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Counsel for Intervenor Dean Westlake

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

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

Plaintiffs,

v.

LT. GOVERNOR BYRON MALLOT, in his official capacity as Lt. Governor for the State of Alaska, and JOSEPHINE BAHNKE, in her official capacity as Director of the Division of Elections,

Defendants.

Case No. 3AN-16-09015 CI

WESTLAKE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT

1. People residing in the village of Shungnak, Alaska are primarily Alaska Natives. According to a recent U.S. Census, approximately 95% of the residents are Alaska Natives.

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2. Fifty residents of Shungnak went to the polls to cast their votes in the primary election held on August 16, 2016. (In addition, one voter voted a special needs ballot).

3. All 50 residents who went to the polls were qualified to vote in the primary election.

4. Twenty-five of the qualified voters in Shungnak were registered as a member of either the Democratic Party or the Alaskan Independent Party.

5. Because the Republicans have adopted a closed primary, those 25 voters were not entitled to vote in the Republican primary. All 25 were able to vote in the Alaskan Independence, Democratic-Libertarian ("ADL" or "Combined") primary.

6. The remaining 25 voters in Shungnak were registered as Republicans or as not affiliated with any political party, and thus were entitled to vote in either the Combined primary or the Republican primary.

7. Thus, all 50 of the Shungnak voters were entitled to cast a vote in the Combined primary.

8. On the Republican primary ballot, voters had a choice of 4 Republican candidates for U.S. Senate, and 4 Republican candidates for U.S. Congress. There were no Republican candidates for State House in District 40, and there were no Republican candidates for State Senate in District T. Thus, a voter who chose a Republican primary ballot could vote in only two races: the U.S. Senate race and in the U.S. Congress race.

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9. On the ADL primary ballot, voters had a choice of 1 Libertarian and 2 Democratic candidates for U.S. Senate, and 3 Democratic and 2 Libertarian candidates for U.S. Congress. In addition, voters could vote for one of two candidates, Dean Westlake or Ben Nageak, in the House District 40 race, and one candidate in State Senate District T (who ran unopposed). Thus, a voter who chose a Combined primary ballot could vote in four races: U.S. Senate, U.S. Congress, House District 40, and Senate District T.

10. No Republican candidates appeared on the ADL primary ballot. Similarly, no Democratic or Libertarian candidates appeared on the Republican primary ballot.

11. Thus, no candidate appeared on both the ADL ballot and the Republican ballot, and no voter could cast a vote for the same candidate more than once even if they were given both an ADL ballot and a Republican ballot.

12. Specifically in the House District 40 race, even if given both an ADL ballot and a Republican ballot, voters could cast only one vote in the race: They could vote for either (A) Dean Westlake, or (B) Ben Nageak. These two candidates appeared on the ADL ballot. No candidate for House District 40 appeared on the Republican ballot.

13. Election officials inadvertently provided each of the 50 Shungnak voters who cast a vote in Shungnak with ballots for the both the Combined primary and the Republican primary.

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14. All 50 Shungnak voters voted a ballot in the ADL primary. All 50 voters also voted a ballot in the Republican primary.

15. In House District 40, the Division of Elections certified Dean Westlake as the winner, over Ben Nageak, by 8 votes, 825 to 817.

16. In Shungnak, Westlake won 47 to 3 over Nageak.

17. In 2014, Westlake also ran against Nageak in the ADL primary (but lost). In Shungnak, Westlake won 49 to 6 over Nageak in 2014.

18. The ADL primary race in House District 40 between Westlake and Nageak is the only race in which anyone has challenged the election or its results.

19. John-Henry Heckendorn testified for Westlake as an expert in campaign and voting analysis. Heckendorn testified that the election most similar in Shungnak to the 2016 election was the 2012 election.

20. Heckendorn based his conclusion largely by comparing the "undervote" in House District 40 in the primary elections in 2010, 2012, 2014 and 2016. An undervote occurs when a voter casts a ballot, but does not vote in every race shown on it. Assessing the undervote in an election is a good barometer of voter participation levels in a given race and in a given year. Heckendorn believed that the undervote calculation was the best indicator of which election would be most similar to 2016.

21. An "undervote" is calculated in two steps: (A) first, you add together the votes from the race in each primary, the ADL and the Republican, in which voters cast

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the most votes in that primary, and subtract that figure from the total number of votes cast in the election in the District, resulting in a figure (the "difference"); (B) second, you divide the difference by the total number of votes cast in the District, producing a percentage. This is the undervote percentage or ratio.

22. In 2016, in House District 40 in the Republican primary, the most votes cast were in the race for U.S. Senate: 426; and in the ADL primary, the most votes cast were in the race for House District 40: 1592.[1]

23. According to Heckendorn, the undervote percentage in each of these primaries was as follows: (A) 2010: 5.67%; (B) 2012: 4.72%; (C) 2014: 7.82%; (D) 2016: 2.13%.[2] The year most similar to 2016 was the 2012 election: in 2016, the undervote was 2.13%, and in 2012 it was 4.72%. In contrast, in 2014, it was 7.82%.

24. The 2012 and 2016 elections were also similar in the percentage of voters who chose the ADL ballot across House District 40: in 2012, 78.47% chose the ADL ballot; in 2016, 79.04% chose the ADL ballot.[3]

B. CONCLUSIONS OF LAW

The Right to Vote Generally

1. 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

[1] These figures have been adjusted to "back-out" or remove the votes cast in Shungnak.
[2] The 2016 figure has been corrected to remove a data entry error, and to account for the extra 50 votes cast in Shungnak.
[3] The 2016 figure has been adjusted to "back-out" or remove the votes cast in Shungnak.

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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).

2. There are some "longstanding principles" that the Alaska Supreme Court has "consistently applied" to election issues in Alaska "over the past 50 years." *Miller v. Treadwell*, 245 P.3d 867, 868 (Alaska 2010). One "bedrock principle" states: "'The right of the citizen[s] to cast [their] ballot[s] and thus participate in the selection of those who control [their] government is one of the fundamental prerogatives of citizenship.'" *Miller,* 245 P.3d at 868 (footnote omitted), *quoting Carr v. Thomas,* 586 P.2d 622, 626 (Alaska 1978) (internal quotation omitted).

3. The right to vote "'is fundamental to our concept of democratic government.'" *Miller,* 245 P.3d at 868-69 (footnote omitted), *quoting Dansereau v. Ulmer,* 903 P.2d 555, 559 (Alaska 1995). The right to vote "'encompasses the [voter's] right to express [the voter's] opinion and is a way to declare [the voter's] full membership in the political community.'" *Miller,* 245 P.3d at 869 (footnote omitted), *quoting Dansereau,* 903 P.2d at 559. "[O]ver three decades ago," the Supreme 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,* 586 P.2d at 626.

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4. Notably, the Supreme Court has observed that "errors 'solely on the part of election officials' will not invalidate ballots." *Finkelstein v. Stout*, 774 P.2d 786, 791 (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).

5. The Supreme Court has "uniformly held" that, in "reviewing and interpreting election statutes…, '[w]here any reasonable construction of [a] statute can be found which will avoid such a result, the courts should and will favor it.'" *Miller,* 245 P.3d at 869 (footnote omitted), *quoting Carr,* 586 P.2d at 626 (internal quotation omitted). The Supreme Court has applied this principle "throughout the years because we recognize that the right to vote is key to participatory democracy." *Miller,* 245 P.3d at 869. "Guided by this polar principle," the Supreme Court has declared that "'the voter shall not be disenfranchised because of mere mistake, but [the voter's] intention shall prevail.'" *Miller*, 245 P.3d at 869 (footnote omitted), *quoting Edgmon v. State, Office of the Lieutenant Governor, Division of Elections,* 152 P.3d 1154, 1157 (Alaska 2007) (internal citations and quotations omitted). The Supreme Court has "'consistently emphasized the importance of voter intent because the 'opportunity to freely cast [one's] ballot is fundamental.'" *Miller,* 245 P.3d at 869, *quoting State, Division of Elections v. Alaska Democratic Party,* Case No. S-14054, Order dated Oct. 29, 2010 at 3 (*quoting Edgmon v. State*, 152 P.3d at 1157).

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6. As the Supreme Court has recognized, "'a true democracy must seek to make each citizen's vote as meaningful as every other vote to ensure the equality of all people under the law.'" *Miller,* 245 P.3d at 870 (footnote omitted), *quoting Dansereau*, 903 P.2d at 559. "'There is well-established policy which favors upholding of 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. "In order to ensure that each citizen's vote is as meaningful as every other vote, we must interpret the election statute to preserve a voter's clear choice rather than to disenfranchise that voter." *Miller*, 245 P.3d at 870.

7. The Supreme Court has consistently remained "'reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and '[w]here any reasonable construction of the statute can be found which will avoid such a result, [we] should and will favor it.'" *Miller,* 245 P.3d at 870 (footnote omitted), *quoting Carr,* 586 at 626 (internal quotation omitted). The Supreme 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).

the bias can be shown to be the result of a significant deviation from lawfully prescribed norms." *Hammond*, 588 P.2d at 258-59.

11. In *Hammond*, the 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.* "Significant deviations which impact randomly on voter behavior will amount to malconduct 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). "[E]vidence of an election official's good faith may preclude a finding of malconduct under certain circumstances." *Hammond*, 588 P.2d at 259 (footnote omitted).

12. In *Hammond,* the Supreme Court concluded that, under the facts presented there, "it was error for the trial court to cumulate isolated instances of irregularity to support a finding of malconduct." *Hammond*, 588 P.2d at 259. (The trial court had "cumulated individual irregularities which, when analyzed separately, did not amount to malconduct because such irregularities did not constitute 'significant deviations' from prescribed norms." *Id.*) The *Hammond* Court held that "each alleged deviation from a statutorily or constitutionally prescribed norm must be analyzed individually to determine

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8. In addition to the application of State election laws, the disenfranchisement of votes cast by Alaska Natives would implicate 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).

The Standards for Elections, and for Requiring a New Election

9. It is fundamental 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 622, 626 (Alaska 1978) (internal quotation omitted). Thus, 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 v. Hickel*, 588 P.2d 256, 259 (Alaska 1978), *cert. denied*, 441 U.S. 907 (1979).

10. "*Boucher v. Bomhoff,* 495 P.2d 77 (Alaska 1972), held that 'malconduct,' as used in AS 15.20.540, means a significant deviation from statutorily or constitutionally prescribed norms." *Hammond*, 588 P.2d at 258. Under *Boucher*, "'malconduct' exists if

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if it is "significant" and to ascertain if it involves an element of scienter." *Hammond*, 588 P.2d at 259. "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." *Hammond*, 588 P.2d at 259.

13. 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). In *Hammond*, however, 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." *Hammond*, 588 P.2d at 259.

14. The *Hammond* Court also 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*, 588 P.2d at 259. Under such circumstances "minor irregularities and other good faith errors and omissions may be anticipated," although the Court did not "condone any such departures from lawful requirements." *Id.*

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15. From the evidence presented in *Hammond*, however, "the errors that occurred in this election appear to be of that nature [i.e., minor irregularities and other good faith errors and omissions]." *Hammond*, 588 P.2d at 259. "There were no such numerous serious violations as to permeate the entire election process, so as to require the extreme remedy of a new election." *Hammond*, 588 P.2d at 259. "Any malconduct on the part of election officials must be of sufficient magnitude "to change the results of the election.'" *Hammond*, 588 P.2d at 259, *quoting* AS 15.20.540 (footnote omitted).

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*, 588 P.2d at 260. "The 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." *Hammond*, 588 P.2d at 260.[4]

17. "[I]f the malconduct has a random impact on votes and those votes cannot be precisely identified," the *Hammond* Court held that "the contaminated votes must be

[4] 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.

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). "[I]f a specified number of votes should have been counted but are no longer available for counting, they should be added to the vote totals of each candidate in proportion to the votes received by the candidate in the precinct or district in which the votes would otherwise be counted." *Hammond*, 588 P.2d at 260 (footnote omitted). The *Hammond* 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." *Hammond*, 588 P.2d at 260.

Conclusions Specific to this Case

18. It is well established in Alaska that a party challenging an election must show that there was malconduct, fraud or corruption on the part of election officials sufficient to change the results of an election. *See Hammond v. Hickel*, 588 P.2d 256 and other cases cited above.

19. In this case, Plaintiffs have shown no evidence of fraud or corruption on the part of election officials.

20. Although Plaintiffs have provided some evidence that election officials made some mistakes, those mistakes were made in good faith and without bias. Further,

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the mistakes do not rise to the level of malconduct as that term is construed in Alaska. *See Boucher v. Bomhoff,* 495 P.2d 77, and other cases cited above.

21. In addition, even if the mistakes, taken in the aggregate, constituted malconduct, Plaintiffs have not shown that they were sufficient to change the results of the election in House District 40.

22. The right to vote—and to have that vote counted—is so fundamental that "errors 'solely on the part of election officials' will not invalidate ballots." *Finkelstein v. Stout*, 774 P.2d 786, *quoting Willis v. Thomas*, 600 P.2d 1079, and *citing Fischer v. Stout*, 741 P.2d 217. A court should therefore be "'reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own.....'" *Miller,* 245 P.3d at 870 (footnote omitted), *quoting Carr,* 586 at 626 (internal quotation omitted).

23. The ADL primary is a wide open primary, that is, a voter registered with any political party in Alaska, or those not affiliated with any political party, may vote in it. Even voters registered as Republicans may vote in the ADL primary.

24. In contrast, the Republican primary is a closed primary. Only those voters registered as Republicans, or those not affiliated with any political party, may vote in the Republican primary. Thus, Democrats, Libertarians, Greens, and Alaska Independents cannot vote in the Republican primary.

25. In the race for House District 40, only two candidates appeared either on the ADL ballot or on the Republican ballot: Dean Westlake and Ben Nageak. Both of

these candidates appeared on the ADL primary ballot. Neither of them appeared on the Republican primary ballot. In fact, no candidate for House District 40 appeared on the Republican ballot.

26. The primary election in House District 40 most similar in overall nature to the 2016 primary was the 2012 primary. This is based on the "undervote" percentage (2.13% in 2016, and 4.72% in 2012), as well as the percentage of voters who chose the ADL primary ballot (79.04% in 2016, and 78.47% in 2012).

27. In Shungnak, each of the 50 voters who went to the polls was given a ballot for the ADL primary, and a ballot for the Republican primary.

28. Although voters were given two ballots, one for the ADL primary, and one for the Republican primary, no voter was able to cast a vote for more than one candidate running for House District 40. They were able to cast only a single vote in the race for House District 40: either for Dean Westlake, or Ben Nageak.

29. The Division of Elections determined that, in the ADL primary in Shungnak, voters cast 47 votes for Westlake, and 3 votes for Nageak.

30. All 50 ballots cast in Shungnak in the ADL primary were validly cast by voters qualified to vote in that primary.[5]

[5] In contrast, of the 50 votes cast in Shungnak in the Republican primary, 25 of those were cast by voters who were not entitled to vote in that primary, because they were registered as Democrats or Alaska Independents. However, no party has challenged the results of either race that appeared on the Republican ballot in House District 40.

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31. Since the population of Shungnak is approximately 95% Alaska Native, on a statistical basis, 47 or 48 of those votes would have been cast by Alaska Natives. Not counting those 50 votes, or not counting any portion of them, would therefore improperly disenfranchise a number of Alaska Natives.

32. The Division of Elections properly counted all 50 votes cast in the ADL primary in Shungnak. The Division properly determined that Westlake received 47 of those votes, and Nageak 3.

33. Plaintiffs have failed to meet their burden for an election contest. Accordingly, judgment is rendered for Defendants Mallott and Bahnke and for Intervenor Westlake, and Plaintiffs' complaint in this matter is dismissed.

Dated this 4th 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 4th day of October, 2016.

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