.

Assuming that actual evidence matters, the record demonstrates only that the Shungnak workers failed to take the Division's training and did not realize that voters could have only one ballot. This mistake is, at worst, negligence. A reasonable poll worker might have taken advantage of the training offered and would have understood the ballot rules. Even so, a showing of "knowing noncompliance" with, or "reckless indifference" to the one-ballot rule requires evidence far beyond the failure to get training or to appreciate the rules. The caselaw explaining these terms makes this clear.

Discussing this scienter element of malconduct for the first time, this Court cited two cases that demonstrate that unknowing, negligent conduct of poll worker duties is insufficient to meet the election contest standard.[100] The Court first cited *Taliaferro v. Lee*,[101] in which the court did not find the challenged conduct to rise to the level of malconduct, but defined malconduct as meaning "essentially the same thing" as "fraud," understanding the prefix "mal" to require that the conduct of the official "must have proceeded from evil motive, wickedness of purpose, . . . and not from mere omissions of official duty—mere negligence—on their part."[102]

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100 *Hammond v. Hickel*, 588 P.2d at 259 n.3.

101 13 So.125 (Ala. 1893).

102 *Id.* at 129.

In the second case this Court cited, *McGallagher v. Bosarge*,[103] the election officials testified that they *knew* they were reporting an incorrect election result. They set up the voting machine incorrectly, so that votes for two particular candidates were credited to empty, unnamed candidate spots; as a result, those two unlucky candidates received no votes and the unnamed spots received the highest and second-highest vote totals.[104] The mistake was obvious to inspectors—some of whom themselves had voted for the candidates who received no votes—but the inspectors nevertheless listed the results as no votes for the two actual candidates, gave the votes for the unnamed spots to no one, and declared as the winner a different candidate who had received fewer votes than each of the two others should have received.[105] The inspectors testified that they used the result that the mis-programed machine reported even though they knew it was wrong.[106]

This high level of culpability is reflected in other contexts where "reckless indifference" is a factor. In bankruptcy, for example, a discharge is precluded when a debtor has "made a statement under oath . . .which he knew to be false . . . willfully, with intent to defraud."[107] Although the standard is fraudulent intent, this can be

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103 136 So.2d 181 (Ala. 1961).

104 *Id.* at 183.

105 *Id.*

106 *Id.*

107 *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 251 (4th Cir. 1987).

demonstrated with "reckless indifference to the truth,"[108] as in a case where the bankruptcy court found the debtor's omissions on her schedules and statement of financial affairs to be "too many and too material to attribute . . . to honest mistakes."[109] "The reckless indifference standard applies when a pattern of conduct evinces an *obvious pattern of deceit* that flies in the face of the purpose of the Bankruptcy Code."[110] The same high level of culpability applies to punitive damages claims based on "reckless indifference." Upholding an award of punitive damages allowed only for conduct that was "outrageous because of evil motive or reckless indifference to the rights of others," the Eighth Circuit found that a dealer's representations that a vehicle was in good condition showed reckless indifference because the dealer knew or should have known that it had been in a rollover accident.[111] The Court found that this conduct was "egregious" and "demonstrated a clear and disturbing disregard for [the plaintiff's] safety and her economic interests.[112]

Rep. Nageak failed to present any evidence at all about the motives of the Shungnak poll workers—he presented no testimony from the Shungnak poll workers themselves, from anyone who voted in Shungnak, or from anyone who served as a poll

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108 *In re Kinard*, 518 B.R. 290 (E.D. Pa. 2014).

109 *Id.*

110 *Dranichak v. Rosetti*, 492 B.R. 370 (N.D.N.Y. 2013) (emphasis added).

111 *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1027 (8th Cir. 2000) (referring to facts cited in *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565 (8th Cir. 1998)).

112 *Grabinski*, 203 F.3d at 1027.

worker anywhere else during the 2016 primary. Rep. Nageak's only evidence about the Shungnak poll workers was that they did not attend training in 2016. [*See* Tr. 158] That fact suggests only that their mistake might have been prevented if they had attended training. It does not show that they benefitted from distributing both ballots, that they knew that they should not do this, or that they intended to do anything other than to follow the rules. It is not the kind of evidence that suggests "an evil motive" or "wickedness of purpose" as opposed to "mere omissions of official duty."[113] The record thus does not support the superior court's finding that the Shungnak poll workers acted with "reckless indifference," and it should be reversed.

C. The superior court erred in concluding that the Shungnak mistake was "sufficient to change the result of the election."

Even if the Shungnak poll worker mistake did constitute "malconduct," Rep. Nageak did not prove that it was "sufficient to change the result of the election."[114]

When the Court analyzes whether an error was "sufficient to change the result of the election," the question is not merely whether the raw number of votes touched by the error is larger than the margin between the candidates such that it is mathematically *possible* that the result could change. If the analysis were that simple, the Court's discussion of pro-rata vote reduction in *Hammond v. Hickel*,[115] *Fischer v. Stout*,[116] and

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113 *Taliaferro v. Lee*, 13 So. at 129 (cited in *Hammond v. Hickel*, 588 P.2d at 259 n.3).

114 AS 15.20.540(1).

115 *See Hammond v. Hickel*, 588 P.2d at 260.

116 *See Fischer v. Stout*, 741 P.2d at 225-26.

Finkelstein v. Stout[117] would have been unnecessary. Instead of just considering raw numbers, the Court has used methods like pro-rata reduction to examine whether an error *likely* changed the result, not simply whether it is possible that it did.

Given the unique circumstances of this case, Rep. Nageak's burden of showing the Shungnak mistake was sufficient to change the result had two parts: first, proving that some of the Shungnak votes would not have been cast absent the mistake, and then proving that the number of such votes was sufficient to change the result. To satisfy the first part, Rep. Nageak presented only Mr. Ruedrich's speculation about how many voters in Shungnak would have chosen the Republican ballot. Without testimony from any Shungnak voters, Rep. Nageak failed to prove that *any* of them would have taken the Republican ballot. This failure means not that we do not know the number of invalid votes in Shungnak—it means that Rep. Nageak has failed to meet his burden of showing any of the Shungnak votes are actually invalid at all.

In *Hammond*, *Fischer*, and *Finkelstein*, the Court used pro-rata reduction to try to subtract out the effect of ballots known to be invalid.[118] None of the Shungnak votes in the Democratic primary were actually invalid, so the Court should not try to discount them, whether via pro-rata reduction or other estimates. But even if the Court believes that such estimation is appropriate, the more persuasive evidence shows that if the poll worker mistake had not occurred, most Shungnak voters would have chosen the

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117 *See Finkelstein v. Stout*, 774 P.2d at 792-93.

118 *Hammond*, 588 P.2d at 263 (97 ballots); *Fischer*, 741 P.2d at 226 (17 ballots) *Finkelstein*, 774 P.2d at 793 (51 ballots).

combined party ballot and voted in the race between Rep. Nageak and Mr. Westlake anyway. Thus, the mistake was not "sufficient to change the result."[119]

i. Courts should not guess what voters might have done differently in order to disenfranchise them.

Rep. Nageak presented no testimony from any Shungnak voter asserting that he or she would have chosen the Republican ballot. Absent any such testimony, the Court can only guess how many voters might have chosen the Republican ballot. But the Court should not invalidate votes—thereby disenfranchising the voters who cast them—based on a guess. It is one thing to estimate how many of a group of invalid votes might have been cast for each candidate to discount for the impact of those invalid votes; it is quite another to guess at how many *valid* votes might never have been cast, with the goal of potentially disenfranchising the voters who cast them.

If the Court's election jurisprudence has one consistent theme, it is that the Court errs in favor of *counting* votes, not invalidating them.[120] And while perhaps unlikely, it is certainly possible that every person who voted in Shungnak might have chosen the combined party ballot—after all, only four of these voters were registered Republicans. [R. 499-511] If all of the Shungnak voters had chosen the combined party ballot—as they were all fully entitled to do—every Shungnak vote in the Democratic primary

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119 AS 15.20.540(1).

120 *See, e.g.*, *Miller v. Treadwell*, 245 P.3d at 870 ("[I]t is Miller's interpretation of the statute that would erode the integrity of the election system, because it would result in the disenfranchisement of some voters and ultimately rejection of election results that constitute the will of the people."); *Edgmon*, 152 P.3d at 1159; *Carr v. Thomas*, 586 P.2d at 625-26.

would have been cast regardless of the poll worker mistake. Because election results are presumptively valid[121] and because every voter who participated in the Democratic primary was eligible to do so, the Court should not guess that some number of voters would have behaved differently and consider that guess to be a sufficient basis to reject their otherwise valid votes. Because Rep. Nageak provided no testimony from voters to prove what ballot they would have chosen, he did not meet his burden.

ii. The superior court's analysis was fatally flawed because it was based on raw numbers averaged over very different elections.

Even if the Court believes that it should estimate the number of voters who would have chosen the combined party ballot to assess the potential impact of the mistake on the election result, it should reject the superior court's analysis. The superior court relied on testimony offered by Randolph Ruedrich—a former chairman of the Alaska Republican Party who was attempting to join the litigation as a plaintiff—finding his testimony to be "more authoritative and reliable" than that provided by Mr. Westlake's campaign manager. [R. 255, n.83] But Mr. Ruedrich's analysis is fundamentally flawed and the superior court's reliance on it was clear error.

The Division's calculations, explained below, apply basic arithmetic to vote totals from election results found in admitted exhibits. [R. 943-75] Computing simple averages and percentages does not require expertise, so the Division does not believe that it needed to present these calculations through an expert witness. But even if the Court thinks an expert would have been helpful, it should still consider the Division's

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121 *Turkington v. City of Kachemak*, 380 P.2d at 595.

calculations because the Division had no fair opportunity to present an expert to counter Mr. Ruedrich's testimony. Rep. Nageak's attorney did not disclose any intent to offer expert testimony until Mr. Ruedrich took the stand mid-trial—indeed, he had disclaimed any intention to do so earlier that same day—effectively denying the Division a chance to obtain its own expert. [Tr. 207, 332] But in any event, the calculations of Mr. Ruedrich—who when he testified was seeking to become a plaintiff in the case—are no more objective or impartial than the calculations of the Division's attorneys.

Mr. Ruedrich estimated that 12.75 Shungnak voters would have selected the Republican ballot in 2016 based on the average number of Shungnak voters who chose the Republican ballot in the last four primary elections.[122] [Tr. 291, R. 254-55] According to the superior court, that average "means that many voters [i.e. 12.75] would not have voted in the ADL primary and the votes received by both state house candidates would have been reduced." [R. 254-55] The court then "allocate[ed] the reduction resulting from the 12.75 votes" proportionately to the two candidates and calculated that "Mr. Westlake's vote count would have been reduced by 11.9 votes and

[122] In 2014, 11 Shungnak voters chose the Republican ballot [R. 969]; in 2012, only 7 did so [R. 963]; in 2010 and 2008, the numbers were 18 and 15 respectively [R. 959, 950]. Mr. Ruedrich did not explain why he limited his analysis to the last four election cycles, but it seems probable that he chose those elections to reach back to the two primaries with the highest take-up of the Republican ballot since the blanket primary was abolished, but not to the 2004 and 2006 elections when only six and eight Republican ballots were voted respectively. [R. 945 (2006 primary results); 2004 primary results are available at: http://www.elections.alaska.gov/results/04PRIM/data/sovc/hd40.pdf

Mr. Nageak's vote count would have been reduced by 0.76 votes."[123] [R. 255] Because Mr. Westlake's lead after the recount was eight votes, the court concluded that this proved that Rep. Nageak actually won the election. [R. 256, 262]

But this analysis ignores the crucial factor of voter turnout, and is thus meaningless. To see why, imagine a precinct in which 70 voters turn out to vote in each of four primary elections, 50 choosing the Blue Party ballot and 20 the Red Party ballot in each election. Then imagine that in the next election turnout drops significantly and only 45 voters show up, but all 45 are allowed to vote both the Blue Party ballot and the Red Party ballot. If you applied the superior court's approach to the question of how many of those 45 voters would have chosen the Red Party ballot if forced to choose, you would subtract the average number of Blue Party ballots over the previous four elections—i.e. 50—from the number of voters—i.e. 45—and deduce that negative 5 Red Party ballots would have been cast, an obviously absurd result.

Another way to understand the flaw in using raw numbers without considering turnout is to invert the superior court's calculation, using the last four primaries to estimate the number of combined party ballots Shungnak voters would have chosen, rather than the number of Republican ballots they would have chosen. If the court's analysis were sound, the end result should be the same, but it is not. Over the last four elections, on average, 44.75 voters in Shungnak chose the combined party ballot—56 in 2014 [R. 966]; 53 in 2012 [R. 962]; 32 in 2010 and 38 in 2008. [R. 956, 949] If 44.75

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123 Mr. Westlake won 47 votes in Shungnak to Rep. Nageak's 3, or 94% to 6%.

voters chose the combined party ballot in 2016 and their votes are allocated proportionately to Mr. Westlake and Rep. Nageak, then Mr. Westlake wins approximately 42 votes in Shungnak (rather than 47) and Rep. Nageak wins 2.75 votes (rather than 3). If we use these numbers—subtracting 5 votes from Mr. Westlake's total and 2.75 from Rep. Nageak's—Mr. Westlake remains the winner.

In other words, relying on the raw numbers of ballots chosen over the last four elections suggests that 12.75 Republican ballots and 44.75 combined party ballots would have been voted in the 2016 primary. That is a total of 57.5 votes. But only 51 people actually voted in Shungnak in 2016. Thus, using raw numbers and ignoring turnout as the superior court did produce a nonsensical result.

This fatal flaw in the superior court's calculations is clear error that requires reversal. Instead of using raw numbers, any estimate of the impact of the Shungnak mistake must start with the *percentage* of participating voters who chose the combined party ballot in past elections. That percentage can then be multiplied by the turnout in 2016 to calculate the numbers of each ballot that would likely have been cast.

iii. The best available evidence indicates that the Shungnak mistake was not sufficient to change the result of the election.

In addition to erring by using raw numbers, the superior court also erred by ignoring dramatic differences between the four previous primaries that significantly affected overall turnout, precinct turnout, and the relative popularity of the Republican ballot versus the combined party ballot. Taking those differences into consideration, the 2012 primary offers the closest parallel to this year's ballot options. And using the

percentage of Shungnak voters who chose the combined party ballot in 2012 as a guide suggests that the poll worker mistake did not change the result of the election.

In both 2012 and 2016, the Republican ballot in House District 40 was relatively uninteresting compared to the combined party ballot, providing voters with more reason to choose the combined party ballot. In 2012, the Republican ballot in House District 40 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. [R. 964] Similarly, in 2016, the Republican ballot in House District 40 had only federal races that were not expected to be close, whereas the combined party ballot had a hotly contested and locally relevant State House race. [Tr. 417-18]

By contrast, voters in the 2008, 2010, and 2014 primaries had much more reason to choose the Republican ballot than they did in 2016. The 2008 primary included an extremely close race for the Republican nomination for U.S. Congress between Sean Parnell and Rep. Don Young;[124] and the 2010 and 2014 primaries included close races for nomination to the U.S. Senate in addition to gubernatorial races to attract voters to the Republican primary ballot. [R. 956-61, 966-71, Tr. 412-13] Because the 2008, 2010 and 2014 primaries involved Republican ballots with much more to attract voters than the 2016 primary, the 2012 primary provides the best guide for estimating the number of combined party ballots that might have been chosen in Shungnak this year.

[124] Rep. Young won by a margin of 304 votes out of 105,987 or barely a quarter of a percent. *See* http://www.elections.alaska.gov/results/08PRIM/data/results.html

In the 2012 primary, 85.5% of Shungnak voters chose the combined party ballot.[125] [R. 964] If the same percentage held true in 2016, 43.6 Shungnak voters (85.5% of 51) would have chosen the combined party ballot. Distributing those 43.6 votes to Rep. Nageak and Mr. Westlake in proportion to the overall vote split in Shungnak (which was 94% Westlake to 6% Nageak) results in 41 votes for Mr. Westlake and 2.6 votes for Rep. Nageak.[126] This narrows the margin between the candidates, but still results in a lead for Mr. Westlake of 819 to 816.6, indicating that the mistake was not sufficient to change the result of the election.

Nor is it simply speculation that voters in House District 40 were more likely to choose the combined party ballot in 2012 and 2016 than they were in 2008, 2010 and 2014. The election results show this to be true. John-Henry Heckendorn, Mr. Westlake's expert witness, presented statistics showing that a similar percentage of voters in House District 40 chose the combined party ballot in 2012 and 2016—78.47% and 76.59% respectively—and a substantially lower percentage of voters chose the combined party ballot in 2010 and 2014—53.25% and 67.84% respectively. [R. 1140] The superior court apparently misunderstood the analysis presented by Mr. Heckendorn, characterizing it as "a mathematical 'what if' analysis of the overall District 40 vote." [R. 254, n.82] But there is nothing hypothetical about Mr. Heckendorn's turnout and

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125 53 votes were cast in the most popular combined party ballot race. The turnout in Shungnak was 62. 53/62 = 0.85.5.

126 94% of 43.6 is 41; 6% of 43.6 is 2.6.

ballot choice statistics—they come straight from previous election results.[127]

Although Mr. Heckendorn's exhibit contains a transcription error in the number of 2016 ballots cast and presents the number of Republican and combined party ballots voted in the 2016 primary without adjusting for the extra Shungnak votes, [Tr. 683, 685-86] the adjusted numbers actually provide even more striking support for his opinion that the closest approximation to this year's election is the 2012 primary.

The following table reproduces Mr. Heckendorn's numbers for 2010, 2012 and 2014; adds comparable figures for 2008; and adjusts the 2016 numbers to exclude the Shungnak ballots.

Year	Ballots cast	Number of ADL ballots	Percentage of voters choosing ADL ballot
2008[128]	3020	1800	59.6%
2010	2030	1081	53.25%
2012	2522	1979	78.5%
2014	3131	2124	67.8%
2016[129]	2031	1584	78%

These numbers show that a remarkably similar percentage of House District 40 voters chose the combined party ballot in 2012 and 2016, providing substantial statistical support for using the 2012 election as a comparator.

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127 Compare the turnout numbers and ballot choice numbers from Exhibit I-B [R. 1140] with those in Exhibits 41-46. [R. 956-75]

128 [R. 948-55]

129 [R. 1088-91] The Division's election results show that 2131 ballots were cast in the 2016 primary, including 100 in Shungnak. Subtracting all the Shungnak ballots gives us a figure of 2031 for ballots cast. 1634 votes were cast in the Democratic primary for state house. [R. 1091] Subtracting the 50 Shungnak votes gives us 1584 combined party ballots. 1584 divided by 2031 is 0.78 or 78%.

Moreover, because the district-wide percentage of voters choosing the combined party ballot is an average of precinct-level numbers that vary dramatically—in 2016, the number of voters who chose the combined party ballot ranged from as many as 90% of voters in Browerville (322 out of 358) to as few as 52.5% in Point Hope (21 out of 40) [R. 1091]—the district-wide number does not accurately reflect what the percentage in Shungnak might have been. Because of this variation, the best estimate of the percentage of Shungnak voters who would have chosen the combined party ballot in 2016 is the percentage of voters who did so in Shungnak in 2012; i.e. 85.5%.

This estimate that a high percentage of Shungnak voters would have chosen the combined party ballot is also consistent with trial evidence about the efforts of Mr. Westlake's campaign to identify likely supporters in communities like Shungnak. [Tr. 662-666] Mr. Westlake traveled to Shungnak twice during the primary campaign, including the day before the election, and visited the town's residents by going door-to-door. [Tr. 664] His campaign raised more than $35,000 in 2016, substantially more than it did in 2014. [Tr. 662] The campaign made a video of Mr. Westlake in the villages and promoted it on Facebook, as well as using mailings, yard signs, and door-to-door campaigning to get out the vote. [Tr. 663-666] These efforts likely made Shungnak voters aware of—and likely to have opinions on—the Nageak-Westlake race, making them more likely to choose the combined party ballot. [*See* Tr. 663-664]

Thus, all the credible evidence at trial suggests that the vast majority of Shungnak voters would have chosen the combined party ballot in the primary if they

had been forced to choose. As a result, the Court should conclude that the superior court erred—both in its legal analysis and in its evaluation of the evidence—when it concluded that Rep. Nageak met his heavy burden of proving that the Shungnak mistake was sufficient to change the result of the election.

D. The superior court correctly rejected the other election contest claims.

The superior court properly concluded that the rest of the irregularities alleged by Rep. Nageak were "isolated and random" and did not "rise to the level of malconduct" supporting an election contest. [R. 261] The Division will address these issues below, to the extent that they are raised in the recount appeal, and in its responding brief, to the extent that Rep. Nageak argues in his opening brief that the superior court erred in ruling against him on these issues in the election contest case.

II. Recount Appeal: Rep. Nageak's recount appeal fails because the Director properly counted ballots in the House District 40 recount.

The Court should reject all of the points raised in Rep. Nageak's recount appeal, some for reasons already discussed above.

A. Legal standards for a recount appeal

"The inquiry in a recount appeal is whether specific votes or classes of votes were correctly counted or rejected."[130] As discussed above, the line between a recount appeal and an election contest is not clear.[131] Some past recount appeals have required

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130 *Cissna v. Stout*, 931 P.2d at 367.

131 *Supra* at 12-19.

the Court to assess voter intent from ballot markings,[132] but this is not such a case. Other past recount appeals have looked at what election statutes require, whether requirements were followed, and whether violations of requirements mean votes must be rejected.[133]

A violation of a requirement does not necessarily justify discarding a voter's vote. In recount appeals, as in election contests,[134] the Court has recognized that election statutes are "directory" when looked at post-election

> 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.[135]

Even a violation of a mandatory requirement does not necessarily justify discarding a vote: "Even where statutory terms have been construed as mandatory, it has been held that the right to vote is a superseding mandate."[136] A voter's interest in having her vote counted despite an error is particularly strong where the voter is not at fault. "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

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132 *See, e.g.*, *Edgmon*, 152 P.3d at 1157-58.

133 *See Finkelstein*, 774 P.2d at 791 ("Having established what the law requires, the next step is to determine whether it was complied with"; "The next question is whether the director properly counted these absentee ballots [despite noncompliance]").

134 *See Boucher v. Bomhoff*, 495 P.2d at 80.

135 *Carr v. Thomas*, 586 P.2d at 626.

136 *Id.*

will avoid such a result, the courts should and will favor it."[137] Thus, "[i]f in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms."[138]

Even "[a] voter who has voted illegally has an interest in having his or her vote counted," and "that interest stands on a high level where the source of the illegality lies with election officials."[139] But some violations of mandatory requirements will invalidate votes. "[W]here the vote violates provisions designed to insure the integrity of the electoral process, the 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."[140]

B. Rep. Nageak has waived his recount appeal points by not raising them at the Division's recount.

Rep. Nageak has waived all of his recount appeal challenges. At the Division's recount, the only challenge Rep. Nageak's observers made was to the seven Kivalina questioned ballots. [R. 939] The Court has held that an objection to ballots was untimely where it was "raised after the recount was concluded."[141] If Rep. Nageak wished to pursue a recount appeal about specific ballots, he should have challenged those ballots

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137 *Id.*

138 *Id.* at 626–27.

139 *Finkelstein*, 774 P.2d at 791–92.

140 *Id.*

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

during the recount.[142] And even though Rep. Nageak challenged the Kivalina ballots at the recount, he challenged the Division's decision *not* to count them, and thereby waived his challenge to the ultimate decision to count them. [R. 939, Tr. 173] Because Rep. Nageak's recount appeal points are waived—and because they are redundant with his election contest claims in any event—the Court should reject them and consider only the election contest appeal.

C. The Director properly counted the three Ambler questioned ballots.

Rep. Nageak's first point in the recount appeal challenges three questioned ballots that were counted at the recount but had not been counted previously. [*See* Points on Appeal ¶ 1] The Division understands this claim to be about three ballots from Ambler, because those were the only questioned ballots added during the recount. So the Division has lodged these ballots and their envelopes with the Court. [*See* October 6, 2016 Notice of Lodging Additional Sealed Record] The Court should reject the challenge to these ballots because they were cast by qualified voters in person at a precinct on Election Day, and a mail delay is not a reason to disenfranchise these voters.

The day after Election Day, poll workers place questioned ballots, special needs ballots, and other materials in a red bag and mail it to the regional office. [Tr. 74-75, 458-59; R. 1261] The election materials from Ambler did not arrive at the Region IV

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[142] *See also Far North Sanitation, Inc. v. Alaska Public Utilities Com'n*, 825 P.2d 867, 871 (Alaska 1992)("If Far North's claim of unauthorized rate making is not jurisdictional, then it has waived any errors it now asserts by virtue of its failure to raise any such claims of error before the administrative agency."); *Alaska Wildlife All. v. Rue*, 948 P.2d 976, 980 n.5 ("AWA waived this issue by failing to raise it in the agency appeals [so] [w]e will not consider it now.").

office in Nome before the regional absentee and questioned review boards and the statewide review board completed their work and the Division certified the results on September 6. [Tr. 127-29, 261] Ambler was the only precinct for which the materials did not arrive before the end of the review process. [Tr. 128]

Alaska Statute 15.15.440 directs that "[i]f no election materials have been received [from a precinct], but election results have been received by telephone, telegram, or radio, the director shall count the election results so received." In accordance with this statute, the Director certified the election result including the vote totals reported from the Ambler precinct by phone on election night. [Tr. 128]

By the time the recount requested by Rep. Nageak began on September 12, the Ambler materials had finally arrived in the mail and could be included in the recount. [Tr. 231] The Ambler materials contained the regular ballots that had been included in the vote totals reported by phone, but also five questioned ballots that had not been included in those totals because poll workers do not open and count questioned ballots. [Tr. 231, R. 1265-69] Based on the Division's review of the voter information on the questioned ballot envelopes, three of the five Ambler questioned ballots were accepted and counted at the recount. [Tr. 231, 264-66, R. 1265-67]

Reviewing and counting the Ambler questioned ballots in the recount was proper because they were cast in person on Election Day and were received by the time of the recount. The recount statute, AS 15.20.480, instructs the Director to "review all ballots," thus contemplating a broad review. The statute's further directive to "count absentee

ballots received before the completion of the recount" simply creates and clarifies a specific exception to the statutory timeframe in which absentee ballots may be received and counted.[143] Questioned ballots do not need such a specific exception in the recount statute, because unlike absentee ballots, questioned ballots are cast in person at a precinct and do not have separate deadlines for receipt and counting. The counting of questioned ballots is supposed to continue until "all questioned ballots reviewed and eligible for counting have been counted," and questioned ballots "received after certification of the count shall be forwarded immediately to the director by the most expeditious service," as occurred here.[144] [Tr. 261-64] Read together, AS 15.20.203, AS 15.20.205, and AS 15.20.480 contemplate counting late-received questioned ballots at a recount. But even if the Court believes these statutes are ambiguous with respect to the counting of such ballots, any ambiguity should be resolved in favor of counting validly cast votes of eligible voters, not rejecting them.[145]

The Court should not invalidate the Ambler questioned ballots.

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143 *See* AS 15.20.203(b)(4)-(5) (specifying that "[a]n absentee ballot may not be counted if "the ballot, if postmarked, is not postmarked on or before the date of the election" or "after the day of election, the ballot was delivered by a means other than mail.").

144 AS 15.20.205(b) & (d).

145 *See Miller v. Treadwell*, 245 P.3d at 869 (stating that "[c]ourts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own," so "[i]n reviewing and interpreting election statutes, we have uniformly held that '[w]here any reasonable construction of [a] statute can be found which will avoid such a result, the courts should and will favor it.'") (quoting *Carr v. Thomas*, 586 P.2d at 626).

D. The Director properly counted the Shungnak ballots.

Rep. Nageak's third point in the recount appeal overlaps with his election contest about the Shungnak mistake, discussed at length above.[146] [*See* Points on Appeal ¶ 3] The Director properly counted all of the Shungnak ballots in the Democratic primary.

First, the Shungnak voters' votes in the Democratic primary were all valid. Rep. Nageak has not alleged that any of the voters were not registered, were not qualified to vote the combined party ballot, or inadequately marked their ballots. The Court has said even "[a] voter who has voted illegally has an interest in having his or her vote counted"[147]—surely a voter who has voted legally has an even stronger interest.

Second, the Shungnak voters were not at fault for the poll workers' mistake in handing them both primary ballots. The Court has "consistently ruled" that it is "reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own."[148] A voter's interest in having her vote counted "stands on a high level" where the source of a problem "lies with election officials" rather than with the voter.[149]

Third, although violations of mandatory requirements can invalidate votes even where voters are not at fault, the Shungnak mistake did not impact any essential element of the Democratic primary so as to justify that result. As explained above, no voter voted more than once in any race, no voter voted in more than one party's State House

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146 *Supra* at 23-48.

147 *Finkelstein*, 774 P.2d at 791–92.

148 *Miller v. Treadwell*, 245 P.3d at 870 (quoting *Carr v. Thomas*, 586 P.2d at 626).

149 *Finkelstein*, 774 P.2d at 791.

primary, and no voter was ineligible to vote in the Democratic primary.[150] Discarding the votes of an entire precinct in the *open Democratic primary* based on asserted problems with the proper administration of the *closed Republican primary* is unwarranted. If anything, discarding the Shungnak voters' *Republican* ballots might be justified, because an unknown number of those ballots were cast by ineligible voters. But the races on the Republican ballot were not close and have not been challenged.

Finally, no statute says that votes should be discarded due to a problem like the Shungnak mistake, and the Court has applied a clear statement rule when it comes to tossing out votes: "[i]f in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms."[151] The Legislature has made a clear statement on some issues—for example, providing that an absentee ballot "may not be counted" if "the ballot, if postmarked, is not postmarked on or before the date of the election"[152]—but it has made no clear statement about rejecting the ballots of voters in circumstances like this.

Given the Court's precedent, the Division errs in favor of counting voters' votes, not discarding them. Other courts agree on this outlook, recognizing that "[t]he very heart of our form of government depends upon the legal and moral principle that each valid vote should be counted,"[153] and instructing that "[e]very rationalization within the

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150 *Supra* at 24-29.

151 *Carr v. Thomas*, 586 P.2d at 626–27.

152 AS 15.20.203(b)(4).

153 *State ex rel. Olson v. Bakken*, 329 N.W.2d 575, 580 (N.D. 1983).

realm of common sense should aim at saving the ballot rather than voiding it."[154]

Accordingly, the Court should not invalidate the Shungnak ballots.

E. The seven Kivalina questioned ballots make no difference.

Rep. Nageak's second point in the recount appeal overlaps with his election contest and challenges counting seven questioned ballots from Kivalina voters who had already cast a primary ballot. [*See* Points on Appeal ¶ 2] The superior court correctly concluded that these ballots make no difference, so they do not support either an election contest claim or a recount appeal claim. [R. 258]

In Kivalina, seven voters who had already voted one primary ballot (either the Republican or the combined party ballot) insisted on also voting the other primary ballot. [Tr. 170-71] The poll workers allowed these voters to cast a second primary ballot as a questioned ballot; these seven ballots were placed in questioned ballot envelopes that went to the regional review board. [Tr. 170-71, 510] The regional review board rejected these ballots as duplicates because the voters had already cast a primary ballot, so these ballots were not part of the original certified election results. [Tr. 123, 172] At the recount, one of Rep. Nageak's observers challenged the Division's decision not to count these seven ballots, insisting that they be counted because the Shungnak ballots had been counted. [Tr. 173] Upon review at the request of Rep. Nageak's observer, the Division decided to count the ballots. [Tr. 173-175, 231] Because Rep. Nageak challenged the Division's decision not to count the Kivalina ballots,

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154 *Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955).

insisting that they be included in the recount, [R. 939] he may not now assert that it was error to count them. But even if this point is not waived, any error was harmless.

Although counting the Kivalina ballots was not necessary in hindsight because they had been segregated—unlike the Shungnak ballots—and could be rejected as duplicates, counting them made no difference. [Tr. 174] Five were Republican ballots and two were combined party ballots. [Tr. 173-174] Of the two combined party ballots, one was voted for Mr. Westlake and the other was voted for Rep. Nageak. [Tr. 173-174] This was confirmed when the ballots were examined at trial. [Tr. 540-45, R. 1314] Thus, for purposes of this case, these ballots cancel each other out.

It does not matter which ballots the seven Kivalina voters marked first. When asked to place one ballot in the ballot box and submit the other as a questioned ballot, a rational voter would place his or her first choice in the ballot box. But regardless of the order in which the voters cast their ballots, counting their regular ballots—rather than their questioned ballots—is appropriate. Whenever a voter submits duplicate ballots, the Division must always count the ballot that is commingled with other ballots and reject the ballot that is segregated. [Tr. 622] Thus, a voter who marks and mails an absentee ballot five days before Election Day, and then votes a second ballot on Election Day, will have the second, commingled ballot counted and the first, segregated ballot rejected. [Tr. 621-22] This is how the Division typically prevents duplicate votes from being counted.

If the Court disagrees with the Director's decision to count the Kivalina questioned ballots, it should simply direct that the final vote totals for Mr. Westlake and Rep. Nageak each be reduced by one vote, which will not affect the result.

F. The Director properly counted the Buckland special needs ballots.

Rep. Nageak's fourth point in the recount appeal overlaps with his election contest and challenges the counting of twelve special needs ballots cast by elderly and disabled voters in Buckland. [*See* Points on Appeal ¶ 4] The superior court correctly concluded that the ballots were cast in accordance with the law; they thus do not support either an election contest claim or a recount appeal claim. [R. 259-61]

The Division facilitates special needs voting for those who cannot get to the polls. [Tr. 449] A voter may request a special needs ballot in several ways, including from a member of the precinct election board on Election Day.[155] In rural Alaska, elders can call the precinct by phone or VHF radio and request a special needs ballot. [Tr. 51, 448] In some communities, elders are encouraged to do this. [Tr. 110]

Alaska Statute 15.20.072(c) requires that a representative for a special needs voter sign a register that includes a list of required information. A special needs ballot envelope contains blanks for all of this information in a column entitled "Step 1." [R. 1252] The voter's representative fills out this information directly onto the envelope. [R. 1252] A carbon copy of this information is torn off and remains with the precinct voter register, which serves as the special needs register required by AS 15.20.072(c).

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155 AS 15.20.072(b)(4).

[Tr. 53][156] When the polls close on Election Day, the precinct chair accounts for special needs ballots by matching the carbon copies with the returned envelopes. [Tr. 73]

Twelve special needs ballots were cast in the 2016 primary in the House District 40 precinct of Buckland. [R. 1240-51] All but one of the voters were elderly, with ages ranging from 64 to 94 years old; the average age was 79. [R. 1240-51, Tr. 222] Elders are honored and respected in the Inupiaq culture. [Tr. 244, 447] Ten of the special needs voters in Buckland cast their ballots with the assistance of Krystal Hadley, a poll worker in Buckland. [R. 1241-49, 1251, Tr. 449] In rural communities, the representative for a special needs voter is often a poll worker. [Tr. 71, 448] That is not unexpected, because poll workers are familiar with the special needs ballot procedure. [Tr. 448-49] Although more special needs ballots were cast in Buckland than in other communities in House District 40, [Tr. 503], this was likely due to that community's familiarity with the special needs ballot option. [Tr. 424] And there is nothing suspicious about the number of special needs ballots from Buckland. [Tr. 602]

Each special needs ballot envelope from Buckland is filled out with all of the information required by AS 15.20.072(c). [R. 1240-51] In addition to having blanks for the statutorily required information, a special needs ballot envelope has a column labeled "Election Official." [R. 1252] This column is not completely filled out on the Buckland envelopes. [R. 1240-51] But none of the information in this column is required by law. An election official's failure to fill out information that is not even

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156 The original special needs ballot envelopes from Buckland were admitted as Exhibit Y-1 at the trial. [Tr. 702]

required by law is not a reason to disenfranchise the voters who cast those ballots.[157] "If in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms."[158] The Legislature not said in any terms—let alone "clear and unmistakable terms"—that ballots should be rejected for lack of this information.

Special needs ballots must be received before 8 p.m. on Election Day,[159] but Rep. Nageak presented no evidence that the Buckland special needs ballots were not cast and received on time. "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."[160] Special needs ballots in Region IV precincts, including Buckland, are sent to the regional headquarters in Nome on the day after Election Day to be counted by the regional review board. [Tr. 224-225, 458] Mail can take six to fourteen days to get from Buckland to Nome. [Tr. 223, 453] This is because mail is routed from Buckland to Kotzebue, then to Anchorage, and finally to Nome. [Tr. 224] Given this mail route, the fact that the Buckland ballots were received in Nome the Monday after the election suggests that they were in fact mailed the day after the election. [Tr. 453, 224]

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157 *See Edgmon*, 152 P.3d at 1159 ("[W]e will not disenfranchise special needs voters where the personal representatives' forms appear on their face to comply with the statute."); *Fischer v. Stout*, 741 P.2d at 223 (rejecting claim that failure to fill out information on an envelope that is not required by statute should invalidate a ballot).

158 *Carr v. Thomas*, 586 P.2d at 626–27.

159 AS 15.20.072(e).

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

The "Election Official" column of the special needs ballot envelope—which is not required by statute—includes blanks for recording when a ballot is issued to a representative or returned to the Division, but the absence of a notation in this column does not prove untimeliness. [R. 1252] And indeed, when an election official serves as a voter's personal representative, the ballot is never really "issued" by the Division or "returned" to the Division—instead, it remains in the Division's custody the whole time.

The Court should not invalidate the Buckland special needs ballots.

G. The Director properly counted the four ballots misplaced by the regional review board.

Rep. Nageak's fifth point in the recount appeal overlaps with his election contest and challenges counting four absentee ballots misplaced by the regional review board. [*See* Points on Appeal ¶ 5] The superior court correctly rejected the claim about these ballots as "unsubstantiated"; these ballots provide no basis for either an election contest claim or a recount appeal claim. [R. 241, n.21]

The crux of this claim is that four ballots were mistakenly put in one full-count pile instead of another full-count pile, an error that had no impact on vote tallies because both piles were counted. Ballots designated "full count" are those that the regional absentee and questioned ballot review board has already determined should be counted. [Tr. 462-63] The board keeps full-count ballots separate from other ballots. [Tr. 463] Lena Danner, an observer for Rep. Nageak who had never been an election observer before, observed the regional review board in Nome for four hours out of the five days the board met. [Tr. 305-06, 320, 460] While she was observing, the board was counting

only full-count absentee and questioned ballots. [Tr. 463] During the process, four full-count absentee ballots were mistakenly placed in an envelope containing full-count questioned ballots. [Tr. 467-68] The review showed that the questioned ballot count was four too many and that the absentee ballot count was four too few. [Tr. 468] To correct the issue, 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—would contain the correct total number of ballots. [Tr. 468]

Because all of the ballots in both groups were full-count ballots—i.e., ballots that officials had already decided would be fully counted—the transfer of ballots had no effect on the vote totals in any race. [Tr. 468] No ballots were counted that had not already been determined to be valid, full-count ballots. [Tr. 468] The Court should reject Rep. Nageak's recount appeal claim based on these ballots.

H. Rep. Nageak's remaining points in the recount appeal raise issues not justiciable in a recount appeal.

Rep. Nageak's remaining points in the recount appeal are clearly not recount appeal issues. [*See* Points on Appeal ¶ 6-8] In particular, he alleges that "[v]oters in several precincts were improperly, illegally and unconstitutionally deprived of the primary ballot of their choice." [Points on Appeal at ¶ 6] He also alleges that "[n]umerous other violations of the law occurred." [Points on Appeal at ¶ 7] And he asserts that the Division "erred in its recount to ensure an election that did not disenfranchise voters." [Points on Appeal at ¶ 8] These are not recount appeal issues

because they do not concern whether any particular ballots were properly counted or rejected.[161] The election contest case was the proper avenue for these issues, and this Court should address these issues only in its appellate review of the superior court's decision in the election contest case, as discussed above.

III. Remedies: The superior court erred in ordering that the candidates' vote totals be changed and Rep. Nageak certified as the winner.

Even if the Court believes the Shungnak mistake was malconduct sufficient to change the outcome of the election or that the Director erred in counting the Shungnak votes or other votes in the recount, the superior court contravened clear precedent by ordering that the candidates' vote totals be proportionately reduced. [R. 256, 262] The Court should affirm the certified election result for the reasons argued above, but if it does not, it should reverse the superior court's remedy and choose a new one.

A. The superior court's application of a proportionate formula to actually reduce the candidates' vote totals is contrary to precedent.

The superior court's choice of remedy directly contravenes *Fischer v. Stout*, which held that it was inappropriate to "us[e] a proportionate reduction formula to actually change the official vote totals of each candidate."[162] The Court said the proportionate approach, which originated in *Hammond v. Hickel*,[163] "was to be used

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161 *See Cissna v. Stout*, 931 P.2d at 371 ("Cissna argues that election officials improperly prevented Stephanie Butler from voting. The reason or reasons for denying Ms. Butler the opportunity to vote are irrelevant to our resolution of the ballot recount. Because she never cast a ballot, no ballot can be counted or rejected, as contemplated in AS 15.20.510. The Butler claim is not now justiciable before this court.").

162 *Fischer v. Stout*, 741 P.2d at 226.

163 *Hammond v. Hickel*, 588 P.2d at 260.

only as an analytical tool to aid in the determination of whether the contaminated ballot[s] actually would [a]ffect the result of the election," not "to actually reduce the candidate's official total."[164] The superior court therefore erred as a matter of law by ordering the candidates' vote totals reduced, even if one accepts the court's calculations.

The superior court's choice of remedy also does not improve the integrity of the election result. Even if this Court accepts Mr. Ruedrich's numbers as a basis to conclude that the Shungnak mistake was *sufficient* to change the election outcome, it should not uphold the superior court's decision to *actually change the election outcome* based on its guess about what would have happened absent the error. Nobody can know how many Republican ballots would have been taken if the voters in Shungnak had been forced to choose between the two primary ballots. So if the Court believes Rep. Nageak sustained his heavy burden and cast enough doubt on the election result to overcome the strong presumption in favor of upholding it, the result should be voided. Otherwise, the court is simply taking over the role of the voters and, based on its guess about how many of them probably would have taken the combined party ballot, is deciding the election itself. This disenfranchises the entire population of House District 40.

B. The Court could instruct the Division to hold a special election.

If the Court concludes that the primary result must be set aside, the Division could hold a special election to re-run the primary. Given the administrative tasks involved, a special election would likely have to take place after the general election.

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164 *Fischer v. Stout*, 741 P.2d at 226.

Normally, re-running a primary after a general election would be impossible, because a party's nominee must be selected in time to run against the nominees of other parties. But a separate special election would be possible here because no other party nominated a candidate for the House District 40 seat. Then, the winner of a special primary would perhaps have to run in a special general election to actually win the House District 40 seat, allowing for the possibility of a write-in challenger.

A special election is an imperfect remedy. As the Supreme Court of Arizona has observed, a second election is "not immune from illegal ballots and may prove no better than the first."[165] Moreover, "[s]ome votes will be lost in a second election that were properly recorded in the first; these include voters who have died, voters who have moved, and voters whose interest in the office or electoral issue is too attenuated to pull them to the polls a second time."[166] And there may be "identifiable biases" in second elections: "Candidates with ready access to financing and with strong and continuing party organizations will be able to mobilize a second campaign in the short time available much more effectively than opponents who lack such advantages."[167]

Here, a special election would not recreate the Democratic primary absent the Shungnak mistake. The problem in Shungnak was that some voters were not forced to choose between the Republican and combined party ballots. In a special election, the

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165 *Huggins v. Sup. Court In & For Cty. of Navajo*, 788 P.2d 81, 84 (Ariz. 1990).

166 *Id.*

167 *Id.* (quoting Note, *Developments in the Law: Elections*, 88 Harv.L.Rev. 1111, 1315 (1975)).

voters again would not be forced to choose between two ballots, because there would be only one primary race to vote in. Below, Rep. Nageak's attorney asserted that a special election could somehow be crafted in which voters were offered a choice between the Republican and combined party ballots, thereby fixing the Shungnak mistake, but he did not explain *how* this could be done. [Tr. 780] All of the other races on the Republican and combined party ballots for the House District 40 primary ballot have been certified and are unchallenged, and could not be affected by a future election. Thus, there is no way to offer voters a choice of two ballots in a special election, because there will only be one ballot with one race available to vote on.

The closest a special election could come to fixing the Shungnak mistake would be if it were held only in Shungnak, because that is the only precinct in which the mistake occurred. Courts have occasionally ordered special elections to be held involving only those voters affected by the original mistake.[168] But holding such an election seems likely to simply duplicate the result of the August 16 vote in the Democratic primary, because all voters would be voting only in that election.

C. The Court could instruct the Division to place the names of both Rep. Nageak and Mr. Westlake on the general election ballot.

The Division has printed three versions of the 2016 general election ballot for House District 40, one with Mr. Westlake's name, one with Rep. Nageak's name, and

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168 *See, e.g.*, *State ex rel. Olson v. Bakken*, 329 N.W.2d at 582 (remanding for "a special election limited to the 526 voters who can be identified and whose votes were not counted."); *Jenkins v. Williamson-Butler*, 883 So. 2d 537 (La.App.4 2004) (applying statute expressly permitted holding restricted special election to remedy election error).

one with both candidates' names. As an alternative remedy, if the Court concludes that the primary result must be set aside, it could instruct the Division to use the general election ballot listing both candidates' names, such that a special primary election would essentially be collapsed into the general election for the House District 40 seat. This is a viable option because no other party nominated a candidate, so it has always been understood that the winner of the Democratic primary will be the winner of the seat in the general election unless there is a serious write-in challenge.

But this option also would not recreate the Democratic primary absent the Shungnak mistake. In a general election with both candidates on the ballot, the voters would not be forced to choose between two ballots, because there is only one general election ballot. And the conditions of the election would be completely changed. The turnout in a general election—and the party makeup of those voting—will likely be very different from that in a normal Democratic primary. This option is, however, preferable to actually altering the candidates' actual vote totals based only on a guess.

D. The Court could void the election result and, because this is a political party primary, allow the party to fill the vacancy on its ticket.

Finally, if the Court concludes that the primary result must be set aside, the Court could simply declare the Democratic nomination for the House District 40 seat vacant. Such a vacancy could be filled by the Alaska Democratic Party under the statutory provision for filling vacancies when a nominated candidate "dies, withdraws, resigns, becomes disqualified from holding the office for which the candidate is nominated, or is

certified as being incapacitated."[169] Although this statutory provision is not a perfect fit, it could provide a process to use when a primary election result is set aside.[170] Given the short time between a primary and a general election and the need to pick a candidate to run in the general, holding a special election to re-do a primary (either before or during the general) usually would not be possible if a primary result is voided. The party petition statute would provide an efficient solution. A primary is, after all, just a political party's nominating contest—not a democratic process to select an elected official—so allowing a party to fill a void by choosing the candidate it wishes to represent it in the general election may be appropriate.

CONCLUSION

For the foregoing reasons, the Court should reverse the superior court's decision, reject Rep. Nageak's recount appeal, and uphold the Director's certification of Dean Westlake as the winner of the House District 40 Democratic primary election.

DATED: October 8, 2016.

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169 AS 15.25.110.

170 *Cf. Cox v. Laycock*, 345 P.3d 689, 701 (Utah 2015) (holding that where primary election was set aside, a political party could use the statutory procedure for filling a candidate vacancy even though the vacancy filling statute did not address that situation).

Certificate of Service and Typeface
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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.

Ninia Dizon 10/8/2016
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