Thomas V. Van Flein
Clapp, Peterson, Van Flein,
Tiemessen & Thorsness LLC
711 H St., Suite 620
Anchorage, Alaska 99501-3454
Phone: (907) 272-9272
Facsimile: (907) 272-9586
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

JOE MILLER, *Plaintiff*, v. LIEUTENANT GOVERNOR CRAIG CAMPBELL, in his official capacity; STATE OF ALASKA, DIVISION OF ELECTIONS, *Defendants*.	Civil Action No: _____

MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

This case revolves around one simple question: does the Lieutenant Governor, through the Division of Elections (collectively "the state" or "the DOE"), have to comply with clear legislative mandates and applicable provisions of the U.S. Constitution, or may the state instead substitute and implement--at the last minute--its own vague and entirely subjective

policy preferences? With 83,201 write-in votes cast in the 2010 general election,[1] Alaska stands on the precipice of identifying who its citizens have elected as their next United States Senator. Inexplicably, just as the vote count is set to start, the state has discarded the clear, unambiguous, and uniform statutory rules for counting write-in votes that the Alaska Legislature enacted—an objective standard that promotes fairness across the board. In its stead, the state has essentially repealed the legislatively established objective ballot counting standard and has now ordered state officials to attempt to cobble together an amorphous new and, as of 4:00 p.m. November 8, 2010, just-written standard. Attached as Exhibit A is a newly minted state policy issued for the first time 36 hours before the ballot count is to start. Establishing new rules for counting votes after those votes already have been cast unavoidably carries the taint of manipulation, favoritism, and unfairness. When those new rules are directly contrary to a state legislature's clear statutory directives, or are based on an impossibly vague, general, and subjective standard, that taint degenerates into unconstitutionality. Preserving a fair electoral process and ensuring that every valid vote is counted is fundamental to democracy. The rule of law has to be followed. The laws cannot be changed—literally in this case—***after*** the votes have been cast and just 36 hours before the count. An injunction is needed to prevent state action that is clearly unconstitutional.

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[1] *See* Alaska Division of Elections, *State of Alaska 2010 General Election: November 2, 2010 Unofficial Results* (Nov. 3, 2010), *available at* http://soaelections.gci.net/data/results.pdf.

I. Summary of Argument

The Alaska Legislature has established clear, unambiguous, and uniform rules for counting write-in votes. AS § 15.15.360(a)(10) states, "In order to vote for a write-in candidate, the voter ***must write in the candidate's name*** in the space provided and fill in the oval opposite the candidate's name." (Emphasis added). This provision clearly requires a voter to include a "candidate's name" on his ballot in order for a write-in vote to be counted; the statute does not provide that a "reasonable approximation" or a "close variation" or "something that could be interpreted as the candidate's name" is sufficient.

The next section, AS § 15.15.360(a)(11), elaborates and clarifies upon this requirement, stating, "A vote for a write-in candidate . . . shall be counted if the oval is filled in for that candidate and ***if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.***" AS § 15.15.360(a)(11) (emphasis added). This provision is even more explicit—a write-in vote may not be counted if there is any deviation between the name of the candidate as written on the ballot and the candidate's name "as it appears on the write-in declaration of candidacy." In short, this legislative mandate provides a bright line objective standard—and for good reason—it prohibits voting manipulation.

The legislature then emphasized that state officials have no discretion in enforcing these requirements. Under AS 15.15.360(b)—the "No Exceptions Provision"—the legislature could not have been any clearer:

> The rules set out in this section are ***mandatory*** and there are ***no exceptions*** to them. A ballot ***may not be counted*** unless marked in compliance with these rules.

AS § 15.15.360(b) (emphasis added). The legislative mandate could not have been more explicit. The totality of the law is that a write-in vote "may not be counted" unless it contains a candidate's name "as it appears" on that candidate's write-in declaration of candidacy. *Id.* § 15.15.360(a)(10), (a)(11), & (b). "No exceptions." These statutes do not leave room for write-in ballots with misspellings, protest votes, or variation's on a candidate's name, to be counted.

In a stunning departure from the law, and these clear statutory directives, the Lieutenant Governor and Director publicly announced—after Election Day—that they will be counting at ballots in which the candidate's name is misspelled. *See* Affidavit of Thomas V. Van Flein, Ex. 1 – 4. Less than 36 hours before the counting of write-in votes commences, Defendants suddenly released a new state policy. (Exhibit A). But even this new policy fails to detail any specific criteria the state intends to employ to determine which misspellings will count. In other words, what ballots will count and what won't apparently will be determined in the exclusive and subjective determination of one person—the director of elections. This will in turn make one person a "super voter" purporting to re-cast votes capriciously and whimsically. Far from determining "voter intent" (a subjective standard rejected by legislature—"no exceptions") all that will be accomplished is determining state's intent. This rife for injustice.

This Court should enjoin Defendants from implementing their new policy for counting write-in votes, and direct them to implement the requirements of AS §§ 15.15.360(a)(10), (a)(11), and (b) instead, because the new policy would violate both the U.S. Constitution and

Alaska law. ***First***, the policy violates the Elections Clause of the U.S. Constitution, which provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State ***by the Legislature*** thereof." U.S. Const., Art. I, § 4, cl. 1 (emphasis added). The Elections Clause specifically bestows authority to regulate the "Manner of holding Elections for Senators" to the Alaska legislature, not state executive branch officials such as the Lieutenant Governor or Director. *See McPherson v. Blacker*, 146 U.S. 1 (1892); *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). Defendants' attempt to effectively nullify various provisions of AS § 15.15.360 by establishing their own subjective standards for counting write-in ballots therefore violates the Elections Clause. Further, since the new subjective standard is in fact "an exception" expressly barred by the legislature, the Defendants have usurped state law and violated the Constitutional Elections Clause.

Second, Defendants' brand new policy, issued 36 hours before the vote count, is so vague and amorphous that it violates the Equal Protection Clause, because it does not contain sufficiently specific standards to ensure that comparable write-in ballots are treated the same. Defendants have declared publicly that, when a write-in ballot contains an unrecognized name not reflected on any candidate form, they will attempt (somewhat mystically) to divine the "intent of the voter" in order to determine the candidate for whom that ballot should be counted. The U.S. Supreme Court has held, however, that a policy directing election officials simply to attempt to ascertain "the intent of the voter" when deciding whether, or how, to count ballots is "unobjectionable as . . . a starting principle," but is not constitutionally sufficient.

Bush v. Gore, 531 U.S. 98, 105. The Equal Protection Clause requires state officials to establish much more "specific standards" and "uniform rules" in order to prevent "the standards for accepting or rejecting contested ballots" to vary "within a single county from one []count team to another." *Id.* at 106. Defendants' new policy, therefore, is unconstitutional. There will be 15 election teams. Each team will be free to reject or accept any write-in vote based on what they believe the voter intended. It is entirely possible that a team at Table 1 could reject a ballot that has "Moochiski" written in, but Table 8 may count that as "Murkowski." Such inconsistency is *per se* unconstitutional.

Third, the new policy makes no provision for the many voters who cast protest votes. Prior to the election, people commented on radio stations and in the comment sections in blogs and newspaper stories that they would deliberately incorrectly write-in a variation of "Murkowski" as a protest. They did so knowing that Murkowski was spending hundreds of thousands of dollars on a "spelling bee" campaign, replete with wrist bands, pencils and tattoos, all to educate the voters on proper spelling. Why was this done? Because even Murkowski had read the law and knew that it required proper spelling---"No exceptions." So protest voters were trying to send a message to the candidate. The state has failed to create any guideline or standard that would account for the intent of the voter who intentionally cast a protest vote. To the contrary, the state is indicating that it will now count a protest vote, deliberately cast with a misspelling, as a vote ***for*** Murkowski. This effectively nullifies the protest and falsely inflates the vote for the write-in candidate. In short, the state has become a super-voter and will override voter intent and recast votes for the candidate the state chooses. This is at core a

fraudulent abuse of the electoral process and severely undermines our democratic process. It makes a mockery of the voting process—allowing voters to believe they cast a protest vote, but then overriding that vote by state fiat.

Fourth, Defendants' new policy is *ultra vires* and invalid because it is contrary to the clear, unambiguous, and uniform provisions of the Alaska Election Code for counting write-in ballots. *See* AS. § 15.15.360(a)(10), (a)(11), and (b). ***Fifth,*** the policy is unenforceable because it qualifies as a "regulation" under the Alaska Administrative Procedures Act ("APA"), *see* AS § 44.62.640(a)(3), but advance public notice of the policy was not given, legally required details about it were not published, and the public had no opportunity to have the Division consider its comments, *cf. id.* §§ 44.62.190(a)(1), (d), 44.62.200(a), 44.62.210(a). And, it is Black Letter law that a regulation has to be consistent with the enabling statute. In this case, the new policy/regulation is completing contrary to the statute (which provides for "no exceptions") and is therefore invalid substantively, even if the regulation had gone through the public notice process.[2]

This Court should enjoin Defendants' clear violations of the U.S. Constitution and Alaska law. Plaintiff Miller will suffer irreparable injury, as both a candidate for U.S. Senate

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[2] Once an agency regulation is found to exist but has failed to comply with the enactment provisions of the APA, the regulation is deemed invalid and unenforceable. "Since the policy falls within the meaning of a 'regulation,' it was invalid for failure to comply with the APA." *Gilbert v. State,* 803 P.2d 396 (Alaska 1990); *Wickersham v. State Commercial Fisheries Entry Comm'n,* 680 P.2d 1135, 1140 (Alaska 1984) ("When a policy is invalidly promulgated under the APA, generally the appropriate remedy is to invalidate the offending policy until the procedures required by the APA are observed.").

and a registered voter who cast a vote in the U.S. Senate race in this election, if Defendants are permitted to proceed with counting write-in ballots under an illegal standard. As the preceding discussion demonstrates, he has a strong likelihood of success on the merits. Furthermore, both the balance of equities and the public interest weigh strongly in favor of ensuring that the write-in ballots are counted lawfully, properly, according to legally mandated standards and within constitutional parameters.

II. DISCUSSION

A. Defendants' New Policy for Analyzing Write-In Votes Violates the U.S. Constitution's Elections Clause

The Elections Clause of the Constitution requires that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives *shall* be prescribed in each State *by the Legislature thereof*." U.S. Const. art. I, § 4, cl. 1 (emphasis added). The Constitution thus delegates the power to regulate elections for the United States Senate not to state agencies or state courts, but to the state legislature. The Division's new policy, which relies on dicta from inapposite state judicial decisions to subvert a clear command of the state legislature, thus violates the Elections Clause.

1. The Elections Clause Requires That "the Legislature"—Not a State Agency or the Judiciary—Set Election Standards.

The text of the Elections Clause is clear—the manner of election of U.S. Senators "shall" be prescribed by the state "Legislature." U.S. Const. Art. I, § 4, cl. 1. The Supreme Court has emphasized that the term "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for purposes of

interpretation. A Legislature was then the representative body which made the laws of the people.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). Other constitutional provisions specifically address the states, *see*, *e.g.*, U.S. Const art. I, § 10, cl. 1-3 ("No State shall" engage in various specified activities); the people of the states, *see, e.g.*, *id.* art. I, § 2, cl. 1 (members of House of Representatives chosen "by the People of the several States"); or the executive and judicial branches of the states, *see*, *e.g.*, *id.* art. VI, cl. 3 (requiring constitutional oath for "Members of the several State Legislatures, *and all executive and judicial Officers*" (emphasis added)). By contrast, the Elections Clause delegates authority only to the state "Legislature," and "[t]here can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states." *Hawke*, 253 U.S. at 227.

By delegating the authority for regulating federal elections only to state legislatures, the Elections Clause prevents usurpation of that authority by the state judiciary or executive, or even by the state constitution. As the Supreme Court explained in *McPherson v. Blacker*, 146 U.S. 1 (1892), delegations of authority to the "Legislature" rather than to the "State" "operat[e] as a limitation upon the state in respect of ***any*** attempt to circumscribe the legislative power." *Id.* at 25 (emphasis added). If the Constitution had simply delegated authority to each "State," then the state legislature could wield the authority only "in the absence of any provision in the state constitution in that regard." *Id.* But by granting the authority to regulate the manner of Senate elections specifically to the state legislatures, the Constitution gives those legislatures "plenary power" that "cannot be taken from them or modified." *Id.* Thus, while a State may

normally organize its internal powers as it deems fit, the Elections Clause is one of the "few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of the State's government." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).[3]

Applying these principles, the Supreme Court has held that neither the state executive nor the state judiciary, nor even the state constitution itself, may circumscribe exclusive grants of power made to state legislatures by the federal Constitution. In *Hawke v. Smith*, 253 U.S. 221 (1920), the Court invalidated a state constitutional provision that purported to circumscribe the power of a state legislature to ratify federal constitutional amendments, which the Constitution delegates to "the Legislatures of three fourths of the several States" (U.S. Const. art. V). More recently, in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), a decision of the Florida Supreme Court appeared to invalidate certain statutory provisions enacted by the Florida Legislature regarding the appointment of presidential electors, despite a federal constitutional provision stating that "Each State shall appoint, in such Manner as the

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[3] *See also id.* (delegation of power to appoint presidential electors to state legislature "'convey[s] the broadest power of determination' and 'leaves it *to the legislature exclusively* to define the method' of appointment." (quoting *McPherson*, 146 U.S. at 27)); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J., dissenting) ("[T]he text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state 'Legislature[s].'"); Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, in THE VOTE: BUSH, GORE AND THE SUPREME COURT 13, 20 (Cass R. Sunstein & Richard A. Epstein eds., 2001) ("Article II, Section I, Clause 2 reads like a strict liability provision. The Florida legislature directs the manner in which presidential electors are appointed, and all other actors within the Florida system have to stay within the confines of that directive.").

Legislature thereof may direct" the specified number of presidential electors (U.S. Const. art. II, § 1, cl. 2 (emphasis added)). The U.S. Supreme Court made clear that the state judiciary could not override a decision of the state legislature in this area, and it remanded for clarification because there were "expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Elections Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'" *Id.* at 77 (citing *McPherson*, 146 U.S. at 25). Finally, in *Bush v. Gore*, in addressing a point not reached by the majority, three concurring Justices explained that the Florida Supreme Court, by imposing rules for the appointment of presidential electors that conflicted with those provided in the governing statutes by the Florida legislature, overstepped its constitutional authority under Article II. *See* 531 U.S. at 112-20 (Rehnquist, C.J., concurring). As the concurrence explained, "[t]his inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Id.* at 115.

As these decisions make clear, **states cannot deviate from the express commands in the Election Clause.** The manner of election of federal officers is not a power reserved to the state by the Tenth Amendment. Rather, "federal offices . . . 'aris[e] from the Constitution itself,'" and the power to regulate their election "had to be delegated to, rather than reserved by, the states." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995)). "No constitutional provision gives the states authority over congressional elections, and no such authority could be reserved under the Tenth

Amendment . . . the states may regulate the incidents of such elections . . . only within the exclusive delegation of power under the Elections Clause." *Id.* at 522; *see also Term Limits*, 514 U.S. at 805.

2. The Division's New Policy Violates the Elections Clause.

Pursuant to its authority under the Elections Clause, the Alaska Legislature has established the manner for analyzing write-in votes. As discussed above, the relevant statute provides that "[a] vote for a write-in candidate . . . shall be counted if the oval is filled in for that candidate and if the name, *as it appears on the write-in declaration of candidacy*, of the candidate or the last name of the candidate is written in the space provided." AS § 15.15.360(a)(11) (emphasis added). The statute provides for "no exceptions", and is explicit that "[t]he rules set out in this section are mandatory and there are no exceptions to them. ***A ballot may not be counted*** unless marked in compliance with these rules." *Id.* § 15.15.360(b). Unlike subdivision (a)(5), which, with respect to the filling in of ovals on the ballot, requires that officials determine whether "the voter intended the particular oval to be designated," subdivision (a)(11) requires that the write-in match the name "as it appears" on the declaration of candidacy. Indeed, until the ballots were cast in this election, the Murkowski campaign believed that the exact spelling of her name was required on the write-in ballots, and therefore focused intently during the campaign on educating voters on how to spell Murkowski's name.

Despite the statutory requirement of an exact match between the writing on the ballot and the candidate's declaration of candidacy, Alaska election officials have now publicly stated that "[t]hey plan to count misspellings of registered candidates' names in their favor, as long as

the voter's intent is clear." *See* Affidavit of Thomas V. Van Flein, Ex. 1 (copy of Vauhini Vara, *Candidate Argues Spelling Should Count in Alaska Vote*, WALL ST. J., Nov. 6, 2010). And, just yesterday, the Defendants issued a written policy purporting to implement these new subjective standards. (Exhibit A). These officials have not even attempted to reconcile their decision with the terms of the governing statute. Indeed, it appears that the Defendants believe that they are free to ignore the legislative mandates and instead, they rely on dicta from two Alaska Supreme Court decisions that supposedly require consideration of voter intent in analyzing a ballot. *See Edgmon v. State, Div. of Elections*, 152 P.3d 1154, 1157 (Alaska 2007); *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978). But the Defendants err is so doing.

Neither *Edgmon* nor *Carr* remotely supports this decision. To begin with, **neither case involved write-in ballots at all;** thus, neither case had occasion to construe the statutory requirement that the last name on a write-ballot must be written "as it appears on the write-in declaration of candidacy." AS 15.15.360(a)(11). Moreover, in concluding that voter intent could be considered in reviewing ordinary ballots for possible overvotes, the Alaska Supreme Court expressly relied upon statutory language expressly permitting consideration of what "the voter intended" in determining whether an oval was sufficiently filled out. *See* 152 P.3d at 1157; AS 15.15.360(a)(5). Comparable language is conspicuously absent from the separate provision specifically addressed to the spelling of names of write-in candidates. Thus, using voter intent to determine overvotes is constitutionally permissible under the Elections Clause because the state legislature said so. But for write-in votes, the legislature prohibited it. Thus,

the state errs in applying the voter intent standard to write-in votes and to effectively override the legislative directives.

More fundamentally, no state judicial decision, even if applicable, could support the Division's decision to abandon the statutory requirement of an exact match in the context of write-in ballots. For purposes of the Elections Clause, it is entirely irrelevant whether this decision by the state *executive* finds support in the decisions of the state *judiciary*, because neither the state executive nor the state judiciary is the state legislature. By attempting to define the standard for reviewing write-in ballots, the Division has unquestionably sought to regulate the "manner" of electing U.S. Senators. *See, e.g.*, *Cook*, 531 U.S. at 523–24 (the "manner" of elections "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns'" (quoting *Smiley*, 285 U.S. at 366)). And by attempting to override a standard expressly provided by the state legislature, it has violated the clear command of the Elections Clause. *See, e.g.*, *Bush v. Gore*, 531 U.S. at 112-20 (Rehnquist, C.J., concurring);.*Bush v. Palm Beach County Canvassing Board*, 531 U.S. at 77; *Hawke*, 253 U.S. 221; *McPherson*, 146 U.S. at 25

The manner in which the Division made its decision highlights the need for *legislative* action in adopting election standards. As discussed at greater length below, the Division has not followed statutory procedures for implementing election regulations, as required under the state Administrative Procedures Act. Nor has it provided any detailed guidance about how it intends to divine voter intent. The new written guidelines fail to define an objective standard.

Rather, in the midst of a closely contested election, the Division has adopted a standard without any input from the public or any chance for deliberation or debate. Such *post hoc* and *ad hoc* decision-making is a recipe for biased and arbitrary election decisions, as Judge McConnell has explained:

> [L]egislatures, in contrast to courts and executive officials, must enact their rules in advance of any particular controversy. A legislative code is enacted behind a veil of ignorance; no one knows (for sure) which rules will benefit which candidates . . . . To be sure, this veil of ignorance is only partially opaque: it is sometimes possible to make an educated guess about the probable partisan consequences of particular electoral rules. For example, favorable rules for recognizing absentee ballots from abroad could be expected to benefit Republicans, and easy registration of voters could be expected to benefit Democrats. Partisan calculation therefore can play a role. By requiring the manner of selection of electors to be specified in advance by the legislature, however, the Constitution limits the ability of political actors to rig the rules in favor of their candidate.

Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, in THE VOTE, *supra* n.3, at 103–04.

Rather than acting "behind a veil of ignorance," the Division adopted its policy when it knew precisely which candidate would benefit from it. Senator Murkowski was the only creditable major write-in candidate, and a broad policy of considering "voter intent" to count misspelled ballots would obviously lead to more votes being counted for Murkowski. And the state was well aware of Murkowski's expenditure of hundreds of thousands of dollars to educate people on how to spell. As set forth below determining "voter's intent" is an open ended inquiry rife with the potential for abuse. But if such a standard is to be adopted at all, it must be adopted by the Legislature, not by agency officials acting contrary to the governing

statute on the eve of the vote count. The Division's policy violates the Elections Clause and should therefore be enjoined.

B. Defendants' New *Ad Hoc*, Subjective Standard for Determining Whether and How to Count Write-In Votes Violates the Equal Protection Clause

Defendants' new policy (Exhibit A) also violates the Equal Protection Clause. In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court invalidated a statewide recount procedure conducted under unelaborated instructions to determine "the intent of the voter." *Id.* at 105. The Court reasoned that the right to vote is fundamental, and the Equal Protection Clause thus requires states "to avoid arbitrary and disparate treatment of the members of its electorate." *Id.* Moreover, "'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id* at 104-105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)) The Court explained that, because voter intent involves questions of "how to interpret the marks or holes or scratches on an inanimate object," the "search for intent can be confined by specific rules designed to ensure uniform treatment." *Id.* at 106. In *Bush v. Gore*, "[t]he want of those rules . . . led to unequal evaluation of ballots in various respects," and the Supreme Court accordingly struck down the recount process. *See id.*

In the wake of *Bush v. Gore*, the Alaska legislature amended AS § 15.15.360, which specifies the rules governing the counting of ballots in Alaska. Furthering the equal-protection requirement of clear rules capable of uniform application, the statute sets forth a simple rule to govern the counting of ballots cast for write-in candidates: it provides that a voter must either

write "the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate ... in the space provided." AS § 15.15.360(a)(11). In addition to this unambiguous language, the Alaska legislature enacted an additional provision to further ensure that the Division of Elections would not deviate from this objective standard: "The rules set out in this section are mandatory and there are no exceptions to them. A ballot may not be counted unless marked in compliance with these rules." AS § 15.15.360(b).

In replacing the clear, objective standard set forth in § 15.15.360(a)(11) with an unelaborated, subjective inquiry into "voter intent," the Division has produced the same equal-protection problem that was present in *Bush v. Gore.* As in that case, the question here is whether the counting procedures adopted by state executive officials are "consistent with [their] obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore,* 531 U.S. at 105. The answer to that question is "no." The Division has indicated that it will attempt to mystically divine the intent of each write-in voter, but has provided no standards for so doing. The inevitable result is that similar ballots will be treated differently. As the Supreme Court explained in *Bush v. Gore*, divining the intent of the voter "is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary." *Id.* at 106.

Here, over two hundred Alaskans applied to be write-in candidates for the U.S. Senate election this year. Many of the candidates have similar names. If a write-in ballot does not

contain the exact name of one of these candidates, election workers will be forced to guess which candidate the voter intended to write, without any guidance capable of consistent and principled application. For example, five individuals who sought to be write-in candidates have a variation of "Lisa" in their name;[4] thus, a write-in vote for "Lisa" would not adequately identify any particular candidate. Moreover, write-in candidates include both Lisa Murkowski and Lisa M. Lackey; thus, a write-in vote for "Lisa M." would not adequately identify any particular candidate, despite the Division's erroneous public statements to the contrary.[5] Under these circumstances, a standard-less inquiry into voter intent violates the Equal Protection Clause.

Poor handwriting can exacerbate these problems even more. If one could only make out "___kowski" or just "__ski", there is no principled rule for discerning if the vote was intended for Daniel C. Piaskowski, Lee Hamerski, or Lisa Murkowski—all candidates. Sloppy handwriting could also cause "Tom M" to look like "Lisa M" or "Lyn Marcum" to look like "Lisa Murkoski." Both "Morawitz" or "Murray," if written poorly, could resemble "Murkowski". Moreover, a voter is not limited to writing only those names that appear on the list. A voter could write "Liza Minnelli" as easily as "Lisa Murkowski." Every election cycle,

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[4] These include Lisa, Lissa, and Lisabeth.

[5] "[T]he first hurdle to a possible write-in win disappeared when elections director Gail Fenumiai said voters won't have to spell 'Murkowski' correctly, as long as she can figure out who they intend to vote for. Just 'Lisa' might be a problem but 'Lisa M' would be acceptable, Fenumiai told the adn.com politics blog." "Alaska Ear", *Anchorage Daily News,* (Sept. 11, 2010), *available at* http://www.adn.com/2010/09/11/1449989/alaska-ear.html (last retrieved Nov. 6, 2010).

there are stories of voter's writing in the names of celebrities or fictional characters as a means of protest. Divining the intent of the voter who casts an ambiguous write-in vote is just as subjective, and constitutionally offensive, as divining the intent of a voter by scrutinizing a dimpled chad.

Finally, even apart from similar names and handwriting problems, the Division's "voter intent" standard affords no guidance as to when a misspelled name will be counted. Will a vote for "Murkowsky" be counted as a vote for write-in candidate Lisa Murkowski? What about a vote for "Murcowsky"? "Murrcowsky"? Or "Murrcousky"? As in *Bush v. Gore*, the lack of standards all but ensures that identically-situated ballots will be counted differently.

Amplifying the problem is the fact that the Division of Elections intends to utilize 15 separate teams to count the write-in votes. Uniformity of application of the ballot review process cannot be assured with an "intent of the voter" standard, because each team will invariably apply different standards to determine voter intent. As in *Bush v. Gore*, it is a violation of equal protection for "the standards for accepting or rejecting contested ballots [to vary] from one []count team to another." *Id.* at 106.

The ad hoc and subjective voter-intent standard created by the Division of Elections violates the Equal Protection Clause of the Constitution. In accordance with *Bush v. Gore*, the Division of Elections should be ordered to follow the objective standards set forth in AS § 15.15.360, and count as valid votes only those write-in votes that precisely match the last name of a candidate "as it appears on the write-in declaration of candidacy."

C. The New Policy is *Ultra Vires* and Unenforceable Because It Squarely Contradicts State Law

Defendants' new policy not only violates the U.S. Constitution, but also is void as a matter of state law. A regulation, rule, or other policy promulgated by a state agency or executive branch official is void and unenforceable if it is "inconsistent" with a state statute. *See, e.g.*, *State v. Morton*, 123 P.3d 986, 988, 990 (Alaska 2005); *see also Grunert v. State*, 109 P.3d 924, 932 (Alaska 2005). As discussed throughout this Memorandum, Alaska law specifies that a write-in ballot may not be counted unless the candidate's name is written on the ballot "as it appears on the write-in declaration of candidacy." AS § 15.15.360(a)(11). The statutory No Exceptions Provision goes on to emphasize that a ballot "may not be counted" unless it satisfies this requirement, which is "mandatory" and has "no exceptions." *Id.* § 15.15.360(b). Defendants' decision to essentially ignore these requirements and count write-in ballots with misspellings directly contravenes § 15.15.360, and therefore was *ultra vires* and cannot be given any legal effect. It is a *per se* invalid regulation since it is diametrically opposed to the statute.

D. The State's "Voter Intent Standard" Fails To Discern Protest Votes From Legitimate Misspellings.

More problematic is the failure of the state to discern protest votes that were cast with intentional misspellings. Many voters stated, prior to the election, that they intended to misspell Murkowski as a protest to her write-in effort. This was in response to Murkowski's expensive spelling campaign (a campaign that reveals that even candidate Murkowski read the law accurately and knew it required proper spelling). The Defendants have failed to explain

how they can distinguish a protest vote from a good faith misspelling. The new state policy makes no provision for the many voters who stated they would cast protest votes. Prior to the election, people commented on radio stations and in the comment sections in blogs and newspaper stories that they would deliberately incorrectly write-in a variation of "Murkowski" as a protest. This was done to protest her failure to keep her promise that she would honor the will of the voters in the primary and to mock her expensive write-in campaign, with its pricey wrist bands, pencils and tattoos, all to educate the voters on proper spelling. The Murkowski campaign read the law and knew that it required proper spelling---"No exceptions." So protest voters were trying to send a message to the candidate that she would get a "write in" but not a vote. The state has failed to create any guideline or standard that would account for the intent of the voter who intentionally cast a protest vote. The state will now count a protest vote, deliberately cast with a misspelling, as a vote ***for*** Murkowski. This effectively nullifies the protest and falsely inflates the vote for the write-in candidate. The state has become a super-voter and will override voter intent and recast votes for the candidate the state chooses. This is at a fraudulent abuse of the electoral process and severely undermines our democratic process.

E. The New Policy is Invalid Because It Was Not Promulgated In Accordance With the Administrative Procedures Act

The State DOE issued a new "voter intent" regulation 36 hours before the voting count is set to start.[6] Without waiving the assertion that the "voter intent" standard is contrary to the

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[6] This new written regulation is directly contrary to what the Lt. Gov. stated one month ago, where he stated that the Division of Elections would follow the statute and not "voter intent." On September 15, 2010, the Lt. Governor issued statement refuting Ms. Fenumiai's statement. The Lt. Governor reported:

plain text of the law and legislative intent, the standard now issued violates the APA. This new policy, issued yesterday, is in fact a regulation, and because it completely failed to comply with any aspect of the APA, it is invalid and unenforceable. Once an agency regulation is found to exist but has failed to comply with the enactment provisions of the APA, the ***regulation is deemed invalid and unenforceable.*** "Since the policy falls within the meaning of a 'regulation,' it was invalid for failure to comply with the APA." *Gilbert,* 803 P.2d 396. *See also Wickersham v. State Commercial Fisheries Entry Comm'n,* 680 P.2d 1135, 1140 (Alaska 1984) ("When a policy is invalidly promulgated under the APA, generally the appropriate remedy is to invalidate the offending policy until the procedures required by the APA are observed."). This new regulation, now codified on November 8, 2010, failed to comply with any of the notice provisions, public input provisions, drafting provisions and legal review

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> (September 15, 2010, Anchorage, Alaska) – Lieutenant Governor Craig E. Campbell is speaking out regarding comments made to the media by Division of Elections (DOE) Director Gail Fenumiai relative to a potential write-in campaign. In a recent article in the Anchorage Daily News, Ms. Fenumiai is quoted as saying she would have to "speak with the Department of Law for an opinion on whether 'Lisa' alone would count" but indicates that "Lisa M." would be sufficient for a write-in vote would be counted. Ms. Fenumiai is referring to Senator Lisa Murkowski and rumors that she will launch a write-in candidacy to retain her seat in the U.S. Senate.
>
> "After careful review of the statutes it is clear that the oval must be marked and either a candidate's last name or their name as written on their declaration of candidacy must be present in order for the vote to be counted," Campbell said. It is questionable whether simply listing the first name and initial of the last name of a write-in candidate meets the requirements of state statute, unless that is the declared name by the candidate on the written declaration of candidacy.

(Exhibit B) http://ltgov.alaska.gov/campbell/lieutenant-governor/full-press-release.html?pr=125.

provisions mandated under the APA. *See* AS 44.62.040 (submission to Lt. Governor and notice to public); AS 44.62.190 ("(a) At least 30 days before the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be (1) published in the newspaper of general circulation or trade or industry publication that the state agency prescribes and posted on the Alaska Online Public Notice System . . . ."); AS 44.62.200 (notice requirements); AS 44.62.210 (public hearing and comment). Because none of these statutes were complied with in enacting the new voting standards and regulation, the voting regulation is invalid and unenforceable. *Gilbert,* 803 P.2d 396 ("Since the policy falls within the meaning of a 'regulation,' it was invalid for failure to comply with the APA").

1. <u>The APA Establishes the Sole Procedures for Enacting State Regulations</u>

Although the state statute prohibits any exceptions and deviation from the candidate form, the new state policy is directly opposite. As reported recently:

> The state's top election official has said ballot counters will use discretion in determining voter intent, possibly allowing misspelled names to count, but there must be complete agreement among the counters for it to be tallied") (emphasis added); "elections director Gail Fenumiai said voters won't have to spell "Murkowski" correctly, as long as she can figure out who they intend to vote for. Just "Lisa" might be a problem but "Lisa M" would be acceptable, Fenumiai told the" ADN. (available at http://www.adn.com/2010/09/11/1449989/alaska-ear.html)

In order to enact a regulation, which if properly enacted has the force of law, the state agency that wants the regulation has to first comply with all procedural steps set forth in the APA. The APA provides that, for any regulation "[t]o be effective, each regulation adopted must be

within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." AS 44.62.020. Further, an agency cannot enact a regulation unless it is carrying out a mandate provided in a statute. AS 44.62.030 ("If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, ***a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute***"). Further, even assuming there was a statute that authorized the DOE to use a loose and subjective "voter intent" standard, (which there isn't), there is a very specific procedure for getting such a regulation enacted into law. As set forth by the APA:

> (a) Subject to (c) of this section, ***every*** state agency that by statute possesses regulation-making authority ***shall*** submit to the lieutenant governor for filing a certified original and one duplicate copy of every regulation or order of repeal adopted by it, except one that
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> (1) establishes or fixes rates, prices, or tariffs;
>
> (2) relates to the use of public works, including streets and highways, under the jurisdiction of a state agency if the effect of the order is indicated to the public by means of signs or signals; or
>
> (3) is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.
>
> (b) Citation of the general statutory authority under which a regulation is adopted, as well as citation of specific statutory sections being implemented, interpreted, or made clear, must follow the text of each regulation submitted under (a) of this section.
>
> (c) Before submitting the regulations and orders of repeal to the lieutenant governor under (a) of this section, every state agency that by statute possesses regulation making authority, except boards and commissions, the office of

victims' rights, and the office of the ombudsman, shall submit to the governor for review a copy of every regulation or order of repeal adopted by the agency, except regulations and orders of repeal identified in (a)(1) - (2) of this section. The governor may review the regulations and orders of repeal received under this subsection. The governor may return the regulations and orders of repeal to the adopting agency before they are submitted to the lieutenant governor for filing under (a) of this section (1) if they are inconsistent with the faithful execution of the laws, or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee. The governor may not delegate the governor's review authority under this subsection to a person other than the lieutenant governor.

AS 44.62.040 (emphasis added). Thus, as this statute makes clear, the DOE is to prepare a regulation, cite the authorizing statute, and then submit it to the Lt. Governor for review, formatting, legal opinion, and publication for public review and comment. This new regulation failed to comply with any of these procedures.

As further set forth in the APA, the DOE was obligated to work with the Department of Law to determine the proposed regulation's prospective legality, its form and related issues:

(a) Every state agency that by statute possesses regulation-making authority shall work with the Department of Law, under AS 44.62.125, in the preparation and revision of its regulations and shall adhere to the drafting manual for administrative regulations prepared by the Department of Law under AS 44.62.050 .

(b) In the performance of duties under AS 44.62.125 , the Department of Law shall advise the agencies on legal matters relevant to the adoption of regulations and may advise the agencies on the need for and the policy involved in particular regulations. In addition, ***the department shall prepare a written statement of approval or disapproval*** after each regulation has been reviewed in order to determine

(1) its legality, constitutionality, and consistency with other regulations;

(2) the existence of statutory authority and the correctness of the required citation of statutory authority following each section;

(3) its clarity, simplicity of expression, and absence of possibility of misapplication;

(4) compliance with the drafting manual for administrative regulations.

(c) The lieutenant governor may not accept for filing a regulation, amendment, or order of repeal required by AS 44.62.040 ***unless*** it is accompanied by the written statement specified in (b) of this section and the statement approves the regulation, amendment, or order of repeal.

AS 44.62.060 (emphasis added). The proposed regulation is then published for public comment and may ultimately become enacted after a period of time (assuming it has a proper enabling statute). AS 44.62.190 ("(a) At least 30 days before the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be (1) published in the newspaper of general circulation or trade or industry publication that the state agency prescribes and posted on the Alaska Online Public Notice System . . . ."). The published notice must comply with very specific information disclosure requirements. AS 44.62.200. And, there must be a public hearing on the proposed regulation. AS 44.62.210 ("(a) On the date and at the time and place designated in the notice the agency shall give each interested person or the person's authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally"). The APA states that these notice and publication requirements exist as ***"minimum" procedural due process requirements***. AS 44.62.280 ("It is the purpose of AS 44.62.180 - 44.62.290 to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations.").

The new "voter intent" standard constitutes a "regulation" under the APA because it purports to "affect the public" and it "interprets or makes specific the law enforced or administered by the" Election Board. *Jerrel v. State, Dept. of Natural Resources,* 999 P.2d 138, 143 (Alaska 2000). In *Jerrel*, the state DNR issued a "letter" that tried to establish a minimum visibility mark for owners of livestock whereby the mark could be seen up to 20 feet away. *Jerrel*, 999 P.2d at 142 ("in its June 28, 1990 letter to the Jerrels, DNR stated that the Jerrels must use a mark 'plainly distinguishable from a distance of twenty feet.'"). The Jerrels challenged this "letter" as an invalid regulation since it was not enacted pursuant to the terms of the APA. The Alaska Supreme Court agreed, and reasoned:

> Administrative agencies must comply with the APA guidelines when issuing regulations pursuant to delegated statutory authority. The label an agency places on a policy or practice does not determine whether that rule falls under the APA; the legislature intended for the term "regulation" to encompass a variety of statements made by agencies. Rather, we look to the character and use of the policy or rule. In determining which policies fall under the APA, one of the statutory "indicia of a regulation is that it implements, interprets or makes specific the law enforced or administered by the state agency." A regulation also "affects the public or is used by the agency in dealing with the public." Under these standards, ***we believe that the twenty-foot visibility requirement is a regulation.***

Jerrel v. State, Dept. of Natural Resources, 999 P.2d 138, 142-43 (Alaska 2000) (emphasis added). Thus, a "letter" from the DNR that purported to require the public to meet a standard constituted a "regulation" under the APA. Similarly, the new "voter intent" standard for the Election Board also constitutes a "regulation" for the same reason. *See also Gilbert v. State, Dep't of Fish & Game,* 803 P.2d 391, 396-97 (Alaska 1990) (state agency claimed its

requirements were simply a "policy" not a regulation, the court rejected the agency's argument and held even informal "policies" are "regulations" that have to comply with the APA). In short, any written guideline, policy or standard for general application is in fact a "regulation" and has to comply with the APA.

The DOE new "voter intent" standard, issued 36 hours before the voting count, claims that it is being enacted pursuant to court dicta—but as noted by the Lt. Governor in his September 15 press release, the subjective "voter intent" standard is diametrically opposed to the objective standard established by the Legislature. Once a "letter" or "policy" (see Exhibit A) from a state agency is determined to be a "regulation" then all of the APA procedural requirements must be satisfied or the "regulation" is deemed invalid. Thus, the regulation has to be based on a statute authorizing the regulation, and the notice and publication requirements have to be met. As further explained by the *Jerrel* court:

> The regulation contains neither a requirement of minimum visibility nor a mandate of permanence. Yet, in its June 28, 1990 letter to the Jerrels, DNR stated that the Jerrels must use a mark "plainly distinguishable from a distance of twenty feet." . . . The Jerrels contend that in creating the twenty-foot visibility rule, DNR did not interpret its existing marking regulations but rather "established new ones without following the proper procedures." DNR responds that its expertise allows it the power to make policy rules interpreting regulations. We agree with the Jerrels.

Jerrel v. State, Dept. of Natural Resources, 999 P.2d 138, 142-43 (Alaska 2000). Comparing the *Jerrel* letter to the DOE new voting policy here, there is but one conclusion: the DOE new voting standard constitutes an invalid regulation. The DOE policy amounts to an *ad hoc* order

that failed to embrace any of the public notice, and public input, requirements mandated by public policy.

> The APA accordingly requires state agencies to follow a rule-making procedure before they may alter or amend the substance of their regulations. "The courts have usually rejected arguments that ... discretion to proceed by ad hoc orders rather than by rules is necessary to permit an agency to make decisions finely tuned to the facts and circumstances of an individual case." When an agency is freed from the requirement of having to make general rules, this invites the possibility that state actions may be motivated by animosity, favoritism, or other improper influences.

Jerrel, 999 P.2d at 144 (citations omitted). Here, the mischief warned of in *Jerrel*, including the possibility of improper motivations, bias, or favoritism, is particularly enhanced in a contested and highly partisan election. The legislature obviously rejected any subjective element to avoid bias and favoritism.

But with or without improper bias or the potential for favoritism, the new regulation was required to meet all of the APA requirements in order to be valid and enforceable. "Under the APA, the term 'regulation' encompasses many statements made by administrative agencies, including policies and guides to enforcement." *Kenai Peninsula Fisherman's Coop. Ass'n, Inc. v. State,* 628 P.2d 897, 905 (Alaska 1981). "Indicia for identifying a 'regulation' include (1) whether the practice implements, interprets or makes specific the law enforced or administered by the state agency, and (2) whether the practice 'affects the public or is used in dealing with the public.'" *Gilbert v. State, Dep't of Fish & Game,* 803 P.2d 391, 396 (Alaska 1990). Under this two part test, the new DOE standard is an obvious regulation. In

Reichmann v. State, Dept. of Natural Resources, 917 P.2d 1197, 1201 (Alaska 1996), the court determined that a DNR "policy" of distinguishing recreational users from residential users for purposes of granting land rights was a "regulation" and therefore invalid because the policy was not enacted in accord with the APA. The same result should occur here. The DOE states it will now be applying a new policy for the Election Board. This type of policy cannot be enacted outside of the APA and must be invalidated. The decision in *Gilbert* is instructive. That decision clearly articulates when and how any agency policy, letter or rule constitutes a "regulation" and the consequences for failing to comply with the APA rule making procedures. The *Gilbert* court explained:

> The legislature has broadly defined what constitutes a regulation under the APA. AS 44.62.640; *State v. Northern Bus Co.,* 693 P.2d 319, 322 (Alaska 1984). The legislature specifically defined "regulation" to "include[ ] ... 'policies' ... and the like, that have the effect of rules, orders, regulations *or standards of general application.* " AS 42.62.640(a)(3) (emphasis added). Indicia for identifying a "regulation" include (1) whether the practice implements, interprets or *makes specific the law enforced or administered by the state agency,* and (2) whether the practice "affects the public or is used by the agency in dealing with the public." *Kenai Peninsula,* 628 P.2d at 905 (emphasis added); AS 42.62.640(a)(3).***
>
> In our view, the state is all but saying the policy has the effect of a "standard of general application," in that it is a goal the Board seeks to obtain. Further, both of the aforementioned indicia of a "regulation" are implicated here: the Board policy "makes [more] specific the law enforced or administered" and the policy "affects the public," insofar as it has been used to modify commercial fishery limits. Thus, we conclude that the policy in question falls squarely within the definition of a "regulation" contained in AS 44.62.640(a)(3) and, therefore, it is required to be implemented pursuant to the APA. This conclusion is buttressed by our decision in *Kenai Peninsula,* 628 P.2d at 905, wherein we observed that a "regulation," under

> AS 44.62.640(a)(3) "encompass[es] many statements made by administrative agencies, *including policies and guides to enforcement.*"

Gilbert, 803 P.2d 396-397 (emphasis in original). The DOE's new "voter intent" standard satisfies more than one criteria for establishing a "regulation" since the new policy on its face enacts a "standard of general application" and the DOE is attempting to "make specific the law enforced or administered" and the policy "affects the public," it involves a public election. Like the fisheries policy in *Gilbert*, the DOE policy "falls squarely within the definition of a 'regulation' contained in AS 44.62.640(a)(3) and, therefore, it [was] required to be implemented pursuant to the APA." It was not. It is therefore invalid and cannot be applied in the current count. Once an agency regulation is found to exist but has failed to comply with the enactment provisions of the APA, the ***regulation is deemed invalid and unenforceable***. "Since the policy falls within the meaning of a 'regulation,' it was invalid for failure to comply with the APA." *Gilbert,* 803 P.2d 396. *See also Wickersham v. State Commercial Fisheries Entry Comm'n,* 680 P.2d 1135, 1140 (Alaska 1984) ("When a policy is invalidly promulgated under the APA, generally the appropriate remedy is to invalidate the offending policy until the procedures required by the APA are observed."). The new regulation here should be summarily struck as violative of minimal due process requirements.

F. Plaintiff Miller Satisfies the Requirements for Obtaining a Preliminary Injunction

This Court should enjoin Defendants' impending violations of the U.S. Constitution and Alaska law. "Preliminary injunctive relief is proper if the plaintiff establishes that 'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of

preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Small ex rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 611 F.3d 483 (9th Cir. 2010) (amended op.) (*quoting Winter v. Nat'l Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008)); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009). Plaintiff Miller satisfies each of these requirements.

First, the preceding discussions demonstrate that Plaintiff Miller is likely to succeed on the merits of his claims that Defendants' new policy violates the Elections Clause and Equal Protection Clause of the U.S. Constitution, are *ultra vires* and void because they are contrary to AS § 15.15.360, and are unenforceable because it was not promulgated in compliance with the Alaska Administrative Procedure Act.

Second, Plaintiff Miller will suffer irreparable injury if the Defendants are permitted to proceed with counting the write-in ballots under an illegal and unconstitutional standard. As Justice Scalia explained in his concurrence to the grant of *certiorari* in *Bush v. Gore*:

> The counting of votes that are of questionable legality does in my view threaten irreparable harm to [a candidate], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.

Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring in grant of *certiorari*). Courts in other contexts likewise have recognized that irreparable injury results when a person's vote is "included in a vote count that, having been tainted by irregularities . . . will not reflect the will of the [people]." *E.g.*, *Morris v. Int'l Bhd. of Locomotive Eng'rs*, 165 F. Supp. 2d 662, 672 (N.D. Ohio 2001) (union election).

Courts also have recognized, in a variety of contexts, that a voter suffers irreparable harm if his vote is improperly diluted or effectively nullified. *See, e.g., Montano v. Suffolk County Legislature,* 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) ("An abridgement or dilution of the right to vote constitutes irreparable harm."); *see also Day v. Robinwood W. Cmty. Improvement Dist.*, No. 4:08-CV-01888 (ERW), 2009 U.S. Dist. LEXIS 36586, at *6-7 (E.D. Mo. Apr. 29, 2009) ("These Plaintiffs are threatened with an irreparable harm because, absent a preliminary injunction, their votes will be diluted in the upcoming June 9, 2009 election.").

Plaintiff Miller will not be able to rely on post-election remedies to vindicate his right to vote, the right to a fair electoral process, and to have only validly cast ballots counted in his U.S. Senate race. A recount, for example, is available only to "[a] defeated candidate or 10 qualified voters who believe there has been a mistake made by an election official." AS § 15.20.430(a). It is highly unlikely that Defendants would employ a different standard for counting write-in ballots during a recount than they use during the original count. An election contest involves similar obstacles, *see id.* § 15.20.540, as well as the additional limitation that it may be filed only based on certain statutorily specified grounds that do not appear to apply in this case, *see id.* §15.20.540(1)-(3). Moreover, the Constitution's exclusive grant of jurisdiction to each House of Congress to judge the "elections, returns and qualifications of its own members," *see* U.S. Const., art. I, § 5, cl. 1, may further impede Plaintiff Miller's ability to seek after-the-fact judicial relief from Defendants' illegal and unconstitutional policy. Thus, Defendants' policy is creating a substantial likelihood of irreparable injury to Plaintiff Miller.

Turning to the ***third*** and ***fourth*** factors, the balance of equities clearly tips in Plaintiff Miller's favor, and a preliminary injunction clearly would be in the public interest. The public has a strong interest in ensuring both that the results of elections are accurate, *see, e.g.*, *Am. Ass'n of People With Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1131 (C.D. Cal. 2004) ("[T]he public interest in the accuracy of the upcoming election cannot be overestimated."), and that its election laws are enforced properly, *see, e.g.*, *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006) ("It is beyond dispute that the injunction serves the public interest in that it enforces the correct and constitutional application of Texas's duly-enacted election laws."); *Watland v. Lingle*, 85 P.3d 1079 (Haw. 2004) (Acoba, J., concurring) ("It was contrary to the public interest to tabulate and certify the results [of an election to ratify an amendment to the state constitution] when there was a substantial likelihood that Plaintiffs would ultimately prevail. . . . [T]he public interest factor weighed heavily in favor of determining beforehand the question of procedural validity raised by Plaintiffs.").

Preserving a fair electoral process and ensuring that every valid vote is counted is fundamental to democracy. The rule of law has to be followed. The laws cannot be changed—literally in this case—after the votes have been cast. Given the strong public interest in preventing Defendants from counting write-in ballots according to a statutorily and constitutionally invalid standard, the issuance of an injunction cannot be deemed to cause them legally cognizable injury. Plaintiff Miller, in contrast, would suffer harm both as a candidate

(by having invalid votes counted in his election) and as a voter (by having his vote diluted and effectively nullified by invalid votes[7]) if an injunction fails to issue.

III. CONCLUSION

For these reasons, Plaintiff Joe Miller respectfully requests that this Court issue a Preliminary Injunction pursuant to Federal Civil Rule 65(a), enjoining Defendants Craig Campbell, Lieutenant Governor and the Division of Elections, State of Alaska from counting, or otherwise accepting as valid, any ballot in the 2010 general election (hereafter, "the Election") in which:

1. the voter did not correctly write either the full name or last name of a candidate in Election;

2. the voter wrote a candidate's name incorrectly, or misspelled it; ***or***

3. the name written on the ballot is not the name of a candidate as it appears on any candidate's write-in certificate of candidacy, or any other such certificate of candidacy or equivalent document issued by or filed with the Defendant Division of Elections.

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[7] *Cf. Anderson v. United States*, 417 U.S. 211, 226 (1974) (discussing "the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots"); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote cannot be . . . diluted by ballot-box stuffing . . . [or] denied by a debasement or dilution of the weight of a citizen's vote"); *Hawkins v. Blunt*, No. 04-4177-CV-C-RED, 2004 U.S. Dist. LEXIS 21512, at *21 (W.D. Mo. Oct. 12, 2004) ("Individual voters have an interest in . . . [not] hav[ing] their votes offset or diluted by fraudulently cast votes.").

Dated this 9th day of November, 2010.

Respectfully submitted,

Thomas V. Van Flein,
John Tiemessen
CLAPP, PETERSON, VAN FLEIN
TIEMESSEN & THORSNESS LLC
711 H St., Suite 620
Anchorage, Alaska 99501-3454
Phone: (907) 272-9272
Facsimile: (907) 272-9586
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Chelsea Greene, hereby certify that, on this 9th day of November, 2010, I did cause a true and correct copy of the foregoing Plaintiff's Motion for Preliminary Injunction; Affidavit of Thomas V. Van Flein filed in support thereof, and Proposed Order to be served via hand delivery on:

Daniel S. Sullivan, Esq.
Attorney General, State of Alaska
Department of Law
1031 W. Fourth Ave.
Suite 200
Anchorage, Alaska 99501
Phone: (907) 745-3900
E-mail: Daniel.sullivan@alaska.gov
Counsel for Defendants Lieutenant Governor Craig Campbell, and Elections Division.

Courtesy Copy to:

Michael Barnhill
Sarah Felix
Attorney General's Office
P.O. Box 110300
Juneau, AK 99811

Chelsea Greene