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How do you spell M-U-R-K-O-W-S-K-I? Part I:  
The Question of Assistance to the Voter

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Abstract

The 2010 race for the Alaska Senate now seems to be over.  After losing in the Republican Party Primary to Tea Party-backed candidate Joe Miller, Senator Lisa Murkowski staged a write-in candidacy and, bucking both U.S. and Alaska history, won the general election.  Although much attention has been paid to Miller’s post-election challenges to Murkowski write-in ballots, a major election law question was at issue prior to the election: to what extent can poll workers assist voters who need help in voting for a write-in candidate?

After Murkowski declared her write-in candidacy, the Alaska Division of Elections distributed a list of eligible write-in candidates to polling places, in case voters had questions about how to properly spell the name of a write-in candidate.  Both parties, sensing this would benefit Murkowski, cried foul, and challenged the new policy in Alaska state court as a violation of the Division’s own regulations prohibiting the distribution of “information” about write-in candidates at polling places.

This essay examines four issues regarding voter assistance in the Murkowski litigation: (1) how to interpret statutes and regulations regarding voter assistance; (2) what kind of assistance is permissible and what kind is not; (3) whether the state can legitimately handicap the ability of voters to write-in the name of a candidate; and (4) how decisions on assistance to voters before the election might affect a court’s disposition on cases that arise after the election.

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How do you spell M-U-R-K-O-W-S-K-I? Part I:  
The Question of Assistance to the Voter

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“They tell us this is impossible, you cannot do it, Alaskans can’t figure out how to fill in an oval and spell M-U-R-K-O-W-S-K-I?”

--Sen. Lisa Murkowski¹

I. Introduction

By now, Lisa Murkowski’s re-election as Alaska’s senator seems inevitable, but it didn’t always look that way. Certainly after she lost the Republican primary to Joe Miller -- due to anti-incumbent sentiment and the early surge of the Tea Party -- Murkowski’s candidacy seemed to be over. Even when she later decided to campaign as a write in candidate there were problems, and not only because she would be fighting the odds to become the first write-in Senate candidate since Strom Thurmond² and without major backing from the Republican Party. There was, more specifically to Ms. Murkowski, the problem of whether people would be able to successfully spell her name on the ballot.

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² See also Michael Carey, Murkowski write-in run bucks history, ANCHORAGE DAILY NEWS, Sept. 29, 2010 (history of write-candidacies in Alaska, all of which were unsuccessful).

* Assistant Professor of Law, Saint Louis University School of Law and former law clerk to Justice Warren Matthews, Alaska Supreme Court, 2007-2008. Member, Alaska Bar (inactive). Thanks to Kirsten Nussbaumer, Efthimi Parasides, Molly Walker-Wilson, Joey Fishkin, Christopher Bradley, Hanah Volokh and Will Baude for comments and conversations on an earlier draft. Comments welcome: e-mail to cflande2@slu.edu. Part II of this essay will examine the post-election litigation between Joe Miller and Lisa Murkowski.
That problem -- and the Alaska Election Division’s response to it -- made up the first round of legal wrangling in the Alaska Senatorial contest. The Alaska Election Division, mindful that this year many more people would be voting write-in, sought to make available to polling places a list of all the eligible write-in candidates, including Lisa Murkowski. The Alaska Democratic Party filed suit (later joined by the Alaska Republican party) seeking to enjoin the use of the list, and after winning an early victory in Alaska state superior court, the Division’s ability to use the list in limited circumstances was affirmed in early November by the Alaska Supreme Court in a unanimous decision.

The supreme court’s pre-election decision has since been eclipsed by two things: the election itself, and Miller’s subsequent litigation over which write-in ballots should be counted. But the questions presented by the pre-election lawsuits raise issues of enduring importance to election law, not just in Alaska, but everywhere in the United States -- issues that will certainly be coming up again and again with the rise of third party activism.

In this essay, I focus on four questions raised by the early election litigation in Alaska:

- First, how should courts read statutes regarding voter assistance, especially when those statutes seem to clash with regulations promulgated by the election division itself?

- Second, what type of assistance should poll workers permissibly be able to give to voters who wish to vote for a write in candidate? When does voter assistance go too far and lapse into undue influence over the voter?

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3 Jill Burke, *Election staff ‘changed the rules,’ Miller now argues*, ALASKA DISPATCH, Nov. 19, 2010; Richard L. Hasen, *Alaska’s Big Spelling Test: How strong is Joe Miller’s argument against the Leeza Markovsky vote?* SLATE, Nov. 11, 2010

4 See, e.g., Ben McGrath, *Bloomberg, 2012?*, THE NEW YORKER, Nov. 15, 2010, at 32 (quoting Democratic consultant Joe Trippi as putting the odds of an independent candidacy for President in 2012 or 2016 at “probably sixty to seventy per cent.”).
• Third, to what extent can states legitimately disadvantage candidates who win neither party’s primary, and who seek election as write-in candidates? Can states, for reasons of either principle or expediency, make it harder for voters to write in the names of candidates?

• Fourth, how should decisions regarding assistance to voters before they vote affect how votes are counted after the election? If voters were able to seek help in spelling a candidate’s name on a write-in ballot, does that mean that ballots which spell the name incorrectly should not be counted?

The Alaska Supreme Court in *State of Alaska v. Alaska Democratic Party* was required to give answers, or at least hint at answers, to all of these questions, save the last (which is now the subject of current litigation). In the main, I agree with the court’s answers. But the supreme court’s opinion and oral arguments were done under time pressure and the need to render a decision so that the election could proceed smoothly. What follows is an attempt to spell out the arguments on both sides of each question, and to give a somewhat fuller justification for the supreme court’s decision.

II. Background

The facts leading up to the supreme court’s decision should be vaguely familiar to those who followed the political races in 2010. Joe Miller, a West Point and Yale law graduate and veteran of the first Iraq war, won a surprising upset over Senator Lisa Murkowski in the Republican primary, thanks in part to the backing of the Tea Party and the support of former Alaska Governor Sarah Palin. His opponent, Senator Lisa Murkowski conceded and appeared willing to accept the verdict of the primary voters.

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that she should not be a candidate in the general election. But a few days later, she changed course -- based, she said, on the outpouring of support for her from ordinary Alaskans. She announced that she would wage a write-in campaign, as the date for filing as an independent candidate had already passed.

In anticipation of many voters writing in Murkowski’s name -- she still retained statewide popularity in a largely “red” state -- the Alaska Division of Elections sent out a written list of write-in candidates with their party affiliations to polling places. The Division had never done this for any other Alaska race, state or federal. At least one polling place posted the list, which is how the two political parties eventually learned of the list. The Division also wrote to the Department of Justice asking for preclearance of its actions. Alaska is a covered state under the Voting Rights Act and is required to submit all major election changes to the Department of Justice for approval. In its letter, the Division said it wasn’t sure whether the change was significant enough to require

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6 Becky Bohrer, Write-in option for Murkowski poses challenges, opportunity, ANCHORAGE DAILY NEWS, Sept. 10, 2010 (“Earlier this week, Murkowski said that upon conceding she had been ready to begin considering her future outside the Senate.”); Sean Cockerham & Erika Bolstad, Murkowski says ‘Let’s Make History’, ANCHORAGE DAILY NEWS, Sept. 18, 2010 (Miller accusing Murkowski as going back on her word that she would respect the wishes of the primary voters); id. (Murkowski regretting statement that she would support the winner of the Republican primary).

7 Erika Bolstad, Murkowski expected to make write-in decision today, ANCHORAGE DAILY NEWS, Sept. 7, 2010 (Murkowski stating, “[i]t is people from all walks of life, every corner of the state, who are concerned about Alaska’s future and concerned enough to take action on it.”). Murkowski had especially strong support from the Alaska Native community, Cockerham & Bolstad, supra note 6 (co-chair of Alaska Native Federation promising that the Alaska Native Community “will be there” for Murkowski).

8 Cockerham & Bolstad, supra note 6. Murkowski: wait until the absentees are counted before writing her off, adn.com, Aug. 25, 2010 (after primary too late for filing an independent candidacy); Murkowski supporters: come to “campaign kickoff” tonight, adn.com, Sept. 17, 2010 (announcement as write-in candidate). Murkowski apparently briefly flirted with running as a libertarian candidate. Bohrer, supra note 6 (citing pollster as predicting that if Murkowski stayed in the race, she would run on the libertarian ticket).

9 Hans A. von Spakovsky, The Justice Department Goes to Alaska, NATIONAL REVIEW ONLINE: THE CORNER, Oct. 31, 2010 (“[T]he Election Division has never provided a list of write-in candidates in any election in the past.”).

10 Erika Bolstad, Supreme Court allows state to provide write-in list, ANCHORAGE DAILY NEWS, Oct. 28, 2010 (“The Division of Elections has been providing early voters who ask for assistance a list of all write-in candidates, and in one case actually posted the list at an early-voting location in Homer.”).

11 Alaska Democratic Party v. Gail Fenumiai et al., No 3AN-10-11621CI, Alaska Superior Court, Oct. 27, 2010 at 3.
preclearance, but thought it should err on the side of caution. In a reply a few days later, the D.O.J. provisionally approved the measure.\textsuperscript{12}

The response by the two major parties wasn’t as welcoming. They saw the (unprecedented) move of giving a list of write-in candidates to polling places as a move clearly favoring the write-in candidate with the hard to spell name: Murkowski.\textsuperscript{13} The Democratic Party filed suit in Alaska state court alleging that the Division was violating its own regulations that prohibited any “information” about write-in candidates to be available, posted, or discussed within a polling place. The Division replied that it was complying with its statutory mandate to offer assistance to voters. The Murkowski campaign intervened on the side of the Division.

In a thirteen page opinion, Judge Frank Pfiffner of the Alaska Superior Court granted the Democratic Party’s request for a temporary restraining order enjoining the Division of Election’s distribution of a list of names of write-in candidates to polling places.\textsuperscript{14} Judge Pfiffner found that the Alaska Division of Election’s regulation prohibiting the dissemination of information regarding write-in candidates was clear, and

\begin{footnotesize}
\textsuperscript{12} Because the Division’s compliance with the Voting Rights Act was not at issue in the Alaska Supreme Court’s decision, I do not discuss it here. For a critical assessment of the Division’s actions in regard to the V.R.A., see von Spakovsky, \textit{supra} note 9 (claiming that both the Division of Elections in Alaska and the Department of Justice behaved wrongly with regard to the change in practice).

\textsuperscript{13} \textit{See} von Spakovsky, \textit{supra} note 9. Although the write-in list would surely benefit Murkowski, the Murkowski campaign denied that it had requested such a list be available to voters. Erika Bolstad, \textit{Court OKs limited access to write-in list}, ANCHORAGE DAILY NEWS, Oct. 30, 2010. The Murkowski campaign did seek clarification in September 2010 over what would count as an acceptable write-in vote for Murkowski. \textit{Murkowski seeks clarification on election write-in criteria}, adn.com, September 25, 2010.

There is of course also the broader -- non-partisan -- interest in having rules that are clear prior to the election, and not changing those rules in the middle of an election contest. See Michael W. McConnell, \textit{Two-and-a-Half Cheers for Bush v. Gore}, in \textit{THE VOTE} at 103-4 (Cass Sunstein & Richard Epstein, eds., 2001) (discussing how legislatures devise rules for elections appropriately behind a “veil of ignorance” about who will benefit from them). A version of this argument was made by the attorneys for the both the Democratic and Republican Parties at Oral Argument. Transcript of Oral Argument, State of Alaska v. Alaska Democratic Party, October 29, 2010 at 31:00, 59:00 (noting potential unfairness of change in past practices of Division of Election).

\end{footnotesize}
that the Division’s interpretation that their list of candidates was not information was “simply wrong.” Judge Pfiffner’s opinion also rejected the Division’s argument that its statutory obligation to assist “qualified voters” trumped the regulation banning information about write-in candidates. Assisting voters in voting was different, Pfiffner wrote, than providing them with information about whom they could vote for. If such assistance was truly necessary, then the Division “has been asleep at the switch for the past 50 years,” added Pfiffner.

The victory for the Alaska Democratic Party was short lived. The Alaska Supreme Court stayed the superior court’s order and granted the Division’s motion for expedited consideration. In an opinion released just days before the general election, the court ruled unanimously against the Democratic Party, which had been joined by the Alaska Republicans. The court sided with the Division, stating that its decision was generally informed by Alaska’s case law which emphasized the importance of “facilitating voter intent.” More particularly, the court read the regulation that restricted disseminating information about write-in candidates against the Alaska statute which charged the Division with assisting voters. The statute, in the court’s mind, should trump -- even if (or especially if) the regulation clearly conflicted with the statute.

Accordingly, the court allowed the list of write-in candidates to be available for poll workers to give to voters provided that its use was “tailored to a voter’s request for

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17 Alaska Democratic Party v. Gail Fenumiai et. al., No 3AN-10-11621CI, Alaska Superior Court, Oct. 27, 2010 at 10.
specific assistance.” The court further held that the list should only include the names of the write-in candidates, but could not include the party affiliation of the candidates.

By this time, the list had swelled to over 150 candidates (from a one page list to an eight page list), a fact which might have assuaged the court’s worries that the list would influence voters. With so many names, the voter would have to come in with some idea of the candidate’s name he or she was looking for; accordingly, the list would be less likely to favor any one candidate.

There was some later rumbling after the supreme court’s decision and order, but this phase of the litigation was basically over. After the ruling, the Miller campaign filed suit in federal court, claiming that the supreme court’s order represented an unprecleared change in Alaskan voting procedures. The Division quickly asked for Justice’s approval, and it was granted. The attention of the campaigns switched to the election and to the next round of litigation: challenging the ballots of those who wrote in Murkowski’s name.

III. What interpretation? Which standard?

20 Although the court did not discuss its reason for this exclusion, it may have been because the designation of Lisa Murkowski as a “Republican” might be controversial: she was not, after all, the Republican nominee. But see Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) (upholding Washington primary process in which candidates can choose the party label they wish to have shown on the ballot). See also Transcript of Oral Argument, State of Alaska v. Alaska Democratic Party, October 29, 2010 at 24:40 (discussion of whether or not to include party affiliation on write-in list, given that write-in candidates have not won any party’s primary).
21 Kyle Hopkins, Senate write-in candidates flood Division of Elections, adn.com, October 28, 2010 (mass registration designed to “make it harder for voters to find Murkowski’s name”); Bolstad, supra note Error! Bookmark not defined. (list at over 150 candidates due to efforts of Anchorage disc jockey).
The first issue the Alaska courts had to face was how to interpret the apparent conflict between the regulation prohibiting write-in candidate information and the Division’s subsequent decision to allow poll workers to show voters a list of eligible write-in candidates. If the two were in conflict, which should yield? And if one should yield, according to what interpretive principle should that decision be made? The superior court held that the regulation governed, even in the face of the Division’s contrary practice because of the unambiguous nature of the regulation’s directive. The supreme court, by contrast, agreed with Division, and held that it (the Division) was acting faithfully in accordance with its broader statutory mandate to assist voters.

The regulation at issue stated that “information regarding a write-in candidate may not be discussed, exhibited, or provided at the polling place, or within 200 feet of any entrance to the polling place, on election day.” The Alaska Democratic Party, as well as the Alaska superior court, read “information” as meaning any information, and as such, it included the information that was given to the poll workers to show -- in appropriate circumstances -- to voters. Clearly, “information” meant that no signs or placards explicitly advertising a write-in candidate could be displayed at the polling place, something that was also prohibited for the major party candidates. This would be tantamount to political advocacy or electioneering. Thus, when a poll worker posted the list of write-in candidates at the polling place, this ran afoul of the restriction (and the Division of Election has never defended the position that the list should have been posted). The question was how far the regulation prohibiting information about write-in

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23 6 AAC 25.070(b).
candidates extended past this. Did it mean that poll workers could not have the list and show it to voters who requested assistance in spelling the name of a candidate?

In answering this question, the Division of Elections proposed making a distinction between mere information, such as the information regarding write-in candidates on the list, and persuasive information, such as signs or placards advocating for one particular write-in candidate — that is, electioneering materials. Yet such a distinction might prove elusive. On the one hand, we might wonder how a sign on the wall with the names of write-in candidates could conceivably influence a voter to vote for a write-in candidate when he or she previously had no intention of doing so. The Division defended giving voters a list rather than posting the list, but does the posting of the sign change the list’s fundamental nature from being merely informative to being persuasive?

On the other hand, the superior court worried that giving people a list when they requested help in voting for a write-in candidate might itself be a persuasive act. No more were election workers merely helping voters with the mechanics of voting; they were instead giving them information that they didn’t have. Such a worry may have also motivated the Division of Election’s own warning in its handbook for poll workers: “The election board must not discuss write-in candidates with voters. If a voter asks how to

25 But see Cobb v. Thurman, 957 S.2d 638 (Florida 2006) (posted notice that a vote for a withdrawn candidate would be a vote for the party’s substitute candidate held to violate impartiality requirements of the election code).
26 Alaska Democratic Party v. Gail Fenumiai et. al., No 3AN-10-11621CI, Alaska Superior Court, Oct. 27, 2010 at 10 (“The Division’s list prompts voters on who to vote for; it doesn’t provide assistance in actually voting. … [P]roviding voters with a list of write-in candidates smacks of electioneering at the polls.”); see also Alaska Democratic Party’s Opposition to Petition for Review, State of Alaska v. Alaska Democratic Party, No. S-14054, Oct. 28, at 11 (“Assisting with how to cast a write-in vote is markedly different than providing a list of the names of who can be written in.”).
vote for a write-in refer the voter to the instructions on the power in the voting booth or
the sample ballot.”

Mechanics of voting might be discussed under the regulation, but
not particular write-in candidates.

The superior court largely abstracted from the possible policy reasons for the
restriction on discussions of information, instead resting mainly on the fact that the
regulation itself made such a clear statement: no information was no information. In the
face of such a statement, the superior court felt constrained. It could not credit the
Division of Election’s new and unprecedented policy, given on the fly in the middle of an
election. If the Division doubted the wisdom of its previous policy, it needed to have a
new round of public notice-and-comment rulemaking. This is precisely what it hadn’t
done with the distribution of the (ever-changing) list of write-in candidates, a point the
Republican Party made repeatedly in its briefs.

The Alaska Supreme Court spent little time on the question of what the
appropriate interpretation of the Division’s regulation was, although they did note that a
deferential standard of review should apply to the Division’s interpretation because “the
agency is best able to discern its intent in promulgating the regulation at issue.”

Rather, the supreme court focused on the principle that if a regulation conflicts with a

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Party, Exhibit E.
28 Alaska Democratic Party v. Gail Fenumiai et. al., No 3AN-10-11621CI, Alaska Superior Court, Oct. 27,
2010 at 7 (“[A]n agency’s new, last minute interpretation of a regulation is not entitled to deference.”
29 Von Spakovsky, supra note 9 (“No one’s saying the regulation can’t be changed. But if the Division
wants to change it, it should follow the procedures laid out in the Alaska Administrative Practices Act:
proposing a new regulation, taking public comments, and only then changing the law.”); see also AS
44.62.190(a)(1) (Alaska Administrative Procedure Act guidelines for promulgating or amending a
regulation).
statute, the regulation simply must yield.\textsuperscript{31} Here, the statute was the broadly worded AS 15.15.240 that if a voter requests assistance, the Division “shall assist the voter.” The court held that there would be some circumstances where providing the list of candidates would be “necessary to address a voter’s request for assistance.”\textsuperscript{32} But the court also ruled that the list could not include the party affiliation of the candidate, saying that it was not information that would be necessary to address a voter’s request for assistance (something that the Murkowski campaign conceded was not necessary at oral argument\textsuperscript{33}). In short, the supreme court ignored the regulation, or better, thought the regulation inconsequential given the statutory mandate to assist voters.

For the supreme court, then, this case was a rather straightforward statutory interpretation case about the meaning of “voter assistance.” But the supreme court did also cite some general rules about how they went about interpreting statutes about elections, which belong to what Richard Hasen has called the “democracy canon.”\textsuperscript{34} For instance, in a footnote, the supreme court quoted the rule it had set down in \textit{Carr v. State of Alaska v. Alaska Democratic Party et al., No. S-14054, Alaska Supreme Court, Oct. 29, 2010} at 4 (“The legislature’s statutory mandate that the division assist voters who request assistance is paramount. Our decisions have consistently held that when a regulation conflicts with a statutory requirement, ‘it is the regulation that must yield.’” (internal citation omitted)).

\textsuperscript{31} State of Alaska v. Alaska Democratic Party et al., No. S-14054, Alaska Supreme Court, Oct. 29, 2010 at 4 (“The legislature’s statutory mandate that the division assist voters who request assistance is paramount. Our decisions have consistently held that when a regulation conflicts with a statutory requirement, ‘it is the regulation that must yield.’”) (internal citation omitted).
\textsuperscript{33} State of Alaska v. Alaska Democratic Party et al., No. S-14054, Alaska Supreme Court, Oct. 29, 2010 at 6. The attorney for Murkowski said that party affiliation was “information” and not necessary for assisting voters. Bolstad, \textit{supra} note 21.
\textsuperscript{34} Richard L. Hasen, \textit{The Democracy Canon}, 62 \textit{Stan. L. Rev.} 69 (2009). Although Hasen lists several types of laws for which the democracy canon might be usefully deployed, laws regulating voter assistance do not fall neatly in to any of them. \textit{See id.} at 83-84. There are a dearth of cases on this subject. \textit{See, e.g.}, Smith v. Arkansas, 385 F.Supp. 703 (1974) (unmarried voter challenging statute that allowed spouse to aid voter in preparing ballot on equal protection grounds); O’Neal v Simpson, 350 So.2d 998 (Miss. 1977) (whether all voters or only those who are blind, physically disabled or illiterate may receive assistance in marking their ballot); Morris v. Fortson, 261 F.Supp. 538 (1966) (write-in voters have right to bring in paper with correct spelling of candidates name) \textit{see generally} 26 Am. Jur. 2d Elections § 309 (collecting cases on assistance to voters). The closest case I could find, factually, to the Alaska case was \textit{Carter v. White}, 161 S.W. 2d 525 (Tex. App. 1942) in which the court held that various types of assistance to write-in voters was permissible. There are of course cases under the Voting Rights Act dealing with illiterate voters, but these too rarely bring up the issue of voter assistance.
Thomas, which stated that “[i]n the absence of fraud, election statutes will be liberally construed to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disenfranchisement, and to uphold the will of the electorate.” As Hasen stressed in his article, the courts of Alaska have traditionally adhered to a rather strong version of the democracy canon.

Yet although references to the democracy canon frame the supreme court’s analysis, it is not clear that they do much work in the opinion itself. What exerts the most pull in the opinion is the rule that a statute will trump a regulation, as well as the court’s subsequent interpretation of that statute. It is possible that the court used the democracy canon in giving a liberal gloss to the Alaska statute at issue, that is, to give “assist” a broad meaning so that poll workers could do everything in their power to make sure a voter’s will is adequately expressed. But it seems more correct to simply characterize the court’s decision as a case of ordinary plain-meaning statutory interpretation. “Assist” is potentially ambiguous, but not necessarily so. It is not too controversial that a commonsense interpretation of it would encompass providing a written list of write-in candidates to voters who specifically request assistance in casting a write-in ballot. More salient in this regard seems to be the footnote in which the court discusses the change in the statutory language from specifying that only those who could not “read, mark the ballot, or sign his or her name” could request assistance to the more generic any “qualified voter” could request assistance. The legislative history seems telling in

36 Hasen, supra note 34, at 78-79 (discussing Alaska’s “particularly strong form” of the democracy canon, and citing Carr). For a recent use of the democracy canon in Alaska, see Anchorage v. Mjos, 179 P.3d 941, 943 n.1 (Alaska 2008).
relation to how broadly the legislature wanted the statute to be read. No appeal to the
democracy canon was necessary to read the legislative history aright.

Finally, as I will suggest in the next section, the supreme court could have
rejected a strict reading of the regulation based on the fact that it would result in poll
workers being extremely constrained in the assistance they could have given to even the
most handicapped of voters. That is to say, the supreme court could have upheld a broad
reading of the assistance statute in order to avoid the “absurd results” that the regulation
could give rise to. 38 It remains possible that this gave them an additional reason to assert
the primacy of the statute over the regulation, and simply to reject the regulation as being
in any way relevant to the question of what assistance poll workers could give to voters. 39

IV. What counts as “assistance”?

The supreme court’s opinion seemed to explicitly leave open the question of what
sorts of things would count as permissible assistance beyond the provision of the list of
write-in candidates. Moreover, it didn’t try to specify all the possible circumstances in
which providing a list of write-in candidates to a qualified voter would be appropriate. In
this respect, the opinion was narrow, and appropriately so. The Division of Elections had
introduced a specific policy change in order to better assist voters, and the parties
challenged that change. The court simply had to rule on whether that policy change
could be made consistent with Alaska law. But it seems likely that the Division will now
seek to make a more formal change to its regulations, in order both to remove the

39 See AS 44.62.030 (stating that “a regulation adopted is not valid or effective unless consistent with the
statute.”).
seeming contradiction between the new policy and the old regulation (which prohibited any information about write-in candidates to be provided at polling places) and also to give guidelines to poll workers in the next election as to when the list may be permissibly shown to a voter.

The question of to what extent the state can assist the voter is a more general one in election law. As Pam Karlan has noted, the bias in the American context is to put a great majority burden of voting on to the voter him- or herself.\textsuperscript{40} For instance, the state does not have an affirmative obligation to make sure people are registered to vote: it merely has to eliminate unfair barriers to people getting the right to vote for themselves. This point was made clear in the recent litigation about laws passed in several states requiring that voters show photo identification, as opposed to a utility bill or something other (non-photographic) form of identification in order to voter. In the 7th Circuit decision \textit{Crawford v. Indiana}, later affirmed by the United States Supreme Court, Richard Posner wrote of those voters who “couldn’t be bothered” to take the necessary steps to obtain photo identification.\textsuperscript{41} For Posner, the reasonable burden was clearly on the would-be voters if they wanted to exercise their right to vote.

A similar question of the division of the burden of the right to vote was present in the Murkowski litigation. If a voter wants to write in a candidate’s name, does the burden of spelling the name correctly rest entirely with the voter?\textsuperscript{42} At one extreme,

\textsuperscript{40} Pam Karlan, \textit{Framing the Voting Rights Claims of Cognitively Impaired Individuals}, 38 \textit{McGeorge L. Rev.} 917, 920 (2007) (“By contrast to many other advanced democracies, the United States does not automatically enfranchise all eligible citizens. Rather, the burden remains on individual citizens to register.”).

\textsuperscript{41} Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007).

\textsuperscript{42} To use Christopher Elmendorf’s useful categories, this question is another instance of the divide between liberals and conservatives between “access” and “integrity.” Conservatives will tend to put the burden on the voter -- for reasons of securing the integrity of the ballot, where liberals will tend to give the voter the benefit of the doubt, in order to maximize access to the ballot. \textit{See generally} Christopher Elmendorf,
there is the view that the voter bears the entire burden of having the correct spelling of the candidate’s name memorized, or written down on a slip of paper he or she brings to the polling place.⁴³ Consistent with this view is the strict reading of the Division’s regulation that no information about a write-in candidate could be provided or even discussed at the polling place. The only thing a polling place worker can discuss is the mechanics of making a write in vote -- who to vote for, and how to spell the candidate’s name is entirely up to the voter. If the voter wants to vote for a write-in candidate it is the voter’s job -- assisted by the write-in candidate himself or herself -- to make sure she has the information necessary to make her vote count. Prior to the election, Lisa Murkowski recognized this burden, as she deployed volunteers to give out bracelets with her name spelled correctly, and made it a centerpiece of her ad campaign to show her name being written in correctly on the ballot.⁴⁴ Even if Murkowski didn’t engage in these efforts, surely voters could be counted on to engage in self-help: to get the correct spelling of her name from newspapers, or from the Alaska Division of Elections webpage. Or so runs the extreme view.

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⁴³ See State v. Sweeny, 94 N.E.2d 785, 789 (Ohio 1950) (“The right of citizens to vote may not be denied or abridged, and, clearly, all qualified citizens have a right to vote even though they may suffer physical infirmities, illiteracy, feebleness of mind, ignorance or lack of information. *But the ability to mark and cast a ballot rests upon the individual voter.*” (emphasis added)): State ex re. Bateman v. Bode, 45 N.E. 195, 196 (Ohio 1896) (“The ballot is the same for all, and given equal protection and benefit to all. There is no discrimination against or in favor of any one; and, if any inequality arises, it arises, not from any inequality caused by the statute, but by reasons of inequalities in the persons of the voters, and such inequalities are unavoidable. It is always much more difficult for some electors to cast their ballots than for others. … but these difficulties inhere in the men themselves, and not in the law.”).

⁴⁴ Sean Cockerham et al., *Write-ins favor Murkowski; Miller won’t quit*, ANCHORAGE DAILY NEWS, Nov. 3, 2010 (Murkowski “spent over $1 million telling voters to ‘fill it in, write in’ after she lost to Miller in the Aug. 24 Republican primary. … She distributed rubber bracelets with her name on it, t-shirts, even temporary tattoos.”); Kyle Hopkins, *Murkowski proclaims herself the victor*, ANCHORAGE DAILY NEWS, Nov. 17, 2010 (same); Cockerham & Bolstad, *supra* note 4 (Murkowski saying Alaskans are “going to have to learn to spell my name.”).
The problem with the view that leaves the *entire* burden on the voter who wishes to vote by writing in a candidate’s name, however, is that it seems to leave out some cases of voter assistance which seem obviously legitimate, but which violate the strict letter of the Division’s original regulation. In its brief and at oral argument, the Republican Party conceded that it would be a permissible kind of assistance if a handicapped voter went up to a poll worker requesting assistance in writing in the name of the candidate. At that point, the poll worker could legitimately ask for the name of the candidate, and upon hearing the answer, confirm that this indeed was the candidate the voter wished to vote for. The poll worker could then write in the name of the candidate on the ballot, and fill in the appropriate oval.

On the extreme view, this might seem to amount to providing information of a write-in candidate by a poll worker, and so be prohibited. After all, the poll worker has provided the correct spelling of the name Murkowski to the voter. On the extreme view (which was not the view of the Republican Party), all the poll worker could do would be to inform the voter of the mechanics of writing in the name of a candidate, and nothing

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45 See Alaska Republican Party’s Opposition to Petition for Review, State of Alaska v. Alaska Democratic Party, No. S-14054, Oct. 28, 2010 at 5 (“All of this leaves plenty of room for genuine assistance. There is nothing, for instance, which would prevent the following conversation: Voter: I need some help here. Official: What help do you need? Voter: I need help writing in a candidate for Senate. Official: No problem, I can help you do that. Who do you want to write in? Voter: Lisa Murkowski. Official: Okay, do you need me to write it in for you? Voter: Yes. Official: alright, I’ve written it on the line and darkened the oval. Do you need any other help?”). A similar distinction between offering information and (merely) giving assistance seems to have been made by the Ohio Supreme Court in *State v. Sweeney*, 94 N.E.2d 785, 790 (Ohio 1950), where the court held that aid to illiterate voters “is intended to be mechanical in marking the ballot and not informative in the choice of candidates.” (emphasis added).

46 The attorney for the Democratic Party may have advanced what I have been calling the “extreme” view at oral argument. Transcript of Oral Argument, State of Alaska v. Alaska Democratic Party, October 29, 2010 at 36:00 (seeming to suggest that even the correct spelling of a candidate’s name is “information” regarding a write in candidate and therefore poll workers would be prohibited from giving it out).

The attorney for the Republican Party noted its disagreement with this apparent position of the Democratic Party at oral argument. Transcript of Oral Argument, State of Alaska v. Alaska Democratic Party, October 29, 2010 at 42:45 (permissible for election official to convey the correct spelling of a candidate’s name to a voter who requests assistance).
about the candidate and how to spell his or her name. But just as the core instance of prohibiting discussion of write-in candidates would be posting signs advertising a write-in candidate in the polling place, so too it seems that there is a core instance of assisting voters when it comes to write-in candidates: helping a handicapped voter write in the name of the candidate of his or her choosing.

Once this core case is conceded, then it becomes hard to draw a reasonable line that would make supplying a list of write-in candidates impermissible. If a poll worker can write the name of a candidate, spelling the name correctly, on what grounds could the poll worker not simply tell a voter how to spell the name of a candidate if asked, or to provide a list with the correct spelling of the candidate’s name? Put differently, how do we draw a line between the core case of voter assistance (assisting a handicapped voter to write in the name of a candidate) and a case where a voter simply needs help in spelling the name of a candidate, but is able to write-in the candidate’s name him or herself?

There are actually two issues here. First, as noted above, the Alaska statute governing voter assistance does not limit the class of people who can request and receive assistance just to those who have an obvious handicap. It used to have such a restriction, but now no longer does: the class of people who can request and receive assistance now extends to the class of all qualified voters. In other words, Alaska law makes no distinction between the handicapped voter who needs assistance and the merely forgetful.

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47 On this view, the poll work would ultimately have to ask the voter how to spell the name of the candidate. This way, the information about the correct spelling of the name would not be conveyed to the voter.

48 A point noted by the Alaska Division of Elections at oral argument. Transcript of Oral Argument, State of Alaska v. Alaska Democratic Party, October 29, 2010 at 14:00 (“If the name is information, why isn’t how you spell the name information?”)
or absent minded voter, who might have the name of the candidate on the tip of his or her
tongue. If one can get help, there does not seem to be a principled way in the statute to
give one help and not to give the other help. The supreme court, in its opinion, grouped
those with learning disabilities and those with memory problems and those who merely
had trouble spelling. 49 This seems right, given the broad wording of the revised statute. 50

But if this is the case, then this raises a second question, which seems more a
question of pragmatics than of principle: how can the Division of Elections best assist
those voters who need help writing in the name of a candidate, without unduly
influencing either the voter requesting assistance or any other voter? The Division of
Elections seems to have simply made the choice that it would be less disruptive to offer
those wishing assistance in writing in a vote a list of all write-in candidates -- either
because voters forgot who was running as a write-in candidate, or because they didn’t
know how to spell a candidate’s name. 51 Having to physically help each voter who
requested assistance in spelling a name (as the Republican Party seemed to suggest)
might have been more time consuming and more disruptive than simply giving interested
voters a list of names, and leaving it to the voter to correctly fill in the name of the
candidate (especially in a race where many voters could be anticipated to vote write-in 52).
Indeed, there seems to be a heightened risk of influence when a polling worker actually

4 (“Some voters require assistance for medical difficulties … [s]ome voters suffer from learning disabilities …
some voters may need assistance remembering or spelling the name of a candidate due to conditions
impacting their memory or comprehension …”).
2-3 n.3.
51 State of Alaska, Addendum to Petition for Review, State of Alaska v. Alaska Democratic Party, S-14054,
Oct. 27, 2010 at 2 (“[T]he list provides the simplest and least intrusive means of providing … assistance
consistently to all voters.”).
52 Bolstad, supra note 21 (noting the Division of Election’s “anticipation that there’d be an unprecedented
number of questions about Sen. Lisa Murkowski’s write-in bid”).
goes in to the voting booth help a person vote,\textsuperscript{53} rather than simply providing them with a list when they ask about how to spell a certain candidate’s name. It is again hard to say that there is an obviously \textit{principled} reason why a conversation about how to spell a name of a candidate would be less disruptive than handing out a list of candidates to the voter who requested help in spelling the name of a candidate.\textsuperscript{54} The Division chose to go for a wholesale approach -- lists given to voters who need help -- rather than a retail approach -- individual, labor-intensive assistance to voters in marking their ballots. In other words, the statute requires assistance, and it was the Division’s pragmatic choice to go with a list rather than with any other means.\textsuperscript{55}

The idea that in the case where the person asks how to spell a name and gives that name it permitted because the voter is doing the prompting doesn’t necessarily offer a principled grounds for allowing assistance in that case but not providing the list to someone who asks for the list.\textsuperscript{56} For even in the case where the list is provided, the voter will still have to ask for the list and will still have to pick the name from the list and write

\textsuperscript{53}This was a worry about the early assistance provision, i.e., would helping voters mark their ballot violate the secrecy of the ballot? \textit{See} 1996 Alaska Op. Atty. Gen. (Inf.) 91, 1996 WL 148628, at *2-*3 (Alaska A.G.) (rehearsal legislative debates about the importance of secrecy of the ballot, and whether it was an unqualified right).

\textsuperscript{54}State of Alaska, Addendum to Petition for Review, State of Alaska v. Alaska Democratic Party, S-14054, Oct. 27, 2010 at 2-3 (concern that if the list is not allowed, poll workers “will have to spell the name aloud, which may be overheard by other voters”).

\textsuperscript{55}Although the political parties did raise legitimate concerns about the lack of training the Division of Elections gave -- basically none -- about how to use the list, and in what circumstances. \textit{See}, \textit{e.g.}, Alaska Democratic Party’s Opposition to Petition for Review, No. S-14054, Oct. 28, at 7-8 (“The Division’s last-minute, unannounced change to Alaska’s election procedures … has not given poll workers sufficient education and training about the proper method and procedure to use when asked for the write-in list.”); \textit{but see } State of Alaska, Addendum to Petition for Review, State of Alaska v. Alaska Democratic Party, S-14054, Oct. 27, 2010 at 3 (“[A]sking the poll workers in hundreds of locations with varying levels of sophistication to determine what constitutes a valid request for spelling help, and for what candidate, opens the election to challenge based on either the provision of too much or not enough assistance.”).

\textsuperscript{56}The Republican Party suggested the “bright line” rule that the voter must always prompt the poll worker with the name of the candidate. They conceded that this might rule out assistance for a stroke victim who could not remember the name of the candidate they wished to vote for. \textit{Transcript of Oral Argument, State of Alaska v. Alaska Democratic Party, October 29, 2010 at 54:45.}
down that name in the appropriate place on the ballot.\textsuperscript{57} The burden is still on the voter to make the actual choice of whom to vote for: the list does not “suggest” any candidate should receive the voter’s vote.\textsuperscript{58} There is no undue influence at any point in the process where it might threaten the integrity of the vote. In fact, there may be a greater risk of influence in the person who asks for help in spelling the name of a candidate but does not specify which one, and an overeager poll worker, rather than simply handing over a list of names may say, “Oh yes, I can help you spell Murkowski.”

V. Can the state disfavor write-in candidates?

If the goal is merely to help give effect to a voter’s intent -- something the supreme court said was foremost in its mind in making its decision in \textit{Alaska Democratic Party} -- then it is plausible to say that giving voter’s the list does this, and does so in an arguably unobtrusive way. The voter gets the list, finds the candidate’s name on the list, and writes it in. But there was possibly another purpose in the Division’s original regulation: to disfavor write-in candidates generally. Obviously, if that was the goal, the offering a list of write-in candidates -- again, an unprecedented move -- to any voter asking for help in voting write in, would obviously cut against achieving it.

Why would a state want to limit the success of write-in candidates? One possible reason is that it is much more efficient to have voters simply vote for the candidates pre-

\textsuperscript{57} \textit{See} Bolstad, \textit{supra} note 21 (quoting the attorney for the Alaska Division of Elections Margaret Paton-Walsh as saying that the list is “just names on a piece of paper. … The voter still has to pick a candidate. The list doesn’t tell them which candidate to pick. It merely helps them identify the candidate they want to vote for.”).

\textsuperscript{58} \textit{Contra} \textit{Alaska Republican Party’s Opposition to Petition for Review, No. S-14054, Oct. 28, 2010} at 7 (“Suggesting who to vote for is the bright line which the law, as currently written draws. The Division, and the courts, would cross it at the peril of opening up opportunities for electioneering at the polling places.”).
printed on the ballot than to have them write in a candidate. Votes for candidates already on the ballot can be counted by machine, whereas write-in ballots can only be counted by hand -- which takes time, and costs money (as Alaska found out). But there may also be a more principled reason or reasons. The state of Alaska has a primary in order to focus the electorate on the candidates who actually represent a party, and who have a plausible shot at winning statewide support. The reward for winning your party’s primary is not only that you get your party’s backing (something which, given Murkowski’s entry, was only ambivalently extended to Miller), but you also get to have your name printed on the ballot. A consequence of not winning your party’s primary is that the only way you can win the general election is by having a write-in campaign. The state might legitimately want to favor candidates who have the support of the major parties and to discourage ‘sore losers’ from mounting write in candidacies -- either when they lost the primary, or decided to sit the primary out.60

In the United States Supreme Court case Burdick v. Takushi, the court held that the state had an interest in “channeling expressive activity at the polls,” and could do so by limiting write in candidacies.61 The goal of an election, the court held, was not merely to give voters a chance to say whatever they wanted to say -- the state does not have to count a vote for Donald Duck in the overall election tally, even if the voter wants to

59 See also Richard G. Niemi & Paul S. Herrnson, Beyond the Butterfly: The Complexity of U.S. Ballots, 1 PERSPECTIVES ON POLITICS 322 (2003) (“One can only imagine the difficulties involved [with write-in ballots] if many thousands, let alone millions of voters wrote in a name for some election. Beyond deciphering the handwriting, difficulties would arise over what spellings would be allowed, whether voters had to include a first and last name, and so on.”).

60 At oral argument Kenneth Kirk also defended the primary system as making “dark horse” candidacies possible. “There’s a reason for the primary system,” he said. “The primary system makes it easier for dark horses, for people who don’t have a lot of money but a lot of time and are willing to put in the effort, to have a shot. It makes it less likely that people can win a seat with a small plurality, so they’re more likely to try to build consensus with people in their district of state.” Bolstad, supra note 21.

express his opinion that he’d rather have a cartoon character than whichever real person was running for the office. Alaska’s own regulation requiring that write-in candidates register as candidates five days before the election has the effect of channeling expressive activity. You can write in a protest vote for Mr. Duck, but it won’t count toward the results. Donald Duck presumably wasn’t registered as a write in candidate in Alaska, so any votes for him would simply be tossed out.

But how far can states go in regulating legitimate write-in candidacies in order to “channel” voter’s “expressive activity”? In Hawaii, the state banned write-in votes at the general and primary elections. The Supreme Court said this was permissible, in part because it was rather easy (the Court thought) to get on the primary and general election ballots as a legitimate candidate,\(^\text{62}\) and also because of the state’s interest in limiting “sore loser” candidacies, i.e., candidacies by those like Murkowski who lost the primary but wanted a second chance in the general election. Of course, Alaska does not prohibit write-in votes, and subjects write-in ballots to the rather mild constraint that voters can only write in the names of candidates who have officially declared their write-in candidacy five days before the election. In Alaska, over 150 candidates ended up running for the Senate seat, thanks to the urgings of an Anchorage disc jockey. The ease with which they were able to register demonstrates how low the barrier to entry was for Alaskan write-in candidates.

Could the state of Alaska have asserted its interest in limiting third party, write-in candidates at the general election? It could have, but it did not. It was left to the Republican Party to raise the issue that primaries have the function of winnowing down

\(^{62}\) See Elmendorf, supra note 42 at 1086 n.157 (minimal barriers to getting on primary ballots key part of Burdick decision).
the choice of candidates, and the losers of party primaries should not be able to get a second bite at the apple. In other words, the Republican Party asserted that the restriction on assistance to those wishing to write in a candidate’s name might be a legitimate barrier set up by the state. If the state could ban write in candidacies in some instances, surely it could make it harder for voters to vote for a non-primary winner? (Doesn’t the greater power include the lesser?) Or, to put it slightly more polemically, couldn’t the state legitimately hold that if a candidate has lost the primary election it now becomes her burden (along with the voters) to make sure her name is spelled correctly on the ballot?

The state supreme court did not rule directly on this issue, even though it was raised by the Republican Party. I can think of two reasons for this, one procedural and one substantive. The first, procedural, reason is simply that the state itself did not choose to advance this interest. The state, as represented by the Division of Elections was on the exact other side of the issue: they wanted to give full effect to the voter’s intent, even if the voter’s intent was to write in a candidate. The point, then, was simply not as persuasive when raised by a Party against the state. With that procedural posture, it may have simply looked as if the Party was trying to manipulate the rules in order to give itself an advantage over the spoiler candidate.

Second, and more damning from this perspective, the Republican Party could offer no legislative history to the effect that the state meant to limit voter choice by means

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63 Alaska Republican Party’s Opposition to Petition for Review, No. S-14054, Oct. 28, 2010 at 8-10 (citing “good public policy reasons” to have a primary system that winnows down the number of candidates on the ballot in the general election).

64 Of course (as in many election law cases), accusations of bad faith could be made equally by both sides: Murkowski’s side could be charged with favoring a lax position in helping voters because they stood to benefit from it.
of the regulation prohibiting the distribution of information on write-in candidates.\textsuperscript{65}

Given this lack of evidence as to the state’s purpose, it would have been odd for the supreme court then to turn around and protect the state from its own express position in the litigation. And it would have been odder still for the court to rule in a way that limited the expression of the voter’s intent, especially when the state was on the side of helping the voter.

In the end, the Alaska Supreme Court probably felt that the larger issue of the rights of write-in candidates could safely be prised apart from the issue of to what extent the state is able to assist the voter. When a voter asks for assistance in voting for a candidate, the proper inquiry is what the state can permissibly do to help \textit{that voter} in voting for his or her candidate of choice. Larger questions concerning the limits states may put on write in candidacies should appropriately recede into the background. At this point it seems that the state’s efforts to make it harder for write-in candidates to succeed - - say by limiting who can be on the list of eligible write-in candidates -- have already done whatever work they were meant to do. When the voter asks for help, the question is no longer what more the state can do to limit the voter’s choice, but to what extent the state can permissibly assist the voter in making his or her choice. If the state really wanted to limit voter choice at this point in the process, it would need a fairly clear indication that this was the state’s intent. The Republican Party failed to offer any evidence that it was.

VI. From assistance at the polls to counting the votes

\textsuperscript{65} As was apparently conceded at oral argument by the attorney for the Republican Party. Transcript of Oral Argument, State of Alaska v. Alaska Democratic Party, October 29, 2010 at 48:45. \textit{Id.} at 1:00:30 (admitting the rationale of excluding non-primary winners was “admittedly speculative”).
As I write, Lisa Murkowski seems to have won the senatorial election, even in spite of Miller’s challenge to many of the write-in ballots. Even were all of the ballots challenged by Miller to be discarded -- which seems unlikely -- Murkowski would still have enough of a margin to win. Whether this will render moot of Miller’s subsequent challenges to the legitimacy of the election results remains to be seen. In any event, it seems clear that Miller has lost his effort to become Alaska’s new senator.

Still, there is the fact of Miller’s latest legal challenge, which again relies on a strict reading of an Alaska rule. In this case, the Alaska statute at issue says that only those ballots that have Murkowski’s last name spelled correctly can be counted as legitimate. In the words of the statute, 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 last name of the candidate is written in the space provided.” Moreover, on Miller’s reading of the statute, the ballots cannot have a wrong first name, and they cannot have any other information written in on the line, such as “Republican.” Miller has challenged all of the ballots that depart from his strict reading of the rule which, it must be said, is not an entirely implausible way of constructing the statute, although a more liberal reading of the statute also seems

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66 See Cockerham, supra note 44.
67 Hopkins, supra note 44 (“Murkowski’s margin over Miller appears to make irrelevant his lawsuit asking the courts to toss out misspelled votes.”).
68 Miller originally filed in federal court; his suit has since been moved to state court and is now pending. Becky Bohrer, Judge halts vote certification pending state review, ANCHORAGE DAILY NEWS, Nov. 20, 2010; Richard Mauer, Miller files suit in state court over Senate vote count, ANCHORAGE DAILY NEWS, Nov. 22, 2010. The election results cannot be certified until Miller’s suit is resolved by the state courts. Id.
69 AS 15.15.360.
70 Becky Bohrer, Murkowski camp cries foul in ballot count, YAHOO! NEWS, Nov. 11, 2010 (noting challenges to ballots that “appeared to have” Murkowski’s name spelled correctly, although the L in Lisa was in cursive, or where the vote read “Lisa Murkowski Republican.”).
plausible. The state, however, has said that it will count all those ballots where it can discern the voter’s intent.\(^{71}\)

The ultimate correctness of Miller’s interpretation of the Alaska standard for counting write-in ballots is not my main concern here. That task lies for another paper. My question now is whether the fact that the Alaska Supreme Court ruled against Miller (and the two major parties) in the litigation regarding voter assistance should matter to whether we should strictly construe the Alaska rule about counting write-in ballots.

The argument that we should would go something like this.\(^{72}\) The Alaska Statute providing that poll workers may assist voters has been read as allowing poll workers to give a list of the eligible write-in candidates that has the correct spelling of the candidates’ names. Given this, there is simply no excuse for the voter if he or she misspells the name of the candidate -- no reason election officials after the election should have to struggle to discern the voter’s “intent.” Not only could the voter have educated herself prior to voting (and even brought in a slip of paper with the correct spelling), he or she could have requested the correct spelling of the candidate’s name at the polling place itself. Accordingly, when looking at the ballots themselves, any errors should be construed against the voter -- or assumed to be deliberate, protest votes.\(^{73}\)

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\(^{71}\) Complaint for Injunctive and Declaratory Relief, Miller v. Campbell, No. 10CV00252, Nov. 9, 2010 at ¶16 (citing instances in the popular media that the Alaska Division of Elections planned to use an “intent of the voter”); Sean Cockerham, 98% of write-in votes go to Murkowski, ANCHORAGE DAILY NEWS, Nov. 11, 2010 (quoting Director of Division of Elections saying, “If I can pronounce the name by the way it’s spelled, that’s the standard I’m using.”); Becky Bohrer, ANCHORAGE DAILY NEWS, Nov. 14, 2010 (“[T]he state has been using discretion in determining voter intent, pointing to prior case law as the basis for this.”); but cf. Sean Cockerham, Murkowski confident as write-in tally for Senate continues, ANCHORAGE DAILY NEWS, Nov. 12, 2010 (Miller spokesman arguing that Alaska “does not have a voter intent law.”).

\(^{72}\) A Justice raised a version of this point at the oral argument, albeit running it the other way. Transcript of Oral Argument, State of Alaska v. Alaska Democratic Party, October 29, 2010 at 10:41 (asking whether the fact that the standard for counting the ballot after the fact is “intent of the voter” solves any worry about voter assistance prior to the ballot being market).

\(^{73}\) See Complaint for Injunctive and Declaratory Relief, No. 4FA-10-3151-CI, Alaska Superior Court, Nov. 22, 2010, at 8-9 (noting potential inconsistency between Division of Election’s position that assistance to
There are two problems with this argument. The first is that there can be, and probably was, a slip between what the Division of Election allows and what voters have adequate notice of. Just because poll workers are able to help voters who do not know how to properly spell the name of their candidate doesn’t mean that they will always avail themselves of that help, or even know that they can be assisted. Poll workers still have to be prompted to help. Moreover, given the fact that this was a new policy by the Division and its permissibility was only confirmed days before the election, voters could legitimately claim that they did not know that there was help and that they were supposed to ask for help if they had any doubt about how to write in their candidates name.

The second problem with the argument for construing marked ballots strictly abstracts from any problem peculiar to this year’s election in Alaska. Put simply, there is no reason why a liberal standard for voter assistance compels a strict standard for reading the ballots, anymore than a liberal standard for reading ballots would compel a strict standard for assisting voters. In fact, if the principle that governs elections in Alaska is following the intent of the voter when this is readily ascertainable, then this would suggest a liberal standard both at the assistance stage and at the vote counting stage. Each stage must be examined on its own, the supreme court might insist, and whatever will best facilitate divining the intent of the voter at each stage -- and making that intent manifest in an actually counted ballot -- should be favored.

VII. Conclusion

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done favoring a liberal “intent of the voter” standard when reading ballots).
Based on the above analysis, I conclude that the Alaska Supreme Court reached the right result in *State of Alaska v. Alaska Democratic Party*. Although the regulation was clear, it also seemed to countenance an extreme restriction on the ability of poll workers to assist voters, something that the Division of Elections was under a statutory mandate to do. The supreme court was on firm ground in reading the statute to allow the Division to help voters by making a list available to those who either requested it, or made a request to which the list would be an appropriate response.

There, however, is the rub. The supreme court listed *some* circumstances where providing the list would be appropriate, but left it open as to which questions should prompt the giving of the list. The Division should, and no doubt will, try to firm up the rules regarding the provision of a list of write-in candidates. They may even make it harder to become a write in candidate, to avoid the deluge of names that accompanied the last election. In any event, there remains work to be done, and the Alaska Supreme Court gave the Division room in its decision to do that work.