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for the District of Alaska

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

JOE MILLER, *Plaintiff*, v. LIEUTENANT GOVERNOR MEAD TREADWELL, in his official capacity; and DIVISION OF ELECTIONS, STATE OF ALASKA, *Defendants*.	Civil Action No: 3:10-CV-00252 (RRB)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff Joe Miller respectfully asks this Court to grant his Motion for Partial Summary Judgment on Counts I and II of his proposed Substitute Amended Complaint.

I. THIS CASE IS NOT MOOT.

This Court may exercise subject-matter jurisdiction over this case and address the merits of Plaintiff Miller's claims, despite the State's likely contention that this case is moot. Plaintiff Miller received a total of 90,760 votes (including 20 write-in votes added to his total during the manual review). *See* Ex. 2, p. 7 (Fenumiai aff.). Lisa Murkowski received a total of 101,108 write-in votes, of which 92,929 were not challenged by Plaintiff Miller's observers during the manual review by Division of Election (hereafter, "Division") personnel. *Id.* Thus, even excluding the votes that Plaintiff Miller challenged, Murkowski still leads him by 2,169 votes. The State is likely to argue that this proves that the case is moot, because any decision this Court renders cannot affect the outcome of the election. To the contrary, this case remains a live controversy, for four reasons.

First, even if a favorable ruling regarding the ballots at issue in Count I or Count II of the proposed Substitute Amended Complaint would not, in itself, be sufficient to change the outcome of the election, it would enable Plaintiff Miller to pursue an election contest regarding at least two other groups of ballots, based on purely state-law claims over which this Court lacks jurisdiction. A candidate may not pursue an election contest under Alaska law unless the number of ballots at issue would be "sufficient to change the results of the election." AS § 15.20.540.

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The Alaska Supreme Court has ruled that two of the causes of action that Plaintiff Miller attempted to bring in his state lawsuit regarding the election may be pursued only through an election contest. *See* Ex. 1, at 21 (Alaska supreme court op.) ("If Miller intends to pursue his superior court claim about improper voting by felons, he must do so as an election contest under AS § 15.20.540."); *see also id.* at 20 (noting that Plaintiff Miller "did not raise his claim" about voting officials' failure to check voters' identifications "as an election contest," but that he "cannot avoid the avenues established by the legislature to challenge elections"). In themselves, Plaintiff Miller's claims regarding voting officials' failure to check voters' identifications and illegal voting by disenfranchised felons do not implicate enough votes to change the outcome of the election. *See* Ex. 4 at 2 (Miller aff.). Consequently, Plaintiff Miller would be foreclosed from pursuing them in an election contest. A favorable ruling on Plaintiff Miller's federal claims, however, would—at a minimum—reduce Lisa Murkowski's margin by enough votes to entitle Plaintiff Miller to have the Alaska Supreme Court consider his election contest regarding those claims on its merits. *Id.*

Second, Plainitff Miller is seeking to protect, among other things, his legally cognizable interest in obtaining a state-funded recount of the election results. Under Alaska law, the State is required to bear the cost of a recount if the margin between the top two candidates is less than 0.5% of the total number of votes cast for those candidates. AS § 15.20.450. Plaintiff Miller would be entitled to a state-funded recount if Murkowski were 959 votes or less ahead of him. If Plaintiff Miller prevails on Count III in the proposed

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Substitute Amended Complaint (which could result in Murkowski losing 1,553 votes[1]), as well as ***either*** Count I or Count II (both of which implicate a minimum of 8,169 challenged votes, *see* Ex. 2, at 7 (Fenumiai aff.)), it will reduce Murkowski's margin of victory by enough votes to entitle Plaintiff Miller to a state-funded recount.

Third, even considering Counts I and II of the proposed Substitute Amended Complaint on their own, enough unchallenged misspelled ballots reasonably may exist in order for a favorable ruling in this case to either change the outcome of the election, or at the very least entitle Plaintiff Miller to a state-funded recount. The Alaska Supreme Court has held that, as a matter of state law, a candidate's failure to challenge certain ballots during the Division of Elections' count or review does not foreclose that candidate from including them in a judicial challenge. *See Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987). Plaintiff Miller already has recognized that the number of challenged ballots (8,169) likely is somewhat overstated because some of his observers' challenges were erroneous or unsupportable. That number also is substantially understated, however, because there likely is a substantial number of unchallenged misspelled ballots. During the initial days of the review, many observers effectively were precluded from challenging ballots because they were compelled to review them upside-down, and Division of Elections personnel

[1] Automated tally machines recognized only 102,252 ballots as containing potentially valid write-in votes. Ex. 2, at 7 (Fenumiai aff). During the automated tally, Division personnel recognized 103,805 ballots as containing potentially valid write-in votes. *Id.* Thus, 1,553 write-in votes that the automated tally machines had rejected as invalid and declined to count were assessed during the manual review, so that Division of Elections personnel could determine whether to count them for Murkowski.

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processed the ballots too quickly for observers to make out the handwriting, which often was cursive. Ex. 3, at 2 (Johnson aff.). Furthermore, there were various points throughout the count at which the Miller campaign was not able to have full staffing. *Id.* Many of these problems likely can be traced back to the fact that Defendants decided to start the manual review over a week early, on November 10 rather than November 18, thereby making it difficult for the Miller campaign to recruit and train observers in time. *See* Ex. 6, at 3 (second Miller aff.). In short, the probability that approximately 10% of the write-in ballots, rather than only 8%, contain misspellings is sufficiently high that this Court may exercise subject-matter jurisdiction over Plaintiff Miller's claims.

Fourth, even if this Court's rulings regarding Plaintiff Miller's federal claims—either considered individually, in conjunction with each other, or in combination with other potential actions and remedies—is not sufficient to change the outcome of the election, or even trigger a state-funded recount, he still has an independent, legally cognizable interest in ensuring that the vote tallies from this election are accurate. The number of votes by which a candidate loses an election is an important consideration that affects public opinion and perceptions regarding the candidate; the candidate's continued viability as a public spokesperson or representative for the causes that he or she supports; the candidate's fundraising ability, both for himself and others; and his or her future viability as a candidate. *See* Ex. 4, at 2 (Miller aff.). Thus, regardless of the outcome of this election, Plaintiff Miller has a legally protected interest in ensuring that Lisa Murkowski's vote total

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is not artificially inflated by votes that have been illegally or unconstitutionally accepted as valid and counted.

For these reasons, this case remains a live controversy, and this Court should reach its merits.

II. PLAINTIFF MILLER IS ENTITLED TO SUMMARY JUDGMENT ON HIS ELECTIONS CLAUSE CLAIM (COUNT I), BECAUSE THE ALASKA SUPREME COURT ALLOWED THE DIVISION OF ELECTIONS TO USURP THE ALASKA LEGISLATURE'S EXCLUSIVE AUTHORITY UNDER THE U.S. CONSTITUTION.

This Court should grant Plaintiff Miller summary judgment on Count I of his proposed Substitute Amended Complaint (which is identical to Count I of his original Complaint). The Elections Clause of the U.S. Constitution prohibits both the Division of Elections and the Alaska Supreme Court from effectively amending the clear rules that the Alaska legislature set forth regarding the "manner" in which U.S. Senate elections must be conducted, by allowing misspelled write-in ballots to be accepted as valid, and counted, in clear violation of State law. Section A discusses the general requirements of the Elections Clause, while Section B applies them to this case.

A. The Elections Clause Requires State Executive and Judicial Officials to Give Special Deference to the Plain Meaning of Statutes Governing Federal Elections, Rather Than "Interpreting" Those Statutes in Light of Their Own Policy Preferences.

In general, "the distribution of powers among the branches of a State's government raises no questions of federal constitutional law." *Bush v. Gore*, 531 U.S. 96, 112 (2000) (Rehnquist, C.J., concurring). The Elections Clause, however, states, "The Times, Places

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and Manner for holding Elections for Senators and Representatives, shall be prescribed in each State ***by the Legislature*** thereof." U.S. Const., art. I, § 4, cl. 1 (emphasis added). This provision specifically grants state legislatures—independent of state executive officials and state judiciaries—exclusive constitutional authority to determine the manner in which elections for U.S. Senate shall be conducted.

When a constitutional provision confers a particular power on a specific governmental entity, it is unconstitutional for any other governmental entity to purport to exercise that power.[2] Thus, the Election Clause prohibits executive branch officials from conducting federal elections in a manner that violates the state legislature's clear dictates, as set forth in state law. *See Libertarian Party of Ohio v. Blackwell*, 567 F. Supp. 2d 1006, 1012 (S.D. Ohio 2008) (holding that a directive from the Secretary of State concerning minor party candidates was unconstitutional, because it "purport[ed] to create new law" and, "[u]nder the Constitution, the Secretary of State, a member of the executive branch of government, has no authority independent of the Ohio General Assembly to direct the

[2] *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 732, 734 (1986) (holding that the Balanced Budget Act of 1985 was unconstitutional because it purported to vest in the Comptroller General, a legislative branch officer, authority that the Constitution reserved for executive branch personnel); *Buckley v. Valeo*, 424 U.S. 1, 126-28 (1976) (per curium) (holding that the Federal Election Campaign Act of 1975 was unconstitutional, in part because it purported to grant congressional leaders the authority to nominate, and Congress as a whole the power to approve the nomination of, members of the Federal Election Commission—powers that the Appointments Clause reserved to the President and Senate, respectively); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (holding that President Truman's wartime seizure of steel mills was unconstitutional because, in the absence of any statutory authorization, it constituted a usurpation of the legislative authority that the Constitution assigns to Congress).

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method of the appointment of . . . federal officials."); *see also Grills v. Branigin*, 284 F. Supp. 176, 180 (S.D. Ind. 1968) ("[The Elections Clause] clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly."), *aff'd* 391 U.S. 364 (1968).

The Clause likewise prohibits state judges from effectively amending state law in the course of purporting to "interpret" or "construe" it, and therefore ***requires federal judges to independently construe state law***, to make such determinations. In *Bush v. Palm Beach County Canvassing Board*, a unanimous Supreme Court held:

> As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the election of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

531 U.S. 70, 76 (2000). The cited constitutional provision, Art. II, § 1, cl. 2, is analogous to the Elections Clause, but for presidential electors.[3] The clear implication of the Court's ruling is that the general rule, requiring federal courts to defer to state-court interpretations of state laws, does not apply in the context of constitutional provisions—such as Art. II, § 1, cl. 2 or the Elections Clause—that give state legislatures the exclusive authority to regulate federal elections.

In *Bush v. Gore*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring), a three-Justice plurality revisited this issue, ruling, "In most cases, comity and respect for federalism

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compel us to defer to the decisions of state courts on issues of state law." For state statutes enacted directly under U.S. Const., Art. II, § 1, cl. 2, however, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Id.* at 113 (Rehnquist, C.J., concurring). It elaborated that this doctrine "does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id.* at 115.

The four-Justice dissent in *Bush v. Gore* led by Justice Souter echoed this sentiment, stating that the main issue was:

> whether the judgment of the state supreme court had displaced the state legislature's provisions for election contests: is the law as declared by the court different from the provisions made by the legislature, to which the national Constitution commits responsibility for determining how each State's Presidential electors are chosen?

Id. at 131 (Souter, J., dissenting).

The same analysis applies to statutes enacted under the Elections Clause to govern the election of Representatives and Senators. Federal courts have an independent obligation to interpret for themselves the actual meaning of a state legislature's enactments, without the usual deference to the State's administrative or judicial interpretations of them.

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[3] It provides, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const., Art. II, § 1, cl. 2.

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The Eleventh Circuit's rulings in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), and 68 F.3d 404 (11th Cir. 1995)—although that case involved the Due Process Clause rather than the Elections Clause—demonstrate the need to sometimes ignore state-court "interpretations" of state laws governing federal elections that fly in the face of the statutes' plain text. In *Roe*, an Alabama law provided that an absentee ballot was invalid unless the voter signed it in the presence of either a notary public or two witnesses. Ala. Code § 17-10-7. In its first ruling, the Eleventh Circuit upheld the district court's preliminary injunction that barred the State from counting any absentee ballots that were not notarized or witnessed (hereafter referred to as "Contested Ballots"), and from certifying election results that included Contested Ballots in the tally. *Roe*, 43 F.3d at 583. The court concluded that counting the Contested Ballots would unconstitutionally "dilute the votes of those voters who met the requirements of § 17-10-7 as well as those voters who actually went to the polls on election day." *Id.* at 581.

Rather than entering a permanent injunction, however, the Eleventh Circuit, out of deference to the State of Alabama, certified to the state supreme court the question of whether § 17-10-7, as its text suggested, required absentee ballots to be notarized or witnessed in order to be counted. *Id.* at 582-83. The Alabama Supreme Court ruled that § 17-10-7 did not actually require the affidavits accompanying absentee ballots to be witnessed or notarized. *See Roe v. Mobile Cty. Appt. Bd.*, No. 1940461, 1995 Ala. LEXIS 128 (Ala. Mar. 14, 1995). After issued this opinion issued, the U.S. District Court held a trial on the merits of the permanent injunction, found that the state supreme court's

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conclusion constituted a departure from past practice, and concluded that counting the Contested Ballots would violate the Due Process and Equal Protection Clauses. *See Roe v. Mobile Cty. Appointing Bd.*, 904 F. Supp. 1315 (S.D. Ala. 1995). The Eleventh Circuit affirmed, stating:

> [T]he [Defendants] urge[] us to give effect to the Supreme Court of Alabama's answer to the question we certified in *Roe I*: that the envelopes enclosing absentee ballots need not bear the signature of either a notary public or two witnesses. What the [Defendants] ignore[] is that the Alabama Supreme Court, in answering our question, construed an Alabama statute; the court did not, and was not called upon to, decide whether the counting of the contested ballots cast in the November 8, 1994, general election—***in the face of Ala. Code § 17-10-4*** and in the face of a uniform state-wide practice of excluding such ballots—infringed the Roe Class' constitutional rights.

Roe v. Alabama, 68 F.3d 404, 406-07 (11th Cir. 1995) (emphasis added).

Thus, after certifying to the Alabama Supreme Court the question of § 17-10-5's proper interpretation, the Eleventh Circuit effectively ***ignored*** the court's conclusion and refused to count the Contested Ballots, because the state court's interpretation was contrary to "the face" of the statute and, in light of the State's past practice of rejecting such ballots, it would violate the Due Process and Equal Protection Clauses to decide, mid-election, to starting counting them. *Id.*

Federal courts have not hesitated to similarly invalidate or ignore state courts' actions regarding federal elections when they violated the Elections Clause. *See, e.g.*, *Valenti v. Mitchel*, 790 F. Supp. 551, 555 (E.D. Pa. 1992) ("To the extent that the Pennsylvania Supreme Court was setting the schedule for the elections of senators and representatives, the court was acting in a role assigned and entrusted by the Constitution to

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the legislature."), *aff'd on other grounds* 962 F.2d 288, 297 (3d Cir. 1992); *see also Smith v. Clark*, 189 F. Supp. 2d 548, 558 (S.D. Miss. 2002) ("[T]he requirements of [the Elections Clause] were not met in this case, as there has been no indication that the chancery court had any legislative authority to draw the state's congressional districts."), *vacated as moot sub nom. Branch v. Smith*, 538 U.S. 254, 265-66 (2003) (declining to reach merits of Elections Clause issue because district court ruling could be affirmed on other grounds).

The Supreme Court has held that "[i]t cannot be doubted" that the "comprehensive words" of the Elections Clause embrace the "authority to provide a complete code . . . in relation to . . . [the] counting of votes." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Consequently, under *Palm Beach County*, 531 U.S. at 76; *Bush*, 531 U.S. at 112-13, 115 (Rehnquist, C.J., concurring); and *Bush*, 531 U.S. at 131 (Souter, J., dissenting), this Court must independently interpret AS § 15.15.360(a)(10), (a)(11), and (b)'s rules for counting write-in votes, to determine whether the Division of Elections and Alaska Supreme Court usurped the legislature's exclusive constitutional authority over that issue by applying and approving, respectively, a standard other than that expressly set forth in state law.

B. The Division of Elections and Alaska Supreme Court Unconstitutionally Substituted Their Policy Preferences for Those of the Legislature.

Both the Division of Elections and the Alaska Supreme Court usurped the Alaska Legislature's exclusive constitutional authority by substituting their own policy preferences for the clear mandate set forth in state law. Alaska law provides, "In order to vote for a write-in candidate, the voter ***must write in the candidate's name*** in the space provided and

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fill in the oval opposite the candidate's name." AS § 15.15.360(a)(10) (emphasis added). The statute goes to state that the vote counts if either "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." *Id.* § 15.15.360 (a)(11). The statute concludes by emphasizing, "The rules set out in this section are mandatory and there are no exceptions to them. A ballot may not be counted unless marked in compliance with these rules." *Id.* § 15.15.360(b).

Thus, the plain text of Alaska law prohibits a write-in ballot from being counted unless it contains either the name that the candidate wrote on his write-in declaration of candidacy, or the candidate's "legal" last name. This is a clear-cut, binary, objective test. If a candidate's name[4] appears on a ballot, the ballot may be counted; if some other word appears on the ballot instead, the ballot may not be counted, regardless of how close that word may be to the candidate's name. This is not merely an "interpretation" or "construction" of the statute—it is the indisputable plain meaning of the statute. AS § 15.15.360(a)(10) and (11) are not grants of authority or discretion to determine whether certain ballots are "close enough" to be counted, and do not incorporate voters' subjective intent in any way.

It is undisputed that the Division of Elections replaced this objective, clear-cut, bright-line standard with its own subjective test. The Division's Director swore under oath,

[4] For brevity, the phrase "the candidate's name"—as found in AS § 15.15.360(a)(10)—will be used to refer to either the candidate's name, "as it appears on the write-in declaration of candidacy," or the candidate's legal last name, to avoid having to repeat this verbiage throughout this Memorandum.

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"I allowed write-in ballots containing minor misspellings and phonetic variations of 'Murkowski' to be counted for Lisa Murkowski when I determined that the voter clearly intended to vote for that candidate." Ex. 2, at 4. In fact, the Director counted write-in ballots for Murkowski that contained variations barely recognizable as her name. *See generally* Ex. 5 (Mayo affidavit).

The Alaska Supreme Court approved the Director's approach, ruling, "Our interpretation of AS 15.15.360 permit[s] abbreviations, misspellings, or other minor variations in the form of the name of a write-in candidate so long as the intention of the voter can be ascertained." Ex. 1, at 7. Thus, neither the Director nor the Court based their decisions regarding the validity of write-in ballots on the test actually set forth in state law—whether the voter ***in fact*** wrote the candidate's name on the ballot. Instead, both the Director and the Court have supplanted the legislature by adopting their own alternate test for deciding which write-in ballots to count—whether the Director ***believes*** that the voter ***intended*** to write a particular candidate's name on the ballot.

Another problem with the State's interpretation is that the Alaska legislature expressly identified the provisions within § 15.15.360 itself for which it wished to allow voter intent to be considered. When a legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion." *APL Co. Pte., Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 952 (9th Cir. 2009)

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(*citing Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)) (quotation marks omitted). Alaska Stat. § 15.15.360(a)(5) (emphasis added) provides that a voter's marking on a ballot "shall be counted only if it ***substantially*** inside the oval provided, or touching the oval so as to ***indicate clearly that the voter intended*** the particular oval to be designated." The Alaska legislature's selective inclusion of language concerning "substantial" compliance with certain requirements and its authorization to consider the intent of the voter in Subsection (a)(5), but not Subsection (a)(11), strongly suggests that the omission was both deliberate and significant.

The Alaska Supreme Court's opinion makes it clear that, rather than "interpreting" or "construing" the text of AS § 15.15.360, it simply substituted its own policy preferences. The opinion begins with a page of substantive principles based exclusively on judicial precedent, rather than the Election Code, including the dictates that "the voter shall not be disenfranchised because of mere mistake, but [the voter's] intention shall prevail," Ex. 1, at 3-4, *citing Edgmon v. State, Office of the Lieut. Gov.*, 152 P.3d 1154, 1157 (Alaska 2007), and "[w]e have consistently emphasized the importance of voter intent because the opportunity to freely cast [one's] ballot is fundamental," *id.* at 4, *citing State, Division of Elections v. Alaska Democratic Party*, No. S-14054, Order at 3 (Oct. 29, 2010). In basing its ruling on these judicial principles, rather than state law, the Court nullified the legislature's policy determinations and effectively amended § 15.15.360.

The Court later went on to state, "[W]hen read as a whole, AS 15.15.360's purpose is inclusive, not exclusive; it is designed to ensure that ballots are counted, not excluded."

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Ex. 1, at 4. That conclusion simply is not consistent with AS § 15.15.360(b)'s express declaration that "[t]he rules set out in this section are mandatory and there are no exceptions to them. A ballot may not be counted unless marked in compliance with these rules."

The Court's treatment of the Uniformed and Overseas Citizens Voting Act (UOCAVA) eliminates any doubt that, rather than interpreting or applying state law, it actually amended it. As the Court recognized, UOCAVA provides, "Any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or a political party shall be disregarded in determining the validity of [a federal write-in] ballot, if the intention of the voter can be ascertained." 42 U.S.C. §§ 1973ff-2(c)(3), *quoted in* Ex. 1, at 7-8; *accord* 6 Alaska Admin. Code § 25.670(b). The Court stated,

> Miller's proposed construction of [AS § 15.15.360] would require us to impose a different and more rigorous, voting standard on domestic Alaskans than on those who are serving in the military or living abroad. Our construction of AS 15.15.360 treats overseas and domestic Alaskans voters equally, ensures that each write-in vote is treated equally and counted in the same manner, and avoids valuing one person's vote over that of another.

Ex. 1, at 7-8.

As noted above, AS § 15.15.360(a)(10) requires the voter to write a candidate's name on a write-in ballot and entirely lacks any language about permitting misspellings or variations in the candidate's name. The statute further provides that its rules are "mandatory," ballots "may not be counted" unless they satisfy those rules, and there are "no exceptions" to them. AS § 15.15.360(b). UOCAVA, in contrast, contains completely different language. It allows ***either*** a candidate's name or the name of a political party to

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appear on a write-in ballot, and ***expressly states*** that misspellings and variations in candidates' names are permissible. The language of state law and UOCAVA are completely different. [5] The court's decision to treat all Alaska ballots under the liberal,

[5] Indeed, the Alaska Legislature chose to omit from AS § 15.15.360 language found in the statutes of a third of its sister states that expressly allows write-in ballots with misspellings to be counted. For example, Alabama's provision governing write-in ballots is similar to Alaska's, except it expressly states:

> No votes for write-in candidates shall be counted or tabulated unless . . . [t]he name written on the ballot is the same name listed on the write-in candidate's political practices pledge, except that ***any abbreviation, misspelling, or other minor variation in the form of the name of the candidate shall be disregarded if the intention of the voter may be ascertained.***

Ala. Code § 7-5-205(3) (emphasis added). Indiana law likewise provides, "An abbreviation, a misspelling, or other minor variation in the form of the name of a candidate or an office shall be disregarded in determining the validity of the ballot if the intention of the voter can be ascertained." Ind. Code § 3-12-1-1.7(a)(4). The election codes of numerous other states contain comparable provisions. *See, e.g.*, Cal. Elec. Code § 15342 ("Any name written upon a ballot for a qualified write-in candidate, including a reasonable facsimile of the spelling of a name, shall be counted."); Colo. Rev. Stat. § 1-7-114(1) ("Each write-in vote may include a reasonably correct spelling of a given name, an initial or nickname. . . . and shall include the last name of the person for whom the vote is intended."); Del. Code § 15-4972(b)(8) ("The misspelled, incomplete or minor variation of the name of a declared write-in candidate for an office shall be counted if the name as written bears a reasonable resemblance to the declared candidate's name."); 21 Maine Rev. Stat. § 696(4); Minn. Stat. § 204C.22(8) ("Misspelling or abbreviations of the names of write-in candidates shall be disregarded if the individual for whom the vote was intended can be clearly ascertained from the ballot."); New Mex. Stat. Ann. § 1-12-19.1(F)(1) ("A vote for a write-in candidate shall be counted and canvassed only if . . . the name written in is . . . the full name as it appears on the declaration of intent to be a write-in candidate [or a] misspelling[] . . . that can be reasonably determined . . . to identify a declared write in candidate."); N.J.S.A. § 19:16-4 ("No ballot cast for any candidate shall be invalid . . . because the voter in writing the name of such candidate shall misspell the same."); Neb. Rev. Stat. § 32-1005; N. Dak. Cent. Code § 16.1-15-19 ("[T]he county canvassing board shall disregard technicalities, misspellings, and the use of initial letters or abbreviations of the name of any candidate for office if it can be ascertained for whom the vote was intended. "); Wash. Rev. Code § 29A.60.040 ("No write-in vote may be rejected due to a variation in the form of the name if the election board . . . can determine . . . the person and the office for which the voter intended to vote."); Wis. Stat. § 7.50(2)(e) ("No write-in vote shall be regarded as

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forgiving standards set forth in UOCAVA cannot be a matter of statutory interpretation, but rather is a pure policy decision. Thus, both the Division of Elections and the Alaska Supreme Court have intruded upon the Alaska Legislature's exclusive constitutional prerogatives. This Court should rule that, under the Elections Clause, AS § 15.15.360(a)(10), (a)(11), and (b) must be interpreted and applied according to their plain text, and misspelled write-in ballots may not be accepted as valid or counted.

The State is likely to contend that this will "disenfranchise" voters. As the Supreme Court has held, however, a voter is disenfranchised not only if a validly cast ballot of his is discarded, but also if his vote is diluted or effectively cancelled out by an improperly cast vote counted in violation of the law. *See Anderson v. United States*, 417 U.S. 211, 226 (1974) (discussing "the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots"); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote cannot be . . . diluted by ballot-box stuffing . . . [or] denied by a debasement or dilution of the weight of a citizen's vote"). Thus, Plaintiff Miller is attempting to prevent the disenfranchisement of those voters who cast their ballots properly, in compliance with § 15.15.360 and other provisions of Alaska law. *Cf. Roe I*, 43 F.3d at 581 (holding that counting absentee ballots without affidavits that were properly notarized

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defective due to misspelling a candidate's name, or by abbreviation, addition, omission or use of a wrong initial in the name."); Wyo. Stat. § 22-14-114 ("For write-in votes, names which are misspelled or abbreviated or the use of nicknames of candidates shall be counted for the candidate if the vote is obvious to the board.").

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or witnessed would unconstitutionally "dilute the votes of those voters who met the requirements of [state law] as well as those voters who actually went to the polls on election day").

State and federal courts throughout the country have upheld statutes, like Alaska Stat. § 15.15.360, that strictly require that the names of write-in candidates be spelled correctly, against claims that they are unconstitutional, discriminatory, or unreasonable. In *Porras v. Nichol*, 405 F. Supp. 1178, 1181 (D. Neb. 1975), for example, the court held that Neb. Stat. § 32-489, which allowed write-in votes to be counted only if the candidate's name was spelt properly, did not discriminate against "the less educated, the illiterate, those who are unable to spell, [or] those who act or fail to act through mistake or inadvertence." *Id.* at 1182. It held that the provision was subject only to rational-basis scrutiny, and easily survived that test, because

> The State of Nebraska has a legitimate interest in a method of determining quickly and easily the identity of a person for whom a vote is being cast. . . . If a ballot carries a written name under the proper office, it will be counted, no matter how poorly educated, illiterate or incapable of spelling the voter may be. The voter may take measures to learn to write the full name of the candidate before entering the booth, irrespective of his being poorly educated or illiterate. Indeed, a voter may carry into the polling booth a sample of the name and office of the candidate, whether prepared by him or someone else, and there is nothing to prevent the voter's copying or tracing the sample. As for the careless, not even the Constitution can save them.

Id. at 1183 (citation omitted).

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In *Paulsen v. Huestis*, 13 P.3d 931, 934 (Mont. 2000), the Montana Supreme Court clearly sympathized with the argument that minor misspellings on write-in ballots should be acceptable, but held that it lacked authority to ignore the clear mandates of Mont. Stat. § 13-10-202(3), and stressed that such complaints must be directed to the legislature. It stated:

> The election laws referred to above clearly specify what names voters may write-in where the candidate being voted for has filed a declaration of intent. Statutorily, if one of those names is not used, then the vote may not be counted by the election judges. Again, if this statutory framework is too harsh and, arguably, subverts the exercise of the elector's franchise, then it is up to the legislature, not this Court, to change the law.

Id.; *see also Morris v. Fortson*, 261 F. Supp. 538, 540 (N.D. Ga. 1966) (upholding Ga. Code § 34-1505, allowing write-in votes to be counted only if the candidate's name is spelled correctly, because "those persons who do not spell well may take a paper with them into the voting booth which contains the correct spelling of their candidate's name and from which they may copy that name, and thereby avoid any problem of spelling," or request assistance in casting their ballots); *Greene v. Heffernan*, 75 N.E.2d 752, 752-53 (N.Y. 1947) (affirming lower court's order directing that write-in ballots containing "variations" on the candidate's name "not . . . be counted").

In this case, voters were permitted to bring the correct spelling of candidates' names into the voting booth with them. They could have pens, pencils, bracelets, notes, or even temporary tattoos with a candidate's name written on them. Ex. 4, at 2 (Miller aff.). Pursuant to a ruling from the Alaska Supreme Court, voters could ask election

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officials at each polling place for a list containing the correct spellings for each of the write-in candidates. *See State v. Alaska Democratic Party*, No. S-14054, Order at 5-6 (Oct. 29, 2010). If a voter felt incapable of completing a write-in ballot on his own, he could request assistance in completing it from whomever he desired, including election officials. AS § 15.15.240. Neither Alaskan Natives nor anyone else was required to rely on their own memorization, reading or spelling ability, or knowledge of the English language to complete a write-in ballot. Thus, there is no reason to believe that Plaintiff Miller's interpretation would disenfranchise Alaskan Natives or any other subset of disadvantaged voters.

Thus, the Division and Alaska Supreme Court effectively amended state law in violation of the Elections Clause by allowing write-in votes to be counted if the voter "intended" to vote for a particular candidate, despite the fact that state law clearly allows a write-in vote to be counted only if—regardless of the voter's subjective intent—it actually contains the candidate's name. AS §15.15.360(a)(10), (a)(11). There are "no exceptions" to this rule. *Id.* § 15.15.360(b). Plaintiff Miller therefore is entitled to summary judgment on his Elections Clause claim (Count I).

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III. PLAINITFF MILLER IS ENTITLED TO SUMMARY JUDGMENT ON HIS FIRST EQUAL PROTECTION CLAIM (COUNT II), BECAUSE THE U.S. SUPREME COURT HAS HELD THAT IT IS UNCONSTITUTIONAL TO COUNT BALLOTS BASED ON AN "INTENT OF THE VOTER" STANDARD.

This Court should grant Plaintiff Miller summary judgment on Count II of his proposed Substitute Amended Complaint (which is identical to Count II of his original Complaint). In *Bush v. Gore*, the Supreme Court held that the Equal Protection Clause prohibits state officials from reviewing and counting ballots based exclusively on an "intent of the voter" standard, without more specific policies, guidelines, or restrictions to limit their discretion, because such a standard is unconstitutionally vague, subjective, and amorphous. *Bush*, 541 U.S. at 102.

In *Bush*, 531 U.S. at 102, 105, the Florida Supreme Court had ordered certain counties to conduct a hand recount of the ballots cast in the 2000 presidential election, and count any ballot in which there is a "clear indication of the voter," even if an automatic tabulation machine had rejected it. The Supreme Court held that a recount based on such a vague standard would "not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to equal protection of the laws. *Id.* at 105. It explained:

> Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." *Gore v. Harris*, 779 So. 2d at 270 (slip op., at 39). This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

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Id. at 105-06. The Court further noted, "[T]he question is . . . how to interpret the marks or holes or scratches on an inanimate object. . . . The search for intent can be confined by specific rules." *Id.* at 106.

Thus, the Court held that, although the "intent of the voter" was an acceptable starting principle, it was not sufficiently "specific" to be the only officially promulgated standard for counting ballots. *Id.*; *see also Dolan v. Powers*, 260 S.W.3d 376, 380 (Mo. Ct. App. 2008) (recognizing that, under *Bush v. Gore*, "equal protection demands that ballots be considered according to specific, uniform, statewide standards, beyond vague directives to determine 'the intent of the voter.'"); *State ex rel. League of Women Voters v. Herrera*, 203 P.3d 94, 98 (New Mex. 2009) (noting that the Court in *Bush v. Gore* found a constitutional violation because "[t]he Florida Supreme Court had ordered that local officials find the 'intent of the voter,' but provided no guidelines for doing so").

The Minnesota Supreme Court's analysis in *Sheehan v. Franken* illustrates the applicability of *Bush v. Gore* to this case:

> [T]he essence of the equal protection problem addressed in *Bush* was that there were no established standards under Florida statutes or provided by the state supreme court for determining voter intent . . . . [T]he decision to be made by Florida election officials with which the Supreme Court was concerned in *Bush* was voter intent—that is, for whom the ballot was cast—as reflected on ballots already cast in the election. In *Bush*, officials conducting the recount were reviewing the face of the ballot itself, creating opportunities for manipulation of the decision for political purposes.

767 N.W.3d 453, 466 (Minn. 2009).

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Here, although all of the challenged write-in ballots were reviewed by a single official, the Director, it is undisputed that she did not apply any specific criteria or guidelines in deciding which ballots to count, or the candidates for whom they will be counted, but rather attempted only to ascertain the "intent of the voter." Ex. 2, at 4. Although having a single person review all of the challenged ballots eliminates the concerns articulated in *Bush v. Gore* about inconsistencies among different counting teams, it does not resolve the overarching problem that, under the Equal Protection Clause and *Bush v. Gore*, the "intent of the voter" is too vague, amorphous, and subjective to apply as the sole standard for counting ballots. Indeed, without clear, specific criteria cabining the Director's discretion, she effectively can act as a "supervoter," substantially impacting if not altogether determining the outcome of the election.

Thus, the Director violated the Equal Protection Clause by reviewing the write-in ballots based only on an "intent of the voter" standard, and Plaintiff Miller is entitled to summary judgment on Count II.

CONCLUSION

For these reasons, this Court should grant Plaintiff Miller's Motion for Partial Summary Judgment on Counts I and II of his proposed Substitute Amended Complaint.

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DATED at Anchorage, Alaska, this 27th 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 27th day of December 2010 via:

( ) First Class Mail
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( ) E-Mail
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to the following listed individual(s):

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