

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

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

**FILED IN OPEN COURT**

Date: 9.29.16

Clerk: DW

Plaintiffs, )

v. )

Case No.: 3AN-16-09015CI

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, )

and )

DEAN WESTLAKE, )

Intervenor-Defendant. )

**OPPOSITION OF STATE DEFENDANTS TO PLAINTIFFS'  
REVISED MOTION TO AMEND COMPLAINT**

The defendants, Lieutenant Governor Byron Mallott and Director of the Division of Elections Josephine Bahnke, oppose the plaintiffs' pending motion to amend their complaint in this case. The plaintiffs downplay the significance of the amendment, claiming that the revisions are needed because "in preparing for trial, it has become evident 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."<sup>1</sup> But the

<sup>1</sup> Revised Motion and Memorandum for Leave to Amend Complaint, at 2.

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2 addition of the new plaintiffs does not appear to be due to the discovery of “additional  
3 qualified voters.” Rather, based on the pleadings filed in the past few days and  
4 testimony at trial, this appears to be an attempt to avoid withdrawal of the plaintiff  
5 critical to subject matter jurisdiction in this case—Rep. Nageak, the defeated  
6 candidate—without first adding the number of voters who could also invoke jurisdiction  
7 in lieu of a defeated candidate—“ten qualified voters.”<sup>2</sup> But Rep. Nageak was already  
8 removed as a plaintiff when the First Amended Complaint was filed. And Rep. Nageak  
9 appears to believe that he is no longer a party to the case, and his attorneys indicated the  
10 same to the parties and the Court (albeit temporarily). Because this is an election contest  
11 subject to statutory subject matter jurisdiction requirements and strictly construed  
12 deadlines, if Rep. Nageak is no longer a party to this case, the Court no longer has  
13 subject matter jurisdiction. Adding plaintiffs to provide a sum of “ten qualified  
14 voters”—or seeking to add Rep. Nageak back in, after his previous withdrawal—would  
15 not revive jurisdiction; rather it would create a new case that is filed too late.  
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### 18 **Factual Background**

19 This case was filed as an election contest on September 19, 2016, by  
20 Benjamin Nageak, who represents House District 40 in the Alaska State Legislature,  
21 and four other plaintiffs. *See* Appendix A (Complaint).<sup>3</sup> As described below, contesting  
22 an election is a statutorily created right subject to strict deadlines and precise subject  
23

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25 <sup>2</sup> AS 15.20.540(a).

26 <sup>3</sup> The plaintiffs dated the complaint and served the defendants on September 16,  
but the complaint is docketed as filed on September 19.

1  
2 matter jurisdiction standards: an election contest may be filed only by “[a] defeated  
3 candidate or 10 qualified voters”<sup>4</sup> and must be brought “within 10 days after the  
4 completion of the state review.”<sup>5</sup> Rep. Nageak qualified as a plaintiff and brought the  
5 case within the allowable window.  
6

7 Only a week later, a motion and an amended complaint was filed that did not  
8 include Rep. Nageak as a plaintiff, either in the caption or in the body of the complaint.  
9 See Appendix B (First Amended Complaint). While the first plaintiff in the Complaint  
10 caption was “Benjamin N. Nageak,” his name was missing altogether from the caption  
11 in the First Amended Complaint. App. A, B. While the first sentence of the Complaint  
12 began, “Comes now Plaintiff Benjamin N. Nageak, and other qualified voters . . .,” the  
13 first sentence of the First Amended Complaint was “Comes now Plaintiffs, qualified  
14 voters in the State of Alaska . . .” App. A, B. This change appeared throughout the  
15 complaint, including in the description of the parties, the case name in the footer on  
16 every page, and the remedy sought. In short, in this pleading filed by his attorneys,  
17 Rep. Nageak was no longer a party.  
18

19 Rep. Nageak’s attorneys clearly viewed the pleading to have this meaning. One  
20 of his attorneys sent an email to the defendants’ attorneys on Saturday, September 24,  
21 the day after the pleading was filed, stating that he had “heard rumors that the director  
22 of the division is telling people that because we filed a proposed amended complaint in  
23 the superior court which removed Mr. Nageak as a plaintiff, that he has dropped out of  
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25  
26 <sup>4</sup> AS 15.20.540(a).

<sup>5</sup> AS 15.20.550.

1  
2 the race”—a rumor that was not in fact true. *See* App. C. The attorney denied that  
3 Rep. Nageak had dropped out of the race, because “Mr. Nageak is still the named party  
4 in the recount appeal [the separate case in the Alaska Supreme Court].” *Id.* He asked the  
5 defendants’ attorneys to “confirm that the division does not consider Mr. Nageak to  
6 have withdrawn any claim that the election and the recount was improper.” *Id.*  
7

8 The defendants’ attorney responded that she thought it was fair “to consider that  
9 Mr. Nageak has withdrawn his election contest claim by virtue of his withdrawal from  
10 the election contest lawsuit.” *See* App. D “Indeed, I cannot immediately imagine an  
11 alternative way to look at that development.” *Id.* She added that “[t]he ability of the new  
12 voter plaintiffs to pursue the election contest in his stead will doubtless be addressed by  
13 the superior court next week.” *Id.*  
14

15 An hour later, Rep. Nageak’s attorney sent a second email stating, “[t]o minimize  
16 confusion, Monday we will file a revised motion to amend in Superior Court which  
17 includes the ten voters and Rep. Nageak as parties to the election challenge case.” *Id.*  
18

19 As promised, Rep. Nageak’s attorney filed a pleading the following Monday,  
20 September 26, entitled Notice of Filing Revised Motion and Memorandum for Leave to  
21 Amend Complaint. *See* App. E. This pleading did not *minimize* confusion, however. It  
22 stated that the plaintiffs’ original motion to amend the complaint had “sought only to  
23 modify the original Complaint to include additional plaintiffs who were discovered to  
24 be qualified voters after the date that the original complaint was filed.” *Id.* But, it  
25 explained, in its First Amended Complaint, the plaintiffs “inadvertently omitted”  
26

Benjamin Nageak from the caption and list of parties. *Id.* This pleading stated that  
*Nageak v. Mallot*  
Defendants Opp to Revised Motion to Amend

1  
2 Rep. Nageak “remains a party to this case . . . .” The accompanying motion and  
3 “revised” amended complaint added back all of the earlier references to Rep. Nageak.

4 The defendants called Rep. Nageak as a witness on Wednesday, September 28,  
5 and asked him if he knew that his attorneys had dropped him from the case. He replied  
6 affirmatively. When asked if he wanted to be part of this lawsuit, he stated that he did  
7 not.

8  
9 **Legal Analysis**

10 Subject matter jurisdiction is granted by the statute, and relies on two elements:  
11 the proper plaintiff<sup>6</sup> and a timely case.<sup>7</sup> Elections normally do not fall within the scope  
12 of judicial review;<sup>8</sup> rather, an election contest is strictly statutory, and the statute must  
13 be strictly observed and construed.<sup>9</sup> The statutory requirements are considered  
14 jurisdictional.<sup>10</sup> The failure of a contestant to an election to strictly comply with the  
15 statutory requirements is fatal to his right to have the election contested.<sup>11</sup> And if a  
16 complaint initiating an election contest is defective as to any of the jurisdictional  
17 requirements, it cannot be amended by adding the missing element after the time for  
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21 <sup>6</sup> AS 15.20.540

22 <sup>7</sup> AS 15.20.550.

23 <sup>8</sup> *Crouch v. Howard*, 23 So.3d 663, 664 (Ala. 2009).

24 <sup>9</sup> *Washington v. Hill*, 960 So.2d 643, 646 (Ala. 2006); *Donaghey v. Attorney*  
25 *General*, 584 P.2d 557, 559 (Ariz. 1978) (en banc); *Dale v. Greater Anchorage Area*  
26 *Borough*, 439 P.2d 790, 792 (Alaska 1968).

<sup>10</sup> *Forbes v. Bell*, 816 S.W. 2d 716, 718 (Tenn. 1991).

<sup>11</sup> *Dale v. Greater Anchorage Area Borough*, 439 P.2d at 792.

1  
2 commencing the contest has expired.<sup>12</sup> Thus, for example, a plaintiff in an election  
3 contest who did not meet the jurisdictional requirement that he name the contestee as a  
4 defendant was not permitted to amend his complaint to add the correct defendant after  
5 the five-day deadline for an election contest had passed.<sup>13</sup>  
6

7 Rep. Nageak dropped out of the case on Friday, when he served the motion and  
8 first amended complaint on the parties, and delivered the pleadings to the clerk's office  
9 for filing. The amended complaint filed Friday, by both its own terms and by the  
10 reasons stated in the motion, indicated that Mr. Nageak was not a party to the case any  
11 longer. This was verified by the email of his attorney, who expressed concern that  
12 anyone would think that his elimination as a plaintiff might mean that he was no longer  
13 interested in holding the seat should the other plaintiffs prevail. App. C. His attorney  
14 represented in that email that Rep. Nageak was a party "until the motion is granted," but  
15 that is legally incorrect. A plaintiff can withdraw without an order of the Court simply  
16 by giving notice—which the amended complaint certainly accomplished—until an  
17 adverse party files an answer or a motion for summary judgment, neither which had  
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20 <sup>12</sup> *Washington v. Hill*, 960 So.2d at 646 (citing *Groom v. Taylor*, 178 So. 33  
21 (1937)); see also *State v. Kivett*, 177 S.W.2d 551 (Tenn. 1944) (holding that the election  
22 contest statute deadline, which required all grounds of the election contest to be filed  
23 within 20 days after the election, applied to amendments as well as to the original  
24 complaint); *Kitt v. Holbert*, 248 P.25 (Ariz. 1926) ("[A] statement of contest in an  
25 election contest may not be amended, after the time prescribed by law for filing such  
26 contest as expired, by adding thereto averments of a jurisdictional nature."); *Turner v.  
Hamilton*, 80 P.664 (Wyo. 1905) (holding that plaintiff in an election contest could not  
add new causes of action where the amendment was not filed within the time required  
by statute for instituting election contests).

<sup>13</sup> *Crouch v. Howard*, 23 So.3d at 664.

1  
2 occurred in this case. Alaska R. Civ. P. 41(a)(1).<sup>14</sup> The amendment to the complaint was  
3 also self-executing because a plaintiff may file an amended complaint without leave of  
4 the court anytime before the answer is filed. Alaska R. Civ. P. 15(a). As a result, the  
5 plaintiffs' "revised amended complaint" was actually a second amended complaint,  
6 which requires leave of the court. Alaska R. Civ. P. 15(a). Although Rep. Nageak's  
7 attorney later claimed that he still remained a party to the case, his attorney has not been  
8 entirely candid about the status of Rep. Nageak, as suggested by the attorney's claim  
9 that his elimination from the complaint in several different places, including the  
10 description of the parties, was "inadvertent." App. E. Additionally, Rep. Nageak  
11 testified that he was aware that his attorneys had dropped him from the case and that he  
12 does not in fact wish to be part of the case.  
13  
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15 This Court lost subject matter jurisdiction over the case when the plaintiffs' filed  
16 their first amended complaint and Rep. Nageak withdrew as a plaintiff. This jurisdiction  
17 cannot later be revived, should the Court be inclined to allow additional "qualified  
18 voters" to join the case, because those plaintiffs have missed the deadline for filing an  
19 election contest. And there is no room for leniency on deadlines for election contests. It  
20 is "well established, both in Alaska and in other jurisdictions, that election law filing  
21

22 <sup>14</sup> Alaska Rule 41(1) is nearly the same as Federal Rule of Civil Procedure  
23 41(a)(1)(A), which has been interpreted not to require a court order when a plaintiff  
24 wishes to be dismissed as a plaintiff. *See, e.g., Thorpe v. Scarne*, 599 F.2d 1169, 1171  
25 n.1 (2nd Cir. 1979) (holding that no action by the court is necessary to effectuate a  
26 dismissal; the notice of voluntary dismissal automatically terminates the lawsuit); *Cruz-  
Mendex v. Hospital General Castaner, Inc.* 637 F.Supp.2d 73, 75 (D. Puerto Rico 2009)  
("Since Rule 41(a)(1)(A) permits dismissal as of right, it requires only notice to the  
court, not a motion, thus the court's permission is not required.").

1  
2 deadlines are to be strictly enforced.”<sup>15</sup> “Strict compliance is the rule, and substantial  
3 compliance the rare exception.”<sup>16</sup> “Because filing dates are mandatory, ‘substantial  
4 compliance is not sufficient, absent substantial confusion or ‘impossibility.’”<sup>17</sup>

5  
6 Alternatively, if the Court determines that Rep. Nageak has not dropped out of  
7 the case and jurisdiction remains intact, the Court should deny the motion. This is  
8 necessary to prevent the plaintiffs’ attorneys from simply waiting until the motion to  
9 add additional plaintiffs is granted to give notice that Rep. Nageak is no longer a  
10 plaintiff. And the additional plaintiffs serve no other purpose; they are figurehead  
11 plaintiffs with no allegations of any interest other than their voter status.

### 12 Remedy Sought

13  
14 The State defendants take the position that Rep. Nageak is no longer a plaintiff  
15 and that therefore the Court has lost subject matter jurisdiction over this case. New  
16 plaintiffs attempting to join the case—or Rep. Nageak seeking to re-join the case after  
17 his previous withdrawal—cannot restore jurisdiction because the deadline for an  
18 election contest is long past. Nevertheless, the State asks the Court to wait to make a  
19 ruling to this effect until it issues its final decision on the merits. Without alternative  
20 bases for decision, the State and voters might face the expense, confusion, and  
21 disruption of a special election, should the Supreme Court reverse on jurisdictional  
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23  
24 <sup>15</sup> *State v. Jeffery*, 170 P.3d 226, 234 (Alaska 2007) (quoting *Falke v. State*, 717 P.2d 369, 373 (Alaska 1986)).

25 <sup>16</sup> *Id.*

26 <sup>17</sup> *Jeffery*, 170 P.3d at 234 (quoting *Silides v. Thomas*, 559 P.2d 80, 82 (Alaska 1977)).

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grounds and remand for a decision on the merits.

Alternatively, if the Court finds that Rep. Nageak is still a plaintiff, it should deny the motion to add new plaintiffs because it serves no purpose other than to allow Rep. Nageak to withdraw later without disturbing subject matter jurisdiction, an attempt to manipulate jurisdictional requirements.

DATED: September 29, 2016.

JAHNA LINDEMUTH  
ATTORNEY GENERAL

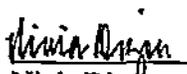
By:   
Margaret Paton-Walsh (0411074)  
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Certificate of Service

This is to certify that on this date true and correct copies of the foregoing document is being served via hand delivery and e-mail to the following:

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Counsel for Plaintiff

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,

vs.

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,

Case No. \_\_\_\_\_

Defendants.

COMPLAINT

COMES NOW Plaintiffs Benjamin N. Nageak, Rob Elkins, Robin D. Elkins,  
Laura Welles and Luke Welles by and through their attorneys, Holmes, Weddle &  
Barcott, P.C. and for their complaint against Defendant Lt. Governor Byron Mallot  
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. Plaintiff Benjamin N. Nageak, a registered Democrat, appeared on the Primary Election Day ballot for reelection to the Alaska State House District 40, and at the conclusion of the most recent recount was behind his challenger by eight votes.

3. The remaining plaintiffs are qualified voters pursuant to AS 15.20,540

4. Defendant Byron Mallot 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.

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

### III. FACTS

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

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

8. In the District 40 Precinct of Point Lay, 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.

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9. 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 were apparently voted both the Republican and Democrat ballot. The voters were not required to cast questioned ballots

10. 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.

11. 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.

12. 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.

13. 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.

14. In addition to the foregoing, the voters, the representatives and the election workers failed 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

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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. Plaintiff realleges and incorporates by reference the allegations set forth above.

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.

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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. Plaintiff realleges and incorporates 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. Plaintiff realleges and incorporates 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 fully Republican voters who sought to vote the other ballot thus depriving voters of their right to vote for the candidate of their choice. .

29. Plaintiff is entitled to relief based on the disenfranchisement of one class of voters.

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

30. Plaintiff realleges and incorporates 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 Benjamin N. Nageak and qualified voters 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

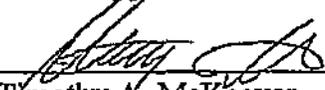
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the true winner cannot be determined and ordering that a new election conducted in accordance with law be conducted.

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 16<sup>th</sup> day of September, 2016, at Anchorage, Alaska.

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

By:   
Timothy A. McKeever  
Alaska Bar No. 7611146  
Stacey C. Stone  
Alaska Bar No. 1005030

**CERTIFICATE OF SERVICE**

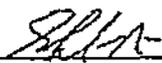
The undersigned certifies that on this 16<sup>th</sup> day of September, 2016, a true and correct copy of the foregoing document was served via:

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Counsel for Plaintiffs

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

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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

**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:

## 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.

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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.

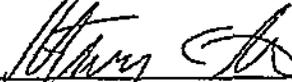
IX. PRAYER FOR RELIEF

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: 

Timothy A. McKeever  
Alaska Bar No. 7611146  
Stacey C. Stone  
Alaska Bar No. 1005030

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 23<sup>rd</sup> day of September, 2016, a true and correct copy of the foregoing document was served via:

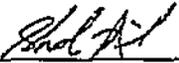
- E-Mail
- U.S. Mail
- Facsimile
- Hand-Delivery

to:

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Margaret Paton-Walsh  
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By: \_\_\_\_\_

  
Legal Assistant  
Holmes Weddle & Barcott, P.C.

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**From:** Timothy A. McKeever [mailto:Tmckeever@hwb-law.com]  
**Sent:** Saturday, September 24, 2016 12:51 PM  
**To:** Bakalar, Elizabeth M (LAW); Paton-Walsh, Margaret A (LAW)  
**Cc:** Stacey C. Stone; Molly A. Haas  
**Subject:** Confusion

Libby and Mags,

We have heard rumors that the director of the division is telling people that because we filed a proposed amended complaint in the superior court which removed Mr. Nageak as a plaintiff, that he has dropped out of the race. Of course that is not true. Mr. Nageak is still the named party in the recount appeal. The fact that we have asked to amend the complaint in the Superior Court case to name ten qualified voters who are pursuing the litigation does not mean that Mr. Nageak has withdrawn from the race. And of course until the motion is granted he remains a party in both actions. Please confirm that the division does not consider Mr. Nageak to have withdrawn any claim that the election and the recount was improper.

---

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**Paton-Walsh, Margaret A (LAW)**

---

**From:** Timothy A. McKeever <Tmckeever@hwb-law.com>  
**Sent:** Saturday, September 24, 2016 4:16 PM  
**To:** Paton-Walsh, Margaret A (LAW); Bakalar, Elizabeth M (LAW)  
**Cc:** Stacey C. Stone; Molly A. Haas; Grace, Joanne M (LAW); Fox, Laura F (LAW)  
**Subject:** RE: Confusion

Mags,

To minimize confusion, Monday we will file a revised motion to amend in Superior Court which includes the ten voters and Rep. Nageak as parties to the election challenge case. As stated earlier today, Mr. Nageak does intend to continue to pursue the recount appeal in the Supreme Court.

Tim

**From:** Paton-Walsh, Margaret A (LAW) [<mailto:margaret.paton-walsh@alaska.gov>]  
**Sent:** Saturday, September 24, 2016 3:20 PM  
**To:** Timothy A. McKeever; Bakalar, Elizabeth M (LAW)  
**Cc:** Stacey C. Stone; Molly A. Haas; Grace, Joanne M (LAW); Fox, Laura F (LAW)  
**Subject:** RE: Confusion

Tim,

I'm not sure what the source of this rumor is, but the director of elections is free to discuss developments in the litigation with anyone she chooses.

Moreover, I think it is fair for the division to consider that Mr. Nageak has withdrawn his election contest claim by virtue of his withdrawal from the election contest lawsuit. Indeed, I cannot immediately imagine an alternative way to look at that development. The ability of the new voter plaintiffs to pursue the election contest in his stead will doubtless be addressed by the superior court next week.

You mention that Mr. Nageak is still the named party in the recount appeal. Will you represent to us that Mr. Nageak still intends to pursue that appeal to the Supreme Court?

Thanks.

Mags Paton Walsh  
Chief Assistant Attorney General  
Special Litigation Section  
Alaska Department of Law  
1031 W. 4<sup>th</sup> Avenue, Suite 200  
Anchorage, AK 99501-1994  
Tel: (907) 269-5275

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Counsel for Plaintiffs

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

BENJAMIN N. NAGEAK, ROB ELKINS,  
ROBIN D. ELKINS, LAURA WELLES,  
LUKE WELLES, RICH THORNE, MARY  
PAPKOTAK, HARRY PAPKOTAK,  
SOPHIE TRACEY, MARIE TRACEY,  
BILL TRACEY, AMANDA KALEAK,  
and RANDOLPH RUEDRICH

Plaintiffs,

v.

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

NOTICE OF FILING REVISED MOTION AND MEMORANDUM FOR  
LEAVE TO AMEND COMPLAINT  
AND REVISED FIRST AMENDED COMPLAINT

NOTICE OF FILING REVISED MOTION AND  
MEMORANDUM FOR LEAVE TO AMEND  
COMPLAINT AND REVISED FIRST AMENDED  
COMPLAINT  
Page 1 of 3

*Benjamin N. Nageak, et al. v. Lt. Gov. Byron  
Mallott, et al*  
Case No. 3AN-16-09015CI

Appendix E  
Page 1 of 3

Plaintiffs have filed a revised motion for leave to amend its complaint and a revised First Amended Complaint against Defendants Lt. Governor Byron Mallott and Josephine Bahnke, in their official capacities. Plaintiffs' original motion, dated September 23, 2016, sought only to modify the original Complaint to include additional plaintiffs who were discovered to be qualified voters after the date that the original complaint was filed and to correct an error. However, in its First Amended Complaint, Plaintiffs inadvertently omitted Benjamin Nageak from the caption and list of parties. As Mr. Nageak remains a party to this case, Plaintiffs request that the Court accept its revised motion and First Amended Complaint in lieu of those filed on September 23, 2016.

DATED this 26th day of September, 2016, at Anchorage, Alaska.

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

By: 

Timothy A. McKeever  
Alaska Bar No. 7611146  
Stacey C. Stone  
Alaska Bar No. 1005030

NOTICE OF FILING REVISED MOTION AND  
MEMORANDUM FOR LEAVE TO AMEND  
COMPLAINT AND REVISED FIRST AMENDED  
COMPLAINT  
Page 2 of 3

*Benjamin N. Nageak, et al. v. Lt. Gov. Byron  
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**Appendix E**  
**Page 2 of 3**

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**CERTIFICATE OF SERVICE**

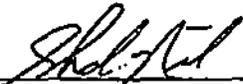
The undersigned certifies that on this 26 day of  
September, 2016, a true and correct copy of the  
foregoing document was served via:

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to:

Elizabeth Bakalar  
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By:   
Legal Assistant  
Holmes Weddle & Barcott, P.C.

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Page 3 of 3

*Benjamin N. Nageak, et al. v. Lt. Gov. Byron  
Mallott, et al*  
Case No. 3AN-16-09015CI

Appendix E  
Page 3 of 3