Thomas V. Van Flein
Clapp, Peterson, Van Flein,
Tiemessen & Thorsness LLC
711 H St., Suite 620
Anchorage, Alaska 99501-3454
Phone: (907) 272-9228
Facsimile: (907) 272-9586
E-mail: tvf@akcplaw.com

Michael T. Morley
616 E St. N.W. #254
Washington, D.C. 20004
Phone: (860) 778-3883
Facsimile: (907) 272-9586
E-mail: michaelmorleyesq@hotmail.com
Application for *pro hac vice* admission forthcoming

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

JOE MILLER, *Plaintiff*, v. LIEUTENANT GOVERNOR CRAIG CAMPBELL, in his official capacity; and DIVISION OF ELECTIONS, STATE OF ALASKA, *Defendants*.	Civil Action No: 3:10-CV-00252 (RRB)

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF FEDERAL QUESTION JURISDICTION, OR IN THE ALTERNATIVE TO ABSTAIN

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

This Court should exercise jurisdiction over this case and grant Plaintiff Joe Miller's request for a preliminary injunction, because Defendants' decision to accept as valid write-in ballots that were completed improperly violates two provisions of the U.S. Constitution. First, Defendants have usurped the constitutional power of the Alaska Legislature to "prescribe[]" the "manner of holding elections for Senators," in violation of the Elections Clause, U.S. Const., art. I, § 4, cl. 1, by establishing and implementing a policy that flatly contradicts the rules for counting write-in ballots that the Legislature established, *see* Alaska Stat. § 15.15.360(a)(10), (a)(11), (b). Second, Defendants have violated the Equal Protection Clause, U.S. Const. amend XIV, by adopting the precise standard for counting write-in ballots—attempting to divine the "intent of the voter"—that the U.S. Supreme Court held in *Bush v. Gore*, 541 U.S. 98 (2000) (per curium), was unconstitutional because it was too vague, general, and subjective. As the Affidavit of former Lieutenant Governor Loren Leman establishes, this new policy, adopted at the eleventh hour, represents a substantial departure from the Division's past practice and interpretation of § 15.15.360. *See* Affidavit of Loren Leman in Support of Plaintiff's Motion for Preliminary Injunction, ¶¶ 5-6, 8 (hereafter, "Leman Aff."). This Court should enjoin Defendants from certifying the results of the 2010 general election for the U.S. Senate based on a ballot count that is infected with such constitutional infirmities.

Part I of this Reply Memorandum establishes that this Court has, and should exercise, subject-matter jurisdiction over this lawsuit. Part II demonstrates that Plaintiff

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

Miller is likely to succeed on the merits of his claims (both under the U.S. Constitution and state law), while Part III shows that he otherwise is entitled to a preliminary injunction.

I. THIS COURT HAS, AND SHOULD EXERCISE, FEDERAL-QUESTION JURISDICTION OVER PLAINTIFF'S CLAIMS UNDER THE U.S. CONSTITUTION.

Plaintiff Miller respectfully asks that this Court deny Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction or In the Alternative to Abstain (hereafter, "Motion" or "Mot."). Section A explains that this Court has subject-matter jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331 (and supplemental jurisdiction over his state-law claims pursuant to 28 U.S.C. § 1367). Section B shows that abstention under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), would be improper. Finally, Section C demonstrates that neither this case, nor Plaintiff Miller's request for a preliminary injunction, is moot.

A. Plaintiff Miller's Claims Under the U.S. Constitution Fall Within This Court's Federal Question Jurisdiction.

Defendants have asked this Court to dismiss the Complaint due to lack of subject-matter jurisdiction, in effect making the remarkable argument that alleged violations of the U.S. Constitution do not constitute "federal questions" under 28 U.S.C. § 1331, which expressly grants this Court jurisdiction over "all civil actions arising under the Constitution." Defendants, however, neither have articulated nor applied the correct standard for seeking dismissal, for lack of subject-matter jurisdiction, of claims that expressly implicate, on their face, provisions of the U.S. Constitution or federal law. To the

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

contrary, Defendants expressly admit in their Motion to Dismiss, "It is ***undeniable*** that the complaint alleges two violations based on sensitive questions of constitutional law: whether [the] Division's practice violates the Election Clause or equal protection." Mot. at 11 (emphasis added). This admission, in itself, is sufficient to defeat Defendants' jurisdictional arguments.

Subject-matter jurisdiction "refers to a tribunal's power to hear a case" and "presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quotation marks and citations committed). Federal-question jurisdiction under 28 U.S.C. § 1331 exists over a claim "in which federal law creates the cause of action," *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986); *see also Am. Well Works v. Layne*, 241 U.S. 257, 260 (1916) ("[A] suit arises under the law that creates the cause of action."), even if the claim "'will be sustained under one reading of the Constitution and laws and defeated under another,'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), *quoting Bell v. Hood*, 327 U.S. 678, 685 (1946).[1] A claim brought under a federal constitutional or statutory provision falls outside of a federal court's jurisdiction only if it "clearly appears to be immaterial and made solely for the purpose of

[1] Since the Supreme Court's seminal ruling in *Ex Parte Young*, 209 U.S. 123 (1908), federal courts have exercised jurisdiction over claims for injunctive and declaratory relief against state officials for violating the U.S. Constitution. "If the question of unconstitutionality, with reference, at least, to the Federal Constitution, be first raised in a Federal Court, that court . . . has the right to decide it, to the exclusion of all other courts." *Id*. at 160.

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711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

obtaining jurisdiction or . . . is wholly insubstantial and frivolous." *Steel Co.*, 523 U.S. at 89; *see also Hagans v. Lavine*, 415 U.S. 528, 542-43 (1974).[2]

Defendants' Motion to Dismiss articulates a variety of alternative standards that they wish this Court to employ instead of these simple and well-established principles, including considering whether: the plaintiff "has a remedy in state court" for the conduct at issue, Mot. at 5, "[t]he federal law that plaintiff invokes . . . [is] sufficiently central to the dispute to support such jurisdiction," *id*., and the assertion of jurisdiction would "threaten the legitimate interest of the state in having state courts interpret state law," *id*. at 5-6. Defendants do not cite a single case in support of any of these proposed standards or

[2] Instead of expressly arguing that Plaintiff's claims are immaterial, insubstantial, or frivolous, Plaintiffs' Motion to Dismiss instead appears to focus on whether the allegations in the Complaint amount to "a violation of [a] constitutional provision." Mot. at 4 (discussing Plaintiff's Election Clause argument); *see also id*. at 7 ("[T]he facts of this case do not support an Equal Protection Claim."). As the Supreme Court has held, however, subject-matter jurisdiction "is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell*, 327 U.S. at 682. Plaintiffs likely attempted to camouflage their Motion as being brought under Fed. R. Civ. P. 12(b)(1), rather than acknowledging it as arising under Fed. R. Civ. P. 12(b)(6), in order to compel Plaintiff Miller to prove "the necessary jurisdictional facts" at the outset of the case, Mot. at 2, before Defendants even have filed their Answer or responded to his Motion for a Preliminary Injunction. Had Plaintiffs filed their Motion correctly under Fed. R. Civ. P. 12(b)(6), they would have been forced to acknowledge that, for purposes of the Motion, this Court must accept the allegations in the Complaint as true and construe them in the light most favorable to the Plaintiff. *Minchummina Natives, Inc. v. U.S. DOI*, 394 F. Supp. 2d 1145, 1147 (D. Alaska 2005); *see also Alaska Stock. LLC v. Houghton Mifflin Harcourt Publ'g Co.*, No. 3:09-CIV-0061 (HRH), 2010 U.S. Dist. LEXIS 108041, at *6 (D. Alaska Sept. 21, 2010), *quoting Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009).

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711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

considerations, however, and the Supreme Court never has held that any of them are relevant to determining whether federal question jurisdiction exists under 28 U.S.C. § 1331.

On their face, Plaintiff Miller's Elections Clause and Equal Protection claims clearly fall within this Court's federal-question jurisdiction, under the standards set forth by the Supreme Court in *Merrell Dow*, 478 U.S. at 808, *Steel Co.*, 523 U.S. at 89, and *Bell*, 327 U.S. at 685, because they are expressly based on, and "arise under," specific provisions of the United States Constitution. *See* U.S. Const., art. I, § 4, cl. 1 (Elections Clause); *id*. amend. XIV (Equal Protection Clause). Furthermore, Defendants have not, and could not in good faith, argue that Plaintiff Miller's claims are "wholly insubstantial," "immaterial," or "frivolous." *Steel Co.*, 523 U.S. at 89. To the contrary, Plaintiff Miller has articulated non-frivolous (indeed, meritorious) interpretations of the Elections Clause and Equal Protection Clause that, if adopted by this Court would warrant relief.

1. This Court Has Federal-Question Jurisdiction Over Plaintiff Miller's Election Clause Claim.

Plaintiff Miller's Election Clause claim, on its face, arises directly under the U.S. Constitution and falls squarely within the scope of this Court's federal question jurisdiction. In this cause of action, Plaintiff Miller contends that Defendants unconstitutionally have usurped the Alaska Legislature's prerogative under the Elections Clause to "prescribe[]" the "manner of holding elections for Senators," U.S. Const., art. I, § 4, cl. 1, by accepting as valid and counting write-in votes that contain misspellings, despite the fact that the legislature has declared statutorily that:

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

- "[a] vote for a write-in candidate . . . shall be counted 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," Alaska Stat. § 15.15.360(a)(11);
- the legislature's ballot-counting rules are "mandatory and there are no exceptions to them," *id*. § 15.15.360(b); and
- "[a] ballot may not be counted unless marked in compliance with these rules," *id*.

Defendants argue, in contrast, that they have not violated the Elections Clause because their policy does not "ignore" or "override" § 15.15.360, but rather "interpret[s]" it. Mot. at 3; *see also id*. at 5 (arguing that Defendants did not "change" the law). Thus, a legitimate federal question within the scope of this Court's jurisdiction exists. Numerous federal courts have exercised subject-matter jurisdiction over such Elections Clause claims. *See, e.g.*, *Libertarian Party of Ohio v. Blackwell*, 567 F. Supp. 2d 1006, 1011 (S.D. Ohio 2008); *Smith v. Clark*, 189 F. Supp. 2d 548, 558 (S.D. Miss. 2002), *vacated as moot sub nom. Branch v. Smith*, 538 U.S. 254, 265-66 (2003); *Valenti v. Mitchel*, 790 F. Supp. 551, 555 (E.D. Pa. 1992), *aff'd on other grounds* 962 F.2d 288, 297 (3d Cir. 1992); *Grills v. Branigin*, 284 F. Supp. 176, 180 (S.D. Ind. 1968), *aff'd* 391 U.S. 364 (1968).

Defendants attempt to argue that this dispute does not give rise to a federal question because, even if their policy violates § 15.15.360, it would not constitute a "violation of the [Elections Clause]." Mot. at 4; *see also id*. at 5 (arguing that, even if Defendants "failed to properly follow the legislature's statutes," it did not "change[]" them). Defendants'

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

argument essentially would preclude Elections Clause claims from being litigated in federal court. Furthermore, it is based on a misunderstanding of the nature of Plaintiff Miller's claim. When the U.S. Constitution confers a particular power on a specific governmental entity, it is unconstitutional for any other governmental entity to purport to exercise that power. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 732, 734 (1986) (holding that the Balanced Budget Act of 1985 was unconstitutional because it purported to vest in the Comptroller General, a legislative branch officer, authority that the Constitution reserved for executive branch personnel); *Buckley v. Valeo*, 424 U.S. 1, 126-28 (1976) (per curium) (holding that the Federal Election Campaign Act of 1975 was unconstitutional, in part because it purported to grant congressional leaders the authority to nominate, and Congress as a whole the power to approve the nomination of, members of the Federal Election Commission, powers that the Appointments Clause reserved to the President and Senate, respectively); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (holding that President Truman's wartime seizure of steel mills was unconstitutional because, in the absence of any statutory authorization, it constituted a usurpation of the legislative authority that the Constitution assigns to Congress).

Of course, in general, "the distribution of powers among the branches of a State's government raises no questions of federal constitutional law." *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring). In this case, however, the Elections Clause specifically assigns the power and responsibility for "prescrib[ing]" the "manner of holding elections for Senators" to state legislatures. U.S. Const., art. I, § 4, cl. 1. Thus, when regulating

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711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

federal elections, "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under [the Elections Clause]." *Palm Beach County*, 531 U.S. at 76 (addressing the materially identical constitutional provision concerning presidential electors).[3] Consequently, a policy affecting federal elections, promulgated by a state executive officer or agency, that directly conflicts with or contradicts a state statute ***not only*** is invalid under state law, ***but also*** violates the Elections Clause, because it usurps or infringes upon the legislature's constitutional authority. *See Bush*, 531 U.S. at 113-15 (Rehnquist, C.J., concurring); *Palm Beach County*, 531 U.S. at 76-78. Although, as Defendants point out, *see* Mot. at 5, state law issues necessarily constitute a substantial component of such a claim, it still remains a federal question that arises under the Election Clause of the U.S. Constitution.

Defendants contend that this case is distinguishable from *Bush v. Gore* because, in that case, the Florida Supreme Court effectively "changed" the law, whereas here, Defendants claim they are accused of merely "violating" the law. Mot. at 5. Regardless of how Defendants wish to characterize their conduct, the promulgation and enforcement of a

[3] *See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1994) ("[P]owers over the election of federal officers had to be [constitutionally] delegated to, rather than reserved by, the States."); *State ex rel. Wettengel v. Zimmerman*, 24 N.W.2d 504, 506 (Wis. 1946) ("When the Wisconsin legislature enacted a law relating to the times, places, and manner of holding elections for senators and representatives, the times and places so fixed and the manner so prescribed apply to a choice of a United States senator not because of any provision of state law but because of the provisions of the United States constitution."); *Moran v. Bowley*, 179 N.E.526, 534 (Ill. 1932) ("When the legislature exercises this power [to regulate federal elections], it acts by virtue of a mandate from the people of the United States and not of the State").

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

policy regarding the counting of write-in ballots in a U.S. Senate race clearly "prescribe[s]" the "manner of holding elections for Senators, " U.S. Const., art. I, § 4, cl. 1, and therefore is unconstitutional unless consistent with the state legislature's enactments on the matter. Moreover, nothing in *Bush v. Gore* supports Defendants' proffered distinction between state executive branch officials "changing" the law and "violating" it through their policy pronouncements.

Defendants also maintain that, if this Court exercises jurisdiction over Plaintiff Miller's claim, "every state election law dispute would implicate the U.S. Constitution, and the federal courts would find themselves the primary arbiters of state election law." Mot. at 4. That concern is greatly exaggerated, for at least two reasons. First, the Elections Clause applies only to congressional elections, whereas most elections and election disputes involve candidates for state, county, or local office. Second, an Elections Clause claim may be brought only in the rare event that the Lieutenant Governor or Division of Elections enacts or implements a policy that contradicts or effectively nullifies a state statute. Thus, such suits are likely to be few and far between. In any event, Plaintiff Miller's Election Clause claim is not insubstantial, frivolous, or immaterial, and so falls within the scope of this Court's federal-question jurisdiction under 28 U.S.C. § 1331.

2. This Court Has Federal-Question Jurisdiction Over Plaintiff Miller's Equal Protection Claim.

Plaintiff Miller's Equal Protection claim also arises directly under the U.S. Constitution and falls within this Court's federal-question jurisdiction. *Cf*. Mot. at 4-5. In

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

Bush v. Gore, 531 U.S. at 102, 105, the Florida Supreme Court had ordered certain counties to conduct a hand recount of the ballots in the 2000 presidential election, and count any ballot in which there is a "clear indication of the voter," even if the tabulation machine had rejected it. The Supreme Court held that such a recount would "not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to equal protection of the laws. *Id*. at 105. It explained:

> Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." *Gore v. Harris*, 779 So. 2d at 270 (slip op., at 39). This 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 105-06. The Court further noted, "[T]he question is . . . how to interpret the marks or holes or scratches on an inanimate object. . . . The search for intent can be confined by specific rules." *Id*. at 106. Thus, the Court held that, although the "intent of the voter" was an acceptable starting principle, it was not sufficiently "specific" to be the only officially promulgated standard in counting ballots.

Here, although all of the challenged write-in ballots are reviewed by a single official, the Director of the Division of Elections (hereafter, "Director"), it is undisputed that she is not applying any specific criteria or guidelines in deciding which ballots to count, or the candidates for whom they will be counted, but rather merely attempting to ascertain the "intent of the voter." *See* Mot. at 8-9; Defendants' Opposition to Motion for Preliminary Injunction at 2, 3, 6 (hereafter, "Opposition" or "Opp."). Although having a

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

single person review all of the challenged ballots eliminates the concerns articulated in *Bush v. Gore* about inconsistencies among different counting teams, it does not resolve the overarching dispute over whether, under the Equal Protection Clause and *Bush v. Gore*, the "intent of the voter" is too vague, amorphous, and subjective to apply as the sole standard for counting ballots.

Indeed, the risks of adopting such a broad standard are especially acute in a case such as this, where the official making the subjective determinations regarding write-in ballots knows exactly which candidate each decision will benefit, and how many votes each candidate needs to prevail. Without clear, specific criteria cabining the Director's discretion, she effectively is permitted to act as a "supervoter," likely determining the outcome of the election. Thus, a legitimate federal question within the scope of this Court's jurisdiction exists.

For these reasons, this Court clearly has the "power to hear [this] case," *Morrison*, 130 S. Ct. at 2877,[4] and it should deny Defendants' Motion.

B. <u>This Court Should Not Abstain From Exercising Jurisdiction.</u>

This Court should not abstain from exercising its subject-matter jurisdiction over this case pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The Supreme Court has held that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conserv. Dist. v. United States*,

[4] Defendants do not challenge this Court's supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiff Miller's state law claims.

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711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

424 U.S. 800, 817-18 (1976). Consequently, abstention "rarely should be invoked." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992). In this case, *Pullman* abstention is inappropriate for three reasons. First, the state statute at issue here, Alaska Stat. § 15.15.360, is clear and unambiguous, and not reasonably susceptible to an interpretation by the state courts that would eliminate the federal constitutional issue. Second, *Pullman* abstention is inapplicable in the unique context of an Election Clause claim. Third, *Pullman* abstention often is inadvisable in cases concerning federal elections, because it leads to inordinate delays that can undermine both the election and voters' constitutional right

1. *Pullman* abstention is inappropriate because the state statute at issue is clear and unambiguous.

As Plaintiffs themselves recognize, *see* Mot. 13-15, *Pullman* abstention is permissible only if, among other things, "the proper resolution of the state law question at issue . . . [is] uncertain." *Burdick v. Takushi*, 846 F.2d 587, 588 (9th Cir. 1988); *see also San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998) (holding that one of the requirements for *Pullman* abstention is that "the possibly determinative issue of state law is unclear"); *accord* Mot. at 11. If the state statute at issue is clear and unambiguous, declining to exercise jurisdiction is an abuse of discretion and reversible error. *See, e.g.*, *Pue v. Sillas*, 632 F.2d 74, 79 (9th Cir. 1980) ("Because we find that there are no doubtful state law issues in this case, we hold that the district judge's decision to abstain was an abuse of discretion. The challenged statutes are perfectly

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711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

clear."); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 827 (9th Cir. 1963); *see also San Francisco County Democratic Cent. Comm. v. March Fong Eu*, 826 F.2d 814, 825 (9th Cir. 1987) ("Section 11702 is clear on its face that central committees may not make preprimary endorsements . . . . Thus the district court's refusal to invoke *Pullman* abstention was not an abuse of discretion."). As the Supreme Court has explained, "If the state statute in question, ***although never interpreted by a state tribunal***, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the ***duty*** of the federal court to exercise its properly invoked jurisdiction." *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965) (emphasis added).

As in *Harman*, 380 U.S. at 535, the state statute at issue here is "clear and unambiguous in all material respects." As noted earlier, Alaska Stat. § 15.15.360 provides, in relevant part:

> (a) 10. 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 . . . .
>
> 11. 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.***
>
> (b) 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.***

Alaska Stat. § 15.15.360(a)(10), (a)(11), (b) (emphasis added). Subsection (b), in particular, underscores the need for strict compliance with these statutory requirements by

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

taking the unusual step of emphasizing that these rules are "mandatory," there are "no exceptions" to them, and a ballot "may not be counted" unless it complies with them. The clear intent of § 15.15.360(b) was to prevent precisely the type of ballot-by-ballot subjective determinations in which Defendants presently are engaged.

The validity of this interpretation is underscored by the fact that other provisions of state and federal law, as well as comparable statutes from other states, expressly require ballots with misspellings or variations on candidates' names to be counted. For example, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)—to which Defendants themselves cite, *see* Opp. at 12— allows citizens living overseas and members of the military who are deployed (collectively, "UOCAVA Voters") to submit their votes on a special form referred to as the "federal write-in absentee ballot" if they request, but do not receive, an official absentee ballot from their state. 42 U.S.C. § 1973ff-2(a)(1). UOCAVA expressly provides:

> In completing the ballot, the absent uniformed services voter or overseas voter may designate a candidate by writing in the name of the candidate or by writing in the name of a political party (in which case the ballot shall be counted for the candidate of that political party). . . . ***Any 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.***

Id. § 1973ff-2(c)(1), (3) (emphasis added).[5]

[5] UOCAVA effectively preempts Alaska Stat. § 15.15.360's rules regarding the counting of write-in ballots for federal write-in absentee ballots from UOCAVA Voters, and UOCAVA's more liberal standards apply to such ballots. Any Order in this case would not apply to UOCAVA voters.

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

The State of Alaska has implemented UOCAVA's requirements through a regulation in the Alaska Administrative Code which provides:

> In completing the federal write-in ballot, the voter may designate a candidate . . . for the general or special election by writing in the name of the office and candidate or by writing in the office and the name of a political party. . . . ***Any 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.***

6 Alaska Admin. Code § 25.670(b) (emphasis added). Thus, Alaska law clearly specifies the circumstances under which "abbreviation[s], misspelling[s], or other minor variation[s] in the form of the name of a candidate" are permissible. The absence of any comparable language in § 15.15.360 confirms that, in general, a candidate's name must be spelled correctly on a write-in ballot in order for it to be counted.[6]

This conclusion is further bolstered by comparing § 15.15.360 to statutes from other jurisdictions that govern the counting of write-in ballots. Indiana law, for example, provides, "An abbreviation, a misspelling, or other minor variation in the form of the name of a candidate or an office shall be disregarded in determining the validity of the ballot if

[6] Defendants suggest that it would violate the Equal Protection Clause to apply UOCAVA's liberal standards to federal write-in absentee ballots from UOCAVA voters, but impose stricter standards on write-in ballots from other voters. Mot. at 13. This argument fails for two reasons. First, in other contexts, courts have rejected Equal Protection challenges to the special privileges and protections that UOCAVA affords to military and overseas voters. *See, e.g.*, *Romeu v. Cohen*, 265 F.3d 118, 125 (2d Cir. 2001). Second, under Defendants' argument, UOCAVA effectively would preempt all state laws throughout the nation regarding the counting of write-in ballots, because any state establishing stricter standards for non-UOCAVA voters would be violating the Equal Protection Clause. This Court should not infer that Congress implicitly established a single, uniform, nationwide standard for the counting of write-in ballots from all voters through the very narrow, carefully delimited text of § 1973ff-2.

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711 H Street, Suite 620
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(907) 272-9272 fax (907) 272-9586

the intention of the voter can be ascertained." Ind. Code § 3-12-1-1.7(a)(4). Minnesota law likewise states, "Misspelling or abbreviations of the names of write-in candidates shall be disregarded if the individual for whom the vote was intended can be clearly ascertained from the ballot." Minn. Stat. § 204C.22(8); *see also* New Mex. Stat. Ann. §1-12-19.1(F)(1) ("A vote for a write-in candidate shall be counted and canvassed only if . . . the name written in is . . . the full name as it appears on the declaration of intent to be a write-in candidate [or a] ***misspelling[]*** . . . that can be reasonably determined by a majority of the members of the precinct board to identify a declared write in candidate.") (emphasis added); Colo. Rev. Stat. § 1-7-114(1) ("Each write-in vote may include ***a reasonably correct spelling*** of a given name, an initial or nickname. . . . and shall include the last name of the person for whom the vote is intended.") (emphasis added); 21 Maine Rev. Stat. § 696(4); N.J.S.A. § 19:16-4 ("No ballot cast for any candidate shall be invalid . . . because the voter in writing the name of such candidate shall misspell the same.").

Whereas jurisdictions wishing to allow misspellings on write-in ballots expressly authorize it in their statutes, the Alaska legislature took the exact opposite course, not only omitting any such language from its election code, but specifically emphasizing that there were "no exceptions" to the rules concerning the spelling of candidates' names on ballots, and that any ballots not "marked in compliance with these rules" would not be counted. Alaska Stat. § 15.15.360(b). Thus, because § 15.15.360 is clear and unambiguous, *Pullman* abstention is inappropriate.

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2. *Pullman* abstention is inapplicable to cases arising under the Elections Clause.

A second reason why *Pullman* abstention is inappropriate in this case is that, in the unique context of a claim under the Elections Clause, federal courts have an independent obligation to interpret the plain text of state election laws in order to uphold the constitutional command that state legislatures—not state executive branch officials or even state courts—"prescribe" the "manner" in which congressional elections are conducted. In *Palm Beach County*, a unanimous Supreme Court held

> As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the election of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

531 U.S. at 76. The cited constitutional provision, Art. II, § 1, cl. 2, is analogous to the Elections Clause, but for presidential electors. It provides, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const., Art. II, § 1, cl. 2. The clear implication of the Court's ruling is that the general rule, requiring federal courts to defer to state-court interpretations of state laws, does not apply in the context of Art. II, cl. 2—or, by extension, the Elections Clause—through which the Constitution gives state legislatures exclusive authority to act.

In *Bush v. Gore*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring), a three-Justice plurality revisited this issue, ruling, "In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law." For state statutes

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711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

enacted directly under U.S. Const., Art. II, § 1, cl. 2, however, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Id*. at 113 (Rehnquist, C.J., concurring). It elaborated that this doctrine "does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id*. at 115.

The same analysis applies to statutes enacted under the Elections Clause to govern the election of Representatives and Senators. *Pullman* abstention is inappropriate because federal courts have an independent obligation to interpret for themselves the actual meaning of the legislature's enactments, without the usual deference to the State's administrative or judicial interpretations of them. Rather than defer to a state court's interpretation of § 15.15.360, the Elections Clause permits and requires this Court to ascertain the statute's meaning for itself, to determine whether the Defendants' policy for counting write-in ballots effective nullifies it, thereby usurping the Alaska legislature's constitutional authority. Thus, *Pullman* abstention is inappropriate.

The Eleventh Circuit's rulings in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), and 68 F.3d 404 (11th Cir. 1995), exemplify the unseemly results that can result from involving the state courts in this matter. In that case, an Alabama state law provided that a person voting by absentee ballot must include with his ballot an affidavit signed in the presence of

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either a notary public or two witnesses. Ala. Code § 17-10-7. In its first ruling, the Eleventh Circuit upheld the district court's preliminary injunction that barred the State from counting any absentee ballots that were not notarized or witnessed (hereafter referred to as "Contested Ballots"), and from certifying election results that included Contested Ballots in the tally. *Roe*, 43 F.3d at 583. The court concluded that counting the Contested Ballots would unconstitutionally "dilute the votes of those voters who met the requirements of § 17-10-7 as well as those voters who actually went to the polls on election day." *Id*. at 581.

Rather than entering a permanent injunction, however, the Eleventh Circuit, out of deference to the State of Alabama, certified to the state supreme court the question of whether § 17-10-7, as its text suggested, required absentee ballots to be notarized or witnessed in order to be counted. *Id*. at 582-83. The Alabama Supreme Court ruled that § 17-10-7 did not actually require the affidavits accompanying absentee ballots to be witnessed or notarized. *See Roe v. Mobile Cty. Appt. Bd.*, No. 1940461, 1995 Ala. LEXIS 128 (Ala. Mar. 14, 1995). After issued this opinion issued, the U.S. District Court held a trial on the merits of the permanent injunction, found that the state supreme court's conclusion constituted a departure from past practice, and concluded that counting the Contested Ballots would violate the Due Process and Equal Protection Clauses. *See Roe v. Mobile Cty. Appointing Bd.*, 904 F. Supp. 1315 (S.D. Ala. 1995). The Eleventh Circuit affirmed, stating:

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> [T]he [Defendants] urge[] us to give effect to the Supreme Court of Alabama's answer to the question we certified in *Roe I*: that the envelopes enclosing absentee ballots need not bear the signature of either a notary public or two witnesses. What the [Defendants] ignore[] is that the Alabama Supreme Court, in answering our question, construed an Alabama statute; the court did not, and was not called upon to, decide whether the counting of the contested ballots cast in the November 8, 1994, general election—***in the face of Ala. Code § 17-10-4*** and in the face of a uniform state-wide practice of excluding such ballots—infringed the Roe Class' constitutional rights.

Roe v. Alabama, 68 F.3d 404, 406-07 (11th Cir. 1995) (emphasis added).

Thus, after certifying to the Alabama Supreme Court the question of § 17-10-5's proper interpretation, the Eleventh Circuit effectively ***ignored*** the court's conclusion and refused to count the Contested Ballots, because the state court's interpretation was contrary to "the face" of the statute and, in light of the State's past practice of rejecting such ballots, it would violate the Due Process and Equal Protection Clauses to decide, mid-election, to starting counting them. *Id*. Abstaining in the case (or certifying a question to the Alaska Supreme Court) would be ineffectual for similar reasons. First, as discussed earlier, *see supra* Subsection I.B.1, the plain text of Alaska Stat. § 15.15.360 (like that of Ala. Code § 17-10-5 with regard to Contested Ballots) flatly prohibits the counting of write-in votes unless the candidate's name is written as it appears on the write-in declaration of candidacy.

Second, Defendants' new policy represents a departure from their past practice of rejecting such write-in votes. Leman Aff., ¶¶ 5-6, 8. Finally, as in *Roe*, 68 F.3d at 406-07, the federal courts (whether this Court, after the conclusion of state-court proceedings, or the United States Supreme Court, on direct appeal from such proceedings) would be in the position of having to effectively ignore the state court's ruling, because the Elections

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Clause requires a federal court to construe state statutes regulating federal elections for itself, without regard to a state court's judicial gloss or construction. Thus, given the unique constitutional requirements of the Election Clause, *Pullman* abstention is inappropriate.

3. *Pullman* abstention often is inappropriate in cases involving federal elections.

Finally, this Court should exercise jurisdiction in this case because abstention often is inappropriate in cases involving federal constitutional challenges to ongoing federal elections. The Supreme Court has recognized that "the delay inherent in referring questions of state law to state tribunals" often makes it improper to abstain from deciding election-related cases. *Harman*, 380 U.S. at 537. The Ninth Circuit has echoed this sentiment, stating, "The dangers posed by an abstention order are particularly evident in voting cases" because of "the special dangers of delay." *Badham v. U.S. Dist. Ct.*, 721 F.2d 1170, 1173 (9th Cir. 1983). As a result, "courts have been reluctant to rely solely on traditional abstention principles in voting cases." *Id*.; *see also Rosello v. Calderon*, No. 04-2251 (DRD), 2004 U.S. Dist. LEXIS 27216, at *14, *23 (D.P.R. Nov. 30, 2004), *Roe I*, 43 F.3d at 582 ("The unnecessary delay that would result were we to leave the plaintiffs to their state court remedy would be particularly insidious: It would extend the time that the two offices at issue remain in limbo, hindering those offices in the handling of state affairs."). Thus, this Court should expedite this matter by ruling on the merits, rather than abstaining in favor of a state court.

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C. This Case is Not Moot.

Although Defendants have nearly, or entirely, completed their initial count of the write-in ballots applying their unconstitutional standard, both the underlying federal questions in this case, as well as Plaintiff Miller's request for a preliminary injunction, remain live. As explained in Plaintiff Miller's concurrently filed Amended Motion for Preliminary Injunction, these intervening events require Plaintiff Miller to change some of the details of the relief he seeks. Specifically, rather than asking this Court to bar Defendants from counting write-in votes under their unconstitutional standard, Plaintiff Miller's Amended Motion asks this Court to enjoin Defendants from either:

1. certifying the results of the 2010 general election for the office of U.S. Senator based on a count in which write-in votes were accepted as valid, despite the fact that the candidate's name was misspelled, or was not written on the ballot as it appeared on the candidate's write-in declaration of candidacy; or

2. accepting as valid any write-in votes in which a candidate's name is misspelled, or is not written on the ballot as it appears on the candidate's write-in declaration of candidacy, in any further counts or recounts of the ballots in the 2010 general election for the office of U.S. Senator.

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Nor does the fact that the Opposing Candidate presently has approximately 2,200 more unchallenged votes than Plaintiff Miller moot this case.[7] This margin represents less than 1% of the quarter-million-plus votes cast in this election. Due to the haste with which the State decided to expedite the recount, Plaintiff Miller was unable to assemble and train his team of volunteers to observe the write-in count until shortly before counting started, and so they failed to challenge numerous write-in ballots with misspellings at the beginning of the process. Affidavit of Joe Miller in Support of Plaintiff's Motion for Preliminary Injunction, ¶ 2 (hereafter, "Miller Aff."). Likewise, Defendants decided to count numerous write-in ballots, despite the fact that the automated tally machines had rejected them because the ovals had been filled in incorrectly. *Id*. ¶ 3. If this standard also were to be applied to rejected ballots in which the voter had attempted to vote for Plaintiff Miller, it is likely that he would gain numerous additional votes.[8] Furthermore, it has not yet been confirmed that all military and overseas ballots were distributed in a timely manner, *id*. ¶ 4, the tapes from the electronic voting machines accurately recorded and stored all votes cast, *id*. ¶ 5, and there was no fraud or other irregularity with voters' signatures, either on absentee ballots or in precinct registers, *id*. In addition, the State Ballot Review Board has yet to complete its review of the election results. Alaska Stat. §15.15.440. In short,

[7] *See* State of Alaska, Division of Elections, *2010 General Election Unofficial Results*, *available at* http://www.elections.alaska.gov/results/10GENR/data/resultsWI.htm and http://www.elections.alaska.gov/results/10GENR/data/results.htm.

[8] Plaintiff Miller will be filing an Amended Complaint and a separate Motion for Preliminary Injunction based on this independent violation of the Equal Protection Clause.

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sufficient uncertainty remains concerning the integrity of the unofficial, interim vote tallies for the instant dispute concerning the approximately 8,153 challenged ballots containing misspellings to remain live.

II. PLAINTIFF MILLER IS LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS.

Defendants contend that Plaintiff Miller is attempting to "disenfranchise voters" by asking this Court to enforce Alaska Stat. § 15.15.360(a)(10), (a)(11), and (b), pursuant to the Elections Clause of the U.S. Constitution. Opp. at 2. As the Supreme Court has held, however, a voter is disenfranchised not only if a validly cast ballot of his is discarded, but also if his vote is effectively diluted, nullified, or cancelled out by an improperly cast vote counted in violation of the law. *See 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"). Thus, Plaintiff Miller is attempting to prevent the disenfranchisement of those voters who cast their ballots properly, in compliance with § 15.15.360 and other provisions of Alaska law. *Cf. Roe I*, 43 F.3d at 581 (holding that counting absentee ballots without affidavits that were properly notarized or witnessed would unconstitutionally "dilute the votes of those voters who met the

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requirements of [state law] as well as those voters who actually went to the polls on election day"). He is likely to succeed on the merits of his claims.

A. Plaintiff Miller is Likely to Succeed on the Merits of His Election Clause Claim.

Plaintiff Miller is likely to succeed on the merits of his Election Clause claim because the Director has usurped the authority of the Alaska Legislature under the U.S. Constitution to "prescribe" the "manner of holding elections for Senators," U.S. Const., art. I, § 4, cl. 1. "It cannot be doubted" that the "comprehensive words" of the Elections Clause give state legislatures "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to . . . ***counting of votes***, . . . in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (emphasis added).

Federal courts throughout the nation has recognized that the Election Clause is violated if a state entity other than the legislature purports to impose rules concerning the conduct of federal elections, in the absence of—and especially contrary to—legislative authority. In *Libertarian Party of Ohio v. Blackwell*, 567 F. Supp. 2d 1006, 1011 (S.D. Ohio 2008), for example, the court recognized that the Elections Clause "provide[s] for no role on the part of the executive branch of state government as to the election of . . . members of the House of Representatives." It held that, "[u]nder the Constitution, the Secretary of State, a member of the executive branch of government, has no authority

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independent of the Ohio General Assembly to direct the method of the appointment of . . . federal officials." *Id*. at 1012.

The court ruled that a directive by the Secretary of State concerning minor party candidates was unconstitutional—despite a general statutory grant of authority to the Secretary to issue directives, rules and instructions concerning elections—because it effectively "serve[d] as a substitute for state legislative action" and "purport[ed] to create new law." *Id*. at 1012 & n.2; *see also Grills v. Branigin*, 284 F. Supp. 176, 180 (S.D. Ind. 1968) ("[The Elections Clause] clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly."), *aff'd* 391 U.S. 364 (1968); *Valenti v. Mitchel*, 790 F. Supp. 551, 555 (E.D. Pa. 1992) ("To the extent that the Pennsylvania Supreme Court was setting the schedule for the elections of senators and representatives, the court was acting in a role assigned and entrusted by the Constitution to the legislature."), *aff'd on other grounds* 962 F.2d 288, 297 (3d Cir. 1992); *see also Smith v. Clark*, 189 F. Supp. 2d 548, 558 (S.D. Miss. 2002) ("[T]he requirements of [the Elections Clause] were not met in this case, as there has been no indication that the chancery court had any legislative authority to draw the state's congressional districts."), *vacated as moot sub nom. Branch v. Smith*, 538 U.S. 254, 265-66 (2003) (declining to reach merits of Elections Clause issue because district court ruling could be affirmed on other grounds).

As noted throughout this Memorandum, the Alaska Legislature has established clear and unambiguous rules concerning the "manner" in which write-in votes are to be counted:

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> (a) 10. 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 . . . .
>
> 11. 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.
>
> (b) 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.

Alaska Stat. § 15.15.360(a)(10), (a)(11), (b).

Unlike UOCAVA, *see* 42 U.S.C. § 1973ff-2(c)(1), (3); provisions of the Alaska Administrative Code codifying the procedure for counting federal write-in absentee ballots, *see* 6 Alaska Admin. Code § 25.670(b); and the laws of numerous other states, *see, e.g.*, Ind. Code § 3-12-1-1.7(a)(4); Minn. Stat. § 204C.22(8); New Mex. Stat. Ann. §1-12-19.1(F)(1); Colo. Rev. Stat. § 1-7-114(1); 21 Maine Rev. Stat. § 696(4); N.J.S.A. § 19:16-4, Alaska law does not allow a write-in ballot to be counted if it contains a "misspelling," "minor variation" on a candidate's name, or merely a "reasonably correct" spelling. This has been the interpretation that the State of Alaska has adopted for years, until Defendants' policy shift at the eleventh hour. *See* Leman Aff., ¶¶ 5-6, 8.

As Defendants point out, *see* Opp. at 9-10, a closely related provision of the Election Code, Alaska Stat. § 15.15.360(a)(5) (emphasis added) provides that a voter's marking on a ballot "shall be counted only if it ***substantially*** inside the oval provided, or touching the oval so as to ***indicate clearly that the voter intended*** the particular oval to be designated."

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Although Defendants contend that this provision somehow undermines Plaintiff Miller's argument, it substantially bolsters it.

Where a legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *APL Co. Pte., Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 952 (9th Cir. 2009) (*citing Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)) (quotation marks omitted). The Alaska legislature's selective inclusion of such language in Subsection (a)(5) demonstrates that, within the text of §15.15.360 itself, it took pains to specify the circumstances under which "substantial[]" compliance with a particular requirement is sufficient, and when the State could attempt to ascertain the voter's intent despite a failure to satisfy a particular requirement (in this case, filling in an oval). The absence of similar language in § 15.15.360(a)(11) regarding "substantial[]" compliance suggests that the omission was both deliberate and significant, and further underscores the fact that, with "no exceptions," a write-in ballot "may not be counted" unless the candidate's name is spelled correctly, as it appears on the candidate's write-in declaration of candidacy, *id*. § 15.15.360(a)(11), (b).

Defendants admit that they are accepting as valid and counting ballots in which the candidate's name is misspelled, and is not written as it appears on the candidate's declaration of candidacy. *See, e.g.*, Opp. at 6 ("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."). This policy is flatly contrary to

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§ 15.15.360, is a dramatic change from the Division's past practice, ignores the "manner" in which the Legislature has determined that write-in votes must be counted, and so (at least as applied to the race for U.S. Senate) violates the Elections Clause.[9]

Defendants assert that their policy is consistent with the Elections Clause and §15.15.360 because "[s]ubsection (a)(11) is silent on how technically accurate a write-in voter's spelling and handwriting must be for the vote to be counted." Opp. at 7. To the contrary, that provision requires a candidate's name to be written on a ballot as that name appears on the candidate's write-in declaration of candidacy. Thus, although Defendants may be correct in asserting that "a misspelled version of the candidate's name is still that candidate's 'name,'" *id*., it presumably is not the name as it appears on the certificate of candidacy, and so would not meet the statutory criteria for being counted.

To take Defendants' examples, Plaintiff Miller acknowledges that "a candidate whose given name is James Janos may specify [on his write-in declaration of candidacy] that he wishes voters to write his popularly known stage name 'Jesse Ventura' on the ballot." Opp. at 7. If he does so, then § 11.11.360(a)(11) allows ballots with the name "Jesse Ventura" written in to be counted for him, but not ballots with names such as "Jess Venturo," because that is not the candidate's name "as it appears on the write-in declaration of candidacy." Similarly, if "[a] candidate whose name was Henry Boucher . . . went by the nickname 'Red' Boucher," Opp. at 8, then he may indicate on his declaration that he

[9] For the same reason, Plaintiff Miller is likely to prevail on the merits of his *ultra vires* claim in Count III.

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wishes to be known as "Red Boucher," so that votes for either Henry Boucher or Red Boucher may be counted for him.[10]

Plaintiff Miller likewise acknowledges that, as Defendants point out, if Alaska Stat. § 15.15.360 is applied according to its plain text to "require spelling precision," it still would be necessary to attempt to decipher voters' handwriting—"shaky, cramped, or scrawling as [it] may be." Opp. at 9. That is an unavoidable consequence of the legislature's decision, under the Elections Clause, to allow handwritten write-in ballots, and does not affect the proper construction of § 15.15.360.

Defendants cite a litany of Alaska cases discussing the importance of voter intent. *See, e.g.*, *Edgmon v. Moses*, 152 P.3d 1154, 1158 (Alaska 2007) (holding that a stray mark touching the edge of the oval next to a candidate's name, where the voter completely filled in the oval next to an opposing candidate's name, should not be counted as an overvote), *cited in* Opp. at 11; *Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987) (establishing rules for interpreting marks on punchcard ballots), *cited in* Opp. at 11; *Willis v. Thomas*, 600 P.2d 1079, 1085 (Alaska 1979) (holding that punchcard ballots in which the holes that voters punched near candidates' names were off-center were valid), *cited in* Opp. at 11;

[10] Contrary to Defendants' assertion, *see* Opp. at 8, § 15.15.360(a)(11)'s reference to "the last name of the candidate" should be understood to refer back to the surname portion of "the candidate's name, as it appears on the declaration of candidacy." Defendants' attempt to split the two provisions of § 15.15.360, so that a candidate's full name must be written on a ballot as it appears on the candidate's declaration of candidacy, but his last name alone may be misspelled, would be an absurd and self-defeating construction of the statute. *Cf. United States v. Hoffman*, 733 F. Supp. 314, 316 (D. Alaska 1990) (adopting interpretation of statute's text that avoids "absurd" results).

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Hammond v. Hickel, 588 P.2d 256, 274 (Alaska 1978) (identifying different categories of ballots and ruling whether they will be counted), *cited in* Opp. at 11. None of these cases involved in write-in ballots however and, crucially, none of them held that Defendants are free to look to, and implement, voter intent when the voter violates a specific statutory requirement (*i.e.*, such as the need to write the candidate's name as it appears on the certificate of candidacy)—particularly where the legislature expressly specifies there can be "no exceptions" to that requirement. Thus, these precedents are inapplicable.

Defendants contend that, even if they are "misinterpret[ing]" § 15.15.360, they are not "violat[ing] the Elections Clause." Opp. at 14. To the contrary, as noted earlier, the Supreme Court has recognized that rules governing the "counting of votes" qualify as prescriptions concerning the "manner of elections." *Smiley*, 285 U.S. at 366. Defendants have established, and are applying, their own policy for counting write-in ballots that squarely contradicts that set forth by the state legislature. That is a usurpation of the legislature's exclusive role under the Elections Clause, and is unconstitutional. *Cf. Libertarian Party*, 567 F. Supp. 2d at 1011; *Grills*, 284 F. Supp. at 180; *Valenti*, 790 F. Supp. at 555; *see also Smith*, 189 F. Supp. 2d at 558; *see also Bowsher*, 478 U.S. at 732, 734; *Buckley*, 424 U.S. at 126-28; *Youngstown*, 343 U.S. at 587-89. Although, as Defendants maintain, the Alaska legislature has fulfilled its obligations under the Election Clause by enacting laws such as § 15.15.360 to govern the manner in which federal elections are conducted, Opp. at 14, Defendants have violated the restrictions the Elections Clause places on their authority by effectively nullifying and overriding those laws.

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Defendants melodramatically argue that Plaintiff Miller's interpretation of § 15.15.360 will "undermine[] bedrock principles of the rights and roles of voters in a democratic society" and "ignore the will of the electorate." Opp. at 6. This aspersion ignores the fact that state and federal courts throughout the country have upheld statutes, like Alaska Stat. § 15.15.360, that strictly require that the names of write-in candidates be spelled correctly, against claims that they are unconstitutional, discriminatory, or unreasonable. In *Porras v. Nichol*, 405 F. Supp. 1178, 1181 (D. Neb. 1975), for example, the court held that Neb. Stat. § 32-489, which allowed write-in votes to be counted only if the candidate's name was spelt properly, did not deny anyone the right to vote based on "race, color, or previous servitude." It also rejected Plaintiffs' argument that the law violates the Equal Protection Clause by discriminating against "the less educated, the illiterate, those who are unable to spell, and those who act or fail to act through mistake or inadvertence." *Id*. at 1182. It held that the provision was subject only to rational-basis scrutiny, and easily survived that test, because

> The State of Nebraska has a legitimate interest in a method of determining quickly and easily the identity of a person for whom a vote is being cast. . . . If a ballot carries a written name under the proper office, it will be counted, no matter how poorly educated, illiterate or incapable of spelling the voter may be. The voter may take measures to learn to write the full name of the candidate before entering the booth, irrespective of his being poorly educated or illiterate. Indeed, a voter may carry into the polling booth a sample of the name and office of the candidate, whether prepared by him or someone else, and there is nothing to prevent the voter's copying or tracing the sample. As for the careless, not even the Constitution can save them.

Id. at 1183 (citation omitted).

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711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

In *Paulsen v. Huestis*, 13 P.3d 931, 934 (Mont. 2000), the Montana Supreme Court clearly sympathized with the argument that minor misspellings on write-in ballots should be acceptable, but held that it lacked authority to ignore the clear mandates of Mont. Stat. § 13-10-202(3), and stressed that such complaints must be directed to the legislature. It stated:

> The election laws referred to above clearly specify what names voters may write-in where the candidate being voted for has filed a declaration of intent. Statutorily, if one of those names is not used, then the vote may not be counted by the election judges. Again, if this statutory framework is too harsh and, arguably, subverts the exercise of the elector's franchise, then it is up to the legislature, not this Court, to change the law.

Id.; *see also Morris v. Fortson*, 261 F. Supp. 538, 540 (N.D. Ga. 1966) (upholding Ga. Code § 34-1505, allowing write-in votes to be counted only if the candidate's name is spelled correctly, because "those persons who do not spell well may take a paper with them into the voting booth which contains the correct spelling of their candidate's name and from which they may copy that name, and thereby avoid any problem of spelling," or request assistance in casting their ballots); *Greene v. Heffernan*, 75 N.E.2d 752, 752-53 (N.Y. 1947) (affirming lower court's order directing that write-in ballots containing "variations" on the candidate's name "not . . . be counted"). In this case, pursuant to an order of the Alaska Supreme Court, a list of write-in candidates was available at each polling location, upon request, so that voters could even double-check the proper spelling of a candidate's name. *Fenumiai v. Alaska Democratic Party*, No. S14054 (Alaska Oct. 29, 2010).

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Thus, there is nothing unreasonable or idiosyncratic about Plaintiff Miller's plain-meaning interpretation of § 15.15.360. Defendants' objections to Plaintiff Miller's Elections Clause argument are spurious, and he is likely to prevail on the merits of that claim.

B. Plaintiff Miller is Likely to Succeed on the Merits of His Equal Protection Claim.

Plaintiff Miller also is likely to prevail on the merits of his Equal Protection Claim. Defendants argue that there is no Equal Protection violation because, under their policy, all write-in ballots are treated "uniformly." Opp. at 16. They explain, "Only one person—the director—reviews challenged write-in votes to determine whether the voter's intent can be ascertained," and she "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." *Id*.

As noted earlier, the *Supreme Court* held in *Bush v. Gore*, 531 U.S. at 105-06, that although the "intent of the voter" is a valid starting point for a ballot-counting standard, it is too vague, amorphous and subjective to be, in itself, constitutionally sufficient under the Equal Protection Clause. *See also Dolan v. Powers*, 260 S.W.3d 376, 380 (Mo. Ct. App. 2008) (recognizing that, under *Bush v. Gore*, "equal protection demands that ballots be considered according to specific, uniform, statewide standards, beyond vague directives to determine 'the intent of the voter.'"); *State ex rel. League of Women Voters v. Herrera*, 203 P.3d 94, 98 (New Mex. 2009) (noting that the Court in *Bush v. Gore* found a constitutional

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violation because "[t]he Florida Supreme Court had ordered that local officials find the 'intent of the voter,' but provided no guidelines for doing so").

The Minnesota Supreme Court's analysis in *Sheehan v. Franken* illustrates *Bush v. Gore*'s applicability to this case:

> [T]he essence of the equal protection problem addressed in *Bush* was that there were no established standards under Florida statutes or provided by the state supreme court for determining voter intent . . . . [T]he decision to be made by Florida election officials with which the Supreme Court was concerned in *Bush* was voter intent—that is, for whom the ballot was cast—as reflected on ballots already cast in the election. In *Bush*, officials conducting the recount were reviewing the face of the ballot itself, creating opportunities for manipulation of the decision for political purposes.

767 N.W.3d 453, 466 (Minn. 2009). The same problems apply here—a state official is reviewing each ballot, after it has been cast, and determining the candidate for whom it should be counted based on nothing more than an ill-defined standard. Defendants contend that the Equal Protection clause "does not require election officials to develop rules to cover every potential write-in variation they may encounter." Opp. at 16.[11] Even if that is true, the Supreme Court's ruling in *Bush v. Gore* makes clear that, on its own, "intent of the voter" is too vague, subjective, and liable to abuse to serve as the exclusive touchstone for conducting a ballot count or recount. Defendants' previous policy, which required candidates' names to be spelled correctly, as required by Alaska Stat. § 15.15.360, complies

[11] Plaintiff Miller concedes that, given the state of the record before the court at this time, he is unlikely to succeed on the merits of his "protest vote" argument. *See* Opp. at 18.

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with this constitutional requirement. *See* Leman Aff., ¶¶ 5-6, 8. Thus, Plaintiff Miller is likely to prevail on this claim.

C. Plaintiff Miller is Likely to Succeed on the Merits of his Administrative Procedures Act Claim.

Plaintiff Miller likewise is entitled to relief on his claim under the Alaska Administrative Procedure Act (APA). Defendants do not dispute that they failed to fulfill any of the APA's requirements before promulgating their new policy of counting ballots with misspellings. Rather, they contend that the policy does not constitute a regulation, for two reasons. Opp. at 19. ***First***, Defendants maintain that, instead of a regulation, the new policy is merely an "interpretation" of Alaska Stat. § 15.15.360. Opp. at 19; *citing Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 334-335 (Alaska 2009). The APA's definition of "regulation," however, expressly includes every "standard . . . adopted by a state agency to implement, ***interpret***, or make specific the law enforced or administered by it." Alaska Stat. § 44.62.640(a)(3) (emphasis added). The *Squires* Court held that only "obvious, commonsense interpretations of statutes" are exempt from the APA's rulemaking requirements. 205 P.3d at 334; *see also Alaska Ctr. for the Envt. v. State*, 80 P.3d 231, 243-44 (Alaska 2003). As the foregoing discussion establishes, Defendants' purported interpretation of § 15.15.360 is anything other than "obvious" or "commonsense," and cannot fall under this *de minimus* exception to the APA.

Second, Defendants argue that their vote-counting policy is not a regulation because it merely implements caselaw from the Alaska Supreme Court. Opp. at 22-23. As

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discussed earlier, however, *see supra* pp. 31-32, none of the cases upon which Defendants rely have anything to do with write-in ballots, or allow the "intent of the voter" standard to be applied in violation of express statutory requirements concerning the proper way of counting certain ballots. Thus, Defendants' policy cannot be treated as an innocuous codification of already established judicial precedent. For these reasons, Plaintiff Miller is likely to succeed on the merits of his APA claim.

III. PLAINTIFF MILLER IS OTHERWISE ENTITLED TO A PRELIMINARY INJUNCTION.

Defendants assert that, regardless of whether Plaintiff Miller is able to show a likelihood of success on the merits of his claims, he is unable to establish the other elements for obtaining a preliminary injunction. Opp. at 22. In particular, Defendants contend that he cannot establish irreparable injury because, even if the results of the U.S. Senate race are certified based on a ballot count that violates the Elections Clause and Equal Protection Clause, he is free to request a recount and, upon its completion, seek judicial review before the state supreme court. *Id*. at 22-23.

Federal courts often have enjoined State officials from certifying the results of elections, however, where there was a substantial likelihood that the results would be tainted with federal constitutional or statutory problems. *See, e.g.*, *Hoblock v. Albany Cty. Bd. of Elecs.*, 422 F.3d 77, 83 (2d Cir. 2005) (upholding preliminary injunction barring certification of election results where certain absentee ballots were not being counted, in violation of the Equal Protection Clause and 42 U.S.C. § 1983); *Doe v. Walker*, No. 10-CV-

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(907) 272-9272 fax (907) 272-9586

2646 (RWT), 2010 U.S. Dist. LEXIS 115457, at *39-40 (D. Md. Oct. 29, 2010) (entering order prohibiting certification of results tallied in violation of UOCAVA).[12]

These courts explained that certification of incorrect election results constitutes irreparable harm to the voters who participated in the election. In *Doe*, for example, the U.S. District Court for the District of Maryland held:

> In the absence of an order from this Court, Defendants will likely certify the results of the elections for state office without counting the "late-arriving" votes of absent uniformed services and overseas voters. Once state election results are certified, a court would be understandably reluctant to require the

[12] *See also Marks v. Stinson*, 19 F.3d 873, 875, 887-88 (3d Cir. 1994) (upholding preliminary injunction enjoining the candidate who had been certified as the winner of an election "from exercising any of the authority of the office of state senator," due to likely violations of the Civil Rights Act, First Amendment, and Fourteenth Amendment in his election); *Republican Party v. North Carolina State Bd. of Elecs*., No. 94-1057, 1994 U.S. App. LEXIS 14961, at *7, 10-11 (4th Cir. June 17, 1994) (upholding, with minor modifications, preliminary injunction requiring the State to tally the election results for state judges on both a statewide and a district-by-district basis, due to substantial First and Fourteenth Amendment concerns about maintaining the state's at-large, statewide electoral system of judges); *Awad v. Ziriax*, No. CIV-10-1186-M, 2010 U.S. Dist. LEXIS 119660, at *13 (W.D. Okla. Nov. 9, 2010) (enjoining state from certifying results of referendum on state constitutional amendment that raised First Amendment concerns); *Day v. Robinwood W. Cmty. Improvement Dist.*, No. 4:08-CV-1888 (ERW), 2009 U.S. Dist. LEXIS 36586, at *8 (E.D. Mo. Apr. 29, 2009) (entering preliminary injunction to bar defendants from counting ballots likely cast in violation of state law due to First Amendment and Equal Protection concerns); *New York v. United States*, 874 F. Supp. 394, 395 (D.D.C. 1994) (discussing the preliminary injunction the court entered to prevent "the State of New York from certifying the results of . . . state judicial elections" due to a potential violation of the Voting Rights Act, 42 U.S.C. § 1973c); *Dallas Cty. Bd. of Educ. v. Jones*, No. 92-0583-B-M, 1992 U.S. Dist. LEXIS 15340, at *8 (Sept. 28, 1992) (entering injunction prohibiting the defendants from "certifying the results of the primary election for positions on the Dallas County Board of Education," due to violations of § 5 of the Voting Rights Act); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 442 F. Supp. 334, 335 (W.D.N.C. 1977) ("The Court entered a temporary Order on October 26, 1977 restraining the Council from certifying the returns of the Tribal Election," due to potential violations of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8), although plaintiffs' claims later were dismissed).

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Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

> state to count Plaintiffs' votes, because to do so would disrupt the state's interest in assuring the finality of the election results. Therefore, Plaintiffs will be irreparably deprived of their right to participate in electing candidates running for Maryland state offices this election cycle if this Court does not issue a preliminary injunction.

Id. at *39-40; *see also Hoblock*, 422 F.3d at 97 (holding that certifying the results of an election based on illegal standards constitutes irreparable injury to voters). The U.S. Court of Appeals for the Third Circuit likewise ruled:

> The integrity of the election process lies at the heart of any republic. The people, the ultimate source of governmental power, delegate to their elected representatives the authority to take measures which affect their welfare in a multitude of important ways. When a representative exercises that authority under circumstances where the electors have no assurance that he or she was the choice of the plurality of the electors, the legitimacy of the governmental actions taken is suspect.

Marks, 19 F.3d at 887; *see also Republican Party*, 1994 U.S. App. LEXIS 14961, at *9 (holding that the prospect of having to "unseat" a candidate declared the winner in an election based on violations of federal law warrants entry of a preliminary injunction). In *Day*, 2009 U.S. Dist. LEXIS 36586, at *6-7, the Court approached the issue from a slightly different perspective, holding that a voter would be irreparably injured if his ballot is diluted by an illegally cast ballot, thereby violating his constitutional rights under the First Amendment and Equal Protection Clause. Thus, Plaintiff Miller can establish irreparable injury as a matter of law.

It also should be noted that, contrary to Defendants' assertion, the public interest is not served best by a "prompt determination of the outcome of the election," but rather by an accurate determination. Opp. at 23. There is no public interest in obtaining erroneous,

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711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

albeit rapid, results. Thus, the public interest would be furthered by issuing a preliminary injunction requiring Defendants to apply constitutionally adequate standards in counting the write-in ballots, and the balance of equities likewise favors granting relief.

CONCLUSION

For these reasons, this Court should grant Plaintiff Miller's Amended Motion for a Preliminary Injunction.

DATED at Anchorage, Alaska, this 18th day of November 2010.

CLAPP, PETERSON, VAN FLEIN, TIEMESSEN & THORSNESS, LLC
Attorneys for Plaintiff Joe Miller

By: /s/ Thomas V. Van Flein
Thomas V. Van Flein, #9011119
Clapp, Peterson, Van Flein,
Tiemessen & Thorsness LLC
711 H St., Suite 620
Anchorage, Alaska 99501-3454
Phone: (907) 272-9228
Facsimile: (907) 272-9586
E-mail: tvf@akcplaw.com

Michael T. Morley
616 E St. N.W. #254
Washington, D.C. 20004
Phone: (860) 778-3883
Facsimile: (907) 272-9586
E-mail: michaelmorleyesq@hotmail.com
Application for *pro hac vice*
admission forthcoming

Attorneys for Plaintiff

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

Certificate of Service:

The undersigned hereby certifies that a true and exact copy of the foregoing was served this 18th day of November 2010 via:

( ) First Class Mail
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to the following listed individual(s):

Michael Barnhill
Sarah Felix
Margaret Paton-Walsh

By: /s/ Thomas V. Van Flein
Thomas V. Van Flein

Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586