

From: mnardin@brenalaw.com

To: ANC\_civil@akcourts.us

Cc: matt.singer@hklaw.com, lee.baxter@hklaw.com, cori.mills@alaska.gov, margaret.paton-

Subject: 3AN-20-05901CI - Defendant Vote Yes for Alaska's Fair Share's Response To Plaintiffs' Motion to

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Robin O. Brena, Esq.  
Jon S. Wakeland, Esq.  
Brena, Bell & Walker, P.C.  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Telephone: (907) 258-2000  
E-Mail: [rbrena@brenalaw.com](mailto:rbrena@brenalaw.com)  
[jwakeland@brenalaw.com](mailto:jwakeland@brenalaw.com)

FILED IN DISTRICT COURT  
STATE OF ALASKA, THIRD DISTRICT

MAY 11 2020

Clerk of the Trial Courts

By \_\_\_\_\_ Deputy

Attorneys for Defendant Vote Yes for  
Alaska's Fair Share

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

RESOURCE DEVELOPMENT COUNCIL )  
FOR ALASKA, INC.; ALASKA TRUCKING )  
ASSOCIATION, INC.; ALASKA MINERS )  
ASSOCIATION, INC.; ASSOCIATED )  
GENERAL CONTRACTORS OF ALASKA: )  
ALASKA CHAMBER; ALASKA SUPPORT )  
INDUSTRY ALLIANCE, )

Plaintiffs, )

v. )

KEVIN MEYER, in his official capacity )  
as Lt. Governor of the State of Alaska; )  
GAIL FENUMIAL, in her capacity as Director )  
of the Alaska Division of Elections; the )  
STATE OF ALASKA, DIVISION OF )  
ELECTIONS; and VOTE YES FOR )  
ALASKA'S FAIR SHARE, )

Defendants. )

Case No. 3AN-20-05901CI

BRENA, BELL &  
WALKER, P.C.  
810 N STREET, SUITE 100  
ANCHORAGE, AK 99501  
PHONE: (907) 258-2000  
FAX: (907) 258-2001

FAIR SHARE'S RESPONSE TO MOTION TO CHARACTERIZE  
*RDC v. Meyer*, No. 3AN-20-05901 CI

May 11, 2020  
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**#1**  
**DEFENDANT VOTE YES FOR ALASKA'S FAIR SHARE'S RESPONSE  
TO PLAINTIFFS' MOTION TO CHARACTERIZE CASE AS NON-ROUTINE  
AND SET EXPEDITED DISCOVERY AND AUGUST 2020 TRIAL DATE,  
JOINDER IN THE STATE OF ALASKA'S CROSS-MOTION TO DISMISS,  
NOTICE OF INTENTION TO FILE A MOTION TO DISMISS BY  
FRIDAY, MAY 15, 2020, AND COMMENT ON RELEVANT AUTHORITY**

Vote Yes for Alaska's Fair Share ("Fair Share"), by and through its counsel, Brena, Bell & Walker, P.C., agrees this is not a routine case but does not agree this case merits discovery or a trial. Instead, this case should be fully and quickly resolved through motion practice based on the Plaintiffs' failure to state a claim upon which relief may be granted.

**I. NON-ROUTINE CHARACTERIZATION**

Rather than challenge the Fair Share Act initiative on the merits, the Plaintiffs and their allies seek to use this Court to disenfranchise 39,000 Alaskan voters and to bog down the Fair Share Act initiative's proponents in expedited discovery and trial during the heart of the campaign season. Plaintiffs ask this Court to permit this extraordinary intrusion into the initiative process and into the constitutional rights of all citizens to political speech based upon the thinnest legal pretext possible and without stating a claim upon which relief may be granted.

Plaintiffs do not allege a single signature supporting the Fair Share Act initiative was obtained fraudulently. Plaintiffs misinterpret the law governing "per signature" compensation for signature gatherers. Plaintiffs do not advance allegations that support a violation of the law, if it is properly applied. Moreover, as the State made clear, Plaintiffs do not advance a credible legal theory that would justify this Court disenfranchising 39,000 Alaskan voters or limiting citizens' constitutional rights to engage in political speech through the initiative process.

BRENA, BELL &  
WALKER, P.C.  
810 N STREET, SUITE 100  
ANCHORAGE, AK 99501  
PHONE: (907)258-2100  
FAX: (907)258-2001

Instead, Plaintiffs seek to impose an unstated duty on the lieutenant governor that he does not have -- to obtain a remedy the statute does not provide and thereby disenfranchise 39,000 signatures verified as proper by Alaskan voters. Plaintiffs' actions are an exemplar of why Alaska should join the 30 states that have enacted statutory protections against this sort of strategic lawsuit against public participation ("SLAPP") through a coalition of industry interests using the court system to distract, drain, and otherwise harass a campaign supporting a certified ballot initiative.

Apparently, Plaintiffs believe the lieutenant governor should conduct some type of formal adjudication concerning the certifying affidavits. Such a formal adjudication would apparently involve an investigation by the lieutenant governor into each certifying affidavit, some sort of evidentiary hearing (that apparently Plaintiffs believe they should have the right to participate in), and the issuance of factual and legal rulings by the lieutenant governor on each certifying affidavit.

Not surprisingly, Plaintiffs do not offer any details into the boundaries of the lieutenant governor's new role in the initiative process or how that new role would burden the initiative process. Plaintiffs similarly do not offer any guidance into the lieutenant governor's new role in investigating misdemeanors. Nor do Plaintiffs offer any guidance as to the treatment of the perilous constitutional issues associated with disenfranchising 39,000 proper voter signatures based upon the manner of compensation for the signature gatherers. For that matter, Plaintiffs ignore that the underlying law expressly provides for a misdemeanor remedy against the wrongdoer rather than against the voter. In short, Plaintiffs offer no insight or justification into

BRENA, BELL &  
WALKER, P.C.  
810 N STREET, SUITE 100  
ANCHORAGE, AK 99501  
PHONE: (907)258-2100  
FAX: (907)258-2001

their attempt to use this Court in an unprecedented fashion to actively harass the Fair Share Act initiative.

## **II. JOINDER AND NOTICE OF INTENT TO FILE**

The State has rightfully moved to dismiss the Plaintiffs' baseless claims as failing to state a claim upon which relief can be granted. Fair Share joins the State's Cross-Motion to Dismiss, dated April 30, 2020, and intends to file a separate motion to dismiss on additional grounds by Friday, May 15, 2020. Fair Share intends, through its motion to dismiss, to supplement the State's position and raise additional arguments based on the underlying legislative history and constitutional rights of citizens to engage in political speech.

Accordingly, Fair Share respectfully requests this Court to stay any discovery in this case prior to ruling upon the motions to dismiss. As the State also points out, Plaintiffs have not bothered to sue the parties most relevant to their allegations, and those allegations implicate an express criminal penalty the Plaintiffs have no authority to enforce.

## **III. NORTH WEST CRUISESHIP**

Plaintiffs have offered a cursory argument in their Reply, dated May 7, 2020, and Fair Share now addresses that single cited authority to demonstrate Plaintiffs' fundamental failure to present a legitimate case before this Court.

Plaintiffs cite to *North West Cruiseship Association v. State*,<sup>1</sup> for the bare proposition "the Division of Elections has invalidated otherwise valid subscriber signatures on a petition

BRENA, BELL &  
WALKER, P.C.  
810 N STREET, SUITE 100  
ANCHORAGE, AK 99501  
PHONE: (907)258-2000  
FAX: (907)258-2001

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<sup>1</sup> 145 P.3d 573 (Alaska 2006).

because of circulator neglect” and “the same remedy is available for circulator misconduct.”<sup>2</sup> *North West Cruiseship* also involved a coalition of industry groups suing to invalidate a certified ballot initiative to enact taxation and regulatory changes upon the industry. The plaintiffs attacked the signatures supporting the initiative on four grounds, none of which apply here.<sup>3</sup> The Alaska Supreme Court rejected all of *North West Cruiseship* plaintiffs’ arguments for invalidating more signatures and affirmed the superior court’s grant of summary judgment against them. In relying on the two pages of signatures that the State and the courts agreed should be disqualified for lacking the required “paid by” information, the Plaintiffs here fail to recognize they are standing upon the narrow exception to the broad rule against “wholesale dis[en]franchisement of qualified electors”<sup>4</sup> that *North West Cruiseship* embodies. Indeed, the case weighs heavily toward dismissal of their complaint.

The superior court’s order in *North West Cruiseship* (adopted and attached by appendix in the Alaska Supreme Court’s decision) contains a thorough discussion of the requirements of AS 15.45.130 and how they should be construed “only as broadly as is necessary to address the specific error” and “should avoid an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong.”<sup>5</sup> The specific error the superior court considered with regard to the two disqualified pages of signatures was the failure to comply with the last of the eight express substantive requirements for the affidavits under

BRENA, BELL &  
WALKER, P.C.  
810 N STREET, SUITE 100  
ANCHORAGE, AK 99501  
PHONE: (907)238-2000  
FAX: (907)238-2001

<sup>2</sup> Plaintiffs’ Reply in Support of Motion to Characterize Case at 2-3 (May 7, 2020).

<sup>3</sup> *North West Cruiseship*, 145 P.3d at 573, 576-79 (Alaska 2006).

<sup>4</sup> *Id* 578 (quoting *Fischer v. Stout*, 741 P.2d 217, 225 (Alaska 1987)).

<sup>5</sup> *Id* at 587.

AS 43.56.130: “whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.”<sup>6</sup> The parties agreed the two pages in question lacked the required “paid by” information.

Plaintiffs here have not claimed any violation of the eighth requirement or any of the other seven substantive requirements of AS 43.56.130. They do not allege any of the affidavits in this case have any formal flaw like the two pages disqualified in *North West Cruiseship*. Instead, Plaintiffs ask this Court to read a new requirement into the statute well beyond the formal requirement of ensuring certifying affidavits have been filed.

This is the *diametric opposite* of the narrow construal for which *North West Cruiseship* stands. Furthermore, the provision Plaintiffs choose to wield in the name of disenfranchisement is AS 15.45.110(c), a restriction on the method of compensating signature gatherers with an express criminal remedy under AS 15.45.110(e). As presented in Fair Share's motion to dismiss, Plaintiffs' interpretation of this restriction as applying to methods of compensation other than per-signature is both contrary to the legislative intent of the statute and clearly unconstitutional under current precedent. But even if AS 15.45.110(c) had actually been violated, invalidating tens of thousands of certified signatures is the not the remedy for that violation.

The Alaska Supreme Court's reasoning in rejecting the first of *North West Cruiseship* plaintiffs' arguments speaks to this issue. The Court held:

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<sup>6</sup> AS 15.45.130(8).

Although the Division's method of auditing the signatures may have been somewhat imprecise, in that a subscriber's voting registration status could only be verified as of the date the petitions were filed, the audit was nevertheless reasonable given that there was no statutory requirement that each signature be dated at the time of the audit. Our analysis would be different had the legislature affirmatively required the signatures to be individually dated. But here there is no question that the Division fully complied with what the statutes and its own regulations required at the time. We further note that the petition booklets were prepared with several safeguards, including (1) a warning that anyone who signs the petition knowing that he or she is not a qualified voter is guilty of a misdemeanor; (2) directions to the petition circulators that each subscriber must be a registered Alaskan voter; and (3) a certification affidavit from the petition circulator attesting, under penalty of perjury, that the signatures in each petition booklet were drawn from persons "who were qualified voters on the date of the signature." The training materials provided to petition circulators also emphasized that the subscribers must be registered voters. Given these additional safeguards, we conclude that the 1,202 signatures were properly counted.<sup>7</sup>

The same safeguards the Court relied upon above are present in this case, and the State had no duty or power to review the veracity of the affidavits required under AS 15.45.130. Plaintiffs are deeply mistaken in trying to use the principles of *North West Cruiseship* to construe additional requirements and remedies in the statutes.

#### IV. CONCLUSION

Regardless of how this case is characterized, Fair Share urges the Court to stay any pre-trial deadlines or discovery until the dispositive motions have been decided in order to minimize the waste of resources caused by these claims.

BRENA, BELL &  
WALKER, P.C.  
810 N STREET, SUITE 100  
ANCHORAGE, AK 99501  
PHONE: (907)258-2000  
FAX: (907)258-2001

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<sup>7</sup> *North West Cruiseship*, 145 P.3d at 576-77.  
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RESPECTFULLY SUBMITTED this 11th day of May, 2020.

BRENA, BELL & WALKER, P.C.  
Attorneys for Defendant Vote Yes for Alaska's  
Fair Share

By /s/ Robin O. Brena  
Robin O. Brena, Alaska Bar No. 8410089  
Jon S. Wakeland, Alaska Bar No. 0911066  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000/Fax (907) 258-2001  
Email: [rbrena@brenalaw.com](mailto:rbrena@brenalaw.com)  
[jwakeland@brenalaw.com](mailto:jwakeland@brenalaw.com)

**Certificate of Service**

I hereby certify that a true and correct  
copy of the foregoing document  
was served by e-mail upon  
the following this 11<sup>th</sup> day of May 2020.

**Attorneys for RDC**

Matthew Singer, Esq.  
Lee C. Baxter, Esq.  
Holland & Knight, LLP  
420 L Street, Suite 400  
Anchorage, AK 99501  
Phone: (907) 263-6300  
Fax: (907) 263-6345  
E-mail: [matt.singer@hklaw.com](mailto:matt.singer@hklaw.com)  
[lee.baxter@hklaw.com](mailto:lee.baxter@hklaw.com)

State of Alaska  
Department of Law  
c/o Margaret Paton-Walsh  
1031 W. 4<sup>th</sup> Avenue, Suite 200  
Anchorage, Alaska 99501  
E-mail: [Margaret.paton-walsh@alaska.gov](mailto:Margaret.paton-walsh@alaska.gov)

By: /s/ Melody Nardin  
Melody Nardin

State of Alaska  
Department of Law  
c/o Cori Mills  
P.O. Box 110300  
Juneau, Alaska 99811-0300  
E-mail: [cori.mills@alaska.gov](mailto:cori.mills@alaska.gov)

BRENA, BELL &  
WALKER, P.C.  
810 N STREET, SUITE 100  
ANCHORAGE, AK 99501  
PHONE: (907) 258-2000  
FAX: (907) 258-2001



From: mnardin@brenalaw.com

To: ANC\_civil@akcourts.us

Cc: matt.singer@hklaw.com, lee.baxter@hklaw.com, cori.mills@alaska.gov, margaret.paton-

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**BRENA, BELL  
& WALKER**

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From: mnardin@brenalaw.com  
To: ANC\_civil@akcourts.us  
Cc: matt.singer@hklaw.com, lee.baxter@hklaw.com, cori.mills@alaska.gov, margaret.paton-  
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Melody Nardin | mnardin@brenalaw.com<mailto:mnardin@brenalaw.com> | 907-258-2000

\* ONE document: Defendant Vote Yes for Alaska's Fair Share's Response To Plaintiffs' Motion to Characterize Case as Non-Routine And Set Expedited Discovery and August 2020 Trial Date, Joinder in The State of Alaska's Cross-Motion to Dismiss, Notice of Intention to File A Motion to Dismiss By Friday, May 15, 2020, And Comment on Relevant Authority

\* Total Pages: 8

Melody Nardin  
Legal Assistant  
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810 N Street, Suite 100  
Anchorage, AK 99501  
Tel: (907) 258-2000<tel:(907)%20258-2000>  
Fax: (907) 258-2001<tel:(907)%20258-2001>

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