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STATE OF ALASKA  
THIRD DISTRICT

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Counsel for Plaintiffs

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ROB ELKINS, ROBIN D. ELKINS, LAURA  
WELLES, LUKE WELLES, RICH THORNE,  
MARY P APKOTAK, HARRY P APKOTAK,  
SOPHIE TRACEY, MARIE TRACEY, BILL  
TRACEY, AMANDA KALEAK, and  
RANDOLPH RUEDRICH

Plaintiffs,

vs.

LT. GOVERNOR BYRON MALLOTT, 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-16-09015CI

**MOTION AND MEMORANDUM FOR  
LEAVE TO AMEND COMPLAINT**

COMES NOW Plaintiffs qualified voters in the State of Alaska by and through their attorneys, Holmes Weddle & Barcott, P.C., and pursuant to Alaska R. Civ. P. 15(a), hereby moves the Court for an order allowing Plaintiff to file its First Amended Complaint against Defendants Lt. Governor Byron Mallott and Josephine Bahnke, in their official capacities. A proposed order and the First Amended Complaint are lodged herewith.

MOTION AND MEMORANDUM FOR LEAVE  
TO AMEND COMPLAINT  
Page 1 of 4

*Rob Elkins, et al. v. Lt. Gov. Byron Mallott, et al*

3AN-16-09015CI

**HOLMES WEDDLE & BARCOTT, PC**  
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## FACTS

Plaintiffs filed their complaint in this action on or about September 16, 2016. As the undersigned has come to further develop this case, conduct discovery, and prepare for trial, it has become evidence that there are additional qualified voters to be named as Plaintiffs, and the location of at least one city alleged in the complaint required revision. These revisions are set forth in the First Amended Complaint in the interests of both parties and judicial economy. Plaintiff has not been dilatory in any fashion, but has now collected pertinent information to develop the allegations contained in the First Amended Complaint.

## LEGAL AUTHORITY

Alaska R. Civ. P. 15(a) provides that a party may amend its pleading by leave of the court and that such “leave shall be freely given when justice so requires.” Alaska Civil Rule 15(a) is identical to Federal Rule of Civil Procedure 15(a). The federal rule has been interpreted by the United States Supreme Court as follows:

Rule 15(a) declares that leave to amend “shall be freely given when justice so requires”; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be “freely given.”

*Foman v. Davis*, 371 U.S. 178, 182 (1962). The Alaska Supreme Court has “expressly” adopted this interpretation of Rule 15. *Bauman v. Day*, 942 P.2d 1130, 1132 (Alaska 1997). See also, *Estate of Thompson v. Mercedes Benz, Inc.*, 514 P.2d 1269, 1271 (Alaska 1973).

Plaintiffs submit that justice requires that leave to amend be granted. Because this case is still in the early stages of litigation, no prejudice will accrue to Defendants as a result

of this amendment. Furthermore, because this amendment is not due to any lack of diligence or bad motive on the part of Plaintiff, but rather due to further factual information that has come to light during the course of litigation or become ripe for prosecution, the leave requested should be "freely given."

**CONCLUSION**

Plaintiffs respectfully requests that the motion to amend their complaint be granted and that the proposed first amended complaint be deemed filed.

DATED this 23<sup>rd</sup> day of September, 2016, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.  
Attorneys for Plaintiffs

By: \_\_\_\_\_



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Stacey C. Stone  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 28<sup>th</sup> day of September, 2016, a true and correct copy of the foregoing document was served via:

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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.

**[PROPOSED] ORDER GRANTING LEAVE TO FILE  
FIRST AMENDED COMPLAINT**

Upon motion of the Plaintiffs for leave to file their First Amended Complaint, and for good cause shown, the Court hereby GRANTS the motion. The First Amended Complaint shall be deemed filed as of the date of this Order.

PROPOSED ORDER GRANTING LEAVE TO  
FILE FIRST AMENDED COMPLAINT  
Page 1 of 2

*Rob Elkins, et al. v. Lt. Gov. Byron Mallott, et al*  
Case No. 3AN-16-09015CI

SEP 26 2016

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
Hon. Andrew Guidi  
Superior Court Judge

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Plaintiffs,

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LT. GOVERNOR BYRON MALLOTT, 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-16-09015CI

**FIRST AMENDED COMPLAINT**

COMES NOW Plaintiffs, qualified voters in the State of Alaska, by and through their attorneys, Holmes, Weddle & Barcott, P.C. and sets forth their first amended complaint against Defendant Lt. Governor Byron Mallott and Josephine Bahnke, in their official capacities by stating and alleging as follows:

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## I. JURISDICTION AND VENUE

1. The Alaska Superior Court has jurisdiction under and by virtue of Alaska Stat. § 15.20.550 and other applicable law. The Third Judicial District at Anchorage is an appropriate venue under Alaska R. Civ. P. 3(c) and 4(d)(8).

## II. PARTIES

2. Plaintiffs are qualified voters pursuant to AS 15.20.540

3. Defendant Byron Mallott is the Lt. Governor of the State of Alaska. He is vested with the executive power of the State and is responsible for the faithful execution of the election.

4. Josephine Bahnke is the Director of the Alaska Division of Elections, which administers the elections.

## III. FACTS

5. The Primary Election took place in the State of Alaska on August 16, 2016.

6. There were several errors in the conduct of the election that likely changed the results of the election.

7. In the District 40 Precinct of Point Hope, there was only one election worker present in violation of Alaska State Law. In other voting locations only two election workers were present during voting hours.

8. In Shungnak, the poll workers provided every voter with both the Republican and Democrat ballots and of the 50 votes that were cast, all 50 voters apparently voted both the Republican and Democrat ballot. The voters were not required to cast questioned ballots.

9. In the District 40 Precinct of Kivalina, seven voters were allowed to vote both the Republican and Democrat ballot but were required to cast questioned ballots. While those questioned ballots were originally not counted by the regional and statewide review boards, they were counted during the recount.

10. In the District 40 Precinct of Browerville, voters were registered Republicans were required to vote questioned ballots if they asked to vote the Democrat ballot.

11. In the District 40 Precinct of Bettles, one voter was identified by an election worker as a Republican and handed a ballot, not given the choice of which ballot to vote.

12. In the District 40 Precinct of Buckland, there were numerous issues with special needs ballots. Only one voter indicated a party preference on the application, but all of the voters received the Democrat ballot, in spite of the fact that some of these voters are non-declared and eligible to vote a Republican ballot.

13. In the Barrow precinct, a voter who was at the time qualified to vote as a Democrat, was told that he could only cast a Republican ballot.

14. In addition to the foregoing, the voters, the representatives and the election workers committed numerous other errors in how the election was conducted

and how the accuracy and validity of the election are determined, including but not limited to, failing to properly complete the envelopes needed to establish the validity of these ballots and some information on the envelopes appears to have been modified, or revised. A single person claims to have acted as the representative for 10 of the special needs voters. The date the special needs ballots were issued was not listed, and likewise the date/time the ballots were returned. The date the signature of the representative signed the ballot was obscured on 11 of the 12 ballots. These special needs ballots were not cast in accordance with the requirements of the Division of Elections.

15. The special needs ballots were not returned to Nome until six days after the election.

16. The Precinct of Buckland had more special needs ballots voted than Palmer or Wasilla despite the population disparity.

17. In Nome, during the regional absentee and questioned ballot review board session, there was an issue when four absentee ballots were misplaced. The workers in Nome conferred with Division officials in Juneau in private, and upon their return they indicated they had been instructed to randomly select four questioned ballots and count them as absentee ballots.

#### IV. COUNT I – VIOLATION OF ALASKA STATUTE § 15.10.120

18. Plaintiffs reallege and incorporate by reference the allegations set forth above.

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19. AS 15.10.120 provides that there shall be appointed in each precinct an election board composed of at least three qualified voters.

20. In at least one precinct, the election supervisor failed to ensure there were at least three qualified voters comprising the election board.

21. With only one election board worker, the integrity of the election is at question and thus, plaintiff is entitled to relief.

**V. COUNT II – VIOLATION OF ALASKA STATUTE § 15.15.080**

22. Plaintiffs reallege and incorporate by reference the allegations set forth above.

23. Pursuant to State law the polls shall be open from 7:00 AM until 8:00 PM.

24. During the time that the polls are open, special needs ballots are likewise required to be returned during those hours.

25. In at least one precinct, the date of issuance of special needs ballots was not recorded and the date and time the ballot were returned was not recorded this making it impossible to determine if the ballots were cast prior to the close of voting.

**VI. COUNT III – VIOLATION OF ALASKA STATUTE § 15.15.210**

26. Plaintiffs reallege and incorporate by reference the allegations set forth above.

27. A voter may only be questioned as not qualified to vote under AS 15.05.

28. Election workers improperly challenged the right of Republican voters who sought to vote the other ballot thus depriving voters of their right to vote for the candidate of their choice.

29. Plaintiffs are entitled to relief based on the disenfranchisement of one class of voters.

#### **VII. COUNT IV – VIOLATION OF ALASKA STATUTE § 15.15.215**

30. Plaintiffs reallege and incorporate by reference the allegations set forth above.

31. Pursuant to AS 15.20.207 and AS 15.15.215, the questioned ballots are to be kept separate.

32. In at least one case, ballots were misplaced and/or lost.

33. As a result of the missing ballots, four questioned ballots were taken from the questioned group and wrongfully comingled with other ballots, thus improperly allowing votes which may be invalid to be counted.

#### **VIII. VIOLATION OF THE 14<sup>TH</sup> AMENDMENT TO THE UNITED STATES CONSTITUTION**

34. By allowing certain voters to cast more than one ballot and allowing those multiple ballots to be counted and by failing to otherwise properly conduct the election the Division of Elections has deprive other voters in District 40 of the equal protection guaranteed by the 14<sup>th</sup> Amendment to the United States Constitution.

**IX. PRAYER FOR RELIEF**

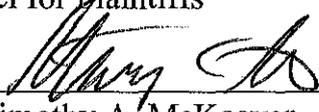
WHEREFORE, Plaintiffs pray for the following relief:

1. An order directing that the votes properly and legally cast in the August 16, 2016 primary election in House District 40 be properly tabulated and the correct result be certified.
2. In the alternative for an order declaring that because of the many manifest errors in the conduct of the August 16, 2016 primary election in House District 40, that the true winner cannot be determined and ordering that a new election conducted in accordance with law be conducted.
3. Costs and attorneys' fees pursuant to any applicable statute or authority;  
and
4. Any other relief this Court deems just and appropriate.

DATED this 23<sup>rd</sup> day of September, 2016, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.  
Counsel for Plaintiffs

By: \_\_\_\_\_

  
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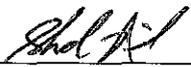
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