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5 **UNITED STATES DISTRICT COURT**  
 6 **DISTRICT OF ALASKA**

7 JOE MILLER, )  
 8 ) Civil Action No:  
 9 *Plaintiff,* ) \_\_\_\_\_  
 10 v. )  
 11 LIEUTENANT GOVERNOR CRAIG )  
 12 CAMPBELL, in his official capacity; )  
 and the STATE OF ALASKA, )  
 13 DIVISION OF ELECTIONS, )  
 14 *Defendants.* )  
 \_\_\_\_\_ )

15 **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

16 Plaintiff, Joe Miller, hereby alleges as follows:

17 **Introduction**

18 1. The Director of the Division of Elections (hereafter, the “Director”) has  
 19 announced publicly that she is changing the rules for this election after the voting has  
 20 been completed. Instead of counting write-in ballots in the manner clearly and  
 21 unambiguously set forth by the legislature in the Alaska Statutes, the Division director  
 22 has instead decided to adopt her own alternative—and highly subjective--approach,  
 23

1 thereby effectively ignoring the provisions of state law with which she apparently  
2 disagrees.

3 2. On November 8, 2010, just 36 hours before the ballot counting was to start for  
4 write-in ballots, the state released heretofore unknown ballot counting polices. This  
5 new policy is attached as Exhibit A to this Complaint. This eleventh hour change  
6 comes *after* all the votes in this election already have been cast, thereby making it  
7 impossible for voters to take these rules into account when casting their ballots.  
8 Furthermore, changing the rules for counting votes after voting has concluded  
9 unavoidably raises the specter of manipulation, favoritism, and fundamental unfairness.  
10 Even if the Director's new policy were substantively valid, it cannot be applied  
11 retroactively to an election in which the ballots already have been cast.  
12

13  
14 3. Despite the fact that the Alaska Division of Elections (hereafter, the "Division")  
15 is scheduled to begin counting write-in ballots in less than 24 hours, the details for the  
16 new standards the Director intends to apply, just released in written form, fail to provide  
17 guidance on "voter intent" and lack a statutory, constitutional and regulatory basis.  
18 Further, by issuing an edict a day before the count is to begin is a disturbing lack of  
19 transparency regarding the fundamental rules governing how a substantial portion of the  
20 ballots cast in this election will be counted and effectively shields the electoral process  
21 from public scrutiny and underscores the illegitimacy of this last-minute change.  
22  
23

**Jurisdiction**

1  
2 4. This Court may exercise federal-question jurisdiction, *see* 28 U.S.C. § 1331,  
3 over Count One, which arises under the Elections Clause of the U.S. Constitution, *see*  
4 U.S. Const., Art. I, § 4, cl. 1; and Count Two, which arises under the Equal Protection  
5 Clause of the U.S. Constitution, *see* U.S. Const., amend. XIV.

6  
7 5. This Court may exercise supplemental jurisdiction, *see* 28 U.S.C. § 1367(a), over  
8 Count Three, which arises under the Alaska Election Code, *see* AS §§ 15.15.360(a)(10),  
9 (a)(11), and (b); and Count Four, which arises under the Alaska Administrative  
10 Procedure Act, *see* Alaska Stat. §§ 15.15.010, 44.62.190, 44.62.300(1).

11  
12 6. This Court may exercise declaratory judgment jurisdiction, *see* 28 U.S.C. § 2201,  
13 over all Counts in this Complaint because an actionable, justiciable controversy now  
14 exists between Plaintiff and Defendants.

**Venue**

15  
16 7. Venue is proper in the United States District Court for the District of Alaska  
17 because all defendants reside in Alaska, and a substantial portion of the events giving  
18 rise to the underlying claims occurred in Alaska. 28 U.S.C. §§ 1391(b)(1), (b)(2).

19  
20 8. This case is properly filed in this Division pursuant to D.Ak. LR 3.3(a); *see also*  
21 28 U.S.C. § 81A.

**Parties**

1  
2 9. Plaintiff Joe Miller is the Republican nominee for U.S. Senate, a citizen and  
3 registered voter of the State of Alaska. He is at least 30 years of age and is a natural-  
4 born U.S. citizen. On August 31, 2010, Mr. Miller won the primary election to become  
5 the Republican nominee in the 2010 general election (hereafter, “the Election”) for the  
6 office of U.S. Senator. He also cast a vote for the office of U.S. Senator in the 2010  
7 general election.  
8

9 10. Defendant Craig Campbell, Lieutenant Governor of Alaska, is a resident of  
10 Alaska. In addition to protecting the state seal, he is statutorily required to “control and  
11 supervise the division of elections,” AS § 15.10.105(a), and “administer state election  
12 laws,” *id.* § 44.19.020(1).  
13

14 11. Defendant, the State of Alaska, Division of Elections (hereafter, the “Division”),  
15 is a department of the State of Alaska. Its Director is the “chief elections officer of the  
16 state,” AS § 15.80.010(3); “act[s] for the lieutenant governor in the supervision of  
17 central and regional election offices . . . and the administration of all state elections,” *id.*  
18 § 15.10.105(a); *see also id.* § 15.15.010; and serves at the lieutenant governor’s  
19 pleasure, *id.* § 15.10.105(a). The director may “adopt regulations under [Alaska Stat.]  
20 [§] 44.62 necessary for the administration of state elections.” *Id.* § 15.15.010.  
21

22 12. Defendant Alaska Division of Elections (hereafter, the “Division”) is a state  
23 entity established under Alaska Stat. § 15.10.105(a). Defendant Campbell, as  
24

1 Lieutenant Governor, “control[s] and supervise[s]” the Division, and the Director acts  
2 on his behalf. *Id.*

3 **The Division’s Eleventh Hour Decision to Change**  
4 **the Rules Governing the Election**

5 13. According to the Unofficial Election Results on the Division’s website, 203,169  
6 Alaska citizens cast votes in the 2010 general election in the race for U.S. Senator. Of  
7 those, 83,201 votes—or 40.95% of the total ballots cast—were write-in votes.

8 14. Alaska law sets forth clear and unambiguous requirements for counting write-in  
9 votes.

10  
11 a. Alaska law clearly specifies, “In order to vote for a write-in candidate, the  
12 voter *must write in the candidate’s name* in the space provided and fill in the oval  
13 opposite the candidate’s name in accordance with (1) of this subsection.” AS  
14 § 15.15.360(a)(10) (emphasis added). This provision clearly requires that a voter must  
15 include a “candidate’s name” on his ballot in order for a write-in vote to be counted.  
16 The statute does not permit a write-in vote to be counted if a voter includes only a  
17 “reasonable approximation” or a “close variation” of a candidate’s name.

18  
19 b. Alaska law further provides, “A vote for a write-in candidate, other than a  
20 write-in vote for governor and lieutenant governor, shall be counted if the oval is filled  
21 in for that candidate and *if the name, as it appears on the write-in declaration of*  
22 *candidacy, of the candidate or the last name of the candidate is written in the space*

1 *provided.*” AS § 15.15.360(a)(11) (emphasis added). This requirement is even more  
2 explicit—a write-in vote may not be counted if there is any deviation between the name  
3 of the candidate as written in on the ballot and the candidate’s name “as it appears on  
4 the write-in declaration of candidacy.”

5 15. Alaska law goes on to specify, “The rules set out in this section are mandatory  
6 and there are no exceptions to them. A ballot may not be counted unless marked in  
7 compliance with these rules.” AS. § 15.15.360(b) (emphasis added).  
8

9 16. Notwithstanding these clear, unambiguous, and “mandatory” requirements, the  
10 Director, for the Division and the State, announced publicly—following the Election—  
11 that she likely will establish her own subjective “standards” to govern the Division’s  
12 counting of write-in ballots.  
13

14 a. A November 6, 2010 article in the *Wall Street Journal* entitled,  
15 “Candidate Argues Spelling Should Count in Alaska Vote” discusses “election officials’  
16 plan[s] to accept misspellings of Lisa Murkowski’s name on write-in ballots.”  
17 According to the article, election officials stated that “[t]hey plan to count misspellings  
18 of registered candidates’ names in their favor, as long as the voter’s intent is clear.” The  
19 article further states that the Director is basing this new policy on two Alaska cases “in  
20 which ballots were counted for a candidate when voter intent was clear, even if the ballot  
21 wasn’t filled out correctly,” even though “[t]hose cases didn’t involve write-in ballots.”  
22

23 A true and complete copy of this article is attached to the Complaint as Exhibit B.

1           b.     A November 4, 2010 article in the *Anchorage Daily News* entitled,  
2 "Write-Ins to Be Counted Sooner Than Expected" states, "The state hasn't been clear on  
3 what's allowed. Minor misspellings of Murkowski's name are probably OK, but simply  
4 writing 'Lisa M,' for example, could be an issue." A true and complete copy of this  
5 article is attached to the Complaint as Exhibit C.

6           c.     A November 4, 2010 article from the Associated Press State & Local  
7 Wire entitled, "Miller Attorney Wants to Ensure Law's Upheld" states, "The state's top  
8 election official has said ballot counters will use discretion in determining voter intent,  
9 possibly allowing misspelled names to count." A true and complete copy of this article  
10 is attached to the Complaint as Exhibit D.

11           d.     A November 4, 2010 article from the *Associated Press* entitled,  
12 "Murkowski Acts Like Victor, Though Questions Linger" states, "Lt. Gov. Craig  
13 Campbell, who oversees elections said this week that ballot counters would debate over  
14 ballots on which there are spelling errors before determining whether they should count."  
15 A true and complete copy of this article is attached to the Complaint as Exhibit E.  
16 Previously, in a press release, the Lt. Governor stated that misspellings would not be  
17 counted and that state law would be followed. *See* Exhibit F.

18           e.     On November 8, 2010, just 36 hours before the vote count was to start, the  
19 State, through the Director and Division, issued a written policy that purports to apply a  
20

1 subjective standard allowing the Director to determine, at her own whim, what votes will  
2 be counted and what votes will not be counted. *See* Exhibit A.

3 17. As discussed above, Alaska statutes do not allow election officials to count a  
4 write-in ballot unless the candidate's name is written on the ballot "as it appears on the  
5 write-in declaration of candidacy." AS § 15.15.360(a)(11). There "are no exceptions"  
6 to this rule, and any ballots that do not satisfy this standard "may not be counted." *Id.*  
7 § 15.15.360(b). Thus, write-in ballots with misspellings are statutorily invalid, and  
8 election officials lack the authority to decide nevertheless to count them.  
9

10 **COUNT ONE—ELECTIONS CLAUSE**  
11 **(U.S. Const., Art. I, § 4, Cl. 1)**

12 18. Plaintiff re-allege and incorporate by reference the foregoing Paragraphs 1  
13 through 17, as if set forth fully herein.

14 19. Defendants' decision to override state law by establishing a policy whereby  
15 write-in ballots with misspellings can be counted violates the Elections Clause of the  
16 U.S. Constitution, which provides, "The Times, Places and Manner of holding Elections  
17 for Senators and Representatives, shall be prescribed in each State *by the Legislature*  
18 thereof." U.S. Const., Art. I, § 4, cl. 1 (emphasis added).  
19

20 20. The Elections Clause specifically bestows authority to regulate the "Manner of  
21 holding Elections for Senators" to the Alaska legislature, not state executive branch  
22 officials such as the Lieutenant Governor or Director. Defendants' attempt to  
23



1 effectively nullify various provisions of Alaska Stat. § 15.15.360 by establishing their  
2 own standards for counting write-in ballots therefore is unconstitutional.

3 21. Plaintiff respectfully request injunctive and declaratory relief against this  
4 impending violation of the Elections Clause.

5 **COUNT TWO—EQUAL PROTECTION CLAUSE**  
6 **(U.S. Const., amend XIV)**

7 22. Plaintiff re-allege and incorporate by reference the foregoing Paragraphs 1  
8 through 21, as if set forth fully herein.

9 23. The U.S. Supreme Court has held that a policy directing election officials simply  
10 to attempt to ascertain “the intent of the voter” when deciding whether, or how, to count  
11 ballots is “unobjectionable as . . . a starting principle,” but is not constitutionally  
12 sufficient. *Bush v. Gore*, 531 U.S. 98, 105. The Equal Protection Clause requires state  
13 officials to establish much more “specific standards” and “uniform rules” in order to  
14 prevent “the standards for accepting or rejecting contested ballots” to vary “within a  
15 single county from one [ ]count team to another.” *Id.* at 106.  
16  
17

18 24. Defendants have adopted the same type of policy that the Supreme Court already  
19 has declared constitutionally inadequate. Rather than implementing the clear, specific,  
20 and uniform standards for counting write-in votes set forth in Alaska Stat. § 15.15.360,  
21 Defendants and their counting boards apparently will be attempting to divine for  
22 themselves the “intent of the voter” based on vague, amorphous, subjective—and  
23

1 unspecified—criteria. This quixotic quest will result in the arbitrary and disparate  
2 treatment of write-in ballots in clear violation of the U.S. Constitution.

3 25. Plaintiff respectfully request injunctive and declaratory relief against this  
4 impending violation of the Equal Protection Clause.

5 **COUNT THREE— ALASKA ELECTION CODE**  
6 **(AS § 15.15.360)**

7 26. Plaintiff re-allege and incorporate by reference the foregoing Paragraphs 1  
8 through 25, as if set forth fully herein.

9 27. Defendants’ decision to override state law by establishing a policy whereby  
10 write-in ballots with misspellings can be counted is *ultra vires* and invalid. This policy,  
11 which would authorize the counting of certain ballots on which the candidate’s name is  
12 *not* written as it appears on a write-in declaration of candidacy, is flatly contrary to  
13 Alaska Stat. § 15.15.360(a)(10), (a)(11), and (b), and therefore is unenforceable.

14 28. Plaintiff respectfully request injunctive and declaratory relief against this  
15 impending violation of the Administrative Procedure Act’s substantive prohibitions.  
16

17 **COUNT FOUR— ALASKA ADMINISTRATIVE PROCEDURE ACT**  
18 **(AS §§ 44.62.020, 44.62.030, 44.62.300)**

19 29. Plaintiff re-allege and incorporate by reference the foregoing Paragraphs 1  
20 through 28, as if set forth fully herein.

21 30. The Administrative Procedure Act defines the term “regulation” as including:  
22

1 every rule, regulation, order, or standard of general application or the  
2 amendment, supplement, or revision of a rule, regulation, order, or  
3 standard adopted by a state agency to implement, interpret, or make  
specific the law enforced or administered by it, or to govern its procedure,  
except one that relates only to the internal management of a state agency.

4 AS § 44.62.640(a)(3). The definition specifies that the term includes ‘manuals,’  
5 ‘policies,’ ‘instructions,’ ‘guides to enforcement,’ ‘interpretative bulletins,’  
6 ‘interpretations,’ and the like, that have the effect of rules, orders, regulations, or  
7 standards of general application.” *Id.* “[W]hether a regulation, regardless of name, is  
8 covered by this chapter depends in part on whether it affects the public or is used by the  
9 agency in dealing with the public.” *Id.*

11 31. The new policy issued on November 8, 2010 constitutes a regulation that was  
12 required to be issued in conformance with the APA. The Administrative Procedure Act  
13 specifies that an agency wishing to promulgate or amend a regulation must publish a  
14 formal public notice in a newspaper of general circulation at least 30 days before it  
15 takes effect, AS § 44.62.190(a)(1), along with “the reason for the proposed action” and  
16 certain other pieces of information about the proposal, *id.* §§ 44.62.190(d),  
17 44.62.200(a).

20 32. A regulation may not be adopted unless and until the public has had the  
21 opportunity “to present statements, arguments, or contentions in writing,” if not orally,  
22 regarding the proposal. AS § 44.62.210(a). The agency is required to “consider all  
23

1 factual, substantive, and other relevant matter presented to it before adopting, amending,  
2 or repealing a regulation.” *Id.*

3 33. If an agency purports to promulgate a regulation without satisfying these  
4 requirements, it may be struck down in court. AS § 44.62.300(1)-(2).

5 34. Defendants’ decision to ignore the clear, unambiguous, and uniform standard for  
6 counting write-in votes set forth in Alaska Stat. § 15.15.360, and instead impose a new  
7 standard—36 hours before the ballot count—that authorizes the counting of write-in  
8 ballots containing misspellings, or in which the candidate’s name is not as it appears on  
9 the write-in declaration of candidacy, qualifies as the promulgation of a new regulation,  
10 or amendment of an existing regulation, under AS § 44.62.640(a)(3).

11 35. Defendants did not give advance public notice of this regulation; publish the  
12 required information regarding it; or solicit or consider public feedback, as required by  
13 Alaska Stat. § 44.62.190(a)(1), (d); § 44.62.200; and § 44.62.210(a). The regulation  
14 therefore is invalid and unenforceable.

15 36. Plaintiff respectfully request injunctive and declaratory relief against this  
16 violation of the procedural provisions of the Administrative Procedure Act.

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18  
19  
20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiff pray for judgment in their favor and against Defendants as  
22 follows:

1 1. For an immediate, preliminary and permanent injunction enjoining Defendants to  
2 comply with state law as mandated by the Legislature and restraining Defendants from  
3 counting or otherwise accepting as valid any write-in ballots in which the name of the  
4 candidate is spelt incorrectly, or on which the name of the candidate is not written as it  
5 appears on a write-in declaration of candidacy;

6 2. For a declaratory judgment that:

7 a. the Elections Clause of the U.S. Constitution prohibits Defendants from  
8 enacting election provisions inconsistent with legislative mandates, and in this case,  
9 from counting or otherwise accepting as valid any write-in ballots in which the name of  
10 the candidate is spelled incorrectly, or on which the name of the candidate is not written  
11 as it appears on a write-in declaration of candidacy;

12 b. Defendants' new policy of attempting to divine the "intent of the voter"  
13 from write-in ballots with misspellings is so vague and amorphous as to violate the  
14 Equal Protection Clause of the U.S. Constitution, and it will over-count protest votes;

15 c. Defendants' decision to count, and accept as valid, write-in ballots in  
16 which the name of the candidate is spelt incorrectly, or on which the name of the  
17 candidate is not written as it appears on a write-in declaration of candidacy, is *ultra*  
18 *vires*, contrary to AS §§ 15.15.360, and unenforceable; and  
19  
20  
21

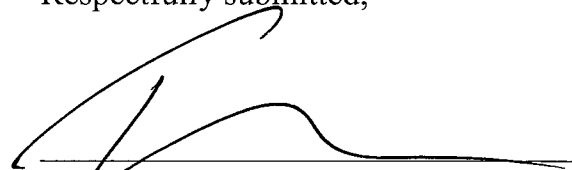
1 d. Defendants' policy is unenforceable under Alaska Stat. § 44.62.300  
2 because it was not promulgated pursuant to the procedures set forth in the  
3 Administrative Procedure Act.

4 3. For costs and attorneys' fees, if any, as allowable by applicable law; and

5 4. For such other and further relief as this Court deems just and appropriate.  
6

7 Dated this 8th day of November, 2010.

8 Respectfully submitted,

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