IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TUPE SMITH,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

Court of Appeals Case No. A-14529

Superior Court No. 3AN-23-08873CR

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or a witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PETER R. RAMGREN, PRESIDING

REPLY BRIEF OF PETITIONER TUPE SMITH

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Filed in the Court of Appeals of the State of Alaska on September __, 2025

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AS 15.56.040. Voter misconduct in the first degree

(a) A person commits the crime of voter misconduct in the first degree if the person

(1) votes or attempts to vote in the name of another person or in a name other than the person's own;

(2) votes or attempts to vote more than once at the same election with the intent that the person's vote be counted more than once;

(3) intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title;

(4) knowingly votes or solicits a person to vote after the polls are closed with the intent that the vote be counted.

(b) Voter misconduct in the first degree is a class C felony.

AS 15.56.199. Definitions

In this chapter,

. . . .

(2) "knowingly" has the meaning given in AS 11.81.900(a).

AS 11.81.900. Definitions

(a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that

result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

. . .

I. INTRODUCTION

Petitioner Tupe Smith exercised what she believed was her right to vote in a local election. She did so without any intent to mislead or deceive anyone. Her belief that U.S. nationals may vote in local elections, which was supported by advice from City of Whittier election officials, was simply mistaken. Nevertheless, the State of Alaska charged her with first-degree voter misconduct under AS 15.56.040(a)(3), a felony. That statute proscribes "intentionally mak[ing] a false affidavit, swear[ing] falsely, or falsely affirm[ing] under an oath required by this title."

At issue in this case is what it means to "*intentionally* mak[e] a false affidavit, swear[] falsely, or falsely affirm[]."[1] The parties take sharply different positions on that question. But Smith and the State agree on one thing: The text of AS 15.56.040(a)(3) does not on its face answer the question presented here.[2] It lacks *something*. The State's view is that "something" is a *mens rea* that is not apparent in—and is in fact contradicted by—the express words of the statute.[3] Smith's view is that the Court should accept the text of the statute as written and, consistent with legislative intent and the statutory structure as a whole, attribute to it a requirement that an individual act with an intent to mislead or deceive a public official for the purpose of voting unlawfully.[4]

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[1] AS 15.56.040(a)(3) (emphasis added).
[2] *See, e.g.,* Resp. Br. 9 (conceding that the statute's *mens rea* requirement "is complicated by the structural make up of the statute and lack of statutory definition for 'intentionally'").
[3] *See id*. at 23 (urging the Court to interpret "intentionally" to mean "knowingly").
[4] *See* Petr. Br. 16–23.

Ultimately, then, this Court must make a choice because the text alone does not provide a clear answer. For the reasons provided in Petitioner's Brief and the analysis that follows, Smith's interpretation is the correct one: Unlike the State's, it effectuates the statute's purpose while hewing faithfully to its text and legislative history. Alternatively, if this Court concludes that AS 15.56.040(a)(3) is reasonably susceptible to more than one meaning, it should nonetheless adopt Smith's interpretation under the rule of lenity. Either way, this Court should reverse the superior court's denial of her Motion to Dismiss Indictment.

II. ARGUMENT

A. AS 15.56.040(a)(3) proscribes acting with the intent to mislead or deceive a public official.

1. "Intentionally" means "intentionally," not "knowingly."

As a matter of basic statutory interpretation, terms that are not the same should not be understood synonymously.[5] Subsection (a)(4) of the first-degree voter misconduct statute uses the term "knowingly," which the statute defines by reference to AS 11.81.900(a) to mean awareness of particular conduct or a particular circumstance.[6] By contrast, subsection (a)(3) of the first-degree voter misconduct statute uses the term "intentionally," but does not define the term by reference to AS 11.81.900(a). The legislature's decisions to use a term other than "knowingly," and to decline to adopt a

[5] *Alaska Pub. Def. Agency v. Superior Ct.*, 450 P.3d 246, 254 (Alaska 2019) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").
[6] AS 15.56.040(a)(4); *see* AS 15.56.199(2); AS 11.81.900(a).

readily available statutory definition of "intentionally,"[7] must be presumed to be meaningful.[8] These decisions indicate that what the legislature intended to proscribe as a felony offense was something more than mere *knowledge* that an individual made a false affidavit or swore falsely under oath.[9] The legislature intended to proscribe actions taken with *intent*—more specifically, with intent to mislead or deceive a public official for the purpose of voting unlawfully.

2. Reading a result element into AS 15.56.040(a)(3) effectuates the statutory text, history, and purpose.

The State spends most of its brief trying to persuade the Court that "intentionally" means "knowingly," which is unpersuasive for the reasons Smith discusses below.[10] But the State also insists that Smith invents a result element "out of whole cloth."[11] The State lobs this accusation without meaningfully grappling with Smith's arguments.[12]

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[7] *See* AS 11.81.900(a)(1).

[8] *Alaska Pub. Def. Agency*, 450 P.3d at 254.

[9] *Cf.* [R.158 (reasoning that "the intentionality component" of first-degree voter misconduct "applies in regard to whether Ms. Smith knowingly made a false affidavit or swore falsely under oath about whether she was a U.S. citizen")]

[10] The State repeatedly argues that "intentionally" should mean "deliberate action with knowledge of the relevant circumstances." Resp. Br. 9, 12, 14, 30, 50. This construction is synonymous with reading "intentionally" to mean "knowingly." *Cf. Turner v. State*, 552 P.3d 1077, 1082 n.17 (Alaska App. 2024) (explaining that a *mens rea* of "knowingly" "impl[ies] *knowing, deliberate action*" (emphasis added)); *Wilson v. State*, No. A-12361, 2018 WL 4492365, at *3 (Alaska App. Sept. 19, 2018) (unpublished) (similar).

[11] Resp. Br. 10, 35.

[12] Incidentally, the State also persistently cites facts related to counts on which the grand jury expressly declined to return a true bill. *See, e.g.*, Resp. Br. 36 (referring to "three of the five forms Smith filled out"). The grand jury returned a true bill for only Counts I and II, concerning the voter registration forms. [R.23–25.]

Smith's position that "intentionally" should mean acting with an intent to mislead or deceive a public official for the purpose of voting unlawfully derives from the statutory text and legislative history. Smith's understanding of "intentionally" more closely mirrors the established meaning of the term "wilfully," the statute's predecessor term, than the State's interpretation. In 1980, the legislature changed the language from "wilfully" to "intentionally."[13] That same year, the Alaska Supreme Court decided *Hentzner v. State*.[14] In that case, the court recognized the term "wilfully" was understood to require a harmful *result*, not just purposeful conduct.[15] The State attempts to undermine this contemporaneous understanding by denigrating it as "trivia" and instead pointing to modern interpretations of "wilfully."[16] Of course, definitions "in existence at or about the time the legislation in question was enacted" are those that matter when assessing legislative intent.[17] Unlike Smith, the State points to no authority defining "wilfully" as it was understood in 1960, when AS 15.56.040(a)(3)'s predecessor statute was enacted, nor in 1980, when the language was revised to its current form ("intentionally").

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[13] The 1980 revision indicates that the legislature sought to align the Title 15 offenses with the revised criminal code in Title 11 while preserving the same substantive underlying crime. *See* Letter from the Election Review Committee to the Governor, Regarding SB 312 Proposed Revisions to Title 15, at 27–28 (Sept. 18, 1979).
[14] 613 P.2d 821 (Alaska 1980).
[15] *Id.* at 826 (recognizing that in *Speidel v. State*, 460 P.2d 77, 88 (Alaska 1969), "wilfully neglect[ing]" to return a rental car meant acting with a "conscious purpose to injure the owner of the vehicle").
[16] Resp. Br. 22 n.12; *see id.* at 19–23.
[17] *Comm. to Relocate Marilyn v. City of Palm Springs*, 305 Cal. Rptr. 3d 70, 82 n.5 (Cal. App. 2023); *see also Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (consulting definitions in use when Congress enacted the statute in question).

The State bends over backwards to distinguish *Hentzner*, including by taking the remarkable (and unsupported) position that first-degree voter misconduct is a crime involving moral turpitude.[18] The State points to no evidence of "broad societal concurrence that [first-degree voter misconduct] is inherently bad."[19] Nor does the State dispute Smith's observation that AS 15.56.040(a)(3) is so rarely invoked that not a single case opines on its meaning.[20] An offense that is not included in Alaska's statutory definition of "felon[ies] involving moral turpitude"[21] and that the State itself almost never charges hardly qualifies as morally turpitudinous or *malum in se*. The State's position is even more remarkable given its position that all the statute requires is mere *knowledge* that an individual made a false affidavit or swore falsely under oath.

Finally, the first-degree voter misconduct statute directs itself at a particular harm: *misconduct* by *voters*.[22] The statute refers to statements made in an oath or affidavit, but not just any oath or affidavit. The statute refers to *false* affidavits or *false* affirmations.[23] It also requires that false affidavits or affirmations be made under an oath "*required by*

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[18] Resp. Br. 32 (arguing, without citation, that "[t]his specific subsection of the voter misconduct statute is a subset of perjury").
[19] *Hentzner*, 613 P.2d at 826.
[20] *See* Petr. Br. 20.
[21] *See* AS 15.80.010(10) (defining "felony involving moral turpitude" without reference to first-degree voter misconduct or AS 15.56.040(a)(3)).
[22] AS 15.56.040(a) (defining "the crime of voter misconduct").
[23] "'[F]alse' has several common meanings in the law . . . . For instance, Black's Law Dictionary 540 (5th ed. 1979), defines 'false,' among other things as: 'assumed or designed to deceive,' 'deceitful,' 'wilfully and intentionally untrue.'" *Kjarstad v. State*, 703 P.2d 1167, 1174 (Alaska 1985) (Compton, J., dissenting). "False" in AS 15.56.040(a)(3) implies more than factual inaccuracy—it suggests wrongful falsity, meaning an intent to mislead or deceive.

this title," *i.e.*, the Elections Title (Title 15).[24] Read without a result element requiring an aim to mislead or deceive a public official for the purpose of voting unlawfully, AS 15.56.040(a)(3) would punish anyone who makes a false affirmation under any oath in the Elections Title, to include not just voters but elections registration officials and candidates for office.[25] But registration officials and candidates for office are not the individuals that the legislature sought to punish in a statute proscribing "the crime of *voter* misconduct."[26] And an individual who sincerely (albeit incorrectly) believed that she was entitled to vote in a local election is not guilty of "voter *misconduct*"[27]—and is certainly not deserving of up to five years in prison.[28] Reading a result element into the statute ensures that it applies to the individuals to whom the legislature meant it to apply:

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[24] AS 15.56.040(a)(3).

[25] The State argues in the alternative that AS 15.56.040(a)(3)'s result element is "that a false statement has been made under oath." Resp. Br. 25. But this interpretation suffers from the same deficiency as an interpretation that does not include a result element at all. Reading AS 15.56.040(a)(3) to preclude making a false affidavit or falsely affirming—with the result that a false statement was made under oath—would mean that candidates for office and elections registration officials who make a false affidavit or affirmation would be punishable under the statute. Again, that cannot be what the legislature intended in a statute intended to punish *voter* misconduct. Thus, AS 15.56.040(a)(3) is distinguishable from statutes punishing murder and theft, which involve conduct and result elements that that are "functionally . . . the same." Resp. Br. 25–26.

[26] AS 15.56.040(a) (emphasis added).

[27] *Id.* (emphasis added); *see* Misconduct, Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/misconduct (defining "misconduct" as "intentional wrongdoing," including "deliberate violation of a law or standard"); *see also* Brief of *Amici Curiae* American Civil Liberties Union Foundation and American Civil Liberties Union of Alaska at 14–15 (describing the Alaska Division of Elections' uncertainty about whether American Samoans are eligible to vote in state and local elections).

[28] AS 12.55.125(e) (providing for punishment of up to five years in prison for class C felonies).

people who act with the conscious objective to mislead or deceive a public official for the purpose of voting unlawfully.

3. The State has no meaningful response to Smith's alternative argument that the rule of lenity requires dismissal of her case.

The text and legislative history of AS 15.56.040(a) make clear that the legislature intended to criminalize false statements made with an intent to mislead or deceive public officials for the purpose of voting unlawfully. Even if ambiguity remained, however, the rule of lenity requires granting Smith's motion to dismiss the indictment.[29]

The State hardly disputes this point. It takes the position that the rule of lenity is inapplicable because the statute is not reasonably susceptible to more than one meaning.[30] In other words, the State simply reiterates that it believes Smith's position is wrong.[31] Importantly, the State does not contest that (1) if this Court concludes that the language is ambiguous, it should apply the rule of lenity and conclude that "intentionally" means "intentionally," not "knowingly"; and (2) here, that analysis requires reversing the denial of Smith's motion to dismiss.[32]

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[29] *Grant v. State*, 379 P.3d 993, 995 (Alaska App. 2016).
[30] Resp. Br. 35.
[31] The State also gestures at the importance of interpreting statutory language consistent with "the objectives of the legislature," Resp. Br. 35 (quoting *Briggs v. Donnelly*, 828 P.2d 1207, 1208–09 (Alaska App. 1992)), but offers no legislative objectives motivating the enactment of AS 15.56.040(a)(3).
[32] *See* Petr. Br. 24–25.

B. The State's interpretation is untenable.

1. The State's position requires the Court to turn its back on the legislature's choice of "intentionally," rather than "knowingly," as the applicable mens rea.

The State's argument requires this Court to conclude that although the legislature chose a *mens rea* of "intentionally," what it really meant was "knowingly." But courts assume that a legislature acts deliberately when it "includes particular language in one section of a statute but omits it in another section" of the same statute.[33] Here, the legislature was unquestionably aware of the availability of the term "knowingly," which it used in AS 15.56.040(a)(4), the provision immediately following the one at issue here (AS 15.56.040(a)(3)). The State has no clear answer to why the legislature used the term "intentionally" when it could easily have used the term the State argues it ostensibly meant ("knowingly"). The State's accusation that Smith's interpretation "tortur[es]" the statutory language better applies to the wholesale rewriting required by the State's preferred interpretation.[34]

The State invokes *Neitzel v. State* to argue that this Court sometimes reads "intentionally" to mean "knowingly."[35] In *Neitzel*, the defendant, who was intoxicated, fired a number of shots at his girlfriend, who was sitting on the ground.[36] His final shot

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[33] *See Polselli v. Internal Revenue Serv.*, 598 U.S. 432, 439 (2023) (quoting *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013)).
[34] Resp. Br. 10.
[35] *Neitzel v. State*, 655 P.2d 325, 326 (Alaska App. 1982); *see* Resp. Br. 24 (quoting a concurrence by Justice Mannheimer rather than grappling with *Neitzel* itself).
[36] Resp. Br. 24.

struck her in the head, killing her.[37] The defendant raised intoxication as a defense.[38] Determining whether the defendant was entitled to an instruction requiring the jury to consider his intoxication when deciding whether he intended to shoot at his girlfriend required deciding (1) the mental state applicable to the crime of second-degree murder; and (2) whether that mental state could be negated by evidence of intoxication.[39] Intoxication is not a defense to crimes performed "knowingly" or "recklessly"—only "intentionally."[40] In other words, only if the Court concluded that the statute required "intentional" action would the defendant be able to raise an intoxication defense.[41]

The Court carefully reviewed the definitions of "murder" in the Model Penal Code, the tentative draft prepared by the Alaska Code Revision Commission, and the Alaska Revised Criminal Code.[42] The Court observed that the applicable Alaska statute contained "slight variation[s] in language" from that in the Model Penal Code.[43] While the Model Penal Code provides that "criminal homicide constitutes murder when . . . it is committed recklessly under circumstances manifesting extreme indifference to the value of human life," Alaska law defined second-degree murder as "intentionally perform[ing] an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life."[44] The Court recognized that the

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[37] *Id.* at 325–26.
[38] *Id.* at 326.
[39] *Id.* at 328–34.
[40] *Id.* at 334.
[41] *See id.*
[42] *Id.* at 327–33.
[43] *Id.* at 332.
[44] *Id.* (quoting AS 11.41.110(a)(2)).

defendant believed that the legislature's decision to use the word "intentionally" evinced a desire to require specific intent,[45] and noted the defendant's assumption that the relatively "minor modifications" made to the language of the Model Penal Code could be understood to convey "major modifications in meaning."[46] But the Court ultimately concluded that departing from the Model Penal Code's meaning would be unwise.[47] The Court emphasized that adhering to the Model Penal Code's meaning meant that the Court could turn to Model Penal Code commentary where appropriate.[48] Doing so also advanced "the public interest in certainty and predictability in the laws."[49] Thus, the Court concluded that to be guilty of second-degree murder, the defendant "had to *know* he was firing a gun and be reckless regarding: (1) the circumstances, *i.e.*, the location of [his girlfriend, the victim], her vulnerability, and the direction in which he was shooting; and (2) the result, *i.e.*, her death."[50] Because "intoxication is not relevant in evaluating the culpable mental state[] of 'knowingly,'" the Court concluded that the defendant could not avail himself of an intoxication defense.[51]

This case is distinguishable for three reasons. First, the *Neitzel* Court made clear that its interpretation was motivated in no small part by its reluctance to depart from the meaning of the corresponding provision in the Model Penal Code, both to avoid

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 333 (emphasis added).
[51] *Id.* at 334.

jettisoning the Model Penal Code's helpful commentary and to avoid opening the door to defining the same crime differently across jurisdictions.[52] There is no such dynamic at play here. The Model Penal Code does not address voter misconduct; thus, there is no need to alter the plain meaning of the statute to conform with that of another.[53]

Second, and relatedly, *Neitzel* was decided in the context of a prosecution for second-degree murder. As the Court recognized, interpreting the *mens rea* applicable to second-degree or extreme "reckless" murder required tracing the crime back to the common law. Only after reviewing its development and evolution through the common law, the Model Penal Code, and early Alaska laws, could the Court conclude that "the legislature's intent [was] clear."[54] AS 15.56.040(a)(3) lacks such interpretive constraints. AS 15.56.040(a)(3)'s prohibition on voter misconduct is not rooted in "malice aforethought," nor embedded in the common law in the same way.[55] The Court can and should review AS 15.56.040(a)(3) by reference to its legislative history, but that history does not place a thumb on the scale in favor of reading "intentionally" to mean "knowingly" here.

Finally, the crime at issue in *Neitzel* and the crime at issue here are not remotely comparable. The Court in *Neitzel* was confronted with a heinous crime and was

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[52] *Id.*at 332.
[53] Moreover, the State's interpretation does not advance the public interest in certainty and predictability of the laws because it criminalizes a pandora's box of elections oaths that are unrelated to the subject matter of the charged offense of voter misconduct. *See supra* at pp. 6–7.
[54] Resp. Br. at 326–27.
[55] *Cf. id.* at 327 (citation omitted).

ultimately charged with determining whether the defendant would be entitled to a potentially exonerating intoxication defense. Here, the Court has before it an almost-never-invoked voter misconduct statute, violation of which—as the State all but concedes—involves no violence or individual harm.[56] The Alaska Supreme Court has made clear that statutes must be interpreted "in light of precedent, reason, and policy."[57] Unlike in *Neitzel*, no clear policy counsels in favor of reading the applicable statute atextually. The Court should reject the State's suggestion that *Neitzel* controls.

2. The Court can disregard the State's argument that AS 15.56.040(a)(3) does not incorporate Title 11's definition of "intentionally" because Smith never argued that it did.

The State devotes a considerable portion of its brief to attacking a strawman: The State emphatically claims that the legislature did not adopt Title 11's definition of "intentionally."[58] But Smith never argued that it did. Smith argued that (1) the first-degree voter misconduct statute adopts Title 11's definition of "knowingly" but leaves "intentionally" undefined;[59] (2) doing something "intentionally" involves a higher degree of culpability than doing something "knowingly";[60] and (3) the legislative history,

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[56] *Cf.* Resp. Br. 33 (citing, in a footnote, "[e]lection security" as an "important goal of election related laws").
[57] *Matter of Darren M.*, 426 P.3d 1021, 1027 (Alaska 2018) (citation omitted).
[58] Resp. Br. 10 ("However, the legislature did not explicitly incorporate this Title 11 definition into Title 15, though it chose to do so for Title 11's 'knowingly' *mens rea*." (citing AS 15.56.199)); *see id.* at 10–23.
[59] Petr. Br. 12.
[60] *Id.* at 12–13; *see Stoner v. State*, No. A–12012, 2016 WL 1394221, at *4–7 (Alaska App. 2016) (unpublished) (Mannheimer, J. concurring) (explaining that although "[i]n everyday English, we often speak of a person 'intentionally' engaging in conduct—by which we mean that the person engaged in the conduct deliberately or wittingly, as opposed to accidentally or unwittingly," "our criminal code does not use the word

statutory structure, and statutory purpose indicate that "intentionally" means acting with the intent to mislead or deceive a public official for the purpose of voting unlawfully.[61] Smith did not and does not advocate that the Court adopt Title 11's definition of "intentionally."

The State's argument is self-defeating in any event. The State goes so far as to insist that there is "no evidence that the legislature intended to incorporate" Title 11's definition of "intentionally" into AS 15.56.040(a)(3).[62] But the State proceeds to argue that the first-degree voter misconduct statute effectively adopts Title 11's definition of "knowingly."[63] The State does not explain how the legislative history could fail to support the incorporation of Title 11's definition of "intentionally," but could support the incorporation of Title 11's definition of "knowingly." Setting aside the illogic of the State's argument that "intentionally" should be read to mean "knowingly," this Court can

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'intentionally' in this way" and instead uses the term to refer "only to a person's conscious desire to achieve a particular result" (emphasis omitted)).

[61] Petr. Br. 12–23.

[62] Resp. Br. 9.

[63] The State couches its argument as advancing a position that "intentionally" should be read "akin to" Title 11's definition of "knowingly." *See, e.g.*, Resp. Br. 9 (arguing that "intentionally" should be read to "requir[e] a *mens rea* akin to Title 11's use of 'knowingly'"), 23, 24, 29 ("[T]he plain language of the statute more naturally supports an interpretation of 'intentionally' that is akin to our statutory definition of 'knowingly.'"). The State does not explain what, if any, difference there is between its proposed interpretation and Title 11's definition, and none is apparent. Ultimately, the State is asking this Court to apply Title 11's definition of "knowingly" to the first-degree voter misconduct statute's use of "intentionally." *Compare* Resp. Br. 9 (urging the Court to hold that first-degree voter misconduct "requir[es] deliberate action with knowledge of the requisite circumstances") *with* AS 11.81.900(a)(2) (noting that "knowingly" means awareness of the existence of a circumstance described by a provision of law defining an offense).

reject the State's argument on the basis that there is no evidence that the legislature intended to incorporate any of Title 11's definitions in AS 15.56.040(a)(3).[64]

Relatedly, the State argues that there is a "structural inconsistency" between Title 11's definition of "intentionally" and its use in Title 15.[65] This inconsistency is a function of the State's argument that AS 15.56.040(a)(3) does not incorporate Title 11's definition of "intentionally." As Smith explained *supra*, the first-degree voter misconduct statute does not incorporate that definition. Any "structural inconsistency" is therefore not a function of the incorporation of Title 11's definition into AS 15.56.040(a)(3). It is instead a function of the legislature's decision to use a *mens rea* that ordinarily applies to results ("intentionally") without expressly articulating a result element. The question the Court must answer is how to resolve that inconsistency. The State urges the Court to read "intentionally" as "knowingly" to resolve that tension. As previously discussed, Smith's position is that the better course is to read in a result element, as the legislative history, statutory structure, and statutory purpose suggest.

3. The State's insistence that the mistake of law defense "already provides protection" for people like Smith is not germane to the task of analyzing the meaning of AS 15.56.040(a)(3).

The State defends its decision to prosecute Smith despite the lack of any evidence that she acted with the intent to mislead or deceive a public official for the purpose of voting unlawfully on the grounds that she can defend herself against its unjust prosecution. The State insists that "the law already provides tools to combat unjust

[64] *See* Resp. Br. 10–23.
[65] *Id*. at 17.

prosecutions in instances of good faith legal mistakes or impossible choices," including affirmative defenses.[66] That may be so, but it is beside the point. Here, Smith is challenging the State's unjust prosecution of her, as she is entitled to do.

The undersigned counsel are not aware of a canon of statutory interpretation under which the availability of affirmative defenses bears on a court's interpretation of a statute defining the underlying offense. Rather, as the Alaska Supreme Court has repeatedly stated, a court's analysis is guided by statutory language, legislative history, and legislative purpose.[67] Thus, whether an affirmative defense like mistake of law was or remains available to Smith does not counsel in favor of either party's preferred interpretation of AS 15.56.040(a)(3). It certainly does not support the State's position that the Court should adopt its preferred interpretation because Smith has other ways to defend herself against its unjust prosecution.

4. The State's attacks on amici's arguments are unavailing.

The State contends that the cases cited by Smith's *amici* do not "demonstrate a judicially created intent to mislead or deceive," but merely "demonstrate the basic premise that a reasonable factual mistake negates the 'knowing' mens rea."[68] That is incorrect. For example, as *amici* explained, federal courts interpreting 52 U.S.C. § 10307(e)—which contains no express *mens rea*—criminalize multiple voting only when the individual acts "knowingly, willfully and expressly for the purpose of having

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[66] *Id*. at 48–49.
[67] *Dinh v. Raines*, 544 P.3d 1156, 1165 (Alaska 2024); *In re M.K.*, 278 P.3d 876, 881 (Alaska 2012).
[68] Resp. Br. 38.

[their] vote count more than once."[69] A person who casts multiple ballots does not violate Section 10307(e) unless they intend for their vote to count more than once. By the same token, a person does not violate AS 15.56.040(a)(3) unless they intend for their affidavit to mislead or deceive a public official.

The State's attempts to distinguish other cases are likewise unpersuasive. The State asserts that the Tennessee and Texas cases show only that a "knowing" *mens rea* protects against innocent voter mistakes.[70] In fact, those cases demonstrate that, had Smith resided in those states, she would not have been prosecuted. Texas courts would have concluded that Smith did not violate the law because she did not know she was ineligible to vote.[71] And Tennessee courts would have concluded that she did not violate the law because a government officer led her to make a mistake on a voter registration form.[72]

The State's reliance on other states' election statutes is similarly misplaced.[73] While it notes that a "majority" of states include a "knowing" *mens rea*,[74] the key is what the law requires the voter to have actually known or intended. Some of the examples the State cites in fact support Smith's position by making clear that a person does not commit a violation if they are unaware of their ineligibility (and, by extension, do not intend to

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[69] *United States v. Salisbury*, 983 F.2d 1369, 1377 (6th Cir. 1993).
[70] Resp. Br. 38–39.
[71] *Mason v. State*, 663 S.W.3d 621, 624 (Tex. Crim. App. 2022).
[72] *See* Sam Levine, *New Evidence Undermines Cases Against Black US Woman Jailed for Voting Error*, The Guardian (Feb. 24, 2022), https://www.theguardian.com/us-news/2022/feb/24/fight-to-vote-newsletter-black-woman-jailed-voting-error-evidence.
[73] Resp. Br. 39 n.23.
[74] *Id*. at 39.

mislead or deceive a public official).[75] In any event, the State does not identify a single case that has interpreted any of the statutes it cites to permit punishment of someone like Smith. As *amici* explained, any such interpretation should be rejected under the rule of lenity and the Democracy Canon.[76]

C. The citizenship question is not before this Court.

The State implies that Smith is asking the Court to "solv[e]" the question of American Samoan citizenship "via an atextual interpretation of Alaska's voter misconduct statute."[77] Smith has done no such thing. Smith did not argue that this Court can or should opine on the question whether American Samoans are in fact U.S. citizens under the Fourteenth Amendment in answering the narrow statutory interpretation question now before the Court. Nor is this a question this Court asked the parties to address in its detailed order granting Smith's petition for review.[78] The State's discussion of the question is, once again, a sideshow.

III. CONCLUSION

The State accuses Smith of calling for statutory interpretation "by judicial fiat."[79] By asking this Court to interpret a statute according to what it says, what the legislature intended, and what the statutory structure suggests, Smith is not demanding a judicial fiat.

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[75] *See, e.g.*, Ala. Code § 11-44E-164.
[76] *See* Brief of *Amici Curiae* American Civil Liberties Union Foundation and American Civil Liberties Union of Alaska at 3–5; *Alaska Democratic Party v. Beecher*, 572 P.3d 556, 567 & n.88 (Alaska 2025) (embracing the Democracy Canon).
[77] Resp. Br. 42.
[78] *See* Order on Petition for Review at 2 (Feb. 5, 2025) (detailing the questions on which the Court sought briefing).
[79] Resp. Br. 29.

Rather, she is asking the Court to say "what the law is," which is "emphatically" its "province and duty."[80] Smith respectfully requests that the Court reverse the denial of her Motion to Dismiss Indictment.

DATED: September 18, 2025

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[80] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).