## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

FOR THE DISTRI	· · · · · · · · · · · · · · · · · · ·
JOE MILLER  Plaintiff,	CLEPIA COLOR
V.  LIEUTENANT GOVERNOR CRAIG CAMPBELL, in his official capacity; and DIVISION OF ELECTIONS, STATE OF ALASKA  Defendants.	) ANCHORAGE, ALASKA  Civil Case No.  3:10-CV-0252 (RRB)

# BRIEF OF THOMAS A. LAMB AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF JOE MILLER

I submit this brief to address the constitutionally permissible actions allowed in determining a voter's intent without disenfranchising a voter.

I am an eligible Alaskan voter who voted for candidate Joe Miller in Alaska's 2010 U.S. Senate general election.

#### Introduction

Like most Alaskan voters, during the general election for the 2010 U.S. Senate seat, I watched candidate Lisa Murkowski launch her write-in campaign with much publicity. The candidate aired commercials on the importance of filling in an oval next to the write-in name and spelling her name correctly.

In one commercial titled the Spelling Bee, the last name Murkowski is spelled correctly. See http://www.youtube.com/watch?v=PQSy6GRsuuo

In another commercial titled Fill it in, Write it in, candidate Lisa Murkowski instructs Alaskan voters to fill the oval next to the write-in candidate's name and spell the name Lisa Murkowski correctly. See http://www.youtube.com/watch?v=ypcRMKfcrLs

Both commercials convey the statutory intent and the commercials aired, created the impression that Alaska election law required her name to be spelled correctly:

AS 15.15.360 (a) 11 A vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that

candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.

The statutory language is instructive to the voter.

It clearly states that the voter can write-in the last name or the name as it appears on the write-in declaration form. See http://www.elections.alaska.gov/doc/forms/A33.pdf

The write-in candidate declaration form has an area that states:

# I am requesting voters to write my name as follows:

,			
(Last Name)	(First Name)	(MI)	(Nickname and/or Suffix)

While the law instructs the write-in candidate to request their last name be first with their first name following, the commercials that were aired by candidate Lisa Murkowski, instructed Alaskan voters to correctly spell her name Lisa Murkowski.

With the campaign commercials and the actions taken by the State of Alaska to post write-in lists at precincts that had "Lisa Murkowski" printed on the lists, it is easy to see how most Alaskan voters like myself would be under the impression that correctly writing in Lisa Murkowski is required. *See* State of Alaska candidate write-in list http://i852.photobucket.com/albums/ab86/210thars/179931276.jpg

Moreover, voters were able to wear wristbands with the engraved name Lisa Murkowski on the wristbands and carry pencils into the voting poll with the name Lisa Murkowski written on the pencils. See Murkowski closes in on victory in write-in count http://www.juneauempire.com/stories/111110/sta\_734481544.shtml

Interestingly, some voters were under the impression that the law required that the last name be filled in first. *Infra*.

In a press release put out on November 24, 2010, candidate Lisa Murkowski accused Joe Miller of challenging a ballot where the voter understood the plain and strict meaning of the law and wrote in Murkowski, Lisa:

Miller's campaign challenged more than 8,000 votes during the hand-count in Juneau. While the Miller campaign has stated it only challenged ballots with spelling errors, in the Motion to Intervene, the Murkowski campaign notes that many of those were challenged for no apparent reason. The Motion cites examples of challenged ballots such as those with "Murkowski, Lisa" written in or "Lisa Murkowski, Republican." *See* http://lisamurkowski.com/main/murkowski-files-for-expedited-intervention-in-miller-lawsuit/

Arguably, the language in the statute is written in a manner to create parity among other federal candidates who have their names printed on the ballot with their last name first as is written on the declaration form. See <a href="http://www.elections.alaska.gov/doc/forms/A23.pdf">http://www.elections.alaska.gov/doc/forms/A23.pdf</a>

And there is no dispute what the voter's impression was: the law required parity among similarly situated voters and Lisa Murkowski's name was to be spelled correctly. *Supra*.

Moreover, pristine logic applies to understand the meaning of the statutory language "as it appears." *Infra*.

### Logic and Legal Reasoning

Taking two hypothetical write-in candidates John L. Smyth and John R. Smith and applying the rule of pristine logic, only one conclusion can be made on what the statutory language "as it appears" means.

AS 15.15.360 (a) 11 A vote for a write-in candidate, other than a write-in vote for governor and lieutenant governor, shall be counted if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.

The statutory language in question does not qualify or make any distinction on how "as it appears" applies in write-in contests. It does not matter if there is one write-in candidate or one hundred and sixty write-in candidates, the voter is instructed to write-in the name as it appears on the candidate declaration form.

Arguably, this is done to maintain the integrity and avoid confusion in the voting system.

Given the above hypothetical situation with the two write-in candidates, a voter writes in John R. Smyth.

Should the vote be counted? No. There is no John R. Smyth.

The only logical conclusion that can be made is: the statutory language, "as it appears", requires the voter to correctly spell the name as it appears on the candidate's declaration. The statutory law does not allow the Defendants to pick and choose when the law can be subjective. *Infra*.

To be 100% correct, is to be divine.

#### **Similarly Situated Voters**

The equal protection clause to the federal constitution requires that people who are similarly situated be treated equally. See, e.g., Harper v. Virginia Bd. of Elections, 383 U. S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are

inconsistent with the Equal Protection Clause of the Fourteenth Amendment").

The secret ballot in Alaska is cast in such a way, the identity of the voter is unknown. Thus putting the majority of ballots cast under the category of voters who are similarly situated and who do not require any assistance under federal law or were not overseas in the military.

In this election, it is clear that the Defendants have acted in a biased and arbitrary fashion by counting votes where the voter has written in a name that can only be construed (under the public impression of what the law requires) as a protest vote. *Infra*.

According to one observer for candidate Joe Miller, in affidavit, Bill Peck witnessed a ballot having the last name Murcowshit written on it, and it was counted by the Alaska Division of Elections (DOE herein) as a vote for candidate Lisa Murkowski but challenged. On another ballot, Peck witnessed a ballot with Murkowski written on it but an unhappy face drawn next to the name. See Exhibit A - Affidavit of Bill Peck paragraph 10 labeled Protest Votes

Arguably, these ballots would indicate a protest vote.

Clearly there are instances when a protest vote had been cast, but the DOE chose to act as an advocate for candidate Lisa Murkowski and counted the protest votes as a vote for Lisa Murkowski.

This constitutes a clear violation of the equal protection clause by showing disregard for one write-in voter who was under the impression that a cast ballot with the name Murkowski spelled incorrectly could be a protest vote or a vote that would not be counted - a vote that equates to the effect of a vote for *none of the above*.

The DOE's disparate and arbitrary treatment is found in other ballots cast. *Infra*.

In the same affidavit, Bill Peck points to two ballots cast that were treated differently and quite frankly, in an arbitrary manner. *See* Exhibit A - Affidavit of Bill Peck paragraph 7d labeled Sorting ballots into box 2.

In one ballot cast, there was an original vote cast with Joe Miller and the oval correctly filled in with what looks like black ink or pencil. Then over the vote cast for Joe Miller, a line is drawn in blue ink with the comment that the voter changed their mind. *See* http://i852.photobucket.com/albums/ab86/210thars/double\_vote\_for\_Lisa-Dirk\_Moffatt.jpg

Notably, to the right you can see where the oval for a bond issue was filled in later with blue ink.

The DOE considered the overvote to be a valid vote for candidate Lisa Murkowski.

In another ballot, there was a vote for Scott McAdams correctly filled in. And below in the write-in line, the name Lisa Murskowski was written in but the oval next to the write-in name was crossed out. See http://i852.photobucket.com/albums/ab86/210thars/double\_vote\_for\_Lisa-Penny\_Mayo-1.jpg

The DOE considered the overvote to be a valid vote for Lisa Murkowski.

In both cases, the Defendants can't divine the voters' intent and both votes should be invalid.

Who is to say that the one ballot with the change in blue ink was not made later by someone else? Who is not to say that the one voter accidently received a tainted ballot with the name Lisa Murskowski written in and crossed the oval out in order to vote for candidate Scott McAdams.

Moreover, while there was the impression that you had to fill in the oval and spell Lisa Murkowski correctly, after the ballots had been cast and the counting began, a disparate and arbitrary application of the law started to take hold. *Infra*.

With ballots that were spelled McCosky, Misskowski and Morcowski, the DOE agreed with candidate Joe Miller that the votes should not count. And ballots that were spelled Murkowsky, Murcowski and Merkowski, the DOE determined the ballots should be counted for candidate Lisa Murkowski. And the standard for deciding the validity of the ballot was: if the DOE could phonetically spell the name, it was valid. See http://www.adn.com/2010/11/10/1548282/senator-leading-as-write-ins-counted.html

Fenumiai said she accepted minor misspellings. "If I can pronounce the name by the way it's spelled, that's the standard I'm using," Fenumiai said.

It is evident in determining the validity of a ballot, there was no objective and clear line standard used by the Defendants. They have in a discriminating and arbitrary manner, held precincts and the voters of their precincts under different standards as indicated by the different results in ballots being accepted or denied.

There is no logical reason why you would accept a ballot with Murcowshit written as a vote for candidate Lisa Murkowski and not a ballot with Morcowski written on the ballot. Or not accept a ballot with Morcowski written in as a valid vote but accept a ballot with Murcowski written in as valid vote.

A one vowel difference in both Morcowski and Murcowski but a different voter intent and application of the law?

By the Defendants applying the law in an arbitrary and disparate manner among the precincts and the voters that voted in the precincts, the DOE clearly violated the equal protection clause. See Bush vs. Gore 531 U.S. 98 (2000) citing Gray v. Sanders, 372 U.S. 368 (1963) (An early case in our one person, one vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties.)

Even in his dissent in *Bush*, Justice Souter stated:

I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. . . . I would . . . remand the case to the courts

of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order. *Id.* at 134-35

In this case however, arguably, there is a uniform and clearly defined standard in the law but the Defendants create a vague standard in the law with their application of the law. *Supra*.

And constitutional jurisprudence is exact when it comes to vague laws or standards. *See Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)], supra, at 433, 112 S.Ct. 2059 ("'[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process'") (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); See also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), a statute must ("give the person of ordinary intelligence a reasonable opportunity to know what is prohibited")

#### Conclusion

Therefore, for the reasons stated above, this Court should rule in favor for the Plaintiff Joe Miller and a stricter reading of the law in question, should be followed. To try and create any standard after the election is *verboten*.

Dated this the 28<sup>th</sup> day of December, 2010.

Respectfully submitted.

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