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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOE MILLER, Plaintiff, v. LIEUTENANT GOVERNOR MEAD TREADWELL, in his official capacity; and the STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	)	Case No. 3:10-cv-00252 RBB

STATE'S OPPOSITION TO MILLER'S MOTION
TO MODIFY THE PRELIMINARY INJUNCTION

As Miller's filing this morning appears to concede, it is now time for this Court to lift its November 19 preliminary injunction against certification of the U.S. Senate race. Miller's consent to certification amply demonstrates that certification cannot cause him the irreparable harm necessary to justify the injunction, nor can he show that he is likely to succeed on the merits of his federal claims. Therefore, this Court should immediately allow the Alaska Division of Elections to certify the election result.

Miller apparently wishes to condition his "consent" to vacating the injunction against certification on the issuance of an entirely new injunction tolling various state deadlines. But he

cites no authority for this unorthodox procedure and he makes no attempt to show that this new injunction is justified under the federal standards.[1] The state thus requests that this Court lift its November 19 preliminary injunction against certification of the election and decline to grant Miller's motion for a new injunction without sufficient briefing for this Court to comply with the requirements of F.R.C.P. 65(d)(1).

INTRODUCTION

This Court abstained from considering the state law questions raised by Miller in this lawsuit so that the state courts could fulfill their role as the primary interpreters of state law. The Alaska courts acted with exemplary speed and ruled against Miller on all of the state law issues he raised, concluding that "[t]here are no remaining issues raised by Miller that prevent this election from being certified."[2] Indeed, Miller has conceded that the election should be certified, effectively acknowledging that this Court's preliminary injunction against certification is no longer justified. Docket 79 at 2. **Thus, the time has come for this Court to lift its injunction.** Miller cannot demonstrate that he is likely to succeed on the merits of his federal claims, and the balance of the equities and considerations of public interest tip overwhelmingly in favor of the state being allowed to certify in time for Murkowski's credentials to be presented to the Senate before noon on January 3, 2011.[3] The state respectfully asks this Court to issue a prompt ruling lifting the injunction, **no later than the close of business on Tuesday, December 28**, to ensure delivery of the necessary certification paperwork to the Senate by the deadline. *See* Affidavit of Gail Fenumiai at ¶ 4-6.

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1 *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 24-25 (2008).

2 *Miller v. Treadwell*, Alaska Opinion No. 6532 (December 22, 2010), slip opinion at 24.

3 Because the certificate of election must be hand-delivered to the Senate before noon on January 3, 2011, the state must be able to certify the election result and finalize the formal certificate several days in advance of that date. Aff. of GF at ¶ 4-6.

Although Miller purports to offer his "consent" to a "modification" of this Court's existing preliminary injunction, he actually is asking for is an entirely new and different injunction. Docket 79 at 2. But not only does he fail to acknowledge that he is asking the Court for something new, he also makes no attempt to establish that he is entitled to any such thing. To obtain a preliminary injunction, Miller must demonstrate a probability of success on the merits, and show that he will suffer irreparable harm if the injunction does not issue, that the balance of equities tips in his favor, and that an injunction is in the public interest.[4] Miller's "consent" to "modification" ignores this test entirely. This Court should not issue a new preliminary injunction without briefing on whether such an injunction is justified.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

This Court issued its preliminary injunction on November 19, 2010. But when the division completed its official review of the election[5] on November 30,[6] Lisa Murkowski was ahead of Joe Miller by over 10,000 votes. And on December 22, the Alaska Supreme Court conclusively rejected all of the state law questions that could have reduced the size of this 10,000+ vote lead — including each of the state law questions that were originally raised in this federal suit.[7] Thus, circumstances have changed significantly since the injunction issued, and the

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4 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. at 24-25.

5 *See* AS 15.15.440, AS 15.15.450, AS 15.20.220.

6 This fact was widely reported in the media. *See* *http://www.adn.com/2010/12/01/1583190/state-election-results-save-two.html*; http://www.ktuu.com/news/ktuu-election-results-except-senate-113010,0,7611564.story; http://www.newsminer.com/view/full_story/10500141/article-Officials-certify-all-but-2-races-in-Alaska-?instance=alaska_news; http://www.thenewstribune.com/2010/12/01/1448060/state-election-results-save-two.html (all last viewed December 19, 2010).

7 *Miller v. Treadwell*, slip op.

injunction is not justified.[8]

"In deciding whether to vacate a preliminary injunction, the Court must apply the same standards it used when issuing the injunction in the first instance."[9] Thus, this Court must consider whether Miller has demonstrated a probability of success on the merits, whether Miller will suffer irreparable harm if the injunction does not continue, whether the balance of equities tips in his favor, and whether an injunction is in the public interest.[10] Miller cannot demonstrate that he is likely to succeed on the merits of his claims, and the balance of the equities and considerations of public interest tip overwhelmingly in favor of the state being allowed to certify in time for Murkowski's credentials to be presented to the Senate by noon on January 3, 2011.[11] Moreover, Miller agrees that certification of the election should proceed. Therefore, this Court should lift its November 19 preliminary injunction.

II. MILLER IS UNLIKELY TO SUCCEED ON THE MERITS

A. Miller is unlikely to succeed on the merits of his claim that the division's interpretation of AS 15.15.360 violates the Elections Clause.

The division and the Alaska Supreme Court have interpreted AS 15.15.360 to allow the counting of write-in votes containing minor misspellings of a candidate's name.[12] Miller

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[8] *See, e.g., Sprint Commc'ns Co. v. CAT Commc'ns Int'l*, 335 F.3d 235 (3rd Cir. 2003) ("[t]he standard that the district court must apply when considering a motion to dissolve and injunction is whether the movant has made a showing that changed circumstances warrant the discontinuation of the order.") (quoting *Township of Franklin Sewerage Auth. v. Middlesex County Utils. Auth*, 787 F.2d 117, 121 (3rd Cir. 1986)); and *Winterland Concessions Co. v Trela*, 735 F.2d 257, 260 (7th Cir. 1984).

[9] *Missouri Republican Party v. Lamb*, 87 F.Supp.2d 912, 914 (E.D. Miss. 2000).

[10] *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. at 24-25; *see also Small ex rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 611 F.3d 483, 490-91 (9th Cir. 2010); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

[11] Because the certificate of election must be hand-delivered to the Senate by noon on January 3, 2011, the state must be able to certify the election result and finalize the formal certificate several days in advance of that date. Aff. of GF at ¶ 4-6.

[12] *Miller v. Treadwell*, slip op. at 4-8.

contends that this interpretation is so clearly contrary to the language of AS 15.15.360 that it is actually a "decision to override" or to "effectively nullify" the Alaska Legislature's command in violation of the Elections Clause of the U.S. Constitution. Docket 40 at ¶ 24-25. But far from being a "decision to override" AS 15.15.360, the division's interpretation of AS 15.15.360 is — *as this Court has already recognized* — "a viable interpretation of the disputed statute." Docket 39 at 3. Because Miller's Elections Clause claim is dependent on his contention that the division's (and the Alaska Supreme Court's) reading of AS 15.15.360 is not only the *wrong* interpretation, but is *not even an interpretation at all*, this Court has already effectively ruled against him. Docket 39 at 3. And the authority Miller cites in support of his apparent view that the Elections Clause prohibits state agencies and state courts from interpreting state election statutes does not support his claim.

The Elections Clause states that

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

U.S. Const. Art. I § 4, cl. 1. In accordance with this mandate, the Alaska Legislature has written a series of election statutes, one of which is AS 15.15.360. Alaska Statutes 15.15.360 prescribes rules for counting votes. In this election, the division was required to tabulate write-in votes for the U.S. Senate race — a task it does not normally face.[13] The division had to determine what standard a write-in ballot must meet in order to be considered as a valid vote under AS 15.15.360. The division interpreted AS 15.15.360, which is silent on the accuracy of spelling for write-in votes, to allow write-in votes containing minor misspellings of a candidate's name to

[13] 6 AAC 25.085(b) provides that write-in votes must be individually counted only if, after the initial vote count by machine, it appears there are enough write-in votes to win a race or come within a half percent of the leading candidate.

be counted if the voter's intent is clear.

Miller believes that the division's interpretation of AS 15.15.360 is incorrect. In fact, he believes it is *so* incorrect that it is not even an "interpretation" at all, but rather is actually an "usurpation" of the Alaska Legislature's authority to prescribe "The Times, Places and Manner of holding Elections for Senators" under the Elections Clause. Miller has characterized the division's interpretation of AS 15.15.360 variously as "stunning departure from the law," an "attempt[] to override a standard expressly provided by the state legislature," and a decision to "subvert a clear command of the state legislature," "ignore legislative mandates," and "abandon the statutory requirement." Docket 13 at 4, 5, 8, 13, 14. But these characterizations are belied by *this Court's own recognition* that the division's position presents "a viable interpretation of the disputed statute," and by the state superior court and supreme court decisions upholding the division's interpretation.[14] Docket 39 at 3; Docket 62, Exhibit 1 at 6-18. Miller asks this Court to disregard both its own reading of the statute and the reasoned analysis of the Alaska Supreme Court to find that the division's position is so outlandish and beyond any legitimate interpretation as to violate the federal Constitution. But the division's interpretation of AS 15.15.360 is not a "usurpation" of the legislature's authority — it is merely an interpretation of an unclear statute that the division is tasked with implementing.

The Elections Clause's delegation of election powers to state legislatures does not mean that a state agency tasked with implementing state election statutes may not interpret those statutes when they are unclear, or that a state court's analysis of such interpretations is irrelevant. The Elections Clause delegates power to state legislatures *in their normal capacity as lawmaking*

[14] *Miller v. Treadwell*, slip op. at 4-8.

bodies, subject to the normal state processes by which state laws are enacted and implemented.[15] Miller cites no authority for his apparent belief that the Elections Clause deprives state agencies and state courts of authority to interpret state election statutes where, as here, they are susceptible to multiple interpretations. State agencies would never be able to conduct elections under such an expansive reading of the Elections Clause, because all statutes must be interpreted to be implemented.

Miller relies on the three-justice *Bush v. Gore* concurrence in which Chief Justice Rehnquist opined that a decision of the Florida Supreme Court violated the counterpart to the Elections Clause that delegates to state legislatures the power to legislate regarding presidential elections, U.S. Const. Art. II § 1, cl. 2.[16] Docket 13 at 8-12. But even setting aside the fact that this was not the opinion of the Court, it provides no support for Miller's position because it recognizes that election statutes must be interpreted, and perceives a constitutional violation only because the Florida Supreme Court effectively *changed* Florida election law rather than rendering a fair interpretation of it.

Chief Justice Rehnquist wrote that due to the specific delegation of power to the legislature in the area of presidential elections, "[a] *significant departure from* the legislative scheme ... presents a federal constitutional question" and thus the "Constitution requires this

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[15] *See Smiley v. Holm*, 285 U.S. 355, 367-68 (1932) (recognizing that the Elections Clause gives state legislature authority to enact elections laws "in accordance with the method which the state has prescribed for legislative enactments" and does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted," meaning that the state governor could exercise his veto power over an election law passed by the legislature in the same manner as with other laws); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567-70 (1916) (recognizing that where state constitution allowed voters to approve or disapprove of any legislative enactment by popular vote, that referendum power could be exercised with regard to election laws without offending the Elections Clause).

[16] 531 U.S. at 111-22.

Court to undertake an independent, *if still deferential*, analysis of state law."[17] He elaborated that "[i]solated sections of the [election] code *may well admit of more than one interpretation*, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change" it.[18] The three concurring justices thus recognized that election laws, like other laws, are subject to interpretation, and confined their constitutional criticism to those situations where an election statute has been so drastically distorted as to have been effectively *changed*.

In *Bush v. Gore*, the Florida Supreme Court arguably effected this kind of drastic distortion of election law. Among other things, the Florida court extended the statutory deadline for certification of the election, thus shortening the election contest period and "jeopardiz[ing] the 'legislative wish' to take advantage of the safe harbor" that a federal statute would provide if a final election result were achieved by a certain date.[19] In stark contrast, in this case the division and the Alaska Supreme Court have simply chosen the best interpretation of AS 15.15.360, a vote counting statute that is — as this Court recognized — clearly susceptible to multiple interpretations.

Thus, even if the *Bush v. Gore* concurrence represented the views of the majority of the Court, it would not support Miller's claim. Moreover, of course, the *Bush v. Gore* concurrence represented the views of only three justices, and was strongly criticized by four justices who pointed out its flaws — as well as the inapplicability of the other cases that Miller cites — in four illuminating dissents.[20]

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17 *Id*. at 113 (emphasis added).

18 *Id*. at 114 (emphasis added).

19 *Id*. at 116-22.

20 Justices Stevens, Souter, Ginsburg, and Breyer each wrote separately and explicitly rejected Chief Justice Rehnquist's analysis. Justices Stevens wrote that the specific delegation of power to the legislature in the area of presidential elections does not "free[] the state legislature from the constraints in the State Constitution that created it" or "grant[] federal judges any

Because a state agency's "viable interpretation" of a state election statute, upheld by the state's highest court, does not create a federal constitutional problem — even under Justice Rehnquist's unusual and much-criticized analysis in the *Bush v. Gore* concurrence — Miller's Elections Clause claim must fail.

C. Miller is unlikely to succeed on the merits of his claims that the division's procedures for counting votes violated Equal Protection.

Miller makes two equal protection arguments, both implicitly raised in his state lawsuit and explicitly rejected by the Alaska Supreme Court.[21] The first is based on the director's decision to count slightly misspelled write-in votes where the intent of the voter was clear. Miller alleged that "[d]efendants and their counting boards apparently will be attempting to divine for themselves the 'intent of the voter' based on vague, amorphous, subjective—and unspecified—criteria," and he claims that this violates equal protection. Docket 40 at ¶¶ 29-30. The second alleged equal protection claim is based on the manual count of write-in ballots. According to Miller, voters whose ballots were rejected by an automated tally machine nevertheless could have their votes counted if they attempted to vote for a write-in candidate, but not if they attempted to vote for a ballot candidate. *Id.* ¶ 33. These "disparate policies," according to Miller, discriminate against ballot candidates and people who unsuccessfully

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special authority to substitute their views for those of the state judiciary on matters of state law." *Id*. at 123-25. Justice Souter opined that the Constitution "is unconcerned with mere disagreements about interpretive merits" regarding state election laws. *Id.* at 129-33. Justice Ginsburg pointed out the flaws in Chief Justice Rehnquist's analysis of case law, and noted that "[t]he Framers of our Constitution ... understood that in a republican government, the judiciary would construe the legislature's enactments." *Id*. at 140-41. She further commented that in suggesting that the Constitution "requires ... revision of a state court's construction of state laws in order to protect one organ of the State from another, [the concurrence's view] contradicts the basic principle that a State may organize itself as it sees fit." *Id*. at 141. Finally, Justice Breyer asserted that the concurrence's "unusual review of state law" in contravention of the "fundamental principle" of "comity and respect for federalism" was not justified. *Id*. at 147-48.

[21] *Miller v. Treadwell*, slip op. at 8, 9-13.

attempted to vote for such candidates. *Id.* ¶ 34.

Both of these arguments are based on the concept of unequal treatment of votes applied in *Bush v. Gore*.[22] In *Bush v. Gore*, the Court was faced with issues that arose in Florida's recount of ballots for the 2000 presidential election. The Court concluded that the recount process that the Florida Supreme Court had ordered did not provide for uniform standards or guidelines on how a vote was to be counted.[23] The Court reasoned that the Florida court's order that local officials were to discern the "intent of the voter," without anything more specific, did not satisfactorily guarantee that voters received equal protection under the law,[24] because officials in one county might decide that a ballot with two of four corners cut out of a "hanging chad" showed voter intent, while officials in another county might decide that an identical chad was insufficient to show intent. The Court noted that the "problem inheres in the absence of specific standards to ensure … equal application" of the "intent" standard throughout the state.[25] "Having once granted the right to vote on equal terms," the Court found, "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[26]

The Court also noted, however, that its consideration was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[27] But even without this express caveat, the *Bush v. Gore* analysis would have no application to this case, as the Alaska Supreme Court recognized, because it was based on unique facts not present here.[28] The Florida election created equal protection problems because

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22 531 U.S. 98 (2000).
23 *Gore v. Harris*, 772 So.2d 1243 (Fla. 2000).
24 *Bush v. Gore,* 531 U.S. at 105-106.
25 *Id.* at 106.
26 *Id.* at 104-05 (quoting *Harper v. Virginia Bd. of Elec.*, 383 U.S. 663, 665 (1966)).
27 *Id.* at 109.
28 *Miller v. Treadwell*, slip op. at 8.

different counties reviewed ballots with identical markings, and — without consistent statewide standards — made different decisions about how these markings reflected voter intent.[29] This unequal treatment of similarly situated ballots was compounded by the Florida court's failure to specify who would recount the ballots, resulting in ad hoc and inexperienced counting teams, and the inability of recount observers to protest the decisions made by the county voting boards.[30]

The state's actions in this case do not create disparate treatment that would "value one person's vote over that of another."[31] All ballots with misspelled names and all overvotes and undervotes were reviewed by one person — the director of elections — who consistently applied a single standard. After reviewing the division's counting procedures, the Alaska Supreme Court concluded that "the Division's methodology gave all of the ballots — as well as all of the candidates — equal treatment," noting that "[w]e fail to see how having one person examine all overcount, undercount, and write-in ballots and all ballots challenged by either candidate is not a uniform standard."[32]

1. In counting slightly misspelled ballots for Murkowski, the director did not violate equal protection because she consistently applied an objective standard to every write-in ballot.

Unlike the Florida recount process, the division's process for counting write-in ballots ensured that write-in votes were treated uniformly. Only one person — the director — reviewed challenged write-in votes to determine whether the voter's intent could be ascertained. As the Alaska Supreme Court recognized, "this avoids any constitutional infirmities that might arise from different reviewers applying the standard differently."[33] The director applied a distinct

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29 *See, e.g., Bush v. Gore*, 531 U.S. at 106-107.
30 *Id.* at 109.
31 *Id*. at 104-05.
32 *Miller v. Treadwell*, slip op. at 13.
33 *Miller v. Treadwell*, slip op. at 8.

standard to all write-in ballots: she counted ballots containing minor misspellings and variations of "Murkowski" for Lisa Murkowski if she determined that the voter clearly intended to vote for that candidate.[34] If the candidates' observers objected to this determination, challenged votes were segregated for potential court review. Because these procedures ensured that all votes were counted in a uniform manner, the arbitrary and disparate treatment of votes that gave rise to *Bush v. Gore* could not occur.

Unable to show that the division actually treated ballots unequally, Miller essentially argues that the division violated equal protection because it did not articulate specific rules for discerning voter intent. But *Bush v. Gore* does not require this. *Bush v. Gore* requires election officials to ensure votes are not subject to arbitrary and disparate treatment; it does not require election officials to develop rules to cover every potential variation they may encounter. It is not always practicable or even possible to articulate very specific standards, and the law recognizes this.

While it might not have been difficult to develop uniform rules for counting Florida's punch-card ballots, given the limited number of possible chad configurations, it would be impossible to develop rules to cover every permutation in spelling and penmanship of the name "Lisa Murkowski," so as to eliminate the need for discretion in counting votes. Even Miller's supposedly "objective" standard of accepting only correctly spelled write-in votes requires the vote counter to use discretion and consider voter intent in deciphering the voter's handwriting — to decide, for example, whether a particular letter is intended to be an "o" or an "a." Handwritten write-in voting is a situation in which, as the Supreme Court acknowledged, "the

[34] This is the standard applied by both federal law and state regulation to the counting of federal absentee write-in ballots. 6 AAC 25.670(b); 42 U.S.C. 1973ff-2(c)(3).

general command to ascertain intent is not susceptible to much further refinement."[35]

A recent Ninth Circuit decision confirms that while election procedures must be applied uniformly, some discretion is permitted in applying those procedures. In *Lemons v. Bradbury*,[36] the court held that Oregon's process of verifying signatures on a voter referendum petition did not violate the Equal Protection Clause. The plaintiffs argued that the state lacked uniform rules for verifying petition signatures and thus violated *Bush v. Gore*.[37] Oregon officials instructed county elections officials to verify referendum signatures by determining whether that signature matched the signature on the signer's voter registration card.[38] As in this case, the Oregon instructions allowed for the exercise of some discretion to determine whether a signature "matched."[39] The court held the process ensured equal treatment because it was applied uniformly across the state's counties.[40] It would have been impossible to articulate standards to eliminate the need for some discretion in deciding whether signatures matched, and *Lemons* shows that the Equal Protection Clause does not require it. And unlike in *Lemons*, in this case all write-in ballots were reviewed by a single person, thus eliminating the interpretative differences inherent in multiple decision makers.

The director did not exercise unmeasured discretion to determine whether to count a particular misspelled ballot. The director applied a standard, counting a slightly misspelled vote when the intent of the voter was clear. Aff. of GF at ¶ 11. But although Miller characterizes this standard as vague, amorphous, and subjective, in the state court litigation Miller "concede[d] that other states use the same standard for counting write-in ballots and that Congress has

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35 *Bush v. Gore*, 531 U.S. at 106.
36 538 F.3d 1098 (9th Cir. 2008).
37 *Id.* at 1105.
38 *Id*.
39 *Id.*
40 *Id.* at 1106.

mandated that standard [for federal absentee write-in ballots.]"[41] Moreover, in this election, several factors made voter intent fairly easy to determine. Lisa Murkowski ran a high-profile, well publicized campaign, so it is fair to assume that most people who came to the polls had heard of her. Also, her name is somewhat unusual. It is hard to imagine how a voter who wrote "Lisa Murkowsky" or even "Leeza Murcowski" might have been trying to vote for anyone else. In addition, these slightly misspelled names were written on the line for write-in candidate for U.S. Senator, the very same race for which Lisa Murkowski had campaigned.

Because Miller cannot show a probability of success on the merits of this claim, the preliminary injunction should be lifted.

2. The division's method of counting votes for ballot candidates and write-in candidates did not violate equal protection.

In count three of his Amended Complaint,[42] Miller alleges that the state has "arbitrarily established two disparate standards for determining whether a person whose vote in the race for U.S. Senate had been rejected by an automated tally machine nevertheless could have their vote counted." Docket 40, ¶ 32; Docket 80, ¶ 35. He claims that the division gave a second "individualized review" to ballots that were not counted by the automated tally machines, where the voter had attempted to vote for a write-in candidate, but not where the voter had attempted to vote for a ballot candidate. Docket 40, ¶ 32; Docket 80, ¶ 35. But Miller misrepresents the process in order to create the appearance of an equal protection violation; and his claim fails anyway because he cannot show that any alleged different treatment of ballots actually made any

41 *Miller v. Treadwell*, slip op. at 8.

42 Miller has moved to substitute a different amended complaint, but his argument has not substantively changed. Docket 80. The state will provide citations to the relevant arguments in both versions.

votes more or less likely to be counted.[43]

Miller alleges that the state's automated tally machines reject "overvotes" —ballots on which a voter marked more than one oval for the same race—and "undervotes"—ballots on which a voter failed to mark an oval for a particular race. Docket 40, ¶ 19; Docket 80, ¶ 5. He alleges that during the write-in review, the director hand-reviewed overvotes and undervotes that may have been votes for a write-in candidate, but did not hand-review overvotes and undervotes that may have been votes for a candidate whose name was printed on the ballot. Docket 40, ¶¶ 21-21; Docket 80, ¶ 5.

But Miller misunderstands the functioning of the automated tally machines. The machines do not physically "reject" overvotes and undervotes, nor do they sort ballots in any way. Aff. of GF ¶ 7. Thus, when the machines have finished counting, there is no stack of "rejected" ballots that is separate from the "accepted" ones, nor are the "accepted" ballots sorted by candidate. Rather, the division can tell how many ballots were overvotes or undervotes for a race by comparing the total number of ballots fed through the machines to the number of votes counted for candidates in that race. *Id.*

Because following the machine count there were no separate stacks of "valid" and "invalid" votes, and no stacks of write-in ballots separated from other ballots, in order to review the write-in ballots for the U.S. Senate race, division workers had to examine and sort every single ballot cast in the election. *Id.* All overvotes and undervotes for the U.S. Senate race were sorted into one separate category, and the director examined each of them and treated them the same. *Id.* ¶ 9, 15-17. She did not count any ballots that had no oval marked for the U.S. Senate race, even if a name was written in. *Id.* ¶ 16. If a ballot had two ovals marked for the U.S.

[43] *Cf. Bush v. Gore*, 531 U.S. at 104-05.

Senate race, she examined the ovals. *Id.* ¶ 17. She counted ballots with two ovals marked when the voter had clearly crossed one out, regardless of whether the remaining oval indicated an intent to vote for a write-in candidate or for a candidate whose name was printed on the ballot. *Id.* And if the voter had marked both the oval by the name of a candidate printed on the ballot and the write-in oval, the director counted the ballot if the voter wrote in the name of the same candidate. *Id.* This is how Miller received many of his 20 "write-in" votes.[44] *Id.*

Thus, *all ballots* in the election were subjected to essentially the same review process: they were initially counted by the automated tally machines;[45] and then they were sorted and reviewed as part of the write-in count.

Miller theorizes that voters who cast votes for ballot candidates were somehow discriminated against or subjected to a more stringent standard for validating their votes than voters who cast their votes for a write-in candidate. Not only does the undisputed evidence regarding the counting process contradict Miller's garbled presentation of the facts, but the evidence clearly shows that the standard applied in the hand review of ballots was not more demanding than the machine's standard. Indeed, the Alaska Supreme Court held that "having carefully examined the record in this case, we conclude that the record does not support Miller's contention that [under- and overvotes] were treated differently depending on whether they were cast for candidates whose names were pre-printed on the ballot."[46]

Although some courts have held that an equal protection claim may lie in the different

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[44] Although not all of these 20 votes were actually write-in votes for Miller, they were nonetheless all categorized as "write-in" votes for Miller because they were counted during the write-in review process. Aff. of GF at ¶ 17.

[45] Although the vast majority of ballots cast in Alaska are counted by automated tally machines, in very small precincts there is often no tally machine available and as a result ballots cast in these precincts are all counted by hand on election night. Miller has not made any challenge to this aspect of the division's practice.

[46] *Miller v. Treadwell*, slip op. at 12.

treatment of ballots by different counting systems or tabulating machines, those courts have typically been faced with actual evidence that the different systems or machines *substantively affect the likelihood that a voter's vote will be counted*.[47] Moreover, the Ninth Circuit, sitting en banc, has suggested that even evidence that a voting system produced twice the rate of over- and undervotes than other systems might not be sufficient to establish an equal protection violation.[48] Miller has presented no evidence that the allegedly different standards applied in this election have in any way substantively affected the likelihood that a voter's vote will be counted; nor do the results of the write-in count suggest that any actual advantage was enjoyed by voters who cast ballots for a write-in candidate.

On election night, the automated tally machines counted 102,252 write-in votes; and the machine count reflected 2,882 over- or undervotes.[49] After the write-in review process, the division reported 101,169 votes for official candidates[50] and 620 other write-in ballots — i.e. ballots containing the names of persons who had not registered as write-in candidates or commentary such as "none of the above."[51] In addition, as a result of the write-in review another

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[47] *See e.g.*, *Black et al v. McGuffage*, 209 F.Supp.2d 889, 898-99 (N.D.Ill. 2002) (denying motion to dismiss for failure to state a claim where voters in different counties voted on machines with different accuracy rates); *Common Cause Southern Christian Leadership Conference of Greater Los Angeles v. Jones*, 213 F.Supp.2d 1106, 1109 (C.D.Cal. 2001) (denying motion for judgment on pleadings where complaint alleged punch-card voting machines less reliable than other voting systems permitted by state); *Chavez v. Brewer*, 214 P.3d 397, 409 (Ariz. 2009); *cf. Weber v. Shelley*, 347 F.3d 1101, 1105 (9th Cir. 2003) (affirming summary judgment in absence of evidence that voting system was inherently less accurate than other systems).

[48] *Southwest Voter Registration Education Project et al v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).

[49] *See* Unofficial results for U.S. Senate race available at http://www.elections.alaska.gov/results/10GENR/data/results.htm

[50] This number also includes 28 votes that were counted for Scott McAdams and Joe Miller as a result of the write-in count. *See*, *http://www.elections.alaska.gov/results/10GENR/data/resultsWI.htm.*

[51] *Id*.

2,016 ballots were segregated, because the decision not to count them was challenged by Murkowski observers. Many of these ballots were undervotes — i.e. the voter had written in Murkowski but had failed to mark the oval. The division segregated and tallied these ballots in order to preserve the Murkowski campaign's challenges. *But the division did not count them as valid votes or subject them to a different review process than any other ballots*. In fact, the supposedly more lenient individualized review of write-in votes by the division did not produce a greater number of valid write-in votes than the machine count; it produced *fewer* valid votes. The machines counted 102,252 write-in ballots, but the division counted only 101,169 of these as votes for official candidates, and 620 as "other write-in" ballots.

Because of this reality, an essential element of a viable equal protection clause claim is missing here. Although Miller claims that voters who voted for write-in candidates "had a substantially greater chance of having their ballots counted than people who chose to cast their votes for candidates whose names appeared on the ballot," he offers no evidence to support this claim and the numbers do not bear out his allegation.[52] Docket 43 at 4-5. Because he cannot establish either disparate treatment or any difference in the likelihood that voters who cast votes for ballot candidates would have their votes counted as compared with write-in voters, he cannot demonstrate even a *possibility* of success on the merits, much less the probability of success that would be necessary to justify continuing the injunction against certification.

III. BECAUSE MILLER LOST THE ELECTION, LIFTING THE INJUNCTION WILL NOT IRREPARABLY HARM HIM

The Court has enjoined the certification of the result of the senate race, but certification of the result cannot harm Miller because he clearly lost the election. Moreover, even if some doubt remained about the outcome of the election, certification would not irreparably harm

[52] *Cf. Bush v. Gore*, 531 U.S. at 107 (noting that almost three times as many new votes were identified in Broward County than in Palm Beach County).

Miller because certification is not a final irrevocable act. Miller could still be seated in the Senate were he to somehow later establish that he was the rightful winner of the election. And Miller apparently recognizes that certification cannot irreparably harm him, having agreed that certification should proceed. Docket 79 at 2. The injunction against certification is thus not justified.

IV. THE BALANCE OF THE EQUITIES TIPS STRONGLY AGAINST THE INJUNCTION

The balance of the equities tips strongly against the continuance of an injunction that will irreparably harm the state and its citizens by denying Alaska full representation in Congress when it convenes in January. In addition, various private parties will be significantly harmed. If Senator Murkowski's seat becomes vacant, her offices rented from private individuals may have to close, because the Senate will no longer pay for leased private space. Exhibit A, Affidavit of Karen Knutson at ¶¶ 6-7. The senator's staff will also not be paid, without specific action by the Senate. *Id*. ¶ 8. Given the significant harm both to the state and to private parties that continuance of the injunction will cause, and Miller's concession that certification will not harm him, the balance of the equities clearly tips in favor of lifting the injunction.

V. THE INJUNCTION IS CLEARLY CONTRARY TO THE PUBLIC INTEREST

Finally, the Alaskan public has a strong interest in being properly represented in Congress, which includes two occupied seats in the U.S. Senate. A Senate vacancy could cause substantial harm to the state and its citizens. Not only will Senator Murkowski be unable to participate in the business of the U.S. Senate, but she will be unable to provide important constituent services to Alaskans. Exhibit A at ¶ 6. Her seniority and committee assignments also may be affected, which could also have important long-term negative repercussions on her ability to effectively represent the interests of Alaskans. *Id*. ¶¶ 9-16.

The Ninth Circuit has recognized a significant public interest in statewide elections and, "[f]or that reason our law recognizes that election cases are different from ordinary injunction cases. Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented."[53] In this case, the public interest in securing full representation in Congress is substantial and makes the continuance of the injunction against certification of the election result inequitable and inappropriate.

CONCLUSION

Miller has agreed that the time has come to lift the preliminary injunction against certification. Because the injunction is not justified and further delay in certification could significantly harm Alaska and its citizens, the state respectfully requests that this Court lift its November 19 injunction and permit the division to certify the result of the U.S. Senate race. But because Miller has offered no legal justification for the new "modified" injunction that he has requested, the state asks this Court to deny his motion to modify the injunction until such time as he has demonstrated that he is entitled to it under the appropriate standard.

DATED December 27, 2010.

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Certificate of Service

The undersigned certifies that on

[53] *Southwest Voter Registration Project et al. v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (citations omitted).

December 27, 2010, a true and correct copy of this document was served via electronic mail on the following:

-Thomas Van Flein, Esq.
-Michael T. Morley, Esq.

By: /s/ Margaret Paton-Walsh