

In the Supreme Court of the State of Alaska

State of Alaska, Division of Elections,)
Gail Fenumiai, in her capacity as)
Director of the Division of Elections,)
and Lisa Murkowski for U.S. Senate,)

Petitioners,)

v.)

Alaska Democratic Party and Alaska)
Republican Party,)

Respondents.)

Supreme Court No. **S-14054**

Order

Trial Court Case # **3AN-10-11621CI**

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

1. In preparation for the upcoming November 2, 2010 election, the Division of Elections anticipated a substantial increase in the number of people wanting to vote with write-in ballots. On October 18, 2010, the Division began offering voters a list identifying approved write-in candidates¹ to voters who appeared at the polls and requested assistance. The list contained the names of the write-in candidates, the candidates' party affiliation, and the candidates' registration status with the Division.

¹ To qualify as an approved write-in candidate, the person must file a letter of intent not later than five days before the general election. AS 15.25.105. Ballots marked in support of candidates who do not meet this requirement may not be counted. AS 15.25.105. The Division's list included only those candidates who had met the necessary requirements; it was updated whenever additional individuals filed a letter of intent within the appropriate deadline.

The list was only provided to those voters who explicitly requested help with write-in voting “beyond the basic assistance provided by the simple instructional poster,” including voters who asked how to spell the name of the candidate for whom the voter wished to cast a ballot.

2. On October 27, 2010, at the request of the Alaska Democratic Party, joined by the Alaska Republican Party, the superior court entered a restraining order prohibiting the Division from providing a list of write-in candidates to voters requesting assistance at the polls. The Division filed an emergency motion for stay, a petition for review, and a motion for expedited consideration. To avoid disruption at the polls, we stayed the superior court’s order, granted expedited consideration of the Division’s petition for review of the restraining order, and received additional information and argument from the parties.² We now grant the Division’s petition for review and issue this brief order to provide guidance regarding the appropriate use of the “write-in candidate list” for the 2010 general election.

3. The legislature provided in AS 15.15.240 that, if a voter requests assistance, the Division “shall assist the voter.”³ But 6 AAC 25.070(b) adopted by the

² We acknowledge the efforts of the parties and amicus curiae Alaska Federation of Natives in presenting this briefing and oral argument to us in such expeditious fashion.

³ In an earlier form, AS 15.15.240 required that, “A qualified voter *who cannot read, mark the ballot, or sign the voter’s name* may request an election judge, a person, or not more than two persons of the voter's choice to assist.” (Emphasis added.) But in 2000, the Alaska State Legislature amended AS 15.15.240 by removing the phrase

Division, provides that “[i]nformation 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 Division asserts that it has authority to provide a list of write-in candidates and their party affiliations under its statutory obligation to assist voters. The Alaska Democratic Party and the Alaska Republican Party respond that the Division’s decision violates the regulation.

4. The decision we reach today is informed by our previous cases regarding the importance of facilitating voter intent. “[W]e have consistently emphasized the importance of voter intent” because the “opportunity to freely cast [one’s] ballot” is fundamental.⁴ “The right to vote encompasses the right to express one’s opinion and is a way to declare one’s full membership in the political community

“*who cannot read, mark the ballot, or sign the voter’s name*” and replaced it with the broader phrase “needing assistance in voting.” Thus, AS 15.15.240 now reads, “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.” Qualified voters requiring assistance *may* include those covered by the old version of the statute, those “*who cannot read, mark the ballot, or sign the voter’s name,*” but they *also* include voters who require assistance for other reasons.

⁴ *Edgmon v. State, Div. of Elections*, 152 P.3d 1154, 1157 (Alaska 2007); *see also Sonneman v. State*, 969 P.2d 632, 636-37 (Alaska 1998) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights, any alleged infringement of the right of the citizens to vote must be carefully and meticulously scrutinized.”); *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978) (“In 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.”).

... 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."⁵

5. 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."⁶ And we have consistently held that we should "defer to an agency's interpretation of a statute if undefined or ambiguous terms appear in the statute."⁷ Regarding regulations we have held, "[w]here an agency interprets its own regulation . . . a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue."⁸

6. We recognize there are myriad reasons why a qualified voter in Alaska may require assistance casting a write-in ballot. Some voters require assistance for medical difficulties or conditions that make spelling or memory recall difficult. Some voters suffer from learning disabilities that interfere with word retrieval, such as aphasia

⁵ *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995).

⁶ *Bradshaw v. State, Dep't of Admin., Div. of Motor Vehicles*, 224 P.3d 118, 122 (Alaska 2010).

⁷ *Id.*

⁸ *Alaska State Emps. Assoc./AFSCME Local 52, AFL-CIO v. State*, 990 P.2d 14, 19 (Alaska 1999).

and dyslexia.⁹ Further, some voters may need assistance remembering or spelling the name of a candidate due to conditions impacting their memory or comprehension, including stroke victims who may have word retrieval problems. Other qualified voters may need assistance spelling the name of a candidate for a variety of reasons, including language barriers.¹⁰ Providing the proper spelling of names written in English could assist those voters who want to vote for a particular candidate and need assistance in ensuring that they write the candidate's name correctly.

7. We conclude that when a voter requests assistance in casting a write-in vote and that request for assistance cannot be addressed by the posted general instructions for completing a write-in ballot,¹¹ the assistance provided to the voter must

⁹ Aphasia is defined as a defect or loss of the power of expression by speech, writing, or signs, or of comprehending spoken or written language, due to injury or disease of the brain. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 105 (28th ed.1994). Dyslexia is defined as the inability to read, spell, and write words, despite the ability to see and recognize letters. *Id.* at 516.

¹⁰ There are twenty different Native Alaskan languages still spoken in Alaska: Aleut, Alutiiq, Iñupiaq, Central Yup'ik, Siberian Yup'ik, Tsimshian, Haida, Tlingit, Eyak, Ahtna, Dena'ina, Deg Hit'an, Holikachuk, Upper Kuskokwim, Koyukon, Tanana, Tanacross, Upper Tanana, Gwich'in and Han. U.S. Census Bureau, Table 4. Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over by State (2000) (available at <http://www.census.gov/population/cen2000/phc-t20/tab04.pdf>). In addition, the 2000 Census reports that 82,758 Alaskans "speak a language other than English at home," and of those 30,842 "do not speak English very well."

¹¹ 6 AAC 25.070(d) provides that "[i]nstructions for indicating a write-in choice will be posted in each polling place"

be related to and commensurate with the voter's request. The Division may provide the list only when its use is tailored to address a voter's request for specific assistance. There will be some circumstances where providing the list will not be necessary to address a voter's request for assistance and other circumstances where providing the list will be necessary to address a voter's request for assistance. For example, if a voter requested the correct spelling of a specified registered write-in candidate's name, it would be unnecessary to provide the entire list to that voter in order to provide the requested spelling assistance.

8. We do agree with the Alaska Democratic Party and Alaska Republican Party that providing information about a write-in candidate's party affiliation is prohibited because party affiliation is "information regarding" a write-in candidate that is not necessary to address a voter's request for assistance. Thus we reiterate our previous order that the "write-in candidate list" shall not include any information other than the write-in candidates' names.

9. We vacate our previous order requiring the Division to mark and segregate ballots cast by voters who use the "write-in candidate list."

Entered at the direction of the court.

Clerk of the Appellate Courts


Marilyn May

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cc: Supreme Court Justices
Judge Pfiffner
Trial Court Clerk - Anchorage

Distribution (phone, fax, & email):

Margaret Paton Walsh
Assistant Attorney General
1031 West Fourth Avenue Suite 200
Anchorage AK 99501

Thomas M Daniel
Perkins Coie
1029 West 3rd Avenue Suite 300
Anchorage AK 99501

Scott Kendall
Holmes, Weddle & Barcott, PC
701 West 8th Ave Suite 700
Anchorage AK 99501

Kenneth C Kirk
Kenneth Kirk & Associates
425 G Street Suite 204
Anchorage AK 99501

Thomas P Amodio
Amodio Stanley & Reeves LLC
500 L Street Suite 300
Anchorage AK 99501