Thomas V. Van Flein
John Tiemessen
Clapp, Peterson, Van Flein,
Tiemessen & Thorsness LLC
711 H St., Suite 620
Anchorage, Alaska 99501-3454
Phone: (907) 272-9272
Facsimile: (907) 272-9586

Michael T. Morley
616 E St. N.W #254
Washington, D.C. 20004
Phone: (202) 393-2851
Facsimile: (907) 272-9586
E-mail: michaelmorleyesq@hotmail.com
Application for *pro hac vice* admission pending

Attorneys for Plaintiff Joe Miller

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

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

SUBSTITUTE AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff Joe Miller hereby alleges as follows:

Introduction

1. In the 2010 general election for U.S. Senate, the Director of the Division of Elections (hereafter, the "Director") ignored the rules for counting write-in ballots that the Alaska legislature clearly and unambiguously set forth in state law, and instead adopted her own alternate—and highly subjective—approach.

2. On November 8, 2010, just 36 hours before Defendant State of Alaska, Division of Elections (hereafter, the "Division") began counting write-in ballots, it released its new ballot-counting policy, attached as Exhibit A to this Substitute Amended Complaint. This retroactive change in the rules for counting votes after voting has concluded unavoidably raises the specter of manipulation, favoritism, and fundamental unfairness. Doing so the day before ballot are to be counted reflects a disturbing lack of transparency regarding the fundamental rules governing how a substantial portion of the ballots cast will be counted, effectively shields the electoral process from public scrutiny, and underscores the illegitimacy of this last-minute change.

3. Although the Division repeatedly declared that the Director would be counting write-in ballots based on what she subjectively perceived to be the "voter's intent," the Division never established or announced any written rules, guidelines, policies, or procedures by which the Director would attempt to divine "voter intent" or apply that nebulous standard.

4. Once Defendants began counting the write-in ballots, it became clear that the Division had established and was imposing two different procedures and policies for determining ballots' validity. For ballots cast for candidates whose names were preprinted on the ballots (hereafter, "preprinted candidates"), such as Plaintiff Miller, the Defendants treated the automated tally machines' determinations regarding which ballots were valid, and could be counted, as conclusive. For write-in candidates, however, the automated tally machines' validity determinations essentially were ignored. Division personnel reviewed all the ballots cast in the election to identify each write-in vote, and determine for themselves whether or not it should be accepted as valid and counted. It is undisputed that Division personnel applied much more liberal, lenient, and forgiving standards than the automated tally machines in determining whether write-in votes were valid, and accepted as valid and counted write-in votes that the automated tally machines would have rejected.

5. Whereas automated tally machines identified only 102,252 potentially valid write-in votes, Division personnel identified a total of 103,805 potentially valid write-in votes, meaning that Division personnel gave additional consideration to 1,553 write-in votes that automated tally machines had rejected as invalid. Of the 103,805 potentially valid write-in votes they identified, Division personnel ultimately counted 101,088 for Lisa Murkowski. Had Division personnel limited their review and further consideration only to the 102,252 ballots that automated tally machines accepted as valid write-in

votes, it is likely that Lisa Murkowski ultimately would have received less than 100,000 votes. Conversely, there were approximately 1,329 votes that the automated tally machines rejected, which the voter had not apparently attempted to cast for a write-in candidate, which Division personnel did not personally review to determine if they nevertheless should be accepted as valid.

6. Thus, in effect, people whose ballots were rejected by automated tally machines had a second chance to have their ballots accepted as valid, and counted, if they attempted to vote for a write-in candidate, but ***not*** if they attempted to vote for a candidate whose name was pre-printed on the ballot, such as Plaintiff Miller. Such arbitrary and disparate treatment unconstitutionally discriminates against candidates such as Plaintiff Miller, as well as the voters who unsuccessfully attempted to cast their ballots for him, and gave a substantial advantage to Lisa Murkowski.

Jurisdiction

7. This Court may exercise federal-question jurisdiction, *see* 28 U.S.C. § 1331, over Count One, which arises under the Elections Clause of the U.S. Constitution, *see* U.S. Const., Art. I, § 4, cl. 1; as well as Counts Two and Three, which both arise under the Equal Protection Clause of the U.S. Constitution, *see* U.S. Const., amend. XIV.

8. This Court may exercise declaratory judgment jurisdiction, *see* 28 U.S.C. § 2201, over all Counts in this Complaint because an actionable, justiciable controversy now exists between Plaintiff and Defendants.

Venue

9. Venue is proper in the United States District Court for the District of Alaska because all defendants reside in Alaska, and a substantial portion of the events giving rise to the underlying claims occurred in Alaska. 28 U.S.C. §§ 1391(b)(1), (b)(2).

10. This case is properly filed in this Division pursuant to D.Ak. LR 3.3(a); *see also* 28 U.S.C. § 81A.

Parties

11. Plaintiff Joe Miller is a citizen and registered voter of the State of Alaska. He is at least 30 years of age and is a natural-born U.S. citizen. On August 31, 2010, Mr. Miller won the primary election to become the Republican nominee in the 2010 general election (hereafter, "the Election") for the office of U.S. Senator. He also cast a vote in the Election for the office of U.S. Senator.

12. Defendant Mead Treadwell, Lieutenant Governor of Alaska, is a resident of Alaska. He statutorily is required to "control and supervise the division of elections," AS § 15.10.105(a), and "administer state election laws," *id.* § 44.19.020(1).

13. Defendant, the State of Alaska, Division of Elections (hereafter, the "Division"), is a department of the State of Alaska established under Alaska Stat. § 15.10.105(a). Its Director is the "chief elections officer of the state," AS § 15.80.010(3); "act[s] for the lieutenant governor in the supervision of central and regional election offices . . . and the administration of all state elections," *id.* § 15.10.105(a); *see also id.* § 15.15.010;

and serves at the lieutenant governor's pleasure, *id.* § 15.10.105(a). The Director may "adopt regulations under AS [§] 44.62 necessary for the administration of state elections." *Id.* § 15.15.010. Defendant Treadwell, as Lieutenant Governor, "control[s] and supervise[s]" the Division, and the Director acts on his behalf. *Id.*

The Division's Eleventh Hour Decision to Accept Statutory Invalid Write-in Ballots

14. Alaska law sets forth clear and unambiguous requirements for counting write-in votes.

a. Alaska law clearly specifies, "In order to vote for a write-in candidate, the voter ***must write in the candidate's name*** in the space provided and fill in the oval opposite the candidate's name in accordance with (1) of this subsection." AS § 15.15.360(a)(10) (emphasis added). This provision clearly requires that a voter must include a "candidate's name" on his ballot in order for a write-in vote to be counted. The statute does not permit a write-in vote to be counted if a voter includes only a "reasonable approximation" or a "close variation" of a candidate's name.

b. Alaska law further provides, "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.***" AS § 15.15.360(a)(11) (emphasis added). This requirement is even more

explicit—a write-in vote may not be counted if there is any deviation between the name of the candidate as written in on the ballot and the candidate's name "as it appears on the write-in declaration of candidacy."

15. Alaska law goes on to specify, "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." AS. § 15.15.360(b) (emphasis added).

16. Notwithstanding these clear, unambiguous, and "mandatory" requirements, the Director applied her own subjective standard in deciding which write-in ballots to count, based on whether she believed the ballot clearly indicates the voter's intent. On November 8, 2010, just 36 hours before the vote count was to start, the Director and Division issued a written policy that allowed the Director to determine, at her own whim, which write-in votes to count or reject as invalid. *See* Exhibit A.

17. As discussed above, Alaska statutes do not allow election officials to count a write-in ballot unless the candidate's name is written on the ballot. AS § 15.15.360(a)(10), (a)(11). There "are no exceptions" to this rule, and any ballots that do not satisfy this standard "may not be counted." *Id.* § 15.15.360(b). Thus, write-in ballots with misspellings are statutorily invalid, and election officials lack the authority to decide nevertheless to count them.

The Division's Discriminatory Treatment of Votes for "Preprinted" Candidates and Write-in Candidates

18. As the Division counted the write-in ballots, it became clear that it also was implementing a discriminatory policy that gave a substantial advantage to write-in candidates.

19. Most ballots cast in the Election were initially counted by automated tally machines. These machines would reject, and decline to count, a person's vote in a particular race if an error or irregularity existed in the portion of the ballot relating to that race, such as:

a. the voter filled in ovals next to the names of more than one candidate;

b. the voter filled in the oval next to the name of the candidate for whom he wished to vote, but also made a stray mark in that area of the ballot;

c. the voter filled in the oval next to the name of a candidate, crossed it out or did not completely erase it, and then filled in the oval next to the name of a different candidate; or

d. the voter did not sufficiently fill in the oval next to the name of the candidate for which he wanted to vote.

20. The automated tally machines rejected and declined to count a total of 2,882 votes. This includes 1,553 votes for write-in candidates, as well as an additional 1,329 votes cast for preprinted candidates or no discernable candidate at all.

21. Once the Division determined, based on the automated tally machines' counts, that the number of write-in votes exceeded the number of votes for any preprinted candidate, it accepted the automated tally machines' vote tallies for the preprinted candidates as conclusive and (with one minor exception) did not further revise or update them. It ignored the automated tally machines' validity determinations regarding write-in votes, however. Rather than reviewing only write-in votes that the automated tally machines had determined were potentially valid, Division personnel started from scratch and reviewed all the ballots cast in the election, to decide for themselves which write-in votes were potentially valid and should be counted.

22. Division personnel applied much more liberal and forgiving standards than the automated tally machines, however, and accepted as valid and counted write-in votes that automated tally machines had rejected. Thus, whereas only ballots for preprinted that satisfied the automated tally machines' strict requirements were counted, Division personnel applied much more favorable and lenient standards in determining which write-in votes to count.

23. Although Division personnel were required to look at and process every single vote cast in the election in order to segregate and review the write-in votes, they did not actually afford any substantive consideration to ballots cast for preprinted candidates. Upon determining that a ballot had been cast for a preprinted candidate, and was not a write-in vote, either Division personnel or the Director simply set it aside without

affording it any further substantive consideration or review. Thus, whereas write-in votes that automated tally machines had rejected were given a "second bite at the apple" to be accepted as valid and counted, votes for preprinted candidates were not.

24. The outcome of the Division's manual ballot review confirms this discriminatory treatment. Whereas 1,553 write-in votes that automated tally machines had rejected as invalid were re-considered by Division personnel, Joe Miller's vote tally increased by a total of only 20 votes as a result of this process (many or all of these additional votes were write-in votes for Miller).

25. This policy of counting write-in votes that had been rejected by automated tally machines if the voter's intent was clear—but not doing the same for other votes—gave a substantial, unfair, and illegal advantage to write-in candidates such as Lisa Murkowski, and unconstitutionally discriminated against both candidates whose names were pre-printed on the ballot, such as Plaintiff Miller, and voters who unsuccessfully attempted to cast ballots for them.

COUNT ONE—ELECTIONS CLAUSE
(U.S. Const., Art. I, § 4, Cl. 1)

26. Plaintiff re-alleges and incorporates by reference the foregoing Paragraphs 1 through 25, as if set forth fully herein.

27. Defendants' decision to override state law by establishing a policy whereby write-in ballots that do not actually contain a candidate's name can be accepted as valid

and counted violates the Elections Clause of the U.S. Constitution, which provides, "The Times, Places and Manner of 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).

28. The Elections Clause specifically bestows authority to regulate the "Manner of holding Elections for Senators" to the Alaska legislature, not state executive branch officials such as the Lieutenant Governor or Director. Defendants' attempt to effectively nullify various provisions of Alaska Stat. § 15.15.360 by establishing their own standards for counting write-in ballots therefore is unconstitutional.

29. Plaintiff respectfully requests injunctive and declaratory relief against this violation of the Elections Clause.

COUNT TWO—EQUAL PROTECTION CLAUSE
"Voter Intent" Standard is Unconstitutionally Vague
(U.S. Const., amend XIV)

30. Plaintiff re-alleges and incorporates by reference the foregoing Paragraphs 1 through 29, as if set forth fully herein.

31. The U.S. Supreme Court has held that a policy directing election officials simply to attempt to ascertain "the intent of the voter" when deciding whether, or how, to count ballots is "unobjectionable as . . . a starting principle," but is not constitutionally sufficient. *Bush v. Gore*, 531 U.S. 98, 105 (2000). The Equal Protection Clause requires state officials to establish much more "specific standards" and "uniform rules"

in order to prevent "the standards for accepting or rejecting contested ballots" to vary "within a single county from one []count team to another." *Id.* at 106.

32. Defendants have adopted the same type of policy that the Supreme Court already has declared constitutionally inadequate. Rather than implementing the clear, specific, and uniform standards for counting write-in votes set forth in Alaska Stat. § 15.15.360, the Director attempted to divine for herself the "intent of the voter" on write-in votes based on vague, amorphous, subjective—and unspecified—criteria. This quixotic quest resulted in the arbitrary and disparate treatment of write-in ballots in clear violation of the U.S. Constitution.

33. Plaintiff respectfully requests injunctive and declaratory relief against this violation of the Equal Protection Clause.

COUNT THREE—EQUAL PROTECTION
Discriminatory Policy Regarding "Rejected" Ballots
(U.S. Const., amend. XIV)

34. Plaintiff re-alleges and incorporates by reference the foregoing Paragraphs 1 through 33, as if set forth fully herein.

35. Defendants 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:

a. If the person had attempted to vote for a candidate whose name was pre-printed on the ballot, and had not written in the name of a candidate, a vote that was

rejected by an automated tally machine was deemed invalid and not counted, without any substantive individualized review by the Division or Director to determine whether the voter's intent could be ascertained.

b. If, in contrast, a person had attempted to vote for a write-in candidate, and had written a candidate's name on the ballot, but the vote was rejected by an automated tally machine, Division personnel or the Director gave a substantive personal review of the ballot to determine whether the voter's intent could be ascertained and, if they believed they subjectively could determine the candidate for whom the voter wished to cast their vote, they counted the ballot.

36. A person whose vote in the race for U.S. Senate was rejected by an automated tally machine could have that vote counted if they had attempted to vote for a write-in candidate, but not if they attempted to vote for a candidate whose name was pre-printed on the ballot.

37. These disparate policies discriminate against both candidates whose names were pre-printed on the ballot, as well as people who unsuccessfully attempted to cast their votes for such candidates. Among the universe of people whose ballots had been rejected by automated tally machines, there is no basis for attempting to ascertain voter intent only of those people who attempted to cast write-in votes, and not of those people who attempted to vote for candidates whose names were pre-printed on the ballot.

38. Such arbitrary and disparate treatment constitutes unlawful discrimination in violation of the Equal Protection Clause, as interpreted in *Bush v. Gore*, 531 U.S. 98, 105 (2000).

39. Plaintiff respectfully requests injunctive and declaratory relief against this violation of the Equal Protection Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment in their favor and against Defendants as follows:

1. For preliminary and permanent injunctions enjoining Defendants from:

a. violating the Elections Clause by usurping the state legislature's authority to determine the "manner" in which elections for U.S. Senate shall be conducted, by counting, recounting, or otherwise accepting as valid write-in ballots in which the name of the candidate is spelt incorrectly, or on which the name of the candidate is not written as it appears on a write-in declaration of candidacy;

b. violating the Equal Protection Clause by determining whether to count or recount write-in ballots based on the vague, amorphous, and subjective "intent of the voter" standard, without further guidelines or restrictions;

c. violating the Equal Protection Clause by applying different standards to determine the validity of ballots, by accepting validity determinations made by automated tally machines, rigidly applying strict criteria, for votes for preprinted

candidates, while allowing Division personnel, applying much more lenient standards, to make validity determinations regarding write-in votes.; and

d. certifying the results of the election for U.S. Senate based on a count that involved any of the federal constitutional violations set forth above.

2. For a declaratory judgment that:

a. the Elections Clause of the U.S. Constitution prohibits Defendants from enacting election provisions inconsistent with legislative mandates, and in this case, from counting or otherwise accepting as valid any write-in ballots in which the name of the candidate is spelled incorrectly, or on which the name of the candidate is not written as it appears on a write-in declaration of candidacy;

b. Defendants' policy of attempting to divine the "intent of the voter" from write-in ballots with misspellings is so vague and amorphous as to violate the Equal Protection Clause of the U.S. Constitution; and

c. Defendants violated the Equal Protection Clause by accepting as conclusive the validity determinations made by automated tally machines for votes cast for preprinted candidates, while allowing Division personnel, applying much more lenient criteria, to conclusively determine the validity of write-in votes.

3. For costs and attorneys' fees, if any, as allowable by applicable law; and

4. For such other and further relief as this Court deems just and appropriate.

Dated this _____ day of December, 2010.

Respectfully submitted,

_____

Thomas V. Van Flein
John Tiemessen
Michael T. Morley (not admitted in the U.S. District Court for the District of Alaska)
Attorneys for Plaintiff Joe Miller