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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

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

PLAINTIFF'S SECOND MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Joe Miller recently has learned that Defendants are arbitrarily and unconstitutionally discriminating among voters whose votes in the 2010 general election in the race for U.S. Senate (hereafter, "Election") were rejected by automated tally machines, based on whether or not the voter had attempted to vote for a write-in candidate. Employees of Defendant State of Alaska, Division of Elections (hereafter, "Division") and/or its Director, Gail Fenumiai (hereafter, "Director"), personally reviewed every rejected ballot in which the voter attempted to vote for a write-in candidate for U.S. Senate, or wrote in the name of a candidate, to determine whether, in their subjective and uncabined opinion, the "intent of the voter" was sufficiently clear to allow them to accept the ballot as valid and count it. No such individualized review was, or will be, conducted, however, for rejected ballots in which the voter attempted to vote for a candidate whose name was pre-printed on the ballot, such as Plaintiff Miller, or who did not write in the name of a candidate on the ballot.

This arbitrary and disparate treatment squarely violates the Equal Protection Clause, U.S. Const., amend XIV, as interpreted in *Bush v. Gore*, 531 U.S. 98 (2000). Plaintiff Miller respectfully asks this Court, pursuant to Fed. R. Civ. P. 65(a), to enter a Preliminary Injunction requiring Defendants:

1. to ensure that an appropriate employee of the Division, or the Director, personally reviews each ballot:

   a. that was rejected by an automated tally machine,

b. in which the voter did not attempt to vote for a write-in candidate, and

c. on which the voter did not write in the name of a candidate,

to determine whether the markings are sufficiently clear to allow the ballot to be counted, based on the same criteria that were applied in determining the validity of write-in ballots;

2. to accept as valid and count any such ballots; and

3. refrain from certifying the results of the 2010 general election for U.S. Senate unless and until such hand count and manual review occurs.

DISCUSSION

The Equal Protection Clause provides, "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV. In *Bush v. Gore*, U.S. Const., 531 U.S. 98, 104 (2000), the Supreme Court held that, under the Equal Protection Clause, "[T]he 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." It explains that a state may not, by "arbitrary and disparate treatment, value one person's vote over that of another." *Id*. It later elaborated, "[T]he idea that one group can be granted greater voting strength than another is hostile to the 'one man, one vote' basis of our representative government." *Id*. at 107 (quoting *Moore v. Ogilive*, 394 U.S. 814, 819 (1969)).

Applying that standard, the Court held that the recount of votes in the 2000 presidential election ordered by the Florida Supreme Court was unconstitutional, because it did "not satisfy

the minimum requirement for non-arbitrary treatment of voters." *Id*. at 105. In particular, the Court held that it was arbitrary and discriminatory for some counties to conduct a hand recount of ballots that had been rejected by automatic tally machines, while other counties did not, thereby giving some citizens a greater opportunity to have their vote counted than others. *Id*. at 107-08. This contributed to the "unequal evaluation of ballots," in violation of the Equal Protection Clause. *Id*. at 106.

A variation of this problem is occurring here. The Division has decided to count a hand count—a personalized re-evaluation—of any votes in the U.S. Senate race that were rejected by automatic tally machines, in which the voter apparently attempted to vote for a write-in candidate, or wrote in the name of a candidate. *See generally* Affidavit of Joe Miller in Support of Plaintiff's Second Motion for Preliminary Injunction (hereafter, "Miller Aff."); Affidavit of Jessica Talbert in Support of Plaintiff's Second Motion for Preliminary Injunction (hereafter, "Talbert Aff."). It accepted as valid, and counted, any such votes in which the Division determined—based on vague, unspecified, subjective criteria—that the voter "intended" to cast the ballot for a write-in candidate (invariably, Lisa Murkowski). *Id.* The Division has refused, however, to conduct a similar hand count or personalized re-evaluation of votes in the U.S. Senate race that were rejected by automatic tally machines, in which the voter apparently attempted to vote for a candidate (such as Plaintiff Miller) whose name was pre-printed on the ballot, or who did not write-in the name of a candidate on the ballot. *Id*.

Thus, people who cast their votes for write-in candidates effectively had a "second bite at the apple," and had a substantially greater chance of having their ballots counted than people

who chose to cast their votes for candidates whose names appeared on the ballot. There is no basis for such arbitrary, disparate, and discriminatory treatment. It is particularly repugnant to apply different procedures for determining the validity of ballots based on the candidate for whom a person chose to cast their vote.

The *Bush* Court itself recognized that conducing a hand count of some ballots rejected by automatic tally machines, but not others, gives certain voters an unfair (and unconstitutional) advantage. In *Bush*, one of the main problems was that the Florida Supreme Court permitted some counties to conduct a recount only of "undervotes" (in which the tally machine did not detect any markings for any candidates on the ballot), whereas other counties were conducting a recount of both undervotes and "overvotes" (in which the machine detected markings for too many candidates on the ballot). The Court explained that such disparate standards created serious problems:

> [T]he citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

Bush, 531 U.S. at 108; *see also Rosello v. Calderon*, No. 04-2251 (DRD), 2004 U.S. Dist. LEXIS 27216, at * (D.P.R. Nov. 30, 2004) (asserting jurisdiction over Equal Protection claim because "an inference has been created that these split ballots were not being equally or

uniformly treated at high levels at the Commission"); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (finding constitutional violation where, due to state policies, some voters were "statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office").

PLAINTIFF MILLER SATISFIES THE
REQUIREMENTS FOR INJUNCTIVE RELIEF

This Court should enjoin Defendants from certifying the results of the Election basedon arbitrary, disparate, and discriminatory procedures that blatantly violate the Equal Protection Clause. "Preliminary injunctive relief is proper if the plaintiff establishes that 'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Small ex rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 611 F.3d 483 (9th Cir. 2010) (amended op.) (*quoting Winter v. Nat'l Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008)); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009). Plaintiff Miller satisfies each of these requirements.

First, as demonstrated above, he is likely to succeed on the merits of his claim that the Equal Protection Clause forbids Defendants from performing a hand count and personalized review of ballots that are rejected by automatic tally machines if the voter attempted to vote for a write-in candidate, but not if the voter intended to vote for a candidate whose name was pre-printed on the ballot.

Second, Plaintiff Miller will suffer irreparable injury if this Court allows the Division to certify results obtained and calculated in an unconstitutional manner, and to give certain votes more weight than his by giving them a greater chance of being deemed valid and counted. *See, e.g.*, *Hoblock v. Albany Cty. Bd. of Elecs.*, 422 F.3d 77, 83 (2d Cir. 2005); *Marks v. Stinson*, 19 F.3d 873, 875, 887-88 (3d Cir. 1994); *Republican Party v. North Carolina State Bd. of Elecs.*, No. 94-1057, 1994 U.S. App. LEXIS 14961, at *7, 10-11 (4th Cir. June 17, 1994); *Day v. Robinwood W. Cmty. Improvement Dist.*, No. 4:08-CV-1888 (ERW), 2009 U.S. Dist. LEXIS 36586, at *8 (E.D. Mo. Apr. 29, 2009).

Third, it clearly is in the public interest to delay certification of the Election until the votes are tallied in a constitutionally sufficient and non-discriminatory manner. Finally, the balance of equities clearly favors Plaintiff Miller, who is asking that a single, uniform standard to counting rejected votes be applied, rather than Defendants, who are attempting to maintain disparate policies.

CONCLUSION

For these reasons, Plaintiff Joe Miller respectfully requests that this Court issue a Preliminary Injunction pursuant to Federal Civil Rule 65(a), requiring Defendants Craig Campbell, Lieutenant Governor and the Division of Elections, State of Alaska:

1. to ensure that an appropriate employee of the Division, or the Director, personally reviews each ballot:

   a. that was rejected by an automated tally machine,

   b. in which the voter did not attempt to vote for a write-in candidate, and

c. on which the voter did not write in the name of a candidate,

to determine whether the markings are sufficiently clear to allow the ballot to be counted, based on the same criteria that were applied in determining the validity of write-in ballots;

2. to accept as valid and count any such ballots; and

3. refrain from certifying the results of the 2010 general election for U.S. Senate unless and until such hand count and manual review occurs.

Dated this 19th day of November, 2010.

Respectfully submitted,

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Certificate of Service:

The undersigned hereby certifies that a true and exact copy of the foregoing was served this 19th day of November 2010 via:

( ) First Class Mail
( ) Hand-Delivery
( ) Facsimile
( ) E-Mail
(X) ECF

to the following listed individual(s):

Michael Barnhill
Sarah Felix
Margaret Paton-Walsh

By: /s/ Thomas V. Van Flein__
Thomas V. Van Flein