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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

JOE MILLER, *Plaintiff*, v. LIEUTENANT GOVERNOR CRAIG CAMPBELL, in his official capacity; and the STATE OF ALASKA, DIVISION OF ELECTIONS, *Defendants*.	)	Civil Action No: 3:10-cv-252 (RRB)

AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff Joe Miller hereby alleges as follows:

Introduction

1. The Director of the Division of Elections (hereafter, the "Director") changed the rules for the 2010 general election for U.S. Senate after voting was complete. Instead of counting write-in ballots in the manner clearly and unambiguously set forth by the state legislature in the Alaska Statutes, the Director instead adopted her own alternate—and highly subjective—approach, thereby effectively ignoring the provisions of state law with which she apparently disagrees.

2. On November 8, 2010, just 36 hours before Defendant State of Alaska, Division of Elections (hereafter, the "Division") began counting write-in ballots, it released its new ballot-counting policy, attached as Exhibit A to this Amended Complaint. This retroactive change in the rules for counting votes after voting has concluded unavoidably raises the specter of manipulation, favoritism, and fundamental unfairness. Doing so the day before ballots are to be counted reflects a disturbing lack of transparency regarding the fundamental rules governing how a substantial portion of the ballots cast will be counted, effectively shields the electoral process from public scrutiny, and underscores the illegitimacy of this last-minute change.

3. Although the Division repeatedly declared that the Director would be counting write-in ballots based on what she subjectively perceived to be the "voter's intent," the Division never established or announced any written rules, guidelines, policies, or

procedures by which the Director would attempt to divine "voter intent" or apply that nebulous standard.

4. Once Defendants began counting the write-in ballots, it became clear that the Division had established and was imposing two different procedures and policies for determining ballots' validity. If a person's vote in the race for U.S. Senate was rejected by an automated tally machine (for example, because the oval was not filled in all the way, or a stray mark appeared on the ballot), and that person had attempted to vote for a candidate whose name was pre-printed on the ballot, such as Plaintiff Miller, that vote was rejected as invalid without further, personalized consideration or review. If, however, that person had attempted to vote for a write-in candidate, Division employees and/or the Director personally reviewed the ballot, to determine whether the "voter's intent" was sufficiently clear to allow the ballot to be counted. Thus, people whose ballots were rejected by automated tally machines nevertheless could have their votes counted if they attempted to vote for a write-in candidate, but ***not*** if they attempted to vote for a candidate whose name was pre-printed on the ballot, such as Plaintiff Miller. Such arbitrary and disparate treatment unconstitutionally discriminates against candidates such as Plaintiff Miller, as well as the voters who unsuccessfully attempted to cast their ballots for him, and gave a substantial—and potentially decisive—advantage to the opposing candidate, Lisa Murkowski.

Jurisdiction

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

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

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

Venue

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

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

Parties

10. Plaintiff Joe Miller is a citizen and registered voter of the State of Alaska. He is at least 30 years of age and is a natural-born U.S. citizen. On August 31, 2010, Mr. Miller won the primary election to become the Republican nominee in the 2010 general election (hereafter, "the Election") for the office of U.S. Senator. He also cast a vote in the Election for the office of U.S. Senator.

11. Defendant Craig Campbell, Lieutenant Governor of Alaska, is a resident of Alaska. He statutorily is required to "control and supervise the division of elections," AS § 15.10.105(a), and "administer state election laws," *id*. § 44.19.020(1).

12. Defendant, the State of Alaska, Division of Elections (hereafter, the "Division"), is a department of the State of Alaska established under AS § 15.10.105(a). Its Director is the "chief elections officer of the state," AS § 15.80.010(3); "act[s] for the lieutenant governor in the supervision of central and regional election offices . . . and the administration of all state elections," *id*. § 15.10.105(a); *see also id*. § 15.15.010; and serves at the lieutenant governor's pleasure, *id*. § 15.10.105(a). The Director may "adopt regulations under AS [§] 44.62 necessary for the administration of state elections." *Id*. § 15.15.010. Defendant Campbell, as Lieutenant Governor, "control[s] and supervise[s]" the Division, and the Director acts on his behalf. *Id*.

The Division's Eleventh Hour Decision to Change the Rules Governing the Election

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

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

a. Alaska law clearly specifies, "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 in accordance with (1) of this subsection." AS § 15.15.360(a)(10) (emphasis added). This provision clearly requires that a voter must include a "candidate's name" on his ballot in order for a write-in vote to be counted. The statute does not permit a write-in vote to be counted if a voter includes only a "reasonable approximation" or a "close variation" of a candidate's name.

b. Alaska law further provides, "A vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and ***if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.***" AS § 15.15.360(a)(11) (emphasis added). This requirement is even more explicit—a write-in vote may not be counted if there is any deviation between the name

of the candidate as written in on the ballot and the candidate's name "as it appears on the write-in declaration of candidacy."

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

16. Notwithstanding these clear, unambiguous, and "mandatory" requirements, the Director, for the Division and the State, announced publicly—following the Election—that she will establish her own subjective "standards" to govern the Division's counting of write-in ballots.

a. A November 6, 2010 article in the *Wall Street Journal* entitled, "Candidate Argues Spelling Should Count in Alaska Vote" discusses "election officials' plan[s] to accept misspellings of Lisa Murkowski's name on write-in ballots." According to the article, election officials stated that "[t]hey plan to count misspellings of registered candidates' names in their favor, as long as the voter's intent is clear." The article further states that the Director is basing this new policy on two Alaska cases "in which ballots were counted for a candidate when voter intent was clear, even if the ballot wasn't filled out correctly," even though "[t]hose cases didn't involve write-in ballots." A true and complete copy of this article is attached to the Complaint as Exhibit B.

b. A November 5, 2010 article in the *Anchorage Daily News* entitled, "Write-Ins to Be Counted Sooner Than Expected" states, "The state hasn't been clear on

what's allowed. Minor misspellings of Murkowski's name are probably OK, but simply writing 'Lisa M,' for example, could be an issue." A true and complete copy of this article is attached to the Complaint as Exhibit C.

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

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

e. On November 8, 2010, just 36 hours before the vote count was to start, the State, through the Director and Division, issued a written policy that purports to apply a subjective standard allowing the Director to determine, at her own whim, what votes will be counted and what votes will not be counted. *See* Exhibit A.

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

18. As the Division counted the write-in ballots, it became clear that it was implementing a discriminatory policy that gave a substantial advantage to write-in candidates.

19. Many ballots cast in the Election were initially counted by automated tally machines. These machines would reject, and decline to count, a person's vote in a particular race if an error or irregularity existed in the portion of the ballot relating to that race, such as:

a. the voter filled in ovals next to the names of more than one candidate;

b. the voter filled in the oval next to the name of the candidate for whom he wished to vote, but also made a stray mark in that area of the ballot;

c. the voter filled in the oval next to the name of a candidate, crossed it out or did not completely erase it, and then filled in the oval next to the name of a different candidate; or

d. the voter did not sufficiently fill in the oval next to the name of the candidate for which he wanted to vote.

20. If an automated tally machine rejected a person's vote in the race for U.S. Senate, and the person had attempted to vote for a candidate whose name was pre-printed on the ballot (*i.e.*, the person did not write in the name of a candidate), that vote was deemed invalid and was not counted. It was not personally reviewed by personnel of the Division, or the Director, to determine whether the voter's intent was clear or the vote otherwise should be counted.

21. If, however, an automated tally machine rejected a person's vote in the race for U.S. Senate, and the person had attempted to vote for a write-in candidate (*i.e.*, the person had written in the name of a candidate on the ballot), that vote was reviewed either by Division personnel or the Director, to determine whether the voter's intent could be ascertained. If Division personnel or the Director determined that a voter's intent was clear, they would count the write-in vote, despite the fact that the automated tally machine had rejected it.

22. Defendants' policy thus treats votes in the race for U.S. Senate that were rejected by an automated tally machine differently, depending on whether the person had attempted to vote for a candidate whose name was pre-printed on the ballot, such as Plaintiff Miller, or a write-in candidate, such as Lisa Murkowski. Defendants' policy of counting write-in votes that had been rejected by automated tally machines if the voter's

intent was clear—but not doing the same for other votes—gave a substantial, unfair, and illegal advantage to write-in candidates such as Lisa Murkowski, and unconstitutionally discriminated against both candidates whose names were pre-printed on the ballot, such as Plaintiff Miller, and voters who unsuccessfully attempted to cast ballots for them.

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

23. Plaintiff re-alleges and incorporates by reference the foregoing Paragraphs 1 through 22, as if set forth fully herein.

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

25. The Elections Clause specifically bestows authority to regulate the "Manner of holding Elections for Senators" to the Alaska legislature, not state executive branch officials such as the Lieutenant Governor or Director. Defendants' attempt to effectively nullify various provisions of AS § 15.15.360 by establishing their own standards for counting write-in ballots therefore is unconstitutional.

26. Plaintiff respectfully requests injunctive and declaratory relief against this violation of the Elections Clause.

COUNT TWO—EQUAL PROTECTION CLAUSE
"Voter Intent" Standard is Unconstitutionally Vague
(U.S. Const., amend XIV)

27. Plaintiff re-alleges and incorporates by reference the foregoing Paragraphs 1 through 26, as if set forth fully herein.

28. The U.S. Supreme Court has held that a policy directing election officials simply to attempt to ascertain "the intent of the voter" when deciding whether, or how, to count ballots is "unobjectionable as . . . a starting principle," but is not constitutionally sufficient. *Bush v. Gore*, 531 U.S. 98, 105 (2000). The Equal Protection Clause requires state officials to establish much more "specific standards" and "uniform rules" in order to prevent "the standards for accepting or rejecting contested ballots" to vary "within a single county from one []count team to another." *Id*. at 106.

29. Defendants have adopted the same type of policy that the Supreme Court already has declared constitutionally inadequate. Rather than implementing the clear, specific, and uniform standards for counting write-in votes set forth in AS § 15.15.360, Defendants and their counting boards apparently will be attempting to divine for themselves the "intent of the voter" based on vague, amorphous, subjective—and unspecified—criteria. This quixotic quest will result in the arbitrary and disparate treatment of write-in ballots in clear violation of the U.S. Constitution.

30. Plaintiff respectfully requests injunctive and declaratory relief against this violation of the Equal Protection Clause.

COUNT THREE—EQUAL PROTECTION
Discriminatory Policy Regarding "Rejected" Ballots
(U.S. Const., amend. XIV)

31. Plaintiff re-alleges and incorporates by reference the foregoing Paragraphs 1 through 30, as if set forth fully herein.

32. Defendants arbitrarily established two disparate standards for determining whether a person whose vote in the race for U.S. Senate had been rejected by an automated tally machine nevertheless could have their vote counted:

a. If the person had attempted to vote for a candidate whose name was pre-printed on the ballot, and had not written in the name of a candidate, a vote that was rejected by an automated tally machine was deemed invalid and not counted, without any individualized review by the Division or Director to determine whether the voter's intent could be ascertained.

b. If, in contrast, a person had attempted to vote for a write-in candidate, and had written a candidate's name on the ballot, but the vote was rejected by an automated tally machine, Division personnel or the Director would personally review the ballot to determine whether the voter's intent could be ascertained and, if they believed they subjectively could determine the candidate for whom the voter wished to cast their vote, they would count the ballot.

33. A person whose vote in the race for U.S. Senate was rejected by an automated tally machine nevertheless could have their vote counted if they had attempted to vote

for a write-in candidate, but not if they attempted to vote for a candidate whose name was pre-printed on the ballot.

34. These disparate policies discriminate against both candidates whose names were pre-printed on the ballot, as well as people who unsuccessfully attempted to cast their votes for such candidates. Among the universe of people whose ballots had been rejected by automated tally machines, there is no basis for attempting to ascertain voter intent only of those people who attempted to cast write-in votes, and not of those people who attempted to vote for candidates whose names were pre-printed on the ballot.

35. Such arbitrary and disparate treatment constitutes unlawful discrimination in violation of the Equal Protection Clause, as interpreted in *Bush v. Gore*, 531 U.S. 98, 105 (2000).

36. Plaintiff respectfully requests injunctive and declaratory relief against this violation of the Equal Protection Clause.

COUNT FOUR—ALASKA ELECTION CODE
(AS § 15.15.360)

37. Plaintiff re-alleges and incorporates by reference the foregoing Paragraphs 1 through 36, as if set forth fully herein.

38. Defendants' decision to override state law by establishing a policy whereby write-in ballots with misspellings can be counted is *ultra vires* and invalid. This policy, authorizes the counting of certain ballots on which the candidate's name is ***not*** written

as it appears on a write-in declaration of candidacy, is flatly contrary to AS § 15.15.360(a)(10), (a)(11), and (b), and therefore is unenforceable.

39. Plaintiff respectfully requests injunctive and declaratory relief against this violation of AS § 15.15.360(a)(10), (a)(11), and (b).

COUNT FIVE—ALASKA ADMINISTRATIVE PROCEDURE ACT
(AS §§ 44.62.020, 44.62.030, 44.62.300)

40. Plaintiff re-alleges and incorporates by reference the foregoing Paragraphs 1 through 39, as if set forth fully herein.

41. The Administrative Procedure Act defines the term "regulation" as including:

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

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

42. The new policy issued on November 8, 2010 constitutes a regulation that was required to be issued in conformance with the APA. The Act specifies that an agency

wishing to promulgate or amend a regulation must publish a formal public notice in a newspaper of general circulation at least 30 days before it takes effect, AS § 44.62.190(a)(1), along with "the reason for the proposed action" and certain other pieces of information about the proposal, *id*. §§ 44.62.190(d), 44.62.200(a).

43. A regulation may not be adopted unless and until the public has had the opportunity "to present statements, arguments, or contentions in writing," if not orally, regarding the proposal. AS § 44.62.210(a). The agency is required to "consider all factual, substantive, and other relevant matter presented to it before adopting, amending, or repealing a regulation." *Id*.

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

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

46. Defendants did not give advance public notice of this regulation; publish the required information regarding it; or solicit or consider public feedback, as required by

AS §§ 44.62.190(a)(1), (d), 44.62.200, and 44.62.210(a). The regulation therefore is invalid and unenforceable.

47. Plaintiff respectfully requests injunctive and declaratory relief against this violation of the procedural provisions of the Administrative Procedure Act.

PRAYER FOR RELIEF

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

1. For preliminary and permanent injunctions enjoining Defendants from:

a. violating the Elections Clause by usurping the state legislature's authority to determine the "manner" in which elections for U.S. Senate must be conducted, by counting, recounting, or otherwise accepting as valid write-in ballots in which the name of the candidate is spelt incorrectly, or on which the name of the candidate is not written as it appears on a write-in declaration of candidacy;

b. violating the Equal Protection Clause by determining whether to count or recount write-in ballots based on the vague, amorphous, and subjective "intent of the voter" standard, without further guidelines or restrictions;

c. violating the Equal Protection Clause by applying different standards to ballots that were rejected by automated tally machines, based on whether the voter attempted to vote for a candidate whose name was pre-printed on the ballot, or a write-in candidate;

d. violating the Alaska Administrative Procedures Act by enforcing a regulation that was not promulgated in compliance with statutory requirements; and

e. certifying the results of the election for U.S. Senate based on a count that involved any of the constitutional or statutory violations set forth above.

2. For a declaratory judgment that:

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

b. Defendants' new policy of attempting to divine the "intent of the voter" from write-in ballots with misspellings is so vague and amorphous as to violate the Equal Protection Clause of the U.S. Constitution;

c. Defendants violated the Equal Protection Clause by reviewing write-in ballots that had been rejected by automated tally machines to determine whether the voter's intent was sufficiently clear to allow them to be counted, but not similarly reviewing ballots rejected by automated tally machines in which the voter had attempted to vote for a candidate whose name was pre-printed on the ballot;

d. Defendants' decision to count, and accept as valid, write-in ballots in which the name of the candidate is spelt incorrectly, or on which the name of the

candidate is not written as it appears on a write-in declaration of candidacy, is *ultra vires*, contrary to AS §§ 15.15.360, and unenforceable; and

e. Defendants' policy is unenforceable under AS § 44.62.300 because it was not promulgated pursuant to the procedures set forth in the Administrative Procedure Act.

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

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

Dated this 19th day of November, 2010.

Respectfully submitted,

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Certificate of Service:

The undersigned hereby certifies that a true and exact copy of the foregoing was served this 19th day of November 2010 via:

( ) First Class Mail
( ) Hand-Delivery
( ) Facsimile
( ) E-Mail
(X) ECF

to the following listed individual(s):

Michael Barnhill
Sarah Felix
Margaret Paton-Walsh

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