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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

In his opening brief, Rep. Nageak maintains his position that a poll worker's distribution of two primary ballots to each voter in Shungnak had constitutional dimensions, despite the fact that no voter had more than one vote in any race. He also maintains his position that the Shungnak mistake was malconduct, despite any evidence to indicate that it was more than simple negligence, and maintains his position that it was sufficient to change the results of the election, despite the transparent flaws in his expert's analysis. The State explained at length in its opening brief why these positions are wrong, and here addresses only a few points.

Rep. Nageak's opening brief also sets forth his view that the Court should throw out the special needs ballots of elderly and disabled voters in Buckland even though they comply with the law, and throw out *all* of the ballots of seven voters in Kivalina, even though they are qualified voters and it is possible to discard only their second, questioned ballots. The State also largely addressed these arguments in its opening brief and responds further only as necessary to correct misstatements.

Finally, Rep. Nageak argues that the 2016 primary was so tainted by cumulative irregularities so as to amount to malconduct *per se*. But the irregularities he identifies are nearly all things like unsigned paperwork, and nearly all concern bureaucratic rather than legal requirements. They are the kind of "irregularities" that occur in every election in a state with over 400 precincts and more than 2,000 poll workers. He offers no standard to determine what magnitude of bureaucratic imperfection is unacceptable, nor

does he even try to tie the various minor oversights to harm—failing to explain how any of them could have changed the result of the election. Without any explanation of how bureaucratic irregularities might cast doubt on the true vote of the people, this claim cannot serve as a basis to upset an election.

ARGUMENT

I. The mistake in Shungnak does not warrant disrupting the election result.

Because this is a responsive brief, it does not address every aspect of the election contest standard, only the points discussed in Rep. Nageak's opening brief.

Rep. Nageak's continued insistence that the Shungnak mistake was a serious constitutional violation rests on a misunderstanding of the constitutional principles he invokes. His assertions that the Shungnak workers acted with "reckless indifference" to the law rather than simple negligence is supported only by uncharitable inferences and exaggerations of the record. And his defense of the superior court's decision to actually alter the candidates' vote totals rests on the unsound data analysis of a biased expert.

A. The Shungnak mistake was not a "significant deviation" from constitutional norms that would warrant a "malconduct" finding.

Though the Shungnak mistake was certainly an error—something the Court might have enjoined if it could have been anticipated pre-election, and something the Division should strive to prevent in the future—it was not a "significant deviation" from "constitutionally prescribed norms" that supports a "malconduct" finding.

As a preliminary matter, Rep. Nageak ignores the fact that this case is about *a political party's nomination process*—not the selection of Alaska's elected officials.

Neither the Alaska Constitution nor the U.S. Constitution requires that party primary elections occur at all, let alone that the states conduct them.[1] Primary elections are the means by which political parties decide who should represent them in the general election, which is when Alaskans actually choose their elected officials. Through the primary process, a party "select[s] a standard bearer who best represents the party's ideologies and preferences."[2] Indeed, the fact that a primary is just a party's nomination process is precisely why a party—like the Alaska Republican Party—has an associational right to prohibit classes of voters from participating in it.[3]

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[1] *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 453 (2008) (upholding Washington's nonpartisan primary, which does not choose parties' nominees, and noting that "parties may now nominate candidates by whatever mechanism they choose.") The only reference to primary elections in either constitution can be found in the 24th Amendment to the U.S. Constitution, which prohibits the use of a poll tax as a qualification "to vote in any primary or other election" for federal office.

[2] *State, Div. of Elections v. Green Party of Alaska*, 118 P.3d 1054, 1064 (Alaska 2005) (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000)).

[3] *See California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) ("In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."); s*ee also State, Div. of Elections v. Green Party of Alaska*, 118 P.3d at 1064–65 ("[T]he Alaska Constitution protects a political party's right to determine for itself who will participate in crystallizing the political party's political positions into acceptable candidates.").

This Court has recognized that voting in more than one party's primary election does not constitute improper "double voting."[4] Not only is it not double voting, but parties have a "constitutionally protected associational interest" in allowing voters to do this by joining together on a ballot like the combined party ballot, just as they have an associational interest in excluding voters from their primaries if they wish.[5] The Alaska Democratic Party has exercised its associational rights by remaining on the combined party ballot and allowing voters to vote in multiple parties' primaries. The Alaska Republican Party has made a different choice, but this is the Democratic primary, so—contrary to the superior court's order—the associational interests of the Alaska Republican Party are not relevant here.[6] [R. 252; State Br. 27-28]

The superior court recognized that the Shungnak error did not result in "double votes," but asserted that it nonetheless produced "over-votes." [R. 254] But the court misused this term. An "overvote" is a ballot on which the voter's intent cannot be discerned because the voter has marked more than one candidate's name in the same

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[4] *See State, Div. of Elections v. Green Party of Alaska*, 118 P.3d at 1070 ("Allowing political parties to share a ballot would not make double voting—either for an office or to establish the needed quantum of support for a political party—possible under Alaska's primary system. . . . Under the proposed combined ballot, although a voter would be able to vote for a Green Party candidate for governor and a Republican Moderate candidate for senator, only one vote could be cast for each office.").

[5] *See State, Div. of Elections v. Green Party of Alaska*, 118 P.3d at 1061 ("[P]olitical parties have a constitutionally protected associational interest in opening their ballots to voters who would otherwise vote in the primaries of their own political parties.").

[6] Even Mr. Ruedrich testified, without apparent irony, that political parties should not interfere in each other's candidate nomination processes. [Tr. 404-05]

race.[7] The Shungnak ballots were not "overvoted," nor does the term "overvote" have any constitutional significance in any event.

Rep. Nageak and the superior court appear to conflate "ballots" with "votes." The Shungnak voters did not get two "votes," they got two ballots. They therefore did not collectively cast 102 "votes," as Rep. Nageak asserts; they collectively cast 102 ballots. [Nageak Br. 8] And they were not "allowed to vote twice," as Rep. Nageak claims; they were allowed to vote two different ballots. [Nageak Br. 19] As explained above, there is nothing constitutionally problematic about voting in more than one party's primary; there is also nothing constitutionally sacred about voting via only one piece of paper. A "ballot" is a unit of administrative convenience; it is a "vote" that is of constitutional significance. There is no "one person, one ballot" constitutional principle.

Rep. Nageak asserts that votes must "be counted with equal weight" and the State may not "value one person's vote over that of another," but the Shungnak voters' votes received the same exact weight and value as all others in all the races they voted in. [Nageak Br. 17] A voter's votes do not have more "weight" or "value" simply because the voter has the opportunity to vote on a larger slate of races than another voter. Voters in different districts vote in different numbers of races and have different numbers of candidates to choose from, depending on who is running. And voters who vote different ballots vote in different numbers of races as well—in House District 40,

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[7] *See Edgmon v. State, Office of Lieutenant Governor, Div. of Elections*, 152 P.3d 1154, 1157 (Alaska 2007) ("[A]n overvote occurs if the voter has voted for two candidates with 'marks' . . . that clearly indicate the voter's intent to vote for more than one candidate.").

the Republican ballot offered only two races, while the combined party ballot offered four. Moreover, Republican, Undeclared, and Non-Partisan voters have a choice between two ballots, whereas voters registered with other parties have no choice—does this mean Republican, Undeclared, and Non-Partisan voters have a greater voice, or that their votes have greater weight, because more races are available to them?

Because the Shungnak votes received equal weight, there was no "wholesale dilution of the votes" of other House District 40 voters, as Rep. Nageak claims. [Nageak Br. 17, 31] Perhaps votes were, in a colloquial sense, "diluted" in the Republican primary—to a vanishingly small degree—by the votes of Shungnak voters who were not legally eligible to vote in that primary. But again, the Republican primary is not at issue. And the *legal* concept of "vote dilution" comes from legislative redistricting cases and does not readily apply to a party primary.[8] Redistricting cases are about drawing the boundaries of legislative districts so that each voter has approximately equal representation in the state legislature.[9] They do not require perfection—state legislative districts can vary in population by up to ten percent without running afoul of the Equal

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[8] *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.").

[9] Or, rather, that each *person* has approximately equal representation. In *Evenwel v. Abbott*, 136 S. Ct. 1120, 1130 (2016), the Supreme Court held that "States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations," rather than equalizing the voter-eligible population.

Protection Clause.[10] And the concept of "fair and effective representation" in the state legislature—something also considered in redistricting cases—is not implicated by party primaries, which do not choose legislators.[11]

All of this is not to say that the Shungnak mistake was not a mistake, or that it would be acceptable for the State to design a system in which voters in some precincts may vote both primary ballots whereas voters in other precincts must choose. But the Court looks at questions of election administration differently when they arise from the

[10] *See Reynolds v. Sims*, 377 U.S. at 577 ("Mathematical exactness or precision is hardly a workable constitutional requirement."); *Brown v. Thomson*, 462 U.S. 835, 852 (1983) ("We have come to establish a rough threshold of 10% maximum deviation from equality (adding together the deviations from average district size of the most underrepresented and most overrepresented districts); below that level, deviations will ordinarily be considered de minimis.").

[11] *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1367 (Alaska 1987); *Braun v. Borough*, 193 P.3d 719, 729 (Alaska 2008) ("[A] successful constitutional claim in the political context requires proof not only of purposeful discrimination but also proof that a group of voters is being 'consistently and substantially excluded from the political process [and] denied political effectiveness over a period of more than one election.'") (quoting *Kenai Peninsula Borough*, 743 P.2d at 1369).

post-election, versus pre-election, perspective.[12] Because the primary is over, the question is not whether giving the Shungnak voters both primary ballots was wrong—it clearly was. Rather, the question is whether the mistake was significant enough to throw out votes or disrupt an election result despite strong presumptions against those remedies. For the reasons discussed above, it was not.

B. The superior court had no evidentiary basis for finding that the Shungnak poll workers acted with "reckless indifference" to the law.

As explained in the Division's opening brief, even if the Shungnak mistake were a "significant deviation" from "statutorily or constitutionally prescribed norms," Rep. Nageak also had the burden of proving "knowing noncompliance with" or "reckless indifference" to the law in order to establish "malconduct." [State Br. 22-23, 29-31] The superior court had no evidentiary basis for its finding that this burden was met here.

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[12] *Cf. DeNardo v. Municipality of Anchorage*, 105 P.3d 136, 141 (Alaska 2005) ("We apply a higher standard of review for post-election challenges to ballot language than we apply to pre-election challenges."); *Braun*, 193 P.3d at 732 ("In a post-election challenge . . . it is insufficient to establish a lack of total and exact compliance with the constitutionally and statutorily prescribed form of ballot. Rather, the challenging party has the dual burden of showing that there was both a significant deviation from statutory direction, and that the deviation was of a magnitude sufficient to change the result of the election.") (internal citations and quotations omitted). Courts are also generally reluctant to disrupt the results of an election, for fear of incentivizing litigants to challenge elections in which they simply disagree with the outcome. *See, e.g., Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir.1988) ("[C]ourts have been wary lest the granting of post-election relief encourage sandbagging on the part of wily plaintiffs."); *Lewis v. Cayetano*, 823 P.2d 738, 741 (Haw.1992) ("[E]fficient use of public resources demand that we not allow persons to gamble on the outcome of the election contest then challenge it when dissatisfied with the results.").

The superior court improperly shifted the burden of proof from Rep. Nageak to the Division by suggesting that the Division had the obligation to produce evidence that the Shungnak poll workers acted in good faith. [R. 253] It is not the Division that should have produced testimony from people in Shungnak—rather, Rep. Nageak should have produced testimony from people in Shungnak. Without any evidence from anyone in Shungnak or anyone with insight into the Shungnak workers' thoughts, motivations, capabilities, or personal circumstances, the superior court's finding that they were recklessly indifferent lacked foundation. As explained in the State's opening brief, the superior court misinterpreted the law by conflating reckless indifference with simple negligence—reckless indifference is a higher standard. [State Br. 34-37]

Rep. Nageak overstates the evidence about Shungnak to prop up the reckless indifference finding. He asserts, citing only the superior court's order, that the Shungnak workers "did not review the manuals or other training materials sent to them, did not read the ballot choice poster and placard, [and] did not attempt to understand the party affiliation cards." [Nageak Br. 19] In fact, there is no evidence in the record about what materials the Shungnak poll workers did or did not "review" or "attempt to understand." Rep. Nageak is thus artificially bolstering the superior court's reckless indifference finding by inferring from the mere fact that the workers made a mistake that they must not have "review[ed]" or "attempt[ed] to understand" the instructions they were given. Such an inference is unfair, as it is quite possible—even common—for a person to diligently review and attempt to understand materials, but nonetheless fail to

retain or apply the information, particularly in the midst of a difficult and infrequently performed job like running a polling place. [*See* State's Br. 32-33 (describing the many tasks required of poll workers)] To show that the workers did not review the materials, Rep. Nageak would have had to ask them, but he did not ask them.

Many of Rep. Nageak's other assertions about the Shungnak workers' purported failures are also inadequately supported. He says the workers "failed to record the identification of all voters" and "did not record if there were any touch screen voters," but the supporting citation is to one of his own pleadings, not to any exhibits or testimony in the record. [Nageak Br. 9 n.34] He also says the workers "failed to complete and sign . . . the absentee accountability report." [Nageak Br. 8] But nothing in the cited document—which is the SRB precinct review sheet for Shungnak—mentions the absentee voting accountability report. [R. 718-19] Moreover, the "absentee voting accountability report" is not part of a precinct poll worker's duties; it is the job of an absentee voting official. [Tr. 45, 57-58] Rep. Nageak further asserts that the Shungnak workers "failed to complete and sign the precinct register," but the cited document indicates that they did sign the oath on the register. [Nageak Br. 8; R. 718, 497] And he asserts that the workers "failed to tally the votes using the tally book provided by the Division," but the cited document does not indicate one way or the other whether the tally book was completed—the SRB left this information blank. [R. 719] Thus, many of Rep. Nageak's assertions about the Shungnak workers are unsupported.

Moreover, Rep. Nageak's critique of the Shungnak poll workers' paperwork ignores the myriad of tasks that poll workers must complete as they wrap up their work at the end of a thirteen-hour day. Once the polls close, workers must print three copies of the touch screen results; secure the machine's memory card; destroy unused ballots but keep all ballot stubs for return to the division; unwind voted touch screen ballots from the TSX machine, place them in an envelope and sign across the seal; open the ballot box and sort the ballots into three groups—regular paper ballots, questioned ballots, and special needs ballots—complete and sign the ballot statement; sort the paper ballots into groups of twenty-five and count them, recording the count in tally books; complete the tally books, verifying the count and signing the last page of the summary sheet; transfer the numbers from the summary sheet to the back of the precinct register; call the election office to report the results; put the ballots in envelopes and sign across the seal; put the register, regular ballots, touch screen ballots, ballot stubs, memory cards and tally books into a green bag to be sent to Juneau; and put questioned and special needs ballots, absentee by mail ballots returned to the precinct, timesheets, language assistance logs, and all other voting materials and supplies into a red bag to be sent to the regional office. [R. 918-27] A worker is not "recklessly indifferent" simply because she does not execute all of these tasks with absolute perfection.

Accordingly, without any real evidence, the superior court's reckless indifference finding rests only on uncharitable inferences and conflates simple negligence with reckless indifference. The Court should therefore reverse it.

C. Mr. Ruedrich's biased and faulty analysis was an inadequate basis for finding that the Shungnak mistake was sufficient to change the result.

As explained in the Division's opening brief, even if Rep. Nageak established "malconduct," he had the further burden of establishing that it was "sufficient to change the result of the election." [State Br. 23, 37-39] The superior court's conclusion that this burden was met—and its remarkable decision to actually alter the candidates' vote totals—rests on an irredeemably unsound analysis of election data. [State Br. 40-48] Rep. Nageak's opening brief offers no further justification beyond the analysis already debunked in the Division's brief. [Nageak Br. 20-21; State Br. 40-48]

Rep. Nageak asserts that the superior court was right to adopt Mr. Ruedrich's "expert approach," observing that Mr. Ruedrich "has studied Alaska elections for three decades." [Nageak Br. 21] But although Mr. Ruedrich might be qualified to do some sort of expert analysis of Alaska elections, he did not do one in this case, as his own testimony establishes. In past situations when looking at what drives voter turnout, Mr. Ruedrich did regression analyses. [Tr. 407] But here, he did not do a regression analysis of voting patterns in Shungnak. [Tr. 407] In past situations when Mr. Ruedrich wanted to know whether certain ballots were crucial to an election outcome, he spoke to the voters themselves. [Tr. 406] But here, he did not speak to any Shungnak voters about their choices. [Tr. 406] Nor did he compare Shungnak with other precincts or districts—he "didn't have time." [Tr. 408, 415] Nor did he consider the potential impact of ballot measures on turnout. [Tr. 414-15] Nor did he look at the party affiliations of the voters who voted in Shungnak in any year. [Tr. 408-09] He did not even look at how

many registered Republican voters voted in Shungnak in 2016. [Tr. 408]

Instead, Mr. Ruedrich took a simple and results-oriented glance at the data, without even making an obvious adjustment for voter turnout. [State Br. 41-43] The results-oriented nature of his analysis is revealed by his choice to look at only the last four election cycles rather than reaching back farther in time. He did not explain his arbitrary choice of four election cycles, so he likely wanted to reach back to the two primaries with the highest take-up of the Republican ballot since the blanket primary was abolished, without reaching back to the 2004 and 2006 elections when fewer voters in Shungnak chose the Republican ballot.[13] Mr. Ruedrich is not impartial—indeed, he attempted to become a plaintiff in this case. [R. 38] He served as chairman of the Alaska Republican Party for thirteen years and continues to do work on the party's behalf, including on the 2016 election and on this lawsuit. [Tr. 328, 404-05, 350-51] Although Rep. Nageak may disparage the calculations of the Division's attorneys and of Mr. Westlake's campaign manager as biased and results-oriented as well, they are no more so than those of Mr. Ruedrich—and his analysis disintegrates upon close review.

In fact, Mr. Ruedrich's own testimony about past analyses he has done undermines his asserted opinion about Shungnak. He testified that in years with U.S. Senate races, most Republican primary ballots are taken by registered Republican voters, and that in years with gubernatorial races, more Undeclared and Non-Partisan

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[13] 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

voters take the Republican ballot. [Tr. 409-10] In 2016, the ballot included a U.S. Senate race but had no gubernatorial race, so Mr. Ruedrich's testimony suggests that most voters likely to choose the Republican ballot in 2016 would be registered Republicans. [Tr. 409-10] Of the fifty in-person voters who voted in Shungnak, only four were registered Republicans. [R. 1201-1213] Even assuming that all of these voters would have chosen the Republican ballot, registered Republicans would only constitute a majority of the Republican ballots chosen—consistent with Mr. Ruedrich's theory—if fewer than eight total voters chose the Republican ballot in Shungnak. [Tr. 409-10]

Rep. Nageak notes that Mr. Westlake's expert witness, John-Henry Heckendorn, "did not testify concerning the effect of the improper double voting in Shungnak itself." [Nageak Br. 21 n.110] But Mr. Heckendorn's testimony supported the Division's use of the 2012 primary as the best comparator for 2016. [Tr. 675-78; State Br. 43-48] His testimony also showed that Shungnak voters were aware of the Nageak-Westlake race due to Mr. Westlake's serious local campaign efforts, and thus more likely to choose the combined party ballot so that they could vote in that race. [Tr. 664-68, 675, 689] As he explained, voters in the 2016 primary "weren't showing up to vote for Lisa Murkowski's forgone conclusion. They were showing up to resolve this incredibly contentious race between Nageak and Westlake." [Tr. 675] Even Mr. Ruedrich recognized the importance of such local campaign efforts: he opined that spending and name identification are what drive turnout in rural Alaska, and that voters are less likely to be aware of or interested in a race if the candidates do not campaign in their area,

asserting that "rural Alaska doesn't know much about" gubernatorial primaries because candidates do not campaign there and "don't have enough name ID." [Tr. 395, 393]

The Division did not need to present an expert's opinion on the ultimate question of whether the Shungnak mistake was sufficient to change the election result. This case need not be a "battle of the experts" when only computation of simple averages and percentages are involved, and when the plaintiffs disclaimed any intent to offer expert testimony until their purported expert took the stand. [Tr. 207, 333-34]

Because Rep. Nageak offered no testimony from Shungnak voters about their actual ballot preferences, and because the analysis he offered to support his guess about their ballot choices collapses under scrutiny, Rep. Nageak failed to meet his burden of proving that the Shungnak mistake was sufficient to change the election result, and the superior court's finding that he met that burden was clear error.

II. The Court should not invalidate the seven Kivalina voters' regular ballots simply because they also voted questioned ballots.

Seven Kivalina voters mistakenly believed they were entitled to vote both primary ballots, and they were permitted to cast one as a regular ballot and the other as a questioned ballot. [Tr. 171, 492] The superior court rejected these voters' questioned ballots as duplicates, which makes no difference to the Nageak-Westlake race. [R. 258] Recognizing that the seven Kivalina voters' *questioned* ballots make no difference, Rep. Nageak argues that those seven voters' *regular* ballots—the ones that were cast and commingled in the ballot box—should be invalidated too. [Nageak Br. 22-23] But these seven voters are qualified and there is nothing wrong with their regularly cast

ballots. Rep. Nageak has no legal basis for suggesting that the Court essentially "punish" these seven voters for their misunderstanding of the rules by attempting to retroactively invalidate their regularly cast votes.

Rep. Nageak claims the superior court relied on hearsay in determining that the Kivalina voters' regularly cast ballots were their first choice, but it does not matter which ballot was their first choice. [Nageak Br. 22] As the Division explained in its opening brief, when a voter casts two ballots and one is segregated and the other is commingled, the Division must reject the segregated one, regardless of the order in which the ballots were cast and the voter's preference. [State Br. 57] And in any event, the voters almost certainly cast the ballots that they cared about most as regular ballots, knowing that those would be counted but that the questioned ballots might not be [State Br. 57], and testimony at trial indicates that this is what they did. [Tr. 171, 492]

The Court should not disregard the votes of the Kivalina voters because they "insisted on breaking the law," as Rep. Nageak urges. [Nageak Br. 22] His assertion that "the seven voters insisted on voting two ballots, thus acting illegally" relies on the very same hearsay evidence that he criticizes the superior court for relying on, and he had the burden of establishing impropriety. [Nageak Br. 22 n.113; R. 257] But regardless of the quality of the evidence, a voter who disagrees with a poll worker about his entitlement to a ballot is not "acting illegally": the poll worker might be wrong or might lack

information, so the voter may cast a questioned ballot so that the poll worker's concern can be reviewed later and the ballot counted if appropriate.[14]

Finally, Rep. Nageak's calculation of how the Court should subtract out the Kivalina voters' ballots is nonsensical. [Nageak Br. 23; 23 n.115] He says his vote total should be reduced by 3.566 votes and Mr. Westlake's by 6.4437 votes (or 3.556 and 6.553 votes, per the footnote). [Nageak Br. 23; 23 n.115] But these numbers add up to approximately ten votes, and it is not clear where they come from. The Court should not reduce the vote count at all based on the Kivalina ballots, but if did, it would not make any sense to subtract a total of ten votes from the two candidates given that the Kivalina voters only voted a total of seven combined party ballots amongst them (having each voted one Republican ballot and one combined party ballot).[15]

III. The Buckland special needs ballots were validly cast and properly counted.

In its opening brief, the Division explained that the special needs ballots in Buckland, cast by twelve disabled and mostly elderly voters, complied with all legal requirements. [State Br. 58-61]

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[14] AS 15.15.210; AS 15.15.215.

[15] Instead, because the seven questioned ballots consisted of five Republican and two combined party ballots, the commingled ballots had to consist of five combined party ballots and two Republican ballots. Thus, the reduction for the commingled ballots should add up to five. Mr. Westlake won 38 of 60 votes in Kivalina (or 63%), so his total would be reduced by 3.15 votes, and Rep. Nageak won 22 of 60 votes (or 37%), so his total would be reduced by 1.85 votes. [See R. 1088-1091] Adding in the two questioned combined party ballots—which, as we know, contained one vote for each candidate—Mr. Westlake's total would be reduced by 4.15 and Rep. Nageak's by 2.85, for a total of seven combined party ballots, one for each voter.

Rep. Nageak strains to find something nefarious to say about the Buckland special needs ballots. He sets the groundwork with an imaginative version of the facts, stating that "[d]espite being paid and designated to work at the polling place, election workers in Buckland spent much of Election Day distributing and collecting ballots from 12 members of the community." [Nageak Br. 11] In fact, the record does not indicate that the Buckland poll workers "spent much of" the day distributing special needs ballots, or neglected their duties in any way. Buckland had sixty-nine total voters on Election Day, served by four poll workers. [R. 1237, 462] One poll worker handled ten special needs ballots and two others handled one each. [*See* R. 1240-1251, 462] The record says nothing about how long Buckland poll workers took to assist the special needs voters, but the Court can take judicial notice that Buckland is a small village of 416 people, according to the last U.S. Census,[16] so the poll workers likely did not have to travel far. And assisting special needs voters is not, as Rep. Nageak suggests, outside the scope of poll workers' duties. A qualified voter "needing assistance may request an election official . . . to assist," and "[i]f the election official is requested, the election official shall assist the voter."[17] Rep. Nageak provides no support for his assertion that poll workers are legally required to stay at the polling place.

With this background, Rep. Nageak argues that the Buckland special needs ballots should not be counted because they "were cast illegally." [Nageak Br. 23] He

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16 http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk

17 AS 15.15.240.

claims "significant deviations from prescribed norms" in two respects: the voters did not have separate representatives other than the poll workers, and the poll workers did not record the date and time the ballots were returned. [Nageak Br. 25]

But a third party representative is not required by law. Special needs ballots are intended to make voting possible for people who cannot otherwise get to the polls,[18] by allowing a representative to check out a ballot from the Division, take it to the voter, and deliver it back.[19] This provides an opportunity for special needs voters, but creates some logistical problems about how to maintain the integrity of those ballots while they are handled by third parties. For this reason, AS 15.20.072 (and its legislative history) describe a process to maintain the integrity of the ballot in the hands of a third party, outside of the Division's custody.

The statute thus describes—but does not require—the involvement of a third party as the voter's personal representative. That third party is unnecessary if a Division employee can take the ballot to the special needs voter. A statute meant to assist elderly, ill, and disabled voters is far less helpful if a disabled person *must* find a third party for assistance. As the committee minutes cited by Rep. Nageak note, the special needs representative is often a family member [Nageak Br. 24], but not all special needs voters have family available and some may prefer poll workers who are familiar with the process and comfortable with the necessary paperwork. Further, in the interest of

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18 AS 15.20.072(a).

19 *See* AS 15.20.072.

maintaining integrity, the statute specifies who may not serve as a representative—and that list of prohibited people notably does not include poll workers.[20]

Eliminating the middle man makes the process more secure, not less. Rep. Nageak asserts that the lack of a third person handling the ballot "risks the integrity of the ballot process," [Nageak Br. 26], but he does not explain how. He makes an analogy to the requirement that an absentee voter sign the ballot envelope in the presence of a witness to ensure that the voter is properly identified and is voting free from coercion. [Nageak Br. 25] But the Buckland ballots were voted with the same safeguards: the voters marked their ballots in the presence of a poll worker who verified their identification, [*See* R. 1252 "Step 2"] and certified that she did not coerce them. [*See* R. 1252 "Step 1"] And absentee in-person voting similarly involves only the voter and an election official, without involvement of a third party: in over 200 locations statewide, a voter can cast a ballot in the presence of an absentee voting official, who signs the ballot envelope as attesting official.[21]

Because the Buckland poll workers carried the ballots to the voters and back to the polls, the ballots never left the Division's custody. Thus, the fact that the workers did not note the precise time they returned—which is not a legal requirement in any event—makes no difference. The date the ballots were returned—also not legally

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[20] AS 15.20.072(g) (stating that a candidate for office, the voter's employer, an agent of the voter's employer, and an officer or agent of the voter's union may not act as a representative for the voter).

[21] AS 15.20.061; Tr. 42; R. 1264]

required—is not marked in the designated box in the far left column of the envelopes, but is clear nevertheless. With one exception, the poll workers indicated that the date they took the ballots to the voters was August 16, 2016—Election Day. [R. 1240-1251] The envelopes—which expressly indicate that they must be returned by 8 p.m.—were all mailed by the precinct chair to the Regional office in Nome with the rest of the precinct materials, and were received in Nome on August 22, six days after the election. [R. 1252, Tr. 74, 223-225, 453] Given that mail can take from six to fourteen days to get from Buckland to Nome (via Kotzebue and Anchorage) [Tr. 223-224, 453], all evidence indicates that the Buckland special needs ballots were voted on August 16.

Rep. Nageak has thus asked the Court to invalidate twelve votes based on nothing more than wispy unsupported insinuations of malconduct. Far from committing malconduct, the Buckland poll workers properly processed the ballots of twelve disabled and elderly voters, allowing them the dignity and satisfaction of participating in the political process.

IV. Deviations from the bureaucratic ideal do not warrant disrupting the election result.

Rep. Nageak also asks the Court to throw out the election result on the theory that the election was so "permeated with serious violations of law" that "substantial doubt has been cast on the outcome of the vote." [Nageak Br. 30] And he asserts that "witness after witness confirmed that across every single precinct [in House District 40], the election workers failed to conduct the election in accordance with Alaska law." [Nageak Br. 28] But this argument merely demonstrates Rep. Nageak's inability to

distinguish between legal requirements—found in statute and regulation—and bureaucratic procedures—outlined in Division manuals and reflected on Division forms.

The Division's poll worker manuals and forms represent a bureaucratic ideal in which every "I" is dotted and every "T" crossed, but very few of the Division's procedures or paperwork requirements are mandated by statute or regulation. In fact, of the eleven different "irregularities" identified by Rep. Nageak only two have a basis in the law—voters casting ballots without signing the precinct register;[22] and understaffing of poll workers in some precincts.[23] The others are bureaucratic deficiencies—for example, workers failing to complete and sign precinct registers or absentee voting accountability reports, to have questioned voters sign the questioned register, to complete tally books, to sign the certification of the count, or to accurately report results [Nageak Br. 14-15]—and a couple of the matters he identifies are not even supported by the record.[24]

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[22] *See* AS 15.15.180 (voters "shall sign" the register before receiving a ballot).

[23] *See* AS 15.10.120 (election board should have at least three members).

[24] For example, although Rep. Nageak claims that election workers "failed to document the identification of multiple voters" and "mismarked spoiled ballots," he miscites the State Review Board's precinct review sheets for these alleged problems, even though none of those sheets contains any reference either to voter identification methods or the mismarking of spoiled ballots. *Compare* Nageak Br. 14 *with* R. 681-731 (Rep. Nageak's brief actually cites "Tr. 681-731," but the transcript at these pages contains the end of John-Henry Heckendorn's testimony and the beginning of closing arguments. The record at pages 681-731 contains notes made by the State Review Board in the course of its work reviewing the House District 40 election materials, including references to some of the incomplete paperwork that Rep. Nageak describes).

No complex organization with thousands of employees—especially temporary employees who work just a few days a year at most [Tr. 524]—can ensure that every form and piece of paperwork is perfectly completed. But an inability to achieve this bureaucratic ideal does not automatically raise questions about the integrity of the organization or its work. And Rep. Nageak ignores the fact that the Division engages in a comprehensive review of the poll workers' paperwork to ensure the integrity of the election. [Tr. 524-29] Indeed, the evidence he cites to establish these errors in precinct paperwork is actually evidence of the State Review Board's audit, which is how the State ensures that any mistakes have not compromised the integrity of the election. [R. 681-736, 1227-31]

Moreover, this Court's precedent clearly rejects the idea that votes should be invalidated due only to poll worker errors in completing paperwork—even statutorily required paperwork.[25] Given the Court's reluctance to throw out individual votes on this basis, the voiding of an entire election and disenfranchisement of every voter who participated would be an extraordinary penalty for this Court to impose, and it is certainly not justified here. As the Court stated in *Carr v. Thomas*: an "election will not be disturbed by reason of technical irregularities in the manner of conducting it or of making the returns thereof."[26]

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[25] *See, e.g.*, *Carr v. Thomas*, 586 P.2d 622, 626-27 (Alaska 1978) ("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.")

[26] 586 P.2d at 626 (quoting *Valdez v. Herrera*, 145 P.2d 864, 870 (N.M. 1944)).

Nor do the two issues Rep. Nageak raises that involve genuine statutory requirements come close to the standard necessary to set aside an election because it is "so permeated with numerous serious violations of the law…that substantial doubt will be cast on the outcome of the vote."[27]

First, the requirement that the Division have at least three election board members in every precinct is the paradigmatic example of a statute that is directory in character in the context of a post-election challenge.[28] The Division tries to ensure adequate poll worker staffing, but some of the precincts in House District 40 are located in remote communities with small populations, making it challenging to recruit poll workers. [Tr. 441] It would be contrary to public policy for an election to be voided due to unexpected understaffing of polls. If the polls cannot open due to understaffing, entire communities would be disenfranchised. Moreover, even if the Court believes that the Division's failure to ensure that the presence of three election board members at every precinct was malconduct, Rep. Nageak must still explain how that malconduct was sufficient to change the result of the election; and he has not done so.

Second, the number of votes cast by voters who did not sign the register is insufficient to change the outcome of the election, even if there were any evidence in the record—which there is not—to support charges of malconduct on the part of poll

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

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

workers in the three precincts where this appears to have happened. According to the State Review Board's notes, three precincts had more ballots cast than voter signatures in the register that could not be explained in the review of election materials: in Allakaket and Buckland the number of ballots exceeded by one the number of signatures in the precinct register, and in Point Hope there were eight more ballots than signatures in the register. [R. 692, 712, 723]

Although Rep. Nageak has argued that this Court should apply a pro-rata formula to reduce each candidate's vote totals as a result of the alleged malconduct in Shungnak, Kivalina, and Buckland, he has not suggested a similar approach to these ten ballots of voters who did not sign the precinct registers. This is doubtless because a pro-rata reduction to account for these ten potentially invalid ballots would reduce his total by one more vote than it would Mr. Westlake's, thereby increasing the margin of Mr. Westlake's victory. [*See* Appendix A] But Rep. Nageak should not be permitted to argue that the entire election should be set aside on the back of a handful of votes the validity of which is merely uncertain, and the counting of which likely favored him rather than his opponent.

In addition to the paperwork problems, Rep. Nageak also asserts that Ambler's "election officials failed to timely return the ballots and election materials to Nome and Juneau for review and certification." [Nageak Br. 13] As a result, the election had to be certified using only the information called in from Ambler on election night, a circumstance he calls "especially concerning" because not all boards accurately reported

their results. [Nageak Br. 13, n. 72] What he fails to acknowledge, however, is that the Ambler materials arrived before the recount was conducted and it is therefore undisputed that the Ambler board's numbers were correct. [R. 1263] Any suggestion that "the authenticity and results of the 36 ballots cast" in Ambler remains in doubt is disingenuous at best. [Nageak Br. 13]

Rep. Nageak also ignores AS 15.15.440, which expressly instructs the Director to count election results reported over the telephone if materials are not received in time for the state ballot counting review. This statute not only establishes that the Division properly relied on the Ambler results in its initial certification of the House District 40 election, but also indicates that the non-arrival of election materials is sufficiently predictable to be explicitly contemplated and addressed in the statutes. The Court should therefore reject the inferences of impropriety that Rep. Nageak draws from the late arrival of the Ambler materials.

In addition to his allegations about imperfections in Division paperwork, Rep. Nageak also alleges that "errors on the statewide level have tainted the results of this election." [Nageak Br. 29] These "errors" are the Director's alleged failure "to make reasonable efforts to obtain the names of persons convicted of a felony involving moral turpitude" so that their voter registration may be canceled,[29] and her failure to ensure that the membership of statewide and regional review boards complies with

[29] *See* AS 15.07.135(a).

statutory requirements as to party affiliation.[30] [Nageak Br. 29]

But these are not viable election contest claims, because Rep. Nageak has not even attempted to draw a link between these alleged violations and the outcome of this election. And even if he had, these are inherently directory statutes. The Director is not tasked with ensuring that no disqualified felon ever votes, but only with making "reasonable efforts" to identify such persons.[31] And Ms. Bahnke's testimony that the Division is currently reviewing its policy is evidence that she is making reasonable efforts, not evidence of a statutory violation. [Tr. 38-41] As for the composition of the regional and statewide review boards, the Division cannot force people to serve on them, so any statute prescribing their partisan make-up can only be directory. Moreover, no authority suggests that this statute can form the basis for an election contest claim absent evidence of partisan bias on the part of a board, which does not exist here.[32]

Finally, Rep. Nageak ignores *Hammond v. Hickel*—which does not support his portrayal of this election as hopelessly permeated with aggregated irregularities—instead relying on a 1955 Minnesota case cited in *Hammond* called *In re Contest of*

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30 *See* AS 15.07.135 (cancellation of registration of convicted persons); AS 15.10.180 (appointment of state ballot counting review board); and AS 15.20.190 (appointment, duties, and compensation of district counting boards).

31 AS 15.07.135 provides that "[t]he director shall make reasonable efforts to obtain the names of persons convicted of a felony involving moral turpitude."

32 These statutes makes sense primarily as vehicles for political parties to demand representation on review boards when they have persons willing to serve and a director who will not appoint those people.

Election of Vetsch.[33] According to Rep. Nageak, the facts in *Vetsch* "are eerily similar to those presented here," [Nageak Br. at 27] but in fact there are precious few similarities, eerie or otherwise. In *Vetsch*, 654 votes were cast in the precinct even though only 653 voters were registered there; 59 ballots were unaccounted for at the end of the election; the apparent chair of the election board was known to be a friend of Vetsch and wanted to see him elected; the board was assisted at the vote count by unauthorized people who were statutorily prohibited from participating by virtue of their familial relationship to board members; the board was informed during its count of the election result in the rest of the county; none of the voters signed the precinct register; and Vetsch won 465 of the 654 votes cast in the precinct.[34] In comparison to the many and serious violations of Minnesota's election statutes that occurred in *Vetsch*, Rep. Nageak has offered evidence of a couple of statutory violations and some incomplete paperwork. These problems are not sufficiently serious or pervasive to meet the Court's standard for cumulating irregularities to "support a finding of malconduct."[35]

A more instructive precedent is *Hammond v. Hickel*, where the Court reversed the superior court's decision that there was cumulative malconduct "sufficient to impeach the integrity of the election process and place the true outcome in doubt."[36] The Court reversed the superior court's cumulative holding, even as it found several

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33 71 N.W.2d 652 (1955).

34 *Id*. at 655-56.

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

36 *Id*. at 258.

violations of statutes governing ballot security and ballot handling; several hundred ballots that had been misplaced and should be counted; and ninety-seven ballots that should not have been counted.[37] If the election in *Hammond* did not involve sufficient violations of law to transform numerous irregularities into malconduct, neither does the 2016 Democratic primary in House District 40.

Rep. Nageak repeatedly mischaracterizes the failure to perfectly complete Division paperwork or precisely follow procedures described in Division manuals as violations of the law in an attempt to justify invalidating the primary election result. [Nageak Br. 19, 20, 23, 26, 28, 30] But "serious violations of the law" are vastly different than mere deviations from the Division's bureaucratic ideal. Nor does declining to disenfranchise voters in precincts where election workers made errors—large or small—somehow "disenfranchise the remainder of the District, and all of the other voters who participated without error." [Nageak Br. at 28] It is hard to see how voters in one precinct would be "disenfranchised" because poll workers in other precincts failed to complete paperwork. It is Rep. Nageak, not the Division, who seeks to disenfranchise District 40 voters wholesale by asking this Court to uphold the superior court's decision to anoint him the winner based only on his muddled math.

Because the handful of problems and the errors in paperwork identified by Rep. Nageak do not even come close to showing that the primary election was "so permeated with serious violations of the law" as to cast doubt on the integrity of the

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[37] *Id*. at 260-63, 269.

primary election, the Court should reject this claim and uphold the election result.

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.

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Ninia Dizon October 10, 2016
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