

1 **IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**
 2 **FIRST JUDICIAL DISTRICT AT JUNEAU**

3
 4 **JOE MILLER,**

5 **Plaintiff,**

6 **v.**

7 **LIEUTENANT GOVERNOR CRAIG**
 8 **CAMPBELL, in his official capacity,**
 9 **and the STATE OF ALASKA,**
 10 **DIVISION OF ELECTIONS,**

11 **Defendants,**

12 **LISA MURKOWSKI,**

13 **Intervenor.**

Case No. 1JU-10-1007CI

14 **MEMORANDUM OF DECISION AND ORDER ON MOTION FOR SUMMARY**
 15 **JUDGMENT AND CROSS MOTIONS**

16 **Statement of the Case**

17 Defendant State of Alaska, Division of Elections (the "State") moves for summary
 18 judgment as to all six counts in Plaintiff Joe Miller's ("Miller") Complaint for Injunctive and
 19 Declaratory Relief. This case involves challenges to the State's conduct of the 2010 United
 20 States Senate election in Alaska and the procedures it used in validating and counting write-in
 21 votes for one of Miller's opponents in the election, incumbent Senator Lisa Murkowski
 22 ("Murkowski").

23 Miller has filed cross motions for summary judgment as to Counts 1 through 4 and argues
 24 that issues of material fact preclude summary judgment as to Counts 5 and 6. Murkowski was
 25

ORDER ON MOTION FOR SUMMARY JUDGMENT

Miller v. Campbell and State, Division of Elections, Case No. 1JU-10-1007CI

Page 1 of 34

Alaska Court System

EXHIBIT 1

1 permitted to intervene in this case and joins in the State's Motion for Summary Judgment and
2 has filed a cross motion asking this court to require the State to count certain ballots for
3 Murkowski that the Division of Elections has previously rejected.

4 The election was held on November 2, 2010. Miller, having earlier won the Republican
5 primary election, was listed on the printed ballot as the Republican candidate for the U.S. Senate
6 seat. Murkowski had lost the primary election to Miller. She chose to run as a write-in candidate
7 for the seat. She entered the race in that capacity in mid-October.

8 The unofficial tabulation of the votes following the election, according to Division of
9 Elections Director Gail Fenumiai, showed Miller receiving 90,740 votes along with 102,252
10 write-in votes cast. Various other candidates listed on the ballot split the remaining 62,839 votes,
11 with Democratic Party candidate Scott Adams receiving 60,007 of that total. 6 AAC 25.085(b)
12 requires the Division of Elections ("DOE") to count the write-in votes where, as here, the write-
13 in votes constitute the highest number of votes received by any candidate for the office.

14 This was done. DOE Director Fenumiai, in her affidavit submitted in support of the
15 State's Motion for Summary Judgment, set out the procedure utilized by DOE in counting the
16 write-in votes. Provision was made for the affected candidates to have observers present for the
17 sorting and counting to be done by DOE. Notice was provided to the parties as to the procedures
18 to be used in the count of the write-in ballots. The parties had been put on notice by the
19 Lieutenant Governor and DOE prior to the election that DOE would look to voter intent in
20 determining the validity of votes for the write-in candidates and that minor variations in spelling
21 and such would not cause the nullification of a vote where voter intent was apparent.¹ This
22
23
24

25 ¹ Exhibit B to State's Memorandum in Support of Motion for Summary Judgment.

1 Court has not been made aware of any objection by any party, prior to the election, of the
2 standard to be used.

3 The process announced and effectuated by DOE consisted of three steps: sorting all of the
4 ballots; reviewing misspelled write-in and challenged ballots; and counting the votes. The
5 ballots were divided into five categories:

- 6 (1) Ballots on which the oval was marked correctly next to a candidate's name
7 printed on the ballot;
- 8 (2) Ballots on which no oval was marked for U.S. Senate, more than one oval was
9 marked for the U.S. Senate race, or a name was written in but the oval was
10 unmarked;
- 11 (3) Ballots on which the write-in oval was marked and the written name was
12 "Lisa Murkowski" or "Murkowski," spelled correctly, and the ballot was not
13 challenged by any observer;
- 14 (4) Ballots on which the write-in oval was marked and the name written appeared
15 to be a variation or misspelling of "Lisa Murkowski" or "Murkowski;" this
16 category also included ballots which were challenged from category #3; and
- 17 (5) Ballots on which the write-in oval was marked and the name written in was
18 not "Murkowski," "Lisa Murkowski," or a variation thereof.²

19 The count commenced in Juneau on November 20, 2010.³ It took approximately one
20 week to complete the process. It was conducted in the manner set out by DOE. Miller's team of
21 observers viewed (or had the opportunity to view) every single ballot counted and registered
22 objections to over 8,000 ballots which DOE had accepted as votes for Murkowski. DOE

23 ² Aff. Gail Fenumiai, attached to State's Memorandum in Support of Motion for Summary Judgment.

24 ³ Miller complains that DOE moved the date up by a number of days and that the preparation, training, and
25 coordination of his observer team were thereby impaired. This impairment, according to Miller, may have caused
his observers to miss some questionable ballots, especially in the early going. On the other hand, affidavits
submitted by the State (and Murkowski) attest to the apparent preparedness, thoroughness, and highly coordinated
efforts of the Miller team during the count. This Court finds that no prejudice to Miller has been demonstrated or
can be inferred by the timing of the count.

1 accepted challenges to over 2,000 votes and did not count them for Murkowski.⁴ Even so,
2 Murkowski, according to DOE's tally at the conclusion of the count on November 17, had over
3 2,000 more votes (all unchallenged) than Miller, including 20 write-in votes for Miller which
4 were added to this total as a result of the DOE counting process.⁵

5 Miller filed for injunctive and declaratory relief in U.S. District Court. That court, the
6 Honorable Ralph R. Beistline, abstained from ruling on the issues presented pending the
7 institution of a state court proceeding and reserved federal issues in the suit for later adjudication
8 in U.S. District Court.
9

10 A six count Complaint for Injunctive and Declaratory Relief was filed by Miller in the
11 Superior Court in Fairbanks on November 22, 2010. On November 26, Murkowski moved to
12 intervene. Fairbanks Superior Court Judge Douglas Blankenship granted the State's motion to
13 change venue and the case was transferred to Juneau on November 29. On that same date, the
14 State filed its Motion for Summary Judgment as to all counts. This court was assigned the case
15 on November 30. The court permitted Murkowski's intervention on December 2, but denied the
16 same request by the Alaska Federation of Natives ("AFN") a day later. AFN's pleading
17 accompanying its Motion to Intervene was accepted as the brief of *amicus curiae*. Miller
18 opposed the State's Motion for Summary Judgment and cross-moved for summary judgment on
19 Counts One through Four. Murkowski joined in the State's Motion and cross-moved for
20 summary judgment on her claims respecting DOE's rejection of some 2,000 votes purportedly
21 for Murkowski. Oral argument on the State's motion for summary judgment and the cross
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24 ⁴ These challenged and not counted votes form the basis for Murkowski's cross-claims.

25 ⁵ Aff. Fenumiai ¶¶ 10-12.

1 motions of plaintiff Miller and intervenor Murkowski was heard in Juneau on December 8.

2 Summary judgment issues as to each Count of the Complaint are addressed in sequence below.

3 **Issues**

4 The court will address each of the six counts alleged by Miller sequentially, based on the
5 following four issues raised by the parties:

- 6 (1) As to Count I, whether AS 15.15.360(a)(10), (11) and (b) should be interpreted to
7 consider voter intent based on the lack of express language requiring strict compliance as
8 to the correct spelling of the candidate's name and the general policy espoused by the
9 Alaska Supreme Court in *Carr v. Thomas*.
- 10 (2) As to Count II, whether a failure to facilitate fairness, pursuant to AS 15.15.030(5) and
11 (12), occurred when ballots were not commingled and ballots instead were organized in
12 different categories with only write-in ballots, and not other ballots that had been rejected
13 by automated tally machines, receiving a direct review, handling and counting.
- 14 (3) As to Counts III and IV, whether in interpreting 6 AAC 25.085, if DOE Director Gail
15 Fenumiai's memorandum addressing a method of organizing and counting write-in votes
16 was a regulation requiring compliance with the Alaska Administrative Procedures Act.
- 17 (4) As to Counts V and VI, whether it has been shown through affidavits that genuine issues
18 of material fact exist to show that irregularities occurred in the election process such as
19 would violate AS 15.15.225 and AS 15.15.360(a)(10), (11) and (b), specifically as to the
20 providing of identification of voters (Count V) and the alleged writing in of votes by
21 persons other than the voter (Count VI).

22 Finally, this Court will deal with the issues raised in Murkowski's Cross Motion for
23 Summary Judgment.

24 **Standard for Granting Summary Judgment**

25 Alaska Rule of Civil Procedure 56(c) allows a party to move for summary judgment upon
a "showing that there is no genuine issue of material fact and that the moving party is entitled to
judgment as a matter of law." The burden, therefore, is upon the movant to show the absence of
a genuine issue of material fact. Once the moving party meets this requirement, the burden shifts
to the opposing party to "set forth specific facts showing that he could produce admissible

ORDER ON MOTION FOR SUMMARY JUDGMENT

Miller v. Campbell and State, Division of Elections, Case No. 1JU-10-1007CI

1 evidence reasonably tending to dispute or contradict the movant's evidence, and thus
2 demonstrate a material issue of fact exists."⁶

3 A motion for summary judgment will not be denied if the opposing party merely
4 provides: (1) assertions of fact in unverified pleadings and memoranda; or (2) allegations of fact
5 made by counsel in oral argument.⁷

6 "Since the impact of a successful Rule 56 motion is rather drastic, summary judgment
7 must be used with a due regard for its purposes and should be cautiously invoked so that no
8 person will be improperly deprived a trial of disputed factual issues."⁸ The court, therefore,
9 examines the pleadings, affidavits and any other evidence to determine whether a triable issue
10 exists to avoid the potential harm granting summary judgment could create.⁹ Stated more
11 colloquially, the court's role is not to resolve the issue, but to assess whether there is a true basis
12 for relief.¹⁰

14 Discussion

15 I. AS 15.15.360(a)(10), (11) and (b) do not preclude consideration of voter intent as to 16 ballot markings.

17 In Count I, Miller urges this Court to accept what he contends would be a literal
18 interpretation of AS 15.15.360(a)(11) whereby write-in votes "in which the candidate's name
19 was not spelled correctly, or was not written as it appears on the candidate's write-in certificate
20

21 ⁶ *Howarth v. First Nat'l Bank of Anchorage*, 540 P.2d 486, 489-490 (Alaska 1975).

22 ⁷ *Jennings v. State*, 566 P.2d 1304, 1309-1310 (Alaska 1977).

23 ⁸ Charles Wright, Arthur Miller, and Mary Kay Kane, 10A *Federal Procedure and Practice* § 2712 at pp. 216-217
(West 3rd Ed. 2007).

24 ⁹ *Id.* at pp. 208.

25 ¹⁰ *Id.*

1 of candidacy" would not be counted. The State proposes a less strict interpretation, basing its
2 reasoning on *Carr v. Thomas* and a policy against disenfranchisement of voters based upon a
3 strained statutory construction: votes with minor misspellings should be counted if clear voter
4 intent exists. Murkowski proposes an even more lenient reading whereby voter intent and only
5 voter intent applies to the extent that a vote should be counted even if clearly expressed aspects
6 of AS 15.15.360(a)(11) have not been met.

7
8 Because Count I only concerns a matter of statutory interpretation, there are no genuine
9 issues of material fact at issue. This is not contested. The matter is therefore subject to the
10 granting of summary judgment, and all of the parties urge the court to grant such relief in their
11 favor.

12 **A. The public interest exception applies to Miller's statutory interpretation claim,**
13 **despite the issue being moot.**

14 A court "will not resolve an issue when it is moot . . . [meaning] when the decision of an
15 issue will not resolve an ongoing case or controversy."¹¹ A controversy can still be considered,
16 despite being moot, if the public interest exception applies.¹² When assessing whether the public
17 interest exception applies, the following three factors are considered: "(1) whether the disputed
18 issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review
19 of the issues to be repeatedly circumvented, and (3) whether the issues presented are so
20 important to the public interest as to justify overriding the mootness doctrine."¹³ None of these
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23 ¹¹ *State v. Roberts*, 999 P.2d 151, 154 (Alaska App. 2000); see also *Kelven v. Yukon-Koyukuk School District*, 853
P.2d 518, 523 & fn. 8 (Alaska 1993)[a case is moot if the party bringing the action would not be entitled to any
relief even if they prevailed].

24 ¹² *Roberts*, 999 P.2d at 154.

25 ¹³ *Id.*

1 factors is dispositive, with the "ultimate determination of whether to review a moot question"
2 being left with the court.¹⁴

3 The issue involved in Count I with respect to the parties' respective interpretations of AS
4 15.15.360(a)(10), (11), and (b) is moot. Based on affidavits submitted to this court, not counting
5 the potentially disputed votes based upon the irregularities alleged in Counts V and VI, as well as
6 the issues raised in Count II with respect to the manner of counting write-in votes (as opposed to
7 how votes for "pre-printed" candidates were tallied), Murkowski has won the election by over
8 2,000 unchallenged votes. The statutory interpretation does not change this outcome.¹⁵ No
9 matter what interpretation this Court makes, and even if the court finds that Miller is correct and
10 only correctly spelled ballots for Murkowski are to be counted, Miller would not be entitled to
11 relief because the outcome does not change.
12

13 While the issue may be moot, the public interest exception applies. All of the factors
14 established in *Roberts* are met here. First, this scenario is certainly susceptible to repetition any
15 time a major write-in effort for election to a public office in Alaska occurs. Also, the issue here
16 will be repeated if and when the federal court takes up this exact issue again after the state
17 remedies are exhausted. The federal court has sought guidance from this Court in interpreting
18 AS 15.15.360, and this Court will do its job in rendering its view on the statute(s) at issue.
19 Second, repeated findings of mootness in such situations could result in the circumvention of the
20 issue. Finally, this election affects all Alaska voters and citizens. This election decides one of
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23 ¹⁴ *Krohn v. State Dept. of Fish and Game*, 938 P.2d 1019, 1021 (Alaska 1997).

24 ¹⁵ This Court notes Miller's argument that the outcome could change if he succeeded on the other arguments
25 presented in his memorandum. As the rest of this order reveals, those arguments fail as well, thus making a finding
of mootness pursuant to statutory interpretation even clearer.

1 two representatives for the Alaska in the Senate, an issue of strong "political value."¹⁶ Because
2 of the importance of the issue in consideration of the foregoing factors, together with the wide
3 discretion granted to this court, this court will address the issue pursuant to the public interest
4 exception to the mootness doctrine.

5 **B. Policies enunciated in *Carr v. Thomas* and canons of construction in election law**
6 **cases apply to the present circumstances.**

7 In interpreting statutes in election law contexts, the Alaska Supreme Court has
8 emphasized the importance of giving effect to the will of the people as expressed in the exercise
9 of their vote. In *Carr v. Thomas*, the Alaska Supreme Court stated, "There is well-established
10 policy which favors upholding of elections when technical errors or irregularities arise in
11 carrying out directory provisions which do not affect the result of an election."¹⁷ Because of this
12 policy, "courts are reluctant to permit a wholesale disenfranchisement of qualified electors
13 through no fault of their own."¹⁸ Therefore, "where any reasonable construction of the statute
14 can be found which will avoid [disenfranchising voters], the courts should and will favor it."¹⁹
15 The Alaska Supreme Court has expressed this policy in a wide range of election law contexts,
16 even if not specifically in the matter of write-in votes.²⁰

17
18 Miller wishes to narrow *Carr*'s holding by limiting the decision to punch ballot and paper
19 ballot issues such as those involved in *Carr*. Such a reading twists the clear language in *Carr* as
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21 ¹⁶ *Vogler v. Miller*, 660 P.2d 1192, 1194 (Alaska 1983).

22 ¹⁷ 586 P.2d 622, 625-626 (Alaska 1978).

23 ¹⁸ *Id.* at 626.

24 ¹⁹ *Id.*; citing *Reese v. Dempsey*, 153 P.2d 127, 132 (1944).

25 ²⁰ see *Grimm v. Wagoner*, 77 P.3d 423, 432 (Alaska 2003) and *Fischer v. Stout*, 741 P.2d 217, 225 (Alaska 1987).

1 well as numerous post-*Carr* cases.²¹ The Alaska Supreme Court expressly stated in the decision,
2 “even if we concluded that punch card ballots were somehow different from other paper ballots .
3 . . we would reach the same result.”²² The Court then espoused the policies cited above in
4 making its ruling on these other grounds. The policy in *Carr* has a long history and is not some
5 newfangled policy,²³ as other state courts have espoused the same policy in a variety of election
6 law contexts.²⁴

7
8 The Alaska Supreme Court has even mentioned this canon of construction in the context
9 of this election. In *Alaska Democratic Party v. Fenumiai*, the Alaska Supreme Court considered
10 whether voters should be given a list of write-in candidates.²⁵ In its order the Alaska Supreme
11 Court noted, “the importance of facilitating voter intent.”²⁶ The Court then cited *Carr v.*
12 *Thomas*, as well as *Edgmon v. State, Div. of Elections*, 152 P.3d 1154, 1157 (Alaska 2007), to
13 reflect the Alaska Supreme Court’s long standing acceptance of this canon of construction.
14 When considering the issue of interpreting AS 15.15.360(a)(11), this Court’s analysis and
15 considerations are reinforced by the policy espoused in *Carr*. That policy informs this decision.
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18 ²¹ See, e.g., *Edgmon v. Moses*, 152 P.3d 1154, 1158 (Alaska 2007) (“[W]e have consistently emphasized the
19 importance of voter intent in ballot disputes.”); *Finkelstein v. Stout*, 774 P.2d 786, 788, 792 (Alaska 1989) (validity
20 of signature and marking on ballot was matter of voter intent); *Fischer*, 741 P.2d at 220 (Alaska 1987) (examining
21 markings on punch-card ballots to determine voter intent); *Willis v. Thomas*, 600 P.2d 1079, 1085 (Alaska 1979) (in
22 reviewing ballot markings on punch cards the court stated that “the crucial question in determining the validity of
23 ballot markings is one of voter intent”).

24 ²² 586 P.2d at 625-626.

25 ²³ see *Montgomery v. Henry*, 39 So. 507 (Ala. 1905); *Barr v. Cardell*, 155 N.W. 312 (Iowa 1915); *Queenan v.*
26 *Mims*, 283 S.W.2d 380 (Ky. 1955); *Carson v. Kalisch*, 99 A. 199 (N.J. 1916).

27 ²⁴ see *New Jersey Democratic Party v. Samson*, 814 A.2d 1028 (N.J. 2002); *Palm Beach County Canvassing Board*
28 *v. Harris*, 772 So.2d 1220 (Fla. 2000).

29 ²⁵ Supreme Court Order S-14054 (November 29, 2010).

30 ²⁶ *Id.* at 3-4, ¶¶ 4-5.

1 C. Based on *Carr's* canons of construction and the language in AS 15.15.360(a)(11),
2 the statute provides for flexibility and allows DOE to consider voter intent.

3 Alaska Courts interpret a statute "according to reason, practicality, and common sense
4 [by] considering the meaning of the statute's language, its legislative history, and its purpose."²⁷
5 To achieve such a result, "when interpreting the meaning of the language in a statute, the words
6 should be given their reasonable or commons sense interpretation in keeping with the legislative
7 intent."²⁸ "Once the plain meaning of a term is determined" the court does not apply the
8 meaning mechanically.²⁹ Instead, "the court uses a sliding scale approach to statutory
9 interpretation in which it also considers the legislative history of the statute and whether the
10 history reveals a legislative intent and meaning which is contrary to the plain meaning."³⁰ "The
11 plainer [the statutory] language, the more convincing contrary legislative history must be."³¹ The
12 parties acknowledge that there is no legislative history with respect to the statute being construed
13 here which might assist or inform the court.
14

15 AS 15.15.360(a)(11) provides, "a vote for a write-in candidate . . . shall be counted if the
16 oval is filled in for that candidate and if the name, as it appears on the write-in declaration of
17 candidacy, of the candidate or the last name of the candidate is written in the space provided."
18 The statute, analyzing its plain meaning based on the use of commas and disjunctives provides
19 the following requirements:
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22 ²⁷ *Parson v. State Dept. of Revenue*, 189 P.3d 1032, 1036 (Alaska 2008).

23 ²⁸ *Stephan v. State of Alaska*, 810 P.2d 564, 566.

24 ²⁹ *Id.*

25 ³⁰ *Id.*

³¹ *State v. Alex*, 646 P.2d 203, 208-209 fn. 4 (Alaska 1982).

- 1 (1) the oval is filled in (meeting the requirements in AS 15.15.360(a)(1) and (5)); and
2 (2) written in the space provided is either:
3 (a) the name of the candidate as it appears on the write-in declaration of
4 candidacy; or
5 (b) the last name of the candidate.

6 This statutory language of how the name can be written-in implies flexibility. Using this
7 case as an example, the provision read in a highly formalistic manner allows the name to be
8 written in as "Murkowski, Lisa" or "Murkowski." The use of "appears" allows variations of the
9 write-in candidate's name to be accepted. "Appears" does not mean "exactly," "precisely," or
10 "perfectly," but rather "close to," "like," or "resembles." As pointed out by Miller in a
11 supplemental pleading filed during the preparation of this decision, the Oxford English
12 Dictionary also offers a definition as follows: "To show itself or be plainly set forth in a
13 document". The court considers this to be constructive, but not conclusive of the issue. If the
14 legislature intended precision insisted upon by Miller, a word like "exactly" could have been
15 used or the matter of spelling addressed. The court finds a fundamental discrepancy or
16 contradiction in Miller's apparent view that "Lisa Murkowski" is acceptable when the
17 candidate's name "as it appears" on the declaration of candidacy is "Murkowski, Lisa", as is
18 further discussed, below. The definition of "appears" in this context does not require perfection
19 or precision, but rather a close, apparent, approximation known to the viewer upon first look.
20 This seems to the court the far more reasonable interpretation of the term than the rigid meaning
21 attributed to it by the plaintiff. If exact spellings were intended by the legislature, even with
22 respect to the most difficult names, the legislature could have and would have said so.

23 This statutory interpretation becomes stronger when considering the other possible way a
24 write-in vote can comply with the statute: writing in the last name of the candidate. This second
25 possible way of writing in a candidate does not include the term "as it appears," and is entirely

ORDER ON MOTION FOR SUMMARY JUDGMENT

Miller v. Campbell and State, Division of Elections, Case No. 1JU-10-1007CI

1 silent as to spelling or exactitude. This possible way of meeting the AS 15.15.360(a)(11)
2 requirement does not place any emphasis on the spelling of the first name either. Misspellings or
3 inadequate spellings of a candidate's first name would seem to be permissible if the candidate's
4 last name has been written. Due to the silence, misspellings and mistakes of the last name are
5 permissible because no express language provides otherwise.

6
7 Statutory flexibility which emphasizes voter intent when the statute lacks clearly
8 expressed language stating otherwise is consistent with the *Carr* holding. Citing *Sanchez v.*
9 *Bravo*, the *Carr* Court noted, "if in the interests of the purity of the ballot the vote of one not
10 morally at fault is to be declared invalid, the legislature must say so in clear and unmistakable
11 terms."³² If the legislature fails to state in clear and unmistakable terms the invalidity of a vote,
12 then courts will find an interpretation which enfranchises votes.³³ There is no clear and
13 unmistakable language here which expressly invalidates a vote for a name change; thus voter
14 intent should be considered. Ruling otherwise would be against the core principle espoused in
15 *Carr*.

16
17 Based on *Carr*, AS 15.15.360(b) does not require a formalistic approach when read in
18 conjunction with AS 15.15.360(a)(11). AS 15.15.360(b) asserts "the rules set out in this section
19 are mandatory and there are no exceptions to them." This language does not change the statutory
20 interpretation set out above. AS 15.15.360(a)(11) appears to encompass variations of the write-
21 in candidates' name to be counted. Applying AS 15.15.360(b) to this interpretation would only
22 make such an the rule, as interpreted, "mandatory." Reading AS 15.15.360(b) in the context of
23 voter intent, the statute serves to protect voters, not to provide a stronger formalistic approach

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25 ³² 251 S.W.2d 935, 938 (Tex.Civ.App. 1952).

1 which the plain language of the statute fails to provide, and would in fact have the potential
2 effect of denying some voters "not morally at fault" the intended effect of their vote.

3 The fact that absentee ballots have strict rules does not provide any insight into how AS
4 15.15.360(a)(11) should be interpreted. Absentee ballots have these stricter rules because they
5 raise fraud concerns.³⁴ While AS 15.20.203 includes these requirements, absent are any
6 expressed language denying a vote cast based on misspellings, writing mistakes, or other
7 potential errors. Instead the statute focuses upon ensuring the validity and verification of the
8 absentee ballot because of the nature of such a ballot, much like a voter must be of a certain age
9 and meet certain requirements to vote in person.³⁵

11 Miller's interpretation of AS 15.15.360(a)(11), despite his claims to the contrary, is
12 inconsistent. According to Miller, minor misspellings are not permitted based on the term "as it
13 appears." However, Miller admits the following write-in votes are appropriate: "Lisa
14 Murkowski" and "Murkowski, Lisa." If "as it appears" means what Miller contends it means³⁶,
15 then only "Murkowski, Lisa" would be appropriate because that would be exactly replicating the
16 write-in declaration form of the name. Miller's interpretation provides latitude, claiming "Lisa
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18 ³³ *Carr*, 586 P.2d at 626.

19 ³⁴ see William T. McCauley, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U.
20 *Miami L. Rev.* 625 (1999-2000).

21 ³⁵ A comparison can be made between the requirements in an absentee-ballot and the identification requirements at a
22 polling station to receive a ballot. Both have certain requirements, which when met the voter's voice can be heard
23 by the public. A distinction can be made between denying a voter's voice based on not meeting certain
24 requirements which are in place to avoid fraud and denying a voter's voice after the person places his or her ballot in
25 the ballot box. In the latter, the *Carr* policy has a foothold which will prevent a registered voter's voice from being
silenced.

26 ³⁶ A supplement filed on December 9, 2010 with a copy of the Oxford English Dictionary's definition of "appears"
reveals Miller attempting to reinforce this position; though even the OED's definition grants conspicuous latitude in
a phrase like "as it appears" which a term like "exact" or "precise" does not. Even if Miller's interpretation was
correct, the *Carr* canon undercuts such an interpretation.

1 Murkowski" would be sufficient to meet the statutory standard or where poor penmanship and
2 wide loops were used by the voter. Miller claims the latitude can be attributed to the statute
3 including "or the last name" so that the first name does not even need to be included. But the
4 "last name" requirement does not include any reference to "as it appears" or any other restrictive
5 language. His analysis ends there, with no adequate explanation for why misspellings, and in
6 particular of the first name, are not permissible while the order of the names would be
7 permissible. Only by considering the policy stated in *Carr* and permitting flexibility in order to
8 deter voter disenfranchisement can this matter be reconciled.
9

10 If the legislature intended that the candidate's name be spelled perfectly in order to count,
11 then the statute would have included such a restrictive requirement. Based on the policy in *Carr*,
12 voter intent informs this Court's statutory interpretation. AS 15.15.360(a)(11) may not be well
13 written, and it is clearly subject to different interpretations; this would account for the two widely
14 divergent views of its language which are no doubt held in good faith by the opposing parties in
15 this case. AS 15.15.360, in general, is terse and somewhat unclear in comparison to other state
16 statutes. The statute, as Miller reveals, does lack the express language that most states have
17 adopted which permits minor misspellings and errors. Furthermore, the statute lacks language
18 such as "the voter intended" as provided in AS 15.15.360(a)(5) regarding filling in ovals. Miller,
19 however, proposes placing statutory interpretation³⁷ on its head by reading a statute narrowly
20 based on latitude not being expressly stated, when the restrictions he proposes are legally
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23 ³⁷ Law professors often make the following admission, "A good law is a vague law." The assumption being, a
24 vague law provides wide latitude. A clear and exact law, instead, restricts rights and eliminates public power based
25 on expressed language. This concept pervades all of the law, whereby a citizen's rights are presumed to exist unless
those rights are expressly restricted. Miller proposes a statutory construct not just anathema to *Carr* but to this
established concept of statutory interpretation. Under Miller's canon of construction, no one would have rights
because none of the laws have expressly provided for those rights.

1 required to be expressly stated pursuant to Alaska's rules of construction.³⁸ Nothing in the case
2 law or the suggestions made by the Alaska Supreme Court implies the intent to limit or eliminate
3 voter intent absent expressed language of a restriction.

4 If this Court applied the deference often given to agency interpretations of statutes and
5 regulations, even absent the policy expressed in *Carr*, Miller's interpretation still falls short.
6 This court has undertaken an independent judgment review of the statute, typically reserved for
7 when the agency interprets a statute which it lacks specialized knowledge or experience as to its
8 application.³⁹ In contrast, the Alaska Supreme Court applies a reasonable basis standard, in
9 deference to the agency, where "the question at issue implicates agency expertise or the
10 determination of fundamental policies within the scope of the agencies statutory functions."⁴⁰
11 DOE's interpretation, as in this case, could be reviewed based on whether their interpretation of
12 AS 15.15.360 was reasonable. As the above analysis reveals, without question DOE's
13 interpretation of the statute was reasonable.
14

15 The only support Miller provides for his interpretation is based on the nature of
16 Murkowski's campaign. Miller argues that Murkowski went to great lengths to advise voters of
17 the spelling of her name and to make it as easy as possible for voters to get her name right. He
18 points to the fact that lists of write-in candidates were posted at polling places and that voters
19 could ask for assistance. He seems to suggest that a voter who really wanted to vote for
20 Murkowski would have no excuse for getting the spelling of her name wrong. But of course
21 there are many reasons why this might happen, whether they involve a village elder who had
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24 ³⁸ *Carr*, 586 P.2d at 626; see also Nebraska Stat. 32-1007; C.R.S. 1-7-114.

25 ³⁹ *Mat-Su Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986).

⁴⁰ *Id.*

1 grown up speaking his or her Native dialect, a recently naturalized citizen, a person with any one
2 of a number of disabilities, or someone who just mistakenly left off a letter in his or her chosen
3 candidate's name. The consequent disenfranchisement of that individual voter, when but for a
4 minor imperfection which otherwise does not conceal that voter's intent, cannot be the inferred
5 intent of the statutory language at issue in this case.

6
7 At the other end of the spectrum, Murkowski's reading would replace AS
8 15.15.360(a)(11) with a test so highly subjective and administratively difficult to apply that
9 elections would become long drawn out contests in assessing voter intent. Under Murkowski's
10 reading of the statute, a write-in vote with no oval filled in or a write-in vote such as "Lisa M."
11 should be counted. AS 15.15.360(a)(10) specifically states an oval must be filled in. AS
12 15.15.360(a)(10) includes the name be written "as it appears on the write-in declaration" or "the
13 last name." Some latitude exists. But *Carr* does not stand for the proposition that voter intent
14 overtakes all statutory constructs, but rather provides a means of statutory interpretation where
15 the legislature has not provided a requirement in "clear and unmistakable terms."⁴¹ The
16 legislature clearly expressed the oval filling requirement in AS 15.15.360(a)(10) and (11). The
17 legislature also expressed certain requirements for a candidate's name. Under Murkowski's
18 interpretation, AS 15.15.360(a)(10) would be swallowed by the *Carr* policy, leaving the statute
19 with little practical effect.

20 21 **D. Conclusion**

22 DOE's interpretation of AS 15.15.360(a)(11), and the policies it implemented in counting
23 write-in ballots on that basis, which recognized voter intent by counting write-in votes with
24

25 ⁴¹ *Bravo*, 251 S.W.2d at 938.

1 minor misspellings and other small technicalities is consistent with well-established election law
2 principles. Miller's interpretation is not supported by the Alaska Supreme Court's policies on
3 the issue of voter enfranchisement set out in cases such as *Carr* and is contrary to other
4 fundamental rules of statutory construction as set out above. This court also considers
5 Murkowski's interpretation to be too broad, to the extent that AS 15.15.360(a)(11) would no
6 longer serve any legitimate purpose if it were adopted. DOE's interpretation and action is
7 consistent with not only the statute's language but also the principles espoused by the Alaska
8 Supreme Court. There being no genuine issues of material fact present here, the State is entitled
9 to summary judgment a matter of law
10

11 **II. DOE complied with the applicable statutes and regulations and did not discriminate**
12 **between write-in votes and those cast for listed candidates⁴²**

13 Miller contends DOE used two different procedures when counting the ballots: one for
14 the write-in ballots by hand review and one for regular ballots containing apparent votes for pre-
15 printed candidates which were counted by machine. By using these two different procedures,
16 Miller claims DOE discriminated against regular ballots by employing this practice.

17 The State and Murkowski oppose this claim, and assert no claim of discrimination can be
18 made. According to the State, write-in votes were treated differently because they were write-in
19 votes subject to the application of a specific regulation as to the method of counting such votes.

20 6 AAC 25.085 provides that if write-in votes in the general election are at least the
21 second highest in number in a race with two or more candidates, the write-in votes will be
22

23 ⁴² In his complaint, Miller asserts a "fundamental fairness" argument pursuant to AS 15.15.030. The statute was
24 misapplied because AS 15.15.030 discusses the "preparation of a ballot." In his motion for summary judgment,
25 Miller backed away from the previous AS 15.15.030 argument and instead argued discrimination. As a result, this
Court only addresses the issue of discrimination. Because the complaint references AS 15.15.030, this Court states
there is no showing of lack of "fundamental fairness" in the preparation of the ballot at issue here. Therefore,
summary judgment is granted to the state on that issue.

1 counted individually. This regulation establishes write-in votes will be counted separately from
2 the other ballots. The nature of write-in ballots warrants different treatment from other ballots
3 which can be counted by a machine. Instead of the language provided above, the regulation
4 could state, "if the total number of ballots containing write-in votes are at least the second
5 highest number in a race with two or more candidates, all votes will be hand counted and
6 scrutinized." But the Code does not contain such language, instead focusing on the write-in
7 votes and how those votes will be counted: individually.

8 Miller argues the reliance on the voting machines results in greater error for "regular"
9 ballots than for write-in ballots.⁴³ First, Miller fails to recognize the distinction between those
10 two types of votes as established in 6 AAC 25.085. Write-in votes are unique and thus must be
11 counted individually. Second, Miller appears to disagree with DOE's categorizing method and
12 use of machines as discussed throughout this order. DOE established a policy to count the votes
13 efficiently, expeditiously and accurately. Closely scrutinizing every vote would not only be
14 counter to the code, but would also be against DOE's goals when dealing with election returns.
15 Finally, statutory regulatory language could provide for counting all votes by hand when a write-
16 in vote leads or is in second place. The regulations do not provide for such a process, but only
17 that write-in votes will be counted "individually."

18 Moreover, the State argues that division workers did actually review every ballot, not just
19 write-in ballots, in the counting process, examining the ovals and making individual
20 determinations of the so-called "undervote, overvote"⁴⁴ ballots. The court finds no factual basis
21

22
23 ⁴³ The concern over Diebold machines has been widely discussed by the media. While other machines may be
24 better and certain principles or practices may be more prudent, this Court's role is to interpret the law. We leave it
to the DOE, the legislature, and other entities to change how those practices could or should be carried out in the
future.

25 ⁴⁴ These are ballots which were rejected by the tally machines for either having too many ovals filled in or no oval
filled in.

1 for an argument that DOE did not "facilitate fairness" in violation of the mandate to do so found
2 in AS 15.15.030, and no basis for any claim that the actions of DOE would have any significant
3 effect on the vote tally.

4 **III. The memorandum disseminated by DOE Director Gail Fenumiai was an agency**
5 **interpretation of regulations and statutes and was not a regulation requiring APA**
6 **compliance.**

7 Shortly before the November 2, 2010 election, the Division of Elections issued a
8 document detailing the process by which it would count write-in votes. This document contained
9 an interpretation of AS 15.15.360(a)(1) permitting election workers to count write-in ballots for a
10 candidate if it was clear that the voter intended to vote for that particular candidate. This
11 interpretation allowed minor misspellings of the name Lisa Murkowski to be counted. Miller
12 now asserts that this interpretation constitutes a regulation under the Administrative Procedures
13 Act ("APA") and challenges this interpretation as invalid as it was not promulgated according to
14 APA rulemaking procedures.

15 Miller also alleges that DOE implemented an additional regulation, as evidenced by its
16 actions, by relying

17 [E]xclusively on automated tally (optical scanning) machines to determine which ballots
18 cast for preprinted candidates were valid and could be counted, while relying exclusively
19 on Division employees to determine, during their manual count, which write-in ballots
were valid and could be counted.

20 Again, Miller contends that this policy is invalid because it was not promulgated pursuant to
21 APA procedures.

22 However, the State contends DOE's interpretation of AS 15.15.360(a)(1) is a
23 commonsense and foreseeable interpretation that only relates to the internal management of a
24 state agency, and thus is not a regulation under the APA. In addition, the State argues that the
25 Division's policy to tally write-in votes through a hand count, while relying on optical scanning

1 for the tally of votes for preprinted candidates is, in fact, a regulation—6 AAC 25.085(b)—
2 enacted pursuant to APA rulemaking. Further, the State argues that, in the event that either
3 policy were construed as a regulation, no retroactive relief altering the vote count totals would be
4 available to Miller. This court finds the State's position persuasive.

5 Under Alaska law, a regulation is defined as

6 [E]very rule, regulation, order, or standard of general application...adopted by a state
7 agency to implement, interpret, or make specific the law enforced or administered by it,
8 or to govern its procedure, except one that only relates to the internal management of a
state agency...⁴⁵

9 Further, AS 44.62.640(b) states that a significant factor in determining whether an
10 agency's interpretation of a statute constitutes a regulation is "whether it affects the public or is
11 used by the agency in dealing with the public." Recognizing that almost every agency action
12 affects the public in some way, the Alaska Supreme Court has noted,

13 Although the definition of 'regulation' is broad, it does not encompass every routine,
14 predictable interpretation of a statute by an agency. Nearly every agency action is
15 based, implicitly or explicitly, on an interpretation of a statute or regulation authorizing it
16 to act. A requirement that each such interpretation be preceded by rulemaking would
result in complete ossification of the regulatory state.⁴⁶

17 The Alaska Supreme Court in interpreting this definition has found two indicia of
18 regulation: (1) a regulation implements, interprets or makes more specific the law enforced or
19 administered by the state agency; and (2) a regulation affects the public or is used by the agency

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23 ⁴⁵ AS 44.62.640(b).

24 ⁴⁶ *Alyeska Pipeline Service Co. v. State, Dept. of Envtl. Conservation*, 145 P.3d 561 (Alaska 2006) (finding that an
25 interpretation of "permit administration fees" to include the cost of defending an administrative appeal was a
commonsense interpretation of AS 46.14.240(c) that did not mandate APA rulemaking).

1 in dealing with the public.⁴⁷ Along this line, the Alaska Supreme Court has ruled that “obvious,
2 commonsense interpretations of statutes do not require rulemaking.”⁴⁸

3 The Alaska Supreme Court has distinguished regulations from mere internal policy
4 interpretations by finding that the former usually add some substantive requirement to a
5 statute/regulation. In *Alaska Center for the Environment v. State*, the Alaska Supreme Court
6 examined whether an interpretation of “major energy facility” was a regulation for the purposes
7 of the APA.⁴⁹ The court found that the interpretation was not a regulation because it ““was not
8 an addition to a regulation involving requirements of substance. Instead, it was the interpretation
9 of the regulation according to its own terms.”⁵⁰

11 An interpretation must satisfy APA standards when an agency changes its statutory
12 interpretation multiple times in an effort to deny a citizen’s specific rights. In *Jerrel v. State*
13 *Department of Natural Resources* (“DNR”), the Jerrels contested a requirement that animals be
14 marked so they could be seen from twenty feet away.⁵¹ The requirement was the result of the
15 DNR’s interpretation of a statute “[requiring] all livestock be tagged, dyed or otherwise
16 marked.”⁵² The Jerrels proposed plastic ear tags.⁵³ DNR denied the ear tags, but instead

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19 ⁴⁷ *Messerli v. Dept. of Natural Resources*, 768 P.2d 1112, 1117 (Alaska 1989).

20 ⁴⁸ *Squires v. Alaska Bd. of Architects, Engineers, & Land Surveyors*, 205 P.3d 326, 334 (Alaska 2009)

21 ⁴⁹ 80 P.3d 231 (Alaska 2003).

22 ⁵⁰ *Id.* at 244 (quoting *Usibelli Coal Mine, Inc. v. State, Dep’t of Natural Res.*, 921 P.2d 1134, 1149 n. 24 (Alaska 1996)).

23 ⁵¹ 999 P.2d 138, 143 (Alaska 2000).

24 ⁵² *Id.*

25 ⁵³ *Id.*

1 proposed permanent tattoos.⁵⁴ When the Jerrells returned with a proposal for ear tattoos, DNR
2 again changed its interpretation of the regulation.⁵⁵ The Alaska Supreme Court ruled the new
3 interpretation was a regulation which needed to meet APA standards.⁵⁶ The Court based its
4 holding on the DNR changing its requirements and creating new requirements because it was the
5 Jerrells.⁵⁷ The Court noted, "when an agency is freed from the requirement of having to make
6 general rules, this invites the possibility that state actions may be motivated by animosity,
7 favoritism, or other improper influences."⁵⁸

9 A regulation changes the rights and interests of the parties, whereas an internal agency
10 determination does not. In *Burke v. Houston Nana LLC.*, the Alaska Worker's Compensation
11 Board adopted a discovery rule where the injured worker had to make a claim within 90 days of
12 discovering the injury.⁵⁹ By adopting this rule, a worker filing for an evaluation of his claim
13 after 90 days would be denied.⁶⁰ The Alaska Supreme Court found the discovery rule was a
14 regulation because it both made the regulation more specific and it altered the rights of the
15 parties.⁶¹ The discovery rule had a direct effect upon Burke because he could not file his claim.⁶²

18 ⁵⁴ *Id.*

19 ⁵⁵ *Id.*

20 ⁵⁶ *Id.* at 143-144.

21 ⁵⁷ *Id.* at 144.

22 ⁵⁸ *Id.*

23 ⁵⁹ 222 P.3d 851, 867 (Alaska 2010).

24 ⁶⁰ *Id.* at 868.

25 ⁶¹ *Id.*

⁶² *Id.*

1 Because Burke was not informed of his rights being changed, the Board's discovery rule was a
2 regulation.

3 Based upon the holdings in *Burke*, *Jerrel* and *Squires*, it is apparent that foreseeability is
4 a fundamental element in the evaluation of an agency interpretation.⁶³ A "commonsense" or
5 "obvious" interpretation is a foreseeable interpretation; an interpretation which the public would
6 expect. A regulation may be seen as an unforeseeable interpretation. An agency cannot change
7 interpretations numerous times in an effort to break a lease agreement. Similarly, an agency
8 cannot adopt a new discovery rule in an effort to end certain claims without the public knowing.
9 Both are unforeseeable changes which affect the public, thus requiring notification by complying
10 with the APA.
11

12 **A. The Policy to review ballots to determine voter intent relates to internal agency**
13 **management and is not a regulation for the purposes of the APA.**

14 The State contends that an interpretation of AS 15.15.360(a)(11) that allows for
15 misspellings as long as voter intent is ascertainable is an obvious, commonsense interpretation
16 because the statute is not explicit about how a candidate's name should be spelled. Further, the
17 State contends that this interpretation is supported by the statute's grammar and word choice as
18 well as a considerable amount of analogous Alaska case law.⁶⁴

19 Miller argues that there is nothing obvious about DOE's interpretation of AS
20 15.15.360(a)(11) because he interprets the statute as requiring perfect spelling of a candidate's
21 name. As noted supra, Miller's interpretation of AS 15.15.360(a)(11) is not considered by this
22
23

24 ⁶³ see *Squires*, 205 P.3d at 335 [the verification requirement, from a third party, was not deemed unforeseeable].

25 ⁶⁴ see, Count I.

1 court to be obvious or commonsensical, as it contravenes basic canons of statutory construction,
2 grammar and well-established Alaska case law.

3 The Alaska Supreme Court has noted in *Squires v. Alaska Board of Architects* that the
4 mere fact that other interpretations of a statute are theoretically possible does not mandate APA
5 rulemaking for a commonsense and natural interpretation of a statute.⁶⁵ In *Squires*, the Supreme
6 Court found that an interpretation of the phrase "satisfactory evidence" mandating third-party
7 verification by professional engineers did not constitute a regulation although this evidentiary
8 requirement "could be interpreted to mean anything from live testimony at a hearing to a an
9 affidavit from the applicant himself."⁶⁶

10
11 Similarly, in this case, DOE has interpreted AS 15.15.360(a)(11) according to its terms,
12 and has not implemented any new substantive requirement. In interpreting "name, as it appears
13 on the write-in declaration of candidacy" and "last name of the candidate" to allow for write-in
14 votes with less than a perfect spelling of a candidate's name, as long as voter intent is clear, the
15 Division has adopted a commonsense interpretation, which the court believes would be evident
16 to most Alaskans. The Division of Elections has not interpreted this statute to add additional
17 requirements to write-in voting, such as a requirement of perfect spelling or a requirement that
18 the voter include party affiliation of the write-in candidate. It has merely interpreted AS
19 15.15.360(a)(11) in an obvious, commonsense, foreseeable way. To require more would
20 certainly place an unprecedented restraint on regulatory power.
21
22
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25 ⁶⁵ *Squires v. Alaska Bd. of Architects, Engineers, & Land Surveyors*, 205 P.3d 326, 334 (Alaska 2009)

1 **B. DOE's hand count of write-in ballots complies with 6 AAC 25.085(b).**

2 Under 6 AAC 25.085(b), if "the aggregate of all votes cast for all write-in candidates for
3 the particular office is the highest number of votes received by any candidate for the office" then
4 "the director will establish the place and date for counting those write-in votes."⁶⁷ This
5 regulation specifically allows for a hand count in the event write-in votes surpass a certain
6 threshold. It does not provide for a recount of preprinted ballots. The State followed this
7 regulation faithfully. If the State hand counted ballots for the preprinted candidates, as Miller
8 contends it should, it would be required by the APA to promulgate a regulation prior to doing so.
9 However, the State need not promulgate a regulation when, in accordance with a current
10 regulation, it refrains from acting. Accordingly, Mr. Miller's contention that the State violated
11 the APA by not promulgating a regulation prior to performing a hand count of the write-in
12 ballots has no basis, and summary judgment is appropriate.

14 **C. Even if Miller established either of DOE's policies were regulations, he would be
15 unable to obtain retroactive relief.**

16 Even assuming that Mr. Miller were able to establish that either of DOE's policies
17 constitute regulations under the APA, and that therefore these policies were thus invalidated for
18 being promulgated without following APA procedures, another regulation would have to be
19 promulgated to achieve either of Miller's desired results (i.e. a perfect spelling requirement and
20 recount of the preprinted votes). Further this regulation could only be applied prospectively. AS
21 44.62.240 states:

22 If a regulation adopted by an agency under this chapter is primarily legislative, the
23 regulation has prospective effect only. A regulation...that is primarily an 'interpretive

24 ⁶⁶ *Id.* at 334-335.

25 ⁶⁷ 6 AAC 25.085(b) & (c).

1 regulation' has retroactive effect only if the agency adopting it has adopted no earlier
2 inconsistent regulation and has followed no earlier course of conduct inconsistent with
3 the regulation. Silence or failure to follow any course of conduct is considered earlier
inconsistent conduct.

4 Legislative regulations "effect a change in existing law or policy;" "create new law, rights, or
5 duties in what amounts to be a legislative act;" and "impose new duties upon a regulated
6 party."⁶⁸ Conversely, interpretive regulations do not create "new law or modify existing law, but
7 rather instruct[] as to what an agency or administrative officer thinks a statute or regulation
8 means."⁶⁹

9 Pursuant to this provision, Miller would be unable to obtain retroactive relief from a
10 regulation allowing for a hand count of ballots for preprinted candidates because such a
11 regulation would undoubtedly be legislative. In addition, Miller would be unable to obtain
12 retroactive relief under a newly adopted regulation interpreting AS 15.15.360(a)(11) to only
13 allow for perfect spelling of a write-in candidate's name because the Division of Elections has
14 followed an earlier course of inconsistent with this regulation; it has conducted a write-in ballot
15 count pursuant to its voter intent standard. Any new regulation promulgated favoring Miller's
16 interpretation of AS 15.15.360(a)(11)) would have no retroactive effect. Accordingly, were Miller
17 successful with regard to his APA claims and were the Division of Elections to promulgate
18 regulations requiring perfect spelling of write-in candidates' names and a hand count of the
19 ballots of preprinted candidates, these regulations would only have prospective effect.
20

21 Nor can Miller assert that a write-in hand count conducted pursuant to an invalid
22 regulation is void *ab initio*. The Alaska Supreme Court has consistently refused to vitiate
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24 ⁶⁸ 2 Am. Jur. 2d *Administrative Law* § 144 (2010); see also *Kelly v. Zamarello*, 486 P.2d 906, 909-10 (Alaska
25 1971).

⁶⁹ 2 Am. Jur. 2d *Administrative Law* § 146 (2010); see also *Kelly*, 486 P.2d at 909-10.

1 elections conducted under regulations later found to be invalid.⁷⁰ In *Coghill v. Boucher*, the
2 Court held certain ballot counting regulations invalid because they were not properly
3 promulgated as administrative regulations pursuant to the APA.⁷¹ The Court directed the
4 superior to enter a declaration that the regulations were invalid and that the lieutenant governor
5 was prohibited from conducting future elections under the invalid regulations.⁷² The Court noted:
6 "In fashioning appropriate relief for appellants, however, we are not obliged to invalidate
7 the . . . election in which ballots were tallied in accordance with [the invalid regulation]."⁷³ Thus,
8 even if the procedures used to count the write-in ballots were regulations not properly
9 promulgated under the APA, the appropriate relief would be prospective only and would not
10 affect the outcome of the instant election.
11

12 The court concludes that the State is entitled to summary judgment as matter of law as to
13 Counts III and IV.

14 **IV. Miller has failed to meet the standard established by AS 15.20.540 and A.K.R.P. 56(c)**
15 **as to Counts V and VI.**

16 Miller alleges in Counts V and VI that: (1) election officials failed to check the box to
17 right of the voter's signature as to the type of verification provided; and (2) a series of ballots
18 appeared to have the same handwriting as two to four people. He requests declaratory and
19

20
21 ⁷⁰ *O'Callaghan v. State*, 914 P.2d 1250, 1263 & n.21 (Alaska 1996); *Coghill v. Boucher*, 511 P.2d 1297, 1304-05
22 (Alaska 1973).

23 ⁷¹ 511 P.2d 1297.

24 ⁷² *Id.* at 1304-05.

25 ⁷³ *Id.* at 1304; *see also O'Callaghan*, 914 P.2d at 1263 ("O'Callaghan is entitled to a judgment declaring the 1992 and 1994 primaries to have been illegally conducted. The remedy goes no further than this. New elections will not be ordered. The acts of officials who were nominated in those primaries will not be invalidated.").

1 injunctive relief as to both counts. This Court considers the claim to be in the nature of an
2 election contest.

3 AS 15.20.540 states, "A defeated candidate . . . may contest the nomination or election of
4 any person . . . upon one or more of the following grounds:

- 5 (1) malconduct, fraud, or corruption on the part of an election official sufficient to
6 change the result of the election;
7 (2) when the person certified as elected or nominated is not qualified as required by law;
8 or
9 (3) any corrupt practice as defined by law sufficient to change the results of the election."

10 Malconduct has been defined as "a significant deviation from statutorily or constitutionally
11 prescribed norms."⁷⁴ "In rare circumstances, an election will be so permeated with numerous
12 serious violations of law, not individually amounting to misconduct, that substantial doubt will
13 be cast on the outcome of the vote."⁷⁵

14 The party claiming such malconduct must also show the conduct would be sufficient to
15 change the election result. In *Hammond v. Hickel*, the court examined whether the malconduct
16 would be sufficient to change the election by adopting several vote tabulating methods.⁷⁶ Votes
17 will be considered in the following manner:

- 18 (1) if the malconduct injects bias, and the bias favors one candidate over another,
19 all votes which can be ascertained with precision will be awarded to the disfavored
20 candidate;
21 (2) if the malconduct does not inject any bias into the vote and affects individual
22 votes in a random fashion, those votes will be either counted or disregarded if they
23 can be identified; and
24 (3) if the malconduct does not inject any bias into the vote and affects individual
25 votes with random impact and those votes cannot be precisely identified, the
contaminated votes will be deducted from the vote totals of each candidate in

74 *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972).

75 *Hammond v. Hickel*, 588 P.2d 256, 259 (Alaska 1978).

76 *Id.* at 260.

1 proportion to the votes received by each candidate in the precinct or district where the
2 contaminated votes are cast.⁷⁷

3 Under this analysis, malconduct must be shown. If the malconduct can be shown, the Court then
4 assess whether it resulted in bias against the candidate. If it did not result in bias, then essentially
5 the votes will either be disregarded if they can be identified or a pro-rata reduction will occur if
6 they cannot be identified.

7 A presumption the state official performed a duty properly and legally exists.⁷⁸ The
8 presumption can be over come if "a challenging party makes some showing of a miscarriage of
9 the official duty" in the form of the official not acting in accordance with the law.⁷⁹ The
10 presumption and statutory requirement can be read in conjunction with A.R.C.P. 56; thus
11 requiring a genuine showing of material fact by Miller of malconduct to overcome the
12 presumption of lawful state official action and "sufficient to change the result of the election."

13 **A. No genuine issues of material fact are presented proving that election official**
14 **malconduct occurred by failing to check the appropriate box as to the**
identification next to the voter's signature.

15 AS 15.15.225 does not require an election official at a polling station to check one of the
16 boxes next to the voter's signature as to the identification shown. The statute does list the ways a
17 voter can be identified: (1) a written form of identification; or (2) the election official recognizes
18 the voter, unless the voter is a first time voter. AS 15.15.225. The statute does not include a
19 requirement that election officials then check the appropriate box next to the voter's signature.

20 The presumption that the election official acted lawfully applies here. This Court
21 presumes the voter entered the polling station and was properly identified. The presumption is

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23 ⁷⁷ *Id.*

24 ⁷⁸ *Irwin v. Radio Corp. of America*, 430 P.2d 159, 161 (Alaska 1967).

25 ⁷⁹ *Tallman v. State Dept. of Public Works*, 506 P.2d 679, 681 (Alaska 1973); see also *United Bonding Ins. Co. v. Castle*, 444 P.2d 454, 458 (Alaska 1968).

1 not overcome where the election officials did not violate a statute by not checking a box next to
2 the voter's signed name. In a perfect election, those boxes would be checked. But Miller fails to
3 provide any showing of "miscarriage of the official duty" of these election officials to overcome
4 the presumption. Circumstantial evidence, as claimed by Miller, does not rise to the level of
5 showing a material fact that election officials acted unlawfully and thus sufficiently changed the
6 election.

7 In his memorandum opposing summary judgment, Miller asserts, "discovery is necessary
8 to ascertain why election officials at certain precincts neglected to check the box" because "there
9 are various reasons why election officials. . . may have checked an identification option . . . for
10 most voters, but declined to do so for certain voters."⁸⁰ The affidavits provide only allegations,
11 not material facts of misconduct. For a claim of relief, Miller was required to overcome the
12 presumption that state officials were legally checking identification and then show the
13 misconduct would change the outcome in the election. Miller has failed to meet that
14 requirement.

15 **B. No genuine issues of material fact exist of election official misconduct based on**
16 **several ballots with handwriting appearing to an untrained observer to be by the**
17 **same person and possible presorting by some precincts.**

18 On November 17, 2010, Miller received notice of fraud allegations by his observers.
19 From November 17 to December 2, 2010, Miller had time to contact officials and at least attempt
20 to provide sufficient evidence to overcome both the presumption election officials did not act
21 legally but also to show misconduct which would sufficiently change the election. He did
22 neither. An assertion that discovery should commence because of "sufficiently suspicious"
23 anomalies does not show a material issue of fact.
24

25 ⁸⁰ p. 43.

1 AS 15.15.240 allows any qualified voter to ask for assistance. The votes being
2 speculated upon could be the result of voters who asked for assistance to avoid potentially
3 misspelling the name; and thus avoid the litigation occurring now. Miller's affidavits do not
4 provide any facts of wrongful conduct at polling stations and not even circumstantial evidence of
5 wrongdoing. No showing has been made to overcome the presumption of lawful conduct by
6 those working at the polling stations and their initial dealings with the votes.

7 Miller fails to provide any admissible facts establishing election official fraud necessary
8 under AS 15.20.540. In her affidavit, Ms. Phillips makes an allegation of fraud by election
9 officials, claiming she was shocked by how two envelopes appeared; one with more signatures
10 and which looked like it had been presorted for write-in votes. These accusations again fail to
11 overcome the presumption of a lawfully abiding election official required by *Tallman*. Phillips'
12 observations could have been the result of a series of benign causes. Instead, she claims Floyd
13 Brown, a strategist for the Miller campaign, told her other precincts had serious concerns.⁸¹ The
14 assumption made by this statement is that the same "serious concerns" were those Phillips
15 witnessed.⁸² These statements only reveal Miller proponents in the heat of an election making
16 allegations of precinct problems, none of which are clearly addressed in Miller's memorandum
17 but addressed via generalities. Nowhere does Miller provide facts showing a genuine issue of
18 fraud or election official misfeasance. Instead, the majority of the problematic statements
19 included in the affidavits are inadmissible hearsay, speculation, and occasional complaints of
20 sarcasm expressed by DOE workers. Nothing rises to the level showing genuine material facts of
21 fraud.

22
23
24 ⁸¹ ¶ 23.

25 ⁸² This statement would be inadmissible evidence, hearsay. The Court recognizes this, but attempts to assess
Miller's argument in the best light possible.

1 **C. In the alternative, Miller has failed to show there would be a sufficient change to**
2 **the election results if these claims were true.**

3 For both these claims of fraud and error by election officials, Miller assumes the conduct
4 only benefited Murkowski. Applying *Hammond v. Hickel*, assuming Miller could show
5 malconduct, he still cannot show sufficient change to the election. Sharon Phillips in her
6 affidavit alleges 303 votes which according to her were the result of election fraud.⁸³ Those 303
7 votes can then be subtracted from Murkowski's total, as under *Hammond*, thus resulting in her
8 still leading by approximately 10,000 votes. Gary Kreep's affidavit then lists problems with the
9 following precincts, where the ballots cannot be identified: 2-210, 40-032, 40-204, 40-018, 40-
10 016, 32-960, 39-928, 40-002, and 40-012. Because the votes cannot be identified, a pro-rata
11 reduction of all of the candidate's votes from those precincts is applied. With Murkowski
12 leading before such a pro-rata reduction, her lead only marginally changes.⁸⁴ As a result, even if
13 sufficient malconduct could be show by Miller, the election results would remain unchanged.

14 In summary, the court finds the claims set out in Counts V and VI to be unsupported as to
15 their allegations of violations of the election statutes. Miller seek declaratory and injunctive
16 relief, presumably to invalidate the election, without demonstrating to a perceivable level any
17 malconduct or fraud on the part of officials and fails entirely to demonstrate that the results of
18 the election were altered thereby. As a matter of law, the State is entitled to summary judgment
19 on Counts V and VI.

20 **V. Murkowski's Cross-Claims**

21 Murkowski claims that write-in votes for her in which the oval is not filled in should
22 count pursuant to what she terms the "Democracy Canon" and the recognition in *Carr* by the

23
24 ⁸³ The other affidavits reveal a fairly clear and proper process occurring. Barbara Ficus' affidavit, other than citing
25 votes she disputed, fails to reiterate any of the claims made by Sharon Phillips.

⁸⁴ Murkowski wins by approximately 9,157 votes.

1 court of the importance of considering voter intent. The court finds the provisions of AS
2 15.15.360(b) requiring the oval to be filled in to be both clear and mandatory. To find otherwise
3 would be in contravention of what the court considers to be a clear legislative mandate.

4 Her claim with respect to the counting of votes for "Lisa M." is likewise rejected. DOE
5 has made a reasonable choice supported by statutory language not to include votes cast in such a
6 fashion. Lisa M. is not even arguably how the candidate's name appears in her declaration, nor is
7 it her last name. Moreover, another candidate, Lisa M. Lackey, appears on the list of write-in
8 candidates and such votes could just as easily be for her. Murkowski's claim that hundreds of
9 other votes should also be counted for her is not supported by any evidence and must likewise be
10 rejected. Her cross-motions for summary judgment will be denied.

11 **CONCLUSION**

12 For the above stated reasons:

13 The State's Motion for Summary Judgment is **GRANTED** as to all Counts.

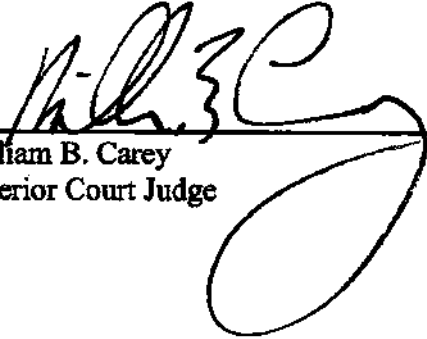
14 Murkowski's Cross Motion for Summary Judgment as to her cross claims is **DENIED**.

15 Miller's Cross Motion for Summary Judgment as to Counts I, II, III and IV is **DENIED**.

16 This Order is hereby **STAYED** until Tuesday, December 13, 2010 to allow for an appeal
17 of same to be filed by any aggrieved party.

18
19 ***IT IS SO ORDERED.***

20 Dated at Ketchikan, Alaska this 10th day of December, 2010.

21
22
23 
24 William B. Carey
25 Superior Court Judge