

**SB**

**31**

<TARGET><BILL>SB 31</BILL><SUBJECT>SB  
31</SUBJECT><COMM>SJUD27</COMM></TARGET>

# SENATE COMMITTEE REPORT

Rules

DATE: 1/28/11

FURTHER:

DATE TURNED  
IN TO OFFICE: 2/2/11

**Judiciary Committee** considered SENATE BILL NO. 31

## SB 31-COUNTING OF WRITE-IN VOTES

"An Act relating to the counting of write-in votes."

and recommends:

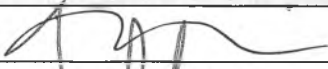
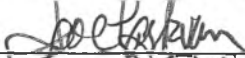


- be replaced with CS SB31 (JUD)  Same Title  New Title
- adopt previous CS \_\_\_\_\_ (\_\_\_\_\_)  Same Title  New Title
- attached amendment(s)
- adopt \_\_\_\_\_ Letter of Intent
- further referral to \_\_\_\_\_ Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
GOV			✓	1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	Do PASS	Do NOT PASS	NO REC	AMEND
	Wielechowski	✓			
	PASKWAN	X			
	McCreire	✓			
CHAIR: 	French	✓			

**CS FOR SENATE BILL NO. 31(JUD)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the counting of write-in votes."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 \* **Section 1.** AS 15.15.360 is amended by adding a new subsection to read:

4 (d) Write-in votes shall be counted according to the following rules:

5 (1) writing in the name of a candidate whose name is printed on the  
6 ballot does not invalidate a write-in vote unless the director determines, on the basis of  
7 other evidence, that the ballot was so marked for the purpose of identifying the ballot;

8 (2) in order to vote for a write-in candidate, the voter must write in the  
9 candidate's name in the space provided and fill in the oval opposite the candidate's  
10 name in accordance with (a)(1) of this section;

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

15 (4) if the write-in vote is for governor and lieutenant governor, the vote

1 shall be counted if the oval is filled in and the names of the candidates for governor  
 2 and lieutenant governor, as they appear on the write-in declaration of candidacy, or the  
 3 last names of the candidates for governor and lieutenant governor, or the name of the  
 4 candidate for governor, as it appears on the write-in declaration of candidacy, or the  
 5 last name of the candidate for governor is written in the space provided;

6 (5) in counting votes for a write-in candidate, the director shall  
 7 disregard any abbreviation, misspelling, or other minor variation in the form of the  
 8 name of a candidate if the intention of the voter can be ascertained.

9 \* **Sec. 2.** AS 15.15 is amended by adding a new section to read:

10 **Sec. 15.15.365. Counting of write-in votes in general election.** (a) Write-in  
 11 votes on a general election ballot shall be counted by candidate only if the aggregate  
 12 of all votes cast for all write-in candidates for the particular office is

13 (1) the highest number of votes received by any candidate for the  
 14 office; or

15 (2) the second highest number of votes received by any candidate and  
 16 the difference between the total number of votes received by the candidate having the  
 17 highest number of votes and the aggregate of all votes cast for all write-in candidates  
 18 for the office is less than the percentage necessary for a recount at the state's cost  
 19 under AS 15.20.450.

20 (b) Write-in votes that do not meet the requirements of this section may not be  
 21 individually counted under this section.

22 (c) If the director determines that the requirements of (a) of this section have  
 23 been met, the director shall establish the place and date for counting those write-in  
 24 votes, and the director, or a designee of the director, shall count all write-in ballots  
 25 under AS 15.15.360(d).

26 (d) This section does not apply to the counting of federal write-in absentee  
 27 ballots submitted under 42 U.S.C. 1973ff.

28 \* **Sec. 3.** AS 15.15.360(a)(9), 15.15.360(a)(10), 15.15.360(a)(11), and 15.15.360(a)(12) are  
 29 repealed.

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
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
State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

February 1, 2011

**SUBJECT:** Comments on the committee's questions  
(CSSB 31(JUD) (Work Order No. 27-LS0350\E))

**TO:** Senator Hollis French   
Chair of the Senate Judiciary Committee  
Attn: Cindy Smith

**FROM:** Alpheus Bullard   
Legislative Counsel

The committee raised a number of questions relating to CSSB 31(JUD) (27-LS0350\E) Monday afternoon. I have a few comments that may be of assistance to the committee's deliberations. I have paraphrased the committee's questions below.

**Why are abbreviations included along with misspellings and other minor variations in the form of the name of a candidate under committee substitute's sec. 15.15.360(d)(5)?**

In drafting the bill, I mirrored language, to the extent applicable, found in the Uniformed and Overseas Citizens Absentee Voting Act.<sup>1</sup> The division of elections (division) is already required to observe the standard set forth by that Act for certain voters, I used the language to ensure a consistent standard.

As employed in the committee substitute, the paragraph clarifies that, if the intention of the voter can be ascertained, the voter's write-in vote for a candidate shall be counted by the director of elections (director). One circumstance that might clearly demonstrate the voter's intent, but not constitute a misspelling or other minor variation, would be a voter's abbreviation of a write-in candidate's hyphenated last name.<sup>2</sup>

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<sup>1</sup> "Any abbreviation, misspelling, of other minor variation in the form of a name of a candidate or political party shall be disregarded in determining the validity of the ballot if the intention of the voter can be ascertained." (42 U.S.C. § 1973ff-2(C)(3)).

<sup>2</sup> Cindy Smith asked if there were any cases addressing the acceptance or construction of abbreviations used by a person voting for a write-in candidate. I am not aware of any cases relating to the construction of, or practice of accepting, abbreviations used by person's voting for a write-in candidate.

The intention of the voter is paramount.<sup>3</sup> If the intention of a voter can be ascertained by the director when she reviews a voter's write-in vote, whether the voter employs an abbreviation, misspells the write-in candidate's name, or makes some other minor variation in the name of the candidate, the form of the variation or mistake should not be considered significant.

**What is the function of the committee substitute's sec. 15.15.365(b)?**

The committee substitute's sec. 15.15.365(b) provides:

(b) Write-in votes that do not meet the requirements of this section may not be individually counted under this section.

Subsection (b) provides that write-in votes on a general election ballot will only be counted by candidate if the conditions required under the section are met. Subsection (a) provides:

(a) Write-in votes on a general election ballot shall be counted by candidate only if the aggregate of all votes cast for all write-in candidates for the particular office is

(1) the highest number of votes received by any candidate for the office; or

(2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

Subsection (b) is redundant. Subsection (a) already provides that "[w]rite-in votes on a general election ballot shall be counted by candidate only if . . ." As a drafting choice, I included the language of the provision's subsection (b) because it appears in the regulation that is the basis for the committee substitute's sec. 2 (6 AAC 25.085(c)).

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<sup>3</sup> See Miller v. Treadwell, Op. No. 6532, 2010 Alas. LEXIS 133 (Alaska Dec. 22, 2010), at 2, citing Edgmon v. State, Office of the Lieutenant Governor, Division of Elections, 152 P.3d 1154 (Alaska 2007), at 1157 ("the voter shall not be disenfranchised because of mere mistake, but [the voter's] intention shall prevail") (internal citations and quotations omitted); State, Division of Elections v. Alaska Democratic Party, Case No. S-14054, Order dated Oct. 29, 2010 at 3 ("[w]e have consistently emphasized the importance of voter intent because the opportunity to freely cast [one's] ballot is fundamental") (internal citations omitted).

While it is my legal opinion that the subsection is not necessary, I strongly recommend consulting with the division as to what their opinion on the matter is; given that the division has been operating pursuant to the regulation, as drafted, for over 10 years.<sup>4</sup>

**Why is the "as appears on the write-in declaration of candidacy" language retained in the committee substitute's sec. 15.15.360(d)(3) and (4)?**

Under AS 15.25.105(a), votes for a write-in candidate in the general election will not be counted unless the candidate has filed a letter of intent (write-in declaration of candidacy) with the director. Under AS 15.25.105(a)(9) that letter must include "the name of the candidate as the candidate wishes it to be written on the ballot by the voter[.]" This permits a candidate to provide an alternative name (i.e. a nickname or pseudonym)<sup>5</sup> or spelling of the candidate's name. This alternative name, or spelling of the candidate's name, appears on the write-in declaration of candidacy.<sup>6</sup>

While the appropriate interpretation of the phrase was litigated in Miller v. Treadwell, Op. No. 6532, 2010 Alas. LEXIS 133 (Alaska Dec. 22, 2010), the Court interpreted the "as it appears" language of AS 15.15.360(A)(11) to not require that a candidate's name be correctly spelled.

Miller points to language in AS 15.15.360(a)(11) providing that "[a] vote for a write-in candidate . . . 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

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<sup>4</sup> The regulation took effect August 13, 2000 (Register 155).

<sup>5</sup> We agree with the State that subsection [AS 15.15.360](a)(11) concerns pseudonyms. The "nickname" field on the declaration of candidacy form supports this interpretation [AS 15.15.030(4)]. If that field were not present, a candidate with a pseudonym might write only his or her legal name on the form, thus invalidating ballots with the candidate's pseudonym written in. The "nickname" field allows a candidate to ensure that his or her pseudonym "appears on the write-in declaration of candidacy" so that the write-in votes listing that pseudonym will count. Thus, the word "appears" relates to a pseudonym's possible presence on the ballot, not the particular form of the vote, and demonstrates that the statute is inclusive — it is designed to include, rather than exclude, votes.

Miller v. Treadwell, Op. No. 6532, 2010 Alas. LEXIS 133, 6 - 7 (Alaska Dec. 22, 2010) (internal footnotes omitted).

<sup>6</sup> By way of analogous comparison, see AS 15.25.030(a)(15), which requires a member of a political party who seeks to become a candidate of that party in the primary election, to include "the manner in which the candidate wishes the candidate's name to appear on the ballot" on the candidate's declaration of candidacy.

candidacy, of the candidate or the last name of the candidate is written in the space provided." He argues that this subsection, read in the context of other provisions of the statute, requires that a write-in candidate's name be written and spelled perfectly, even if the voter's intent to vote for a particular candidate can be readily ascertained. But when 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. And this inclusiveness is consistent with the overarching purpose of an election: "to ascertain the public will."

Id. 2010 Alas. LEXIS 133 at 5 - 6 (internal citations omitted).

The argument, rejected by the Court, that the "as it appears" language evidences a legislative intent to require that a write-in candidate's name be spelled correctly, is addressed by the committee substitute's sec. 15.15.360(d)(5), which provides:

(5) in counting votes for a write-in candidate, the director shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

The inclusion of this paragraph should provide a clear statutory answer as to whether the "as it appears" language of AS 15.15.360 should be interpreted to require that a candidate's name must be spelled correctly, while still allowing a write-in candidate to provide the division, under AS 15.25.105(a)(9), an alternative spelling or nickname that people intending to vote for that candidate might write on the ballot.

**May a write-in candidate running for the office of governor run without an accompanying write-in candidate for the office of lieutenant governor?**

A write-in candidate for governor must run together with a candidate for lieutenant governor. AS 15.25.105(b) provides:

(b) If a write-in candidate is running for the office of governor, the candidate must file a joint letter of intent together with a candidate for lieutenant governor. Both candidates must be of the same political party or group.

If you have further questions, do not hesitate to contact me.

TLAB:plm:ljw  
11-047.plm

*Summary*

27-LS0350E  
Bullard  
1/31/11

**CS FOR SENATE BILL NO. 31(JUD)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:  
Referred:

Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the counting of write-in votes."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 \* **Section 1.** AS 15.15.360 is amended by adding a new subsection to read:

4 (d) Write-in votes shall be counted according to the following rules:

5 (1) writing in the name of a candidate whose name is printed on the  
6 ballot does not invalidate a write-in vote unless the director determines, on the basis of  
7 other evidence, that the ballot was so marked for the purpose of identifying the ballot;

8 (2) in order to vote for a write-in candidate, the voter must write in the  
9 candidate's name in the space provided and fill in the oval opposite the candidate's  
10 name in accordance with (a)(1) of this section;

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

15 (4) if the write-in vote is for governor and lieutenant governor, the vote

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1 shall be counted if the oval is filled in and the names of the candidates for governor  
2 and lieutenant governor, as they appear on the write-in declaration of candidacy, or the  
3 last names of the candidates for governor and lieutenant governor, or the name of the  
4 candidate for governor, as it appears on the write-in declaration of candidacy, or the  
5 last name of the candidate for governor is written in the space provided;

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7 disregard any abbreviation, misspelling, or other minor variation in the form of the  
8 name of a candidate if the intention of the voter can be ascertained.

9 \* **Sec. 2.** AS 15.15 is amended by adding a new section to read:

10 **Sec. 15.15.365. Counting of write-in votes in general election.** (a) Write-in  
11 votes on a general election ballot shall be counted by candidate only if the aggregate  
12 of all votes cast for all write-in candidates for the particular office is

13 (1) the highest number of votes received by any candidate for the  
14 office; or

15 (2) the second highest number of votes received by any candidate and  
16 the difference between the total number of votes received by the candidate having the  
17 highest number of votes and the aggregate of all votes cast for all write-in candidates  
18 for the office is less than the percentage necessary for a recount at the state's cost  
19 under AS 15.20.450.

20 (b) Write-in votes that do not meet the requirements of this section may not be  
21 individually counted under this section.

22 (c) If the director determines that the requirements of (a) of this section have  
23 been met, the director shall establish the place and date for counting those write-in  
24 votes, and the director, or a designee of the director, shall count all write-in ballots  
25 under AS 15.15.360(d).

26 (d) This section does not apply to the counting of federal write-in absentee  
27 ballots submitted under 42 U.S.C. 1973ff.

28 \* **Sec. 3.** AS 15.15.360(a)(9), 15.15.360(a)(10), 15.15.360(a)(11), and 15.15.360(a)(12) are  
29 repealed.

6 AAC  
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**AS 15.15.360. Rules for counting ballots**

(a) The election board [**OR DIRECTOR, AS MAY BE APPROPRIATE**] shall count ballots according to the following rules:

(1) A voter may mark a ballot only by filling in, making "X" marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate, proposition, or question that the voter desires to designate.

(2) A failure to properly mark a ballot as to one or more candidates does not itself invalidate the entire ballot.

(3) If a voter marks fewer names than there are persons to be elected to the office, a vote shall be counted for each candidate properly marked.

(4) If a voter marks more names than there are persons to be elected to the office, the votes for candidates for that office may not be counted.

(5) The mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

(6) Improper marks on the ballot may not be counted and do not invalidate marks for candidates properly made.

(7) An erasure or correction invalidates only that section of the ballot in which it appears.

(8) A vote marked for the candidate for President or Vice-President of the United States is considered and counted as a vote for the election of the presidential electors.

**(b) Write-in votes shall be counted according to the following rules:**

**(1) [9]** Write-in votes are not invalidated by writing in the name of a candidate whose name is printed on the ballot unless **it appears [THE ELECTION BOARD OR DIRECTOR DETERMINES]**, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot.

division ?

election bd.  
must be  
removed

**(2) [10]** 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 **(a)(1)** of this section.

ok

**(3) [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 **of the candidate**, 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.

**(4) [12]** If the write-in vote is for governor and lieutenant governor, the vote shall be counted if the oval is filled in and the names, as they appear on the write-in declaration of candidacy, of the candidates for governor and lieutenant governor or the last names of the candidates for governor and lieutenant governor, or the name, as it appears on the write-in declaration of candidacy, of the candidate for governor or the last name of the candidate for governor is written in the space provided.

**(5) [13] [IN COUNTING VOTES FOR A WRITE-IN CANDIDATE, THE ELECTION BOARD OR DIRECTOR SHALL DISREGARD ANY] Where there is an** abbreviation, misspelling, or other minor variation in the form of the name of **[NAME OF A] a write-in** candidate, the director will review the ballot and will count the vote if the intention of the voter can be ascertained.

**(c) 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.**

Sec. 2 AS 15.15 is amended by adding.....(this section remains the same until (2) (c) (2):

- (2) in an election for federal or statewide office, **[THE DIRECTOR SHALL COUNT]** all write-in ballots **shall be counted** under **the rules set out in AS 15.15.360(b)**.

CONFIDENTIAL

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

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FAX (907) 465-2029  
Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

January 25, 2011

**SUBJECT:** Providing the Director of Elections the authority to ascertain the intention of a voter under AS 15.15.360(a) (CSSB 31( ), Work Order No. 27-LS0350\B)

**TO:** Senator Joe Thomas  
Attn: Grier Hopkins

**FROM:** Alpheus Bullard *AB*  
Legislative Counsel

You requested a blank committee substitute that would revise Senate Bill 31 (27-LS0350\M) and AS 15.15.360 to provide the Director of Elections (director) the authority, in counting votes for a write-in candidate, to disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained.

AS 15.15.360 prescribes how an election board shall count ballots. The change you requested required modifications to the bill beyond the substitution of "director" for "election board" in the bill's ultimate paragraph.<sup>1</sup>

While a regulation, 6 AAC 25.085(d),<sup>2</sup> provides the director authority to establish the place and date for counting certain write-in votes, the director is not currently authorized

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<sup>1</sup> Note the change to the bill's title.

<sup>2</sup> **6 AAC 25.085. Counting of write-in votes in general election.**

(a) Except as provided in 6 AAC 25.670, the provisions of this section apply for the counting of write-in votes in a general election in this state.

(b) Counting write-in votes in a general election by candidate will only be done under this section if the aggregate of all votes cast for all write-in candidates for the particular office is

(1) the highest number of votes received by any candidate for the office; or

(2) the second highest number of votes received by any candidate and the difference between the total number of votes received by the candidate having the highest number of votes and the aggregate of

Senator Joe Thomas

January 25, 2011

Page 2

under statute to count ballots outside of certain statutorily identified situations.<sup>3</sup> Nothing now in statute specifically authorizes the director to count ballots in a close election contest between a candidate on the ballot and a write-in candidate.

For this reason, your requested committee substitute includes an added section codifying the substance of 6 AAC 25.085 and further providing that the director shall count write-in ballots in certain elections for a federal or statewide office.

If I can be of further assistance please do not hesitate to contact me.

TLAB:med  
11-006.med

Enclosure

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all votes cast for all write-in candidates for the office is less than the percentage necessary for a recount at the state's cost under AS 15.20.450.

(c) Write-in votes that do not meet the requirements of this section will not be individually counted under this section.

(d) If the director determines that the requirements of this section have been met, the director will establish the place and date for counting those write-in votes.

<sup>3</sup> While the director has general administrative supervision over the conduct of state elections and may adopt regulations necessary for the administration of state elections (AS 15.15.010) and regulations prescribing the manner in which the precinct ballot count is accomplished so as to ensure accuracy in the ballot count (AS 15.15.350), the director is authorized to review or count ballots only in certain statutorily enumerated areas. The director must (1) count or review certain absentee and vote by mail ballots under AS 15.15.430, AS 15.20.082(c), AS 15.20.201(d), AS 15.20.480, and AS 15.20.800(e); (2) review and count certain ballots under AS 15.15.430; and (3) review all ballots in a recount election (AS 15.20.480).

27-LS0350\B  
Bullard  
1/24/11

**CS FOR SENATE BILL NO. 31( )**

IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

**BY**

**Offered:  
Referred:**

**Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the counting of ballots."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 **\* Section 1.** AS 15.15.360(a) is amended to read:

4 (a) The election board or director, as may be appropriate, shall count  
5 ballots according to the following rules:

6 (1) A voter may mark a ballot only by filling in, making "X" marks,  
7 diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or  
8 plus signs that are clearly spaced in the oval opposite the name of the candidate,  
9 proposition, or question that the voter desires to designate.

10 (2) A failure to properly mark a ballot as to one or more candidates  
11 does not itself invalidate the entire ballot.

12 (3) If a voter marks fewer names than there are persons to be elected to  
13 the office, a vote shall be counted for each candidate properly marked.

14 (4) If a voter marks more names than there are persons to be elected to  
15 the office, the votes for candidates for that office may not be counted.

1 (5) The mark specified in (1) of this subsection shall be counted only if  
2 it is substantially inside the oval provided, or touching the oval so as to indicate  
3 clearly that the voter intended the particular oval to be designated.

4 (6) Improper marks on the ballot may not be counted and do not  
5 invalidate marks for candidates properly made.

6 (7) An erasure or correction invalidates only that section of the ballot  
7 in which it appears.

8 (8) A vote marked for the candidate for President or Vice-President of  
9 the United States is considered and counted as a vote for the election of the  
10 presidential electors.

11 (9) Write-in votes are not invalidated by writing in the name of a  
12 candidate whose name is printed on the ballot unless the election board or director  
13 determines, on the basis of other evidence, that the ballot was so marked for the  
14 purpose of identifying the ballot.

15 (10) In order to vote for a write-in candidate, the voter must write in  
16 the candidate's name in the space provided and fill in the oval opposite the candidate's  
17 name in accordance with (1) of this subsection.

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

22 (12) If the write-in vote is for governor and lieutenant governor, the  
23 vote shall be counted if the oval is filled in and the names, as they appear on the write-  
24 in declaration of candidacy, of the candidates for governor and lieutenant governor or  
25 the last names of the candidates for governor and lieutenant governor, or the name, as  
26 it appears on the write-in declaration of candidacy, of the candidate for governor or the  
27 last name of the candidate for governor is written in the space provided.

28 (13) In counting votes for a write-in candidate, the election board  
29 or director shall disregard any abbreviation, misspelling, or other minor  
30 variation in the form of the name of a candidate if the intention of the voter can  
31 be ascertained.

1 \* **Sec. 2.** AS 15.15 is amended by adding a new section to read:

2 **Sec. 15.15.365. Counting of write-in votes in general election.** (a) Write-in  
3 votes on a general election ballot shall be counted by candidate only if the aggregate  
4 of all votes cast for all write-in candidates for the particular office is

5 (1) the highest number of votes received by any candidate for the  
6 office; or

7 (2) the second highest number of votes received by any candidate and  
8 the difference between the total number of votes received by the candidate having the  
9 highest number of votes and the aggregate of all votes cast for all write-in candidates  
10 for the office is less than the percentage necessary for a recount at the state's cost  
11 under AS 15.20.450.

12 (b) Write-in votes that do not meet the requirements of this section may not be  
13 individually counted under this section.

14 (c) If the director determines that the requirements of (a) of this section have  
15 been met,

16 (1) the director shall establish the place and date for counting those  
17 write-in votes; and

18 (2) in an election for federal or statewide office, the director shall  
19 count all write-in ballots under AS 15.15.360. ✓

20 (d) This section does not apply to the counting of federal write-in absentee  
21 ballots submitted under 42 U.S.C. 1973ff.

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**C**

Supreme Court of Missouri, Division No. 1.  
Oscar P. KASTEN, Appellant,  
v.  
Ora N. GUTH, Respondent.

No. 50373.  
Feb. 10, 1964.

Action to contest county school superintendent election. The Circuit Court of Perry County, J. O. Swink, J., entered a judgment adverse to the contestant who appealed. The Supreme Court, Holman, J., held that notice to contest election alleging that 67 uncounted votes were cast for person with same first and last name as contestant without insertion of any middle initial and that voters intended those ballots to be cast for contestant, a write-in candidate, thereby giving contestant more votes than declared winner was sufficient to state claim upon which relief could be granted.

Reversed and remanded.

West Headnotes

**[1] Statutes 361**  **181(1)****361** Statutes

**361VI** Construction and Operation  
**361VI(A)** General Rules of Construction  
**361k180** Intention of Legislature  
**361k181** In General  
**361k181(1)** k. In General. Most

Cited Cases

Primary rule in construction of statutes is to ascertain and give effect to intent of legislature.

**[2] Elections 144**  **181****144** Elections

**144VII** Ballots  
**144k181** k. Erasure and Insertion of Names.  
Most Cited Cases

Qualified voter may vote for any candidate of his choice by writing name of such person on ballot. Sections 77.040, 79.030, 111.580(2), 122.210, 122.400, 122.960 RSMo 1959, V.A.M.S.

**[3] Elections 144**  **181****144** Elections**144VII** Ballots

**144k181** k. Erasure and Insertion of Names.

Most Cited Cases

Statute providing for filing of declaration by candidates for office of county school superintendent 45 days before election does not prohibit election of write-in candidate to that office. Section 167.020 RSMo 1959, V.A.M.S.

**[4] Elections 144**  **285(3)****144** Elections**144X** Contests

**144k283** Pleading

**144k285** Complaint, Petition, Statement, or Notice

**144k285(3)** k. Errors and Irregularities.

Most Cited Cases**Elections 144**  **285(4)****144** Elections**144X** Contests

**144k283** Pleading

**144k285** Complaint, Petition, Statement, or Notice

**144k285(4)** k. Result of Election and Effect of Irregularities. Most Cited Cases

Notice to contest election alleging that 67 uncounted votes were cast for person with same first and last name as contestant without insertion of any middle initial and that voters intended those ballots to be cast for contestant, a write-in candidate, thereby giving contestant more votes than declared winner was sufficient to state claim upon which relief could be granted. V.A.M.S.Const. art. 5, § 3; Section 167.020 RSMo 1959, V.A.M.S.

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[5] Elections 144 ↪ 186(4)

144 Elections  
144VII Ballots  
144k185 Effect of Irregularities or Defects  
144k186 In General  
144k186(4) k. Indication of Choice by Voter. Most Cited Cases

If voters' intention in **writing in name** of candidate can be determined, intention will not be defeated because of an irregularity in writing of **candidate's name**.

[6] Elections 144 ↪ 293(4)

144 Elections  
144X Contests  
144k290 Evidence  
144k293 Admissibility in General  
144k293(4) k. Showing for Whom Votes Were Intended. Most Cited Cases

Evidence was admissible in election contest to disclose intent of voters who **wrote in name** on ballot which bore some similarity to **name of write-in** candidate.

[7] Elections 144 ↪ 181

144 Elections  
144VII Ballots  
144k181 k. Erasure and Insertion of Names. Most Cited Cases

Ballots on which **name** of candidate was **written in** without a line drawn through printed **name** of other candidate for same office should not be **counted** for either candidate.

\*111 Stephen N. Limbaugh, Limbaugh, Limbaugh & Russell, Cape Girardeau, for appellant.

Francis Toohy, Jr., Roscoe D. Moore, Perryville, for respondent.

HOLMAN, Judge.  
In this action appellant, Oscar P. Kasten, seeks

to contest the election of respondent, Ora N. Guth, to the office of county superintendent of public schools at the school election held on April 2, 1963. The circuit court sustained respondent's motion to dismiss the notice of election contest filed by appellant. Contestant has duly appealed from that judgment. We have jurisdiction because the case involves the title to an 'office under this state.' Article V, § 3. Constitution of Missouri, 1945, V.A.M.S.; Armantrout v. Bohon, Mo.App., 157 S.W.2d 530.

The Notice of Election Contest reads as follows:

'Take notice that I, Oscar P. Kasten, hereby present this notice to the Circuit Court of Perry County, Missouri, for the purpose of contesting the election of Ora N. Guth to the office of County Superintendent of Schools for Perry County, Missouri, at the election held on April 2, 1963, and as grounds for such contest state as follows:

'1. On Tuesday, April 2, 1963, an election was held in Perry County, Missouri, \*112 for the purpose of electing, among other officers, a county superintendent of schools for Perry County, Missouri.

'2. The printed ballot for this office contained the name of Ora N. Guth, she being the only candidate who had announced for this office in accordance with the requirements of Section 167.020 RSMo 1959 [V.A.M.S.].

'3. About 15 days before the election held April 2, 1963, Oscar P. Kasten decided to run for the office of Perry County Superintendent of Schools and announced his candidacy as a write-in candidate through the media of newspapers, radio, posters, printed cards and word of mouth.

'4. The formal canvass of the ballots cast for this office revealed the following tabulation: For Ora N. Guth 1107 votes; for Oscar P. Kasten 1084 votes; for Oscar Kasten 67 votes; for Oscar P. Kassel 1 vote; for Oscar P. Casten 1 vote; for Roger Kasten 1 vote; for Leo Rozier 1 vote; for James Burgess 1 vote.

'In addition, there were 145 votes which were voided because the name of Oscar P. Kasten was written in but the name of the printed candidate was not crossed out. On the basis of the foregoing Ora N.

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Guth was declared the winner by a margin of 23 votes over her write-in opponent Oscar P. Kasten.

'5. Contestant Oscar P. Kasten avers that he should have been declared the winner of such election for the following reasons: (a) The sixty-seven (67) votes cast for Oscar Kasten were intended for contestant and should have been counted for him. (b) The one (1) vote cast for Oscar P. Kassel was intended for contestant and should have been counted for him. (c) The one (1) vote cast for Oscar P. Casten was intended for contestant and should have been counted for him. (d) The one (1) vote cast for Roger Kasten was intended for contestant and should have been counted for him. (e) The one hundred forty-five (145) voided votes which had contestant's name written in but which failed to have contestee's name crossed out were intended for contestant and should have been counted for him. (f) The votes cast for Oscar P. Kasten, Oscar Kasten, Oscar P. Kassel, Oscar P. Casten and Roger Kasten were all intended to be cast for one and the same person, Oscar P. Kasten, and all said votes should have been counted for him. (g) The vote cast by Jerri Carter and that cast by Joan Lorberg were invalid because they were cast in the City of Perryville District when such persons were residents of the Hunt District and such votes should have been cast in the Hunt District. (h) The vote cast by Winifred Ketchum and that cast by Mary Lewis were invalid because such persons had not resided in the State of Missouri one whole year before the election of April 2, 1963.

'Wherefore, contestant, Oscar P. Kasten, prays for a recount of all votes cast in the election of Perry County Superintendent of Schools held April 2, 1963, in Perry County, Missouri; that all votes cast for Oscar Kasten, Oscar P. Kassel, Oscar P. Casten, Roger Kasten and all void ballots be counted for contestant; that the votes of Jerri Carter, Joan Lorberg, Winifred Ketchum and Mary Lewis be voided and not counted for the reasons mentioned in this notice and for such other and further relief as may appear proper and just.'

Ora N. Guth filed the following motion to dismiss the foregoing notice: '1. Comes now the contestee and moves to dismiss the notice of election contest filed by contestant on the ground that such notice fails to state a claim upon which relief can be granted. 2. Contestee further moves that the notice of

election contest filed by contestant be dismissed for the reason that he has failed to comply with the mandatory provisions of § 167.020 RSMo 1959 [V.A.M.S.] pertaining to the requirement that all candidates for the office of County Superintendent of Schools must file a declaration of candidacy at least 45 days before the date of the election and that he is therefore not entitled to file this contest nor to hold the office of \*113 County Superintendent of Schools.' As stated, the trial court sustained said motion to dismiss.

We will first consider the allegations of paragraph 2 of the motion. While it states that contestant 'is therefore not entitled to file this contest nor to hold the office of County Superintendent of Schools,' we construe that portion of the motion as alleging that contestant was disqualified from election or was not entitled to be elected to the office in question because he had not filed a written declaration of his candidacy at least 45 days before the election.

It is provided in § 167.010 (unless otherwise indicated all statutory references are to RSMo 1959, V.A.M.S.) that '[t]he qualified voters of each and every county in this state shall elect a county superintendent of public schools at the annual district school meeting held on the first Tuesday in April, 1943, and every four years thereafter. \* \* \* Section 167.020 provides that '[a]t least forty-five days before the annual school meeting in any year when a county superintendent of public schools is to be elected, any person desiring to be a candidate for election to the office of county superintendent of public schools must file with the county clerk a written declaration of his candidacy for the office, which declaration shall be filed by the county clerk and no filing fee shall be charged. \* \* \*' Respondent contends that the quoted portion of § 167.020 is mandatory and that no person is eligible to be voted for at the election unless he has filed a written declaration within the time specified therein. Appellant contends that the provision in regard to filing a written declaration of candidacy relates only to the requirement for a candidate to have his name printed on the ballot, but that 'the printing of one's name on the ballot is not a mandatory requirement for election. A write-in candidate who has not filed a declaration of his candidacy and whose name is not on the printed ballot may still be elected if he receives the greatest number of votes.'

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[1][2] As indicated by the foregoing, a solution of the question presented requires a construction of the provisions of § 167.020. It is elementary that the primary rule to be followed in the construction of statutes is to ascertain and give effect to the intent of the legislature. Taney County v. Empire District Elec. Co., Mo.Sup., 309 S.W.2d 610. A strict literal construction of the quoted portion of the statute would tend to support the contention of respondent. However, in determining the legislative intent, we think the words used in the statute must be considered in connection with certain basic fundamental principles that are firmly established in this state.

We have said that 'the very taproot and reason for any election at all among a free people is that the majority may rule \* \* \*. Election laws must be liberally construed in aid of the right of suffrage. State ex rel. [Wills] v. Hough, 193 Mo. [615], l. c. 651, 91 S.W. 905 [l. c.]; Hale v. Stimson, 198 Mo. 134, 95 S.W. 885. The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors.' Nance v. Kearbey, 251 Mo. 374, 158 S.W. 629, 631. While mandatory statutory requirements must be followed, '[e]lections should be so held as to afford a free and fair expression of the popular will \* \* \*.' State ex Inf. McKittrick ex rel. Martin v. Stoner, 347 Mo. 242, 146 S.W.2d 891, 894. The statutes of this state indicate that it is the established public policy that a qualified voter may vote for any candidate of his choice by writing the name of such person on the ballot and the voter is not restricted to voting for the candidated whose names are printed thereon. Our general election laws contain the express provision that '[i]f the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such canceled name the name of person for whom he desires to vote, and placing a \*114 cross mark in the square at the left of such name.' Section 111.580(2). Other statutes, by reference, have made that provision applicable in elections conducted in cities of the first, second, third, and fourth classes. See §§ 122.210, 122.400, 77.040, and 79.030. Similar provisions appear in § 423 of the Charter of Kansas City. See also § 122.960 relating to elections in the City of St. Louis; Gumm v. Hubbard, 97 Mo. 311, 11 S.W. 61; Bradley v. Cox, 271 Mo. 438, 197 S.W. 88; Ousley v. Powell, Mo.App., 12 S.W.2d 102.

[3] In construing § 167.020, we think it is significant that it contains no express provision to the effect that no person should be voted for whose name does not appear upon the printed ballot. We also note that subsection 2 of that statute contains the following: 'The voting for county superintendent shall be by ballot and all ballots cast shall be **counted** for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is **counted** for the person receiving the same \* \* \*.' It is, of course, implicit in every election statute that the ballot shall be **counted** for the person for whom cast. We therefore, have concluded that this provision was inserted in the statute in order to make it clear that the ballot should be **counted** for any person for whom it is cast and that the voting not be restricted to the **candidated** printed on the ballot.

We have also considered our constitutional provisions, i. e., Art. I, § 25, that 'all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage,' and Art. VIII, § 2, which provides that all qualified electors are 'entitled to vote at all elections by the people.' It is the majority rule in this nation that statutory provisions expressly stating that no person shall be voted for unless his name is printed on the ballot are unconstitutional under constitutional provisions similar to those above quoted. See Littlejohn v. People, 52 Colo. 217, 121 P. 159, Ann.Cas.1913D, 610; Annotation, Ann.Cas.1913D, 614; 18 Am.Jur., Elections, § 191, p. 307. It therefore appears that if § 167.020 should be construed in accordance with respondent's contention there is good authority for holding it unconstitutional. We need not expressly so hold. It is sufficient to say that it is presumed that the legislature did not intend to enact an unconstitutional statute.

We also note that respondent in her brief concedes that 'had no one filed for the office of county superintendent of schools and a blank ballot would be prepared, write-in candidates would be permitted, or the election would be a nullity but where you have candidates who have complied with the statute, no other persons would be entitled to be elected at such election.' We do not agree that the situation would have been any different in the event no one had filed.

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If it is mandatory that a candidate file a timely declaration in order to be qualified for election, then that requirement should be applied in every event. The situation suggested in respondent's brief tends to accentuate the fact that the construction for which she contends is unreasonable.

In view of all of the foregoing, we have concluded that the legislature, in enacting § 167.020, did not intend to restrict the electors to voting for the candidates printed on the ballot, but, on the contrary, intended that any elector could vote for a person of his own selection by drawing a line through the names printed on the ballot and writing in the name of his candidate. Any other conclusion would attribute to the legislature an intent contrary to our established public policy to the effect that a qualified voter be permitted to vote for any person of his choice and that the will of a majority of the voters should prevail. We accordingly rule the point under consideration contrary to the contention of respondent.

[4] As to the remaining point raised by respondent's motion to dismiss, we are clearly of the opinion that the appellant's \*115 notice states a claim upon which relief can be granted. It is alleged that Oscar P. Kasten received 1,084 votes and that 67 votes were cast for Oscar Kasten which were intended to be voted for Oscar P. Kasten, contestant herein. For the purposes of the motion these allegations are considered to be true. Hence it must be ruled that the 67 votes cast for Oscar Kasten should have been counted for contestant, which would have given him a total of 1,151 votes, and he should therefore have been declared the winner of said election.

In the case of Gumm v. Hubbard, 97 Mo. 311, 11 S.W. 61, Caleb Gumm contested the election of Joel D. Hubbard. The court approved a recount wherein 'one vote for 'J. D. Huba,' one for 'J. D. Hubba,' one for 'Huber,' one for 'J. D. Hub,' and one for 'D. Huber' were counted for contestee. Effect should be given to the will of the electors, and it is now generally agreed that the circumstances surrounding the election may be given in evidence, on an election contest, to explain ambiguities in the ballots. McCrary, Elec. § 396; Cooley, Const. Lim. 611; 6 Amer. & Eng.Cyclop.Law, 431. There were but two candidates for this office, and their names are so unlike that there is no danger of confusion as between

them. The election, as to these candidates, was local, confined to the county where they resided, and the voting population seems to have been largely German. Under the evidence, the court might well have found that these ballots were for the contestee, and there would have been no error in **counting** them for him.' 11 S.W. 63.

'Generally, where the voter's intention is found it should not be defeated by the fact that the **name** of the candidate is misspelled, the wrong initials are employed, or some other or slightly different **name** of similar pronunciation has been written instead of that of the candidate actually intended to be voted for. If there is a misspelling of a **candidate's name** when **written in** by a voter or when printed on the ballot, evidence of the circumstances surrounding the election is admissible for the purpose of showing that the ballot was intended for a particular candidate, unless the **name** is so different that thus to apply it would be to contradict the ballot itself or unless the ballot is so defective that it fails to show any intention whatever. Although some courts deem themselves bound by a stricter rule, it has been held that a ballot which contains a **candidate's** surname only may be **counted**, even though there are other persons in the county having the same surname, where it is shown that there was no other person of such **name** who was a candidate for the same or any other office. This rule is also followed if only the middle **name** of the candidate is wrong, if the first **name** is **abbreviated**, or if the wrong initials are used. Furthermore, where there are two persons in the same district with the same **name**, one of them a candidate, and the other not, and there are ballots which do not designate which of these persons is voted for thereon, parol evidence may be received to show for whom the votes were intended.' 18 Am.Jur., Elections, § 195, p. 311.

[5] In 29 C.J.S. Elections § 180, pp. 263, 265, it is stated that 'a candidate for public office is generally entitled to have his name written upon the official ballot by voters who desire to support him as their choice, although he has not been nominated by any convention, caucus, or meeting and under most statutes, when an elector desires to vote for a person whose **name** is not on the ballot he may do so by writing his **name** on the ballot in an appropriate place, notwithstanding the person whose **name** is thus **written in** was not eligible to have his **name**

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printed on the ballot. \* \* \* [I]f the voter's intention can be determined, that intention will not be defeated because of an irregularity in the writing of the **candidate's name**. Thus ballots have been held not invalidated because the voter misspelled the **candidate's name** or address, as where the error was so slight and of such a nature as to render the **name** as written within the scope of the doctrine of idem sonans; or because the voter wrote some other or slightly different **name** of like or similar pronunciation,\*116 as where there is a clear relation between the appearance or sound of the **name written in** and that of the candidate and only one man of a particular **name** is a candidate for the office; or where the voter omitted the **candidate's** initial or employed a wrong initial, or wrote the **candidate's** initials in place of his given **name**, or wrote only the **candidate's** last **name**, there being no other candidate of the same **name** to be voted for.' See also, Annotation, 86 A.L.R.2d 1025.

[6][7] Certain questions are suggested by the allegations of the notice and the points briefed that will likely arise upon the trial of this case. Due to the nature of the case we deem it advisable to express our views upon those questions. In accord with the foregoing authorities, we are of the opinion that evidence is admissible which bears upon the intent of voters who wrote in the name of Oscar Kasten, Oscar P. Kassel, Oscar P. Casten, and Roger Kasten on their ballot. As to the votes cast for Oscar Kasten, we have the view that said name is so similar to Oscar P. Kasten that they should be counted for contestant unless it should appear from the evidence that there was a person residing in Perry County (other than contestant) who had the name of Oscar Kasten and who possessed the qualifications specified in § 167.010 for the office here involved. In the event it should appear that there were on the date of the election two residents of Perry County bearing the name of Oscar Kasten and possessing the aforesaid qualifications, then the court shall determine from all of the evidence in the case the identity of the person for whom those voters intended to cast their ballot. There were 145 ballots which were alleged to have been voided because the name of contestant was written in but no line was drawn through respondent's name. Contestant alleges that those votes should have been counted for him. We have the view that those ballots should not be counted for either appellant or respondent. Ousley v. Powell, Mo.App., 12 S.W.2d 102.

The judgment is reversed and cause remanded for further proceedings in accordance with the views herein expressed.

HYDE and DALTON, JJ., concur.  
 HOLLINGSWORTH, P. J., concurs in result.

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**C**

Court of Appeals of North Carolina.  
 In re PROTEST BY ROCKY MIDGETTE OF 2  
 NOVEMBER 1993 MANTEO TOWN ELECTION.

No. 9410SC332.  
 Dec. 6, 1994.

Candidate in town election appealed from order of Superior Court, Wake County, Henry V. Barnette, Jr., J., which affirmed decision of State Board of Elections, which directed that additional 41-votes for **write-in** candidate be certified by County Board of Elections. The Court of Appeals, Greene, J., held that: (1) when confronted with technical errors in following **write-in** procedure, court would generally look to face of ballot, and if **write-in candidate's name** was on ballot, but not in exact accordance with mandatory statutory requirements, to extrinsic evidence to see if voter's choice could be determined; (2) 36 ballots which had no **name** written on them should not have been counted for **write-in** candidate; and (3) five ballots with variations of **write-in candidate's name** written on them were properly counted for **write-in** candidate.

Affirmed in part, reversed in part, and remanded.

West Headnotes

**[1] Elections 144 ↪298(1)**

144 Elections  
144X Contests  
144k297 Scope of Inquiry and Powers of Court or Board  
144k298 In General  
144k298(1) k. In General. Most Cited Cases

Candidate contended that State Board of Elections' decision to count write-in votes for another candidate was in excess of statutory authority and was error of law, and thus de novo review was required.

**[2] Elections 144 ↪158**

144 Elections  
144VI Nominations and Primary Elections  
144k158 k. Effect of Irregularities or Defects.  
Most Cited Cases

**Elections 144 ↪227(8)**

144 Elections  
144VIII Conduct of Election  
144k227 Effect of Irregularities or Defects  
144k227(8) k. Voting by Ballot. Most Cited Cases

Under statutes regarding marking of ballots in primaries and elections and counting of ballots, although voter must write in name of person not on ballot in order for the vote to be counted, any technical errors in following procedure will not make ballot invalid unless it is impossible to determine voter's choice. G.S. §§ 163-151, 163-170.

**[3] Elections 144 ↪293(5)**

144 Elections  
144X Contests  
144k290 Evidence  
144k293 Admissibility in General  
144k293(5) k. Admissibility of Ballots.  
Most Cited Cases

In determining if it is impossible to ascertain voter's choice, due to error in following **write-in** procedures, court will generally look to face of ballot, and if **write-in candidate's name** is on ballot, but not in exact accordance of mandatory statutory requirements, to extrinsic evidence to see if voter's choice can be determined. G.S. § 163-170.

**[4] Elections 144 ↪293(4)**

144 Elections  
144X Contests  
144k290 Evidence  
144k293 Admissibility in General

144k293(4) k. Showing for Whom  
Votes Were Intended. Most Cited Cases

No name at all was written on 36 ballots, and thus court would not consider any extrinsic evidence in attempting to ascertain voter intent, as ballots were tantamount to technical errors in following "write-in" vote procedures which made it impossible to determine voter's choice. G.S. §§ 163-151, 163-170.

[5] Elections 144 ↪ 239

144 Elections  
144IX Count of Votes, Returns, and Canvass  
144k239 k. Votes to Be Counted. Most Cited  
Cases

Thirty-six ballots which had no name written on them could not be counted for write-in candidate in election, since they did not express intention of voter's choice. G.S. §§ 163-151, 163-170.

[6] Elections 144 ↪ 293(4)

144 Elections  
144X Contests  
144k290 Evidence  
144k293 Admissibility in General  
144k293(4) k. Showing for Whom  
Votes Were Intended. Most Cited Cases

There was some evidence of voter intent on five ballots in election, which contained variations of **write-in candidate's name**, and thus it was appropriate to look at extrinsic evidence in attempting to ascertain voter intent. G.S. §§ 163-151, 163-170.

[7] Elections 144 ↪ 239

144 Elections  
144IX Count of Votes, Returns, and Canvass  
144k239 k. Votes to Be Counted. Most Cited  
Cases

It was not impossible to tell voter's choice from five ballots, and thus State Board of Elections correctly ordered County Board of Elections to **count** ballots for **write-in** candidate, where they were marked with variations of **write-in candidate's name**, **write-in** candidate was only person actively

campaigning as **write-in** candidate, and no other person with similar **name** was running as candidate in town election or otherwise actively seeking votes for town office. G.S. §§ 163-151, 163-170.

**\*\*520 \*213** Appeal by Dellerva Collins from order entered 4 February 1994 in Wake County Superior Court by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 27 October 1994.  
Atty. Gen. Michael F. Easley by Sp. Deputy Atty. Gen. Charles M. Hensey, for State Bd. of Elections.

Tharrington, Smith & Hargrove by Michael Crowell and Jaye P. Meyer, Raleigh, for Rocky D. Midgette.

Thigpen, Blue, Stephens & Fellers by Cressie H. Thigpen, Jr., and Steven F. Bryant, Raleigh, for appellant Dellerva Collins.

GREENE, Judge.

Dellerva W. Collins (Ms. Collins) appeals from an order entered 4 February 1994 in Wake County Superior Court, affirming the State Board of Elections' (the State Board) 23 November 1993 decision directing that an **\*\*521** additional forty-one votes for write-in candidate Rocky Dillon Midgette (Rocky Midgette) be certified by the Dare County Board of Elections (the County Board) for the 2 November 1993 town election for three seats on the Manteo town board.

On 2 November 1993, the town of Manteo, North Carolina, had a general election to elect three town commissioners by plurality vote. Ms. Collins, Edward C. Etheridge, and Lee Tugwell filed as candidates **\*214** and were listed on the ballot while Rocky Midgette was a write-in candidate. On 3 November 1993, Rocky Midgette wrote a letter to the chairman and supervisor of the County Board, stating that although 152 votes were attributed to him, "41 ballots were set aside because the precinct could not figure out whether they should be **counted** or not." He asked the County Board to **count** the forty-one votes for him.

The County Board met on 4 November 1993 to canvass the votes and determined that thirty-six ballots which were punched in the proper place but did not have a **name** written on the ballot should not be **counted** because the directions on the ballot stated that a **name** must be **written in**. The County Board

also determined that several ballots on which voters wrote "R. Midgette," "Rocky," "Midgette," or some other **abbreviation** of Rocky Midgette's **name** should not be **counted**. The County Board therefore dismissed Rocky Midgette's complaint for lack of probable cause and determined that the official canvass results for town commissioner were 254 votes for Edward Etheridge, 254 votes for Lee Tugwell, 185 votes for Ms. Collins, and 162 votes for Rocky Midgette.

Rocky Midgette filed a complaint with the County Board and protested the following alleged violations and misconduct:

(1) Precinct officials and the Board of Elections refused to **count** several ballots on which voters wrote "R. Midgette", "Rocky", "Midgette" or some other, similar **abbreviations** of Rocky Midgette's **name**. Those votes should have been **counted** because the voter expressed a clear intent to vote for Rocky Midgette. Although the **name** was not written out completely and there are other citizens in town **named** Midgette, no other Midgette was actively seeking the town commissioner's office.

(2) Approximately 36 ballots were rejected and not **counted** at all because the voter had punched next to place 70 on the punchcard ballot but had not **written in** Rocky Midgette's **name**.... Because 70 was the place to vote for **write-ins**, campaign material for Rocky instructed voters to punch next to 70, and there was no other **write-in** candidate in the election, it is clear that the voters' intent in punching out 70 was to vote for Rocky Midgette.

Rocky Midgette requested that all ballots with a variation of his **name** and the thirty-six ballots on which place 70 was punched be **counted** for him and added to his total.

**\*215** The County Board held a hearing on 13 November 1993 and by order dated 16 November 1993, made the following findings of fact based on testimony from Rocky Midgette and several voters and the affidavits of several voters:

5. Rocky Midgette ran an active campaign for town commissioner. He set up approximately 500 posters, distributed 1,000 flyers, mailed over 500 postcards to voters, visited homes, ran display ads in

the newspaper, spoke at candidates' forum sponsored by League of Women Voters, and had workers telephone voters.

6. Rocky Midgette's campaign material directed voters to cast a write-in vote for him by punching 70 on the ballot and writing in his name.

7. No other person was actively campaigning as a write-in candidate for town commissioner, and no other person named Midgette or Midgett or Rocky was running as a candidate in the town election or otherwise actively seeking votes for town office.

....

10. ... Each [voting] booth included a plastic holder containing a booklet listing the names of candidates and the number of the space on the ballot to be punched for each candidate.

....

**\*\*522** 12. Lines 70, 71 and 72 in the booklet were identified as spaces for write-in candidates for town commissioner.

13. The instructions printed on the top of each ballot indicated that to vote for a person whose name is not on the ballot, you were to write in on the ballot in the space provided, the number for the office and the person's name you wanted to vote for.

....

18. One ballot had space 70 punched for a write-in and "Rocky" written on it. Two ballots had space 70 punched for a write-in and had "R. Midgette" written on them. Two ballots had space 70 punched for a write-in and had "Midgette" written on them. These ballots were not counted.

19. On 36 ballots, the voters punched place 70 on the ballot but wrote no name or number on the ballot. Those ballots were not counted.

....

**\*216** 24. At the November 13th hearing, 5 voters

testified and 13 voters had affidavits presented which indicated they punched space 70 on their ballots but did not write anything on the ballot itself. These voters indicated that they either mistakenly wrote Rocky Midgette's name in the booklet on line 70 or did not believe it was necessary to write his name anywhere because it was already written in the booklet on line 70.

Based on these findings of fact, the County Board concluded it properly excluded one ballot with space 70 punched and "Rocky" written on it, two ballots with space 70 punched and "R. Midgette" written on them, two ballots with space 70 punched and "Midgette" written on them, and thirty-six ballots with space 70 punched but no name written on them. The County Board therefore dismissed Rocky Midgette's complaint.

Rocky Midgette then appealed to the State Board which, after considering the Board's findings of fact and conclusions of law, all submissions previously distributed to all State Board members, and verbal presentations before the County Board and the State Board, rejected the County Board's order. By decision and order entered 23 November 1993, the State Board ordered that "the 41 questioned votes for write in candidate Rocky Midgette be certified by" the County Board.

On 3 December 1993, Ms. Collins filed a petition with the State Board to reconsider its 23 November 1993 decision; however, on 9 December 1993, the State Board, by letter, informed her that it would not reconsider its decision. On 15 December 1993, Ms. Collins, pursuant to N.C.Gen.Stat. § 150B-43, appealed the 23 November 1993 and 9 December 1993 decisions of the State Board to Wake County Superior Court. On 22 December 1993, she filed an amendment to her petition to except to the failure of the State Board to include findings of fact and conclusions of law "in contravention of N.C.G.S. Section 150A-36" and requested that "the matter be remanded to the State Board ... for appropriate findings of fact and conclusions of law." On 22 December 1993, she also filed a motion to remand for findings of fact and conclusions of law. By order entered 4 February 1994, the trial court found that the State Board "adopted the findings of fact of the county board and concluded as a matter of law that the additional votes should be counted for Mr. Midgette."

The trial court also concluded the State Board "acted within the scope of its authority in determining that the 41 additional votes should be counted for Rocky \*217 Midgette," its decision was "supported by substantial admissible evidence in view of the entire record as submitted," and its decision was not "in violation of constitutional provisions, in excess of authority, made upon unlawful procedure, affected by other error of law or arbitrary and capricious." The trial court therefore denied Ms. Collins' appeal and affirmed the State Board's decision.

---

The issue presented is whether it is impossible to determine the voter's choice from ballots containing variations of Rocky Midgette's name and ballots with no name written on them, but punched in the space for write-in candidates, where Rocky Midgette conducted an active campaign and was the only write-in candidate.

**\*\*523 [1][2]** Because Ms. Collins contends the State Board's decision to count the forty-one votes in question was in excess of its statutory authority and was an error of law, *de novo* review is required. Brooks, Comm'r of Labor v. Rebarco, Inc., 91 N.C.App. 459, 463, 372 S.E.2d 342, 344 (1988). N.C.Gen.Stat. § 163-151, which provides for marking ballots in primaries and elections, states that in an election, "if a voter desires to vote for a person whose name is not printed on the ballot, he shall write in the name of the person in the space immediately beneath the name of a candidate, if any, printed on the ballot for that particular office." N.C.G.S. § 163-151 (1991). N.C.Gen.Stat. § 163-170, which governs the rules for counting ballots, provides:

Only official ballots shall be voted and counted. No official ballot shall be rejected because of technical errors in marking it unless it is impossible to determine the voter's choice. In applying the general rule, all election officials shall be governed by the following rules....

(5) Write-In Votes.-If a name has been written in on an official general election ballot as provided in G.S. 163-151, it shall be counted in accordance with the following rules:

a. The name written in shall not be counted un-

less written in by the voter or a person authorized to assist the voter pursuant to G.S. 163-152.

b. The name shall be written in immediately below the name of a candidate for a particular office, if any, and shall be counted as a vote for the person whose name has been written in for that office....

\*218 N.C.G.S. § 163-170 (1994). Under these statutes, while a voter must write in the name of a person not on the ballot in order for the vote to be counted, any technical errors in following this procedure will not make the ballot invalid “unless it is impossible to determine the voter's choice.” See Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968) (all parts of same statute dealing with same subject are to be construed together as a whole, and every part must be given effect if this can be done by fair and reasonable intentment). We must therefore determine whether it is impossible to tell the voter's choice for the thirty-six ballots where no name was written in and the five ballots marked “Rocky,” “R. Midgette,” or “Midgette.”

[3] It is unclear under N.C.Gen.Stat. § 163-170 whether or not, in determining if it is impossible to ascertain a voter's choice, a court is to look to the circumstances surrounding an election or only to the specific ballot in question. We agree, however, with the approach taken by other courts, which have dealt with this issue by generally looking to the face of the ballot, and if the write-in candidate's name is on the ballot, but not in exact accordance with mandatory statutory requirements, looking to extrinsic evidence to see if the voter's choice can be determined. “[T]here must be an expression of intent on the ballot, but the ballot is to be read in the light of surrounding circumstances, evidence of which is admissible.” Fifteen Registered Voters on behalf of Flanagan, 129 N.J.Super. 296, 323 A.2d 521, 523 (1974) (write-in votes for “Wright” or “Mr. Wright” should be counted for “Harry C. Wright” where evidence showed no other “Wright” sought the office and where “Harry Wright” vigorously campaigned); see also Meyer v. Lamm, 846 P.2d 862 (Colo.1993) (if ballot is substantially marked as law requires, and from such marking, intention of voter, when viewed in light of circumstances surrounding election, can be ascertained, ballot should be counted); Devine v. Wonderlich, 268 N.W.2d 620 (Iowa 1978) (candidate's surname sufficient to indicate vote for him

where he vigorously campaigned, and it was unlikely to confuse him with others having same surname, none of whom were politically active); 26 Am.Jur.2d Elections §§ 268-72 (1966). Based on this general rule, courts have considered extrinsic evidence to determine a voter's intention where he or she has written in only a surname, where only the middle name of the candidate is wrong, where the first name is abbreviated, or if the wrong initials are used. 26 Am.Jur.2d Elections § 272.

[4][5] In this election, the thirty-six ballots which have no name written on them do not express an intention of the voter's choice \*\*524 because \*219 they do not contain Rocky Midgette's name, a variation of Rocky Midgette's name, or any name at all, and disregard completely the requirements of Sections 163-151 and 163-170, the instructions on the ballot, and even the instructions Rocky Midgette provided in his campaign. Accordingly, because no name at all was written on these thirty-six ballots, we do not consider any extrinsic evidence in attempting to ascertain voter intent based on the rules articulated above. These thirty-six ballots, therefore, are tantamount to technical errors which make it impossible to determine the voter's choice. The County Board's findings of fact, which the trial court found the State Board adopted, cannot support the conclusion that these thirty-six votes should be counted for Rocky Midgette.

[6][7] We now consider the one ballot marked “Rocky,” the two ballots marked “R. Midgette,” and the two ballots marked “Midgette.” Because there is some evidence of voter intent on these five ballots, it is appropriate to look at extrinsic evidence. The evidence adduced at the hearing before the County Board, contained in the County Board's findings of fact, indicates that Rocky Midgette ran an active campaign for town commissioner by setting up approximately 500 posters, distributing 1,000 flyers, mailing over 500 postcards to voters, visiting homes, running display ads in the newspaper, speaking at a candidates' forum sponsored by the League of Women Voters, and having workers telephone voters. There was also evidence that Rocky Midgette was the only person actively campaigning as a write-in candidate for town commissioner, and no other person named Midgette or Midgett or Rocky was running as a candidate in the town election or otherwise actively seeking votes for town office. Given these facts, it is

not impossible to tell the voter's choice from these five ballots, and the State Board correctly ordered the County Board to count these five votes for Rocky Midgette. See McIntosh v. Helton, 828 S.W.2d 364 (Ky.1992) (write-in votes for candidate could be counted for him even though they only designated him by initials rather than name as statute requires; election commission had given approval to use of initials and only one person with initials in question campaigned for position). For these reasons, the trial court's decision should be affirmed in part and reversed in part. We remand the case to the trial court with directions to reverse the State Board's decision in part and remand to the State Board so that it may order the County Board not to count the thirty-six ballots which did not have a name written in.

\*220 Affirmed in part, reversed in part, and remanded.

WYNN and JOHN, JJ. concur.

N.C.App., 1994.  
In re Protest by Rocky Midgette of 2 Nov. 1993 Man-  
teo Town Election  
117 N.C.App. 213, 450 S.E.2d 519

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44 Pa. D. & C.3d 249, 1987 WL 46855 (Pa.Com.Pl.)  
 (Cite as: 44 Pa. D. & C.3d 249, 1987 WL 46855 (Pa.Com.Pl.))

## C

Court of Common Pleas of Pennsylvania, Mercer  
 County.  
 In re Grove City, Second Ward Council Democrat  
 Write-In Nomination

No. 587 C.D. 1987.  
 June 24, 1987

**\*\*1 \*249** Petition to establish identity by candi-  
 date nominated under different **names**.

West Headnotes

### Elections 144 172

#### 144 Elections

##### 144VII Ballots

144k165 Form and Contents of Official Bal-  
 lots

144k172 k. **Names** and Designations of  
 Candidates. Most Cited Cases

Where the intent of the voter can be ascertained,  
 ballots will be **counted** in a disputed election even  
 through the **name** of the candidate is misspelled, the  
 wrong initials are employed, or some other slightly  
 different **name** of similar pronunciation has been  
 written instead of the **candidate's name**.

*Michael J. Wherry*, for petitioner.

ACKER, P.J.

We have for consideration a "petition of James  
 H. Montgomery to **\*250** establish identity by candi-  
 date nominated under different **names**."

James H. Montgomery, a registered Republican,  
 is currently the incumbent councilman of Grove City  
 Borough Council for the 2nd Ward of Grove City, Pa.  
 His re-election bid for that office was opposed by  
 Joseph M. Jaskol, also a registered Republican, in the  
 May 19, 1987, primary. After a tabulation of the pri-  
 mary votes, the Mercer County Election Board certi-  
 fied that Montgomery had been nominated as the  
 Republican candidate for the council seat.

No candidates were listed on the Democratic bal-  
 lot for the Second Ward Councilmanic seat. There  
 were, however, a number of write-in votes cast for  
 that office on behalf of both Montgomery and Jaskol.  
 The election board did not certify that either candi-  
 date has secured the necessary 10 votes to be the  
 Second Ward nominee of the Democratic Party.<sup>FN1</sup>  
 Rather, the board, pursuant to 25 P.S. §3155, certified  
 that 12 votes under 11 variations of the **name** James  
 H. Montgomery were **written-in** for that nomination  
 at the May 19, 1987, primary. The **names** as written  
 on the ballots, and the number of votes received by  
 each, were certified as follows:

FN1. Under 25 P.S. §3155, the county elec-  
 tion board shall not certify the votes cast on  
 irregular ballots for any person unless the to-  
 tal number of votes cast for said person is  
 equal to or greater than the number of signa-  
 tures required on a nomination petition for  
 the particular office. Under 25 P.S.  
§2872.1(35), 10 signatures would be needed  
 on a nomination petition for 2nd Ward  
 councilman.

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 table

**\*251** Montgomery now seeks to have these votes  
 counted in his favor, and to be declared the nominee  
 of more than one party, i.e., the nominee of the Dem-  
 ocratic Party.

### DISCUSSION

Section 3156 of the Election Code, 25 P.S.  
§2600 et seq., provides in pertinent part:

"Any person who has been nominated at a pri-  
 mary election by more than one party for the same  
 office under different names may, at any time not  
 later than five days after the certification by the coun-  
 ty board of the votes cast at a primary election,  
 present a petition to the court of common pleas of the  
 proper county, praying for an order declaring such  
 petitioner by his true name to be the person who was  
 thus nominated by more than one party under differ-

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ent names. If the court shall determine that the different names so appearing on the returns of the primary represent one and the same person, the court shall enter an order finding said fact and directing the county board to revise its return accordingly.”

\*\*2 However, the election code itself does not provide any instruction on how the court is to make this determination. Therefore, we turn to the case law on the subject for guidance.

The seminal case on this subject appears to be \*252 *McCracken Appeal*, 370 Pa. 562, 88 A.2d 787 (1952). Appellee therein, Joseph Kratochvil Jr., received 313 votes as a write-in (sticker) candidate for township treasurer during the general election. His opponent, Thomas H. McCracken, who had previously won the nomination of both the Republican and Democratic tickets, received 314 votes. At issue was one ballot on which the voter had written-in the name “Joseph Kratochvil,” without the “Jr.” Kratochvil petitioned to have the vote cumulated with his other votes. The election returns board, after a hearing, determined that Joseph Kratochvil and Joseph Kratochvil Jr. were one and the same person and ordered that the vote be cumulated, raising Kratochvil's total to 314 votes. Kratochvil then won the casting of lots due to the tie vote and was declared the successful candidate. McCracken appealed to the court of common pleas, which affirmed the decision of the board. McCracken then appealed to the Pennsylvania Supreme Court, asserting the illegality of Kratochvil's election.

In commenting on the duties of the county election board to canvas and compute the election results, the court stated:

“There could scarcely be a duty more apparent and impelling on an election board than that of ascertaining *for whom* votes were cast. Id. at 565, 88 A.2d at 788 (emphasis in original).

Further, the court stated:

In any disputed election, nothing can be more vital towards the accomplishment of an honest and just selection than the ascertainment of the intention of the voter. What was the intention of the voter who wrote Joseph Kratochvil instead of Joseph Kratochvil Jr.? Can anyone doubt that the voter wished to regis-

ter his vote for Joseph Kratochvil Jr.? And with that fact established, nothing should be \*253 permitted to change the effect of that intention so honestly manifested.” Id. at 566, 88 A.2d at 789.

Finally, the court declared, quoting from 9 Ruling Case Law, at 1144:

“[W]here the voter's intent is found it should not be defeated by the fact that the **name** of the candidate is misspelled, the wrong initials employed, or some other or slightly different **name** of like or similar pronunciation has been written instead of that of the candidate actually intended to be voted for. . . . A ballot may be **counted** which contains a **candidate's** surname only, although there are other persons in the county having the same surname, it being shown that there was no other person of such **name** who was a candidate for the same or any other office; and so also if only the middle **name** of the candidate is wrong or if the first **name** is **abbreviated**, or if the wrong initials are used.” Id. at 566, 88 A.2d at 789.

The court then concluded from its examination of the record that the **names** of Joseph Kratochvil and Joseph Kratochvil Jr. identify one and the same individual, and affirmed the decision of the election board cumulating the votes.

\*\*3 A second decision bearing on this subject is *Parente Appeal*, 390 Pa. 249, 134 A.2d 62 (1957). Appellee therein, John R. Stieska, petitioned the county election board to cumulate all the votes cast in the various forms of his **name** and to declare him the successful nominee on the ticket. The board credited Stieska and his principal competitor, Hugo J. Parente, with only such votes as were **written-in** with their full **names**. Stieska appealed the board's action to the court of common pleas, which sustained the appeal and ordered that all the contested **write-in** votes be cumulated. Parente appealed to the Supreme Court, which concluded that the court \*254 of common pleas, upon the appeal of a decision of the county election board, is not precluded from cumulating votes for a candidate by **write-ins** on voting machines, if the evidence so warrants it, in order to effectuate the will of the voters. The court then affirmed the cumulation of the following votes:

“John R. Stieska, 58; John Steiska, 33; J. Steiska, 13; J. R. Stieska, 1; Stieska, 59; John T. Stieska, 1;

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John S. Stieska, 1; John Steiska, 2; Steiska, 1;  
Sleiska, 1;

Hugo J. Parente, 70; Hugo Parente, 27; H. Parente, 8; Parente, 38; Parenti, 5; Hugo Parenti, 1.”

From the election code and these cases, it is evident that this court has the power and duty to determine the intent of the voter in casting his ballot, and having found such intent, to see it effectuated. Here, the court is faced with a determination of whether the 12 votes cast under variations of the name James H. Montgomery were intended as votes for the petitioner.

Numerous decisions in Pennsylvania have addressed similar problems involving the cumulation of votes.<sup>FN2</sup> These decisions evidence no absolute rule on what variations of a petitioner's name may be allowed in order to cumulate the contested votes. However, the thrust is towards a liberal application \*255 of the cumulation rule as long as the court can determine the voter's intent in casting his ballot.

FN2. See Antonelli Appeal, 405 Pa. 179, 174 A.2d 107 (1961); Nomination of Lamb, 73 Pa. D. & C.2d 142 (1975); Petition of Warner, 51 Sch. L.R. 96 (1956); Petition of Wenzel, 51 Sch. L.R. 172 (1956); In re Kramer's Nomination, 94 P.L.J. 241 (1945); In re Nomination of McLaughlin, 31 Erie L.J. 184 (1947); In re Election of Edgmont Township Supervisor, 53 Del. 317 (1965). In re Re-count of Vote in the Second District, Third Ward, Borough of Steelton, 65 Dauph. 192 (1953); In re Election for Tax Collector of Seward Borough, 36 West. 291 (1955).

In the instant case, James H. Montgomery is the incumbent councilman for the Second Ward and is well known to the voters of that ward. There is no evidence of any other James H. Montgomery running as a candidate for that office.<sup>FN3</sup> With the following exception, we are convinced that the variations of the name James H. Montgomery written-in at the May 19 primary represent one and same person who is the petitioner, James H. Montgomery. We do not believe that the one vote cast for “Mantony” is sufficiently close to the petitioner's name to allow its cumulation on his behalf.

FN3. There was however a Robert F. Montgomery running for School Director.

\*\*4 Wherefore, we conclude and find as a fact that the identity of the petitioner, James H. Montgomery, under the different names written-in for the remaining 11 votes is established, and we direct the Mercer County Election Board to revise its return accordingly.

Hence, this

#### ORDER

And now, on this June 24, 1987, it is hereby ordered and decreed that the county election board as constituted by a prior court order shall **count** as votes for James H. Montgomery upon the Democratic ticket all **write-in** votes cast for the petitioner, James H. Montgomery, except the one vote cast for “Mantony,” and shall revise its return accordingly. Those votes to be **counted** are:

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Pa.Com.Pl. 1987.  
In re Grove City, Second Ward Council Democrat Write-In Nomination  
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### *Abbreviations of Common Christian Names*

Abbreviation	Name	Abbreviation	Name
Abr	Abraham	Jn/Jno	John
Agn	Agnes	Jnthn	Jonathan
Alex	Alexander	Jos	Joseph
Alf	Alfred	Jud	Judith
Amb	Ambrose	Kath	Katherine
And	Andrew	Lau	Laurance
Ant/Anth	Anthony	Lawr	Lawrence
Art/Arth	Arthur	Len/Leon	Leonard
Barb	Barbara	Let	Letitia or Lettice
Bart/Barth	Bartholomew	Lyd	Lydia
Ben/Benj	Benjamin	Margt/Mgt	Margaret
Brid	Bridget	Margy	Margery
Cath	Catherine	Marm	Marmaduke
Chas	Charles	Math/Matth	Matthew
Charlt	Charlotte	Mich	Michael
Chris	Christopher	Mild	Mildred
Clem	Clement	Mill	Millicent
Const	Constance	Nath	Nathaniel
Cuth	Cuthbert	Neh	Nehemiah
Dan	Daniel	Nic/Nich	Nicholas
Dav	David	Ol	Oliver
Deb	Debora(h)	Pen	Penelope
Den	Den(n)is	Pet	Peter
Dor	Dorothy	Philad	Philadelphia
Doug	Douglas	Phil	Philip
Eben	Ebenezer	Phyl	Phyllis
Edm	Edmond/Edmund	Pris	Priscilla
Edw	Edward	Pru	Prudence
Eliz	Elizabeth	Rach	Rachel

Abbreviations of Common Christian Names

Abbreviation	Name	Abbreviation	Name
Elnr	Eleanor	Reb	Rebecca
Esth	Esther, Hester	Reg	Reginald
Eus	Eustace	Ric/Rich	Richard
Fra	Francis (m.) or Frances (f.) [only abbreviated where sex is obvious]	Rob/Robt	Robert
Fred	Frederick	Rog	Roger
Gab	Gabriel	Rowl	Rowland
Geof	Geoffrey, Jeffery	Sam	Samuel
Geo	George	Sar	Sarah
Gilb	Gilbert	Sim	Simon
Godf	Godfrey	Sol	Solomon
Greg	Gregory	Ste	Stephen
Han	Hannah	Sus	Susan, Susanna
Hel	Helen	Susna/Sus	Susanna, Susannah
Hen/Hy	Henry	Theoph	Theophilus
Hep	Hephzibah	Tho/Thos	Thomas
Herb	Herbert	Tim	Timothy
Hest	Hester	Urs	Ursula
Hum/Humph	Humphrey	Val	Valentine
Isab/Isb	Isabel	Walt	Walter
Jac	Jacob	Wm	William
Jas	James	Win	Winifred
Jerh/Jermh	Jeremiah	Zach	Zachariah

**CS FOR SENATE BILL NO. 31(JUD)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): SENATORS THOMAS, FRENCH, MENARD, AND WIELECHOWSKI

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the counting of write-in votes."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 **\* Section 1.** AS 15.15.360 is amended by adding a new subsection to read:

4 (d) Write-in votes shall be counted according to the following rules:

5 (1) writing in the name of a candidate whose name is printed on the  
6 ballot does not invalidate a write-in vote unless the director determines, on the basis of  
7 other evidence, that the ballot was so marked for the purpose of identifying the ballot;

8 (2) in order to vote for a write-in candidate, the voter must write in the  
9 candidate's name in the space provided and fill in the oval opposite the candidate's  
10 name in accordance with (a)(1) of this section;

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

15 (4) if the write-in vote is for governor and lieutenant governor, the vote

1 shall be counted if the oval is filled in and the names of the candidates for governor  
 2 and lieutenant governor, as they appear on the write-in declaration of candidacy, or the  
 3 last names of the candidates for governor and lieutenant governor, or the name of the  
 4 candidate for governor, as it appears on the write-in declaration of candidacy, or the  
 5 last name of the candidate for governor is written in the space provided;

6 (5) in counting votes for a write-in candidate, the director shall  
 7 disregard any abbreviation, misspelling, or other minor variation in the form of the  
 8 name of a candidate if the intention of the voter can be ascertained.

9 \* **Sec. 2.** AS 15.15 is amended by adding a new section to read:

10 **Sec. 15.15.365. Counting of write-in votes in general election.** (a) Write-in  
 11 votes on a general election ballot shall be counted by candidate only if the aggregate  
 12 of all votes cast for all write-in candidates for the particular office is

13 (1) the highest number of votes received by any candidate for the  
 14 office; or

15 (2) the second highest number of votes received by any candidate and  
 16 the difference between the total number of votes received by the candidate having the  
 17 highest number of votes and the aggregate of all votes cast for all write-in candidates  
 18 for the office is less than the percentage necessary for a recount at the state's cost  
 19 under AS 15.20.450.

20 (b) Write-in votes that do not meet the requirements of this section may not be  
 21 individually counted under this section.

22 (c) If the director determines that the requirements of (a) of this section have  
 23 been met, the director shall establish the place and date for counting those write-in  
 24 votes, and the director, or a designee of the director, shall count all write-in ballots  
 25 under AS 15.15.360(d).

26 (d) This section does not apply to the counting of federal write-in absentee  
 27 ballots submitted under 42 U.S.C. 1973ff.

28 \* **Sec. 3.** AS 15.15.360(a)(9), 15.15.360(a)(10), 15.15.360(a)(11), and 15.15.360(a)(12) are  
 29 repealed.

## **Intent of law will be a good measuring stick**

Joe Miller left a number of things in the wake of his failed bid to unseat Sen. Lisa Murkowski, like divisions in the Republican Party and a highlighted need to examine state election law concerning write-in ballots.

Miller's bid for the Senate and Murkowski's successful write-in campaign exposed the vagueness of some election laws, such as exactly what counts as a write-in vote. State law says a person has to fill in the bubble next to the write-in option and then write in the candidate's name.

Whether that means the name needs to be spelled correctly wound up being a topic that wasn't settled until the state's Supreme Court weighed in.

En route to the Supreme Court's ruling, a federal judge described Alaska's laws on the topic as "poorly drafted."

"Wisdom would suggest that the Alaska Legislature act to clarify it to avoid similar disputes in the future," U.S. District Court Ralph Beistline wrote in a decision dismissing Miller's case.

The Supreme Court's decision that turned against Miller was based mainly on prior Supreme Court decisions, which held that a voter's intent was paramount and that minor misspelling shouldn't stand in the way of that.

But there's a difference between having something written in statute and having something addressed in court decisions.

For one thing, a statute in a law book carries greater weight. A new court can overturn an old court's ruling, but to change a statute requires the Legislature to act.

For another, leaving the courts to decide something as important as what constitutes a legal vote leaves the state open to further lengthy and expensive court challenges.

We were always puzzled by why Miller chose to contest the election's results long after basic math suggested the battle was lost: Even if all of the ballots Miller had contested were thrown out, Murkowski still had enough votes to win handily.

But we don't fault Miller for asking the courts to weigh in on the question. Supreme Court decisions are generally based on a set of facts specific to each case. The facts of Miller's case surely differed from the cases that led to the relevant court precedents. So it makes sense, then, that he would at least attempt to see if the cases leading to the precedents establishing voter intent as the standard resembled his enough that those precedents also applied to his case. The courts are the proper venue for that.

But the challenge didn't come cheap. The court case cost the state more than \$100,000. And the state has said that Miller will get a bill for part of that total.

Speaking before the state Senate, Sen. Linda Menard referred to the court cases that came in the wake of the November 2010 U.S. Senate election as a debacle.

We agree and hope that Senate Bill 31, of which Menard is a co-sponsor, will allow the state to avoid similar debacles in the future. The bill states that "the election board shall disregard any abbreviation,

misspelling or other minor variation in the form of the name of a candidate.”

Who is to say whether this language would have been enough to satisfy Miller or whether he would have sought out another avenue to challenge the election’s results had such language been in place last November.

Still, we hope SB 31 passes because as Beistline said, state law — and Alaska voters — can only benefit from less ambiguity.

# FISCAL NOTE

**STATE OF ALASKA**  
**2011 LEGISLATIVE SESSION**

Fiscal Note Number \_\_\_\_\_  
 Bill Version SB31  
 () Publish Date \_\_\_\_\_

Identifier (file name) SB031-OOG-DOE-1-23-11  
 Title "An Act relating to the counting of write-in votes"  
 Sponsor Senators Thomas, French, Menard, Wielechowski  
 Requester (S) STA  
 Dept. Affected Office of the Governor  
 Appropriation Elections  
 Allocation Elections  
 OMB Component Number 21

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information						
		FY 2012	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
<b>OPERATING EXPENDITURES</b>								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>								
-----------------------------	--	--	--	--	--	--	--	--

<b>CHANGE IN REVENUES</b>								
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2011) cost \_\_\_\_\_

**POSITIONS**

Full-time								
Part-time								
Temporary								

**Why this fiscal note differs from previous version**

Prepared by Gail Fenumiai, Director  
 Division Division of Elections  
 Approved by Linda J. Perez, Administrative Director  
Office of the Governor

Phone 465-2644  
 Date/Time 1/23/11, 10:18pm  
 Date 1/23/2011

# ALASKA STATE LEGISLATURE



SENATOR JOE THOMAS

## Senate Bill 31: An Act relating to the counting of write-in votes.

### Sponsor Statement

“We start with the bedrock principle that the right of the citizens to cast their ballot and thus participate in the selection of those who control their government is one of the fundamental prerogatives of citizenship.”

- Alaska Supreme Court, (*Miller v. Treadwell*)

Last fall, Alaskans reelected Lisa Murkowski to the United States Senate as a write-in candidate with nearly 100,000 votes statewide, something not witnessed by our nation in over fifty years. Because of the unique nature of write-in votes and confusion in state statute there was substantial debate over the validity of nearly 12,000 ballots. In the suit that followed, (*Miller v. Treadwell*), Joe Miller argued that these ballots should not be counted because the name written was not *identical* to the way Senator Murkowski’s name appeared on her declaration of candidacy. **Superior Court Judge William Carey and the Alaska Supreme Court both ruled against this argument, finding that judging the validity of a ballot based on the intent of the voter is paramount.**

Much of this case centered on the interpretation of state statute regarding the counting of ballots. Each court, in their findings, including Federal District Judge Ralph Bieistline, found that AS 15.15.360 was badly worded and left open for legitimate debate. **Senate Bill 31 looks to address this language by inserting a section that would place the intention of the voter above minor variations, mismarks or abbreviations.**

Senate Bill 31 follows on over fifty years of consistent precedent in support of a voter’s intent and enfranchisement. In strengthening this statute by inserting federally recognized language from the Uniformed and Overseas Citizens Absentee Voting Act, **SB 31 will reduce potential future litigation while strengthening the public’s perception of Alaska’s democratic process.**

I urge you to join me in supporting Senate Bill 31.

## Quotes of significance to Senate Bill 31 from the 2010 United States Senate Race Court Findings

"AS 15.15.360(a)(11) may not be well written, and it is clearly subject to different interpretations...AS 15.15.360, in general, is terse and somewhat unclear in comparison to the other state statutes. The statute, as Miller reveals, does lack the express language that most states have adopted which permits minor misspellings and errors." - Miller v. Campbell, pg. 15 Superior Court Judge William Carey

"While the issue may be moot, the public interest exception applies...this scenario is certainly susceptible to repetition any time a major write in effort for election to a public office in Alaska occurs." - Miller v. Campbell, pg. 8 Superior Court Judge William Carey

"We start with the bedrock principle that "the right of the citizens to cast their ballot and thus participate in the selection of those who control their government is one of the fundamental prerogatives of citizenship." - Alaska Supreme Court Miller v. Treadwell pg. 3

"In light of our strong and consistently applied policy of construing statutes in order to effectuate voter intent, we hold that abbreviations, misspellings or other minor variations in the form of the name of a candidate will be disregarded in determining the validity of the ballot, so long as the intention of the voter can be ascertained." - Alaska Supreme Court Miller v. Treadwell pg. 6

"Our interpretation of AS 15.15.360...is also consistent with the federally mandated standard for counting write in votes for those voters living or serving in uniform overseas. The Uniformed and Overseas citizens Absentee Voting Act provides that in counting the ballot of a uniformed voter or other voter who is overseas "any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or political party shall be disregarded in determining the validity of the ballot if the intention of the voter can be ascertained." - Alaska Supreme Court Milier v. Treadwell pg. 7

"The Alaska Supreme Court did not make a finding clearly contrary to the face of the statute and its findings were entirely consistent with the State's past practices of making voter intent a priority. This is not to say that Miller's technical arguments are frivolous, for it is easy to understand his view as to the proper interpretation of AS 15.15.360 (a)(11). But it is just as easy to accept the interpretation given by the Alaska Supreme Court. What we have before us is a poorly drafted state statute. Wisdom would suggest that the Alaska Legislature act to clarify it to avoid similar disputes in the future." – Federal District Court Judge Ralph Bieistline pg. 7



# LEGISLATIVE RESEARCH SERVICES

Alaska State Legislature  
Division of Legal and Research Services  
State Capitol, Juneau, AK 99801

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research@legis.state.ak.us

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## Memorandum

TO: Senator Joe Thomas  
FROM: Susan Warner, Legislative Analyst  
DATE: January 21, 2011  
RE: Legal History of Counting Write-in Votes in Alaska  
*LRS Report 11.113*

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***You asked about the history in Alaska of write-in vote counting. You were particularly interested in legal precedents, and you asked for copies of pertinent decisions.***

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Within certain parameters defined by the U.S. Constitution, states have the authority to make their own election laws, and most states allow voters to write in the name of a candidate who is not listed on the ballot. Legal challenges occur most often in close races; courts then attempt to balance the constitutional right of citizens to elect the person of their choice against state laws that are designed to ensure efficient and orderly elections, among other things. The Alaska Supreme Court has consistently held that the right of citizens to select their government representatives is a fundamental prerogative of citizenship and should not be impaired or destroyed by "strained" statutory constructions.<sup>1</sup> As such, the Court in the most recent case (*Miller v. Treadwell*, 2010) held as follows:

**Voter intent is paramount, and any misspelling, abbreviation, or other minor variation in the form of the candidate's name on a write-in ballot does not invalidate a ballot so long as the intention of the voter can be ascertained.<sup>2</sup>**

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### ***Alaska Voting Law***

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As you know, Alaska law does not allow write-in voting during primary elections, but provisions must be made for write-in voting on general election ballots. Alaska's rules for counting write-in ballots specify that a vote for a write-in candidate "shall be counted" if the oval is filled in and if the candidate's last name, or the candidate's name as it appears on the declaration of candidacy, is written in the space provided.<sup>3</sup> The law further specifies that the rules on counting ballots are, without exception, mandatory.

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### ***Miller v. Treadwell***

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Voter intent prevailed in litigation over the counting of write-in ballots in Alaska's 2010 U.S. Senate race. Joe Miller, the Republican senate candidate on the general ballot, argued that write-in votes for his opponent should not have been counted unless the candidate's name was spelled flawlessly. The Alaska Supreme Court ruled against Mr. Miller in *Miller v. Treadwell*, and the Court opinion begins with powerful language in support of voter enfranchisement. The Court proclaims that a citizen's right to vote is *of profound importance; key to participatory democracy; and a polar, cardinal, and bedrock principle*. The Court also notes that such longstanding principles have been consistently applied to election issues in Alaska over the past 50 years.

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<sup>1</sup> *Carr v. Thomas*, 586 P.2d 622, 627(1978). We provide this document as Attachment A.

<sup>2</sup> *Miller v. Treadwell*, Alaska Supreme Court No. S-14112, December 22, 2010. Please note the recitation of pertinent case history entitled "Longstanding Alaska Election Principles" on page 2 of that decision (Attachment B).

<sup>3</sup> 15.15.360(a)(11).

Mr. Miller had argued that Alaska statutory language excludes any vote that is not spelled perfectly. The Superior Court held that if the legislature intended a candidate's name to be spelled perfectly, legislators would have used words like *exactly*, *precisely*, or *perfectly*.<sup>4</sup> The Supreme Court agreed and held that Alaska's statutory language is meant to be *inclusive* rather than *exclusive*:

It is designed to ensure that ballots are counted, not excluded. And this inclusiveness is consistent with the overarching purpose of an election: to ascertain the public will. . . . Voter intent is paramount, and any misspelling, abbreviation, or other minor variation in the form of the candidate's name on a write-in ballot does not invalidate a ballot so long as the intention of the voter can be ascertained.

Additionally, the Court noted that Alaskan voters arrive at their polling places with a variety of backgrounds and capabilities, including some being raised without English as their first language, and such issues should not take away a person's right to decide which candidate to elect:

We must construe the statute's language in light of the purpose of preserving a voter's choice rather than ignoring it.

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### Legal Precedents

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The decision reached in *Miller v. Treadwell* reflects the tendency for all U.S. courts to favor voter intent over ambiguous statutory language, but election scholar Richard Hasen asserts that the Alaska Supreme Court—even before *Miller*—appears to have gone the furthest in giving emphasis to voter intent.<sup>5</sup> Alaska's 1978 precedent-setting case, *Carr v. Thomas*, involved the question of counting certain ballots, and Alaska's highest court declared that the state would need "clear and unmistakable" statutory language to take away a citizen's right to have his or her voted counted.

Alaska courts have consistently emphasized the importance of voter intent. The decisions for the following Alaska cases are attached to this document:

- *Willis v. Thomas*, 600 P.2d 1079 (1979). The Alaska Supreme Court depended on a determination of voter intent in ruling on the results of a recount of ballots in Senate District F (Attachment D).
- *Fischer v. Stout*, 741 P.2d 217 (1987). The Alaska Supreme Court ruled on whether certain votes or classes of votes were properly counted or rejected in the 1986 race for Senate District H. The Court held that ballots marked with a pen rather than punched still showed clear voter intent and should be counted (Attachment E).
- *Finkelstein v. Stout*, 774 P.2d 786 (1989). The Alaska Supreme Court ruled on a ballot recount for Seat A in House District 13. The Court considered voter intent with regard to questioned signatures on absentee ballots (Attachment F).
- *Edgmon v. Moses*, 152 P.3d 1154 (2007). The Alaska Supreme Court ruled on the results of a recount in the District 37 Democratic primary. Considering ballot markings, the Court found that marks clearly intended as votes should be counted (Attachment G).

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<sup>4</sup> *Joe Miller v. Lieutenant Governor Craig Campbell*, Case No. IJU-10-1007CI, Memorandum of Decision and Order on Motion for Summary Judgment and Cross Motions, December 10, 2010. We provide this document as Attachment C.

<sup>5</sup> Richard L. Hasen, "The Democracy Canon," *Stanford Law Review*, Vol. 62, 2009, p. 87.

### Addressing Irregular Write-in Votes in Other States

Although Alaska statute does not address the inevitable misspellings and illegibility of written-in names, many states attempt to clarify how such votes will be counted, and these rules always give primacy to voter intent. There are variations among states, but this directive, by its very nature, is subjective and gives vote-counters the authority to determine who a voter intended to elect. Here are examples from four states:

- California accepts a “reasonable facsimile” of a write-in candidate’s name (Cal. Elec. Code § 15342).
- Nebraska will count a write-in vote without the first name of the candidate, and the write-in name must be “reasonably close to the proper spelling” (Neb. Rev. Stat. § 32-615).
- Delaware allows for a “misspelled or minor variation” of a write-in candidate (Del. Code Ann. Title 15, § 4972 (b)(8)).
- Washington election officials are required to “exercise all reasonable efforts to determine the voter’s intent (WAC 434-262-160).

Some states provide further guidance on counting irregular write-in votes. Washington State has an extensive, pictorial booklet on how election officials are expected to count nearly every deviation from what might be considered a standard marking, including samples of acceptable and unacceptable write-in votes. Attachment H is the portion of the booklet that deals with write-in votes, and the entire document can be viewed at [http://www.sos.wa.gov/\\_assets/elections/2009StatewideStandardsonWhatisaVote.pdf](http://www.sos.wa.gov/_assets/elections/2009StatewideStandardsonWhatisaVote.pdf).

We hope this is helpful. If you have questions or need additional information, please let us know.

**adn.com**

Anchorage Daily News

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**Our view: No doubt*****State smart to review election, need for any changes in law****(01/03/11 19:17:26)*

When federal Judge Ralph Beistline tossed Joe Miller's challenge to Alaska's U.S. Senate election, he granted that Alaska's law could be clearer about the primacy of voter intent.

He was right.

The requirement that a write-in candidate's name be written as it appears in its state-qualified form led to the arguments over spelling and how close voters had to be.

In addition, the state's decision to provide, at voters' request, lists of qualified write-in candidates prompted unsuccessful suits by both the Republican and Democratic parties.

While we disagreed with the Division of Elections on the latter point, state courts upheld their call. And the division ran a straight, fair election.

Lawmakers, however, should revisit the law to make clear that voter intent, not spelling, is the key test in deciding which write-in votes count, and to decide whether write-in lists either will or won't be provided at polling places in the future.

The division did well by Alaskans. But clarity in the law may help keep future elections out of court.

**BOTTOM LINE:** Election law should leave no room for doubt.

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## Politics



# No 'spelling bee' election in Alaska

Ruth Walker | Christian Science Monitor | Dec 7, 2010

The 2010 elections, the gift that keeps on giving, have imparted new meaning to the phrase "all over but the shouting."

At this writing, Lisa Murkowski looks likely to be headed back to Washington as Alaska's senior senator and into the history books as the first candidate since Strom Thurmond in 1954 to win election to the Senate as a write-in. Her victory, if confirmed, as is now expected, will turn in part on a decision to honor ballots from voters who merely approximated the correct spelling of her name.

How should we feel about that? Are standards slipping irretrievably in the republic?

Her Democratic opponent has conceded defeat. But her Republican opponent, Joe Miller, whose own name was easier to spell and was, moreover, actually on the ballot, has had other ideas.

His campaign has challenged all ballots that fall short orthographically. State authorities, on the other hand, have been counting as valid all those who came close to spelling "Murkowski" right.

Alaskan law requires electoral officials to take into account "voter intent" when counting write-in votes. This standard is common across the country, it turns out. The Los Angeles Times quoted Richard Winger, editor of the election law journal Ballot Access News: "I am not aware of any state that says write-ins can't be counted unless the spelling is perfect."

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As a copy editor, I'm with Mr. Miller. What kind of democracy can't spell its leaders' names right?

As a student of language, though, I understand that spoken language came first, and that the written form of any word is an approximation of the spoken form; it's not the other way around. After all, there's a reason we call it "language" - from the Latin word for "tongue" - and not "scribblage," or something like that.

The case for a more generous interpretation of what counts as a valid vote for a write-in candidate starts with this primacy of spoken language.

Much of what we recognize as democracy began

with spoken language, conversations, and debates in halls of assembly and the public square. Democracy was then furthered by written communication, especially after the development of the printing press.

More recently, speech has gained a boost from new forms of communication - from FDR's fireside chats to YouTube - that have let us hear, and hear repeatedly, what we otherwise might only have read.

Of course we need both modes: Writing - "print" - allows for rereading, for reflection and the consideration of nuance. Speech, especially live, in-person speech, provides immediacy and the expression of feelings.

[print](#)

## **Fix the law: Write-in ballot statute needs repair by Legislature**

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12.30.10 - 11:53 pm

### **Editorial**

Federal Judge Ralph Beistline wrote in his Tuesday ruling dismissing Joe Miller's amended federal lawsuit in the U.S. Senate race that he can understand Mr. Miller's viewpoint regarding the wording of state election law.

Judge Beistline also said he can easily see the state's view when it comes to the law governing how a write-in candidate's name must appear on the ballot in order to be considered a valid vote.

The judge ultimately deferred to the Alaska Supreme Court, which ruled in Mr. Miller's state lawsuit that the name of Sen. Lisa Murkowski didn't have to be spelled correctly. Mr. Miller argued, in both state and federal court, that Alaska law required a precise spelling.

But Judge Beistline found the Alaska Supreme Court "did not make a finding clearly contrary to the face of the statute and its findings were entirely consistent with the state's past practice of making voter intent a priority."

But the judge, in his ruling, pointedly noted a problem:

"This is not to say that Miller's technical arguments are frivolous, for it is easy to understand his view ...

"What we have before us is a poorly drafted state statute. Wisdom would suggest the Alaska Legislature act to clarify it to avoid similar disputes in the future. For now we have to work with what we have and that is what the Alaska Supreme Court has done."

Judge Beistline's message is clear and sound: The Legislature should clarify the law. It should do so this coming session while the subject is fresh.

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## Supreme Court takes reasonable approach in election challenge

by Dermot Cole / cole@newsminer.com

Dec 22, 2010 | 757 views | 0 | 5 | |

FAIRBANKS — The Alaska Supreme Court said it relied on principles applied consistently during the past 50 years to reject Joe Miller's court case and approve the state's approach to counting ballots.

The decision Wednesday helps clear the way for Sen. Lisa Murkowski's re-election to be certified before the next Congress. Miller may pursue a federal court fight, however.

This unanimous ruling is not surprising, given the numerous decisions the court has made in contested elections over the years. The ruling also is reasonable.

The court declared that Miller is dead wrong in claiming state law requires the names of write-in candidates be spelled correctly.

"Our prior decisions clearly hold that a voter's intention is paramount," the four justices said. "In light of our strong and consistently applied policy of construing statutes in order to effectuate voter intent, we hold that abbreviations, misspellings or other minor variations in the form of the name of a candidate will be disregarded in determining the validity of the ballot, so long as the intention of the voter can be ascertained."

The court rejected Miller's argument that anything less than his point of view, supporting correct spelling, would threaten the integrity of the election process.

"But it is Miller's interpretation of the statute that would erode the integrity of the election system, because it would result in disenfranchisement of some voters and ultimately rejection of election results that constitute the will of the people," the judges said. "We have consistently construed election statutes in favor of voter enfranchisement."

The court also found its interpretation of state law is consistent with federal and state rules allowing misspellings on the federal write-in absentee ballot for military voters and civilians overseas.

"Miller's proposed construction of the statute 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," the court said.

Other states use the same approach as Alaska in counting ballots and "we see no basis for Miller to argue that the application of the standard in this election violates equal protection under either the state or federal constitution."

The portion of state law Miller said requires perfect spelling really applies to pseudonyms, the court said.

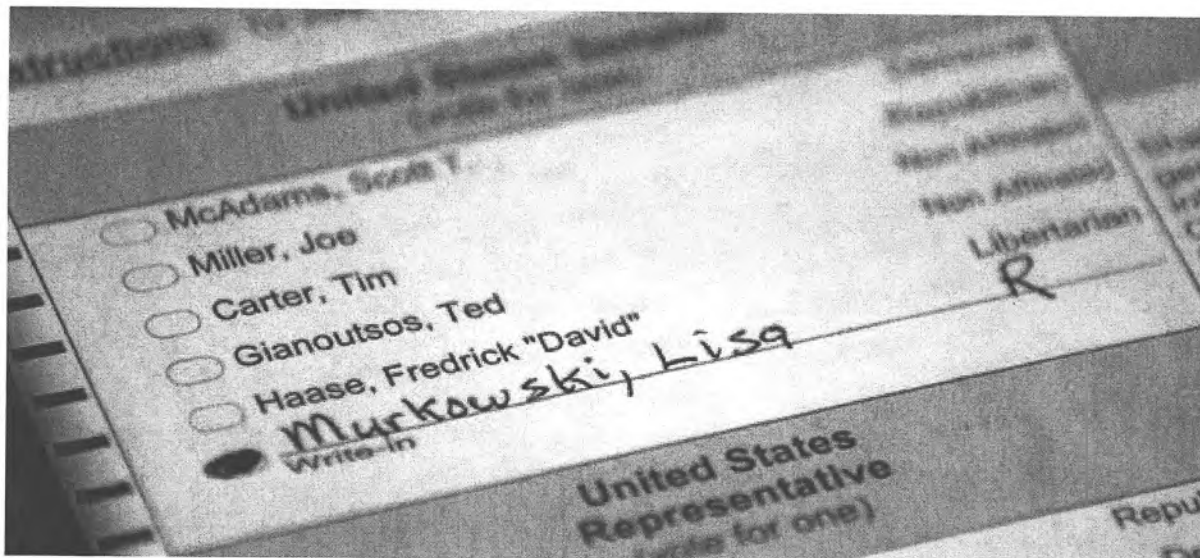
"The 'nickname' field allows a candidate to ensure that his or her pseudonym 'appears on the write-in declaration of candidacy' so that the write-in votes listing that pseudonym will count. Thus, the word 'appears' relates to a pseudonym's possible presence on the ballot, not the particular form of the vote and demonstrates that the statute is inclusive — it is designed to include, rather than exclude, votes."

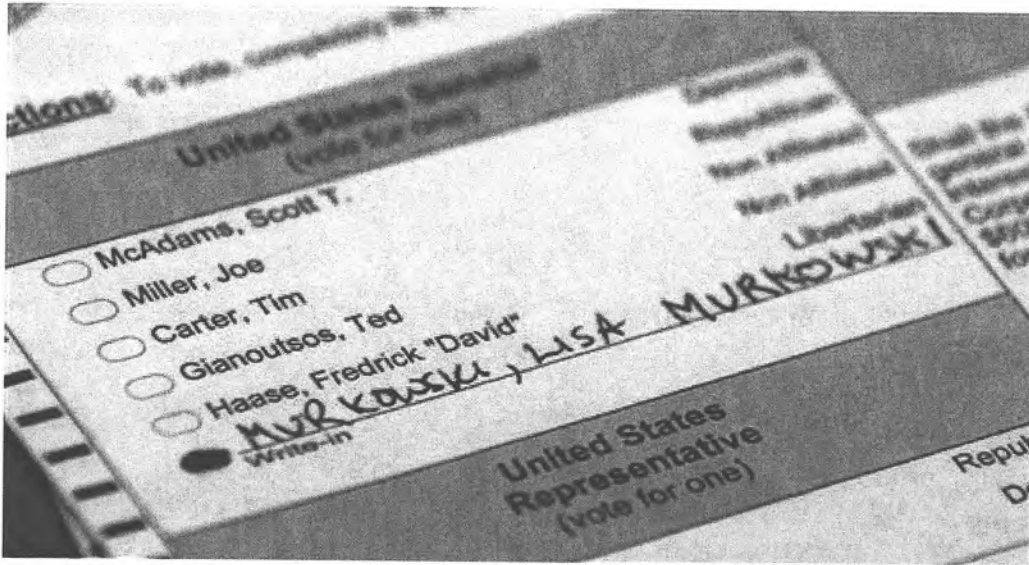
...

**GIVING THANKS:** The Mariutto family wants to pass along thanks to the people of Fairbanks for prayers and support for Sabrina, the Monroe High School student who has been stricken with cancer.

Fabio Mariutto, her father, said he is grateful for the more than \$17,000 raised at a spaghetti feed fundraiser Dec. 12 and for the daily notes, cards, prayers and "all the other little but important things necessary for life."

"For Sabrina's friends, thank you for being there for her despite the distance of thousands of

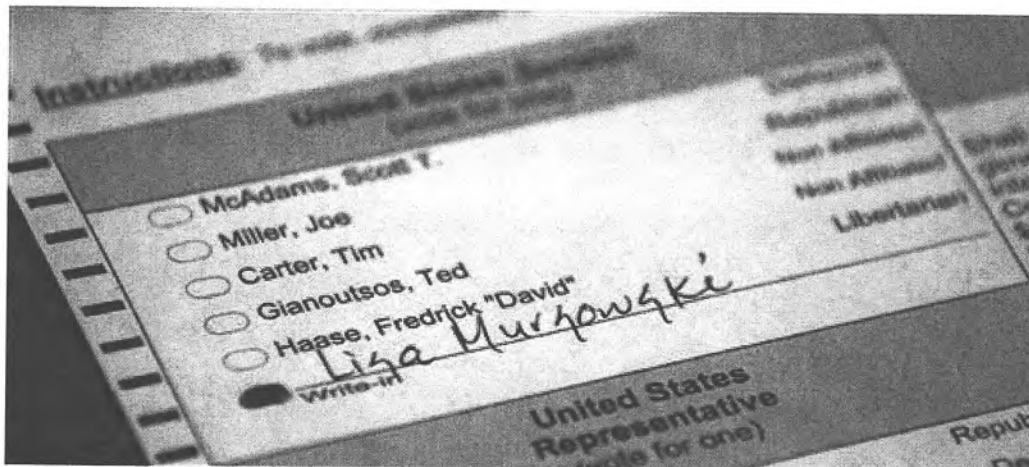


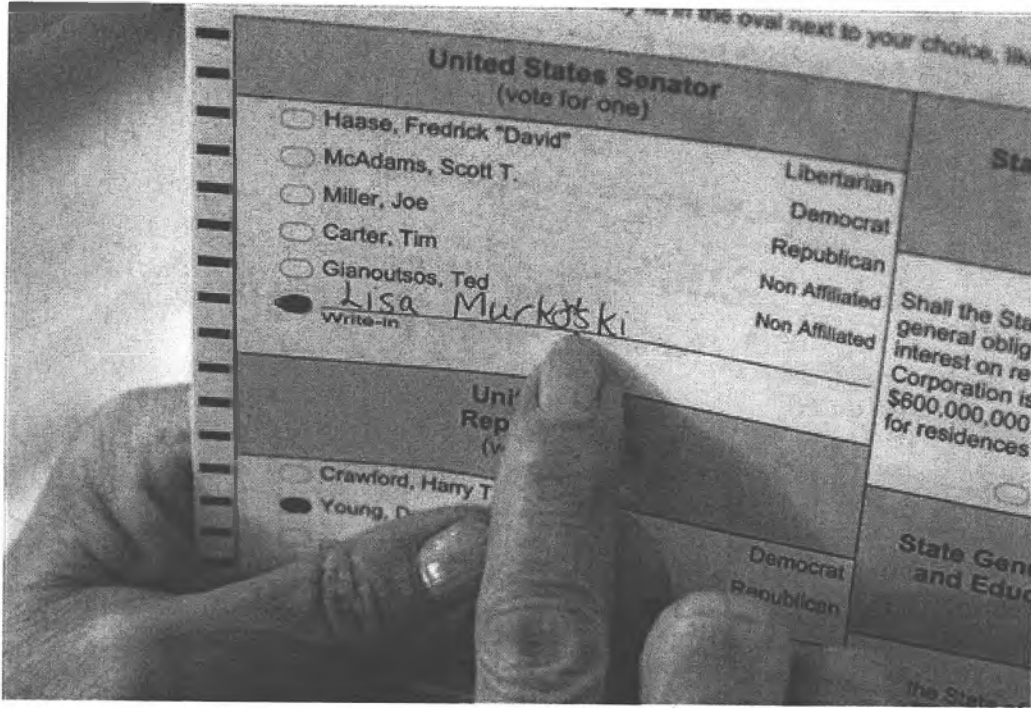


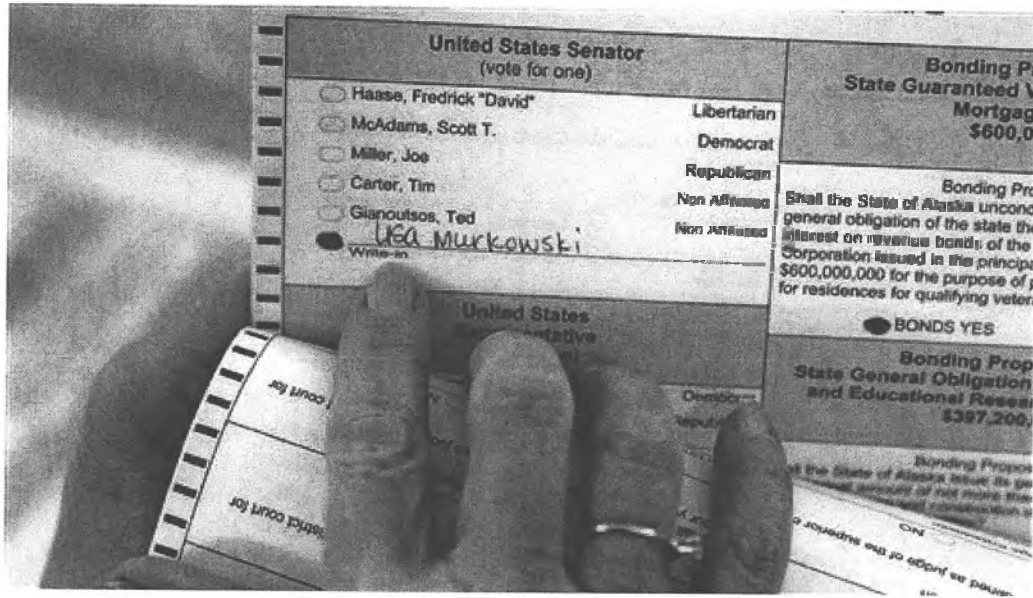
**United States Senator**  
(vote for one)

- Miller, Joe Republican
- Carter, Tim Non Affiliated
- Gianoutsos, Ted Non Affiliated
- Haase, Fredrick "David" Libertarian
- McAdams, Scott T. Democrat

No Confidence  
Write-In









ALASKA FEDERATION  
OF NATIVES

## Memorandum

**To:** Grier Hopkins, Aide to Senator Joe Thomas  
**From:** Adrian LeCornu, Special Assistant AFN  
**Date:** 1/26/2011  
**Re:** Testimony in regards to SB 31

---

Attached to this is the Testimony of Ralph Anderson, Co-Chair of Alaska Federation of Natives. Alaska Federation of Natives is the largest Alaska Native group within the state of Alaska, representing over 190 villages and tribal councils, 11 non-profits and 12 of the largest corporations in the state.

While we do not take a position on SB 31, we do support the language within the bill and believe that it strikes the right tone. If this bill were to be merged with others or amended, we would like a chance to review the resulting bill to insure that the tone of this bill is not lost.

We would like to submit the attached document for the Alaska Senate State Affairs committee's consideration. We thank you for taking up this issue.



**ALASKA FEDERATION  
OF NATIVES**

**Testimony of  
Ralph Andersen, Co-Chair  
Board of Directors  
Alaska Federation of Natives**

TESTIMONY before State Affairs Committee, Senate Bill 31, 27<sup>th</sup> Alaska Legislature

For the record, my name is Ralph Andersen. I am Co-Chair of the Alaska Federation of Natives' Board of Directors. AFN is the largest and oldest statewide Alaska Native organization in Alaska. Its membership includes the 13 regional Native corporations, 12 regional non-profits that contract and run federal and state programs and over 200 villages and tribes throughout the State. Our organization represents about 100,000 Alaska Natives from all around this state.

I would like to preface my comments today by noting that the AFN Board has taken no formal position on this bill. With that being said, we do believe that a bill that addresses our concerns and the concerns of many Alaska residents should be moved along and passed. The events that prompted this bill were historic and are now well documented, not only politically, but also legally with the action of the Alaska Supreme Court.

Our belief has always been and will continue to be the enfranchisement of those we represent. We would hope that the committee would consider the demographics in Alaska, and especially those in rural Alaska. There are many diverse cultures in this State and many Alaska residents whose first language is not English. In parts of rural Alaska one primary Alaska Native language is spoken with a rudimentary knowledge and use of English. Members of the Committee should also consider the population dynamics of their own districts. In Anchorage, for example, you could find over 87 different languages spoken in homes, and not everyone has achieved total fluency of the English language.<sup>1</sup>

There are also questions around education, and the ability to read and write in English. Reading and writing for some is challenging, not to mention the additional challenges faced by those with learning disabilities. We want to avoid creating a law that disenfranchises people because of their education, being impaired or handicapped, and as a result unintentionally or mistakenly placing the wrong vote.

With these considerations, I am certain you understand that memorizing the exact correct spelling of candidates' names may be difficult, even for those with a good education. We support the language on Page 2, Line 27-29 of the bill that "In counting votes for a write-in candidate, the election board shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained." We believe this language is affirmative on the rights of the voter. I thank you for allowing these comments to be included for the record.

---

<sup>i</sup> Anchorage School District



## Legislative changes would fix write-in problems, shake up partisan primary system

Sunday, January 23, 2011

Story last updated at 1/22/2011 - 11:26 pm

Legislative changes would fix write-in problems, shake up partisan primary system  
By Ben Brown | For the Juneau Empire

The 2010 election cycle in Alaska was unlike anything ever seen before. Things in both the primary and general elections directly resulted from the way Alaska statutes governing elections are written, from the outcome of the primary election to the ultimate determination of general election results. Ambiguity in the Alaska Elections Act is a bad thing, creating controversy where it need not exist.

Rep. Tammie Wilson, R-North Pole, has introduced House Bill 70, and Sens. Joe Thomas (D-Fairbanks), Hollis French (D-Anchorage), Linda Menard (R-Wasilla), and Bill Wielechowski (D-Anchorage) Senate Bill 31, to add the following mandate to the list of rules about how ballots are counted:

"In counting votes for a write-in candidate, the election board shall disregard any abbreviation, misspelling, or other minor variation in the form of the name of a candidate if the intention of the voter can be ascertained."

This language follows what the Alaska Supreme Court has set as a fair and just standard for counting Alaskans' votes, erring on a voter's side when he or she has been unclear, but not so unclear as to have one's vote not count at all. This is inherently fair and reasonable, and should become law. I haven't heard what the total cost for the Division of Elections' work in conducting the write-in count was yet, but it will be a large sum of money, one that had to be spent because the ballots had to be counted. While any candidate had the right to challenge the legality and integrity of the methods put forward by the Division of Elections to count write-in ballots, the cost to all parties of litigating that challenge would have been completely unnecessary had the statute been clear. Yes, there was ample general precedent for discerning voter intent, but case law did not provide direct guidance on spelling a write-in candidate's name.

SB 31 will be heard Tuesday morning in the Senate State Affairs Committee, after which it will move to the Judiciary Committee. The positive fiscal impact of this bill may not be directly considered at any of these hearings, but it nevertheless one more reason it should pass. Clearing up this issue will save a lot of time and money. It is also an issue on which both sides of the aisle appear to agree, so I expect quick passage.

A much more complex and far-reaching piece of elections legislation is HB 77, introduced by Reps. Max Gruenberg (D-Anchorage), Sharon Cissna (D-Anchorage), and Scott Kawasaki (D-Fairbanks). HB 77 would make many significant changes to many components of the election

laws, as evidenced by a simple reading of the title:

"An Act establishing a top two nonpartisan blanket primary election system for elective state executive and state and national legislative offices; changing appointment procedures relating to precinct watchers and members of precinct election boards election district absentee and questioned ballot counting boards, and the Alaska Public Offices Commission; requiring certain written notices to appear in election pamphlets and polling places; relating to declarations of candidacy and letters of intent; and amending the definition of 'political party.'"

HB 77 is 21 pages long, and will require much explanation as it moves through the legislative process. Easily the biggest change HB 77 would make — if ever enacted — would be the elimination of the closed Republican primary and a creation of a single, non-partisan top-two winner primary election. Right now the Division of Elections by law is to create a separate ballot for each political party but only the Republican party has this done. All other candidates are on a single other ballot, and members of other parties can only vote on this ballot. HB 77 would not only place Republicans, Democrats, Greens, Libertarians, and others on the same ballot, but would advance only the first- and second-place winners regardless of party. Two members of the same party could move forward to the general election. This is a vast change from our current system as there would never be more than two candidates in the general election (unless, of course, there were write-in candidates) and because the primary election would no longer determine the nominee of a political party.

Last August's Republican primary election turned out the way it did in no small part because it was a closed primary, and many voters were not able to vote for the candidate who ultimately won the U.S. Senate race. It would be possible to return to a unified primary election but not eliminate the process of moving a candidate from each party on to the general. It will be interesting to see how HB 77's more far-reaching approach is received by the Legislature, in addition to the myriad of other changes it would make.

If we don't fix elections law problems that exist, we have no one but ourselves to blame when costly problems flare up in the future. I am grateful that, while the Legislature is busy writing budgets and considering a universe of other issues, attention is being paid to crucial elections issues too.

- Brown is an attorney who lives in Juneau.

## About the Disability Law Center

The Disability Law Center of Alaska is a private non-profit, consumer-directed organization incorporated in 1977, and designated as the Statewide Protection and Advocacy agency to promote the legal and human rights of individuals with physical and/or mental disabilities.

Consumers may access our educational, administrative, and legal services through our four offices, located in Anchorage, Juneau, Bethel and Fairbanks. Services are prioritized through a public input process that occurs annually.

Our advocacy is geared toward improving the lives of individuals and toward creating systemic change for all Alaskans with disabilities in six life domains: health care, individual and community supports, education, transportation, employment and housing.

## Disability Law Center Offices

### Anchorage

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## Division of Elections

### Director's Office

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## Protection and Advocacy for Voting Access



## DISABILITY LAW CENTER OF ALASKA

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ANCHORAGE, ALASKA 99503

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## What is HAVA?

On October 29, 2002, the Help America Vote Act (HAVA) was signed into law. This law requires states to establish, expand and improve access to voting areas and increase voter participation by individuals with disabilities.

HAVA monies are used by states in collaboration with local governments to enhance accessibility to polling places for individuals with disabilities; provide outreach to the disability community about polling accessibility; and to train poll workers, elections officials and volunteers on methods to promote access and increase voter participation for individuals with disabilities.

## What is PAVA?

HAVA has provided specific funds to Protection and Advocacy Systems to ensure that people with disabilities are able to fully participate in the voting process. With this money, Disability Law Center created PAVA – *Protection and Advocacy for Voter Access*. Access includes registering to vote, casting a vote, and accessing polling places. These funds allow PAVA to:

- Develop a disability awareness training for election officials to focus on how to support a person with a disability to vote privately and independently.
- Provide assistance to election officials in surveying polling places and recommending changes to achieve accessibility.
- Develop informational material for people with disabilities on rights in the voting process. This material will be used to educate people with disabilities about their voting rights.

## Requirements to Vote

*A person may register to vote if that person:*

- Is a citizen of the United States
- Is at least 18 years old or will be 18 within 90 days of registering to vote
- Is a resident of Alaska
- Is not a convicted felon, unless unconditionally discharged
- Has not been deemed incompetent to vote
- Is not registered to vote in another state

*A person is eligible to vote if that person:*

- Is a citizen of the United States
- Is 18 years of age or older
- Has registered to vote in the proper election jurisdiction (neighborhood) at least 30 days prior to the election
- Is not a convicted felon

**Sec. 15.15.360. Rules for counting ballots.**

(a) The election board shall count ballots according to the following rules:

(1) A voter may mark a ballot only by filling in, making "X" marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate, proposition, or question that the voter desires to designate.

(2) A failure to properly mark a ballot as to one or more candidates does not itself invalidate the entire ballot.

(3) If a voter marks fewer names than there are persons to be elected to the office, a vote shall be counted for each candidate properly marked.

(4) If a voter marks more names than there are persons to be elected to the office, the votes for candidates for that office may not be counted.

(5) The mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

(6) Improper marks on the ballot may not be counted and do not invalidate marks for candidates properly made.

(7) An erasure or correction invalidates only that section of the ballot in which it appears.

(8) A vote marked for the candidate for President or Vice-President of the United States is considered and counted as a vote for the election of the presidential electors.

(9) Write-in votes are not invalidated by writing in the name of a candidate whose name is printed on the ballot unless the election board determines, on the basis of other evidence, that the ballot was so marked for the purpose of identifying the ballot.

(10) 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.

(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.

(12) If the write-in vote is for governor and lieutenant governor, the vote shall be counted if the oval is filled in and the names, as they appear on the write-in declaration of candidacy, of the candidates for governor and lieutenant governor or the last names of the candidates for governor and lieutenant governor, or the name, as it appears on the write-in declaration of candidacy, of the candidate for governor or the last name of the candidate for governor is written in the space provided.

(b) 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.

(c) [Repealed, Sec. 24 ch 113 SLA 2003].

#### **History -**

(Sec. 3.36 ch 83 SLA 1960; am Sec. 10 - 12 ch 125 SLA 1962; am Sec. 8 - 10 ch 80 SLA 1963; am Sec. 1 ch 136 SLA 1966; am Sec. 24 ch 69 SLA 1970; am Sec. 26 ch 116 SLA 1972; am Sec. 65 ch 100 SLA 1980; am Sec. 40 ch 82 SLA 2000; am Sec. 14, 24 ch 113 SLA 2003)

#### **Decisions -**

Completely filled-in boxes are to be counted. *Hickel v. Thomas*, 588 P.2d 273 (Alaska 1978).

Punch-card ballots marked entirely by pen instead of punched are valid because they provide clear evidence of the voters' intent. *Fischer v. Stout*, 741 P.2d 217 (Alaska 1987).

Boxes completely filled in over prior mark are to be counted. *Hickel v. Thomas*, 588 P.2d 273 (Alaska 1978).

Ballots did not contain overvotes. - Two ballots were improperly categorized as containing overvotes where the voters had completely shaded the ovals for the candidate and all other races on the ballot, there was only a trace touching the edge of the oval next to the opponent's name, and thus, the voters had clearly intended to vote for only one candidate. *Edgmon v. State*, 152 P.3d 1154 (Alaska 2007).

Ballot was improperly categorized as containing overvotes where the voter had placed an "X" in the oval next to a candidate's name, the "X" was consistent with the votes cast on the remainder of the ballot, and thus, the line striking through the opponent's name and the oval next to it was not a vote for that candidate. *Edgmon v. State*, 152 P.3d 1154 (Alaska 2007).

Construction of "overvotes". - Reading subsections (a)(1) and (a)(5) of this section together, an overvote occurs if the voter has voted for two candidates with marks as defined by

subsection (a)(1) that clearly indicate the voter's intent to vote for more than one candidate. *Edgmon v. State*, 152 P.3d 1154 (Alaska 2007).

Use of punch-card machine not required. - Neither this section nor former AS 15.20.730 (rules for counting punch-card ballots) require voters to use a punch-card machine if one is available, but only specify the manner of counting properly punched and hand-marked ballots. *Fischer v. Stout*, 741 P.2d 217 (Alaska 1987).

Former paragraph unconstitutional. - Former paragraph of this section, which was repealed in 1970, added to the qualifications established by U.S. Const., art. I, Sec. 3, and was therefore unconstitutional. *Benesch v. Miller*, 446 P.2d 400 (Alaska 1968).

The over-all effect of former paragraph of this section was that of adding to the qualifications established by U.S. Const., art. I, Sec. 3, the additional qualification that in order to be a candidate at the general election, the candidate must not have been defeated in the primary election for that office. *Benesch v. Miller*, 446 P.2d 400 (Alaska 1968).

#### **Collateral Refs -**

Validity where candidate's surname only is written in on ballot. 86 ALR2d 1025.

#### **Sec. 15.15.361. Stickers.**

Affixing stickers on a ballot in an election to vote for a write-in candidate is prohibited.

#### **History -**

(Sec. 66 ch 100 SLA 1980; am Sec. 41 ch 82 SLA 2000)

Notice: This opinion is subject to correction before publication in the PACIFIC REPORTER. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, e-mail corrections@appellate.courts.state.ak.us.

THE SUPREME COURT OF THE STATE OF ALASKA

JOE MILLER,	)	
	)	Supreme Court No. S-14112
Appellant,	)	
	)	Superior Court No.
v.	)	1JU-10-01007CI
	)	
MEAD TREADWELL, in his official	)	<u>OPINION</u>
capacity as Lieutenant Governor,	)	
STATE OF ALASKA, DIVISION	)	No. 6532 – December 22, 2010
OF ELECTIONS, and LISA	)	
MURKOWSKI,	)	
Appellees.	)	
_____	)	
LISA MURKOWSKI,	)	Supreme Court No. S-14121
	)	
Cross-Appellant,	)	
v.	)	
	)	
JOE MILLER, MEAD TREADWELL,	)	
in his official capacity as Lieutenant	)	
Governor, STATE OF ALASKA,	)	
DIVISION OF ELECTIONS,	)	
	)	
Cross-Appellees.	)	
_____	)	

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, William B. Carey, Judge.

Appearances: Thomas V. Van Flein, Clapp, Peterson, Van Flein, Tiemessen & Thorsness, LLC, Anchorage, and

Michael T. Morley, pro hac vice, Washington, D.C., for Appellant and Cross-Appellee Miller. Joanne M. Grace and Laura F. Fox, Assistant Attorneys General, Anchorage, and Richard A. Svobodny, Acting Attorney General, Juneau, for Appellees and Cross-Appellees Treadwell and State of Alaska, Division of Elections. Timothy A. McKeever and Scott M. Kendall, Holmes Weddle & Barcott, Anchorage, for Appellee and Cross-Appellant Murkowski. Thomas P. Amodio, Reeves & Amodio, LLC, Anchorage, for Amicus Curiae Alaska Federation of Natives.

Before: Carpeneti, Chief Justice, Fabe, Winfree, and Christen, Justices. [Stowers, Justice, not participating.]

PER CURIAM.

## **I. Introduction**

This case presents several issues of constitutional and statutory interpretation that arise from the count of votes following the 2010 election for one of Alaska's two seats in the United States Senate. Two of the contestants for that seat — Joe Miller, the Republican nominee, and Senator Lisa Murkowski, running as a write-in candidate — are parties to the lawsuit. Without seeking a recount, Miller filed suit in superior court challenging several decisions of the Alaska Division of Elections in counting the votes. Murkowski intervened, challenging other vote-counting decisions of the Division. Superior Court Judge William B. Carey upheld the Division's actions. Miller appeals, and Murkowski cross-appeals.

## **II. Longstanding Alaska Election Principles**

In resolving the questions presented by the parties, we are governed by a number of longstanding principles that we have consistently applied to election issues in Alaska over the past 50 years.

We start with the bedrock principle that “[t]he right of the citizen[s] to cast [their] ballot[s] and thus participate in the selection of those who control [their] government is one of the fundamental prerogatives of citizenship.”<sup>1</sup> The right to vote “is fundamental to our concept of democratic government.”<sup>2</sup> “[It] encompasses the [voter’s] right to express [the voter’s] opinion and is a way to declare [the voter’s] full membership in the political community.”<sup>3</sup> We articulated this principle over three decades ago in *Carr v. Thomas*, recognizing the profound importance of citizens’ rights to select their leaders and noting that “[c]ourts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own.”<sup>4</sup> In reviewing and interpreting election statutes, we have uniformly held that “[w]here any reasonable construction of [a] statute can be found which will avoid such a result, the courts should and will favor it.”<sup>5</sup> We have applied this principle throughout the years because we recognize that the right to vote is key to participatory democracy. Guided by this polar principle, we declared in *Edgmon v. State, Office of the Lieutenant Governor, Division of Elections* that “the voter shall not be disenfranchised because of mere mistake, but [the

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<sup>1</sup> *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978) (quoting *Sanchez v. Bravo*, 251 S.W.2d 935, 938 (Tex. Civ. App. 1952)).

<sup>2</sup> *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995). The United States Supreme Court recognized the principle that voting is a fundamental right, emphasizing: “When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. 98, 104 (2000).

<sup>3</sup> *Dansereau*, 903 P.2d at 559.

<sup>4</sup> *Carr*, 586 P.2d at 626.

<sup>5</sup> *Id.* (quoting *Reese v. Dempsey*, 153 P.2d 127, 132 (N.M. 1944)).

voter's] intention shall prevail.”<sup>6</sup> Most recently, in *State, Division of Elections v. Alaska Democratic Party*, we noted that “[w]e have consistently emphasized the importance of voter intent because the opportunity to freely cast [one's] ballot is fundamental.”<sup>7</sup>

It is in light of our consistent application of these cardinal principles that we examine the issues presented in this case.

**III. Voter Intent Is Paramount, And Any Misspelling, Abbreviation, Or Other Minor Variation In The Form Of The Candidate's Name On A Write-In Ballot Does Not Invalidate A Ballot So Long As The Intention Of The Voter Can Be Ascertained.**

Joe Miller seeks an interpretation of election statute AS 15.15.360 that would disqualify any write-in votes that misspell the candidate's name. We do not interpret the statute to require perfection in the manner that the candidate's name is written on the ballot. Our prior decisions clearly hold that a voter's intention is paramount.<sup>8</sup> In light of our strong and consistently applied policy of construing statutes in order to effectuate voter intent, we hold that abbreviations, misspellings, or other minor variations in the form of the name of a candidate will be disregarded in determining the validity of the ballot, so long as the intention of the voter can be ascertained.

Miller points to language in AS 15.15.360(a)(11) providing that “[a] vote for a write-in candidate . . . 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

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<sup>6</sup> 152 P.3d 1154, 1157 (Alaska 2007) (internal citations and quotations omitted).

<sup>7</sup> Case No. S-14054, Order dated Oct. 29, 2010 at 3 (internal citations omitted).

<sup>8</sup> *Edgmon*, 152 P.3d at 1157 (“[W]e have consistently emphasized the importance of voter intent in ballot disputes.”).

last name of the candidate is written in the space provided.” He argues that this subsection, read in the context of other provisions of the statute, requires that a write-in candidate’s name be written and spelled perfectly, even if the voter’s intent to vote for a particular candidate can be readily ascertained. But when 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. And this inclusiveness is consistent with the overarching purpose of an election: “to ascertain the public will.”<sup>9</sup>

Miller urges that only his interpretation of the statute will “preserv[e] the integrity of the electoral process as a whole.” But it is Miller’s interpretation of the statute that would erode the integrity of the election system, because it would result in disenfranchisement of some voters and ultimately rejection of election results that constitute the will of the people. We have consistently construed election statutes in favor of voter enfranchisement.

Turning to the language of subsection (a)(11), it is evident that it does not require exact spelling. We agree with the State that subsection (a)(11) concerns pseudonyms. The “nickname” field on the declaration of candidacy form supports this interpretation. If that field were not present, a candidate with a pseudonym might write only his or her legal name on the form, thus invalidating ballots with the candidate’s pseudonym written in.<sup>10</sup> The “nickname” field allows a candidate to ensure that his or

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<sup>9</sup> *Boucher v. Bomhoff*, 495 P.2d 77, 79 (Alaska 1972) (internal quotations and citation omitted).

<sup>10</sup> Compare AS 15.15.360(11) (requiring write-in vote to include “name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate”), with AS 15.15.030(4) (allowing the Director, in placing names on the ballot, to “include in the candidate’s name any nickname or familiar form of a proper name of the candidate”).

her pseudonym “appears on the write-in declaration of candidacy”<sup>11</sup> so that the write-in votes listing that pseudonym will count. Thus, the word “appears” relates to a pseudonym’s possible presence on the ballot, not the particular form of the vote, and demonstrates that the statute is inclusive — it is designed to include, rather than exclude, votes.

As we have recognized, “a true democracy must seek to make each citizen’s vote as meaningful as every other vote to ensure the equality of all people under the law.”<sup>12</sup> In order to ensure that each citizen’s vote is as meaningful as every other vote, we must interpret the election statute to preserve a voter’s clear choice rather than to disenfranchise that voter. The State characterizes the standard urged by Miller as the “perfection standard,” and we agree that such a standard would tend to disenfranchise many Alaskans on the basis of “technical errors.”<sup>13</sup>

Alaskan voters arrive at their polling places with a vast array of backgrounds and capabilities. Some Alaskans were not raised with English as their first language. Some Alaskans who speak English do not write it as well. Some Alaskans have physical or learning disabilities that hinder their ability to write clearly or spell correctly. Yet none of these issues should take away a voter’s right to decide which candidate to elect to govern. We must construe the statute’s language in light of the

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<sup>11</sup> AS 15.15.360(a)(11).

<sup>12</sup> *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995); *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”).

<sup>13</sup> *See Carr v. Thomas*, 586 P.2d 622, 625-26 (Alaska 1978) (“There is well-established policy which favors upholding of elections when technical errors or irregularities arise in carrying out directory provisions which do not affect the result of an election.”).

purpose of preserving a voter's choice rather than ignoring it. As we have consistently ruled, we remain "reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and '[w]here any reasonable construction of the statute can be found which will avoid such a result, [we] should and will favor it.'"<sup>14</sup>

Our interpretation of AS 15.15.360 permitting 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 is also consistent with the federally mandated standard for counting the write-in votes of those voters living or serving in uniform overseas. The Uniformed and Overseas Citizens Absentee Voting Act provides that in counting the ballot of a uniformed services voter or other voter who is overseas, "[a]ny 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 the ballot, if the intention of the voter can be ascertained."<sup>15</sup> The Alaska Administrative Code incorporates this requirement into state law.<sup>16</sup> Miller's proposed construction of the statute 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 Alaskan voters equally,

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<sup>14</sup> *Id.* at 626 (quoting *Reese v. Dempsey*, 153 P.2d 127, 132 (N.M. 1944)).

<sup>15</sup> 42 U.S.C. § 1973ff-2(c)(3) (2006).

<sup>16</sup> *See* 6 Alaska Administrative Code (AAC) 25.670(b) (2010) ("Any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or political party will be disregarded in determining the validity of the ballot, if the intention of the voter can be ascertained."). We do not reach the question as to whether any provisions of federal law might conflict with relevant portions of the Alaska Administrative Code, as it is not presented here.

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.<sup>17</sup>

Finally, Miller suggests that our interpretation of AS 15.15.360 will lead to elections being decided by the unbridled discretion of election officials in determining voters' intent through visual inspection of write-in ballots. But Miller concedes that other states use the same standard for counting write-in ballots and that Congress has mandated that standard. We see no basis for Miller to argue that the application of the standard in this election violates equal protection under either the state or federal constitution. First, only one person, the Division's Director, made the initial determinations whether write-in ballots demonstrated voter intent for a particular candidate; this avoids any constitutional infirmities that might arise from different reviewers applying the standard differently.<sup>18</sup> Second, the initial election results are subject to the Director's review during a recount.<sup>19</sup> And, of course, the Director's final determinations are subject to judicial review.<sup>20</sup>

We affirm the decision of the superior court on this issue.

#### **IV. The Manual Count Of Write-In Votes Complied With Alaska Law And Did Not Violate Miller's Right To Equal Protection.**

Miller alleges that the Division's procedure to manually count the write-in votes violated 6 AAC 25.085. He argues that this regulation requires the Division to manually examine and count only the write-in ballots the optical scanners had first

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<sup>17</sup> *Cf. Bush*, 531 U.S. at 104-09.

<sup>18</sup> *Cf. id.*

<sup>19</sup> *See* AS 15.20.480.

<sup>20</sup> *See* AS 15.20.510.

validated. Miller claims that his interpretation of 6 AAC 25.085 would best “facilitate fairness” under AS 15.15.030.

Neither this regulation nor the statute Miller cites requires a particular procedure for counting write-in votes. Alaska Statute 15.15.030 addresses ballot preparation. It directs that ballots must be prepared “to facilitate fairness, simplicity, and clarity in the voting procedure”; it does not apply to the method used to conduct a count of write-in votes. In addition, Miller’s contention that the Division should have manually counted only those write-in ballots that were first validated by the optical scanner ignores the State’s uncontested showing that the optical scanner neither sorts nor segregates ballots. The machine merely counts filled-in ovals indicating a vote for those candidates whose names appear on pre-printed ballots and for the “write-in” category. It is possible to quantify the number of ballots that an optical scanner deems invalid, but these ballots are not segregated by the machine. Because the optical scanner counted a sufficient number of ballots for the “write-in” category in this election, it was necessary for the Division to conduct a manual count of the write-in ballots to determine for which candidates the write-in ballots had been cast.<sup>21</sup>

Miller impliedly raises an equal protection argument under *Bush v. Gore*,<sup>22</sup> claiming that Division workers counted more write-in ballots than the optical scanner because they used a more lenient standard than the scanner.<sup>23</sup> But there is no factual

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<sup>21</sup> See 6 AAC 25.085(b).

<sup>22</sup> 531 U.S. at 104-10.

<sup>23</sup> The optical scanner detected 102,252 write-in votes. From all of the ballots cast in the election, the Division workers manually sorted out 103,805 ballots cast for a “write-in” candidate. From that total, the Division determined that 101,088 ballots were cast for Lisa Murkowski; 92,929 were unchallenged and 8,159 were challenged but counted.

dispute that the Division workers looked at every ballot cast in the election to segregate the total ballots cast for “write-in” candidates. In an affidavit to the superior court, Division Director Gail Fenumiai explained the three-step procedure as follows. First, “all the ballots cast in the election were sorted by 30 election board workers who worked in 15 teams of two.” They sorted the ballots into five categories:

- (1) ballots on which the oval was marked correctly next to a candidate’s name that was printed on the ballot;
- (2) ballots on which no oval was marked for U.S. Senate, more than one oval was marked for that race, or a name was written in but the oval was unmarked;
- (3) ballots on which the write-in oval was marked and the written name was “Lisa Murkowski” or “Murkowski,” spelled correctly, and the ballot was not challenged by any observer;
- (4) ballots on which the write-in oval was marked and the name written appeared to be a variation or misspelling of Lisa Murkowski or Murkowski; this category also included any ballot challenged by an observer in the sorting process;
- (5) ballots on which the write-in oval was marked and the name written in was not “Murkowski,” “Lisa Murkowski,” or a variation thereof.

Significantly, the candidates had observers present who could challenge the category into which every ballot was sorted. The Division instructed the workers who conducted the initial sort of the ballots not to proceed unless observers were present at the table from both the Miller and Murkowski campaigns.

After the ballots were sorted, the Director personally examined the ballots in category four — ballots on which ovals had been filled in but the handwritten name was a variation or misspelling of “Lisa Murkowski” and other ballots challenged during

the sorting process — to determine voter intent.<sup>24</sup> The Director examined the ballots that were challenged because they contained misspellings of “Lisa Murkowski” or for any other reason. She permitted write-in ballots containing “minor misspellings and phonetic variations of ‘Murkowski’ to be counted for Lisa Murkowski when [she] determined that the voter clearly intended to vote for that candidate.” The Director placed the ballots into one of two envelopes: “challenged counted” or “challenged not counted.” If the Director’s decision regarding voter intent was not challenged, the ballot was placed in category three (write-in, oval filled, Lisa Murkowski properly spelled, not challenged) or category five (write-in, oval filled, a candidate other than Murkowski), depending on whether the Director decided to count it for Murkowski.

The Director examined ballots in category two in which no oval was filled in for the U.S. Senate race, and those ballots were not counted for any candidate. This was true of ballots on which voters spelled “Lisa Murkowski” correctly but failed to fill in the oval. The Director also examined “over-voted ballots”<sup>25</sup> in category two to determine voter intent. As Director Fenumiai explained:

- 1) I did not count ballots that had no oval filled in for the U.S. Senate race, even if a name was written in.
- 2) If a ballot had two ovals filled in for the U.S. Senate race, I examined the ballot to see where the ovals appeared. If the voter had filled in the oval by the name of a candidate printed on the ballot and also by the write-in choice, I counted the ballot if the voter wrote in the name of the same candidate. This is how Joe Miller received many of his 20 write-in votes. I also counted ballots with two ovals marked

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<sup>24</sup> The Director was the only person who made the final decision regarding voter intent. Given this protocol, we see no basis for any concern that inconsistent standards were used to determine the validity of ballots cast in this election.

<sup>25</sup> This refers to a ballot with more than one oval filled in.

when it was clear that the voter crossed out one of the ovals. I did this regardless of whether the voter expresses an intent to vote for a write-in candidate or for a candidate whose name was printed on the ballot. Otherwise, I did not add the ballot to the count.

3) The candidates' observers were able to challenge all of these determinations.

As a result of this process, each candidate's vote tally was increased. The write-in vote count yielded the following tallies:

Lisa Murkowski, unchallenged	92,929
Lisa Murkowski, challenged, counted	8,159
Total counted for Lisa Murkowski	101,088
Lisa Murkowski, challenged, not counted	2,016
Joe Miller	20
Scott McAdams	8
Other registered write-in candidates	53
Other miscellaneous names	620
Total write-in votes	103,805

The total number of write-in votes identified by the Division workers was 103,805 but the optical scanner detected 102,252. Miller claims that because the total write-in votes from the manual count — 103,805 — was higher than the number of write-in votes detected by the optical scanner, the workers must have applied “more lenient standards” that unfairly advantaged Murkowski. He claims that “it is unclear how many additional votes Joe Miller, or any other preprinted candidate, would have gained, had those same standards been applied to all the ballots in the election.” But having carefully examined the record in this case, we conclude that the record does not support Miller's contention that ballots in category two were treated differently depending on whether they were cast for candidates whose names were pre-printed on the ballot. Observers

working on Miller's behalf had the opportunity to challenge the sorting of every ballot cast in the election, and every category-two ballot was individually examined, as were the ballots in category four.<sup>26</sup> In addition, only one individual — the Director of the Division — looked at all of the ballots containing anomalies, including both over-votes and under-votes. We 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. Finally, the Director's examination resulted in additional votes for both Miller and Democratic nominee Scott McAdams, as well as Murkowski. Because the Division applied the methodology described above to every precinct, we conclude that the Division's methodology gave all of the ballots — as well as all of the candidates — equal treatment.

For these reasons, we affirm the decision of the superior court on this issue.

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<sup>26</sup> We observe that even if Miller had demonstrated that the Division was more lenient in the threshold it used to validate votes than the optical scanner, the difference he cites would not have changed the outcome of this election.

The optical scanners deemed a total of 2,882 votes for the U.S. Senate race to be invalid. But the Division shows that the number of votes rejected by the optical scanner that could have been cast in Miller's favor is much smaller. The Division begins with the total number of ballots cast in this election (258,746) and subtracts the total number of votes cast for candidates on the pre-printed ballot (153,579) and the total number of write-in votes it identified in its manual tally (103,805). The difference (258,746 - 257,384 = 1,362) is the Division's calculation of the number of votes rejected by the scanners that could have been cast in Miller's favor.

## V. The Division's Vote-Counting Procedures Are Not Regulations.

Miller argues that the Division's write-in vote-counting methodology is a regulation, or set of regulations, that should have been enacted pursuant to the Administrative Procedure Act (APA).<sup>27</sup> We disagree.

The APA requires advance notice of a regulation before it can be applied in agency interactions with the public.<sup>28</sup> Common sense statutory interpretations by agencies do not require regulations.<sup>29</sup> By contrast, if a statutory interpretation is "expansive or unforeseeable," the agency may be required to promulgate its interpretation through a regulation.<sup>30</sup> The Division's statutory interpretations of AS 15.15.360 and 6 AAC 25.085 were common sense interpretations and were not required to be promulgated in regulations. We have previously noted that "[n]early every agency action is based, implicitly or explicitly, on an interpretation of a statute or regulation authorizing it to act. A requirement that each such interpretation be preceded by rulemaking would result in complete ossification of the regulatory state."<sup>31</sup> We decline to depart from our previous decisions, and conclude that the Division did not violate the APA. Accordingly, we affirm the decision of the superior court on this issue.

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<sup>27</sup> AS 44.62.010 *et seq.*

<sup>28</sup> AS 44.62.190.

<sup>29</sup> See *Squires v. Alaska Bd. of Architects, Eng'rs & Land Surveyors*, 205 P.3d 326, 334-35 (Alaska 2009); *Alyeska Pipeline Serv. Co. v. State, Dep't of Env'tl. Conservation*, 145 P.3d 561, 573 (Alaska 2006); *Alaska Ctr. for the Env't v. State, Office of the Governor, Office of Mgmt. & Budget, Div. of Gov't Coordination*, 80 P.3d 231, 243-44 (Alaska 2003).

<sup>30</sup> *Alyeska Pipeline*, 145 P.3d at 573.

<sup>31</sup> *Id.*

**VI. We Affirm The Dismissal Of Miller’s Claims For Invalidation Of Two Categories Of Votes: (1) Votes Allegedly Cast By Voters Whose Identities Had Not Been Confirmed, And (2) Write-In Votes Allegedly Cast By The Same Person(s) On Multiple Ballots.**

**A. Overview**

This case comes to us under unusual circumstances. The election was held on November 2, 2010. Without seeking a statutorily available vote recount by the Division<sup>32</sup> or filing a lawsuit in state court to contest the election,<sup>33</sup> on November 9 Miller filed a federal court lawsuit. Miller sought declaratory and injunctive relief (1) stopping the Division from certifying the election results in favor of Murkowski, and (2) directing the Division to follow his interpretation of AS 15.15.360 by invalidating write-in votes “in which a candidate’s name is misspelled or is not written on the ballot as it appears on the candidate’s write-in declaration of candidacy.” On November 19 the federal court issued an injunction against certification, conditioned on Miller’s filing a state court lawsuit by November 22 to resolve the disputed interpretation of AS 15.15.360.

Miller filed suit in superior court on November 22, seeking not only declaratory and injunctive relief regarding the interpretation of AS 15.15.360, but also regarding: alleged disparate treatment of ballots, violation of other election statutes, the validity of the Division’s write-in vote-counting methodology under the Administrative Procedure Act, the validity of classes of votes the Division counted, and the validity of the election results. Murkowski intervened in Miller’s lawsuit, asking for declaratory and injunctive relief regarding the interpretation of election statutes, as well as challenging the validity of two classes of votes not counted by the Division. After expediting the proceedings, on December 10, 2010, Superior Court Judge William B.

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<sup>32</sup> See AS 15.20.430–.530.

<sup>33</sup> See AS 15.20.540–.560.

Carey upheld all of the Division's disputed actions, treating some claims as pure declaratory judgment requests and treating other claims as an election contest under AS 15.20.540.

It may be that certain legal issues could properly be brought to us pre-election or during an election with appropriate requests for declaratory and even injunctive relief. But the legislature has created two specific legal proceedings for election challenges that would normally apply to many of the issues in this case — an election contest and a recount appeal.<sup>34</sup> And as we have noted, “an election contest and a recount appeal are distinct proceedings.”<sup>35</sup>

An election contest is authorized by AS 15.20.540, which provides that “a contest of the election as a whole” is heard first by the superior court.<sup>36</sup> An election contestant must show “malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election” or “any corrupt practice as defined by law sufficient to change the results of the election.”<sup>37</sup>

By contrast, AS 15.20.510 provides for a recount appeal directly to our court to challenge the Director's decisions to count or not count votes during a recount of an election for, among other offices, the United States Senate.<sup>38</sup> We have noted that

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<sup>34</sup> See *Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979) (identifying, describing, and comparing the two legal proceedings).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; see also AS 15.20.550 (providing for superior court's original jurisdiction).

<sup>37</sup> AS 15.20.540.

<sup>38</sup> AS 15.20.510 provides, in relevant part: “A candidate . . . who requested a recount who has reason to believe an error has been made in the recount . . . involving  
(continued...)”

“the inquiry in a recount appeal is whether specific votes or classes of votes were properly counted or rejected.”<sup>39</sup> Our review comes only after the Director “review[s] all ballots . . . to determine which ballots, or part of ballots, were properly marked and which ballots are to be counted in the recount[.]”<sup>40</sup> Issues we have considered in a recount appeal “include the validity of punch cards and a variety of marks on ballots, the proper procedures for absentee voting and consequences for failure to follow those procedures, and registration requirements.”<sup>41</sup>

With this legal framework in mind, we consider Miller’s claims that two classes of votes should not be counted.

**B. Multiple write-in ballots cast by the same person(s)**

Miller alleged in his complaint that the Division accepted and counted as valid “write-in votes in which the candidate’s name apparently was not written on the ballot by the voter” in violation of AS 15.15.360(a)(10), which provides that “the voter” must write in the candidate’s name. In its summary judgment motion,<sup>42</sup> the State noted

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<sup>38</sup> (...continued)  
candidates for . . . Congress . . . may appeal to the supreme court . . . .”

<sup>39</sup> *Willis*, 600 P.2d at 1081.

<sup>40</sup> AS 15.20.480.

<sup>41</sup> *Cissna v. Stout*, 931 P.2d 363, 367 (Alaska 1996). Miller’s claim for declaratory judgment regarding the interpretation of AS 15.15.360 can easily be seen as in the nature of a recount appeal that should not be properly before us. Given the unusual circumstances of this case, we nonetheless chose to decide the legal issues raised regarding Alaska election statutes and regulations.

<sup>42</sup> Under Alaska Civil Rule 56(c), summary judgment may be granted without trial if there are no genuine issues of fact and a party is entitled to judgment as a matter of law.

that under AS 15.15.240 voters “can delegate that authority [to vote] to others — election officials or friends or family members — if they need assistance in writing in the name of a candidate.”<sup>43</sup> The State argued that Miller’s claim was in the nature of an election contest and that he would have to present some evidence of both (1) improper conduct on the part of someone and (2) an indication that any such wrongful conduct was sufficient to affect the election’s outcome.

Miller submitted affidavits from observers of the ballot count attesting that in some precincts many write-in ballots appeared to have been written in similar handwriting. He argued that this evidence was “sufficiently suspicious that it legitimately raises the specter of voter fraud or other electoral improprieties.” (This argument reflects that he considered his claim to be an election contest claim under AS 15.20.540, because misconduct is not an element of a recount appeal.<sup>44</sup>) He also argued that this evidence was sufficient to entitle him to further time for discovery regarding the identity of the people who completed the ballots, whether voters had actually requested assistance, why only a few people apparently filled in many ballots, and the total number of ballots that might have been affected.<sup>45</sup>

The superior court denied Miller’s request for discovery and granted the State’s motion for summary judgment, noting that the admissible portions of Miller’s

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<sup>43</sup> AS 15.15.240 provides, in relevant part, that “[a] qualified voter needing assistance in voting may request an election official, a person, or not more than two persons of the voter’s choice to assist.”

<sup>44</sup> *Willis*, 600 P.2d at 1081 (“[I]n a recount appeal . . . [t]he concept of malconduct does not enter into the question[.]”).

<sup>45</sup> Alaska Civil Rule 56(f) allows the superior court broad discretion to grant a party sufficient time to conduct discovery before opposing a summary judgment motion if the party is unable to marshal evidence in the time normally required to oppose the motion.

evidence did not create a genuine issue of material fact regarding misconduct by anyone, and that it was not even sufficient circumstantial evidence to warrant discovery before opposing the summary judgment motion. We agree.

Alaska Statute 15.15.240 allows any qualified voter to ask for assistance, including assistance in writing in the name of a write-in candidate. No reasonable inference of misconduct can arise from the mere fact that the handwriting on multiple ballots appears to be from a small number of people. And though we have interpreted Civil Rule 56(f) liberally to allow a litigant a meaningful opportunity to obtain evidence to present a case,<sup>46</sup> pure speculation cannot support a fishing expedition for evidence to oppose summary judgment in an election contest. We affirm the superior court's summary dismissal of this election contest claim.

**C. Ballots cast by allegedly unidentified voters**

Miller alleged in his complaint that the Division accepted and counted as valid ballots from voters who, “according to the official election registers from the precinct polling places, . . . neither showed proper identification nor were excused from showing such identification.” He noted that Alaska law requires a voter to show identification before being allowed to vote, unless an election official waives that requirement because the voter is known to the official.<sup>47</sup>

In its motion for summary judgment, the State explained that although the voter registers contain spaces for election officials to specify how they verified each voter's identity, there is no statutory or regulatory requirement that the election officials

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<sup>46</sup> *E.g.*, *Kessey v. Frontier Lodge, Inc.*, 42 P.3d 1060, 1062 (Alaska 2002) (“Generally, ‘requests made pursuant to Rule 56(f) should be freely granted[.]’” (quoting *Jennings v. State*, 566 P.2d 1304, 1313 (Alaska 1997))); *Gamble v. Northshore P’ship*, 907 P.2d 477, 485 (Alaska 1995); *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d 188, 193 (Alaska 1989).

<sup>47</sup> *See* AS 15.15.225.

actually fill in this information. Construing Miller's claim as an election contest, the State argued that Miller would have to produce some evidence both (1) that misconduct by election officials actually allowed unregistered persons to vote and (2) that the number of votes in question would affect the outcome of the election. Miller responded that he was not bringing an election contest on this issue, but rather was "contesting the validity of particular ballots." He argued that the failure of election officials to mark the register form for some voters was circumstantial evidence that "certain people may have voted without showing identification or being personally known to an election worker" and that he needed discovery to determine who they were.

The superior court treated this claim as an election contest, denied Miller's request for discovery, and granted summary judgment in favor of the State. The court noted that there is no requirement that election workers fill out the register, that the failure to fill out the register did not create a reasonable inference of misconduct by election officials, and that there was no legitimate basis for the requested discovery based solely on the failure to fill out some of the registers.

But Miller did not raise his claim as an election contest within the jurisdiction of the superior court. He instead raised a challenge to "the validity of particular ballots," which is in the nature of a recount appeal that would come directly to us. But he also did not ask for a recount and there is no recount decision about the validity of particular ballots for us to review. Miller cannot avoid the avenues established by the legislature to challenge elections: Miller asserted in the superior court that he did not bring an election contest, and he did not seek a recount by the Division. The only possible issue before us, then, is an issue not decided by the superior court: whether Miller is entitled to a judgment declaring that an entire class of ballots — those from voters for whom election officials did not mark on their registers how the officials verified the voters' identification — is invalid. He is not entitled to such a judgment.

We affirm the superior court's dismissal of the claim because there is no legal requirement that an election official mark the register form for identification verification and the failure to do so does not invalidate a vote.

**VII. We Do Not Reach Questions Regarding Miller's Motion To Amend His Complaint To Add Claims About Alleged Voting By Felons.**

During the summary judgment briefing, Miller raised a new claim that an unknown number of felons ineligible to vote had actually voted in the election. This claim was discussed at oral argument before the superior court on the summary judgment issues. Shortly after the oral argument, Miller sought leave to file an amended complaint setting out this claim. The superior court issued its order on summary judgment without ruling on the motion to amend. In light of the expedited nature of this case, we accepted Miller's appeal of the summary judgment ruling without waiting for a final judgment from the superior court.

We now decline to reach whether the superior court implicitly denied the motion to amend and whether it was error to do so. We will resolve all issues actually before us by way of this opinion, and we will return jurisdiction to the superior court to consider Miller's motion to amend. But we note the following.

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. He must allege and prove the necessary elements of an election contest claim, including the level of misconduct necessary to support the claim and that the votes in question are sufficient to change the result of the election. In light of our other rulings and the current voting tally, it appears to us that the number of votes in question would have to be in the tens of thousands to change the result of the election.<sup>48</sup> But it is difficult, at best, to quantify

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<sup>48</sup> Miller currently trails by over 10,000 votes. Because any malconduct in  
(continued...)

the number based on the record before us, and we leave that to the parties to resolve in the superior court should Miller decide to pursue this claim.

Finally, we note that an election contest does not bar certification of an election and that there are no remaining issues raised by Miller that would prevent this election from being certified. Under AS 15.20.560, if an election contest ultimately changes the result of an election, judgment will be so entered and a new certification will be issued.<sup>49</sup>

**VIII. The Superior Court Did Not Err In Denying Murkowski's Motion for Summary Judgment On Her Claim That Write-In Ballots With Her Name But Lacking A Filled-In Oval Should Have Been Counted.**

The Division did not count a number of ballots for Murkowski because the voters had not filled in the ovals next to the write-in line, even though the voters had written in Murkowski's name. Murkowski argues that these votes should have been counted for her.<sup>50</sup> We disagree. Alaska Statute 15.15.360(a)(10) states that "[i]n order to vote for a write-in candidate, the voter must write in the candidate's name in the space

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<sup>48</sup> (...continued)  
allowing ineligible felons to vote would not appear to bias any particular candidate, proportional reduction of votes would be the proper remedy if any ineligible felons were actually shown to have voted. *See Hammond v. Hickel*, 588 P.2d 256, 260 (Alaska 1978).

<sup>49</sup> AS 15.20.560 provides in relevant part that, at the conclusion of an election contest, "[t]he judge shall pronounce judgment on which candidate was elected . . . . The director shall issue a new election certificate to correctly reflect the judgment of the court."

<sup>50</sup> Like Miller's claim regarding the class of votes by allegedly unidentified voters, this claim is in the nature of an election recount appeal. Like Miller, Murkowski did not request a recount. We therefore consider this claim only as one for declaratory judgment with respect to the interpretation of AS 15.15.360's provisions regarding marking the ovals on ballots.

provided *and* fill in the oval opposite the candidate’s name.” (Emphasis added.) Although AS 15.15.360(a) does not address spelling, marks that validly “fill in the oval” are subject to the requirements of AS 15.15.360(a)(1) and (a)(5), which state:

(1) A voter may mark a ballot only by filling in, making “X” marks, diagonal, horizontal, or vertical marks, solid marks, stars, circles, asterisks, checks, or plus signs that are clearly spaced in the oval opposite the name of the candidate, proposition, or question that the voter desires to designate.

....

(5) The mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.

In other words, the statute mandates that the write-in voter mark the oval in some fashion; a blank oval will invalidate the vote. Writing in the name but not marking the oval is not compliant with the statute. Murkowski is not entitled to declaratory judgment that AS 15.15.360 should be interpreted to excuse write-in voters from marking ovals as required by law.<sup>51</sup> Accordingly, we affirm the decision of the superior court on this issue.

## **IX. Conclusion**

For the reasons set out above, we AFFIRM the decision of the superior court in all respects.

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<sup>51</sup> Murkowski also argues that the Division erred by not counting a number of write-in votes for “Lisa M.” and that the superior court erred by affirming the Division’s determination. This claim is essentially a recount appeal that may only be brought to us after a recount by the Director, and is not an election contest within the jurisdiction of the superior court. As with Miller’s claim about specific votes by allegedly unidentified voters, Murkowski’s claim is not properly before us. To the extent she requests declaratory judgment regarding variations on write-in candidates’ names, we have already addressed it.

There are no remaining issues raised by Miller that prevent this election from being certified.