



ROSE INSTITUTE
OF STATE AND LOCAL GOVERNMENT

CLAREMONT MCKENNA COLLEGE

WRITTEN-IN FICTION:

THE MYTH OF THE WRITE-IN VOTE IN CALIFORNIA AND BEYOND

LANE CORRIGAN
FRANCESCA HIDALGO
IAN O'GRADY
CAROLINE PECK

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850 Columbia Avenue,
Kravis Center 436
Claremont, CA 91711-6420
P: (909) 621-8159
E: roseinstitute@cmc.edu

ABSTRACT

According to California Election Code, “Except for a voter-nominated office at a general election, each voter is entitled to write on the ballot the name of any candidate for any public office.”¹ Though the statute may entitle voters to write in any candidate’s name, their votes will be counted only if their write-in candidate of choice has completed a series of requirements. Voters therefore may not write in the name of any candidate, as is implied by the Elections Code, but only the names of duly qualified write-in candidates.

This report examines write-in voting in California. It describes the write-in process for candidates, voters, and election officials. The report then compares California to other states, giving California write-in regulations national context. In addition, the report summarizes legal and constitutional standards surrounding write-in voting, assessing whether voters have a right to write-in their candidates of choice. In the end, the report finds that write-in voting is in fact a misnomer. It is more accurately referred to as a secondary filing process for less organized and less serious candidates.

I. CALIFORNIA WRITE-IN CANDIDATE FILING REQUIREMENTS

Interested Californians must go through a number of steps in order to be eligible write-in candidates.

According to the California Secretary of State and Elections Code, write-in candidates are required to submit a declaration of candidacy, file a variety of other statements, open a candidate bank account, and collect nomination signatures. Here are the candidate steps in detail:

- *Candidate Intention Statement with Campaign Contribution Account:* Any write-in candidate for statewide or state legislative office must file a Candidate Intention Statement and establish a Campaign Contribution Account.² Write-in hopefuls file their Candidate Intention Statements with the Secretary of State’s Political Reform Division, located in Sacramento, prior to solicitation or receipt of any contributions or loans, including any disbursement of personal funds used for campaign purposes.³ Once the candidate has filed her Intention Statement, she must create a Campaign Contribution Account. All contributions to a candidate’s campaign must be made to the Campaign Contribution Account, including personal funds.⁴
- *Statement of Economic Interest:* Write-in candidates must also file a Statement of Economic Interests.⁵ The Statement of Economic Interests discloses investments, interests in real property, and any income received during the immediately preceding 12 months.⁶ Candidates must file the statement no later than the final filing date of the declaration of candidacy—as late as the 14th day before the election.⁷

TABLE 1: WRITE-IN CANDIDATE SIGNATURE REQUIREMENTS⁸

Office	Number of Signatures Required
Statewide: US Senator; Governor; Lieutenant Governor; Attorney General; Controller; Insurance Commissioner; Secretary of State; Superintendent of Public Instruction; Treasurer	Maximum: 100 Minimum: 65
District offices: Member of House of Representatives; State Board of Equalization; State Senate; State Assembly	Maximum: 60 Minimum: 40

TABLE 2: WRITE-IN CANDIDATE FILING REQUIREMENTS

<p>Candidate Statement of Intention and Contribution Account</p> <ul style="list-style-type: none"> • Statement of Intention must be filed with Secretary of State’s Political Reform Division prior to receipt of any contributions • All contributions to a candidate’s campaign must be made to the Account, including the candidate’s personal funds 	<p>Statement of Economic Interest</p> <ul style="list-style-type: none"> • Discloses investments, real property, and any income received during previous 12 month • Candidates must file Statement no later than 14th day before election
<p>Nomination Papers</p> <ul style="list-style-type: none"> • Must be made available to candidates no later than 57th day prior to the election, and must be submitted no later than 14th day prior to the election • For office specific requirements, see Table 1 	<p>Statement of Write-In Candidacy</p> <ul style="list-style-type: none"> • Includes candidate’s name, address, declaration stating candidate is write-in candidate, title of office for which candidate is running, and date of election • Counties must make Statements available to candidates no later than 57th day prior to the election, and candidates must submit the statement no later than the 14th day prior to the election

• *Statement of Write-in Candidacy:* All write-in candidates must also file a Statement of Write-in Candidacy, separate and distinct from the Candidate Intention Statement. The Statement of Write-in Candidacy includes the candidate’s name, address, declaration stating the candidate is a write-in candidate, title of office for which the candidate is running, and the date of the election.⁹ The counties must make the statement available to candidates on the 57th day prior to the election. Candidates must then complete and submit the statement to the elections official responsible for conducting the election no later than the 14th day prior to the election.¹⁰

• *Nomination Papers:* Lastly, California requires all write-in candidates to submit signed nomination papers. As with the statement of write-in candidacy, nomination papers and signatures will be made available on the 57th day before the election, and must be delivered to the elections official responsible for conducting the election no later than the 14th day prior to the election.¹¹ For signature requirements by office, see **Table 1**.

• *Declaration Timeline:* Write-in candidates have a much later timeframe for filing to run compared to candidates who take the more traditional path and file to have their names printed on the ballot. For example, for the 2014 primary election, the filing dates for write-in candidates were from April 7 to May 20—ending only two weeks before the election. Thus, those who receive absentee ballots may already be voting before the county prints and distributes a list of qualified write-in candidates. Moreover, the county prints and distributes voter pamphlets between April 24 and May 7, before the state certifies write-in candidates, thus excluding them from the voter pamphlet.

II. WRITE-IN CANDIDATES IN ELECTIONS

1. *Qualifying for the General Election:* California’s elections system is unique in that its general election ballots do not allow for write-in voting. Instead, a write-in candidate must first advance in the state’s nonpartisan top-two primary before he may appear

on the general election ballot. To advance to the general election, he must receive either the highest or second highest number of votes cast for that office, regardless of candidates' party affiliation. In addition, the write-in candidate must also receive votes equal to at least 1% of all votes cast for that office at the preceding general election at which the office was filled.¹² To qualify as a write-in candidate for California's general election involves complex rules and exceptions; subsections 3 and 4 explore the issue more fully.

2. *General State Rules for Tallying Write-In Votes:* Written-in names on primary ballots are counted as votes only if the candidate whose name was written is a certified write-in candidate, completing all steps listed in section I.¹³ Misspelled write-in names, as well as write-ins with incorrect or omitted offices, are counted so long as the name "bears a reasonable resemblance to the qualified candidate's name" and no other write-in candidate "has a name that is so similar to the name as written in as to leave a reasonable doubt to the voter's intention."¹⁴ Although this standard has not been challenged in California, Section IV discusses US Senator Lisa Murkowski's successful come-from-behind 2010 write-in victory, when candidates rigorously challenged a similar state standard of reasonableness.

3. *General Election Constraints:* California's election system has withstood recent legal challenges to its lack of a write-in option on the general election ballot.¹⁵ The major political parties, third-party advocates, or others may nevertheless continue to lobby the legislature to weaken the law. The write-in ban is not part of the California state constitutional amendment instituting the top-two system, ratified by voters as Proposition 14 in 2010, but is part of California Election Code. If California legislators change the law to allow for write-in candidacies on the general election ballot, the system would be more like Washington's variation of the top-two primary. Washington allows voters to write-in votes in both the primary and general election ballots, in addition to printing a write-in candidate's name on the general election ballot if she finishes first or second in the primary. In California, however, if a write-in candidate does not place in the top two in the primary, then he simply does not advance, creating a more "air-tight" version of the top-two primary by

blocking sore-loser candidacies such as Murkowski's. For now, the law holds, but it remains easily altered.

4. *AB 141 – Further raising the Bar:* With Assembly Bill 141, signed into law September 19, 2014, the California Legislature tightened restrictions on write-in candidates hoping to advance from the primary to the general election. AB 141 amended parts of the California Election Code that accompanied the legislatively-referred top-two primary constitutional amendment (Proposition 14) to create a minimum vote requirement for write-in candidate to advance from the primary to the general election:

This bill prohibits a write-in candidate... from having his or her name appear on the ballot at the general election, unless the candidate received votes equal in number to at least one percent of all votes cast for that office at the last preceding general election at which the office was filled...¹⁶

This law "reestablished" the requirement for write-in candidates to advance to the general election.¹⁷ Before Proposition 14, write-in candidates not only had to win their party primaries; they also had to receive a number of write-in votes equal to at least one percent of all votes cast for that same office at the most recent general election—the same formula used in AB 141. Neither Prop 14 nor its follow-up legislation included any of this language, allowed any write-in candidate who finished in second place to advance to the general, even if he received only a handful of votes. The 2014 California primary was therefore the last election cycle in which there would not be a minimum vote threshold for write-in candidates.

Importantly, none of the six write-in candidates who advanced from the primary to the general election in the 2012 cycle would have advanced under the AB 141 rule:¹⁸

In the June 2012 primary, six write-in candidates finished as one of the top two candidates in the primary election for the offices that they sought, and accordingly moved on to the general election ballot. In each case, the write-in candidates who moved on to the general election were running for an office where only one candidate was listed on the ballot at the primary election.

Those write-in candidates, all of whom received less than two percent of the vote in the primary election, received between 13 and 36 percent of the vote at the ensuing general election.¹⁹

Thus, the possibility of write-in candidates advancing to the general by winning just a handful of votes and then winning a respectable portion of the general election vote share was enough to concern legislators. Moreover, the 1% rule served an important function in the past, before the top-two. In the 2010 general election (pre-top-two), all six qualified political parties were entitled to a total of 918 congressional nominations. Of those, only 375 were filled. Without its 1% threshold, California could have seen 543 write-in candidacies qualify for the general election ballot, facing little to no hurdle between the partisan primaries and general election.²⁰ Without the 1% rule in previous years, Californians could have been one failed candidacy away from an unorthodox write-in candidate winning a seat in an uncompetitive district. AB 141 mitigates similar concerns surrounding the top-two, especially with only two options present on the ballot.

Nevertheless, without guaranteed partisan nominations to the general election ballot, California's top-two structure already limits write-in candidacies. While the 1% requirement will only affect a handful of write-in candidates, those who would have been affected in 2012 happened to be the entirety of the write-in candidates who finished second in the primary, disqualifying all of them from the general election. While legislators argue that California's new AB 141 rule will only affect a handful of write-in candidates, they omit the fact that the top-two system already significantly reduces the number and odds of successful write-in campaigns.

Furthermore, AB 141 creates a system that favors candidates who filed to have their name placed on the ballot over write-in candidates, leading to a noteworthy discrepancy in who advances to the general election. First, a candidate who files for the primary ballot could place second in the primary and advance to the general by receiving just one vote—well below the one percent threshold for write-in candidates—because the one percent threshold does not apply to him. Second, in an unlikely yet possible scenario, a write-in candidate could finish second in

the primary and not qualify for the general election ballot and instead the candidate who filed to have his name on the ballot but finished third would advance over him.²¹

III. COUNTY DISCRETION: INCONSISTENCIES IN VOTER ACCESS TO NAMES OF ELIGIBLE WRITE-IN CANDIDATES

California counties run their elections in a relatively uniform manner, mostly in line with guidelines given in law in California Election Code. The main inconsistency between counties, however, is whether they make the list of certified write-in candidates clearly available to voters before or on election day. Without this information, voters are unable to cast valid write-in votes.

First, this section surveys practices in various California counties:

- *Los Angeles County*

Voters may ask poll workers on election day for a list of the certified candidates, or they may call the Registrar-Recorder/County Clerk for the list of the candidates in advance.

Los Angeles County counts write-in votes in two steps:

- i. **Qualifying Votes:** First, Qualifying Boards will qualify each write-in vote. The board checks any name written on the ballot by office against the list of qualified write-in candidates. If the written-in name matches a name on the list of Qualified Write-In Candidates and no ballot-qualified candidate has been marked for that same office, then the write-in vote shall be counted.

- ii. **Tallying:** The write-in Tally Boards consist of four members, including a reader, two talliers, and a watcher:

All votes for individual candidates are tallied, and we do not wait to count write-in votes until it becomes clear that the write-in vote may affect the results of the election. The qualifying of

write-in votes, whether it is a valid write-in vote or not the process begins on the very first day of the Official Canvass Operations, and uncounted ballots/votes for any individual candidates are also processed at the same time (simultaneously) in canvass.²²

- *San Bernardino County*

San Bernardino Elections Division does not provide a certified list of candidates to the voters. It is “up to voters to do the research,” and the list is available by phone and online, but not at polling places. Online, it is part of a full list of candidates that does not distinguish between write-in and traditional candidates.²³

When the ballots go through the tallying machines, ballots with write-in votes are rejected automatically and are manually tallied. Regardless of whether the write-in votes have a chance of affecting the outcome, the county tallies individual write-in votes per candidate. Although the overall process is relatively seamless, Denise Gonzalez of the County Elections Division expressed concern over whether voters understand that they must cast write-in votes for specific candidates. She even added that sometimes voters fill out their own name as the candidate, which, unless the voter is also a certified candidate, do not count.

- *San Francisco County*

San Francisco County provides poll workers with a piece of paper with the official write-in candidates qualified to receive votes on the day of the election (as an official part of their poll worker handbook). The official write-in names are not in the pre-election materials or ballots given to voters, but the

list is provided by a poll worker if voters specifically request it.

As in San Bernardino County, the counting machines cannot process write-in ballots and the county must manually tally write-in votes. Andy Beetley at the County Elections Division stated that the tallying of write-in votes is “probably done a little after” the other votes are complete, but only because of the time the manual count takes.²⁴

- *San Diego County*

Poll workers in San Diego County receive their election day materials, including a list of certified write-in candidates, no later than the Saturday prior to the election.²⁵ On election day, poll workers post the list of the official write-in candidates on the registration table at each poll site on election day, and the county encourages poll workers to notify voters that the qualified write-in candidates are posted on-site.²⁶

Write-in votes are hand-counted due to mechanical issues similar to those in the other counties. Distinct from other counties, however, all write-in votes in San Diego County each individual candidate is counted “no matter what.”²⁷

1. *Role of Write-in Candidate Lists in Voting*

Lists of qualified write-in candidates provided at the polls are functionally quite similar to candidates’ names listed on the ballot. If voters are given such a list, they will have access to all possible write-in candidates. Therefore, the only distinction between write-in and traditional candidacies is that voters must manually input write your name on the ballot. However, in most counties, this is not the case.

TABLE 3: ACCESS TO LIST OF ELIGIBLE WRITE-IN CANDIDATES BY COUNTY

County	Means of access to write-in candidate list
Los Angeles	Online, at poll registration ²⁸
San Bernardino	By phone
San Francisco	Online, at poll registration ²⁹
San Diego	At poll registration

Many counties do not provide voters with lists of eligible write-in candidates; it is up to the voter to do his research beforehand. This small difference among California counties could have a large impact for write-in candidates. Even in the most accommodating counties, the minimal effort required to look through the list, read the write-in candidate descriptions, and then transcribe a candidate's name could be enough to discourage voters. Only voters who are strongly dissatisfied with the candidate listed on the ballot are likely the ones who would consider even investigating the write-in list.

Different counties in California have different policies regarding the publicizing of write-in candidates' names. One would think these discrepancies in county practices would lead to better or worse prospects for write-in candidates depending on voter access to the list. Further research could indeed determine and measure the effects of county write-in practices on the prospects of write-in candidates. In principle, state legislation to standardize these county policies and make write-in candidate lists more easily accessible would lead to better and fairer opportunities for write-in candidates across counties. Alternatively, a state-level standardization could hurt write-in candidacies if the legislature were to restrict voter access to lists of qualified write-in candidates.

Moreover, California misaligns the timing of voting and write-in candidate filing such that it constrains voter awareness and write-in candidate viability. This discrepancy tasks voters with a large research burden if they are to know who is eligible to be written-in—one that voters are unlikely to undertake. Under current arrangements, either by design or by accident, California severely impedes write-in candidacies: voters are likely unaware of which write-in candidates are eligible, let alone that the state and counties must certify write-in candidates.

Any reform would require more oversight from the state and likely pose a challenge to establishment candidates. The state would have to compile and publicize the list of qualified write-in candidates, especially for races that cross county lines, in addition to an increased burden on counties in hand-tallying more write-in votes. A more standardized process would also threaten ballot-listed candidates—those

who are more invested candidates and with party support. Clearly displayed lists of qualified write-in candidates in voting booths would increase the competitiveness of write-in candidates, as their names would be more accessible to voters. Therefore, greater access to write-in candidates' names would grant them more comparable benefits to those who have their names printed on the ballot, but without the immense cost—though the costs and investment required for filing to be a write-in candidate is not insubstantial.

In California's top-two system, providing voters with a list of write-in candidates may make them more formidable and likely to advance to the general election. In fact, more write-in candidates advanced in the 2014 election in top-two primaries than third party candidates.³⁰ Although access to the write-in candidate list varies by county, with research, voters can find a list of write-in candidates on the California Secretary of State website.³¹ Details of lists provided at the polls (if provided at all) also vary across counties. The Secretary of State publishes the political party affiliation history of all write-in candidates online, but this information may or may not be available at the voting booth, depending on the county.³² Moreover, the information may not be available before voters receive absentee ballots.

While write-in candidates submit notarized list of their past party affiliations, the Secretary of State's office doesn't verify their affiliation upon filing. Whether or not a write-in candidate could tactically change his party preference and enter a race is an interesting and important question. Washington State's timeline for write-in candidacies and unregulated candidate affiliation may lead to greater success for write-in candidates who tactically enter uncompetitive races with a particular party affiliation.³³

In general, a write-in candidate may appear less viable without a major political party listed by her name, and counties' decentralized and informal list access likely hurts write-in candidates. Nevertheless, if counties or the state were to standardize and increase list access, then we may see more bills like AB 141, signaling increased pushback from party establishment in the legislature against write-in candidacies. Until then, write-in candidates face large disadvantages within the California system,

TABLE 4: FILING TIMELINE, ON-BALLOT CANDIDACIES VS. WRITE-IN CANDIDACIES

Type of Candidacy	Start of Nomination Period	End of Nomination Period
Regular	113 days prior	88 days prior
Regular, when eligible incumbent not present	113 days prior	83 days prior
Write-in	57 days prior	14 days prior

notwithstanding more open policies in a few counties.³⁴

IV. AMERICAN WRITE-IN VOTING: STATE COMPARISONS

California has extensive qualification requirements for write-in candidates. Candidates must file multiple statements, disclose financial information, gather nomination signatures, and submit said statements and signatures no later than two weeks before the election. This series of requirements takes foresight and planning; a candidate must be organized and determined in order to qualify for the California ballot.

In one respect, however, write-in candidates have it easier than traditional candidates. Candidates who wish to have their names printed on the ballot in California must file considerably earlier than write-in candidates. Their filing period for Declaration of Candidacy and nomination papers begins 113 days before the primary election, and the declaration and signatures must be delivered to the county elections official by the 88th day before the election.³⁵ The nomination period is extended primary to the 83rd day prior to the primary if the eligible incumbent does not file for candidacy.³⁶ The declaration and nomination documents for write-in candidates do not become available until the 57th day prior to the primary election, and are due on the 14th day prior to the election. However, the same documents and number of nomination signatures are required of both listed and write-in candidates.

In reality, California's write-system operates as a

late filing period for less-organized candidates—or those with less commitment to running for office. Given that both listed and write-in candidates have substantial filing requirements, it is unlikely that there are immense differences between the pool of listed candidates and the pool of qualified write-in candidates. That is, both require some degree of political organization. In the end, however, the idea of a true “write-in” vote is nonexistent in the state—and many other states.

Compared to other states, California in fact appears to be in the middle of the road for write-in requirements. Although California requires write-in candidates to register their candidacy and file campaign finance information, candidates in other states undergo similar procedures. There is, however, significant variation across states in how far in advance write-in candidates must file. This variation seems to vary in accordance with the size of a state (North Dakota registers late, while New York or California perhaps require more time and require write-in candidates to file earlier). Therefore, the timing may be a matter of organization and preparation in election administration—much more difficult in California than Nebraska.

- *Arizona*: In Arizona, write-in candidates must file the same documents as balloted candidates, up until 40 days before the election. Documents include a nomination paper with an affidavit of qualification and a campaign finance laws statement.³⁷ In addition, the candidate must file a financial disclosure statement and a statement of organization or a \$500 threshold exemption statement.³⁸ When running in the primary election, a write-in candidate will not

be eligible for the general election ballot unless she, as a candidate of a political party, receives the same number of write-in votes as the minimum signature requirement for nomination, or she, as a candidate of a minor party, receive a plurality of the votes for her party.³⁹

- *Colorado*: In Colorado, write-in candidates for state office must first follow general candidate protocols, including publicly announcing their candidacy and registering their candidate committee or confirming their intention to be a standalone candidate.⁴⁰ Write-in candidates must then file an Affidavit of Intent with the Colorado Secretary of State, 67 days before the primary election or 110 days before the General Election. This allows them to be on the qualified list of write-in candidates.⁴¹ They then follow the general protocols for the accounting of campaign and personal finance. Importantly, the timing of regular and write-in candidate requirements is even closer than that of California, potentially leading to even more logistical difficulties in circulating voter information, especially given Colorado's all mail election system.⁴²

- *Texas*: Texas State Election Law states, "Except as otherwise provided by law, if the name of the person for whom a voter desires to vote does not appear on the ballot, the voter may write in the name of that person."⁴³ This does not apply to the general election of state and county offices, however, where candidates are required to file a declaration of write-in candidacy with either the secretary of state or a county judge, respectively. Write-in candidates must also obtain a minimum number of signatures for their office and pay a filing fee. The signature requirements are much more extensive than those for California, ranging from 500 for more local offices to up to 5000 for federal offices.⁴⁴

- *North Dakota*: In North Dakota, write-in candidates must file a certificate of write-in candidacy with the secretary of state, 21 days before the election for state or judicial district office, or 4 days before the election for legislative office.⁴⁵ In addition, they must file campaign finance and contribution statements just as regular candidate are required to do. According to North Dakota Century Code, write-in candidates are not required to file in certain cases, including in the absence of any candidate names on the ballot for

an office or if the number of candidates on the ballot for an office is less than the number of candidates to be elected for that office.

- *Most lenient - Massachusetts*: The most lenient state policy for write-in candidacy is the state of Massachusetts. State law declares, "[A] person can seek nomination and election without filing nomination papers to have their name printed as a candidate on the ballot by conducting a write-in or sticker campaign."⁴⁶ Massachusetts therefore has a sticker system by which it practices a unique variation of write-in voting. Candidates distribute stickers to voters with their names and the office for which they are running. Voters then place the candidate's sticker on their ballot in the same space where they would cast their write-in vote. Furthermore, Massachusetts state courts have established a lenient policy towards the interpretation of write-in votes:

All write-in or sticker votes should include the correct name and address of the candidates. Courts have ruled that a vote should be counted whenever the intent of the voter can reasonably be determined, even if a voter omits the candidate's address or makes a mistake in the name or address. In *O'Brien v. Board of Election Commissioners*, 257 Mass. 332, 338-339, 153 N.E. 553, 556 (1926) the court said "that if the intent of the voter can be determined with reasonable certainty from an inspection of the ballot, in the light of the generally known conditions attendant upon the election, effect must be given to that intent... The omission of the residence ... on some ballots on which the name had been written by the voters rightly was found not to invalidate such votes." *Maienski v. Board of Registrars of Voters*, 347 Mass. 681, 199 N.E. 2d 680 (1964). This includes where a voter fails to complete the vote indicator next to the write-in space—the write-in or sticker vote will still be counted.⁴⁷

V. READING WRITING: HOW TO REASONABLY COUNT VOTES

There do not appear to be any cases brought against California testing its "reasonable facsimile" legal standard for spelling of write-in votes.⁴⁸ This is likely because the exact spelling of a write-in vote would come under scrutiny only in a re-count of a

TABLE 5: VOTE BREAKDOWN FOR MURKOWSKI RACE

Candidate	Votes: Write-in or Regular	Write-in: Not Challenged	Write-in: CC	Write-in: CNC	Total Counted
Miller	90,839	NA	NA	NA	90,839
Murkowski	103,810 (100%)	92,931 (89.5%)	8,160 (7.9%)	2,035 (2%)	101,091 (97.3%)

close election, and there have not been any close races in California involving write-in candidates. Additionally, a write-in candidate would have to have the resources to bring suit against the state. Write-in candidates are not as well-funded or well-resourced as other candidates.

We can, however, look to Alaska as an example of what can happen in a legal challenge to write-in votes. The 2010 victory of write-in Lisa Murkowski, an incumbent Republican Senator, is the highest-profile election of a write-in candidate in recent history. After Tea Party candidate Joe Miller defeated Senator Murkowski in the primary, Murkowski decided to run a write-in campaign in the general election. Miller garnered 90,839 votes in the general election, or 35.49%, while the write-in candidates in total won 102,234 votes, or 39.94% of all votes cast—101,091 of which were counted for Murkowski.⁴⁹

Alaska counts write-in votes even if there is “any abbreviation, misspelling, or other minor variation in the form of the name of a candidate,” as long as “the intention of the voter can be ascertained.”⁵⁰ Thus, write-in votes in the Murkowski race fell into three categories: unchallenged votes, challenged counted votes (CC), and challenged not counted votes (CNC). There were 92,931 unchallenged votes, 8,160 CC votes, and 2,035 CNC votes (Table 5).⁵¹

Miller complained that the spelling standards were “extraordinarily ambiguous,” as the Division of Elections evaluated voter intent on a “case-by-case basis.”⁵² On November 19, 2010, Miller brought suit against the State of Alaska Division of Elections, requesting that the US District Court for the State of Alaska order a stay on the counting of ballots and prohibit counting any write-in votes that deviated

at all from the correct spelling of Lisa Murkowski’s name.⁵³ The court, however, denied Miller’s motion to delay the counting of ballots and did not decide on the question of how to count write-in votes with spelling deviations. The court stated that this was a state, and not federal, matter, and so it would defer to a state court. The case then went to the Supreme Court of Alaska in December 2010, in *Miller v. Treadwell*. The Alaska Supreme Court ultimately held that “abbreviations, misspellings, or other minor variations in the form of the name of a candidate [would] be disregarded in determining the validity of the ballot, so long as the intention of the voter [could] be ascertained.”⁵⁴ All write-in votes for Murkowski in which the voter’s intention was clear were counted and the Murkowski victory finalized. At any rate, even if all of the challenged votes had been considered invalid, Murkowski would still have defeated Miller by a margin of more than 2,000 votes.

Because California’s nonpartisan top-two system does not allow write-in votes in general elections, an identical situation to Murkowski’s election would not occur there. Nevertheless, California does evaluate write-in votes based on “voter intent,” as Alaska did in the 2010 general election. If a write-in candidate were to win a primary in California, and the validity of all write-in votes were scrutinized, courts in California would likely undergo an analogous process and come to a similar conclusion as Alaska’s Supreme Court. Given that California’s legal standard is that written-in votes “must bear a reasonable resemblance to the qualified candidate’s name,” a California court would likely hold that a write-in vote is valid even if it is “misspelled or incomplete.”⁵⁵

VI. THE RIGHT TO WRITE-IN

The US Constitution does not grant a right to write-in voting. That is, the U.S. Constitution does not require states to provide voters with a write-in mechanism on election ballots. In *Burdick v. Takushi* (1992), the Supreme Court ruled that Hawaii's ban on write-in voting did not violate an individual's constitutional right to vote under the First and Fourteenth Amendments.⁵⁶ The Court held that the state's write-in vote prohibition imposes only "a very limited burden on voters' rights to associate politically through the vote and to have candidates of their choice placed on the ballot." Although the Court acknowledged the importance of states maintaining citizens' ability to express their political beliefs, it ruled that Hawaii's "comprehensive election scheme" adequately protected these rights.

The Court also stated in *Burdick* that "a law that imposes any burden on the right to vote" is not necessarily subject to strict scrutiny. Although the Court accepts that the Constitution guarantees an individual's right to vote, it has consistently upheld state authority in determining many voting regulations. In *Burdick*, the Court decided that "a regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects the voters' rights to 'severe' restrictions." Here, the Court did not consider the write-in ban a severe restriction, this not triggering strict scrutiny.

The decision cited various cases, each of which reinforced the understanding that states may permit citizens to write-in candidates, though they are not required to do so. Nonetheless, the Court has struck down other laws that appeared to cause an undue burden on the voter. For example, in *Norman v. Reed* (1992), the Court ruled that excessive signature requirements were unconstitutional, although the state maintained the right to require candidates and parties to demonstrate support prior to the election.⁵⁷ The decision, in part, reaffirmed an earlier ruling in *Illinois State Board of Elections v Socialist Workers Party* (1979). In its decision, the Court found that the statute that required new political parties and independent candidates in political subdivisions to gather more than the number of signatures for statewide office

placed an undue burden on these candidates and are therefore unconstitutional.⁵⁸

Still, there are many important considerations in determining the extent of constitutional protection for state regulation of candidate filing requirements. In the dissent *Burdick*, Justice Kennedy wrote that Hawaii's ban did place a "significant burden...on the rights of voters..." and that the write-in ban "prevents voters from participating in Hawaii's elections in a meaningful way." Kennedy noted that because the Democratic Party largely dominates elections in Hawaii, prohibiting write-ins thus restricts a voter's ability to express their vote. In fact, there are other cases in which that Court has intervened and overturned state election regulations on behalf of the rights of voters. For example, in *Bullock v. Carter* (1972), the Court held that Texas' primary election filing fee system was unconstitutional under the Fourteenth Amendment because it excluded individuals without the means of paying the fee from participating.⁵⁹ In this case (and others in which the Court deemed state voting regulation unconstitutional), the plaintiff had to successfully prove that the individual's right to vote was severely burdened by statute.

Overall, the Court has largely maintained states' power over election laws, including arguably full discretion in the regulation write-in candidacies. In *Railroad Comm'n of Texas v Pullman Co.* (1941), for instance, the Court ruled that federal courts may choose could abstain from hearing a case in order to allow state courts to settle such constitutional issues unless the resolution appeared to be still constitutionally suspect.⁶⁰ In California, the election code guarantees that "each voter is entitled to write on the ballot the name of any candidate for any public office..." even though the state has additional regulations that prohibited these votes from counting unless the candidate has followed procedure. Even so, it is likely that the California system would withstand a constitutional challenge. Given precedent, the Court would likely rule that California's regulations do not pose an unreasonable restraint on voting rights and reaffirm the state's interest in keeping a tidy ballot.

VI. CONCLUSION

California, like many other states, creates additional logistical burdens on write-in candidates beyond the mere challenge of running a write-in campaign. Write-in candidates must undergo a rigorous filing process in order to be eligible to receive write-in votes, and they must also take into consideration differences in county elections policies. Counties vary in how they inform voters as to which candidates are write-in eligible. As a result, voters often do not understand this requirement and often throw their vote away, writing in a candidate who is ineligible and thinking that the vote would count. Importantly, the US Supreme Court established that states are not required to provide voters with the option to write-in candidates' names. Nevertheless, it seems if states are going to allow write-in voting, even if they impose stringent requirements for write-in candidacies, they should do so fairly and consistently. In the California, however, write-in voting practices vary greatly across counties, likely leading to differences in voter information and wasted write-in votes.

ENDNOTES

- ¹ Cal Elec Code §15340 (2015).
- ² Does not include federal offices, which file with the FEC; Cal Gov Code §85200, §85201 (2015) Statewide and legislative offices include Governor, Lieutenant Governor, Attorney General, Controller, Insurance Commissioner, Secretary of State, Superintendent of Public Instruction, Treasurer, Member of the State Board of Equalization, State Senator, or Member of the Assembly.
- ³ Cal Gov Code §85200 (2015).
- ⁴ Cal Gov Code §§85200, 85201 (2015).
- ⁵ Instead, those running for federal office will file a similar statement with the Federal Elections Committee.
- ⁶ As a requirement the Political Reform Act of 1974 of California, as amended Cal Gov Code §87201 (2015).
- ⁷ Cal Gov Code §87201 (2015); Cal Elec Code §8601 (2015).
- ⁸ Cal Elec Code §8062 (a) (2015).
- ⁹ Cal Elec Code §8600 (2015).
- ¹⁰ Cal Elec Code §8601 (2015).
- ¹¹ Cal Elec Code §8601 (2015).
- ¹² Cal Elec Code §8605 (2015).
- ¹³ Cal Elec Code §15341 (2015).
- ¹⁴ Specifics on write-in misspellings and errors can be found in Title 2 California Code of Regulations: Write-In Canvass Provisions §§ 20101- 20105.
- ¹⁵ *Chamness v. Maldonado*, No. 11-56303, 9th Cir. (2013).
- ¹⁶ Bill Analysis: Summary, Assembly Committee on Elections and Redistricting, AB 141, page 1, May 7, 2013, accessed November 30, 2014, http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0101-0150/ab_141_cfa_20130506_112707_asm_comm.html.
- ¹⁷ Christopher Simmons, 2013. "Calif. Assemblyman Jeff Gorell Introduces Legislation Clarifying 'Write-In-Vote Requirements.'" *California Newswire*, January 17, 2013, accessed May 3, 2015, http://californianewswire.com/2013/01/17/CNW13321_134101.php/calif-assemblyman-jeff-gorell-introduces-legislation-clarifying-write-in-vote-requirements.
- ¹⁸ This applies to Claremont McKenna's own Nathan Tsai in the 2014 cycle.
- ¹⁹ Bill Analysis: Summary, Assembly Committee on Elections and Redistricting, AB 141.
- ²⁰ *Ibid.*
- ²¹ *Ibid.*, 6: Ian O'Grady, 2014, *Parties Against the State: The Top-Two Primary and State Solutions to Political Partisanship*, Undergraduate Thesis, Claremont McKenna College.; Brock McIntosh, 2014, 2014 Top-Two Election Data. New York University Wagner Graduate School of Public Service. Dataset.
- ²² Francis Guijaro, Registrar-Recorder/County Clerk office of Los Angeles County, email message to Caroline Peck, January 21, 2015.
- ²³ Denise Gonzalez, San Bernardino County Elections Division, in phone conversation with Caroline Peck, January 16, 2015.
- ²⁴ Andy Beetley, San Francisco County Elections Division, in conversation with Caroline Peck, January 16, 2015.
- ²⁵ "2014 California Gubernatorial General Election; Poll Worker Training Manual," San Diego County Registrar of Voters, last modified November 4, 2014, accessed May 3, 2015, http://www.sdvote.com/voters/Eng/election/14-11-04_PW_TRAIN_MAN.pdf, 14.
- ²⁶ "2014 California Gubernatorial General Election; Poll Worker Training Manual," San Diego County Registrar of Voters, last modified November 4, 2014, accessed May 3, 2015, http://www.sdvote.com/voters/Eng/election/14-11-04_PW_TRAIN_MAN.pdf, 21.
- ²⁷ Diane Garcia, Campaign Services, San Diego County Registrar of Voters, in phone conversation with Caroline Peck, January 16, 2015.
- ²⁸ "List of Write-in Candidates," Los Angeles County Registrar-Recorder/County Clerk, last modified June, 2014, accessed May 3, 2015, https://www.lavote.net/Documents/Election_Info/06032014_LIST_WRITE_IN_CANDIDATES.pdf
- ²⁹ "June 3, 2014, Consolidated Statewide Direct Primary Election Certified List of Qualified Write-In Candidates," Department of Elections, City and County of San Francisco, accessed May 3, 2015, http://sfgov2.org/ftp/uploadedfiles/elections/ElectionsArchives/2014/June/June2014_CertWrite-Ins.pdf; "Poll Worker Manual," Department of Elections, City and County of San Francisco, accessed May 3, 2015, <http://sfgov2.org/ftp/uploadedfiles/elections/GetInvolved/PollWorkerTrainingManual.pdf>, 20.
- ³⁰ Ian O'Grady, 2014, *Parties Against the State: The Top-Two Primary and State Solutions to Political Partisanship*.
- ³¹ "Certified List of Write-in Candidates for the June 3, 2014, Statewide Direct Primary Election," State of California Secretary of State, last updated May 23, 2014, accessed May 3, 2015, <http://elections.cdn.sos.ca.gov/statewide-elections/2014-primary/certified-write-in-list.pdf>.
- ³² "June 3, 2014, Statewide Direct Primary Election Write-In Candidate Party Preference History for the last 10 years," State of California Secretary of State, last updated May 23, 2014, accessed May 3, 2015, <http://elections.cdn.sos.ca.gov/statewide-elections/2014-primary/party-preference-history-write-in.pdf>.
- ³³ Ian O'Grady, 2014, *Parties Against the State: The Top-Two Primary and State Solutions to Political Partisanship*.
- ³⁴ *Ibid.*
- ³⁵ Cal Elec Code §8020 (b) (2015).
- ³⁶ Cal Elec Code §8022 (2015).
- ³⁷ A.R.S. §§ 16-311, 16-312, 16-905(I)(5).
- ³⁸ A.R.S. § 38-542 (2015).
- ³⁹ "Running for Office Made EZ: Handbook for Candidates and Political Committees," 13, accessed May 1, 2015, http://www.azsos.gov/sites/azsos.gov/files/candidates_and_political_committees.pdf;
- "Candidate Filing Checklist," accessed March 1, 2015, http://www.azsos.gov/election/Forms/Filing_Checklist.pdf.
- ⁴⁰ "State Candidates," Colorado Secretary of State, accessed May 1, 2015, <http://www.sos.state.co.us/pubs/elections/Candidates/state.html>.
- ⁴¹ C.R.S. 1-4-1103 (2015).
- ⁴² "Questions and Answer," Just Vote Colorado, accessed May 1, 2015, <http://justvotecolorado.org/index.php?id=8>.
- ⁴³ Texas Constitution, Title 9, Ch. 146 (2015).
- ⁴⁴ "Write-in Candidates," Texas Secretary of State, accessed

May 1, 2015, <http://www.sos.state.tx.us/elections/candidates/guide/writein.shtml>.

⁴⁵ N.D. Cent. Code, § 16.1-12-02.2 (2015).

⁴⁶ “How to Run for Office as a Write-in or Sticker Candidate,” Secretary of the Commonwealth of Massachusetts, accessed May 1 2015, <http://www.sec.state.ma.us/ele/elestkr/stkridx.htm>

⁴⁷ “How to Run for Office as a Write-in or Sticker Candidate,” Secretary of the Commonwealth of Massachusetts, accessed May 1 2015, <http://www.sec.state.ma.us/ele/elestkr/stkridx.htm>

⁴⁸ Cal Elec Code §15342 (2015).

⁴⁹ “State of Alaska 2010 General Election Official Results,” State of Alaska State of Elections, accessed May 1, 2015, <http://www.elections.alaska.gov/results/10GENR/data/resultsWI.pdf>

⁵⁰ Alaska Stat. §15.15.360 (d)(5) (2014).

⁵¹ “State of Alaska 2010 General Election Official Results,” State of Alaska State of Elections, accessed May 1, 2015, <http://www.elections.alaska.gov/results/10GENR/data/resultsWI.pdf>.

⁵² Kristi Keck, “Alaska Senate race could be ‘highest stakes spelling bee’ in politics,” CNN, November 4, 2010, accessed May 1, 2015, <http://www.cnn.com/2010/POLITICS/11/04/murkowski.write.in/>

⁵³ *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010). <http://moritzlaw.osu.edu/> (accessed May 1, 2015).

⁵⁴ *Ibid.*

⁵⁵ 2 California Code of Regulations §20104 (2015).

⁵⁶ *Burdick v. Takushi*, 504 US 438 (1992).

⁵⁷ *Norman v. Reed*, 502 US 279 (1992).

⁵⁸ *Illinois State Board of Elections v Socialist Workers Party*, 440 US 173 (1979).

⁵⁹ *Bullock v. Carter*, 405 US 134, (1972).

⁶⁰ *Railroad Comm’n of Texas v Pullman Co.*, 312 US 496 (1941).