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IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Division of Elections Recount;
3AN-16-0901 CI

BRIEF OF INTERVENOR DEAN WESTLAKE

This recount appeal and election contest involves the race for State House in the Democratic "open" primary in District 40 between Dean Westlake ("Westlake") and Ben Nageak ("Nageak"). The voters in House District ("HD") 40 chose Westlake by 8 votes, 825 to 817, over Nageak. In the election contest below, the superior court overturned the will of the voters and installed Nageak as winner. The court below reached this result by disenfranchising 12 qualified voters in Shungnak, Alaska, at least 11 of whom almost certainly were Alaska Native. In a supremely ironic twist, in reaching its erroneous result in a *Democratic* primary race, the court relied on the testimony of a well-known

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Republican leader, Randy Ruedrich, rather than on the Division of Elections ("Division"), to determine how many votes should be disallowed. The superior court was plainly wrong.

This case implicates the important, well-established constitutional right for a qualified voter to cast his vote, and to have that vote counted. It also involves the constitutional right of freedom of association, specifically the rights of a political party and its members (in this case the Alaska Democratic Party ("ADP")) to determine who may participate in its primary. The ADP has an open door policy: unlike the Republican Party, the ADP allows all comers—even registered Republicans—to vote in its primary. This Court must determine whether ballots validly cast in the Democratic primary in the rural Alaska village of Shungnak—by voters who were qualified to vote those ballots—should be counted, as the Division properly determined they should be, or whether some of those votes, most of which were cast by Alaska Natives, instead should be disallowed, as the superior court wrongly decided. Westlake urges this Court not to disenfranchise those voters, but rather to find that their votes to have been properly counted.

The Division should be upheld in the recount appeal, and the superior court should be reversed in the election contest case, for the following reasons:

- Twelve Shungnak voters would be disenfranchised by the court, and not have their votes in the Democratic primary count, in the only contested race in HD 40: Westlake v. Nageak.

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- All 12 of those voters were qualified to vote, and entitled to vote in the Democratic primary, which is open to all registered, qualified voters.
- There was no double-voting or illegal voting in Shungnak in the HD 40 race. There were only two candidates on the Democratic ballot, Westlake and Nageak, and there were no candidates in that race on the Republican ballot. Thus, this is not a case of constitutionally infirm over-voting, such as in *Baker v. Carr*.[1]
- The election workers' mistake did not introduce any "bias" into this race, because registered Republicans, who might be expected to support Nageak,[2] were allowed to vote the Democratic ballot.[3]
- Of the 12 voters who would be disenfranchised by the court, at least 11 most likely were Alaska Native, since Shungnak is 95% Alaska Native.
- Of the 50 votes at issue in Shungnak, 25 of the voters were not entitled to vote in the Republican primary, since they were registered as Democrats or Alaska Independents.
- This Court's admonitions that (A) courts are "reluctant to permit a wholesale disenfranchisement of qualified electors through no fault of their own"[4] and (B)

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[1] 369 U.S. 186 (1962).

[2] Nageak caucused with the Republican majority in the legislature, and he was supported by them in his primary race against Westlake.

[3] Westlake respectfully submits that, whereas the election workers' mistake introduced no bias into the *Democratic* primary race result for HD 40, the trial court's reliance on calculations performed by a *Republican* Party flack incontrovertibly—and impermissibly—injects bias into the result.

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"errors solely on the part of election officials will not invalidate ballots,"[5] compel the conclusion that the superior court clearly erred here.

- The strong associational rights of Democrats[6] to be all-inclusive in their primary races are all but ignored by the court (though, ironically, it notes that Republicans have the constitutional right to *close* their primary).
- The superior court relies on misleading historical data in determining how many voters to disenfranchise—misleading because, in the last 2 primary elections in 2012 and 2014, and again in 2016, voters in HD 40 overwhelmingly chose to vote the Democratic ballot. The court's reliance on the percentage of Shungnak voters who chose the Republican ballot averaged over the last five primary elections (2006, 2008, 2010, 2012 and 2014) rather than the two most recent elections (2012 and 2014) ignores the significant, recent trend of Shungnak voters to choose the ADL ballot, and thus improperly skewed the court's vote-tossing calculations. In effect, the court's reliance on these flawed calculations improperly diluted the ADL vote in 2016.
- The superior court effectively allows a well-known *Republican* Party flack, Randy Ruedrich, to decide the outcome of the *Democratic* primary. The court erroneously chose to rely on Ruedrich's calculations, even though Ruedrich knew

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[4] *Finkelstein v. Stout*, 774 P.2d 786 (Alaska 1989). *See* below.
[5] *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010). *See* below.
[6] *See California Democratic Party v. Jones,* 530 U.S. 567 (2000).

nothing about the campaign conditions in Shungnak in 2016 and in fact has never set foot in Shungnak.

- Westlake spent more than three times on his campaign in 2016 than he did in 2014, and he was the only candidate who campaigned in Shungnak: he mounted an aggressive "Get Out the Vote" campaign there, visiting the village twice and targeting campaign efforts to Shungnak. (In 2014, Westlake convincingly won the primary vote in Shungnak, 49 to 6 for Nageak).

Since there are no facts in dispute, this Court should exercise its independent judgment to reach the correct result, the same one reached by the Division: Westlake won the Democratic primary election for HD 40, 825 - 817. Accordingly, the Court should reverse the decision of the superior court, uphold the Division's decision to count the Shungnak votes, and confirm that Westlake was the winner in the HD 40 race.

I. STANDARD OF REVIEW

A recount appeal involves the original jurisdiction of this Court. In the election contest appeal, there are no factual disputes regarding the sole issue on which the superior court based its decision: each of the 50 voters in Shungnak accidentally was provided with both a Democratic primary ballot and a Republican one. Accordingly, the appeal from that decision involves purely issues of law, which this Court considers *de novo*. This Court has original jurisdiction of the recount appeal.

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II. ARGUMENT

A. Twelve qualified voters who legally voted in the Democratic Primary should not be disenfranchised, in derogation of their constitutional right to vote.

This Court has long recognized that the right to vote is one of the fundamental rights found in the U.S. Constitution: "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *O'Callaghan v. State*, 914 P.2d 1250, 1253 (Alaska 1996), *cert. denied*, 520 U.S. 1209, *quoting Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal citations omitted).

The right to vote—and the corresponding right to have that vote counted—is "'fundamental to our concept of democratic government.'" *Miller v. Treadwell*, 245 P.3d 867, 868-69 (Alaska 2010) (footnote omitted), *quoting Dansereau v. Ulmer,* 903 P.2d 555, 559 (Alaska 1995). It is so fundamental, in fact, that "errors 'solely on the part of election officials' will not invalidate ballots." *Finkelstein v. Stout*, 774 P.2d 786 (Alaska 1989), *quoting Willis v. Thomas*, 600 P.2d 1079, 1087 (Alaska 1979), and *citing Fischer v. Stout*, 741 P.2d 217, 223-24 (Alaska 1987).

More than "three decades ago," this Court "articulated this principle… recognizing the profound importance of citizens' rights to select their leaders and noting that "'[c]ourts are reluctant to permit a *wholesale disfranchisement of qualified electors through no fault of their own.*'" *Miller,* 245 P.3d at 869 (emphasis added) (footnote omitted), *quoting Carr v. Thomas,* 586 P.2d 622, 626 (Alaska 1978).

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This Court has repeatedly applied a "'well-established policy which favors upholding elections when technical errors or irregularities arise in carrying out directory provisions which do not affect the result of an election.'" *Miller*, 245 P.3d at 869 n.13 (footnote omitted), *quoting Carr,* 586 P.2d at 625-26. This Court construes a "statute's language in light of the purpose of preserving a voter's choice rather than ignoring it." *Miller,* 245 P.3d at 870. This is especially true because "Alaskan voters arrive at their polling places with a vast array of backgrounds and capabilities." *Id.* Some voters may have "physical or learning disabilities." *Id.* "Yet none of these issues should take away *a voter's right to decide which candidate to elect to govern*." *Id.* (emphasis added).

1. The voters in Shungnak should not be disenfranchised.

In this case, fifty residents in Shungnak went to the polls to cast their votes in the primary election. All 50 were registered as voters and qualified to vote in tht election. Twenty-five were registered as a member of either the ADP or the Alaskan Independent Party ("AIP").[7] The remaining 25 voters in Shungnak were registered as Republicans or as not affiliated with any political party.

Accordingly, all 50 of the voters were entitled to cast a vote in the Democratic primary and in the race between Westlake and Nageak.

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[7] These 25 voters were able to vote only in the Democratic primary, also known as the ADL (Alaskan Independence-Democratic-Libertarian) primary, because it is open to voters of all political persuasions, even registered Republicans. In contrast, the Republican primary is closed, and these 25 voters were not entitled to vote in it.

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Owing to an error by election officials, each voter in Shungnak was given both the ADL ballot and the Republican ballot, and each was allowed to cast a vote in both primaries. In Shungnak, Westlake won the ADL primary 47 votes to 3 votes for Nageak.[8] The Division certified Westlake as the winner in in HD 40 over Nageak by 8 votes, 825 to 817. The ADL primary race between Westlake and Nageak is the only race in which anyone has challenged the election or its results.

Significantly, none of the 50 voters in Shungnak could have double-voted, that is, none could have cast more than one vote for a candidate in the primary, even though voting *both* the ADL and the Republican ballots.[9] None of the same candidates appeared on both the ADL ballot and the Republican ballot.

Moreover, none of the 50 voters could have cast more one vote in the HD 40 election. On the ADL ballot, Westlake and Nageak were the only two candidates for HD 40. On the Republican ballot, there were no candidates at all for HD 40. Thus, even a voter who voted *both* primary ballots could only cast one vote, either for Westlake, or for Nageak.[10] In Shungnak, 47 of the 50 voters cast their votes for Westlake.

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[8] This vote difference corresponds closely to the 2014 results in Shungnak, when Westlake won 49 votes to 6 for Nageak (though Westlake lost the primary race).

[9] Thus, this case does not present the constitutional concerns articulated in *Baker v. Carr*, 369 U.S. 186, as the trial court mistakenly believed.

[10] The only races in which a Shungnak voter could have voted impermissibly for more than one candidate in the same race were two federal contests: for U.S. Senate, and for U.S. Congress. The voter still could not vote for the same candidate more than once, but

Thus, despite the election workers' error, the voting in Shungnak did not violate the core principle of "one person, one vote." This is amply demonstrated by the following visual aid excerpt, a side-by-side comparison of the ADL and Republican ballots:[11]

[See Next Page]

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could vote for one candidate in the ADL primary, and a different one in the Republican primary. No one has challenged the results in either of those races.

[11] Although intended solely as a visual aid, it accurately reproduces the voting portions of both ballots, side by side, with the ADL ballot on the left-hand side, and the Republican ballot on the right. *See* Appendix 1, reproducing Trial Exs. BB and CC, along with the entire visual aid.

United States Senator (vote for one)	
◯ Blatchford, Edgar	Democrat
◯ Metcalfe, Ray	Democrat
◯ Stevens, Cean	Libertarian

United States Representative (vote for one)	
◯ Watts, Jon B.	Libertarian
◯ Hibler, William D. "Bill"	Democrat
◯ Hinz, Lynette "Moreno"	Democrat
◯ Lindbeck, Steve	Democrat
◯ McDermott, Jim C.	Libertarian

State Senator District T (vote for one)	
◯ Olson, Donald C. "Donny"	Democrat

State Representative District 40 (vote for one)	
◯ Westlake, Dean	Democrat
◯ Nageak, Benjamin P. "Piniqluk"	Democrat

United States Senator (vote for one)	
◯ Murkowski, Lisa	Republican
◯ Kendall, Paul	Republican
◯ Lamb, Thomas	Republican
◯ Lochner, Bob	Republican

United States Representative (vote for one)	
◯ Young, Don	Republican
◯ Heikes, Gerald L.	Republican
◯ Tingley, Jesse J. "Messy"	Republican
◯ Wright, Stephen T.	Republican

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In short, a voter in Shungnak, even though given both ballots, could cast only one vote, either for Westlake, or for Nageak.

Accordingly, the Court should not disenfranchise any of the Shungnak voters by rejecting or discounting their votes. This is not a case where a person has voted illegally, either because he was not eligible to vote or was not registered to vote, or where a person may have double-voted, that is, cast more than 1 vote for a candidate or in a single race. All of the voters in Shungnak who voted the two ballots were registered and qualified.

Notably, no one—not a single person—who cast a vote in Shungnak has come forward and stated that, if he had been presented with the choice, he would have chosen the Republican ballot, not the ADL ballot.

2. The Voting Rights Act further militates in favor of counting all the Shungnak votes.

The trial court's disallowance of votes cast by Alaska Natives also implicates the federal Voting Rights Act. *See* 42 U.S.C. § 1971 *et seq*. Under the Voting Rights Act, a person's "race, color, or previous condition" shall not affect that person's right to vote. 42 U.S.C. § 1971(a). Further, no person shall "willfully fail or refuse to tabulate, count, and report" the vote of a person who falls within the scope of the Act. 42 U.S.C. § 1973i(a).

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The population of Shungnak is approximately 95% Alaska Native.[12] Accordingly, 47 or 48 of the 50 votes cast in Shungnak were cast by Alaska Natives. Thus, not counting those 50 votes or any portion of them would have an unfair and disproportionate impact on the votes of Alaska Natives, in derogation of the Voting Rights Act. 42 U.S.C. § 1971 *et seq.*

At a minimum, federal law counsels using a careful, conservative approach before tossing out a single validly cast vote in Shungnak, since that vote likely was cast by an Alaska Native. Clearly, there is no basis for throwing out 12 such validly cast votes.

B. A party's constitutional freedom of association compels the conclusion that the Democratic primary was properly conducted here.

The United States Supreme Court has recognized the importance of a political party's being able to decide who chooses its candidate. *California Democratic Party v. Jones,* 530 U.S. 567 (2000). In *Jones*, the Court found that, as a corollary to the right to associate with others, the Constitution gave persons the right to refrain from associating with others. *Id.,* 530 U.S. 567. Thus, members of a political party may include (*i.e.*, associate with) persons, allowing them to vote in their party's primary even though they are registered with another party, or may exclude them. *Id.*

Specifically, the *Jones* Court found:

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[12] *Transcript,* Volume II (September 30 and October 3, 2016), p. 671, l. 11 – 19. A copy of the relevant pages from the Transcript are attached as Appendix 2.

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> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself....
> ...[T]he Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs,' *Tashjian, supra,* at 214-215, which 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only,' *La Follette,* 450 U.S., at 122. That is to say, a corollary of the right to associate is the right not to associate. "'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Id.,* at 122, n.22 (*quoting* L. Tribe, American Constitutional Law 791(1978)).
> In no area is the political association's right to exclude more important than in the process of selecting its nominee....
> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." *Eu, supra,* at 224 (internal quotation marks omitted).

California Democratic Party v. Jones, 530 U.S. at 574-575 (citations omitted).[13]

It is indisputable that Republicans have the right to close their primary to Democrats. *California Democratic Party v. Jones,* 530 U.S. 574-75. It is equally indisputable that Democrats have the constitutional right to open their primary to voters of all political persuasions, even Republicans. *See id.* As noted, all of the 50 votes cast by voters in Shungnak, even those cast by registered Republicans, were validly cast in the

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[13] The *Jones* Court was quoting from *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107 (1981); and *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214 (1989).

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Democratic primary race for House District 40. Taken in conjunction with this Court's fundamental principle of preserving a voter's choice and, whenever possible, not disenfranchising voters, the constitutional right of association militates strongly in favor of counting the 50 votes cast in the Democratic primary by qualified voters in Shungnak.

It's surely ironic that the results of the *Democratic* primary are being challenged here not by Democrats, but by the *Republican* Party. (Though this does not come as a complete surprise, since a Republican legislator has described Nageak as "the best Republican we've got in the state legislature."[14]) Despite having closed their own primary to "outsiders," such as Democrats, the Republicans now want to determine the winner of the Democratic primary in HD 40. In contrast, the Democratic Party has accepted and endorsed the Division's certification of Westlake as the winner of its primary: ADP Chair Steinau has stated that "Every eligible voter was able to exercise their right to vote, and registered voters were permitted to vote. Evidence...also indicates that eligible voters were not permitted to vote for the same person more than once."[15]

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[14] *Transcript,* Volume II, p. 669, l. 13 – 16; *see* Appendix 2.

[15] *September 1, 2016 letter from ADP Chair Casey Steinau to Division Director Josephine Bahnke*, attached as Appendix 3. (The superior court declined to admit the letter as an exhibit, questioning its relevance to this dispute.) The ADP Chair concluded that "a costly, wholesale restructuring of the election is unwarranted.... The people of District 40 have spoken and we must respect that." *Id.*

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C. Legal principles governing election contests show that the Division of Elections correctly determined that Westlake won the HD 40 race.

This Court has espoused the fundamental rule that "every reasonable presumption will be indulged in favor of the validity of an election." *Turkington v. City of Kachemak,* 380 P.2d 593, 595 (Alaska 1963). "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 disenfranchisement, and to uphold the will of the electorate." *Carr v. Thomas,* 586 P.2d at 626 (internal quotation omitted). *Hammond v. Hickel* is the seminal decision on election contests in Alaska. 588 P.2d 256, 259 (Alaska 1978), *cert. denied*, 441 U.S. 907 (1979).

In *Hammond,* this Court observed that "Alaska elections are primarily conducted by many volunteer workers. Unique problems are presented in the vast area encompassed as well as the varied cultural backgrounds and primary languages of voters." *Hammond v. Hickel*, 588 P.2d at 259. Under such circumstances "minor irregularities and other good faith errors and omissions may be anticipated," although the *Hammond* Court did not "condone any such departures from lawful requirements." *Id.*

In an election contest, the challenger must show "malconduct on the behalf of election officials," and "that such malconduct was sufficient to change the result of the election." *Hammond*, 588 P.2d at 258 (footnote omitted); *see* AS 15.20.540. In *Hammond,* this Court reaffirmed that "'malconduct,' as used in AS 15.20.540, means a

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significant deviation from statutorily or constitutionally prescribed norms." *Hammond*, 588 P.2d at 258, *quoting Boucher v. Bomhoff,* 495 P.2d 77 (Alaska 1972). Under *Boucher*, "'malconduct' exists if the bias can be shown to be the result of a significant deviation from lawfully prescribed norms." *Hammond*, 588 P.2d at 258-59.

In *Hammond*, this Court found "no evidence of any irregularity causing bias in the vote." *Hammond*, 588 P.2d at 259. All of the irregularities in *Hammond* "were random in their effect, if any, on the casting of votes. Irregularities containing no element of bias, even if they amount to significant deviations from prescribed norms, do not necessarily constitute malconduct." *Id.*

The *Hammond* Court determined that even "[s]ignificant deviations which impact randomly on voter behavior" constitute malconduct only "if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law." *Hammond*, 588 P.2d at 259 (footnote omitted). Thus, "evidence of an election official's good faith may preclude a finding of malconduct under certain circumstances." *Id.* (footnote omitted).

1. The election workers' mistake in Shungnak does not constitute "malconduct."

Under the standards set forth in *Hammond*, the mistake by election workers in Shungnak does not rise to the level of election "malconduct." *Hammond v. Hickel*, 588

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P.2d 256. The election workers made an honest mistake, giving each voter both the Democratic ballot and the Republican one. There was no evidence that they did so in bad faith, or intentionally. In fact, their mistake did not influence the results in HD 40 because none of the Shungnak voters could double vote, or vote for more than a single candidate running in the race.

Plainly, this is the sort of situation recognized by this Court in *Hammond* when it observed: "Alaska elections are primarily conducted by many volunteer workers. Unique problems are presented in the vast area encompassed as well as the varied cultural backgrounds and primary languages of voters." *Hammond*, 588 P.2d at 259. To now find that an election worker's honest mistake disenfranchises 11 or 12 Alaska Native voters would contravene *Hammond*'s guidance.

Accordingly, there was no election malconduct in this case, the superior court should be reversed, and the result certified by the Division should be upheld.

2. If any relief is required to determine the outcome of the Democratic primary race here, it should be carefully crafted and should not be based on the biased calculations of a Republican Party flack.

This Court has held that requiring a new election is an "*extreme remedy*": There must be "numerous serious violations as to permeate the entire election process," in order to "require the extreme remedy of a new election." *Hammond*, 588 P.2d at 259 (Alaska).

In this case, the superior court goes even further: rather than requiring a new election, the judge overturns the certified results and substitutes his will for the will of the

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voters. Given the choice, the more than 800 voters who voted for Westlake in HD 40 would, presumably, prefer the "extreme" remedy: a new election. Although Westlake does not believe it is necessary or appropriate here, it would surely be a better indicator of the will of the voters than the judge's guess, based on the biased views of a *Republican* leader, which flips the result from Westlake winning by 8 votes, to Nageak winning by 2.

In *Hammond,* this Court concluded that "each alleged deviation from a statutorily or constitutionally prescribed norm must be analyzed individually to determine if it is "significant" and to ascertain if it involves an element of scienter." *Hammond*, 588 P.2d at 259, discussed above. "Once it is determined that the individual instance of noncompliance amounts to malconduct, a determination must be made of the number of votes affected. The total number of votes affected by all such incidents must then be considered in ascertaining whether they are sufficient to change the result of the election." *Id.*

In *Hammond*, although the Court found "instances of malconduct," those "isolated instances of irregularity" did not "so permeate the election with numerous serious violations of law as to cast substantial doubt on the outcome of the vote." *Id.*[16] The *Hammond* Court concluded that "concrete standards must be applied in order to determine if votes affected by malconduct are sufficient in number to change the result of the election." *Hammond*,

[16] In "rare circumstances", an election may be "so permeated with numerous serious violations of law, not individually amounting to malconduct, that substantial doubt will be cast on the outcome of the vote." *Hammond*, 588 P.2d at 259. Under such circumstances, "cumulation of irregularities may be proper and will support a finding of malconduct." *Id.* (citation omitted).

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588 P.2d at 260. The Court observed that "[t]he method used to determine if the malconduct could have changed the result of the election will depend upon whether the malconduct injected a bias into the vote.... Where the malconduct has not injected any bias into the vote, but instead affects individual votes in a random fashion, those votes should be either counted or disregarded, if they can be identified, and the results tabulated accordingly." *Id.*[17]

"[I]f the malconduct has a random impact on votes and those votes cannot be precisely identified," this Court held 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." *Hammond*, 588 P.2d at 260 (citations omitted). The Court concluded that "invalid votes will be deducted in this pro rata fashion to determine if the malconduct could have affected the result of the election. This is the procedure which should have been followed here with respect to those votes randomly affected by those actions of election officials which amount to malconduct." *Id*

Nageak presented no evidence that any of the 50 voters in Shungnak would have chosen the Republican ballot. In contrast, Westlake provided evidence that he had strong

[17] In contrast, "[i]f the bias has tended to favor one candidate over another and the number of votes affected by the malconduct can be ascertained with precision, all such votes will be awarded to the disfavored candidate to determine if the result of the election would be changed. If the number of votes affected by the bias cannot be ascertained with precision, a new election may be ordered, depending upon the nature of the bias and the margin of votes separating the candidates." *Hammond*, 588 P.2d at 260, *citing Boucher* 495 P.2d 77.

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support there, and in fact won Shungnak in 2014, 49 votes to 6. Westlake visited Shungnak twice, and was the only candidate to visit it at all during the election campaign. In fact, in 2016, Westlake was the only candidate to have "boots on the ground" in Shungnak.[18] Heckendorn, Westlake's campaign manager, testified that Westlake targeted Shungnak and other villages along the Kobuk River because Westlake had received overwhelming support from the voters there in the 2014 race.

In contrast, Ruedrich, on whom the trial court relied, knew nothing about the campaign efforts in Shungnak in 2016, has never been to Shungnak, and in fact has never even talked to anyone in Shungnak.[19] Ruedrich is a well-known Republican leader who has been warring with Democrats in Alaska for more than 25 years.[20]

Nevertheless, the court effectively allowed this *Republican* party flack to decide the outcome of the *Democratic* party primary race in HD 40.

In 2016, the Westlake-Nageak race was the only real contested race on the HD 40 ballot. On the Republican side, neither Lisa Murkowski nor Don Young was facing a challenge: each won his or her primary with more than 70% of the votes cast.

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[18] Transcript, Vol. II, pp. 659-670, attached as Appendix 2. In addition, the fact that Westlake raised more than three times as much money for his campaign in 2016 than he had in 2014 strongly supports the inference that he would have garnered as much support in Shungnak, if not more, in 2016 as he had in 2014, when he won 49 votes to 6 there. *Id.* at 662-63.

[19] *Transcript,* Volume I (September 27, 28 & 29, 2016), p. 431. A copy of relevant pages from the Transcript are attached as Appendix 4.

[20] Relying on Ruedrich to provide an "unbiased" analysis here ignores the reality of Republican party politics in Alaska for the past 25 years.

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There was a strong indication that almost all, and perhaps all, of the voters in Shungnak would have chosen the Democratic ballot. On the Democratic ballot, as on the Republican ballot, were races for U.S. Senate and U.S. Congress. Also on the Democratic ballot, but not the Republican one, was an unopposed candidate for Senate District T. And, of course, there was the HD 40 race, the only really contested race on the ballot: Westlake v. Nageak.

Clearly, there was much incentive for Shungnak voters to choose the Democratic ballot, and little for them to choose the Republican ballot.

There are better and more recent indicators of the likely split between ADL and Republican ballots than the biased calculations of a staunch Republican. For example, in 2012 and 2014, voters *in all of HD 40* overwhelmingly chose the Democratic ballot, 78.47% and 67.84%. In 2016, the percentage is even greater than for 2012: 79.05%.[21] The election results in HD 40 in 2012 and 2014 were most comparable to the expected results in 2016 because, in 2014, the same two candidates, Westlake and Nageak, vied for the HD 40 seat. In 2012, Westlake did not run, but Nageak ran for an open seat for which several other candidates vied.

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[21] This figure was derived by taking the Division's official results and adjusting them for the Shungnak ballots, by subtracting them from the totals. Including the Shungnak votes in the calculation results in a figure of 77.67%.

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Moreover, *in Shungnak*, an even greater percentage of voters chose the Democratic ballot than in HD 40 generally during those years: 81.16% in 2014, and 85.48% in 2012. Thus, during the last 3 election cycles, the figures show the following:

% of Voters Choosing ADL Ballot	2012	2014	2016
HD 40 Generally	78.47%	67.84%	79.05%
Shungnak	85.48%	81.16%	??[22]

This Table plainly shows that, in recent history, the voters in Shungnak choose the ADL ballot more often than do HD 40 voters generally. Simply comparing the ratios for these years indicates that the Shungnak voters would have chosen the ADL ballot in 2016 at least 86% of the time. (And these raw numbers do not take into account the other factors noted above that likely would have increased the votes for Westlake, *e.g.*, that the Westlake-Nageak race was the only contested one on the ballot.)

In graphic contrast, the superior court tossed out 12 votes from Shungnak, assuming that only 76% of the voters in Shungnak would have chosen the ADL ballot, a calculation that significantly understates the likely percentage, thereby diluting the ADL votes cast in Shungnak.[23]

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[22] The superior court mistakenly calculates this figure to be only 76%, a percentage lower than the district-wide percentage in HD 40 for 2016, even though in 2012 and 2014 Shungnak voters chose the ADL ballot at a significantly higher percentage than did HD 40 voters as a whole.

[23] The court's decision results in Westlake receiving only 36 votes in Shungnak, in contrast to the 49 votes he received there in his 2014 race against Nageak.

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Further, since there was no contested race on the Republican ballot, it is entirely possible (if not likely) that those few Shungnak voters who normally would have chosen the Republican ballot simply stayed home. The only two races on that ballot were won handily by incumbents Lisa Murkowski and Don Young.[24]

In 2010, in contrast, there was a hotly contested Republican primary race for U.S. Senate, Sen. Lisa Murkowski against Joe Miller, motivating many voters to choose the Republican ballot.[25] Yet Ruedrich's calculation, and hence the court's, relies on 2010 (and earlier years), when an unusually low percentage of voters in HD 40 chose the ADL ballot—only 53.25% of the voters in Shungnak chose the Democratic ballot that year. This is in stark contrast to the percentage of voters in Shungnak who chose it in 2012, 85.48%, and again in 2014, 81.16%.

Accordingly, should this Court determine that any relief here is appropriate, the Court should rely on most recent, comparable data available to determine how many votes in Shungnak should be disallowed. Even assuming *arguendo* election worker malconduct occurred, "such malconduct" was not "sufficient to change the result of the election." *See Hammond*, 588 P.2d at 258. By adhering to the principle that the Court should disallow the

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[24] Indeed, the trial court's analysis unfairly skews the results in another way: of those Shungnak voters who would have chosen the Republican ballot, all of them almost certainly would have voted for Nageak, since he was the candidate supported by Republicans. Thus, even if 12 votes should be subtracted from the vote in Shungnak, as the court concluded, Nageak should lose 3, and Westlake the remaining 9.

[25] In fact, incumbent U.S. Senator Lisa Murkowski lost that primary to Joe Miller, only retaining her seat with a successful write-in campaign during the general election.

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least votes possible, and applying the correct figures set forth above, the Court should inescapably conclude that Westlake won the Democratic primary race in HD 40.

3. The remaining issues raised by Nageak below do not constitute election misconduct.

The superior court correctly concluded that the other issues raised by Nageak below in his election contest have little or no merit.[26] None of them—individually or in the aggregate—come close to meeting the standard for "malconduct" adopted by this Court. *See, e.g., Hammond v. Hickel*, 588 P.2d at 258-60. Far from it. To the contrary, they are precisely the sort of "minor irregularities and other good faith errors and omissions" that "may be anticipated" in any election. *Id.*, 588 P.2d at 259.

By way of example, it would be a travesty of justice to throw out 11 special needs ballots cast by Buckland residents, as Nageak seeks to do. The envelopes of these special needs ballots were all properly completed and signed in accordance with law. Buckland, like much of HD 40, is a rural Alaska village, where most of the residents are Alaska Natives. Nageak thus have would this Court disenfranchise 11 village elders (or other Natives too infirm to make it to the polling place to vote), simply because, in Buckland, voters voted overwhelmingly in favor of Westlake. Clearly, this Court should reject Nageak's argument that these Native voters should be disenfranchised.

Nageak's remaining arguments are equally unpersuasive and unsupported by law.

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[26] The Division ably rebuts all of Nageak's arguments in its Brief. *See* Division's Brief, filed today. Westlake joins in and supports all of the points raised by the Division.

III. CONCLUSION

In sum, this Court should reverse the decision of the superior court in the election contest lawsuit, and uphold the Division of Election's certification of Dean Westlake as winner of the race in HD 40 over Ben Nageak.

Dated this 8th day of October, 2016.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was
Emailed, mailed and/or faxed to
the following this 8th day of October, 2016.

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