Margaret Paton-Walsh
State of Alaska, Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone (907)269-6612
Facsimile (907)258-4978
Margaret.paton-walsh@alaska.gov

Attorney for Craig Campbell
and the Alaska Division of Elections

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOE MILLER, Plaintiff, v. LIEUTENANT GOVERNOR CRAIG CAMPBELL, in his official capacity; and the STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3:10-cv-00252 RBB

STATE'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Joe Miller, a candidate for U.S. Senate, has sued to challenge the Alaska Division of Elections' process for counting write-in votes cast in the November 2, 2010 election for Alaska's U.S Senate seat. Miller has raised only state-law claims, however, and the state has moved to dismiss this case for lack of federal-question jurisdiction. Docket #17. But if the Court decides to consider Miller's motion for a preliminary injunction to stop the vote count, it should deny the request because Miller has not demonstrated that he is entitled to this extraordinary relief.

Elections are the foundation of a democratic society. The purpose of an election is to permit citizens to choose the candidate they want to represent them in government. For this reason, Alaska's election law has developed with the goal of determining and effectuating the intent of voters. In this suit, Miller attacks these most fundamental principles. He argues that the Division of Elections must disenfranchise voters who have clearly indicated their candidate of choice if, in writing in that candidate's name, they have failed to meet the standard of absolute perfection. Miller is unlikely to prevail on this and his other, secondary arguments as to why the division should reject thousands of write-in ballots that clearly indicate an intent to vote for his opponent.

II. BACKGROUND

On November 2, 2010, the Alaska Division of Elections (the "division") conducted a general election, including the race for one of Alaska's U.S. Senate seats. The ballot listed the name and party affiliation of several candidates, including Miller. It also contained a space to write in a candidate's name.

During the run-up to the election, the incumbent U.S. Senator, Lisa Murkowski, announced that she would run a write-in campaign. As the exhibits attached to the complaint show, Alaska election officials immediately faced questions as to how they would count write-in ballots that incorrectly spelled a candidate's name. Comp. Exh. F. Election officials stated that minor misspellings of a candidate's name would be counted if the voter's intent were clear. Comp. Exh. F.

The number of write-in votes for U.S. Senate exceeded the number of votes cast for any other candidate. Thus, to determine the winner, the division has had to examine the write-in

votes. The division issued a written explanation of its process for counting write-in votes, which at the time of filing this brief, it has nearly completed. Comp. Exh. A.

The counting process for write-in votes has three steps: sorting; reviewing misspelled and challenged ballots; and counting the votes. Comp. Exh. A. In the first stage of the process all of the ballots are sorted. Working in 15 teams of two, 30 election board workers sort the ballots into five categories:

> (1) oval is marked correctly next to a candidate's name that is printed on the ballot;
> (2) no oval is marked for U.S. Senate, or more than one oval is marked for that race, or a name is written in but the oval is unmarked;
> (3) oval is marked for write-in and the written name is "Lisa Murkowski" or "Murkowski," spelled correctly, and the ballot is unchallenged;
> (4) oval is marked for write-in and the name written appears to be a variation or misspelling of Lisa Murkowski or Murkowski; also includes any ballot challenged by an observer in the sorting process;
> (5) oval is marked for write-in and the name written in is not "Murkowski," "Lisa Murkowski," or a variation thereof.

Comp. Exh. A at 1-2. In sorting the ballots, the election board workers exercise little or no discretion. The candidates have observers present who may challenge the category into which a ballot is sorted.

In the second stage of the process, the division director decides whether to count the ballots in category #4 for Lisa Murkowski. Comp. Exh. A at 2. Only the director reviews each ballot to attempt to ascertain voter intent. She allows ballots containing minor misspellings and variations of "Murkowski" to be counted for Lisa Murkowski if she determines that the voter clearly intended to vote for that candidate. Affidavit of Gail Fenumiai, ¶ 5.

The candidates' observers may challenge these determinations. Comp. Exh. A at 2. If an observer challenges the director's decision to count or not count a particular Category #4 ballot, that ballot is placed into one of two envelopes: "Challenged Counted for Murkowski" or

"Challenged Not Counted for Murkowski." *Id.* These ballots are segregated. *Id.* If the director's decision is not challenged, the ballot is placed either in category #3 or category #5, depending on whether or not the director decides to count it for Murkowski. *Id.*

In the third stage of the process, the division counts the ballots in category #3 — those that are completed correctly and unchallenged — for Lisa Murkowski. *Id*. It then counts the ballots for other write-in candidates in category #5. *Id*. It also counts the ballots for Lisa Murkowski in the envelope marked "Challenged Counted for Murkowski" but does not commingle them with any other ballots. *Id.* All challenged ballots are segregated for further review if necessary.

III. STANDARD FOR A PRELIMINARY INJUNCTION

"A plaintiff seeking a preliminary injunction must establish 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."[1] "A preliminary injunction is an extraordinary remedy never awarded as of right."[2] The burden to establish the need for a preliminary injunction lies squarely with the party requesting it, who must make a "clear showing" of entitlement.[3]

IV. SUMMARY OF ARGUMENT

Miller is not entitled to an injunction stopping the ballot count or to any other relief. He has shown no irreparable harm in allowing the vote count to continue, and his claims are unlikely to succeed on the merits, for the following reasons.

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1 *Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ---, 129 S. Ct. 365, 374 (2008).

2 *Id.* at 376.

3 *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

First, the division correctly interprets the election statute in question, AS 15.15.360, to allow write-in votes to be counted for a candidate if, despite minor misspellings, the voter's intent to choose that candidate is clear. This interpretation is well-grounded in the statute's text, other Alaska election statutes intended to effectuate voter intent, decisions of the Alaska Supreme Court, and related federal law. And consistent with longstanding principles of election law, this interpretation prevents the disenfranchisement of voters who have made their intent clear despite minor mistakes.

Second, Alaska has properly followed the Elections Clause requirement that the legislature prescribe election procedures. An agency's alleged failure to correctly follow those laws does not implicate the Constitution, but rather is a simple question of state law.

Third, the division's procedure assures equal protection to all ballots by providing a single official to interpret write-in votes in a consistent manner.

Fourth, Miller has presented no evidence to support his "protest vote" argument.

Finally, the division's procedure for counting write-in votes complies with Alaska's Administrative Procedures Act ("APA").[4] The counting procedure is an internal process based on a standard already expressed in law. The division is following a common-sense interpretation of the statute informed by Alaska Supreme Court decisions: a write-in vote should be counted if the voter's intent is clear.

[4] AS 44.62.

V. ARGUMENT

A. MILLER IS UNLIKELY TO SUCCEED ON THE MERITS.

1. The division correctly interprets AS 15.15.360 to allow for consideration of voter intent and acceptance of minor misspellings and variations when counting write-in votes.

The division has interpreted AS 15.15.360 to permit write-in votes containing misspellings or minor variations in the form of a candidate's name, if the voter's intent is clear. Miller disagrees with this interpretation, asserting that only ballots that spell a candidate's name perfectly may be counted. P. Memo at 12. But the division's interpretation is grounded in a common-sense reading of the language of AS 15.15.360 and other Alaska election statutes and regulations, decisions of the Alaska Supreme Court, and federal law. Moreover, it is consistent with the longstanding principle that election laws should not be interpreted to disenfranchise voters who have made their intent clear despite minor mistakes. Miller's interpretation of AS 15.15.360, on the other hand, undermines bedrock principles of the rights and roles of voters in a democratic society. It ignores the will of the electorate, creates equal protection problems, and is not justified by the language of the statute.

Miller's argument relies on two subsections of Alaska Statute 15.15.360. Subsection (a)(11) specifies that a write-in vote "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." Subsection (b) provides 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." Miller reads subsection (a)(11) to require perfect spelling and subsection (b) to prohibit any softening of that rule, even if the voter's intent to vote for a particular candidate is perfectly clear upon examination of the ballot.

But the language of AS 15.15.360 is not so unforgiving. It does not transform write-in voting into a literacy test. Subsection (a)(11) is *silent* on how technically accurate a write-in voter's spelling and handwriting must be for the vote to be counted. It indicates that a write-in vote will be accepted if the voter has written in either the candidate's "name, as it appears on the write-in declaration of candidacy" or the "last name of the candidate," but a misspelled version of a candidate's name is still that candidate's "name." Although "Jane Smith" is certainly not Lisa Murkowski's "name," "Lisa Mirkowski" is immediately recognizable as Lisa Murkowski's "name" — it is her name, misspelled. When a newspaper prints an article referring to "Lisa Murkowsky" and her Senate campaign, readers do not assume that, by bizarre coincidence, a woman with a very similar name to the incumbent senator has also decided to run for the U.S. Senate — they understand that this is a spelling error in a story about Senator Lisa Murkowski.

Miller believes that the language in AS 15.15.360(a)(11) stating that a voter may write the candidate's "name, as it appears on the write-in declaration" creates a spelling precision requirement. P. Memo at 12-13. But rather than creating such a requirement, this "as it appears" language merely accounts for the possibility that a write-in candidate may specify a name on the write-in declaration of candidacy different than the person's given name.[5] For instance, a candidate whose given name is James Janos may specify that he wishes voters to write his popularly known stage name "Jesse Ventura" on the ballot. In that case, (a)(11) would permit the counting of write-in votes for "Jesse Ventura" — in addition to write-in votes for "James Janos" (or "Janos") — even though "Jesse Ventura" is not actually the candidate's name.

[5] The write-in registration statute requires a write-in candidate to submit a declaration of intent that specifies *both* "the full name of the candidate" and "the name of the candidate as the candidate wishes it to be written on the ballot by the voter." AS 15.25.105(1) & (9).

The division has had this interpretation of the statute long before this election cycle, as is apparent from its declaration of write-in candidacy form. Exh. A. This form allows a candidate to indicate how he wishes voters to write in his name, and also provides a place for the candidate to indicate a nickname that voters might use to indicate their choice. *Id.* A candidate whose name was Henry Boucher but who went by the nickname "Red" Boucher, for example, would fill out the form "Boucher, Henry Red." Under Miller's interpretation of the phrase "as it appears," voters would have to write "Boucher, Henry Red" to have their votes counted for this candidate, because that would be precisely how his name "appeared" on the form. "Henry Boucher" would not count, nor would "Red Boucher." Thus, under Miller's interpretation of the statute, candidates who provide a nickname would not be offering voters an *alternative* name, but would be requiring voters to write both their first names *and* their nicknames in order to cast a valid write-in vote. This makes no sense. The nickname option shows that the division has long read the "as it appears" language in .360(a)(11) to allow greater flexibility for voters rather than imposing a stringent exact spelling requirement.

Moreover, even if the AS 15.15.360(a)(11) phrase "as it appears on the write-in declaration" were a spelling precision requirement, that requirement would not apply to the second phrase in the statute — the "last name of the candidate" — due to the disjunctive "or." The statute specifies that a write-in vote will be counted if the voter has written "the name, as it appears on the write-in declaration of candidacy, of the candidate *or* the last name of the candidate." [Emphasis added] Thus, even under Miller's reading of the "as it appears" language, AS 15.15.360(a)(11) remains silent as to how precisely a voter must spell "the last name of the candidate" to have the vote counted.

Additionally, even if AS 15.15.360(a)(11) were read to require spelling precision, this reading would not eliminate all need for inquiry into voter intent. The handwriting of write-in voters falls on a spectrum from perfectly legible to completely unintelligible, so reading voters' handwriting cannot be reduced to an entirely mechanistic process. A voter's "r" may resemble a "v," yet to any reasonable human observer the vote would appear to be a correctly spelled vote for "Murkowski," not a vote for "Muvkowski," just as the same "r" on a grocery list would be easily understood to form a correctly spelled request for "bread," not "bvead." Thus even if the statute required exact spelling, determining whether a voter has in fact written and properly spelled "Murkowski" would still require case-by-case scrutiny of ballots to determine whether a voter's marks — shaky, cramped, or scrawling as they may be — are clearly intended to spell M-U-R-K-O-W-S-K-I.

Miller attempts to read significance into Lisa Murkowski's campaign strategy of trying to educate voters on the proper spelling of her name. P. Memo. at 6, 12, 20. But not only is Murkowski's reading of AS 15.15.360(a)(11) completely irrelevant, her campaign materials do not actually demonstrate that she believed misspelled votes could not be counted. Murkowski surely realized that correctly spelled votes would be *more likely* to survive challenges from her opponent, and it would be difficult to imagine a campaign strategy in which she encouraged voters to spell her name "almost" right.

Because AS 15.15.360(a)(11) is silent on spelling and handwriting exactitude, the division must look outside its language to determine whether to count write-in votes containing minor errors. A different subsection of the same statute provides some guidance:
AS 15.15.360(a)(5) provides that a voter's marking of an oval "shall be counted only if it is substantially inside the oval provided, or touching the oval so as to *indicate clearly that the voter*

intended the particular oval to be designated." [Emphasis added] Thus, despite the statute's lack of specific direction to consider voter intent in counting write-in votes, AS 15.15.360 clearly recognizes that the purpose of ballot review is to determine a voter's intent.

This is significant because while the handwritten nature of write-in votes absolutely requires some human analysis and discretion, the same is not true for marking an oval. The legislature theoretically could eliminate the need for analysis of voter intent from the consideration of whether a voter has properly marked an oval — by requiring that the oval be completely filled in, without exception. Instead, the legislature chose to recognize the importance of voter intent in determining whether an oval is sufficiently marked. It makes no sense to suppose, as Miller does, that the legislature chose to recognize the importance of voter intent in the oval-marking context, where consideration of voter intent *could be* completely avoided in the interest of precision, but at the same time chose, in the interest of precision, to avoid consideration of voter intent in the write-in voting context, where consideration of voter intent simply *cannot be* completely avoided. Nor is it clear, if this was the legislature's purpose, why it did not explicitly state that the name must be spelled correctly for a write-in vote to count.

Other Alaska election statutes also require election officials to consider voter intent. For example, AS 15.15.030 provides that "[t]he director shall prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to *reflect most accurately the intent of the voter*, and to expedite the administration of elections." [Emphasis added]. Similarly, AS 15.15.140(a) provides that "[i]f the election board receives an insufficient number of official ballots or official election materials, it shall provide and the voters may use unmarked substitute ballots or other election materials *to indicate the intent of the voter*." [Emphasis added].

Together with AS 15.15.360(a)(5), these statutes show that voter intent is an important element of election decisions about the validity of votes.

The division's regulations also recognize the importance of voter intent. For example, the regulations dealing with facsimile ballots, 6 AAC 25.065 and.067, provide that a facsimile ballot that is marked in a manner that cannot be counted by an Accu-Vote tabulator must nonetheless be hand-counted if "the board members determine[] that the ballot contains *clear evidence of the voter's intent.*" [Emphasis added].

And the Alaska Supreme Court has emphasized the importance of determining voter intent when counting ballots.[6] The court has held that "the crucial question in determining the validity of ballot markings is one of voter intent."[7] In *Edgmon v. Moses*,[8] the court made clear that AS 15.15.360's rules are designed to facilitate a determination of voter intent, rather than to substitute entirely for that inquiry. The court explained that "the terms of the statute itself make voter intent paramount. The statute requires that before a mark is counted as a vote, it must comply with the requirements under subsection .360(a)(1) *and* clearly indicate voter intent as required by subsection .360(a)(5)."[9] The court has also recognized the general principle that,

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6 *See* Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69, 78 (Dec. 2009) (discussing the "Democracy Canon" — the principle that statutes should be construed to favor voter enfranchisement — and noting that Alaska courts have applied "a particularly strong form" of the Canon that "applies to laws governing the right to vote unless the legislature indicates to the contrary in 'clear and unmistakable' terms").

7 *Willis v. Thomas*, 600 P.2d 1079, 1085 (Alaska 1979).

8 152 P.3d 1154, 1158 (Alaska 2007). *See also Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987) ("In each of these challenges we must examine the ballot to determine whether the voter's intent can be adequately identified.") (citing *Willis*, 600 P.2d at 1084-85; *Hammond v. Hickel*, 588 P.2d 256, 274 (Alaska 1978)).

9 152 P.3d at 1157.

where possible, election statutes should be construed to avoid the "wholesale disfranchisement of qualified electors."[10]

The importance of voter intent is also reflected in federal law. In particular, 42 U.S.C. § 1973ff-2 requires states to allow voters in the military or overseas without standard absentee ballots to use federal write-in absentee ballots. This statute mandates that when states count these ballots, "[a]ny abbreviation, misspelling, or other minor variation in the form of the name of a candidate or a political party shall be disregarded in determining the validity of the ballot, if the intention of the voter can be ascertained."[11]

Because states must affirmatively implement Congress's superceding regulations,[12] the division adopted this standard for federal write-in ballots in 6 AAC 25.670(b). This regulation instructs that "[a]ny abbreviation, misspelling, or other minor variation in the form of the name of a candidate or political party will be disregarded in determining the validity of the ballot, if the intention of the voter can be ascertained." The regulation also specifies that "[t]he federal write-in ballot will be counted in the general manner prescribed for the counting of write-in votes in AS 15.15.360, except that the requirement under AS 15.15.360(a)(11) that the voter mark the oval opposite the candidate's name does not apply." In other words, the regulation notes that the manner in which the requirements of AS 15.15.360 differ for federal write-in ballots is *only* that they need not include a marked oval in order to be counted. In all other matters, AS 15.15.360's rules apply, demonstrating that the division did not view counting votes containing "[a]ny abbreviation, misspelling, or other minor variation in the form of the name of a candidate" as an "exception" to the requirements of AS 15.15.360.

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10 *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978).

11 42 U.S.C. § 1973ff-2(c)(3).

12 *Gonzales v. Arizona*, -- F.3d --, 2010 WL 4192623 * 4 (9th Cir.October 26, 2010).

Indeed, the state must treat federal write-in ballots and traditional ballots consistently in order to comply with the Equal Protection Clause of the Fourteenth Amendment.[13] The practical implication of Miller's position that traditional ballots cannot be counted absent perfect spelling and penmanship is that a permissive standard would apply to votes cast for a write-in candidate on federal write-in absentee ballots, while a strict standard would apply to votes cast for a write-in candidate on traditional ballots. The effect of applying two standards to write-in ballots "would be to value one person's vote over that of another."[14] A voter using a federal write-in ballot who wrote in "Lisa Merkowski" for the Senate race would have his vote counted for Lisa Murkowski, but a vote with the identical spelling on a standard ballot would be discarded.

Accordingly, the division's interpretation of AS 15.15.360 is consistent with the language of the statute and with Alaska Supreme Court precedent, harmonizes state and federal requirements, and avoids unnecessary disenfranchisement of voters. In contrast, Miller's cramped reading of AS 15.15.360 would both disenfranchise voters who have made their intent clear and create equal protection problems. The division's interpretation of AS 15.15.360 should stand.

2. The division could not violate the Elections Clause by misinterpreting a state statute.

The division is not, as Miller asserts, violating the Elections Clause of the U.S. Constitution, Art. I, § 4, cl. 1. Under this clause, the Alaska Legislature has the power to prescribe "[t]he Times, Places and Manner of holding Elections for Senators…." The clause establishes two principles: (1) that states, not the federal government, are responsible for running elections; and (2) that within each state, it is the legislature that will prescribe the laws to govern elections. Miller argues that the division has violated the Elections Clause because, he alleges, it

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13 *See Bush v. Gore*, 531 U.S. 98, 104 (2000).

14 *Id*. at 104-05.

is not properly following AS 15.15 360. *See* discussion above. This allegation, if true, offends neither the principle that the state runs elections nor the principle that the legislature enacts the laws to govern elections. It does not implicate the Elections Clause at all.

The entire substance of Miller's "Elections Clause" claim is based on his disagreement with the division's interpretation of AS 15.15.360. P. Memo. at 12-16. As discussed above, the division has not misinterpreted this statute, but even if it has, that misinterpretation would not violate the Elections Clause. An agency's determination that a state election statute mandates a particular process cannot create a constitutional issue because the Elections Clause does not prescribe any particular process. As long as the Alaska Legislature has created the laws governing elections, the state has fulfilled the requirements of the Elections Clause and has not, as Miller claims "deviate[d] from [its] express commands." P. Memo at 11.

Miller's disagreement with the division's interpretation of AS 15.15.360 creates only a state statutory dispute. The legislature has charged the division with implementing its election statutes.[15] Obviously, the division must determine as a practical matter how to accomplish the statutory directives for elections. It does this by creating procedures that fulfill the general statutory guidelines consistent with legal constraints and public policy goals. The Elections Clause's delegation of election powers to state legislatures in no way limits this traditional role of the state agencies charged with effectuating those statutory mandates. Nor does it make the decisions of the Alaska Supreme Court regarding election law "entirely irrelevant" to the agency's interpretation of state election statutes, as Miller claims.[16] P. Memo at 14. If the

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[15] *See* AS 15.15.010, which provides in part that "[t]he director shall provide general administrative supervision over the conduct of state elections, and may adopt regulations ... necessary for the administration of state elections."

[16] *See* Hasen, *supra,* 62 Stanford L. Rev. at 117 (arguing that "even if one concedes for purposes of argument that the legislature has the sole power to set the rules for … congressional

Elections Clause had such an expansive meaning, state agencies would never be able to conduct elections, because all statutes must be interpreted to be implemented. To the extent an agency acts outside the scope of its delegated authority, it has violated state law, not the federal constitution. In effect, Miller's "Elections Clause" challenge is indistinguishable from his argument that the division's process of counting ballots with minor misspellings is *ultra vires.*

3. The division's process for counting write-in votes does not violate the Equal Protection clause.

The division's process for counting write-in votes satisfies the Equal Protection Clause. Miller argues that "the Division has produced the same equal protection problem that was present in *Bush v. Gore*," P. Memo. at 17, but unlike the recount process declared unconstitutional in that case, the division's process for counting write-in votes ensures that all write-in votes will be subject to uniform treatment.

In the context of elections, equal protection requires that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[17] In *Bush v. Gore*, the U.S. Supreme Court ruled that the "absence of uniform rules to determine intent" in the Florida Supreme Court's recount order violated equal protection because it "led to unequal evaluation of ballots in various respects."[18] Specifically, the Court observed, in the absence of uniform guidelines, different counties applied

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elections, subject to congressional override[], that does not mean that a state court's reliance on the Democracy Canon is illegitimate" and asserting that a claim that state courts lack authority to interpret state election laws "would be an untenable position, rendering unreviewable decisions of state agencies (which notably also could be seen as usurping the power of the legislature through agency interpretation) on how to run a presidential or congressional election, and preventing even court supervision of recounts in presidential and congressional elections.").

[17] *Bush v. Gore*, 531 U.S. at 104-05 (quoting *Harper v. Virginia Bd. of Elec.*, 383 U.S. 663, 665 (1966)).

[18] *Id.* at 106.

different standards for discerning voter intent.[19] This unequal treatment of similarly situated ballots was compounded by the Florida court's failure, in its recount order, to specify who would recount the ballots — resulting in ad hoc and inexperienced counting teams — and the inability of recount observers to protest the decisions made by the county voting boards.[20]

Unlike the Florida recount process, the division's process for counting write-in ballots ensures that write-in votes are treated uniformly. Only one person — the director — reviews challenged write-in votes to determine whether the voter's intent can be ascertained. *See* Comp. Exh. A. at 2-3. The director applies a single standard to all write-in ballots: she will count ballots containing minor misspellings and variations of "Murkowski" for Lisa Murkowski if she determines that the voter clearly intended to vote for Lisa Murkowski.[21] Fenumiai Affidavit at ¶ 5. If the candidates' observers object to this decision, challenged votes are segregated for potential court review. Because these procedures ensure that all votes are counted in a uniform manner, the arbitrary and disparate treatment of votes that gave rise to *Bush v. Gore* cannot occur.

Unable to show that the division is actually treating ballots unequally, Miller essentially argues that the division violates equal protection because it has not articulated specific rules for discerning voter intent. Miller has misconstrued the law. *Bush v. Gore* requires election officials to ensure votes are not subject to arbitrary and disparate treatment, but it does not require election officials to develop rules to cover every potential write-in variation they may encounter. Sometimes it is not practicable or even possible to articulate very specific standards, and the law recognizes this.

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19 *Id.* at 106-07.

20 *Id.* at 109.

21 This is the standard applied by both federal law and state regulation to the counting of federal absentee write-in ballots. 6 AAC 25.670(b); 42 U.S.C. 1973ff-2(c)(3).

While it might not have been difficult to develop uniform rules for counting Florida's punch-card ballots, given the limited number of permutations, it would be impossible to develop rules to cover every permutation in spelling and penmanship of the name "Lisa Murkowski," so as to eliminate the need for discretion in counting votes. Even Miller's supposedly "objective" standard of accepting only correctly spelled write-in votes requires the vote counter to use discretion to decipher the voter's handwriting — to decide, for example, whether a particular letter is intended to be an "o" or an "a." Write-in voting is a situation in which, as the Supreme Court acknowledged, "the general command to ascertain intent is not susceptible to much further refinement." *Id.*

A recent Ninth Circuit decision confirms that while election procedures must be applied uniformly, some discretion is permitted in applying those procedures. In *Lemons v. Bradbury*,[22] the court held that Oregon's process of verifying signatures on a voter referendum petition did not violate the Equal Protection Clause. The plaintiffs argued that the state lacked uniform rules for verifying petition signatures and thus violated *Bush v. Gore*.[23] Oregon officials instructed county elections officials to verify referendum signatures by determining whether that signature matched the signature on the signer's voter registration card.[24] As in this case, the Oregon instructions allowed for the exercise of some discretion to determine whether a signature "matched."[25] The court held the process ensured equal treatment because it was uniformly applied across the state's counties.[26] It would have been impossible to articulate standards to

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22 538 F.3d 1098 (9th Cir. 2008).
23 *Id.* at 1105.
24 *Id.*
25 *Id.*
26 *Id.* at 1106.

eliminate the need for some discretion in deciding whether signatures matched, and *Lemons* shows that the Equal Protection Clause does not require it.

In this case, the director is the sole person tasked with reviewing ballots to see if a voter's intent can be ascertained, and she is following a standard prescribed by federal statute. Because the division determines voter intent according to a process that ensures consistency, its process complies with the requirements of equal protection.

4. Miller has presented no evidence or rationale to support his "protest vote" argument.

Miller claims that "[m]any voters stated, prior to the election, that they intended to misspell Murkowski as a protest to her write-in effort" and that such voters "were trying to send a message to the candidate that she would get a 'write in' but not a vote." P. Memo. at 30-31. But Miller cites no evidentiary support whatsoever for this claim. Moreover, when considered in light of the explanation by election officials before the election that the division would count minor misspellings as votes for Murkowski, this argument makes little sense. *See, e.g.*, Comp. Exh. F. A voter who wished to protest any aspect of the election would be unlikely to do so by slightly misspelling the name of a prominent write-in candidate after it was widely reported in the media that such misspellings would count as legitimate votes.

Moreover, the division must determine voter intent from what the voter has written on the ballot, not from what the voter reports before or after the election. If what the voter has written on the ballot unambiguously manifests an intent to vote for Lisa Murkowski, then his vote will count for Lisa Murkowski even if he secretly intended otherwise.

5. The division's counting process does not constitute a regulation under the APA.

The division did not promulgate its instructions for counting write-in ballots as a regulation, because the instructions do not constitute a "regulation" under the APA. Miller argues that the division violated the APA because it issued a "new voter intent regulation" 36 hours before the voting count was set to start. P. Memo at 4. He claims that the counting instructions have the hallmarks of a regulation, and concludes that because the division did not promulgate them in accordance with the APA, the instructions are invalid and unenforceable. *Id.* at 27-31. But the instructions describe an internal agency process for counting ballots, not a standard of general application and, therefore, the instructions are not a regulation.[27] In truth, Miller's complaint does not actually appear to be with the counting instructions, which are simply an agency tool to assist with the practicalities of sorting ballots, dealing with observer challenges, and counting votes. Rather, Miller's real complaint is that the counting process includes the director's attempt to determine whether voter intent can be ascertained from imperfect markings on ballots.

But the practice of attempting to ascertain voter intent by reviewing ballots is not a regulation either, for two reasons. First, as discussed in section V.A.1, above, the division's determination that AS 15.15.360 requires counting ballots that manifest an intention to vote for a particular candidate is nothing more than a routine interpretation of a statute, which does not require the promulgation of a regulation.[28] The Alaska Supreme Court has held that "[a]though the [APA] may require rulemaking in cases in which an agency's interpretation of a statute is

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[27] *See Mathis v. Saucer*, 942 P.2d 1117, 1123 (Alaska 1997) (holding that agency's protocol establishing standard operating procedures did not need to conform to formal requirements of the APA).

[28] *Squires v. Alaska Board of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 334-335 (Alaska 2009).

expansive or unforeseeable, or in cases in which an agency alters its previous interpretation of a statute, obvious, commonsense interpretations of statutes do not require rulemaking."[29] As the court has recognized, "[n]early every agency action is based, implicitly or explicitly, on an interpretation of a statute or regulation authorizing it to act. A requirement that each such interpretation be preceded by rulemaking would result in complete ossification of the regulatory state."[30]

Thus, for example, in *Alaska Center for the Environment v. State,* the Alaska Supreme Court rejected a plaintiff's characterization of the Office of Management and Budget's interpretation of the term "major energy facility" as a regulation that should have been promulgated under the APA.[31] The court held that the OMB had merely made a "common sense interpretation" of a regulation that imposed no new substantive requirements nor made existing ones more specific.[32] Miller ignores this recent caselaw and argues that *Jerrel v. DNR*[33] requires the division to promulgate a regulation.

But *Jerrel* has no application to the division's determination of how to count write-in votes because that did not impose new requirements on the public. In *Jerrel,* the court held that the imposition of a 20-foot visibility requirement on livestock marking was invalid because it constituted a new, substantive requirement, and thus a new regulation for purposes of the APA. The court discounted DNR's claim that the visibility requirement was an "informal policy rule," concluding that the State had "singled out the Jerrels" by imposing "shifting interpretations of

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29 *Id.* (quoting *Alyeska Pipeline Serv. Corp. v. State, Dept. of Envtl. Conservation*, 145 P.3d 561, 573 (Alaska 2006).

30 *Id.*

31 80 P.3d 231, 243-44 (Alaska 2003).

32 *Id.; see also Squires*, 205 P.3d at 334-335.

33 999 P.2d 138 (Alaska 2000).

the meaning of the marking requirements."[34] But the division did not adopt an "informal policy rule" when it interpreted AS 15.15.360.[35] Instead it was complying with existing law requiring it to consider voter intent when counting ballots. Moreover, unlike in *Jerrel,* the division has not imposed a "new substantive requirement" or "shifting requirements" invented post-hoc, because the division's interpretation of AS 15.15.360 is consistent with its past practice. Indeed, the voter intent standard does not pose *any* new requirement on the public; it simply attempts to ascertain the intent of a voter from marks on the ballot.

The second reason that the director's interpretation does not require a regulation is that she is following existing caselaw of the Alaska Supreme Court. Supreme Court rulings are valid law that must be followed by state agencies. Promulgation of regulations to effectuate supreme court caselaw would be an empty gesture merely duplicating existing requirements.[36]

The Alaska Supreme Court has long emphasized the importance of determining voter intent when counting ballots.[37] In 1979, the court noted that "the crucial question in determining the validity of ballot markings is one of voter intent."[38] In *Carr v. Thomas,* the court explained that "[t]he right of the citizen to cast his ballot and thus participate in the selection of those who control his government is one of the fundamental prerogatives of citizenship and should not be impaired or destroyed by strained statutory constructions. If in the interests of the purity of the

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[34] *Id.* at 144.

[35] In *Squires*, that court clarified that the *Jerrel* court was primarily concerned that DNR "singled out" the Jerrels for enforcement of a new rule, and that the rule announced in *Jerrel* did not apply when an agency has applied its longstanding policy in a consistent manner. 205 P.3d at 335.

[36] *Cf. U.S. v. Trident Sea-Foods,* 60 F.3d 556, 558 (9th Cir. 1995) (observing that the existence of case law interpreting a statute obviates the need to promulgate a regulation).

[37] *See generally* Hasen, *supra,* 62 Stanford L. Rev. at 78 (explaining that the Alaska Supreme Court interprets election statutes as requiring a consideration of voter intent unless the legislature has stated otherwise with unmistakable language).

[38] *Willis v. Thomas*, 600 P.2d 1079, 1085 (Alaska 1979).

ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms."[39] The court reaffirmed these principles in 2007, in *Edgmon v. Moses*.[40] *Edgmon* reflects the understanding that the rules laid out in AS 15.15.360 are designed to facilitate a determination of voter intent, rather than to substitute entirely for that inquiry.[41]

If any doubt remained about the importance of considering voter intent when counting ballots, the Alaska Supreme Court put it to rest in its most recent election law decision, issued on October 29, 2010:

> The decision we reach today is informed by our previous cases regarding the importance of facilitating voter intent. We have consistently emphasized the importance of voter intent because the opportunity to freely cast one's ballot is fundamental. . . . [A] true democracy must seek to make each citizen's vote as meaningful as every other vote to ensure the equality of all people under the law.[42]

Accordingly, because this caselaw mandates the division's practice of ascertaining voter intent when counting ballots, a regulation is not required to give effect to the practice.

B. MILLER DEMONSTRATES NO IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION

Miller's claim of irreparable harm depends entirely on his assertion that he "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 the U.S. Senate race." P. Memo at 33. He argues that the recount available under AS 15.20.430 to a defeated candidate is not meaningful because the

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39 586 P.2d 622, 626-27 (Alaska 1978) (quoting *Sanchez v. Bravo*, 251 S.W.2d 935, 938 (Tex. Civ. App. 1952)); *see also Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987) ("In each of these challenges we must examine the ballot to determine whether the voter's intent can be adequately identified.") (citing *Willis*, 600 P.2d at 1084-85; *Hammond v. Hickel*, 588 P.2d 256, 274 (Alaska 1978)).

40 152 P.3d 1154, 1158 (Alaska 2007).

41 *Id.* at 1157.

42 Exh. B (*State of Alaska, Division of Elections v. Alaska Democratic Party and Alaska Republican Party*, S-14054 (Oct. 29, 2010)).

division is unlikely to apply a different standard during any recount. *Id.* at 33.

But this concern is unfounded, because the result of a recount is not necessarily the final word. Alaska law provides for an appeal of a recount to the Alaska Supreme Court, which will review the question of whether the director "properly determined what ballots, parts of ballots, or marks for candidates are valid, and to which candidate … the vote should be attributed."[43] Because the Supreme Court can review the standards the director applied, allowing the division to continue to count ballots under its election procedures will cause Miller no irreparable harm.

C. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR THE STATE DEFENDANTS

Miller argues that the balance of equities and public interest favor enjoining the director from counting write-in votes that are less than letter perfect, based on his contention that this violates the law. P. Memo at 34. This argument and the authorities he cites are premised on the assumption that he will prevail on the merits. As discussed above, he is unlikely to do so. But even if he were likely to prevail, the equities and public interest must be considered separately.[44]

The public interest would be best served by the prompt determination of the outcome of this election. Alaskans have a strong interest in having two senators when the new Congress opens. The division is committed to a process designed to determine and express the will of the Alaska electorate. It believes that its interpretation of AS 15.15.360 is legally correct and gives proper weight to the intent of the voters in filling in their ballots. But because unchallenged votes for Murkowski are being tabulated separately from challenged votes, all parties are protected. The ballots are also being kept separate to facilitate any recount of particular categories of ballots that might be necessary or appropriate.

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43 AS 15.20.510(2).

44 *See Winter,* 129 S. Ct at 378, 381.

Therefore, the balance of the equities tips strongly in favor of allowing the division to continue with its process and protect the public interest in ensuring the speediest possible determination of the result.

VI. CONCLUSION

The Court should deny Miller's motion for a preliminary injunction.

DATED November 15, 2010.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: s/ Margaret Paton-Walsh

Margaret Paton-Walsh
State of Alaska, Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone (907)269-6612
Facsimile (907)258-4978
Margaret.paton-walsh@alaska.gov

Attorney for Craig Campbell
and the Alaska Division of Elections

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November
copy of the foregoing document was served electronically on:

Thomas V. Van Flein

s/ Margaret Paton-Walsh