IN THE SUPREME COURT OF THE STATE OF ALASKA

DOCKETING STATEMENT A

For Use in Appeals Under Appellate Rule 204 and 218

(for court system use)

No. _____

INSTRUCTIONS FOR MULTIPLE PARTIES OR ATTORNEYS: If there are multiple parties or attorneys, repeat the appropriate box. This may be done on a separate page. Please clearly indicate which attorney represents which party.

1. TYPE OF APPEAL

a. [X] General Civil Rule Appeal (App. Rule 204)	b. [ ] Appeal in Child Custody Case (App. Rule 218)

2. PARTY FILING APPEAL (Appellant)

a. Name Joseph Miller	b. Status in the Trial Court [X] Plaintiff [ ] Defendant [ ] Other. Specify: _____
c. Party mailing address (**not** attorney's address) P.O. Box 83440	
City / State / Zip Code Fairbanks, AK 99708	d. Telephone (907)451-8559

3. APPELLANT'S ATTORNEY

a. Name Thomas V. Van Flein	b. Bar Number 9011119	
c. Attorney mailing address 711 H Street, Suite 620	d. Telephone (907)272-9272	e. Fax (907)272-9586
City / State / Zip Code Anchorage, AK 99501	f. Firm/Agency Clapp, Peterson, Van Flein, et al.	

4. PARTY APPEALED AGAINST (Appellee)

[All parties in the trial court when the final order/judgment were entered are appellees and must be listed if they did not file a notice of appeal. AR 204(b)[1] & (g).]

a. Name State of Alaska	b. Status in the Trial Court [ ] Plaintiff [X] Defendant [ ] Other. Specify: _____
c. Party mailing address P.O. Box 110300	
City / State / Zip Code Juneau, AK 99811	d. Telephone

5. APPELLEE'S ATTORNEY

a. Name Michael Barnhill	b. Bar Number 9311063	
c. Attorney mailing address P.O. Box 110300	d. Telephone (907)465-3600	e. Fax (907)465-2520
City / State / Zip Code Juneau, AK 99811	f. Firm/Agency Attorney General's Office	

6. SUPERIOR COURT PROCEEDING

a. Case No.	b. Superior Court Judge	c. Date Judgment Distributed
1JU-10-1007 CI	William Carey	12/10/10

d. Post-Judgment Motions: List all post-judgement motions that affect time for filing appeal. See Appellate Rule 204 (a)(3).

DATE OF FILING			Type of Post-Judgment Motion	DATE ORDER DISTRIBUTED		
Month	Day	Year		Month	Day	Year

7. CONSTITUTIONAL ISSUES

Is the constitutionality of a state statute or regulation at issue in this appeal? [ ] Yes [X] No

If yes, cite statute or regulation: _____

SCT-A (rev. 6/05)

8. FINALITY OF JUDGMENT OR ORDER BEING APPEALED

a. [X] The judgment or order being appealed is final and disposes of **ALL** claims by **ALL** parties. (The judgment or order is final under City and Borough of Juneau v. Thiboudeau 595 P.2d 626 (AK 1979).)

b. [ ] The judgment or order being appealed does not dispose of all claims by all parties but is final under Civil Rule 54(b). (The trial court's Civil Rule 54(b) order must be attached.)

c. [ ] The judgment or order being appealed is not final. The authority for this appeal is _____

9. ATTACHMENTS

The following items are submitted with this form (except that cross-appellants need not submit item a.):

a. [X] A copy of the final order or judgment from which the appeal is taken.

b. [X] A statement of points on appeal.

c. [X] A $150 filing fee or [ ] a motion to appeal at public expense (financial statement affidavit form must be included).

[ ] a motion to waive filing fee (if basis for motion is inability to pay, financial statement affidavit form must be included).

[ ] an application for exemption from filing fee under AS 9.19.010.

[ ] no filing fee is required becuse appellant is [ ] represented by court-appointed counsel, and AS 9.19.010 does not apply.

[ ] the state or an agency thereof.

[ ] an employee appealing denial of benefits under AS 23.20 (Employment Security Act).

d. [X] A $750 cost bond or deposit or

[ ] a copy of a superior court order approving appellant's supersedeas bond or a copy of appellent's motion to the superior court for approval of a supersedeas bond.

[ ] a motion to waive cost bond (if basis for motion is inability to pay, financial statement affidavit form must be included).

[ ] a motion to appeal at public expense (financial statement affidavit form must be included).

[ ] no cost bond is required because appellant is [ ] represented by court-appointed counsel.

[ ] a state agency, municipality, or state or municipal officer.

[ ] an employee appealing denial of compensation by Alaska Workers' Compensation Board or denial of benefits under AS 23.20 (Employment Security Act).

e. Designation of transcript [ ] submitted [X] not submitted (no transcript being requested) [ ] motion to extend submitted

December 13, 2010
Date

Signature of Appellant or Appellant's Attorney

CERTIFICATE OF SERVICE

I certify that on 12/13/10 a copy of the notice of appeal, this docketing statement, and all attachments (except filing fee and cost bond) were

mailed	delivered	to **All Parties** (listed)
[ ]	[X]	Michael Barnhill
[ ]	[X]	Sarah Felix
[ ]	[X]	Joanne Grace
[ ]	[X]	Timothy McKeever
[ ]	[X]	Scott Kendall

Signature: Chelsea Greene

FILING INSTRUCTIONS

File original docketing statement and notice of appeal with all attachments listed in #9 and ONE copy of ALL except filing fee and cost bond.

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IN THE SUPREME COURT OF THE STATE OF ALASKA

JOE MILLER, *Appellant*, v. LIEUTENANT GOVERNOR CRAIG CAMPBELL, in his official capacity, and the STATE OF ALASKA, DIVISION OF ELECTIONS, *Appellees*.	Supreme Court Case No. _____ Superior Court Case No. 1JU-10-1007 CI

NOTICE OF APPEAL

NOTICE IS HEREBY given that Joe Miller, through counsel, will be and is appealing the Superior Court's judgment entered on December 10, 2010 for

review by the Alaska Supreme Court. This appeal is brought pursuant to Alaska Appellate Rule 202(a), and in conformance with the Clerk of the Appellate Court's instructions on Friday December 10, 2010, the appeal and briefing schedule are expedited in order to have oral argument before this Court on Friday December 17, 2010. Appellant may be contacted directly at:

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Fairbanks, Alaska 99708

Appellant's counsel may be contacted at the following address:

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Washington, D.C., 20004

Appellee, the State of Alaska, can be contacted as follows:

Michael Barnhill, Assistant Attorney General
Attorney General's Office
P.O. Box 110300
Juneau, Alaska 99811

The decision of the Superior Court is a final decision for all practical purposes and was distributed on December 10, 2010. Attached to this Notice of Appeal are: (1) a copy of the Superior Court's Order being appealed from; (2) Appellant's Statement of Points on Appeal; (3) Entry of Appearance; (4) Certificate of Compliance (font); and (5) a Certificate of Service of these documents.

Dated: December 13, 2010

Respectfully submitted,

Thomas V. Van Flein
John Tiemessen
Michael T. Morley
Admitted *pro hac vice*
Attorneys for Plaintiff Joe Miller

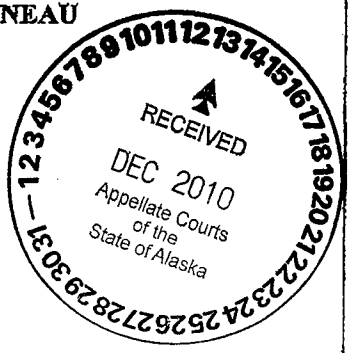
Certificate of Service:

The undersigned hereby certifies that a true and exact copy of the foregoing was served this 13th day of December 2010 via:(X) E-Mail to the following listed individual(s):

Michael Barnhill, Sarah Felix, Joanne Grace
Scott Kendall and Tim McKeever
By: Chelsea Greene
Chelsea Greene

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU



JOE MILLER,

Plaintiff,

v.

LIEUTENANT GOVERNOR CRAIG CAMPBELL, in his official capacity, and the STATE OF ALASKA, DIVISION OF ELECTIONS,

Defendants,

LISA MURKOWSKI,

Intervenor.

Case No. 1JU-10-1007CI

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

Statement of the Case

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

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

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

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

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

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

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

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

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

(1) Ballots on which the oval was marked correctly next to a candidate's name printed on the ballot;

(2) Ballots on which no oval was marked for U.S. Senate, more than one oval was marked for the U.S. Senate race, or a name was written in but the oval was unmarked;

(3) Ballots on which the write-in oval was marked and the written name was "Lisa Murkowski" or "Murkowski," spelled correctly, and the ballot was not challenged by any observer;

(4) Ballots on which the write-in oval was marked and the name written appeared to be a variation or misspelling of "Lisa Murkowski" or "Murkowski;" this category also included ballots which were challenged from category #3; and

(5) Ballots on which the write-in oval was marked and the name written in was not "Murkowski," "Lisa Murkowski," or a variation thereof.[2]

The count commenced in Juneau on November 20, 2010.[3] It took approximately one week to complete the process. It was conducted in the manner set out by DOE. Miller's team of observers viewed (or had the opportunity to view) every single ballot counted and registered objections to over 8,000 ballots which DOE had accepted as votes for Murkowski. DOE

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[1] Aff. Gail Fenumiai, attached to State's Memorandum in Support of Motion for Summary Judgment.

[3] Miller complains that DOE moved the date up by a number of days and that the preparation, training, and 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.

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

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

A six count Complaint for Injunctive and Declaratory Relief was filed by Miller in the Superior Court in Fairbanks on November 22, 2010. On November 26, Murkowski moved to intervene. Fairbanks Superior Court Judge Douglas Blankenship granted the State's motion to change venue and the case was transferred to Juneau on November 29. On that same date, the State filed its Motion for Summary Judgment as to all counts. This court was assigned the case on November 30. The court permitted Murkowski's intervention on December 2, but denied the same request by the Alaska Federation of Natives ("AFN") a day later. AFN's pleading accompanying its Motion to Intervene was accepted as the brief of *amicus curiae*. Miller opposed the State's Motion for Summary Judgment and cross-moved for summary judgment on Counts One through Four. Murkowski joined in the State's Motion and cross-moved for summary judgment on her claims respecting DOE's rejection of some 2,000 votes purportedly for Murkowski. Oral argument on the State's motion for summary judgment and the cross

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[4] These challenged and not counted votes form the basis for Murkowski's cross-claims.

[5] Aff. Fenumiai ¶¶ 10-12.

motions of plaintiff Miller and intervenor Murkowski was heard in Juneau on December 8. Summary judgment issues as to each Count of the Complaint are addressed in sequence below.

Issues

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

(1) As to Count I, whether AS 15.15.360(a)(10), (11) and (b) should be interpreted to consider voter intent based on the lack of express language requiring strict compliance as to the correct spelling of the candidate's name and the general policy espoused by the Alaska Supreme Court in *Carr v. Thomas*.

(2) As to Count II, whether a failure to facilitate fairness, pursuant to AS 15.15.030(5) and (12), occurred when ballots were not commingled and ballots instead were organized in different categories with only write-in ballots, and not other ballots that had been rejected by automated tally machines, receiving a direct review, handling and counting.

(3) As to Counts III and IV, whether in interpreting 6 AAC 25.085, if DOE Director Gail Fenumiai's memorandum addressing a method of organizing and counting write-in votes was a regulation requiring compliance with the Alaska Administrative Procedures Act.

(4) As to Counts V and VI, whether it has been shown through affidavits that genuine issues of material fact exist to show that irregularities occurred in the election process such as would violate AS 15.15.225 and AS 15.15.360(a)(10), (11) and (b), specifically as to the providing of identification of voters (Count V) and the alleged writing in of votes by persons other than the voter (Count VI).

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

Standard for Granting Summary Judgment

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

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

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

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

Discussion

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

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

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

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

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

[9] *Id.* at pp. 208.

[10] *Id.*

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

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

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

A court "will not resolve an issue when it is moot . . . [meaning] when the decision of an issue will not resolve an ongoing case or controversy."[11] A controversy can still be considered, despite being moot, if the public interest exception applies.[12] When assessing whether the public interest exception applies, the following three factors are considered: "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."[13] None of these

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[11] *State v. Roberts*, 999 P.2d 151, 154 (Alaska App. 2000); see also *Kelven v. Yukon-Kayukuk 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].

[12] *Roberts*, 999 P.2d at 154.

[13] *Id.*

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

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

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

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[14] *Krohn v. State Dept. of Fish and Game*, 938 P.2d 1019, 1021 (Alaska 1997).

[15] This Court notes Miller's argument that the outcome could change if he succeeded on the other arguments 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.

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

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

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

Miller wishes to narrow *Carr's* holding by limiting the decision to punch ballot and paper ballot issues such as those involved in *Carr*. Such a reading twists the clear language in *Carr* as

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[16] *Vogler v. Miller*, 660 P.2d 1192, 1194 (Alaska 1983).

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

[18] *Id.* at 626.

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

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

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

The Alaska Supreme Court has even mentioned this canon of construction in the context of this election. In *Alaska Democratic Party v. Fenumiai*, the Alaska Supreme Court considered whether voters should be given a list of write-in candidates.[25] In its order the Alaska Supreme Court noted, "the importance of facilitating voter intent."[26] The Court then cited *Carr v. Thomas*, as well as *Edgmon v. State, Div. of Elections*, 152 P.3d 1154, 1157 (Alaska 2007), to reflect the Alaska Supreme Court's long standing acceptance of this canon of construction. When considering the issue of interpreting AS 15.15.360(a)(11), this Court's analysis and considerations are reinforced by the policy espoused in *Carr*. That policy informs this decision.

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[21] *See, e.g, Edgmon v. Moses*, 152 P.3d 1154, 1158 (Alaska 2007) ("[W]e have consistently emphasized the importance of voter intent in ballot disputes."); *Finkelstein v. Stout*, 774 P.2d 786, 788, 792 (Alaska 1989) (validity of signature and marking on ballot was matter of voter intent); *Fischer*, 741 P.2d at 220 (Alaska 1987) (examining markings on punch-card ballots to determine voter intent); *Willis v. Thomas*, 600 P.2d 1079, 1085 (Alaska 1979)(in reviewing ballot markings on punch cards the court stated that "the crucial question in determining the validity of ballot markings is one of voter intent").

[22] 586 P.2d at 625-626.

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

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

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

[26] *Id.* at 3-4, ¶¶ 4-5.

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

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

AS 15.15.360(a)(11) provides, "a vote for a write-in candidate . . . shall be counted if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided." The statute, analyzing its plain meaning based on the use of commas and disjunctives provides the following requirements:

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[27] *Parson v. State Dept. of Revenue*, 189 P.3d 1032, 1036 (Alaska 2008).

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

[29] *Id.*

[30] *Id.*

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

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

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

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

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

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

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

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

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

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

Miller's interpretation of AS 15.15.360(a)(11), despite his claims to the contrary, is inconsistent. According to Miller, minor misspellings are not permitted based on the term "as it appears." However, Miller admits the following write-in votes are appropriate: "Lisa Murkowski" and "Murkowski, Lisa." If "as it appears" means what Miller contends it means[36], then only "Murkowski, Lisa" would be appropriate because that would be exactly replicating the write-in declaration form of the name. Miller's interpretation provides latitude, claiming "Lisa

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[33] *Carr*, 586 P.2d at 626.

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

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

[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.

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

If the legislature intended that the candidate's name be spelled perfectly in order to count, then the statute would have included such a restrictive requirement. Based on the policy in *Carr*, voter intent informs this Court's statutory interpretation. AS 15.15.360(a)(11) may not be well written, and it is clearly subject to different interpretations; this would account for the two widely divergent views of its language which are no doubt held in good faith by the opposing parties in this case. AS 15.15.360, in general, is terse and somewhat unclear in comparison to other state statutes. The statute, as Miller reveals, does lack the express language that most states have adopted which permits minor misspellings and errors. Furthermore, the statute lacks language such as "the voter intended" as provided in AS 15.15.360(a)(5) regarding filling in ovals. Miller, however, proposes placing statutory interpretation[37] on its head by reading a statute narrowly based on latitude not being expressly stated, when the restrictions he proposes are legally

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[37] Law professors often make the following admission, "A good law is a vague law." The assumption being, a vague law provides wide latitude. A clear and exact law, instead, restricts rights and eliminates public power based 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.

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

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

The only support Miller provides for his interpretation is based on the nature of Murkowski's campaign. Miller argues that Murkowski went to great lengths to advise voters of the spelling of her name and to make it as easy as possible for voters to get her name right. He points to the fact that lists of write-in candidates were posted at polling places and that voters could ask for assistance. He seems to suggest that a voter who really wanted to vote for Murkowski would have no excuse for getting the spelling of her name wrong. But of course there are many reasons why this might happen, whether they involve a village elder who had

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[38] *Carr*, 586 P.2d at 626; see also Nebraska Stat. 32-1007; C.R.S. 1-7-114.

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

[40] *Id.*

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

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

D. Conclusion

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

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[41] *Bravo*, 251 S.W.2d at 938.

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

II. DOE complied with the applicable statutes and regulations and did not discriminate between write-in votes and those cast for listed candidates[42]

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

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

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

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[42] In his complaint, Miller asserts a "fundamental fairness" argument pursuant to AS 15.15.030. The statute was misapplied because AS 15.15.030 discusses the "preparation of a ballot." In his motion for summary judgment, 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.

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

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

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

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[43] The concern over Diebold machines has been widely discussed by the media. While other machines may be 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.

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

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

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

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

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

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

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

However, the State contends DOE's interpretation of AS 15.15.360(a)(11) is a commonsense and foreseeable interpretation that only relates to the internal management of a state agency, and thus is not a regulation under the APA. In addition, the State argues that the Division's policy to tally write-in votes through a hand count, while relying on optical scanning

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

Under Alaska law, a regulation is defined as

> [E]very rule, regulation, order, or standard of general application...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 only relates to the internal management of a state agency...[45]

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

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

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

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[45] AS 44.62.640(b).

[46] *Alyeska Pipeline Service Co. v. State, Dept. of Envtl. Conservation*, 145 P.3d 561 (Alaska 2006) (finding that an 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).

in dealing with the public.[47] Along this line, the Alaska Supreme Court has ruled that "obvious, commonsense interpretations of statutes do not require rulemaking."[48]

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

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

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

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

[49] 80 P.3d 231 (Alaska 2003).

[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)).

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

[52] *Id.*

[53] *Id.*

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

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

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[54] *Id.*

[55] *Id.*

[56] *Id.* at 143-144.

[57] *Id.* at 144.

[58] *Id.*

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

[60] *Id.* at 868.

[61] *Id.*

[62] *Id.*

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

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

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

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

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

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

[64] *see*, Count I.

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

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

Similarly, in this case, DOE has interpreted AS 15.15.360(a)(11) according to its terms, and has not implemented any new substantive requirement. In interpreting "name, as it appears on the write-in declaration of candidacy" and "last name of the candidate" to allow for write-in votes with less than a perfect spelling of a candidate's name, as long as voter intent is clear, the Division has adopted a commonsense interpretation, which the court believes would be evident to most Alaskans. The Division of Elections has not interpreted this statute to add additional requirements to write-in voting, such as a requirement of perfect spelling or a requirement that the voter include party affiliation of the write-in candidate. It has merely interpreted AS 15.15.360(a)(11) in an obvious, commonsense, foreseeable way. To require more would certainly place an unprecedented restraint on regulatory power.

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

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

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

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

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

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

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[66] *Id.* at 334-335.

[67] 6 AAC 25.085(b) & (c).

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

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

Pursuant to this provision, Miller would be unable to obtain retroactive relief from a regulation allowing for a hand count of ballots for preprinted candidates because such a regulation would undoubtedly be legislative. In addition, Miller would be unable to obtain retroactive relief under a newly adopted regulation interpreting AS 15.15.360(a)(11) to only allow for perfect spelling of a write-in candidate's name because the Division of Elections has followed an earlier course of inconsistent with this regulation; it has conducted a write-in ballot count pursuant to its voter intent standard. Any new regulation promulgated favoring Miller's interpretation of AS 15.15.360(a)(1)) would have no retroactive effect. Accordingly, were Miller successful with regard to his APA claims and were the Division of Elections to promulgate regulations requiring perfect spelling of write-in candidates' names and a hand count of the ballots of preprinted candidates, these regulations would only have prospective effect.

Nor can Miller assert that a write-in hand count conducted pursuant to an invalid regulation is void *ab initio*. The Alaska Supreme Court has consistently refused to vitiate

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[68] 2 Am. Jur. 2d *Administrative Law* § 144 (2010); *see also Kelly v. Zamarello*, 486 P.2d 906, 909-10 (Alaska 1971).

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

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

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

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

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

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

[71] 511 P.2d 1297.

[72] *Id.* at 1304-05.

[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.").

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

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

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

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

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

> (1) if the malconduct injects bias, and the bias favors one candidate over another, all votes which can be ascertained with precision will be awarded to the disfavored candidate;
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> (2) if the malconduct does not inject any bias into the vote and affects individual votes in a random fashion, those votes will be either counted or disregarded if they can be identified; and
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> (3) if the malconduct does not inject any bias into the vote and affects individual 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

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[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.

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

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

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

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

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

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

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[77] *Id.*

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

[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).

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

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

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

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

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[80] p. 43.

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

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

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[81] ¶ 23.

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

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

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

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

V. Murkowski's Cross-Claims

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

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

[84] Murkowski wins by approximately 9,157 votes.

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

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

CONCLUSION

For the above stated reasons:

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

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

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

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

IT IS SO ORDERED.

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

William B. Carey
Superior Court Judge

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IN THE SUPREME COURT OF THE STATE OF ALASKA

JOE MILLER, *Appellant*, v. LIEUTENANT GOVERNOR CRAIG CAMPBELL, in his official capacity, and the STATE OF ALASKA, DIVISION OF ELECTIONS, *Appellees.*	Supreme Court Case No. _____ Superior Court Case No. 1JU-10-1007 CI

STATEMENT OF POINTS ON APPEAL

Appellant Joe Miller, by and through undersigned counsel, respectfully gives notice that he is appealing the Superior Court's final judgment entered on

December 10, 2010. Pursuant to Alaska Appellate Rule 204(e), Appellant Miller intends to rely on the following points in his appeal. In light of the extremely expedited nature of these proceedings, Appellant Miller respectfully requests leave to supplement this statement if necessary when he files his brief tomorrow.

STATEMENT OF POINTS

1. The Superior Court erred in ruling, as a matter of law, that AS § 15.15.360 grants State officials the power to impact the outcome of elections by determining which write-in ballots are "close enough" to be counted, rather than establishing an objective, bright-line standard established by the Legislature. The State was not entitled to summary judgment on Counts I and IV.

2. Neither AS § 15.15.030(5), (12) nor 6 AAC 25.085(b) permitted the Division of Elections to use optical scanning machines to conclusively determine the validity of votes for "preprinted candidates,"[1] while accepting as valid, and counting, votes for write-in candidates that the machines had rejected. The State was not entitled to summary judgment on Count II.

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[1] The term "preprinted candidate" refers to a candidate, such as Appellant Miller, whose name was preprinted on the ballots.

3. The Division's policies of accepting misspellings on write-in votes, and employing more lenient standards for determining the validity of write-in votes than votes for "preprinted candidates," are invalid and unenforceable, because they are "regulations" the Division was required to promulgate pursuant to the Alaska Administrative Procedures Act, AS § 44.62. The State was not entitled to summary judgment on Count III.

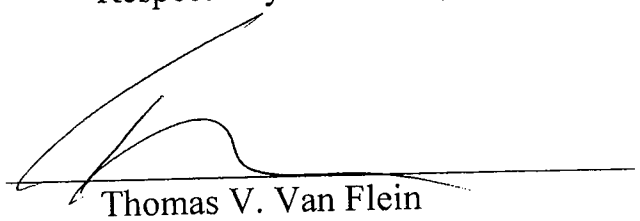
4. The Superior Court erred in denying Appellant Miller an opportunity to take discovery regarding Counts V and VI; deciding there were no genuine disputes of material fact; and awarding summary judgment to the State on those Counts, when the evidence before the court established material questions of fact.

5. The Superior Court erred in constructively denying Appellant Miller an opportunity to amend his Complaint to assert a new claim, that convicted felons had been permitted to vote in the election in possible violation of the Alaska Constitution and Alaska law.

6. The Superior Court erred in holding that some claims were moot. The State was not entitled to summary judgment on Counts I through VI.

Dated this 13th day of December, 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 13th day of December 2010 via:(X) E-Mail to the following listed individual(s):

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NOTICE OF ENTRY OF APPEARANCE

PLEASE TAKE NOTICE that the following counsel enter their appearance on behalf of Appellant Joe Miller:

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Please serve copies of all notices, pleadings and correspondence to each counsel set forth above by email or mail.

Dated: December 13, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT

PLEASE TAKE NOTICE that Appellant Joe Miller certifies that the pleadings filed in this matter, including the Notice of Appeal, the Statement of

Points on Appeal, and the Entry of Appearance were formatted in Times New Roman 14.

In addition, each document was served by email on opposing counsel and a copy filed with the Clerk of the Federal court through the ECF system. Because of the exigent circumstances, the parties to this matter have (both in state and Federal court) been serving each other electronically by PDF email copies of the documents.

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Dated: December 13, 2010

Respectfully submitted,

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