

1 Thomas V. Van Flein  
 2 John Tiemessen  
 3 Clapp, Peterson, Van Flein,  
 4 Tiemessen & Thorsness LLC  
 5 711 H St., Suite 620  
 6 Anchorage, Alaska 99501-3454  
 7 Phone: (907) 272-9228  
 8 Facsimile: (907) 272-9586  
 9 E-mail: [tvf@akcplaw.com](mailto:tvf@akcplaw.com)

6 Michael T. Morley  
 7 616 E St. N.W #254  
 8 Washington, D.C. 20004  
 9 Phone: (202) 393-2851  
 10 Facsimile: (907) 272-9586  
 11 E-mail: [michaelmorleyesq@hotmail.com](mailto:michaelmorleyesq@hotmail.com)  
 12 Application for *pro hac vice* admission pending

13 *Attorneys for Plaintiff Joe Miller*

14 **UNITED STATES DISTRICT COURT**  
 15 **DISTRICT OF ALASKA**

14	JOE MILLER,	)	Civil Action No:
15		)	
16	<i>Plaintiff,</i>	)	3:10-cv-252 (RRB)
17		)	
18	v.	)	
19		)	
20	LIEUTENANT GOVERNOR CRAIG	)	
21	CAMPBELL, in his official capacity;	)	
22	and the STATE OF ALASKA,	)	
23	DIVISION OF ELECTIONS,	)	
24		)	
25	<i>Defendants.</i>	)	
26		)	

27 **PLAINTIFF’S SECOND MOTION FOR PRELIMINARY INJUNCTION**  
 28 **AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

29 Second Motion for Preliminary Injunction and  
 30 Memorandum of Points and Authorities in Support Thereof  
 31 *Miller v. Campbell*, Case No. 3:10-CV-252 (RRB)  
 32 Page 1 of 9

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**INTRODUCTION**

Plaintiff Joe Miller recently has learned that Defendants are arbitrarily and unconstitutionally discriminating among voters whose votes in the 2010 general election in the race for U.S. Senate (hereafter, "Election") were rejected by automated tally machines, based on whether or not the voter had attempted to vote for a write-in candidate. Employees of Defendant State of Alaska, Division of Elections (hereafter, "Division") and/or its Director, Gail Fenumiai (hereafter, "Director"), personally reviewed every rejected ballot in which the voter attempted to vote for a write-in candidate for U.S. Senate, or wrote in the name of a candidate, to determine whether, in their subjective and uncabined opinion, the "intent of the voter" was sufficiently clear to allow them to accept the ballot as valid and count it. No such individualized review was, or will be, conducted, however, for rejected ballots in which the voter attempted to vote for a candidate whose name was pre-printed on the ballot, such as Plaintiff Miller, or who did not write in the name of a candidate on the ballot.

This arbitrary and disparate treatment squarely violates the Equal Protection Clause, U.S. Const., amend XIV, as interpreted in *Bush v. Gore*, 531 U.S. 98 (2000). Plaintiff Miller respectfully asks this Court, pursuant to Fed. R. Civ. P. 65(a), to enter a Preliminary Injunction requiring Defendants:

1. to ensure that an appropriate employee of the Division, or the Director, personally reviews each ballot:

a. that was rejected by an automated tally machine,

- 1                   b.           in which the voter did not attempt to vote for a write-in candidate, and
- 2                   c.           on which the voter did not write in the name of a candidate,
- 3 to determine whether the markings are sufficiently clear to allow the ballot to be counted, based
- 4 on the same criteria that were applied in determining the validity of write-in ballots;
- 5                   2.           to accept as valid and count any such ballots; and
- 6                   3.           refrain from certifying the results of the 2010 general election for U.S. Senate
- 7 unless and until such hand count and manual review occurs.

### DISCUSSION

8

9

10           The Equal Protection Clause provides, “[N]or shall any State . . . deny to any person

11 within its jurisdiction the equal protection of the laws.” U.S. Const., amend XIV. In *Bush v.*

12 *Gore*, U.S. Const., 531 U.S. 98, 104 (2000), the Supreme Court held that, under the Equal

13 Protection Clause, “[T]he right to vote as the legislature has prescribed is fundamental; and one

14 source of its fundamental nature lies in the equal weight accorded to each vote and the equal

15 dignity owed to each voter.” It explains that a state may not, by “arbitrary and disparate

16 treatment, value one person’s vote over that of another.” *Id.* It later elaborated, “[T]he idea

17 that one group can be granted greater voting strength than another is hostile to the ‘one man,

18 one vote’ basis of our representative government.” *Id.* at 107 (quoting *Moore v. Ogilvie*, 394

19 U.S. 814, 819 (1969)).

20

21           Applying that standard, the Court held that the recount of votes in the 2000 presidential

22 election ordered by the Florida Supreme Court was unconstitutional, because it did “not satisfy

23

1 the minimum requirement for non-arbitrary treatment of voters.” *Id.* at 105. In particular, the  
2 Court held that it was arbitrary and discriminatory for some counties to conduct a hand recount  
3 of ballots that had been rejected by automatic tally machines, while other counties did not,  
4 thereby giving some citizens a greater opportunity to have their vote counted than others. *Id.* at  
5 107-08. This contributed to the “unequal evaluation of ballots,” in violation of the Equal  
6 Protection Clause. *Id.* at 106.

7 A variation of this problem is occurring here. The Division has decided to count a hand  
8 count—a personalized re-evaluation—of any votes in the U.S. Senate race that were rejected by  
9 automatic tally machines, in which the voter apparently attempted to vote for a write-in  
10 candidate, or wrote in the name of a candidate. *See generally* Affidavit of Joe Miller in  
11 Support of Plaintiff’s Second Motion for Preliminary Injunction (hereafter, “Miller Aff.”);  
12 Affidavit of Jessica Talbert in Support of Plaintiff’s Second Motion for Preliminary Injunction  
13 (hereafter, “Talbert Aff.”). It accepted as valid, and counted, any such votes in which the  
14 Division determined—based on vague, unspecified, subjective criteria—that the voter  
15 “intended” to cast the ballot for a write-in candidate (invariably, Lisa Murkowski). *Id.* The  
16 Division has refused, however, to conduct a similar hand count or personalized re-evaluation of  
17 votes in the U.S. Senate race that were rejected by automatic tally machines, in which the voter  
18 apparently attempted to vote for a candidate (such as Plaintiff Miller) whose name was pre-  
19 printed on the ballot, or who did not write-in the name of a candidate on the ballot. *Id.*

20  
21 Thus, people who cast their votes for write-in candidates effectively had a “second bite  
22 at the apple,” and had a substantially greater chance of having their ballots counted than people

1 who chose to cast their votes for candidates whose names appeared on the ballot. There is no  
2 basis for such arbitrary, disparate, and discriminatory treatment. It is particularly repugnant to  
3 apply different procedures for determining the validity of ballots based on the candidate for  
4 whom a person chose to cast their vote.

5 The *Bush* Court itself recognized that conducting a hand count of some ballots rejected  
6 by automatic tally machines, but not others, gives certain voters an unfair (and  
7 unconstitutional) advantage. In *Bush*, one of the main problems was that the Florida Supreme  
8 Court permitted some counties to conduct a recount only of “undervotes” (in which the tally  
9 machine did not detect any markings for any candidates on the ballot), whereas other counties  
10 were conducting a recount of both undervotes and “overvotes” (in which the machine detected  
11 markings for too many candidates on the ballot). The Court explained that such disparate  
12 standards created serious problems:

14 [T]he citizen whose ballot was not read by a machine because he failed to vote  
15 for a candidate in a way readable by a machine may still have his vote counted  
16 in a manual recount; on the other hand, the citizen who marks two candidates in  
17 a way discernable by the machine will not have the same opportunity to have his  
18 vote count, even if a manual examination of the ballot would reveal the requisite  
19 indicia of intent. Furthermore, the citizen who marks two candidates, only one  
of which is discernable by the machine, will have his vote counted even though  
it should have been read as an invalid ballot. The State Supreme Court’s  
inclusion of vote counts based on these variant standards exemplifies concerns  
with the remedial processes that were under way.

20 *Bush*, 531 U.S. at 108; see also *Rosello v. Calderon*, No. 04-2251 (DRD), 2004 U.S. Dist.  
21 LEXIS 27216, at \* (D.P.R. Nov. 30, 2004) (asserting jurisdiction over Equal Protection claim  
22 because “an inference has been created that these split ballots were not being equally or  
23

1 uniformly treated at high levels at the Commission”); *Black v. McGuffage*, 209 F. Supp. 2d  
2 889, 899 (N.D. Ill. 2002) (finding constitutional violation where, due to state policies, some  
3 voters were “statistically less likely to have their votes counted than voters in other counties in  
4 the same state in the same election for the same office”).

5 **PLAINTIFF MILLER SATISFIES THE**  
6 **REQUIREMENTS FOR INJUNCTIVE RELIEF**

7 This Court should enjoin Defendants from certifying the results of the Election based on  
8 arbitrary, disparate, and discriminatory procedures that blatantly violate the Equal Protection  
9 Clause. “Preliminary injunctive relief is proper if the plaintiff establishes that ‘he is likely to  
10 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary  
11 relief, that the balance of equities tips in his favor, and that an injunction is in the public  
12 interest.’” *Small ex rel. NLRB v. Operative Plasterers’ & Cement Masons’ Int’l Ass’n*, 611  
13 F.3d 483 (9th Cir. 2010) (amended op.) (quoting *Winter v. Nat’l Resources Defense Council,*  
14 *Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008)); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109,  
15 1127 (9th Cir. 2009). Plaintiff Miller satisfies each of these requirements.

16 *First*, as demonstrated above, he is likely to succeed on the merits of his claim that the  
17 Equal Protection Clause forbids Defendants from performing a hand count and personalized  
18 review of ballots that are rejected by automatic tally machines if the voter attempted to vote for  
19 a write-in candidate, but not if the voter intended to vote for a candidate whose name was pre-  
20 printed on the ballot.  
21

1                   **Second**, Plaintiff Miller will suffer irreparable injury if this Court allows the Division to  
2 certify results obtained and calculated in an unconstitutional manner, and to give certain votes  
3 more weight than his by giving them a greater chance of being deemed valid and counted. *See,*  
4 *e.g., Hoblock v. Albany Cty. Bd. of Elecs.*, 422 F.3d 77, 83 (2d Cir. 2005); *Marks v. Stinson*, 19  
5 F.3d 873, 875, 887-88 (3d Cir. 1994); *Republican Party v. North Carolina State Bd. of Elecs.*,  
6 No. 94-1057, 1994 U.S. App. LEXIS 14961, at \*7, 10-11 (4th Cir. June 17, 1994); *Day v.*  
7 *Robinwood W. Cmty. Improvement Dist.*, No. 4:08-CV-1888 (ERW), 2009 U.S. Dist. LEXIS  
8 36586, at \*8 (E.D. Mo. Apr. 29, 2009).

9                   Third, it clearly is in the public interest to delay certification of the Election until the  
10 votes are tallied in a constitutionally sufficient and non-discriminatory manner. Finally, the  
11 balance of equities clearly favors Plaintiff Miller, who is asking that a single, uniform standard  
12 to counting rejected votes be applied, rather than Defendants, who are attempting to maintain  
13 disparate policies.  
14

### 15                   **CONCLUSION**

16                   For these reasons, Plaintiff Joe Miller respectfully requests that this Court issue a  
17 Preliminary Injunction pursuant to Federal Civil Rule 65(a), requiring Defendants Craig  
18 Campbell, Lieutenant Governor and the Division of Elections, State of Alaska:

- 19                   1.       to ensure that an appropriate employee of the Division, or the Director,  
20 personally reviews each ballot:
- 21                           a.       that was rejected by an automated tally machine,
  - 22                           b.       in which the voter did not attempt to vote for a write-in candidate, and
  - 23

1 c. on which the voter did not write in the name of a candidate,  
2 to determine whether the markings are sufficiently clear to allow the ballot to be counted, based  
3 on the same criteria that were applied in determining the validity of write-in ballots;

4 2. to accept as valid and count any such ballots; and

5 3. refrain from certifying the results of the 2010 general election for U.S. Senate  
6 unless and until such hand count and manual review occurs.

7 Dated this 19th day of November, 2010.

8 Respectfully submitted,

9  
10  
11 /s/ Thomas V. Van Flein  
12 Thomas V. Van Flein,  
13 John Tiemessen  
14 CLAPP, PETERSON, VAN FLEIN  
15 TIEMESSEN & THORSNESS LLC  
16 711 H St., Suite 620  
17 Anchorage, Alaska 99501-3454  
18 Phone: (907) 272-9272  
19 Facsimile: (907) 272-9586

20 Michael T. Morley  
21 616 E St. N.W #254  
22 Washington, D.C. 20004  
23 Phone: (202) 393-2851  
24 Facsimile: (907) 272-9586  
25 E-mail: [michaelmorleyesq@hotmail.com](mailto:michaelmorleyesq@hotmail.com)  
26 Application for *pro hac vice*  
admission pending

*Attorneys for Plaintiff*



Certificate of Service:

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

- First Class Mail
- Hand-Delivery
- Facsimile
- E-Mail
- ECF

to the following listed individual(s):

Michael Barnhill  
Sarah Felix  
Margaret Paton-Walsh

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