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16 Court for the District of Alaska

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18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF ALASKA**

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

101 **AMENDED MOTION TO FILE AMENDED COMPLAINT FOR**
102 **INJUNCTIVE AND DECLARATORY RELIEF**

103 Amended Motion to File Amended Complaint for Injunctive and Declaratory Relief
104 *Miller v. Treadwell*, Case No. 3:10-CV-252 (RRB)
105 Page 1 of 6
106

1 Plaintiff Joe Miller respectfully amends his pending motion for an Order allowing
2 him to amend his Complaint in this case. Plaintiff Miller is entitled to amend his Complaint
3 “as a matter of course,” Fed. R. Civ. P. 15(a)(1)(B), because Defendants are required to file
4 a responsive pleading to it, *see id.* R. 12(a)(1)(A)(i), and they served a motion under Fed. R.
5 Civ. P. 12(b) within 21 days of Plaintiff Miller’s original Complaint being filed.
6

7 Pursuant to Ak. L.R. 15.1(1), Plaintiff has attached a revised copy of his proposed
8 amended pleading to this Motion. Plaintiff Miller respectfully asks that this Court accept
9 the attached Substitute Amended Complaint in lieu of the original Amended Complaint for
10 three reasons: (i) some of the allegations regarding Plaintiff Miller’s new Equal Protection
11 claim (Count III) have been corrected based on subsequent revelation by Defendants; (ii)
12 Plaintiff Miller has omitted his state-law claims (Counts IV and V), in light of the Alaska
13 Supreme Court’s ruling regarding them; and (iii) Plaintiff Miller has updated the style of
14 the case to represent the substitution of the new Lieutenant Governor as a named defendant.
15

16 Even if this Court concludes that Plaintiff Miller is not entitled to file this Substitute
17 Amended Complaint as of right, it nevertheless should allow this amendment as a matter of
18 discretion. Fed. R. Civ. P. 15(a)(2) provides that, when a party is not entitled to amend its
19 pleading as a matter of course, it may do so with “the court’s leave,” and “[t]he court
20 should freely give leave when justice so requires.” Rule 15’s “policy of favoring
21 amendments to pleadings should be applied with extreme liberality.”
22

1 *DCD Progs., Ltd v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quotation marks omitted).

2 “Ordinarily, leave should be granted unless the amendment follows undue delay, seeks to
3 inject an improper claim, unfairly prejudices the opposing party, or threatens to unduly
4 increase discovery or delay trial.” *Wayson v. Schneider*, No F-03-CV-35 (JWS), 2005 WL
5 1079317, at *4 (D. Ak. May 5, 2005).

6 In this case, particularly in light of this Court’s imminent dissolution of the
7 preliminary injunction barring the Defendants from certifying the election results,
8 Defendants would not be prejudiced by allowing this amendment. Because this case has
9 been stayed for over a month, Plaintiff Miller did not unduly delay in filing the proposed
10 amendment. The only real issue is whether the amendment would be futile.

11
12 In its recent ruling in *Miller v. Treadwell*, the Alaska Supreme Court attempted to
13 preclude this Court’s consideration of Appellant Miller’s new Equal Protection claim
14 (based on the Defendants’ disparate treatment of different classes of ballots) by concluding
15 that “The Manual Count of Write-in Votes Complied With Alaska Law and Did Not
16 Violate Miller’s Right to Equal Protection.” Ex. 1 to SJ Memo, at 8. That Equal Protection
17 issue was not properly before the Alaska Supreme Court, however, and its decision to *sua*
18 *sponte* address it does not preclude Plaintiff Miller’s claim here.

19
20 In his state-court complaint, Plaintiff Miller made an express “*England* reservation”
21 of his federal claims, including his Equal Protection claims:

22 Pursuant to the U.S. District Court’s Order, Plaintiff Miller has filed the
23 instant lawsuit so that this Court can have an opportunity to address

1 Defendants' various violations of state law, as well as the state-law issues
2 implicit in his federal constitutional claims. Pursuant to *England v. State*
3 *Board of Medical Examiners*, 375 U.S 411 (1964), and *United Parcel Service*
4 *v. California Public Utilities Comm'n*, 77 F.3d 1178 (9th Cir. 1996), Plaintiff
5 Miller respectfully reserves his right to have the U.S. District Court address
6 the federal claims related to this lawsuit, including but not limited to Plaintiff
7 Miller's claims under the Elections Clause, U.S. Const., art. I, § 4, cl. 1., and
8 the Equal Protection Clause, *id.* amend XIV.

9 *Miller v. Treadwell*, No. 1JU-10-1007 CI, Complaint at ¶ 4 (filed Nov. 22, 2010) (copy on
10 file with this Court).

11 Plaintiff Miller alerted the Alaska Supreme Court to the federal Equal Protection
12 issue at issue in Count III of his Amended Complaint, so it could construe 6 Alaska Admin.
13 Code ¶ 25.085 in light of that claim, as U.S. Supreme Court precedent required him to do.
14 *See England*, 375 U.S. at 420 (holding that a litigant must “inform [the state] courts what
15 his federal claims are, so that the state statute may be construed ‘in light of’ those claims”);
16 *United Parcel Serv., Inc. v. Cal. Pub. Utils. Comm'n*, 77 F.3d 1178, 1186 (9th Cir. 1996)
17 (“[Plaintiff’s] flagging of the federal claim in the headings was not an attempt to ‘argue’ the
18 claim, but to apprise the state court of the existence of the claim so that the state court
19 might rule ‘in light of’ the federal claim.”). Plaintiff Miller’s brief to the Alaska Supreme
20 Court expressly reiterated that he “has reserved for federal court his federal Equal
21 Protection claim regarding the disparate standards [the State] employed for determining the
22 validity of write-in votes and votes for [preprinted] candidates, and does not intend to
23 litigate it here.” *See* Corrected Appellant’s Brief 32 (Dec. 14, 2010), *available at*
24 <http://www.courts.alaska.gov/media/s-14112-d.pdf>. Thus, the fact that the state Supreme

1 Court reached out and, of its own accord, purported to adjudicate that claim, and make
2 factual findings regarding it, does not bar Plaintiff Miller from pursuing it here. *See*
3 *England*, 375 U.S. at 421 n.21; *UPS*, 77 F.3d at 1186.

4 The parties dispute whether, as a matter of fact, Defendants actually did apply
5 different procedures and standards for reviewing write-in votes and votes for pre-printed
6 candidates. It is universally conceded that Division of Elections personnel physically
7 touched and looked at every vote cast in the election, for the purpose of separating them
8 into five piles, segregating the write-in votes from the votes for preprinted candidates. The
9 Director has stated that she personally reviewed every potential overvote and undervote,
10 regardless of whether it involved a write-in vote, to determine whether it should be
11 accepted as valid and counted. *See* Ex. 2 to SJ Memo, at 6. The data suggests otherwise—
12 it defies credulity to contend that the manual review identified 1,553 more potentially valid
13 write-in votes than the automated tally machines had recognized, *id.* at 7, yet a maximum of
14 only 20 additional votes for Joe Miller, *id.*—a figure that is composed primarily of votes
15 that had been rejected by automated tally machines because the voter had both filled in the
16 bubble next to Miller’s name and written his name in the write-in area, *id.* at 8. The
17 extremely expedited state court proceedings did not allow for any discovery whatsoever, so
18 Plaintiff Miller was unable to either depose Ms. Fenumiai regarding her affidavits, nor
19 propound written discovery requests on this issue. Permitting Plaintiff Miller to amend his
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1 complaint to pursue this claim will allow him to take limited, but reasonable, discovery, and
2 ensure that this claim is fully and fairly adjudicated on its merits.

3 For these reasons, Plaintiff Miller respectfully requests that this Court accept the
4 Substitute Amended Complaint and allow discovery to proceed on Count III.

5 DATED at Anchorage, Alaska, this 27th day of December 2010.

6 Respectfully submitted,

7 **CLAPP, PETERSON, VAN FLEIN,**
8 **TIEMESSEN & THORSNESS, LLC**
9 Attorneys for Plaintiff Joe Miller

10 By /s/ Thomas V. Van Flein
11 Thomas V. Van Flein, #9011119
12 John Tiemessen
13 Michael T. Morley (not admitted in the
14 U.S. District Court for the District
of Alaska)
Attorneys for Plaintiff

15 Certificate of Service:

16 The undersigned hereby certifies that a true
and exact copy of the foregoing was served
this 27th day of December 2010 via:

- 17 () Facsimile
18 () E-Mail
(X) ECF

19 to the following listed individual(s):

20 Michael Barnhill
21 Sarah Felix
22 Margaret Paton-Walsh
Timothy McKeever
Scott Kendall

23 By: /s/ Thomas V. Van Flein

24 Amended Motion to File Amended Complaint for Injunctive and Declaratory Relief
25 *Miller v. Treadwell*, Case No. 3:10-CV-252 (RRB)
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