IN THECOURT OF APPEALS OF THE STATE OF ALASKA

TUPE SMITH,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

Court of Appeals No. A-14529

Trial Court No. 3AN-23-08873CR

PETITION FOR REVIEW FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PETER R. RAMGREN, JUDGE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

AUTHORITIES RELIED UPON

Alaska Statutes 11.81.900(a)(1) and (a)(2) provide:

> **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;

Alaska Statute 15.56.040(a)(3) provides:

> **Voter misconduct in the first degree.**
>
> (a) A person commits the crime of voter misconduct in the first degree if the person
>
> . . .
>
> (3) intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title;

Alaska Statute 15.56.199 provides:

> **Definitions.**
>
> In this chapter,
>
> (1) "election" includes a local election as defined in AS 15.80.010 in addition to a state election;
>
> (2) "knowingly" has the meaning given in AS 11.81.900(a).

STATEMENT OF ISSUES PRESENTED

Tupe Smith is an American Samoan and U.S. national. As such, under Alaska law, Smith is not eligible to vote. Between 2020 and 2023, Smith filled out five forms, including voter registration forms, candidate registration forms, and an absentee ballot. In these forms, Smith either swore that she met the criteria of being an eligible voter or was a U.S. citizen. The State subsequently moved to indict Smith on five separate counts of first-degree voter misconduct, alleging Smith intentionally swore a false affidavit under an oath required by Title 15. The grand jury returned a true bill on the two counts in which Smith falsely swore that she was a United States citizen on forms that explicitly informed her she was not eligible to vote and could not continue with the forms if she were not a U.S. citizen.

Smith moved to dismiss the indictment, alleging that the State's witness gave misleading testimony as to Smith's understanding of her eligibility to vote. The court denied Smith's motion, finding that the statements in question did not negate Smith's specific intent to make a falsely sworn statement as to her status as a U.S. citizen and were therefore harmless. Smith then petitioned this court for review. This court granted the petition and asked the parties to brief the following questions:

1. What are the elements of first-degree voter misconduct under AS 15.56.040(a)(3)?

2. Alaska Statute 15.56.040(a)(3) refers to a person who "intentionally makes a false affidavit." Although AS 15.56.199 indicates that, in Chapter 56, the term "knowingly" has the meaning given in AS 11.81.900(a), AS 15.56.199 does not define the term "intentionally." Furthermore, under AS 11.81.900(a), the term "intentionally" applies to a result rather than to conduct or to circumstances. *See* AS 11.81.900(a) ("[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[.]"). With these caveats in mind, what is the proper definition of "intentionally" for purposes of AS

15.56.199? Does the phrase "intentionally makes a false affidavit" require the State to prove that, when the affiant made the statement, the affiant was aware that the statement was false? Or does it require the State to prove that, when the affiant made the statement, the affiant intended to mislead or deceive a public official? Or is this phrase susceptible of some other interpretation?

STATEMENT OF THE CASE

Statement of facts

Tupe Smith is a United States national, born in American Samoa.[1] [R. 94] United States nationals are non-citizen persons "owing permanent allegiance" to the United States, including those persons born in an "outlying possession[] of the United States."[2] 8 U.S.C. 1436. This includes American Samoa. 8 U.S.C. 1101(a)(29). United States nationals have more limited rights than U.S. citizens, including limited voting rights; in Alaska, U.S. nationals may not vote. *See* AS 15.05.010.

Smith moved to Alaska in 2017 or 2019. [Tr. 6] She briefly relocated to Seattle before returning to Alaska in 2020 or 2022. [Tr. 6] In 2019, Smith filled out her Permanent Fund Dividend (PFD) application and selected that she was a U.S. national. [Tr. 7, 9] When filing out her PFD application Smith was told to check U.S. national as she was not a U.S. citizen. [Tr. 9, 22] Smith was spoken to "a couple of times" about the distinction, something she has acknowledged. [Tr. 9]

On July 8, 2020, Smith filled out a voter registration application and checked the box affirming that she was a citizen before signing and dating the form under penalty of perjury. [R. 55] This form explicitly warned "If you checked NO to [the question of whether you are a U.S. citizen], do not complete this form as you are not eligible to vote." [R. 55] On March 30, 2022, Smith again filled out a voter registration application and

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[1] In her brief, Smith additionally claims she is "a pillar of her community" who "regularly volunteers." [Pet. Br. 3] Smith does not provide a citation to support this factual assertion. *See* Alaska App. R. 212(c)(1)(G) ("All assertions in the statement of the case must be supported by references to the record[.]")

[2] Technically, all U.S. citizens are also U.S. nationals, though not all U.S. nationals are citizens; "[t]he term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. 8 U.S.C. 1101(a)(22). For clarity, this brief will describe U.S. citizens as "citizens" and U.S. nationals who do not have citizenship status as "nationals."

checked the box affirming that she was a citizen before signing and dating the form under penalty of perjury. [R. 56] This form again warned "If you checked NO to [the question of whether you are a U.S. citizen], do not complete this form as you are not eligible to vote." [R. 56] On July 21, 2022, Smith declared her candidacy for a Regional Educational attendance Area Board Member in the general election. [R. 52, 86] On the candidate declaration form, Smith signed and dated an oath declaring she met the residency and voter qualifications for the office. [R. 52] On October 3, 2022, Smith filled out an absentee in-person ballot oath and affidavit, again affirming that she was a U.S. citizen. [R. 53] On July 30, 2023, Smith filled out another declaration of candidacy, again signing and dating an oath declaring she met the residency and voter qualifications for office. [R. 54]

Smith's voter registration was eventually flagged for discrepancies, resulting in Sergeant Nathan Bucknall interviewing Smith. [Tr. 1-42, R. 89] During this interview, Smith acknowledged that she was a U.S. national, not a U.S. citizen, that she had not applied to be a U.S. citizen and did not believe herself to be one. [Tr. 8, 9, 10,12-13, 14, 15, 16, 23, 24, 25, 26, 27-29] Throughout the conversation Smith asserted that while she knew she could not vote in a presidential election, she had believed she was able to vote in local elections and only recently learned that she was ineligible to run for office as a U.S. national. [Tr. 9-10, 25-29, 38-39]

When Bucknall asked Smith about the forms that explicitly informed her she could not vote if she was not a U.S. citizen, Smith told Bucknall when she went to vote, she would ask whoever was in the office what citizenship status she should check, and if there was no U.S. national option they would advise her to check the U.S. citizen box and that they would make a notation that she was actually a U.S. national. [Tr. 12-14, 24] Smith asserted that when she let "them know that [she's] a U.S. national . . . they said that they – you know, they will figure that out after." [Tr. 24] Bucknall noted that Smith had signed

her voter application forms under penalty of perjury, swearing that she was a U.S. citizen with no notation indicating that she was a U.S. national. [Tr. 19]

Towards the end of the conversation, Bucknall summarized:

> The impression I'm getting from seeing all these documents and how things went and how you'd only do this on voter forms, based off what you just told me, what it seems like is you just – you're saying you want to be involved in the REA board and the school district and all that. So, it sounds to me like you were willing to check that box, even knowing you shouldn't have, because you want to be involved with, like, the REA board and stuff like that. Does that kind of—does that sound accurate to what happened here or?

[Tr. 31-32]

Smith answered yes. [Tr. 32] Bucknall then arrested Smith for first-degree voter misconduct. [Tr. 42]

Course of proceedings

The State subsequently moved to indict Smith on five counts of first-degree voter misconduct pursuant to AS 15.56.040. [R. 23-25, 70-114] Counts I-III involved Smith falsely swearing she was a United States citizen on two voter applications and one absentee ballot. [*See* R. 23-25, 53, 55-56] Counts IV and V involved Smith swearing under oath that she was a qualified voter. [R. 23-25, 52, 54]

The State presented five exhibits (the physical forms wherein Smith had falsely sworn she was U.S. citizen or qualified voter) and testimony from Michaela Thompson, the operations manager with the Division of Elections, and Sergeant Bucknall. [*See* R.52-56, R. 70-114] Bucknall testified that Smith was a U.S. national, not a U.S. citizen, that she had not applied for citizenship, and that Smith knew she was not a U.S. citizen. [Tr. 94-95] He additionally testified that Smith knew she was not allowed to vote in presidential elections but thought she was allowed to vote in local elections. [Tr. 95] Bucknall then explained that Smith said she contacted the people at the City of Whittier who told her she

should just check the box stating she was a U.S. citizen, but said Smith acknowledged that she probably knew she should not have voted. [Tr. 96]

The grand jury asked several questions about Smith's understanding of her ability to vote and the possibility of her having made a mistake. [Tr. 96-99] The State affirmed that first-degree voter misconduct required intentionality, offered to read the definition again [Tr. 97], and recalled Sergeant Bucknall. [Tr. 99] Bucknall gave additional testimony regarding Smith's explanation that she spoke to city officials when she went to vote. [Tr. 99-106] He explained that the forms in question were typically filled out remotely and that Smith had not given exact details of when she spoke to election officials. [Tr. 100-02] In response to a grand juror's question, Bucknall also testified that Smith was aware she was a U.S. national and not a U.S. citizen and that Smith knew U.S. nationals could not vote.[3] [Tr. 104] A grand juror later asked a clarifying question regarding her understanding of voting, and Bucknall affirmed that Smith asserted she believed she only had to be a U.S. citizen for presidential elections. [Tr.107][4] Bucknall additionally explained that Smith said she learned she could not vote for president at her workplace but admitted that was all she knew about the voting system. [Tr. 107]

After Bucknall finished testifying, the grand jury again asked to hear the definition of "intentional." [Tr. 108] The State read the following definition: "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 the offense, that intent need not be the person's only objective." [Tr. 108] The State then clarified: "[T]he allegations here are –

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[3] This was an overbroad statement. Earlier, Bucknall testified that Smith only knew she was not allowed to vote in presidential elections. [Tr. 95]

[4] Grand Juror: "I believe you, sir, had mentioned that at one point it came up, she believed you only had to be a U.S. citizen for presidential elections. Could you talk –"

Sergeant Buckhall: "Yes." [Tr. 107]

intentionality doesn't go to whether or not she wasn't intentionally voting when she wasn't allowed to. The intentionality component goes to whether she intentionally made a false affidavit or swore falsely or falsely affirmed under oath." [Tr. 108]

The grand jury ultimately returned a true bill for counts I and II and no true bill for counts III, IV, and V. [R. 23-25; Tr. 110-111] Crucially, counts I and II involved Smith swearing she was a U.S. citizen on voter forms that explicitly warned, if she checked "no" to the question of whether she was a U.S. citizen, "do not complete this form as you are not eligible to register to vote." [R. 55-56]

Smith subsequently moved to dismiss her indictment, alleging that Bucknall had made misleading statements regarding her understanding of what elections she was allowed to vote in, specifically citing to Bucknall's statement that Smith knew U.S. nationals could not vote and his statement that Smith had acknowledged that she knew she could not vote. [R. 116-136] Smith additionally argued that the State had presented insufficient evidence to support the indictment, contending only Bucknall's allegedly misleading statements supported the intentionality requirement. [R. 136-38]

The State opposed, arguing that the statements Smith cited did not actually implicate her specific intent to falsely swear that she was a United States citizen, the conduct at issue in the charges for which the grand jury returned a true bill, and, therefore, even if they were improper (which the State did not concede) they were only impactful as to the counts for which the grand jury returned no true bill. [R. 57-69] Further, the State noted that the charges the grand jury returned a true bill for were supported by the affidavits in which Smith swore she was a U.S. citizen, citizenship records demonstrating this was false, and Smith's multiple admissions that she had never believed herself to be a U.S. citizen. [Tr. 68]

Judge Peter Ramgren found that in two instances Sergeant Bucknall's testimony oversimplified Smtih's answers and was therefore misleading as to whole of the interview.

[R.155] However, Judge Ramgren found that this testimony did not impact the grand jury's ultimate decision given that these statements were focused exclusively on Smith's understanding of her eligibility to vote when the counts on which the grand jury returned a true bill concerned her affirmation that she was a United States citizen. [R. 157] For the same reasons, the court found sufficient evidence supported the counts on which Smith was indicted:

> The question presented before the grand jury was whether Ms. Smith knowingly and falsely claimed to be a U.S. citizen in the five counts of voting fraud she was charged with. Ms. Smith knew she was a U.S. national and yet selected a box claiming to be a U.S. citizen. While the PFD confusingly automatically registers recipients to vote in Alaska, Ms. Smith may have thought she could vote for state elections, and a voting official may have given her incorrect information, Ms. Smith knew she was not a U.S. citizen and still claimed to be one multiple times. While the court is sympathetic towards the confusing nature of the PFD automatic voter registration, the lack of voting right information regarding U.S. nationals, and navigating rights as U.S. national, it is difficult under the law to assert that Ms. Smith thought she was a U.S. citizen and not a U.S. national in intentionally and falsely selecting the U.S. citizen box on her voter registration.

[R. 158]

Therefore, the court denied Smith's motion to dismiss the indictment. [R. 158] Smith petitioned this court for review of this decision and this court subsequently ordered briefing.

ARGUMENT

First-degree voter misconduct requires that a person "intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title." AS 15.56.040(a)(3). Facially, the elements of voter misconduct are: the defendant 1) intentionally 2) makes a false affidavit, sworn statement or affirmation 2) under an oath required by Title 15. But the *mens rea* requirement is complicated by the structural makeup of the statute and lack of statutory definition for "intentionally".

This court should interpret "intentionally," as used in the statute, as requiring a *mens rea* akin to Title 11's use of "knowingly." Although "intentionally" is otherwise defined under Alaska law, there is no evidence that the legislature intended to incorporate Title 11's definition of "intentionally" into Title 15. Absent such evidence or explicit statutory definition, "intentionally" should be read according to its common meaning, and interpreted as requiring deliberate action with knowledge of the requisite circumstances. Even if this court were to determine that the legislature intended to incorporate Title 11's definition of "intentionally" into Title 15, this would create an inherent conflict in the statute that this court has historically resolved by interpreting "intentionally" in a similar manner.

Both Smith and Amicus argue that "intentionally" must require a specific intent and that the statute contains a final hidden element, one not apparent from the text or legislative history: the requirement that one intend to deceive or mislead election officials. But while courts may read in a *mens rea* or a criminal intent requirement to satisfy due process concerns, they cannot create a specific intent with no basis in the statutory text or legislative history. Smith can point to no source for this hidden element and indeed the only argument for its inclusion is a policy driven one. But this type of policy consideration is the purview of the legislature, not the judiciary. Should this court find that the use of the

word "intentionally" requires a specific result, that result must be found within the statutory language, not invented out of whole cloth.

The law already provides a tool to prevent miscarriages of justice like the ones Smith and Amicus describe – affirmative defenses such as the mistake of law defense exist to prevent those that are engaged in illegal conduct, but relying in good faith on an official interpretation of the law, from being subjected to criminal penalties for their actions. Rather, than torturing the statute's language, history, and purpose beyond what judicial interpretation allows, Smith should utilize this already available defense.

I. STANDARD OF REVIEW

The question of what elements a particular statute contains and the contours of its *mens rea* requirement are questions of statutory interpretation which this court review *de novo*. *Green v. State*, 541 P.3d 1137, 1143 (Alaska App. 2023), *reh'g denied*, No. A-12856, 2024 WL 87787 (Alaska App. Jan. 2, 2024).

Alaska operates on a sliding scale approach to legislative interpretation; that is, when "interpreting a statute, we consider its language, its purpose, and its legislative history, in an attempt to 'give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.'" *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1234 (Alaska 2003) (*quoting Muller v. BP Expl. (Alaska) Inc.*, 923 P.2d 783, 787 (Alaska 1996)).

II. GIVEN THE STRUCTURE OF THE STATUTE, "INTENTIONALLY" SHOULD BE READ MORE AKIN TO "KNOWINGLY."

"Intentionally" is not statutorily defined under Title 15 but is otherwise defined under Alaska law. *See* AS 15.56.199; AS 11.81.900(a)(1). 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*. AS 15.56.199. With no explicit statutory definition and an

ambiguous at best legislative history, "intentionally" should be read according to its common meaning. But even if Title 11's definition was applied, the statutory structure of the voter misconduct provision is incompatible with the Title 11 definition, necessitating further investigation into what the legislature intended in using the term "intentionally."

A. Common definitions of intentionally

As the supreme court has noted, though Alaska has a sliding scale approach to statutory interpretation, that "interpretation begins with the plain meaning of the statutory text." *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 993 (Alaska 2019). Plain language encompasses "the text, context, and structure of the statute . . . as a whole." *McDonnell v. State Farm Mut. Auto. Ins. Co.*, 299 P.3d 715, 721 (Alaska 2013).

"In the absence of a [statutory] definition, we construe statutory terms according to their common meaning[;] [d]ictionaries provide a useful starting point for this exercise." *State, Dep't of Fam. & Cmty. Servs., Off. of Child.'s Servs. v. Karlie T.*, 538 P.3d 723, 730 (Alaska 2023) (alterations in original) (quoting *State v. Recall Dunleavy*, 491 P.3d 343, 359 (Alaska 2021)). Here, Title 15 pointedly does not define "intentionally" despite providing a definition for the "knowingly" *mens rea*. *See* AS 15.56.199.

The canon of *expressio unius est exclusio alterius* "establishes the inference that, where certain things are designated in a statute, 'all omissions should be understood as exclusions.'" *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 218 (Alaska 2005). Here, the legislature apparently chose to codify the Title 11 definition of "knowingly" but not the Title 11 definition of "intentionally." *See* AS 15.56.199. Without evidence to the contrary, we must presume that the legislature did not intend Title 11's definition to apply to Title 15 and instead intended for the common definition of "intentionally" to apply.

The legislature's decision to codify Title 11's *mens rea* in other statutes supports this presumption. While the legislature chose to only codify Title 11's "knowingly"

definition in Title 15, in other titles it chose to codify additional Title 11 mental states. For example, in Title 16 the legislature codified the Title 11 definitions for "intentionally," "knowingly," and "recklessly." *See* AS 16.30.030(4), (5), and (7). Similarly, under Title 9, while not referencing Title 11, the legislature chose to utilize Title 11's definitions for "intentionally," "knowingly," and "recklessly." *See* AS 09.25.490(c)(1), (2), and (3). That is, the legislature has shown it can and will codify the relevant *mens rea* when it wants a particular definition to be relied upon.

Given that the legislature did not codify Title 11's definition of "intentionally" or any alternative definition, this court should look to the common meaning of the word. *See State, Dep't of Fam. & Cmty. Servs., Off. of Child.'s Servs. v. Karlie T.*, 538 P.3d at 730. Common definitions of "intentionally" generally require deliberate action with knowledge of the requisite circumstances. That is, they are applied to conduct, not to a result. The lay definition of "intentionally" is "with awareness of what one is doing." "Intentionally." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/intentionally, last accessed Jun.11, 2025. Legal sources provide similar definitions. Black's Law Dictionary defines "intentional" as "done with the aim of carrying out the act." *Black's Law Dictionary,* 883 (9th ed. 2009). And, as this court has recognized, the Model Penal Code's definition of "intentional" is essentially synonymous with Title 11's definition of "knowing": "[t]he Model Penal Code actually uses the term 'intentional' to describe the culpable mental state denoting purposeful or deliberate conduct. The Alaska Criminal Code uses the word 'knowing' to describe this culpable mental state." *Scharen v. State*, 249 P.3d 331, 334 (Alaska App. 2011). These common definitions all point to some deliberate action with knowledge of the requisite circumstances.

This accords with this court's previous observations regarding "intentionally." Judge David Mannheimer detailed in a concurrence:

> One might think that the culpable mental state "intentionally" would apply to these "conduct" elements of crimes. In 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. But our criminal code does not use the word "intentionally" in this way.
>
> As defined in AS 11.81.900(a)(1), the culpable mental state "intentionally" refers only to a person's conscious desire to achieve a particular *result.* It does not refer to whether a person's conduct was deliberate or witting. Rather, our criminal code uses the word "knowingly" to describe witting, non-accidental conduct. In fact, of the four culpable mental states defined in AS 11.81.900(a)—"intentionally", "knowingly", "recklessly", and "with criminal negligence"—"knowingly" is the *only one* that applies to conduct.

Stoner v. State, No. A-12012, 2016 WL 1394221, at *5 (Alaska App. Apr. 6, 2016) (unpublished) (Mannheimer, J., concurring)

Thus, a crucial distinction between Title 11's use of "intentionally" and the common meaning is that the common meaning may be applied to conduct whereas the Title 11 definition may only be applied to a result. This distinction is informative in the context of the voter misconduct statute. AS 15.56.040(a)(3) explicitly applies the *mens rea* of "intentionally" to the *actus reus* of the statute, not to a result. This creates a fundamental incompatibility between the Title 11 definition of "intentionally" and its use in the voter misconduct statute.

Therefore, these common definitions are not only appropriate given that the legislature declined to define "intentionally" in the context of Title 15, but additionally the common definitions are compatible with the structure of the voter misconduct statute whereas the Title 11 definition is not. *Compare* AS 15.56.040(a)(3) and AS 11.81.900(a)(1). If no result is specified, "intentionally" only makes sense if it is read in accordance with these other definitions – definitions that apply to conduct and are akin to Title 11's *mens rea* of "knowing." As the first-degree voter misconduct statute utilizes "intentionally" only in respect to conduct, the common definitions should govern the

interpretation of "intentionally" rather than Title 11's definition, which is plainly incompatible with the statutory language.

Further, the voter misconduct provision of Title 15 is not the only offense that utilizes "intentionally" in a way that is only compatible with the common definitions. While most offenses under Title 15 utilize a "knowingly" *mens rea*, several offenses, including first-degree voter misconduct, utilize the "intentionally" *mens rea* but do not include a result. *See* AS 15.53.0404(a)(3); AS 15.56.060(a)(2) and (3), and AS 15.56.070(a)(3). That is, first-degree voter misconduct is not the only provision that cannot be easily reconciled with the Title 11 definition of "intentionally," making it unlikely that the failure to explicitly incorporate Title 11's definition of "intentionally" into Title 15 was unintentional.[5]

Given this context, absent legislative history to the contrary, this court should apply the common definitions of "intentionally" which would require deliberate action with knowledge of the relevant circumstances.

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[5] Smith argues the larger statutory scheme actually suggests "intentionally" must include a specific intent, noting the lesser included offense of second-degree voter misconduct includes a "knowing" *mens rea* and reasoning the *mens rea* for these offenses must be distinct or the statutes would be superfluous. [Pet. Br. 21] But contrary to Smith's arguments, it is not the *mens rea* that distinguishes first-degree voter misconduct from the lesser charge of second-degree voter misconduct. Rather, first-degree voter misconduct is a more serious offense because it requires the false statement be made under oath whereas second-degree voter misconduct merely criminalizes a materially false statement. *Compare* AS 15.56.040(a)(3) and AS 15.56.050(a)(2). As this court has recognized "when the community commands or authorizes certain statements to be made with special formality or on notice of special sanctions, the seriousness of the demand for honesty is sufficiently evident to warrant the application of criminal sanctions." *Harrison v. State*, 923 P.2d 107, 109 (Alaska App. 1996) (internal citations omitted). That is, there is a meaningful distinction between simply making a false statement and making a false statement under oath.

B. Legislative History

If the language of the statute is clear, "the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent.'" *State v. Planned Parenthood of the Great Nw.*, 436 P.3d at 993 (*quoting Univ. of Alaska v. Geistauts*, 666 P.2d 424, 428 n.5 (Alaska 1983)). Here, the legislative history is largely ambiguous regarding legislative intent as to *mens rea*, and does not provide enough context to assume the legislature meant to either codify the Title 11 definition of "intentionally" or to utilize a definition other than the common meaning of "intentionally."

1. History regarding intent to integrate Title 11 definition

The current version of the voter misconduct statute was established in 1980. SLA 1980, ch. 100, §205. In drafting this provision, the legislature modeled it after a previous version of the statute, passed in 1960. SLA 1960, ch. 83 § 11.18. It was not until 1996, when the legislature passed H.B. 364, that the definitional section incorporating Title 11's definition of "knowingly" was added. SLA 1996, Ch. 87 § 3. If the legislature engaged in substantive discussions surrounding the *mens rea* and intentionality requirements, it is not apparent from the available legislative history of any of these bills.[6]

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[6] The most the State was able to find regarding any discussion of *mens rea* came from the 1960 journal excerpts, which do reflect that the legislature made changes to the bill with the intent criminal penalties to be contingent of consciousness of wrongdoing: "penalties are made dependent on consciousness of wrongdoing not just the doing of an act; general penalty clause removed; most offenses made misdemeanors not felonies; minimum penalties done away with." HB 252, House Journal Excerpts, at 139 (Feb. 10, 1960). But the actual changes to the bill did not include changing the *mens rea* of the voter misconduct statute. Rather, the only changes that appear to have been in this vein were additions of some *mens rea* to offenses that lacked any explicit *mens rea*.

The first draft of the bill utilized "willfully" for various crimes (including voter misconduct), "knowingly" for others, or no *mens rea* at all. See HB 252 Draft A at 82-84. In the final version of the legislation, the voter misconduct *mens rea* was unchanged. *See* SLA 1960, Ch. 83 §11.18. A few of the offenses that did not include any mens rea were updated to include a "knowing" *mens rea*. *Compare, e.g.,* HB 252 Draft A at 82 and SLA 1960, Ch. 83 §11.07. But not all. *Compare* HB 252 Draft A at 82 and SLA 1960, Ch. 83 §

The original 1960 version of the voter misconduct statute utilized a *mens rea* of "willfully." SLA 1960, ch. 83 § 11.18. In the 1980 bill, among other changes, the legislature updated the *mens rea* from "willfully" to "intentionally." SLA 1980, ch. 100, §205. As Smith notes, this appears to have largely been a formulaic update. [Pet. Br. 18] In an analysis of the proposed changes to the election code, the special committee on electoral reform described the changes to the election related offenses as follows:

> Chapter 55 Election Offenses. Corrupt Practices and Penalties is repealed and replaced with Chapter 56, which has been rewritten to conform with the New Criminal Code. The reorganization and breakdown of election offenses is clearly set out in this new chapter. Currently election offenses are found throughout Title 15.

Special Committee on Electoral Reform, SB 312 Section by Section Analysis of the Changes Proposed to the Election Code in FCCS HB 3, at 22-23 (April 23, 1980).

The Election Review Committee additionally wrote in a letter to the governor: "The chapter has been rewritten to bring [offenses under the election code] into conformity with the revised criminal code which will become effective January 1, 1980." Letter from the Election Review Committee to the Governor, Regarding SB 312 Proposed Revisions to Title 15, at 27-28, (September 18, 1979). The committee went on to inform the governor

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11.06. That is, the legislature's changes to address consciousness of wrongdoing included leaving some offenses with no explicit *mens rea* and updating others to include a "knowing" *mens rea*.

As discussed in more detail *infra*, consciousness of wrongdoing is a constitutional due process requirement that may be satisfied by a "knowing" *mens rea*: "Where the crime involved may be said to be malum in se, that is, one which reasoning members of society regard as condemnable, awareness of the commission of the act necessarily carries with it an awareness of wrongdoing." *Hentzner v. State*, 613 P.2d 821, 826 (Alaska 1980).

Because the legislature made no changes to the *mens rea* regarding voter misconduct after this journal excerpt and because this is simply a constitutional requirement for criminal penalties that may be satisfied by either a knowing *mens rea* or a specific intent *mens rea* it is difficult to divine any further legislative intent as to what "willfully" might mean from this journal excerpt.

this section "contains few substantive changes" and listed said changes. *Id*. at 28. Notably the change from "willfully" to "intentionally" was not included in this detailing of substantive changes, strongly indicating this was considered a formulaic rather than substantive change. *Id.*

Thus, while it is apparent from this legislative history that the legislature generally intended to bring Title 15 offenses into conformity with what would be Title 11 of the Revised Criminal Code, the legislative history does not reflect any discussion of what that meant in practice. Assuming the change in *mens rea* from "willfully" to "intentionally" was made as part of the effort to bring these offenses into conformity with Title 11, it's unclear whether this was formulaic conformity in which the language was simply updated or substantive conformity in which the terms were intended to have the same meaning under both titles.

If the legislature did intend to incorporate Title 11's *mens reas*, as part of bringing Title 15 into conformity with the revised criminal code, they did not grapple with the structural inconsistency between Title 11's definition of "intentionally" and its use within Title 15. Besides the voter misconduct provision, the 1980 bill's version of Unlawful Interference with an Election contained two subsections that changed "wilfully" to "intentionally" despite the fact that intentionally was being applied to an action rather than a result. *See* SB 312 at 84 (AS 15.56.061(a)(2) and (3)). Its version of First-Degree Election Misconduct also contains at least one, and depending on how it is interpreted, potentially two provisions that utilize "intentionally" without specifying a result. *See* Special Committee on Election Reform, SB 312, at 85 (January 14, 1930) and 15.56.071(a)(1) and (3).[7] Further, while "intentionally" under Title 11 conveys specific intent, the Title 15

[7] 15.56.071(a)(1) contains a specific intent but it is not clear from the structure of the provision whether that specific intent is mean to apply to the whole of the clause or only to the second half of the provision. A person commits election official misconduct under subsection (a)(1) if they "intentionally fail to perform an election duty" or

offenses frequently convey specific intent by using the language "*with the intent that*" rather than the term "intentionally." *See, e.g.,* AS 15.56.040(a). That is, the Title 15 offenses tend to use "intentionally" in regard to conduct and "with the intent that" when referencing a specific intent result. If the legislature intended to utilize Title 11's definition of "intentionally," it is not reflected in the use of various *mens rea* throughout Title 15.

The idea that the legislature intended to incorporate Title 11's *mens rea* in the 1980 bill is further undermined by the later addition of a definitional provision to Title 15. The definitional provision of Title 15 was not codified at the same time as the 1980 bill, when the legislature was purporting to bring Title 15 into conformity with Title 11. Rather, it was added in 1996 via HB 364. *See* SLA 1996, ch. 87 § 3. While the substance of HB 364 did not address the definitional section, it is telling that the legislature felt the need to codify a definitional section. This naturally implies the legislature felt the *mens rea* were not otherwise clearly defined.

The legislative history of this bill does not include substantive discussion of the definitional section addition. It appears the legislature addressed the *mens rea* of "knowingly" because it was specifically at issue in the subsection with which they were primarily concerned.[8] The context of the bill explains why the "knowing" *mens rea* is

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"knowingly does an unauthorized act with the intent to affect an election or its results." Thus, it is not immediately obvious whether the specific intent to affect an election or its results is being applied to both intentionally failing to perform an election duty and knowingly doing an unauthorized act, or just the later. In either event, subsection (a)(3) clearly utilizes intentionally without specifying a result: "intentionally conceals, withholds, destroys, or attempts to conceal, withhold or destroy election returns." SB 312 at 85.

[8] H.B. 364 was passed in response to *Dansereau v. Ulmer*, which, in relevant part, interpreted the language of the first-degree unlawful voting statue ("gives, promises to give, offers, or causes to be given or offered money or other valuable thing to a person with the intent to induce the person to vote for or refrain from voting for a candidate at an election or for an election proposition or question") as requiring an intent to induce voters to choose a candidate whom they would not otherwise had voted. 903 P.2d 555, 564-65 (Alaska 1995); House Judiciary Committee, HB 364, statement of Representative Con Bunde, Tape 96-34 at 02:40-04:12 (Mar. 13, 1996). In HB 364 the legislature changed the

explicitly referenced but it does not indicate if a) the original intent of the bill was to always incorporate Title 11 *mens reas* and this was a corrective action, b) the *mens rea* were not originally intended to be incorporated and the subsequent exclusion of "intentionally" was deliberate, or c) the *mens rea* were not originally intended to be incorporated and the subsequent exclusion of "intentionally" was an oversight. The lack of discussion on this point simply leaves us with a codified definition for "knowingly" and none for "intentionally." Thus, the legislative history of the voter misconduct statute does not provide any real answer and is insufficient to support the proposition that the legislature meant to utilize the Title 11 definition of "intentionally".

2. History regarding intent to utilize a definition other than the common meaning of intentionally.

Given the lack of evidence that the legislature intended to incorporate Title 11's definition of "intentionally" into Title 15, the 1980 change from "willfully" to "intentionally" is the only other piece of legislative history that might shed light on how the legislature meant "intentionally" be read. However, contrary to Smith's assertions, the update from "willfully" to "intentionally" does little more to clarify the legislative intent regarding *mens rea*. The legislature did not engage in any discussion regarding this change, other than what is addressed *supra* indicating this was a mechanical change. And "wilfully" itself is an inherently ambiguous word[9] that does not clarify how "intentionally" should be read.

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language of this offense to "knowingly pays, offers to pay, or causes to be paid money or other valuable thing to a person to vote or refrain from voting in an election." AS 15.56.030(a)(2); SLA 1996, Ch. 87 § 3.

[9] Judge Learned Hand described the word "willfully" as "a very dreadful word," "an awful word," "one of the most troublesome words in a statute that I know" and expressed "[i]f I were to have the index purged, 'wilful' would lead all the rest in spite of its being at the end of the alphabet." Model Penal Code and Commentaries § 2.02, at 249 n. 47 (Official Draft and Revised Comments 1985) (quoting ALI Proceeding 160 (1955)).

As this court has noted, "the legislature has not defined 'willfully'. Definition of this term has been left to common-law development through court decisions." *Hutchison v. State*, 27 P.3d 774, 775 (Alaska App. 2001). In *Hentzner v. State*, the supreme court observed "willfully" can be defined in at least three different ways: "[o]ne is that the defendant must act intentionally in the sense that he is aware of what he is doing; another is that the defendant must be aware that what he is doing is illegal; and a third is that the defendant must know that what he is doing is wrong." *Hentzner v. State*, 613 P.2d 821, 825 (Alaska 1980).

In some contexts, this court has read "willfully" as requiring that the individual acted deliberately, while knowing of the relevant circumstances. In *Thomas v. Municipality of Anchorage*, this court held that the willfulness requirement was akin to Title 11's "knowingly." No. A-12383, 2018 WL 3933528, at *2 (Alaska App. Aug. 15, 2018) (unpublished) ("The Anchorage eluding ordinance does not involve the culpable mental state of "intentionally", because the ordinance does not require proof that a driver acted with the intention of causing a particular result . . . In this context, the state criminal code's culpable mental state of "knowingly" is the closest equivalent to the Anchorage Municipal Code's culpable mental state of "willfully"."). This court made a similar distinction in *O'Brannon v. State* when interpreting willfulness in the context of contempt of court: "the intent required is an intentional act which the defendant know[ingly] violates the court order, not an act motivated by the intent to violate a court order." *O'Brannon v. State*, 812 P.2d 222, 228 (Alaska App. 1991).[10]

[10] Smith cites this case for the proposition that willfulness means the defendant must be aware that the conduct they are engaging in violates the law. [*See* Pet. Br. 20] This is a plainly incorrect reading of *O'Brannon* that Smith reaches by literally changing the words of the opinion, substituting "the law" for the opinion's actual language of "court order" in her quotes from the case. [Pet. Br. 20 Fn. 104] This alteration fundamentally changes the legal holding of the opinion, broadening it well beyond its scope. *See O'Brannon v. State*, 812 P.2d 222, 228 (Alaska App. 1991). *O'Brannon* was interpreting willfulness in terms of contempt, that is violation of a court order. *Id.* Therefore, awareness

Other authorities defining wilfulness generally align with this caselaw. Under the Model Penal Code, the requirement of willfulness is satisfied by acting knowingly: "A requirement that an offense be committed wil[l]fully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." § 2.02. General Requirements of Culpability, Model Penal Code § 2.02(2)(9). Likewise, both lay and legal dictionaries define willfully as more akin to deliberately or acting with the requisite knowledge of the circumstances. *See, e.g., Webster's Third New Int'l Dictionary,* 2617 (unabridged ed. 2002) (defining "willful" as "done deliberately, not accidental or without purpose, intentional, self-determined"); *Black's Law Dictionary,* 1593 (7th ed. 1999) (defining "willful" as "[v]oluntary and intentional, but not necessarily malicious"). And while Alaska had no clear set definition of "willfully" at the time of the original statute, Oregon (which Alaska has often looked to in crafting its criminal law)[11] defined willfully at that time as "when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or omission referred to, and does not require any intent to violate law, to injure another or to acquire any advantage." *Former* ORS 161.010(1), *repealed by* Or. Laws 1971, ch. 743, § 432.

However, as Smith argues, in *Hentzner v. State* the supreme court interpreted "wilfully" as requiring something beyond deliberate action – a consciousness of wrongdoing. [Pet. Br.18-20 (*citing Hentzner v. State*, 613 P.2d 821, 825 (Alaska 1980))][12]

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of the court order is the relevant circumstances of which one must be aware. That is, it is the defendant's knowledge regarding the fact of the court order not the legality of the action which matters for willfulness in this context. To the extent Smith implies *O'Brannon* stands for the proposition that willfulness means one must be aware the conduct they are engaging in is illegal, that is not what the opinion says.

[11] Alaska has modeled many of its criminal statutes off Oregon statutes. *See, e.g., Andrew v. State*, 237 P.3d 1027, 1035 (Alaska App. 2010).

[12] Smith notes this case was decided the same year the 1980 bill was passed. [Pet. Br. 18] However, given that the term "willfully" was present in the 1960 statute it is unclear

But *Hentzner* explicitly stated "willfully" was subject to at least three competing interpretations: "The issue before us is the meaning of the word 'willfully' as used in AS 45.55.210(a). There are several possibilities. One is that the defendant must act intentionally in the sense that he is aware of what he is doing; another is that the defendant must be aware that what he is doing is illegal; and a third is that the defendant must know that what he is doing is wrong." *Hentzner v. State*, 613 P.2d 821, 825 (Alaska 1980). The *Hentzner* court applied the last definition to "willfully" in the context of AS 45.55.210(a), noting the statute prohibiting the sale of unregistered and non-exempt securities was *malum prohibitum* and therefore its criminal intent element required a consciousness of wrongdoing. *Id.* at 826. But the court never pretended to define willfully outside the context of that statute; in fact, the court explicitly noted in the case of *malum in se* crimes "it would be entirely acceptable to define the word "wilfully" to mean no more than a consciousness of the conduct in question." *Id*. The interpretation Smith urges was applied to satisfy due process notice concerns for a *malum prohibitum* offense.[13] That is, *Hentzner* does not support the proposition that "willfully" must be read to include a specific intent element but rather, at most, demonstrates that "willfully" is an ambiguous term that does not necessarily shed light on the legislative intent regarding the *mens rea*.

Outside of the *Hentzner* reading and its due process motivations, "wilfully" is more often read as akin to Title 11's "knowingly" *mens rea*. Absent any discussion regarding "wilfully," it cannot be assumed that the legislature intended its use to support a

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why the supreme court's interpretation of that term in a different statute 20 years later should have any bearing on what the legislature intended it to mean. Further, the proposed change from "willfully" to "intentionally" was included as far back as 1979. *See* Letter from the Election Review Committee to the Governor, Regarding SB 312 Proposed Revisions to Title 15, at 27-28, (September 18, 1979). That is, even the drafters of the 1980 bill did not have the benefit of the *Hentzner* decision to aid their interpretation. Smith's notation is interesting trivia but has no substantive import.

[13] In contrast, voter misconduct is a malum in se offense that does not carry the same due process concerns, addressed *infra.*

specific intent reading of the *mens rea* requirement. At minimum, its use sheds no additional light on the legislative intent regarding the *mens rea* and, absent that, the common definitions of "intentionally" should be applied.

C. Resolving structural incompatibility by reading intentionally as akin to knowing.

But even assuming the legislature did mean to incorporate Title 11's "intentionally" definition into Title 15, this creates an inconsistency between the statutory definition of "intentionally" and the statute's structural makeup. This court has historically resolved similar conflicts by interpreting "intentionally" as having a definition more akin to our statutory definition of "knowingly."

As this court has noted, "[a]s defined in AS 11.81.900(a)(1), the culpable mental state 'intentionally' does not describe conduct; it refers only to a person's conscious desire to achieve a particular result through conduct. The Criminal Code uses the word 'knowingly' to describe purposeful conduct." *Wilson v. State*, No. A-11332, 2015 WL 5478126, at *5 (Alaska App. Sept. 16, 2015) (unpublished). Therefore, the structural makeup of the statute is critical to how we interpret *mens rea*.

Even for offenses that expressly fall under Title 11 and therefore should be governed by AS 11.81.900(a)(1), where "the word 'intentionally' … was not used 'with respect to a result'" it should "not be governed by AS 11.81.900(a)(1)." *Neitzel v. State*, 655 P.2d 325, 326 (Alaska App. 1982).[14] That is, if "intentionally" is being used in regard

[14] Smith tries to rebut this reasoning by noting distinctions between this case and *Turner v. State* in which this court supplied "knowingly" as the *mens rea* where there was no *mens rea* associated with the *actus reus* of the offense. Pet. Br. 15-16 (*citing Turner v. State*, 552 P.3d 1077, 1081 (Alaska App. 2024)). But Smith is confusing a mental state associated with a result with one associated with an *actus reus*. *Turner* was not a case where the court "read 'intentionally' to mean 'knowingly'" as Smith claims. [Pet. Br. 15] Rather, in *Turner* this court noted the result, overcoming a person's resistance to the taking of the property required specific intent, but the *actus reus*, use of force, did not have an explicit *mens rea* attached; this court reasoned that the use of force element must require a *mens*

to conduct not a result, it should be read to have a definition more akin to "knowingly" as that is the only definition that can be applied to conduct.

In *Neitzel*, after reviewing the statute at issue and legislative history, this court dealt with this problematic structure by reading "intentionally" as actually requiring a *mens rea* of "knowingly." 655 P.2d at 326. As this court later summarized:

> This problem was first addressed by this Court in *Neitzel v. State,* 655 P.2d 325 (Alaska App.1982), where we had to construe a portion of the second-degree murder statute which required proof that a defendant "*intentionally* perform[ed] an act that result[ed] in the death of another person under circumstances manifesting an extreme indifference to the value of human life." We held that the legislature must have meant "*knowingly* performed an act"—because, as defined in AS 11.81.900(a), "knowingly" is the only culpable mental state that applies to conduct, and "intentionally" applies only to the results of conduct. *Neitzel,* 655 P.2d at 326–330.

Stoner v. State, No. A-12012, 2016 WL 1394221, at *5 (Alaska App. Apr. 6, 2016) (unpublished) (Mannheimer, J., concurring).

Given the aforementioned legal and lay definitions of "intentionally," this is not as atextual as it would seem.

Here, the voter misconduct statute utilizes "intentionally" as the *mens rea* but applies it only to conduct without an explicit result. Given this structure, the use of "intentionally" should not be governed by AS 11.81.900(a)(1) but rather should be read as more akin to "knowing." In other words, it is satisfied by showing that the person acted deliberately with knowledge of the requisite circumstances.

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rea of "knowingly" as "knowingly" is the only *mens rea* that can be applied to conduct. *Turner v. State*, 552 P.3d 1077, 1081-82 (Alaska App. 2024). The more apt comparison to the voting misconduct statute's structural complexity is *Neitzel v. State*. 655 P.2d 325, 326 (Alaska App. 1982).

III. ALTERNATIVELY, THE STATUTE SHOULD BE INTERPRETED AS REQUIRING THE MAKING OF A FALSELY SWORN STATEMENT THE INTENDED RESULT.

Even if this court were to disagree with this interpretation and find the use of the word "intentionally" requires a specific result, there is still no support in the plain language of the statute or legislative history to include as an element of the offense an intent to deceive or mislead officials. Rather, this court should look to the plain language of the statute to ascertain the result. Here, while "intentionally" appears to be modifying the *actus reus*, which as both the statutory definition and this court's caselaw has made clear, is an improper utilization of "intentionally," the *actus reus* in this statute additionally functions as the result element. That is, the act is making the false statement, and the result is that a false statement has been made under oath.

As this court has noted, "many offenses are defined in terms of a result either in conjunction with specified conduct, or without specifying any conduct." *Smith v. State*, 28 P.3d 323, 325–26 (Alaska App. 2001); *See also Carlson v. State*, 128 P.3d 197, 202 (Alaska App. 2006). For example, "[a] person commits the crime of manslaughter if the person intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree." AS 11.41.120(a)(1). Under this statutory construction, "intentionally" seems to be modifying the *actus reus* of the offense (causing the death of another). Yet, this court has said that manslaughter "does not require proof of any particular type of conduct, but it does require proof that the defendant acted intentionally, knowingly or recklessly with respect to the possibility that the defendant's conduct might cause another person's death." *Smith,* at 326. That is, for purposes of manslaughter, this court treated what is ostensively conduct (causing another's death) as the result.

Other statutes clearly delineate the conduct element from the result element, but functionally the result is the same. For example, "[a] person commits the crime

of murder in the first degree if (1) with intent to cause the death of another person, the person (A) causes the death of any person." AS 11.41.100(a)(1)(A). Similarly, "[a] person commits theft if (1) with intent to deprive another of property or to appropriate property of another to oneself or a third person, the person obtains the property of another." AS 11.46.100(1). That is, the conduct and result elements of these statutes effectively mirror each other.

In contrast, nothing in the statutory language or legislative history suggests that the legislature intended to include a specific intent to mislead or deceive. The statute contains no language to this effect and nothing in the legislative history suggests this is what the legislature contemplated. Further, it's clear that the legislature was capable of codifying clearly required results. In two other subsections the statute explicitly details a result when utilizing "intent": under subsection (2) a person commits voter misconduct if that person "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*"; and under subsection (4) a person commits voter misconduct if that person "knowingly votes or solicits a person to vote after the polls are closed *with the intent that the vote be counted*." AS 15.56.040(a) (emphasis added). That is, the legislature was clearly capable of articulating a result when detailing specific intent. That it did not do so in subsection (3) strongly suggests the legislature did not intend an additional intent of deceiving or misleading officials.

If "intentionally" requires a specific result, that specific result must be derived from the statutory language. In this case, the action is swearing a false affidavit with the swearing of a false affidavit as the intended result. *See* AS 15.56.040(a)(3).

IV. SMITH'S PROPOSED DEFINITION IMPERMISSIBLY ASKS THIS COURT TO REWRITE THE STATUTE.

Though Smith acknowledges that courts cannot rewrite statutes, she urges this court to nevertheless "read" an implied element of intent to deceive or mislead a public

official for the purpose of voting unlawfully, but fails to explain any statutory basis for this result, while simultaneously claiming "[t]his interpretation does less damage to the statutory text." [Pet. Br. 16] It is not clear how an interpretation devoid of any grounding in the text or history of the statute does "less damage" than the state's interpretation (reading the *mens rea* requirement of "intentionally" in line with its common definitions rather than codified definition of a different statute that the legislature expressly chose not to adopt).

Smith spends the bulk of her argument addressing why "intentionally" should not be read akin to "knowingly." [*See* Pet. Br. 12-23] But even assuming her definition of "intentionally" is correct, Smith does not explain why her proposed element of intent to deceive or mislead should be read as the result element. [*See* Pet. Br. 11-22] Smith does not point to anything in the plain language of the statute nor the legislative history that would demonstrate, if a result is required, what that result should be. [*See* Pet. Br. 11-22][15] Rather, she simply asserts that voter misconduct is a specific intent crime and asks this court to create a result that she believes is appropriate.[16] But this is an impermissible

[15] At one point Smith does make the argument that "the statute's reference to the 'affidavit' or 'oath required by title'" implies a result that the defendant must be attempting to vote unlawfully. [Pet. Br. 20] This may be a plain language argument, but the State is unable to discern whether this is Smith's intent, and if so, what the logic of this argument is. Title 15 contains many oaths, not just those relating to voter registration, as Smith later concedes. [Pet. Br. 22] It's unclear to the State how one gets from swearing an oath required by the Title to an intent to deceive or mislead public officials for the purpose of unlawfully voting.

[16] Though Smith fails to raise this argument, the closest the statutory text gets to requiring an element of intent to deceive or mislead is the use of the terms "false" and "falsely." AS 15.56.040(a)(3). But neither term denotes an intent to deceive or mislead standing in isolation. As the statute is written, these terms are adjectives modifying a noun. In this context, "false" is most commonly defined as "not genuine." Merriam-Webster.com Dictionary, Merriam-Webster, "False," https://www.merriam- https://www.merriam-webster.com/dictionary/false. Accessed 15 July 2025. Black's Law similarly defines "false" in the context of a statement as "untrue." *Black's Law Dictionary,* 677 (9th ed. 2009). That is, in this statute the use of false and falsely means the resulting affidavit or sworn statement is untrue. But one can intend a false statement without intending to deceive

interpretation. Given the glaring lack of textual support for Smith's interpretation of the statute, she is effectively asking this court to rewrite the statute to suit her. But this is a method of statutory interpretation that is plainly unconstitutional. While the judiciary is tasked with interpreting laws, that interpretation cannot veer into rewriting the law. Such power is explicitly reserved for the legislature.

Courts are not empowered to rewrite statutes: the separation of powers doctrine "prohibits this court from enacting legislation or redrafting defective statutes." *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1131 (Alaska 2017) (*quoting State v. Campbell*, 536 P.2d 105, 111 (Alaska 1975)).

The supreme court has emphasized the importance of the separation of powers doctrine:

> We have recognized that the separation of powers and its complementary doctrine of checks and balances are part of the constitutional framework of this state. The separation of powers doctrine is derived from the distribution of power among the three branches of government. The Alaska Constitution vests legislative power in the legislature; executive power in the governor; and judicial power in the supreme court, the superior court, and additional courts as established by the legislature. The separation of powers doctrine limits the authority of each branch to interfere in the powers that have been delegated to the other branches. The purposes of the separation of powers doctrine are to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government.

Alaska Pub. Int. Rsch. Grp. v. State, 167 P.3d 27, 34–35 (Alaska 2007).

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someone. Though the two concepts often go hand and hand they are separate and distinct ideas. The use of the term "false" on its own is insufficient to support the proposition that the legislature intended the statute to include an element of intent to deceive or mislead an official. This is further demonstrated by the third-degree forgery statute. Under that statute "(a) A person commits the crime of forgery in the third degree if, with intent to defraud, the person (1) falsely makes, completes, or alters a written instrument." AS 11.46.510(a)(1). While the term "falsely" appears in that statute it is insufficient, on its own, to denote an intent to defraud. Falsely on its own only demonstrates that the action or result is not genuine. The intent to defraud or deceive must be explicitly spelled out in the statue.

Even when there is an obvious statutory gap, "[w]hether the statutory 'gap' is due to intention or oversight, [courts] have no authority to rewrite statutes. The legislature is the branch of government with the authority to fill gaps in a statutory scheme." *Native Vill. of Kwinhagak v. Dep't of Health & Soc. Servs., Off. of Children's Servs.*, 542 P.3d 1099, 1114 (Alaska 2024).

As nothing in the statutory language or legislative history suggests the legislature intended to include an element of intent to deceive or mislead, one cannot simply be added via judicial fiat. Whether or not such an element should be included, the legislature chose not to include it here and "[i]t is not for the courts to second-guess this permissible legislative choice." *Dansereau v. Ulmer*, 903 P.2d 555, 565 (Alaska 1995).

As argued *supra*, the plain language of the statute more naturally supports an interpretation of "intentionally" that is akin to our statutory definition of "knowingly" or, alternatively, interpreting the making of a falsely sworn statement as the required result. Either interpretation resolves an ambiguity in the statutory language created by the incompatibility of the statute's structure with Title 11's definition of "intentionally" without straining the statutory language past its breaking point.

A. There is no due process concern that would require this court to read in an additional element.

Smith relies heavily on the supreme court's interpretation of "wilfullness" in *Hentzner* to argue that this court should require an intent to mislead or deceive in order to satisfy a consciousness of wrongdoing requirement. [Pet. Br. 18-20 (*citing Hentzner v. State*, 613 P.2d 821, 826 (Alaska 1980)] But Smith misunderstands *Hentzner* and consciousness of wrongdoing. The basis of *Hentzner*'s implied element of consciousness of wrongdoing is in actuality a due process analysis. Smith is not alleging the statute has a due process notice problem; rather she argues it should be read as a specific intent crime

with the result being an intent to mislead or deceive. [*See* Pet. Br. 18-20][17] But a crime need not be a specific intent crime to satisfy the consciousness of wrongdoing requirement. Further, contrary to Smith's claims, voter misconduct is a *malum in se* crime where the consciousness of wrongdoing is satisfied by the inherent wrongness of the action.

Consciousness of wrongdoing is more aptly described as criminal intent. Cases that have read an implied element of consciousness of wrongdoing into the statute are doing so to avoid imposing strict liability for the crime:

> "The goal of these cases is to avoid criminal liability for innocent or inadvertent conduct. The use of the phrase 'awareness of wrongdoing' is but one means of assuring this result. The phrase does not mean a person must be aware that the conduct he is committing is specifically defined as a wrongful act. Nor does it mean that a person must know an act is proscribed by law. Rather, the requirement is that a person's intent be commensurate with the conduct proscribed."

Kimoktoak v. State, 584 P.2d 25, 29 (Alaska 1978).

In cases "where the particular statute is not a public welfare type of offense, either a requirement of criminal intent must be read into the statute or it must be found unconstitutional." *State v. Guest*, 583 P.2d 836, 839 (Alaska 1978); *see also State v. Rice*, 626 P.2d 104, 108 (Alaska 1981).

That is, the consciousness of wrongdoing requirement is not a requirement of specific intent but a requirement of a *mens rea*. Here, the voter misconduct statute does not lack an element of criminal intent. *See* AS 15.56.040(a)(3). The criminal intent required is "intentionally" which, given the context of the statute, should be read as requiring deliberate action with knowledge of the relevant circumstances. And, as the supreme court has repeatedly held, a "knowing" *mens rea* satisfies the consciousness of wrongdoing requirement. In *Kimoktoak v. State*, the court held the consciousness of wrongdoing

[17] Failure to make a substantive argument regarding the merits of a claim, means that claim is waived "under our well-established rule that issues not argued in opening appellate briefs are waived." *Hymes v. DeRamus*, 222 P.3d 874, 887 (Alaska 2010).

element was satisfied if the court read in an implied "knowing" *mens rea*. 584 P.2d at 29–30 ("On its face, AS 28.35.060 appears constitutionally defective for its failure to require criminal intent, or more particularly, for its failure to require that a person knowingly fail to render assistance. The issue, then, is whether we may read into the statute by implication the requisite intent. We conclude that we may."). In *State v. Guest*, the supreme court held that mistake of fact must be a defense to statutory rape in order to satisfy consciousness of wrongdoing, which is another way of stating that the conduct must have been "knowing." 583 P.2d at 840; AS 11.81.620(b)(1) (mistake of fact defense is available where the factual mistake is a reasonable one that negates the culpable mental state required for the commission of the offense).

To support her argument for a more stringent *mens rea*, Smith relies on *Hentzner v. Stat*e where the supreme court held that because "t]he crime of offering to sell or selling unregistered securities is malum prohibitum, not malum in se . . . criminal intent in the sense of consciousness of wrongdoing should be regarded as a separate element of the offense[.]" 613 P.2d 821, 826 (Alaska 1980).[18] Yet, contrary to Smith's arguments, *Hentzer*'s logic does not apply here because voter misconduct is lying under oath, which is a *malum in se* not *malum prohibitum* crime.

[18] For *malum in se* crimes the defendant is essentially put on notice due to the moral wrongfulness of the action, therefore the State need only prove they were conscious of the action: "the requirement of criminal intent is met upon proof of conscious action," i.e. "consciousness of the conduct in question," so no separate intent element is necessary. *Hentzner,* 613 P.2d at 826. But for *malum prohibitum* crimes, those that do not have the same inherent immorality but rather are criminalized simply by statute, "criminal intent in the sense of consciousness of wrongdoing should be regarded as a separate element of the offense, unless the public welfare offense exception . . . applies." *Id.* at 826. That is, for crimes that lack an inherent moral wrongfulness, absent some awareness of the legal wrongfulness of the action, the crime would be an impermissible strict liability crime that runs afoul of the due process notice requirement. It was this due process concern that led the *Hentzner* court to adopt a definition of "willfully" that required an awareness of wrongdoing.

Under the first-degree voter misconduct statute, the individual is placed on notice due to the inherent wrongfulness of lying under oath. In arguing voter misconduct does not qualify as *malum in se*, Smith defines *malum in se* as crimes involving "violence or harm to a specific individual." [Pet. Br. 20] Smith provides no citation for this proposition, and it is incorrect as a matter of law. As Smith acknowledged just prior to her unattributed narrow definition, under Alaskan law a *malum in se* crime is "one which reasoning members of society regard as condemnable." *Hentzner*, 613 P.2d at 826. In contrast, *mala prohibita* crimes are those proscribing conduct as to which "there is no broad societal concurrence that it is inherently bad." *Kinney v. State*, 927 P.2d 1289, 1292 (Alaska App. 1996) (*quoting Hentzner,* 613 P.2d at 826). Other methods of distinguishing *malam in se* versus *malum prohibitum* include looking to the common law and looking to whether or not the crime qualifies as one of moral turpitude: "Generally, common-law crimes are called 'mala in se' and statutory crimes are called 'mala prohibita,' but courts also say that a crime is 'malum in se' if it involves 'moral turpitude.'" *Id*. at 1292. Lying under oath unquestionably qualifies as *malum in se* under any of these definitions.

This specific subsection of the voter misconduct statute is a subset of perjury, which is broadly condemned, derived from the common law, and a crime of moral turpitude. There is broad societal consensus that lying, particularly lying under oath, is condemnable, and lying, as a general matter, is universally condemned. Children's media routinely contain messaging that lying is wrong. *See, e.g.*, Sesame Street, *Telling the Truth*, Sesame Street Kid's Guide to Life, https://muppet.fandom.com/wiki/Telling_the_Truth, accessed July 15, 2025. Bearing false witness "has been considered a spiritual offense since at least biblical times." *Perjury, Encyclopedia of Crime and Justice*, at 1049 (J. Dressler ed., 2d ed. 2001). Perjury and crimes involving swearing falsely or bearing false witness can also be traced back to the common law. *See Beckley v. State*, 443 P.2d 51, 54 (Alaska 1968). Additionally, under Alaskan law, perjury is explicitly defined as a crime of moral

turpitude. AS 15.80.010(10). That is, under any standard swearing falsely is a *malum in se* crime.

Both Smith and Amicus urge some higher level of moral culpability should be required here, but this cannot be squared with the statutory language and there is no due process issue that would compel this court to read in an additional *mens rea* element. Smith's problem with the statute is not a notice issue; rather it is an assertion that she relied in good faith on erroneous advice leading to a mistaken violation of the statute. That is, Smith knew of her duty to answer honestly. The form she filled out explicitly told her of her duty. Her argument is not that she lacked notice, it is that she was advised to disregard this provision. But that is not a notice problem with the statute requiring a judicially created additional *mens rea* remedy; it is an affirmative defense which is already available to Smith.

B. Departing from the plain language does not advance the purpose of the statute.

In interpreting a statute, we must look to the underlying purpose of the statute. While the language of the statute is of the utmost import, "[t]he intent of the legislature must govern and the policies and purposes of the statute should not be defeated." *Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety*, 91 P.3d 240, 248 (Alaska 2004). Thus, the underlying purpose is fundamental to understanding the statute.

Smith asserts, that "the legislature instead must have been concerned about discouraging false statements that have the effect of deceiving a public official into counting a vote that should not have been made." *Id*. Assuming this is the legislative purpose[19] (Smith provides no citations or asserts any evidentiary basis to support her

[19] Election security is an important goal of election related laws. The supreme court has observed that the public has "an important interest in the stability and finality of election results" and that allegations of election misconduct may disrupt the stability and finality of elections. *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995).

claim), the *effect* of deceiving a public official and the *intent to* deceive a public official are two very different things. That is, the good or bad intent of the person making the false statement has no impact on whether a public official is deceived and consequently counts a vote that should not have been cast.

Smith further argues that the statute's purpose is to "prohibit voter misconduct," not "voter mistake." [Pet. Br. 23] But, aside from the fact that Smith provides no support for this assertion beyond vaguely gesturing at the title of the statute, the statute does not require reading an element of intent to deceive or mislead to avoid targeting people for innocent mistakes. Smith's reading of the statute does not work to prevent "voter mistake." A "knowing" *mens rea* is negated by a factual mistake. *See* AS 11.81.620(b)(1). What Smith is addressing is a mistake of law.

Smith is not asserting that she made a mistake in that she thought the facts she was swearing to were actually true or that she was confused about her duty to accurately report information on the voter forms. [*See* Pet. Br. 4-6; R. 51] It would be one thing if she were arguing that she believed herself to be a qualified voter and the facts later proved she was not one. That would be a factual mistake that negates the "knowing" *mens rea*. Rather, here Smith is arguing that she knew the statements she was swearing to were false but had been advised by an official to make this false statement under oath. [*See* Pet. Br. 4-6; R. 51] This is not simply a voter mistake. It is, as argued *infra*, a mistake of law that should be addressed as such.

C. The Rule of Lenity does not apply.

Smith additionally argues that, alternatively, the rule of lenity should apply. [Pet. Br. 24] "Under the rule of lenity, when a statute establishing a criminal penalty is reasonably susceptible of more than one meaning, the statute should be construed so as to provide the most lenient penalty." *Grant v. State*, 379 P.3d 993, 995 (Alaska App. 2016);

[Pet. Br. 24] But this rule is only applicable where the statute is *reasonably susceptible to more than one meaning*. Given that Smith's interpretation has no basis in the statutory text or history, the rule of lenity plainly does not apply.

This court has repeatedly clarified that the rule of lenity does not apply where a statute's ambiguity can be resolved via ordinary rules of statutory construction. *See De Nardo v. State*, 819 P.2d 903, 907 (Alaska App. 1991) (stating the "rule of lenity or strict construction comes into play only when, after employing normal methods of statutory construction, the legislature's intent cannot be ascertained or remains ambiguous"). As demonstrated *supra*, no method of statutory construction supports Smith's proposed reading. While she analyzes the word "intentionally" quite thoroughly, she does not point to any source for her proposed "intent to mislead or deceive" element; rather, it appears to have been created out of whole cloth.

But even were we to presume there is some basis for Smith's interpretation, the rule of lenity does not require that a statute be given the narrowest meaning allowed by its language; instead, as this court has long held, "the language should be given 'a reasonable or common-sense construction, consonant with the objectives of the legislature.' The intent of the legislature must govern and the policies and purposes of the statute should not be defeated." *Briggs v. Donnelly*, 828 P.2d 1207, 1208-09 (Alaska App. 1992) (quoting *Belarde v. Municipality of Anchorage*, 634 P.2d 567, 568 (Alaska App. 1981)). Simply put, the complete lack of textual or legislative support for Smith's interpretation makes the rule of lenity inapplicable.

D. Interpreting the statute to require an intent to deceive or mislead would lead to absurd results.

"In ascertaining the legislature's intent, we are obliged to avoid construing a statute in a way that leads to a glaringly absurd result." *Sherbahn v. Kerkove*, 987 P.2d 195, 201 (Alaska 1999). Here, if the court were to adopt Smith's interpretation it would create

a higher evidentiary burden for what is in essence a lesser charge of perjury. This is both absurd and would lead to perverse charging incentives.

Voter misconduct is essentially a varietal of perjury. Under Alaska law, a person commits perjury when "the person makes a false sworn statement which the person does not believe to be true." AS 11.56.200(a). "The statement must be objectively false, and the person must know that the statement is false. The statute encompasses all false sworn statements, not just those made in court." *In re Ivy*, 374 P.3d 374, 379–80 (Alaska 2016) (*citing* AS 11.56.200).[20] The voter misconduct provision in question requires a person "intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title." AS 15.56.040. That is, if someone has committed voter misconduct under this provision, they have made a false sworn statement which they do not believe is true and so they have also committed perjury. In fact, three of the five forms Smith filled out explicitly warned her that she was swearing under penalty of perjury. [*See* R. 52-56].

However, perjury does not include an element of intent to deceive or mislead. It only requires actual knowledge that the statement being sworn is false. *In re Ivy*, 374 P.3d 374, 379–80 (Alaska 2016); *See also* Alaska Crim. Pattern Jury Instruction 11.56.200 (2009).[21] That is, if this court were to require an element of intent to deceive or mislead

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[20] Our law explicitly favors substance over form when it comes to perjury charges. *Harrison v. State*, 923 P.2d 107, 109 (Alaska App. 1996). In *Harrison*, this court noted that "[t]he guiding principle [of the offense of perjury] is that when the community commands or authorizes certain statements to be made with special formality or on notice of special sanctions, the seriousness of the demand for honesty is sufficiently evident to warrant the application of criminal sanctions. Upon this principle, it makes little difference what formula is employed to set this seal of special importance on the declaration." *Id.* (*citing Model Penal Code* § 241.1, Commentary at 129-30 (1980)) Therefore, "Alaska's appellate courts have chafed at arguments favoring a narrow interpretation of the term 'sworn statement.'" *Id.*

[21] The Alaska Pattern Jury Instructions provide the elements of perjury are: "(1) the defendant knowingly made a sworn statement; (2) the statement was false; and (3) the defendant did not believe the sworn statement to be true." Alaska Crim. Pattern Jury Instruction 11.56.200 (2009).

officials under the voter misconduct statute, it would be creating a higher *mens rea* for that statute than perjury. Essentially, this would mean in cases where the conduct could be charged under either statute, the State would face a more difficult evidentiary burden for charges brought under the voter misconduct statute as compared to charges brought under the perjury statute.

But perjury is a class B felony whereas first-degree voter misconduct is a class C felony. *Compare* AS 11.56.200(c) and AS 15.56.040(b). A class B felony carries a penalty of up to 10 years in prison, whereas a class C felony carries a maximum term of 5 years in prison. *See* AS 12.55.125(d) and (e). A first offender like Smith would be subject to a presumptive range of one to three years if charged under a class B felony or a presumptive range of zero to two years if charged under a class C felony. *See* AS 12.55.125(d)(1) and (e)(1). Thus, while someone who has committed first-degree voter misconduct could be charged with perjury, they would face greater penalties if such a charge were actually brought. [22]

Smith argues that the voter misconduct provision should not "be read as a free-standing perjury provision." [Pet. Br. 23] But voter misconduct is undeniably a varietal of a perjury charge. Smith's interpretation would simply make the less serious offense subject to a higher *mens rea* for conduct that could also be charged under the more serious perjury offense. The statute should not be read to create a higher *mens rea* for a less serious offense. This would be an absurd result and create perverse charging incentives.

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[22] While arguably, this could present its own problem under the old *Pirkey/Olsen* rule, this rule was rejected as far as felony statutes criminalizing the same conduct: "We have carefully considered the issue and all of the Alaska Supreme Court decisions discussing it and conclude that we should follow *Batchelder* and reject *Pirkey/Olsen,* at least to the extent that a defendant challenges two felony statutes contending that they overlap and provide disparate penalties." *Hart v. State*, 702 P.2d 651, 662 (Alaska App. 1985).

V. SMITH AND AMICUS ARE ATTEMPTING TO LITIGATE A LARGER POLICY DISPUTE BY REWRITING THIS STATUTE

Both Amicus and Smith argue their interpretation is necessary to avoid punishing voters for innocent mistakes. [*See* Pet. Br. 23; Am. Br. 3-6] But they drastically overstate the risk and do not grapple with the existing legal defenses that would avoid such dire results.

A. The State's interpretation of the voter misconduct statute is sufficient to protect against prosecution for innocent mistakes and is aligned with the majority of states.

A "knowing" *mens rea* is sufficient to accomplish the goal of preventing unjust convictions over innocent mistakes. A factual mistake negates a "knowing" *mens rea*. AS 11.81.620(b)(1). If someone has sworn they are on eligible voter but made an innocent mistake as to their eligibility to vote, they have not "knowingly" sworn a false statement. This is additionally apparent when examining the out-of-state cases Amicus cites.

Amicus argues that Smith's proposed construction is necessary to keep Alaska from becoming an outlier state. [Am. Br. 7-11] But Amicus seems to misapprehend the different *mens rea* the parties are discussing. Citing Tennessee and Texas, Amicus argues that Alaska would be an outlier state if it did not include an intent to mislead or deceive officials. [*See* Am. Br. 7-8, 9-10] But, as Amicus explicitly acknowledges, these states provide a "knowing" *mens rea* for their similarly situated crimes. [*See* Am. Br. 7-8, 9-10] That is, they do not require a specific intent to mislead or deceive. Nor do the cases Amicus cites demonstrate a judicially created intent to mislead or deceive. Rather, they demonstrate the basic premise that a reasonable factual mistake negates the "knowing" *mens rea*. That is, the "knowing" *mens rea* is sufficient to protect innocent mistakes from criminal penalty.

In the Tennessee case cited by Amicus, the defendant's conviction was overturned because she had not known that the information she was swearing to was false. [Am. Br. 7-8] That is, the crucial question in that case was not whether the defendant

intended to mislead or deceive; it was whether she knowingly made a false statement. Similarly, the issue in the Texas case cited by Amicus centered on the defendant's actual knowledge regarding whether she was allowed to vote. [*See* Am. Br. 9-10 (*citing Mason v. State*, 663 S.W.3d 621, 624 (Tex. Crim. App. 2022)]. The Texas statute makes it an offense to vote "in an election *in which the person knows the person is not eligible to vote*" Tex. Elec. Code Ann. § 64.012(a)(1). Thus, the Texas court of appeals determined that the statute "requires *knowledge* that a defendant herself is ineligible to vote, not simple negligence." *Mason v. State*, 663 S.W.3d 621, 629 (Tex. Crim. App. 2022). This is notably different from requiring a specific intent to deceive or mislead.

These cases demonstrate that a "knowing" *mens rea* is sufficient to protect against innocent voter mistakes. Further, such a *mens rea* would actually put Alaska within the majority of states with similar statutes. [23]

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[23] Many states explicitly apply a "knowing" *mens rea*. These include Alabama (Ala. Code § 11-44E-164), Arizona (Ariz. Rev. Stat. Ann. § 16-1017; Ariz. Rev. Stat. Ann. § 16-1016 (generally applies a knowingly mens rea to voting offenses)), Indiana (Ind. Code Ann. § 3-14-2-7), Kentucky (Ky. Rev. Stat. Ann. § 119.025), Louisiana (La. Stat. Ann. § 18:1461.2(A) and (A)(5) (applying a *mens rea* of "knowingly, willfully, or intentionally" to election offenses generally and a "knowing" *mens rea* to its provision for false statements on voter registration applications)), Maine (Me. Rev. Stat. Ann. tit. 21-A, § 159(1)), Massachusetts (Mass. Gen. Laws Ann. ch. 56, § 8), Montana (Mont. Code Ann. § 13-35-209), New Mexico (N.M. Stat. Ann. § 1-20-10), New York (N.Y. Elec. Law § 17-104 (McKinney)), New Hampshire (N.H. Rev. Stat. Ann. § 659:34(II)(applying a purposefully or knowingly *mens rea*)), North Carolina (N.C. Gen. Stat. Ann. § 163-275(4)), Ohio (Ohio Rev. Code Ann. § 3599.11(A)), Oklahoma (Okla. Stat. Ann. tit. 26, § 16-103), Oregon (Or. Rev. Stat. Ann. § 260.715(1)), Washington (Wash. Rev. Code Ann. § 29A.08.210(11) (explicitly cites a "knowing" *mens rea* on the election form warnings)), and West Virginia (W. Va. Code Ann. § 3-1-34(h)).

Some states have no explicit *mens rea* associated with similar provisions. *See* Arkansas (Ark. Code Ann. § 7-1-103(a)(10)), Illinois (55 Ill. Comp. Stat. Ann. 5/1-5013), Michigan (Mich. Comp. Laws Ann. § 168.933), and South Carolina (S.C. Code Ann. § 7-25-10, 150).

Others apply something other than an explicit "knowing" *mens rea* but in practice the *mens rea* requirement is similar to Alaska's "knowing" *mens rea*. For example, Kansas applies an "intentionally and knowingly" *mens rea* to its comparable crime of election perjury. Kan. Stat. Ann. § 25-2411. But Kansas defines intentional conduct "with

respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result." Kan. Stat. Ann. § 21-5202(h). That is, despite nominally applying an intentionally *mens rea*, Kansas does not require anything akin to Smith's proposed element of an intent to mislead or deceive. Intentionally under Kansas's statute merely requires the intent to engage in the conduct.

Some states require a "willful" *mens rea* for similar crimes but do not construe that requirement as being akin to Alaska's "intentionally" requirement. For example, Florida has a "willfully" *mens rea* for crimes involving false oaths in relation to voting but has held that *mens rea* just requires that state to prove that the statement was known by the defendant to be false at the time it was sworn. Fla. Stat. Ann. § 104.011; *State ex rel. Miller v. Coleman*, 130 Fla. 537, 545, 178 So. 157, 160 (1938). And while Delaware has a "willful" *mens rea*, Del. Code Ann. tit. 15, § 5135, "willful" is defined under Delaware law as involving "a purposefulness or design." *State Farm Fire & Cas. Co. v. Hackendorn*, 605 A.2d 3, 12 (Del. Super. Ct. 1991), *abrogated by USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357 (Del. 2020). That is, Delaware's *mens rea* requirement is similar to Alaska's "knowingly" *mens rea*. But Delaware has also codified an affirmative defense specific to election related crimes that is similar to Alaska's mistake of law or mistake of fact defense. Del. Code Ann. tit. 15, § 5104 ("Upon any prosecution for procuring, offering or casting an illegal vote, the accused may give in evidence any fact tending to show that the accused honestly believed upon good reason that the vote complained of was a lawful one."). Mississippi too requires a "willful" *mens rea*, Miss. Code Ann. § 23-15-753, but its supreme court has ruled this does not mean specific intent is required. *McFarland v. State*, 707 So. 2d 166, 179 (Miss. 1997) ("In this statute, the Legislature has defined a crime which requires no showing of actual criminal intent. Rather, the mere willful doing of the forbidden act itself constitutes the crime of vote fraud.").

Other states do not have a specific provision like Alaska's voter misconduct statute, but nevertheless require statements made on voter registration forms be made under penalty of perjury. Thus, the *mens rea* for conduct similar to that at issue here, depends on the *mens rea* associated with that state's perjury statute. For instance, California requires statements made on a voting registration form be under penalty of perjury and so applies its regular perjury statute to false statements made on voter registration forms. Cal. Elec. Code § 2150(b) ("The affiant shall certify the content of the affidavit of registration as to its truthfulness and correctness, under penalty of perjury, with the signature of the affiant's name and the date of signing.") And while perjury is a specific intent crime in California, the specific intent is not to mislead or defraud but rather to intend the false statement be made under oath: "Perjury is also a specific intent crime. To commit perjury, the defendant must (1) knowingly make a false statement, and (2) specifically intend that the false statement be made under oath or penalty of perjury." *Banerjee v. Superior Ct.*, 69 Cal. App. 5th 1093, 1103, 284 Cal. Rptr. 3d 908, 913 (2021).

This is similar to Maryland which applies a "willfully" *mens rea* to its perjury statute but defines "willfully" in that context as having "the same substance and effect" as "knowingly and deliberate and not the result of surprise, confusion or bona fide mistake."

A minority of states have either an ambiguous or higher mens rea requirement.[24]

It's true, as Amicus points out, a similarly designed federal statute includes an express specific intent. [Am. Br. 8] But there the statute includes that intent in its actual statutory language. 52 U.S.C. § 10307(c). Further, this specific intent is "for the purpose of establishing his eligibility to register or vote," a distinct concept from an intent to deceive

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Furda v. State, 421 Md. 332, 353, 26 A.3d 918, 930 (2011); *See also* Md. Code Ann., Elec. Law § 3-202(a)(1)(i) ((False statements on voter applications are subject to penalty for perjury) and Md. Code Ann., Crim. Law § 9-101(a) (Perjury statute applies a "willfully and falsely" *mens rea*)).

Other states explicitly include a "knowing" *mens rea* in their perjury statutes. North Dakota ((N.D. Cent. Code Ann. § 16.1-07-08 and N.D. Cent. Code Ann. § 12.1-11-01(1) (perjury has a "knowing" *mens rea*)), South Dakota (S.D. Codified Laws § 12-4-1.2 and S.D. Codified Laws § 32-3-19 (perjury has a "knowing" *mens rea*)), and Wyoming (Wyo. Stat. Ann. § 22-9-111 (voting oath under penalty of perjury) and Wyo. Stat. Ann. § 6-5-303(a) (applying a "knowingly" *mens rea* for perjury)).

[24] Connecticut has a *mens rea* of "willfully and corruptly." Conn. Gen. Stat. Ann. § 9-358. Iowa also provides a "willfully" *mens re*, Iowa Code Ann. § 39A.2(1)(a)(2), with "willfully" meaning either "intentionally, deliberately, and knowingly" for malum in se crimes or "voluntary and intentional violation of a known legal duty" for malum prohibitum crimes. *State v. Azneer*, 526 N.W.2d 298, 299 (Iowa 1995). Missouri applies a "willfully and falsely" *mens rea*. Mo. Ann. Stat. § 115.631(1). Rhode Island provides a "knowingly and willfully" *mens rea*. 17 R.I. Gen. Laws Ann. § 17-9.1-12. Nebraska uses a "purposefully" *mens rea*, Neb. Rev. Stat. Ann. § 32-1502, and has referred to purposeful action as intentional action "rather than accidentally or involuntarily." *State v. Kipf*, 234 Neb. 227, 236, 450 N.W.2d 397, 405 (1990). Wisconsin utilizes "intentionally." Wis. Stat. Ann. § 12.13(1).

Utah applies either a "knowing" *mens rea* if the form itself warns that the false statement is punishable or requires an intent to deceive if the false statement is made without such an explicit warning. Utah Code Ann. § 20A-2-104(b)(ii)(h) (voter registration statute referencing false statement statute) and Utah Code Ann. § 76-8-504.

Other states that apply a general perjury penalty that do not include an explicit "knowing" *mens rea* or include a higher *mens rea* for perjury are Georgia (*See* Ga. Code Ann. § 21-2-384 (false statements punished under penalty of false swearing); Ga. Code Ann. § 16-10-70) (perjury requires a "knowingly and willfully" *mens rea*.)); Idaho ((Idaho Code Ann. § 18-2302 (false swearing as to voter qualifications is perjury) Idaho Code Ann. § 18-5401 (perjury has a "willfully" *mens rea*)); and Virginia (Va. Code Ann. § 24.2-643 (false statements subject to perjury) and Va. Code Ann. § 24.2-1016 (perjury has a "willfully" *mens rea*).

or mislead. *Id.* In other words, this is not a judicial interpretation but rather the express intent of congress, and that express intent is still less cumbersome than the intent advocated for by Smith and Amicus.

In short, Alaska's treatment of falsely sworn statements in the context of voter applications or similar forms is far from an outlier. And, as Amicus's various examples demonstrate, the "knowing" *mens rea* is sufficient to protect against voter mistakes. Thus, this court need not torture the statutory language in order to bring us in conformity with the rest of the country.

B. Alaska's voting misconduct statute is not the solution to Smith and Amicus's policy concerns regarding American Samoans' voting status.

Amicus raises additional concerns over the *sui generis* status of American Samoans and how this impacts their potential to inadvertently run afoul of the first-degree voter misconduct statute. [Am. Br. 11-16] The State does not dispute that American Samoans are uniquely situated: "American Samoa is the one territory where birthright citizenship is not recognized. Instead, individuals born there are deemed 'noncitizen U.S. nationals'; they enjoy some, but not all, of the protections afforded by the Constitution." Jayanth K. Krishnan, *The "Impractical and Anomalous' Consequences of Territorial Inequity*, 36 Geo. Immigr. L.J. 621, 623 (2022). But, American Samoans status is a deeply complicated question of federal law and public policy; it cannot be solved via an atextual interpretation of Alaska's voter misconduct statute.[25]

[25] American Samoa has a complicated history with the United States. In the late 1800s, during a period of colonialism, the United States utilized Samoa as a naval station before acquiring the western islands as a territory in 1899. Elizabeth K. Watson, *Citizens Nowhere: The Anomaly of American Samoans' Citizenship Status After Tuaua v. United States*, 42 U. Dayton L. Rev. 411, 414 (2017). Between 1900 and 1904 the high Samoan chiefs and the island group of Manu'a signed Instruments of Cession which "granted sovereignty to the United States, but protected the communal land and the power of the Samoan chiefs, generally known as matai. Through these provisions, the Samoans created

a sort of political autonomy by protecting the matai in their role as social and village leaders." Sean Morrison, *Foreign in A Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 Hastings Const. L.Q. 71, 77 (2013).

After the Spanish American War, the Supreme Court decided a series of cases that were collectively known as the *Insular* cases, deciding the rights of residents in various territories annexed by the United States after the war. Michelle Moore, *Fitisemanu v. United States: An Analysis of the Impact of the Supreme Court's Denial of Certiorari and the Future of Citizenship (or Lack Thereof) for American Samoans*, 64 Santa Clara L. Rev. 537, 542 (2024).

> "In these cases, the Court established the doctrine of territorial incorporation where a distinction was made between "incorporated" and "unincorporated" territories. Incorporated territories such as Arizona, New Mexico, and Alaska, which were mostly settled by white people, were thought "destined to be a permanent part of the U.S." and "on the path to statehood." Unincorporated territories such as Puerto Rico, Guam, and American Samoa, were not considered candidates for statehood because their residents were classified as "alien races" and were "uncivilized. "The first Insular Case . . .set the precedent that the territories were not inherently part of the United States, and therefore the Citizenship Clause and other portions of the Constitution did not automatically apply to them…Put simply, unincorporated territories did not receive the full protection of the Constitution. As a result, individuals born in American Samoa, an unincorporated territory, lack certain constitutional rights, including citizenship at birth." *Id.* at 543 (*citing Downes v. Bidwell*, 182 U.S. 244 (1901)).

In later years, peoples of the other unincorporated territories, like Puerto Rico, the Virgin Islands, and Guam were eventually extended citizenship through acts of congress. 8 U.S.C. § 1408; *see id*. § 1402 (declaring all persons born in Puerto Rico to be citizens of the United States); *id*. § 1406 (declaring all persons born in the Virgin Islands to be citizens of the United States); *id*. § 1407 (declaring all persons born in the island of Guam to be citizens of the United States); 48 U.S.C. § 1801 (2006) (approving the Covenant to Establish Commonwealth of Northern Mariana Islands which establishes in Article III Section 301 that all persons born in the Northern Mariana Islands are citizens of the United States).

In 1962, the Secretary of the Interior granted an American Samoan Constitution "which allowed for an elected governor and legislature, returning de facto control to the Samoans and enshrining the cultural institutions of the people." Morrison, *supra*, at 78. However, there has been no congressional act declaring American Samoans U.S. citizens. While there was originally a push in American Samoa for citizenship status, attitudes evolved over time and Samoans largely turned against such an act due to fear of the potential "deleterious effects to the culture[.]" Morrison, *supra*, at 87. "Many Samoans believe that increased federal presence on the islands will challenge the laws protecting the cultural system. American Samoans have fought against an organic act for the territory,

The status of American Samoans was recently litigated, first in the D.C. circuit and later in the Tenth Circuit. In 2015, the D.C. circuit rejected five plaintiffs' argument that the Citizenship Clause guarantees the peoples of American Samoa citizenship; the court applied the *Insular* cases and held citizenship was not guaranteed for inhabitants of unincorporated territories and found "it 'impractical and anomalous,' to impose citizenship

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even after promises that their institutions and laws would remain protected." Morrison, *supra*, at 82. Morrison details the credible basis for this fear:

> "The communal land and matai systems are such pillars of the cultural system that there is a widespread fear that any change to the political structure may affect their durability. Once the system of land ownership is put in jeopardy, "the whole fiber, the whole pattern of the Samoan way of life will be forever destroyed." Similarly, a threat to the matai hierarchy would undermine the very social fabric of the nation, which would in turn dissolve the aiga. This is why the protection of the matai and the land tenure system was a condition of the Instrument of Cession and explicitly stated as policy in the American Samoa Constitution.…
> This fear did not arise in a vacuum. Samoans have learned the lessons of the native Hawaiians. When the United States came to Hawaii and imposed laws and values based on individual land ownership, the Hawaiian cultural system quickly broke down. Native Hawaiians gave up highly valued beachfront property for next to nothing. By the time the Hawaiians had integrated into the new system, most of their land was gone--and their culture along with it. While Hawaii is undergoing a cultural rebirth today, the last century has left behind a stern warning to other cultures facing foreign intrusion." Morrison, *supra*, at 81.

Other scholars have also described a credible basis for this fear:

> "The Samoan culture has developed over 3,500 years. A vital and unique aspect of the culture is their land ownership rules. Native land is under communal ownership of an 'aiga, or family unit. The "matai," or chief, is the head of the 'aiga and the custodian of all 'aiga property. This native land can only be transferred to those who are full-blooded native Samoan. 90% of land in American Samoa is classified as native land and thus subject to this transferability restriction. Moreover, even individually owned land may not be transferred to anyone who has less than one-half of native Samoan blood." Moore, supra, at 541–42.

This means that "[o]nly American Samoans are non-citizen nationals, and American Samoans are the only American residents who are denied birthright citizenship. Essentially, the citizenship status of 'non-citizen national" is synonymous with "American Samoan.'" Watson, *supra*, at 412.

by judicial fiat—where doing so requires us to override the democratic prerogatives of the American Samoan people themselves." *Tuaua v. United States*, 788 F.3d 300, 301, 377-81 (D.C. Cir. 2015) (cert denied) (internal citation omitted). Indeed, the court's reasoning in this last respect was well taken as "there [was] a large backlash against the plaintiffs in *Tuaua v. United States* for bringing this suit without community engagement and support." Morrison, *supra*, at 82.

The Tenth Circuit also addressed this question in *Fitisemanu v. United States*. 1 F.4th 862, 879 (10th Cir. 2021) (cert denied). The court there reached the same conclusion as the D.C. circuit; relying on the *Inslar* cases and the expressed wishes of the American Samoan people, the court rejected the contention that birthright citizenship should be extended to the American Samoan people. *Id*. at 881. The court reasoned that "a people's incorporation into the citizenry of another nation ought to be done with their consent or not done at all." *Id*. at 879.

The position of the Samoan government and the competing legal and policy issues addressed by the D.C. and Tenth Circuits underlines that this is not an easy problem with an easy solution. But the question of American Samoan citizenship is not before this court and the voter misconduct statute at issue here is not and cannot be the solution to this difficult problem. As Judge Ramgren acknowledged, it is very possible that the *sui generis* status of American Samoans has created confusion as to their voting eligibility. [R. 158] But the criminal statute at issue here cannot fix that problem. The citizenship status of American Samoans, Alaska's voting rules and regulations, and the extent those rules and regulations are publicly available are all policy questions that go well beyond this case.

While American Samoans may face greater confusion over their eligibility to vote or their citizenship status, a good faith factual mistake still negates the "knowing" *mens rea*. AS 11.81.620(b)(1). If an American Samoan legitimately believes they are a U.S. citizen and swears to that fact they have not knowingly or intentionally made a false

statement. Similarly, if they legitimately believe they are an eligible voter and they swear to that fact, they have not knowingly or intentionally sworn a false statement. Requiring an intent to mislead or deceive, contrary to the statutory language and legislative history, is simply not necessary to protect against prosecution for good faith mistakes.

C. The policy goal of protecting voters from criminal penalty for innocent mistakes is best advanced through existing legal defenses.

To the extent a voter's confusion goes beyond factual mistakes that would naturally negate the "knowing" *mens rea*, the existence of affirmative defenses serves as an additional safety valve to ensure an innocent mistake is not criminally punished. It is a well-worn maximum that ignorance of the law is no excuse. Absent certain exceptions, "the general rule of law is that mistake of law is not a defense." *Ostrosky v. State*, 704 P.2d 786, 791 (Alaska App. 1985).

> The policy behind this rule is to encourage people to learn and know the law; a contrary rule would reward intentional ignorance of the law. The traditional rule of law that mistake of law is not a defense is based upon the fear 'that its absence would encourage and reward public ignorance of the law to the detriment of our organized legal system, and would encourage universal pleas of ignorance of the law that would constantly pose confusing and, to a great extent, insolvable issues of fact to juries and judges, thereby bogging down our adjudicative system.

Id. (*quoting United States v. Barker*, 546 F.2d 940, 954 (D.C.Cir.1976) (Merhige, J., concurring)).

An exception to this maxim, is the mistake of law defense. Mistake of law is an affirmative defense whereby the defendant must show that they reasonably relied on a mistaken interpretation of the law and "which the defendant must prove to the court by a preponderance of the evidence." *Id.* at 792. Alaska recognizes a mistake of law defense, but "this defense is quite limited: it is available only to people who act in reasonable reliance on 'a formal interpretation of the law issued by the chief enforcement officer or

agency [entrusted with enforcement of that law]'... And, of course, this defense is not available to people who form their own mistaken opinion about the law." *Stevens v. State,* 135 P.3d 688, 695 (Alaska App. 2006). The existence of the mistake of law defense addresses Smith and Amicus's concern regarding the danger of miscarriages of justice.

Smith and Amicus's argument rests on the idea that this statute must be read to contain an additional element (derived from nothing except a belief that it should exist) in order to avoid punishing innocent mistakes. But this requires accepting that Smith's actions were an easily made mistake that occurred because the system was simply too complicated for anyone to reasonably understand.[26] This may be true of the larger system implicating the voting eligibility requirements of U.S. Nationals, and particularly American Samoans, but it is simply not the case for this specific statute and the actual counts on which Smith was indicted. Smith was charged with falsely swearing that she was a United States citizen in instances in which she was being affirmatively informed that if she was not a United States citizen, she was not eligible to vote and could not continue to fill out the form. Smith was not indicted for being unwittingly swept up in Alaska's automatic PFD registration or confusing her eligibility status, as Amicus implies.[27] Rather, she was indicted on two

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[26] The State's voter registration website currently clearly articulates that naturalized U.S. citizens are eligible to vote but U.S. nationals are not. It is not clear how long the website has included this explicit notice. Voter Information, Voter Registration, Division of Elections, https://www.elections.alaska.gov/voter-information/#Reg, last accessed July 15, 2025.

[27] Amicus spends a great deal of time arguing that Smith should not be punished for "misunderstanding her eligibility." [Am. Br. 4, 5] But Amicus is arguing a point not at issue. The question in this case is not whether Smith wrongfully believed herself to be an eligible voter, it is whether she knew she was not a U.S. citizen and yet still swore under oath that she was one. That is, Smith's subjective understanding of her eligibility to vote does not bear on the question of whether she was a U.S. citizen, understood her citizenship status, and yet still swore under oath that she was a United States citizen. Had Smith been swearing that she was an eligible voter, confusion over her eligibility to vote would negate the "knowing" *mens rea*. The specific intent to mislead or deceive would not provide added protection in such a scenario.

counts for intentionally swearing that she was a United States citizen on a voter registration form despite knowing that she was not a United States citizen.

If there is ambiguity associated with this sworn statement, it was introduced by outside sources that Smith alleges she relied upon. That is, here the law was clear and the requirements to continue on with the voter registration forms were not in any way ambiguous or susceptible to mistake. If there was a mistake it was introduced by Smith's reliance on alternative authority. The law already provides protection for such instances. That is the mistake of law defense.

Amicus additionally argues there are other instances in which a person may have a morally justifiable reason for committing voter misconduct, speculating that a domestic violence victim may give a false address in order to hide their location from their abuser. [Am. Br. 5] This example is flawed; while voter addresses are generally public information, in Alaska a voter may elect to keep his or her residential address confidential. AS 15.07.195(b).[28] But even accepting the premise of this hypothetical and assuming that committing voter misconduct were the only means a domestic violence victim had to hide their location from their abuser, they too would be able to employ an affirmative defense. A defendant may be entitled to a necessity defense where "(1) she committed the charged offense to prevent a significant evil; (2) there was no adequate alternative to the charged offense; and (3) the harm caused was not disproportionate to the harm she avoided by breaking the law." *State v. Garrison*, 171 P.3d 91, 94 (Alaska 2007).

Smith and Amicus argue the statute must include this hidden additional *mens rea* to prevent miscarriages of justice. But the "knowing" *mens rea* protects against innocent factual mistakes and the law already provides tools to combat unjust prosecutions in

[28] This information is additionally publicly available on the Division of Elections website: Public and Confidential Information, Alaska Division of Elections, https://www.elections.alaska.gov/Core/publicandconfidentialinformation.php, last accessed July 15, 2025.

instances of good faith legal mistakes or impossible choices. Affirmative defenses exist for exactly this reason. They are a tool which defendants may deploy to exempt themselves from criminal culpability in cases where they would and should otherwise be liable.

It may well be that the rules and regulations surrounding U.S. nationals are confusing to the point that Smith consulted an election official. It may even be true that the election official too was confused and gave Smith misleading advice as to what to check on the form. But that cannot be cured by an atextual reading of the statute. Rather, it is properly addressed by litigating these facts as a mistake of law defense.

CONCLUSION

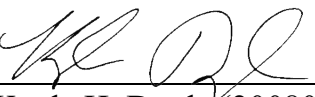
Throughout these proceedings, Smith has asserted what is properly a mistake of law defense. That defense was and remains available to her. But she cannot rewrite the statute to suit her preferred defense or advance her policy goals. That goes well beyond the constitutional powers ascribed to the judiciary. Rather, this court should adhere to the plain language of the statue and hold that in this context "intentionally" means deliberate action with knowledge of the requisite circumstances. Alternatively, if a specific intent is required that result must be found within the language of the statute, i.e. the false affidavit is the result.

Thus, the elements of the statute should be that the defendant 1) intentionally 2) makes a false affidavit, sworn statement or affirmation 2) under an oath required by Title 15. Under this interpretation, either "intentionally" should be applied to the second element which would be read as the *actus reus* and defined as deliberate action with knowledge of the requisite circumstances, or it should be read as requiring specific intent and the second element should be read as the result to which intentionally is applied.

Because the State presented sufficient evidence and because any error in the witness's testimony was necessarily harmless as to the counts on which the grand jury returned a true bill, this court should uphold the denial of Smith's motion to dismiss the indictment.

DATED July 30, 2025.

TREG TAYLOR
ATTORNEY GENERAL

By: 
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