IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RON DUDUM, et al. Plaintiffs/Appellants, vs. JOHN ARNTZ, CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants/Appellees.	No. 10-17198 (U.S. District Court No. CV 10-00504 RS)

APPELLEES' ANSWERING BRIEF

On Appeal from the United States District Court
for the Northern District of California

The Honorable Richard Seeborg

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PRELIMINARY STATEMENT

In March 2002, San Francisco voters adopted a ranked-choice voting ("RCV") system for the election of their local officials. In doing so, the voters decided to use a more efficient one-step RCV election in place of the existing two-step system consisting of a general election and a run-off. In each local election since first implementing RCV in November 2004, the City and County of San Francisco ("the City") has permitted voters to select up to the three candidates for each local elective office, in order of preference. Although Appellants challenge San Francisco's three-candidate version of RCV as unconstitutional, the Supreme Court has repeatedly affirmed that local jurisdictions have wide latitude in how they conduct their elections, so long as the chosen system does not prohibit any qualified voters from participating and treats all voters equally. The City's RCV system meets these criteria. It is undisputed that it affords every voter the equal opportunity to rank up to three candidates in each contest, and it provides that all votes are cast and counted according to uniform rules.

Recognizing the practical challenges of administering a RCV election system, the ballot measure that established RCV also explicitly authorized the City to limit voters to three choices per contest if allowing more rankings is not feasible. The City's voting system cannot accommodate a ballot with rankings of more than three candidates for a single office without compromising its accuracy and reliability, and therefore the City allows voters to rank no more than three candidates in each contest. The City has always conducted its RCV elections in its current three-candidate form.

When compared to more "traditional" election systems in which voters may select only one candidate per office, San Francisco's RCV system provides voters with a greater opportunity to express their preferences. The City's three-candidate

RCV system provides voters with several advantages over the preexisting system. If a voter supports two candidates for a particular elective office, she can use her rankings to select them in order of preference. And if a voter supports a candidate that she suspects will not receive a substantial amount of support from other voters, she will be able to use her second and third-choice rankings on other – potentially more successful – candidates. As compared to other voting systems, RCV provides voters with a greater ability to cast their ballots in support of the eventual winning candidate.

Further, governments routinely impose far more restrictive regulations on voters – such as registration, residency, and voter identification requirements – without running afoul of the Constitution, even though these regulations may prohibit citizens from voting altogether. No aspect of San Francisco's three-candidate RCV prevents any voter from casting a ballot. The City's decision to offer voters no more than three choices is less onerous than these restrictions, but it is motivated by the same compelling concerns – namely, ensuring the integrity and functioning of the City's elections.

Appellants nonetheless argue that San Francisco's RCV system is unconstitutional because of the incidence of "exhausted" ballots. The district court properly rejected this argument. A ballot becomes exhausted when all of the voter's preferred candidates have been mathematically eliminated from the election due to a lack of voter support. In other words, an exhausted ballot is simply a vote cast for the losing candidates, and in RCV elections, like all elections, some candidates will be unsuccessful. As the district court properly concluded, the existence of exhausted ballots does not infringe on any San Franciscan's right to vote.

Finally, in light of the undisputed facts concerning San Francisco's three-candidate RCV, Appellants' hypothetical voting system in "County X" is irrelevant and unpersuasive. *See* Appellants' Opening Brief ("Br.") at 3-5. Simply put, that system –wherever it may exist – is not San Francisco's voting system. In the City's RCV system, each voter casts only one ballot in each RCV election – voters do not cast a ballot, return at some later date, and then cast another ballot. There is a single round of voting – not several rounds over an extended period of time. All San Francisco voters vote at the same time, with respect to the same pool of candidates, and thus have an equal opportunity to participate in the election and affect the outcome. Appellants' hypothetical conflates two separate portions of RCV elections: casting votes and tabulating results. The City's RCV tabulation algorithm proceeds on a round-by-round basis, but those calculations are not separate rounds of *voting*.

For these reasons, this Court should affirm the decision below.

JURISDICTIONAL STATEMENT

Appellees agree that this Court has jurisdiction to hear this matter. The district court had federal question jurisdiction, and this Court has jurisdiction over the appeal. 28 U.S.C. §§ 1291, 1331.

STATEMENT OF ISSUES

1. Whether San Francisco's RCV system – which provides voters with the opportunity to rank up to three candidates, in order of preference, for each local elective office – imposes a severe burden on voters by not permitting them to rank more than three candidates?

2. Whether San Francisco's decision to permit voters to rank no more than three candidates is a reasonable, non-discriminatory regulation justified by

the inability of the City's RCV system to accommodate the selection of more than three candidates?

STATEMENT OF THE CASE

On February 4, 2010, Appellants simultaneously filed their complaint and a motion for preliminary injunction. ER 944-45. Appellants' complaint pled three causes of action, alleging violations of the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and the Due Process Clause of the Fourteenth Amendment. The complaint names John Arntz, Director of Elections, the City and County of San Francisco, the San Francisco Department of Elections, and the San Francisco Elections Commission as defendants.[1] Appellants' complaint "challenges only the three-candidate limitation imposed by the City & County of San Francisco, and not instant runoff voting generally." ER 914 (Complaint at 3 n.2).

On April 16, 2010, the Honorable Judge Seeborg denied Appellants' motion for a preliminary injunction. Supplemental Excerpts of Record ("SER") 25-43. Appellants did not appeal Judge Seeborg's order denying their motion for a preliminary injunction.

On September 9, 2010, after the parties filed cross-motions for summary judgment, the district court denied Appellants' motion for summary judgment and granted Appellees' motion for summary judgment on all claims. ER 2-29.

On September 29, 2010, Appellants filed a notice of appeal. ER 95-96.

[1] The Elections Commission is a seven-member body that oversees local elections and sets general policies for the City's Department of Elections. ER 677-78 (S.F. Charter § 13.103.5).

STATEMENT OF FACTS

I. PROPOSITION A AND SAN FRANCISCO'S IMPLEMENTATION OF RANKED-CHOICE VOTING

A. Through Proposition A, the voters eliminated two-stage elections in favor of a single ranked-choice voting election.

In March 2002, San Franciscans approved a ballot measure, Proposition A, that amended the City Charter[2] to establish a ranked-choice voting system to elect their local officials.[3] Under Proposition A, officials elected using the RCV system include the City's Mayor, City Attorney, District Attorney, members of the Board of Supervisors and others. ER 676 (S.F. Charter § 13.102(b)). Before the adoption of Proposition A, the City Charter provided that if no candidate received a majority of the votes cast in a general election, the City would hold a subsequent run-off election between the two candidates receiving the highest number of votes in the general election.[4] ER 750-51, 777, 786.

By approving Proposition A, the voters decided that they would prefer to elect their local officials by a single RCV election instead of a two-stage run-off election process. *See* ER 777 ("Proposition A is a Charter amendment that would . . . eliminate separate run-off elections."). RCV avoids the need for two separate elections by allowing each voter to rank multiple candidates in order of preference

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[2] Under California law, the charter of a charter city, such as San Francisco, is akin to its constitution. *See Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 170 (1994) (a City charter "represents the supreme law of the City, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law").

[3] Appellants prefer to use a different term, "instant runoff voting," to refer to the same voting system. San Francisco Charter section 13.102, which codifies Proposition A, refers to the City's current voting system as both ranked-choice voting and instant-runoff voting. ER 676-77.

[4] Because local elective offices are non-partisan, the City does not hold primary elections for candidates seeking those offices. *See* Cal. Const. Art. II, § 6(a).

on a single ballot. From these rankings, the RCV tabulation process determines the winning candidate by assessing who has received the strongest support from the greatest number of voters. By eliminating the need for run-off elections, RCV elections offer voters a more efficient election process. In terms of the voters' own time, RCV elections allow voters to participate "without the inconvenience of a second election." ER 778. Additionally, as referenced in the voter pamphlet materials, RCV elections save the City millions of dollars. ER 778. A run-off election system tends to cost more than RCV elections because "having two elections is more expensive than having one election." ER 592 (Transcript at 77:13-14).

Charter section 13.102 states a preference for RCV ballots that "allow voters to rank a number of choices in order of preference equal to the total number of candidates for each office." ER 676. But, recognizing the logistical and technological difficulties that an unlimited ranking system could cause, the Charter also provides: "if the voting system, vote tabulation system, or similar or related equipment used by the City and County cannot feasibly accommodate choices equal to the total number of candidates running for each office, then the Director of Elections may limit the number of choices a voter may rank to no fewer than three."[5] *Id.* As permitted by this provision, the City has offered voters three choices per office in RCV races because the City's voting system, and the ballots that the system can process and tabulate, are unable to accommodate more

[5] Other municipalities that use RCV also employ a three-candidate version. *See* ER 686-88 (Oakland City Charter § 1105(k)(1)); ER 690-92 (Berkeley Municipal Code § 2.14.030(A)); ER 694-700 (Minneapolis Municipal Code § 167.30).

choices.[6] Appellants do not dispute that the technological capacity of the City's voting system is limited in this manner.

B. The operation of San Francisco's ranked-choice voting election system.

Under San Francisco's RCV system, each registered voter may cast a ballot, and the City's voting system does not exclude any qualified voter from participating. ER 15 (Slip Op. at 14:8-10); ER 748. An RCV ballot for a single office consists of three columns. ER 749, 772. Proceeding from the left-hand side of the ballot to the right-hand side, there is a first-choice column, a second-choice column, and a third-choice column. In these columns, the voter is able to select the candidate that she prefers as her first-choice, second-choice, and third-choice, respectively.

Nothing in San Francisco's three-candidate RCV system controls how a voter exercises her three available rankings. ER 18 (Slip Op. at 17:12-13). Each column lists all the candidates competing in the contest. ER 749, 772. While the City permits the ranking of up to three candidates for each office, it does not *require* voters to rank three candidates – voters may rank only one or two if they do not support any other candidates. ER 13, 18 (Slip Op. at 12:10-11, 17:8-10); ER 748. And every voter has the same opportunity to rank up to three candidates – no voter is provided with more rankings than another. *Id.*; ER 6 (Slip Op. at 5:10-11).

[6] Appellants incorrectly describe Charter section 13.102(i) as allowing the City to return to a two-step run-off system if RCV proves to be unworkable. Br. at 50. Charter section 13.102(i) was intended solely as a transitional provision that specified if the Department were not ready to implement RCV by November 2002, the Department could continue to use the pre-existing two-step election system. ER 677. It does not provide for a "backup," as Appellants have suggested. By adopting Proposition A in March 2002, San Francisco voters intended to adopt RCV for all future municipal elections.

After the votes are cast, the City counts them in the identical manner. The district court accurately described the tabulation process as follows:

> Once the polls close, the Department [of Elections] (or, rather, its voting machines) counts all first choice rankings. If a candidate receives a majority of votes, he or she wins the election. If not, the candidate who received the fewest first choice rankings is eliminated. The second choice rankings of voters who supported the eliminated candidate are then redistributed and the Department "retabulates" all votes. If no candidate with majority support emerges, the process repeats.

ER 4 (Slip Op. at 3:10-14); *see also* ER 749, 901-02.[7] In the course of eliminating the least popular candidates and proceeding to examine voters' second-choice and third-choice rankings, there may be several "rounds" of tabulation. ER 750. But while the tabulation process consists of several steps, a RCV election is not a series of separate elections. ER 17-18 (Slip Op. at 16:22-17:7); ER 750. Voters do not cast new ballots between rounds; each round merely tabulates the rankings on the ballots that were cast by voters before the polls closed. *Id*. As with all elections, there is a single, final tabulation of the votes resulting in the declaration of the winning candidate. *Id*. And while a voter may rank up to three candidates, election officials ultimately count the voter's vote towards no more than one candidate. ER 22 (Slip Op. at 21:11-16); ER 749.

During the tabulation process, some ballots may become "exhausted." A voter's ballot is exhausted when all of the candidates ranked on that ballot have been mathematically eliminated. ER 750, 786. If a voter has opted to rank only a first and second choice but no third choice, her ballot will become exhausted when those candidates are eliminated. ER 5 (Slip. Op. at 4:10-11), 750. Similarly, if a voter has "exercise[d] all three available choices but fail[ed] to rank a single

[7] The City's Department of Elections also provides a visual explanation of the City's RCV system, available at http://www.sfelections.org/demo/.

candidate who survives into the final rounds" of tabulation, her ballot will be exhausted as well. *Id.* (Slip Op. at 4:11-12). An exhausted ballot merely means that the voter's candidates of choice were eliminated due to a lack of support from other voters. In other words, the voter simply preferred the losing candidates. Like votes for losing candidates in other elections, those votes have not been rendered null and void. "No matter how or for whom a voter casts his or her preferences, every ballot is counted and every ballot affects the election." ER 15 (Slip Op. at 14:16-17).

Lastly, while the parties have stipulated to the number of exhausted ballots occurring in past RCV elections, the factual record is devoid of evidence that San Francisco's three-candidate "limit" actually *causes* exhaustion. In the proceedings below, Appellants submitted no evidence establishing that more than a handful of voters would rank *more* than three candidates. As Appellants did not dispute, in past RCV elections, "San Francisco voters often forego the use of all three options" on the ballot. ER 13-14 (Slip Op. at 12-13 n.6); ER 152-56. Similarly, despite their comparisons of the number of exhausted ballots to the "margin of victory" in certain contests, *see* Br. at 13-17, Appellants do not claim "that the results of any of those elections would have been different" if ballots were not exhausted. ER 35-36 (Transcript at 6:21-7:5).

II. THE CITY'S DEPARTMENT OF ELECTIONS AND ITS VOTING SYSTEM

Each election in San Francisco is a complicated and lengthy logistical undertaking. The Department of Elections (the "Department") serves more than 450,000 registered voters and manages approximately 560 polling places during each election. ER 747. Before, during, and after each election, the Department

must complete a wide variety of tasks. These tasks include, but are not limited to, the following:

- hiring and training approximately 3,000 temporary poll workers;
- testing the accuracy of every voting machine;
- preparing and printing ballots;
- mailing overseas and other vote-by-mail (absentee) ballots;
- preparing, printing and distributing information to voters, including the Voter Information Pamphlet, in advance of each election;
- collecting and tabulating ballots; and
- conducting a mandatory post-election hand count (known as the post-election "canvass") to verify election results.

ER 747-48.

The City's voting system employs two kinds of voting equipment – optical scan machines that tabulate paper ballots, and touch-screen machines for voters with disabilities and others who prefer not to use a paper ballot. ER 754-56. Optical scan machines process paper ballots completed at polling places. ER 755-56. The City also uses optical scan machines to count all absentee ballots, which represent an increasingly large portion of the vote in San Francisco elections. ER 747, 756. In sum, the vast majority of San Francisco voters – approximately 99% – record their votes on paper ballots that are "read" by optical scan machines. ER 754. Because the California Secretary of State also requires the City to transfer votes cast on touch-screen machines onto paper ballots, every ballot currently cast in San Francisco is eventually recorded on a paper ballot and processed by an optical scan machine. ER 754-56, 843-44.

The voting system used by San Francisco is the only voting system that the California Secretary of State has certified for use in RCV elections, and under

State law, the Department cannot use a voting system without that certification. ER 753; Cal. Elec. Code § 19201(a). A number of limitations of the City's voting system have compelled the use of three-candidate RCV in San Francisco:

- The optical scan machines used in San Francisco elections can only process ballots with three columns and certain dimensions. ER 741-42, 758, 762-63. Both restrictions limit the amount of information that can be included on a ballot, and consequently the number of candidates that a voter can rank.
- The optical scan and touch-screen machines used at polling places can record and store a limited amount of information, and allowing for the ranking of more than three candidates may exceed that capacity. ER 743, 766-67.
- Even if it were possible to overcome these technological barriers, a more complicated ballot that permitted voters to rank every candidate competing for a single office is likely to lead to voter confusion and mismarking of ballots. ER 742, 767-68. This is confirmed by reviews of a four-choice demonstration ballot prepared prior to the initial launch of RCV. ER 759-60. The participants in that demonstration project roundly rejected the four-choice ballot as confusing, difficult to mark, and likely to lead to the casting of invalid votes. ER 760. A multi-card ballot that allowed voters to rank as many as ten or twenty candidates per contest, as Appellants demand, would be exponentially more complicated for voters and would create insurmountable logistical problems. ER 763-66, 767-68.

For these, and several other reasons discussed in detail in section IV, *infra*, the City cannot offer voters the opportunity to rank more than three candidates without compromising the accuracy, integrity, and reliability of local elections. Appellants do not dispute any of these facts.

III. THE DISTRICT COURT PROCEEDINGS

The district court twice rejected Appellants' arguments that the City's three-candidate RCV system is unconstitutional. First, in his order denying Appellants' motion for a preliminary injunction, Judge Seeborg concluded that Appellants had not demonstrated a likelihood of success on the merits of their claims. SER 43 (Order at 19:6-7). Specifically, the court held that while San Francisco's three-candidate RCV "does exert some burden on voting rights, it is not severe." SER 43 (Order at 19:4-5). The court further held that Appellees had justified that burden because the City "adequately introduced important government interests that are well-served" by its three-candidate implementation of RCV. SER 43 (Order at 19:5-6).

In August 2010, the district court heard the parties' cross-motions for summary judgment and granted summary judgment for Appellees. The district court again concluded that the burden imposed on voters by San Francisco's three-candidate RCV system is not severe. Under the City's RCV system, all voters "may express three preferences in any manner they wish" and "each voter has an identical opportunity at the outset to express a preference" between competing candidates. ER 13 (Slip Op. at 12:10-14). Further, "[n]o matter how or for whom a voter casts his or her preferences, every ballot is counted and every ballot affects the election." ER 15 (Slip Op. at 14:16-17). The court also rejected Appellants' theory that a single RCV election consists of a series of elections, finding that "*voting* takes places only once" and "voters cannot rethink their decisions" by casting another vote. ER 17 (Slip Op. at 16:22-26) (emphasis in original). Lastly, the court concluded that Appellants' argument that RCV does not "count" exhausted ballots was a "misconception" – "exhausted ballots are counted just as if

they were votes cast for losing candidates in a winner-take-all system." ER 19 (Slip Op. at 18:5-14).

The district court also held that RCV does not dilute votes by giving any votes more "weight" than others. While "all voters may rank up to three candidates, . . . election officials ultimately 'count' one." ER 22 (Slip Op. at 21:11-12). Consequently, the court concluded that San Francisco's three-candidate RCV – insofar as it does not necessarily permit the ranking of every competing candidate – is a "neutral, even-handed regulation" that appropriately channels expressive activity at the polls. ER 23 (Slip Op. at 22:10-14).

The district court then held that three-candidate RCV furthers several undisputed, important interests "related to the stability, integrity and orderly administration of elections." ER 24 (Slip Op. at 23:16-17), ER 27 (Slip Op. at 26:1-3). The court also recognized that the City's current voting system cannot process ballots that could accommodate an unlimited number of rankings without compromising the accuracy and integrity of local elections. ER 25-26 (Slip Op. at 24-25).

SUMMARY OF ARGUMENT

Because of the integral role that governments play in elections, courts reviewing the constitutionality of election regulations apply a "flexible" standard that balances the rights of the voters and the role of the government in shaping the election process. If the challenged election regulation imposes a "severe burden" on voters, it is subject to strict scrutiny; if the challenged regulation is a reasonable and nondiscriminatory restriction, it need only further important regulatory interests. The City's three-candidate RCV system is constitutional because it is a neutral, non-discriminatory regulation that serves important and compelling governmental interests.

This Court has held that there are two types of voting restrictions that *severely* burden voters: (1) those that prevent voters from voting; and (2) those that dilute the mathematical "weight" of votes in violation of the "one-person-one-vote" principle. Neither type of severe burden exists here. It is undisputed that voters who have cast exhausted ballots are not prevented from voting. Exhausted ballots are counted like all other ballots – they simply become exhausted because voters selected candidates with the least amount of public support. All election systems, including RCV, must sift the winning candidate from the losing candidates. To prop up this argument, Appellants insist that a single RCV election actually consists of several, separate elections. But each RCV election is a *single* election: voters cast a single ballot by a certain point in time, they do not return to cast another ballot at a later date, and the Department calculates and tabulates the final results just once.

The City's RCV system also does not violate the "one-person, one-vote" principle. In each round of RCV, preferences are not counted in a cumulative manner – each ballot counts only as a single vote in favor of a single candidate. No ballot "counts" as more than one vote towards a candidate at any point in the tabulation process, no matter how many rounds of tabulation take place.

San Francisco's three-candidate RCV does not burden any voters. It provides voters with three chances to express their preferences for candidates for a single office, more of an opportunity than many election systems provide. Even assuming it did impose a limited burden, the City's election system serves several important – and compelling – government interests: ensuring that ballots are accurately and reliably completed, gathered, and tabulated. Appellants do not dispute the factual basis for any of these interests. Instead, they attempt a bait-and-switch by focusing on interests underlying RCV generally, not the three-candidate

"limit" that their suit actually targets. Accordingly, this Court should uphold the City's three-candidate RCV system and reject Appellants' plea to intervene in the voters' policy decisions by weighing the "pros and cons" of different election systems.

Appellants' due process claim also has no merit. Because San Francisco's three-candidate RCV does not disenfranchise any voters, due to exhaustion or any other reason, there is no due process violation.

STANDARD OF REVIEW

The district court's order granting summary judgment is subject to *de novo* review by this Court. *Swarner v. United States*, 937 F.2d 1478, 1481 (9th Cir. 1991). While the factual findings in the court's order are "not protected by the deferential clear-error standard of review," they do "pinpoint the undisputed facts supporting the summary judgment." *Id.*

ARGUMENT

I. LOCAL GOVERNMENTS HAVE SIGNIFICANT LEEWAY IN REGULATING THE CONDUCT OF THEIR ELECTIONS.

The Supreme Court has repeatedly recognized the practical necessity of allowing extensive regulation of local elections. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Local governments have a vital role in ensuring "that elections are operated equitably and efficiently." *Id.*

Further, with respect to how municipalities select local officials, "governments may need many innovations, numerous combinations of old and new

devices, great flexibility in municipal arrangements to meet changing urban conditions." *Sailors v. Board of Educ.*, 387 U.S. 105, 110-11 (1967). Thus, the Constitution does not "compel[] a fixed method of choosing state or local officers or representatives," *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982), or "prevent experimentation" in the selection of public officials. *Sailors*, 387 U.S. at 111. State and local governments have adopted a wide range of voting methods without running afoul of the Constitution. *See, e.g., Fortson v. Morris*, 385 U.S. 231, 235-36 (1966) (upholding system allowing Georgia state legislature to choose Governor when no candidate receives majority in general election); *Edelstein v. City and County of San Francisco*, 29 Cal.4th 164, 183 (2002) (affirming constitutionality of plurality elections).

For these reasons, "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (citing *McDonald v. Board of Election*, 394 U.S. 802 (1969)). Because "[n]o balloting system is perfect" and all systems restrict voters to some degree, the Constitution demands deference to reasonable policy judgments in the context of local elections administration. *Weber v. Shelley*, 347 F.3d 1101, 1106-07 (9th Cir. 2003). Thus, the courts have upheld a myriad of election regulations as reasonable and non-discriminatory, even where there is a significant possibility that they would burden voters. *See, e.g., Crawford v. Marion County Election Board*, 553 U.S. 181, 185, 202-03 (2008) (plurality opinion) (voter identification); *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973) (advance enrollment requirement for party primary elections); *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973) (requirement that voters register at least 50 days prior to election); *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973) (requirement that voters reside in jurisdiction for 50 days prior to registration); *see also Ayers-Schaffner v.*

DiStefano, 37 F.3d 726, 729 n.8 (1st Cir. 1994) ("It is, of course, well established that states may restrict the voting privilege through residency and other requirements.").

Notably, unlike San Francisco's three-candidate RCV, some of the election laws upheld by the Supreme Court may actually prevent some otherwise eligible voters from casting a vote altogether. *See, e.g.*, *Crawford*, 553 U.S. at 221 (Souter, J., dissenting) (commenting that there was "no reason to doubt that a significant number of state residents will be discouraged or disabled from voting" as a result of Indiana's voter identification requirement). As established by the undisputed facts, San Francisco's three-candidate RCV does not prevent any voter from casting a ballot. Thus, the City's three-candidate RCV undeniably works a less severe burden than any of these common and legally permissible election regulations.

II. LOCAL ELECTION REGULATIONS THAT DO NOT IMPOSE SEVERE BURDENS ON VOTERS ARE SUBJECT TO LESS DEMANDING REVIEW.

While voting is a fundamental component of a democratic society, "the right to vote in any manner" is not "absolute." *Burdick*, 504 U.S. at 433. "Election laws will invariably impose some burden upon individual voters." *Id.* Thus, to assess the constitutionality of election laws, courts apply a "flexible standard" that weighs the burdens of such regulation against the government's interests in enacting those laws. *Id.* at 434. As a general proposition, courts engage in the following analysis:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. (quotations and citations omitted). Focusing on "the extent to which a challenged regulation burdens First and Fourteenth Amendments rights," the Court has restated this general proposition in the following, more specific formulation:

> . . . when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

Id. (quotations and citations omitted). Following the general balancing approach, this specific formulation highlights two specific ways in which it may be applied: if the burden is severe, the regulation is subject to strict scrutiny; if the challenged regulation is reasonable and nondiscriminatory, it may be justified by important regulatory interests. The Ninth Circuit has consistently applied this balancing approach. *See, e.g.*, *Lemons v. Bradbury*, 538 F.3d 1098, 1103 (9th Cir. 2008); *Prete v. Bradbury*, 438 F.3d 949, 961 (9th Cir. 2006); *Caruso v. Yamhill County ex rel. County Com'r*, 422 F.3d 848, 859 (9th Cir. 2005); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002).[8]

Appellants argue that this balancing approach is the same as intermediate scrutiny. Br. at 53. This is incorrect. Intermediate scrutiny is a "different analysis altogether" from the balancing test used to examine election regulations. *Doe v. Reed*, 586 F.3d 671, 678 n.11 (9th Cir. 2009). As *Burdick* and its progeny clearly direct, the justification for an election regulation *varies* according to the burden

[8] Appellants argue that this standard no longer applies after the Supreme Court issued its multiple opinions in *Crawford*. *See* Br. at 55-56 n.84. Notably, *Crawford* itself disavows any departure from *Burdick*. 553 U.S. at 190 n.8. And this ignores that the Ninth Circuit has applied the same analysis both before and after *Crawford*. *See Pest Committee v. Miller*, --- F.3d ---, 2010 WL 4869097 at *7 (9th Cir. Dec. 1, 2010); *Lemons*, 538 F.3d at 1103. The Eleventh Circuit has also refused to acknowledge a significant change the appropriate legal standard. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352-53 (11th Cir. 2009).

that it may impose on voters. In contrast, under intermediate scrutiny, the restriction must *always* satisfy a pre-determined constitutional threshold. *See id.* at 679.

As the Ninth Circuit has held, there are very few burdens that constitute "severe" restrictions:

> To date, the Supreme Court has subjected only two types of voting regulations to strict scrutiny. First, strict scrutiny applies to regulations that unreasonably deprive some residents in a geographically defined governmental unit from voting in a unit wide election. Examples include laws that condition the right to vote on property ownership or payment of a poll tax. Second, regulations that contravene the principle of one person, one vote by diluting the voting power of some qualified voters within the electoral unit also are subject to strict scrutiny. Examples include laws that weigh votes from rural counties more heavily than votes from urban counties.

Lemons, 538 F.3d at 1104 (quotations and citations omitted). Here, as discussed below, the City's three-candidate RCV does not impose a severe burden because it neither prevents anyone from voting nor dilutes the relative effectiveness of anyone's vote.

III. SAN FRANCISCO'S THREE-CHOICE RCV DOES NOT IMPOSE A SEVERE BURDEN ON VOTERS.

A. San Francisco's three-candidate RCV does not prevent any voter from voting.

San Francisco's three-candidate RCV system does not impose a "severe burden" by "unreasonably depriv[ing]" some voters from voting. *Id*. This type of severe burden exists only when an election law prohibits members of a defined group from voting in an election altogether. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 359-60 (1972) (one-year residency requirement); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1970) (property ownership requirement); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 622 (1969) (prohibiting residents who neither rent or lease property nor have children from voting in school district

elections); *Carrington v. Rash*, 380 U.S. 89, 96-97 (1965) (prohibiting members of armed forces from voting in local elections). Because San Francisco's three-candidate system does not deny any resident the ability to vote in an election, the City's voting system does not impose such a burden on any voter.[9] None of Appellants' strained arguments to the contrary have merit.

1. Voters who cast exhausted ballots receive an equal opportunity to participate in the election.

Under the City's RCV system, every voter has an equal opportunity to indicate up to three choices on his or her ballot, including qualified write-in candidates. ER 748-49. While this fact is undisputed, Appellants nonetheless suggest that some voters – those who have cast exhausted ballots – have been denied the ability to vote. Br. at 12-13, 27-28. The Constitution protects the "right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336. But the Constitution does not require that all ballots, no matter how voters complete them, will generate equal outcomes, *i.e.*, by avoiding exhaustion. *See Griffin v. Burns*, 570 F.2d 1065, 1079 n.14 (1st Cir. 1978) ("The Constitution protects the right of all citizens to democratic processes, not the right of any particular candidate or voters to a certain result.").

Exhausted ballots are counted like all other ballots cast in RCV elections. In fact, the exhausted ballots on which Appellants focus – those that rank three mathematically eliminated candidates – are necessarily reviewed at least three times to ascertain the voter's preferences. ER 750. Before a ballot has become exhausted, the RCV process has tabulated the voter's first, second, and third-choice

[9] Appellants misrepresent the record by claiming it is undisputed "that Restricted IRV has denied thousands of voters the right to have a vote counted in decisive instant runoff elections." Br. at 27. The parties stipulated to certain figures concerning the incidence of exhausted ballots, ER 668-70, but continue to disagree as to their legal significance.

rankings on that ballot. *Id*. A ballot only has a *chance* of being exhausted once these multiple levels of review have taken place. Appellants' suggestion that an exhausted ballot goes uncounted is a "misconception." ER 19 (Slip Op. at 18:6). For this reason, Appellants' citation of the language in Charter section 13.102(a)(3), *see* Br. at 12, is unavailing. It is true that after a ballot has become exhausted, it is not "counted" towards any of the remaining candidates. But that is necessarily the case since the exhausted ballot – by definition – does not contain a vote for any of those candidates. The rankings on that ballot have been used exclusively for candidates who have already lost the election.[10]

An exhausted ballot is just a ballot that contains choices for the losing candidates, and in that respect, it is the functional equivalent of a vote for a losing candidate in a non-RCV election. The Massachusetts Supreme Court made this point in a challenge to Cambridge, Massachusetts' RCV system. In *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 13-15 (Mass. 2006), the plaintiff challenged Cambridge's voting system for city councilmembers, which – like the City's RCV system – allowed voters to rank candidates in order of preference and transferred votes as candidates were eliminated. The plaintiff was the last candidate eliminated in such an election, and one of his legal arguments challenged Cambridge's treatment of "exhausted" ballots. *Id.* at 13-14 & n.7. Like Appellants, the candidate in *McSweeney* argued that the city's voting system was constitutionally suspect because it did not "count" exhausted ballots. *Id.* at 14. But

[10] Further, the Department's published election results for RCV elections tally exhausted ballots round-by-round. *See, e.g.*, Exhibit A to Appellants' Request for Judicial Notice; ER 928-41. Since the Department keeps a running total of the these ballots according to the round of RCV tabulation in which they became exhausted, Appellants cannot credibly argue that the City is not "counting" them in any given round.

the Massachusetts Supreme Court disagreed with the plaintiff's characterization of "exhausted" ballots:

> They too are read and counted; they just do not count toward the election of any of the . . . successful candidates. Therefore it is no more accurate to say that these ballots are not counted than to say that the ballots designating a losing candidate in a two-person, winner-take-all race are not counted.

Id. While the court ultimately denied the plaintiff's claim on another basis, *id.* at 14-15, that reasoning applies here as well. As with the ballots challenged by the plaintiff in *McSweeney*, in San Francisco's RCV system, "the exhausted ballots are counted just as if they were votes cast for losing candidates in a winner-take-all system." ER 19 (Slip Op. at 18:13-14). Thus, "the voter behind an exhausted ballot still participates and 'affects' the election as much as any voter who participates in, but in the end fails to select a winning candidate, in a plurality system." ER 19 (Slip Op. at 18:17-19). And as the district court cogently noted, "a vote for a losing candidate is simply not the same as disenfranchisement." ER 20 (Slip Op. at 19:1).

At its core, Appellants argue that the incidence of ballots cast for losing candidates violates the Constitution, but in San Francisco, as in every election, there are winners and there are losers. After all, the "function of the election process is to winnow out and finally reject all but the chosen candidates," *Burdick*, 504 U.S. at 438, and the "right to equal participation in the electoral process" does not protect anyone "from electoral defeat." *Mobile v. Bolden*, 446 U.S. 55, 77 (1980).

2. RCV elections are single elections.

In an effort to breathe life into their theory that the City's three-candidate RCV does not count votes, Appellants attempt to establish that a single RCV

election is actually a series of separate elections. But there is no factual or legal basis for Appellants' claim.

Appellants' argument that a single RCV election is a series of separate election has no basis in fact. In the district court, Appellants did not dispute that in the City's RCV elections, voting and the tabulation of final results only occurs once. The RCV tabulation system re-distributes and re-tallies rankings, often resulting in several "rounds" of tabulation. ER 749-50. But no new votes are cast during the tabulation process. ER 750. And while the tabulation process consists of several steps, the City's RCV system tabulates and calculates final results only one time. *Id.* Thus, "[c]ontrary to a series of runoffs separated in time, voters cannot rethink their decisions or reflect upon a shifting political landscape." ER 17 (Slip Op. at 16:24-26). For these reasons, Appellants' "County X" hypothetical, *see* Br. at 3-5, is irrelevant. San Francisco's three-candidate RCV does not consist of multiple rounds of voting separated by time. Nor does it allow only certain voters to cast a vote. Unlike "County X," San Francisco provides all voters with an equal, *simultaneous* opportunity to complete and cast their ballots from the same list of candidates.

Ignoring these facts, Appellants resort to a grab-bag of sources to support their theory: FairVote's online description of RCV, a ballot argument submitted by the City's Board of Supervisors in support of Proposition A in 2002, an excerpt from the Minnesota Supreme Court's decision in *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009), and the conclusory statements of their expert, Dr. Katz. Br. at 29. As to the first source, Appellants fail to explain how statements on the website of FairVote, an organization not party to this suit, constitute evidence or persuasive legal authority on the question. Moreover, FairVote's description of RCV, and the Board of Supervisors' description in the

Voter Information Pamphlet in 2002, were merely explanations for laypeople about how RCV works. These statements clearly were not intended as legal conclusions and are especially unhelpful here, where the parties do not dispute how San Francisco's RCV system operates. Both descriptions simply analogize RCV elections to more "traditional" elections; they are illustrative explanations of RCV and nothing more. The same is true of the *Minnesota Voters Alliance* decision – the Minnesota Supreme Court discussed general and primary elections merely as an *analogy*. When discussing the process of transferring votes between candidates ranked on a single ballot, the Minnesota Supreme Court stated, "this aspect of the IRV methodology is directly *analogous* to the pattern of voting in a primary/general election system." 766 N.W.2d at 690 (emphasis added). Those analogies help describe RCV to those who are unfamiliar with the voting system, but they do not stand for the legal conclusion Appellants seek. Appellants simply "push the analogy too far." ER 22 (Slip Op. at 21:10).

Finally, Dr. Katz's testimony, Br. at 32-33, untethered to any analysis or evidence, also does not support Appellants' theory.[11] That San Francisco voters decided to replace the previous run-off system with RCV does not "demonstrate" that the latter also consists of two separate elections – especially where voters did so for the explicit purpose of replacing a two-election system with a single RCV

[11] In the district court, Appellees objected to these portions of Dr. Katz's declaration as inadmissible because they were beyond the scope of his expert disclosure, *see* Fed. R. Civ. P. 26(a)(2), 37(c)(1). SER 87-89; *see also* ER 267-74 (expert disclosure). Additionally, reliance on Dr. Katz's "expert" testimony is especially dubious given that a Washington State trial court previously questioned his expert qualifications - concluding that he has improperly assumed facts "that determine[d] the outcome [he] obtain[ed]." *See* SER 66 (*Borders v. King County*, No. 05-2-00027-3 (Wash. Sup. Ct. Jun. 24, 2005) (final judgment)). The district court did not rule on Appellees' objections. and instead declined to discuss Dr. Katz's views. To the extent this Court considers his statements, Appellees renew their objections.

election. ER 777-78. As the Voter Information Pamphlet explained, "Proposition A is a Charter amendment that would require the City to use an instant run-off voting method that would *eliminate* separate run-off elections." ER 777 (emphasis added). In addition, Dr. Katz's ad hoc "definition" of an election does not carry the day. While he insists that changing the participating voters and candidates results in a new election, in the midst of a single RCV election, the voters and candidates do *not* change. The voters vote once from the same pool of candidates, and the Department calculates final results only one time. ER 748-50.

The two decisions cited by Appellants – *Ayers-Schaffner* and *Partnoy v. Shelley*, 277 F. Supp. 2d 1064 (S.D. Cal. 2003) – highlight the difference between San Francisco's single RCV elections and a multiple-election system. In these cases, there were two separate matters in which voters could cast a vote, and some voters were excluded from casting a vote on one of them. In the City's RCV system, by contrast, voters can only vote once, and every voter has the equal opportunity to do so. In *Ayers-Schaffner*, 37 F.3d at 727, the Rhode Island Board of Elections sought to exclude otherwise eligible voters from voting in a second election held to remedy a prior, invalid election because those voters had not participated in the first election. And in *Partnoy*, 277 F. Supp. 2d at 1078-79, the district court invalidated a provision of the California Elections Code that permitted only those voters who had cast a vote on the question of whether to recall the Governor to cast a second, separate vote on the question of who should fill that potentially empty office. In other words, in *Ayers-Schaffner*, there were two separate elections, and in *Partnoy*, two separate issues appeared on a single ballot.[12] As discussed above, in the City's RCV elections, voters do not cast two

[12] Appellants' citation of *People ex. rel. Devine v. Elkus*, 59 Cal. App. 396 (1992), is similarly inapposite. Br. at 34. There, the California Court of Appeal disapproved of a limited voting scheme because it did not permit voters to select *at*

separate ballots at separate points in time, and in making their first, second, and third-choice selections, they are considering a single issue – which individual will occupy a local elective office on the ballot.

3. San Francisco's three-candidate implementation of RCV is not a content-based restriction.

It is undisputed that San Francisco's three-candidate RCV system permits all voters to select any of the candidates seeking a single office on their ballot, without restriction. ER 748-49. Ignoring these facts, Appellants insist that the City's RCV system "penalizes" voters based on the "content" of their ballots. Br. at 38. The supposed "penalty," exhaustion, is not a penalty at all. As discussed above, a ballot that becomes exhausted has been counted and is the equivalent of a vote cast for losing candidates.

Due to its three-candidate implementation, Appellants argue that San Francisco's RCV system "forces" voters to vote in a certain manner. Br. at 38-39. Appellants' only support for this position, *Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir. 1995), is inapposite. In *Hussey*, the Ninth Circuit reviewed the City of Portland's attempt to impose higher sewer connection fees on persons who refused to consent to annexation. *Id.* at 1262. Since the annexation proceeding was akin to an election, the city's attempt to impose fees on those who voted in a certain manner was improper because it was "similar to, but more distorting than, [a] poll tax." *Id.* at 1265. The city in *Hussey* essentially coerced votes through financial penalties. Appellants here cannot credibly argue that any aspect of San Francisco's RCV system is similar to a poll tax, the aspect of the annexation proceeding that the *Hussey* court found to be improper. In San Francisco elections, some voters

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least one candidate for each available office. *Id.* at 398-99. San Francisco's three-candidate RCV indisputably permits voters to select up to three candidates for each local elective office appearing on the ballot.

may attempt to vote strategically to ensure that their vote accrues to the winner of the election. But that is no different than any other election system and even if it were a burden, it is not unique to RCV.[13]

B. San Francisco's three-candidate RCV does not violate the "one person, one vote" principle.

San Francisco's three-candidate RCV neither dilutes nor enhances any vote cast. Appellants' assertion that a voter who casts an exhausted ballot has had three votes counted – while some voters have only one vote counted – misrepresents the facts in the record. During each round of RCV tabulation, a ballot cannot count as more than one vote for one candidate. ER 749. Because no ballot – at any given time during the RCV process – can count as a vote towards more than one candidate, each person's vote has the same mathematical "weight." Further, at the time that the vote is cast, each voter has an equal opportunity to select up to three different candidates for a single office. ER 748-49. For vote dilution purposes, the "crucial consideration is the right of each qualified voter to participate on an equal footing in the election process." *Wells v. Edwards*, 409 U.S. 1095, 1098 (1973). Since that equal opportunity to rank up to three candidates is provided to every voter in the City's three-candidate RCV system, no person has any more or less "voting power" than anyone else.

In *Minnesota Voters Alliance*, the Minnesota Supreme Court rejected a similar "one person, one vote" argument last year in a constitutional challenge to Minneapolis' RCV system. In Minneapolis, RCV proceeds in the same manner as

[13] In a plurality system like a Presidential election, many voters who are genuinely inclined to vote for third-party candidates nonetheless vote "strategically" by casting their ballot for a Democrat or Republican in the hopes of more directly affecting the outcome. While "strategic" voting is similarly possible in an RCV election, San Francisco's three-candidate RCV system actually *decreases* the likelihood by providing voters with three opportunities to select candidates instead of one.

San Francisco's RCV, and Minneapolis uses a three-candidate ballot just like San Francisco.[14] *Id.* at 686-87. There, the plaintiffs argued that the Minneapolis system gave "some votes more weight than others" because voters who selected a candidate who survived elimination in the first round did not have the opportunity to have their votes "counted for a *different* candidate in the new round." *Id.* at 689, 690 (emphasis in original). In other words, the plaintiffs argued that voters whose first-choice candidate was eliminated in the first round would have enhanced voting power because their second choice would be counted in the second round of tabulation. *Id.* at 690. But the court rejected this argument, finding that the Minneapolis system did not treat voters unequally: "Every voter has the same opportunity to rank candidates when she casts her ballot, and in each round every voter's vote carries the same value." *Id.* at 693.

Appellants' argument is identical to the argument considered and rejected in *Minnesota Voters Alliance*. As with the RCV system examined in *Minnesota Voters Alliance*, under San Francisco's RCV system, each voter has the same opportunity to rank up to three candidates, and each voter's ballot can count as no more than a single vote towards a single candidate. That some ballots may be exhausted or that different rankings will be tabulated on some ballots as candidates are eliminated from contention does not mean that some votes receive greater weight. *See also McSweeney*, 665 N.E.2d at 14 ("Although the[] ballots are examined [multiple] times, no ballot can help elect more than one candidate."); *Stephenson v. Ann Arbor Bd. of Canvassers*, No. 75-10166 AW (Mich. Cir. Ct.

[14] *See* ER 702 ("In 2009, Minneapolis voters may rank up to three candidates for single and multiple seat municipal offices. Each ballot will have three columns."). The *Minnesota Voters Alliance* decision did not focus on the three-candidate limit in the Minneapolis system, but the court's analysis is nonetheless directly on point.

Nov. 1975) (upholding RCV system because "[e]ach voter has an equal opportunity and right at the time he or she casts his or her ballot," and the "fact that each person voting lists different orders of preference does not mean that some voters have greater rights than others.") (ER 707-15).

C. San Francisco's three-candidate RCV imposes little or no meaningful burden on voters.

San Francisco's three-candidate RCV does not impose a severe burden for the reasons discussed above – and indeed, it imposes little or no burden at all on its voters. First, compared to other, more "traditional" voting systems, San Francisco's three-candidate RCV system does not impose any meaningful burden at all. It is actually *less* burdensome than other voting systems because it provides voters with the opportunity to support three candidates for a single elected position, whereas many election systems only permit voters to select a single candidate at a time. Second, the Supreme Court's decision in *Burdick*, which upheld a complete ban on the ability to vote for certain candidates, also supports this conclusion. If a complete ban on voting for write-in candidates imposes only a limited burden, allowing voters to select up to three candidates cannot be more than a limited burden either. And lastly, even if there were some burden, Appellants failed to substantiate their assertion that many voters would select more than three candidates if provided with that opportunity. The number of exhausted ballots relied on so heavily by Appellants does no more than hint at that possibility, and such assumptions cannot establish that the City's three-candidate system actually burdens many voters.

San Francisco's RCV system also does not meaningfully burden any voters because it provides them with three opportunities to select the winning candidate, and three chances to avoid exhaustion. Providing greater opportunities to voters to

express their preferences than in a non-RCV system cannot – as a practical or logical matter – be a burden on voters. As the Massachusetts Supreme Court characterized RCV:

> . . . a preferential scheme, far from seeking to infringe on each citizen's equal franchise, seeks more accurately to reflect voter sentiment and to provide for the representation of minority groups in the municipal council or to enlarge the possibility of a voter's being represented therein by giving [the voter] an opportunity to express more than one preference among candidates. This purpose is not a derogation from the principle of equality but an attempt to reflect it with more exquisite accuracy.

McSweeney, 665 N.E.2d at 15 (internal citation and quotation marks omitted) (alteration in original). Because San Francisco's three-candidate RCV provides voters with more choices – not fewer – than other election systems, it cannot be said to burden voters in any significant way.

Burdick also supports this conclusion. In *Burdick*, the Supreme Court upheld Hawaii's prohibition on write-in votes against a challenge by a voter who claimed that the system "deprive[d] him of the opportunity to cast a meaningful ballot" and have his voice heard at the polls. 504 U.S. at 437-38. Even though Hawaii did not allow voters to cast write-in votes for their chosen candidates – and would not count ballots cast for write-in candidates – the Court concluded that the burden was "a very limited one" because voters retained the right to participate in the electoral process. *Id.* at 437. San Francisco's RCV system restricts voting far less than *Burdick*. Unlike *Burdick*, San Francisco's RCV system does not preclude the selection of any candidate, including qualified write-in candidates. Appellants protest the district court's reliance on *Burdick*, *Br.* at 26, but do not do so in a meaningful way. While the plaintiff in *Burdick* may have sought to cast a protest vote, *id.* at 438, the Court did not limit its holding to voters who wished to support a write-in candidate for that reason. Appellants also correctly note that *Burdick*

considered the relative ease that candidates have in gaining access to the ballot in determining that the burden of the write-in prohibition was slight. *Id.* at 435-37. Even so, the burden on voters there was greater than the burden that Appellants allege here because RCV does not prevent voters from selecting any candidate. It is undisputed that every candidate in San Francisco appears in every column of every ballot, along with a space for qualified write-in candidates. ER 749. Thus, as in *Burdick*, the City's RCV system cannot be said to impose anything more than a limited burden.

Moreover, even if their theory had legal footing, which it does not, Appellants fail to establish any factual support for this argument. In *Crawford*, the Court closely examined the record to determine whether there was any evidence supporting the petitioners' allegations that Indiana's voter identification requirement significantly burdened voters. 553 U.S. at 197-202. Because the petitioners "advanced a broad attack on the constitutionality" of the voter identification requirement, they bore "a heavy burden of persuasion." *Id.* at 200. The Court concluded that the petitioners failed to satisfy their burden by relying on a handful of statements that did not conclusively suggest any real burden existed. *Id.* at 200-02. Here, because Appellants also seek to block any use of San Francisco's three-candidate RCV, they shoulder the same heavy burden. But rather than provide evidence to support their theories, they ask this Court to take a leap of faith. To establish that San Francisco's three-candidate "limit" has actually restricted voters, they rely solely on the declarations of the six named plaintiffs stating that they would rank more candidates if offered that opportunity. ER 485-513. The allegations of six voters, standing alone, cannot satisfy the heavy burden described in *Crawford*. *See Minnesota Voters Alliance,* 766 N.W.2d at 696 ("The Supreme Court has recently reiterated that where the regulation and the burden

imposed affect a limited number of voters, the burden cannot be characterized as severe.") (citing *Crawford*, 128 S.Ct. at 1622-23).

Lacking evidence that many voters would rank more than three candidates, Appellants instead point to the large number of exhausted ballots that have occurred in some elections for members of the San Francisco Board of Supervisors. Br. at 13-16. But Appellants fail to establish a critical fact: that the voters who cast those exhausted ballots would have ranked more than three candidates. It is undisputed that "San Francisco voters often forgo the use of all three options" that the City's RCV system currently provides to them. ER 13 (Slip Op. at 12 n.6); *see also* ER 153-56, 719-21. For example, in 2008, between 28% and 40% of voters did not even use all three available rankings in the supervisorial contests in which there were more than three competing candidates. ER 153-54. In the 2006 race for the District 6 seat on the Board of Supervisors, over half of the voters did not select three different candidates. ER 154.[15] Since many voters do not exercise all of the choices currently available, it is untenable to assume that many voters would want to select *more* than three candidates and are actually "restricted" in any way by San Francisco's three-candidate RCV. In the absence of some evidence supporting Appellants' contention, the Court should not assume these facts to be true. *See Weber*, 347 F.3d at 1105-07 (finding the lack of a paper

[15] In the district court, Appellants objected that this evidence was untimely submitted, *see* ER 138, and Judge Seeborg declined to rule on that objection. Regardless, their objection is misplaced because these figures merely recalculate Appellants' data using simple arithmetic. For example, the number of ballots ranking fewer than three candidates is easily derived by subtracting the number of ballots ranking three different candidates from the total number of ballots. *Compare* ER 153-54, *with* ER 650.

audit trail for touch-screen voting system not a burden where impact on voters was hypothetical).[16]

IV. SAN FRANCISCO'S THREE-CANDIDATE RCV BALLOT IS A REASONABLE, NON-DISCRIMINATORY RESTRICTION THAT IS JUSTIFIED BY IMPORTANT AND COMPELLING GOVERNMENTAL INTERESTS.

A. Technological, logistical, and regulatory concerns prevent the City from offering voters unlimited rankings.

For the reasons discussed above, allowing voters to rank up to three candidates but no more – when it is not feasible to offer unlimited rankings – is a reasonable non-discriminatory restriction. *See Burdick*, 504 U.S. at 434. As such, it need only be justified by important government interests. And since the interests relied upon below are important and well-established, the City's evidentiary burden is low. *See Munro v. Socialists Workers Party*, 479 U.S. 189, 194-96 (1986) (refusing to require "particularized showing" because it "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action"). The City has more than satisfied its burden here.

The City's three-choice implementation of RCV is justified by a number of important – indeed, compelling[17] – interests related to the stability, integrity and orderly administration of elections. *See Eu v. San Francisco Democratic County Central Committee*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election processes."); *Storer*, 415 U.S. at 736 (the "State's interest in the stability of its political system" is "not

[16] There are many ways in which Appellants could have attempted to ascertain the likelihood of voters to select more than three candidates, such as exit polls of actual San Francisco voters, focus groups or opinion surveys. The City submitted such evidence in the proceedings below. ER 718-22.

[17] Despite Appellants' insistence to the contrary, Appellees have consistently taken the position that these interests are compelling and would satisfy strict scrutiny. *See, e.g.*, SER 45.

only permissible, but compelling"); *Lemons*, 538 F.3d at 1104 (the State's interest "in the orderly administration of elections [is] weighty and undeniable"). With respect to integrity of a voting system, nothing can be more central than reliably and accurately collecting and tabulating votes. And without those attributes, RCV cannot provide voters with the confidence that this system will provide the correct results.

There are many undisputed reasons why offering unlimited choices in RCV contests would jeopardize the integrity and the orderly administration of San Francisco's elections:

- *Limited Capability of Current Voting Machines:* San Francisco's optical scan machines cannot read or process more than three columns on the face of any ballot. ER 741-42, 763-66. And the optical scan and touch-screen machines used at polling places can only record and store a limited amount of information – allowing for the ranking of more than three candidates may exceed that capacity. ER 743, 766-67.
- *Uncertainty about Secretary of State Certification for New Voting Systems:* Even if a voting system could be created that allows voters to rank more than three candidates, the City could not use it without approval from the Secretary of State, following a rigorous public examination process. ER 753-54, 767. The Secretary of State has certified only one voting system for use in RCV elections, the one currently used by the City. ER 753. The Secretary of State has never certified a voting system with more than three choices per contest, and it is unlikely that the State would certify a RCV system with unlimited rankings. ER 742, 753. Even if the State would do so, the certification process is a lengthy one – easily consuming up to two and a half years. ER 740, 754.

- *Voter Confusion:* A hypothetical ballot that could accommodate more than three selections would lead to significant voter confusion. ER 742, 767-68. In 2005, the Department tested a ballot with four choices in RCV contests and received negative feedback that the ballot design was more confusing than the three-choice ballot the Department now uses. ER 759-60. It is well-established that larger and more complicated ballots lead to more voter confusion and higher rates of voter error. S*ee Rubin*, 308 F.3d at 1017 (limiting the amount of information on the ballot to avoid voter confusion is "reasonably related to the legitimate goal of achieving a straightforward, neutral, non-confusing ballot"). San Francisco elections commonly have as many as ten or more candidates, ER 758-59, 858, and a ballot offering voters the space to rank that many candidates is likely to lead to widespread voter error. ER 742, 767-68.
- *Cost, Burden and Risk of Error from Using Multiple Ballot Cards:* Because of the challenges described above, the City would not be able to implement a version of RCV that permitted the ranking of more than three candidates without using multiple cards in each contest. If voters had to rank choices for a single contest on a number of separate cards, then any physical separation of those cards – in the voting machines' storage bins, in transportation after the election, or at the polling place when a voting machine returns one of a voter's ballot cards because of a voting error – would undermine the accuracy of the record of that voter's choice and would create serious risks of error in any recount and in the City's mandatory post-election canvass of selected precincts. ER 763-66.
- *Physical Design Limitations for Single Voting Cards:* Because multiple-card contests are not feasible, the only other option would be a single ballot

card with an alternative format – such as a matrix – that permitted for a much larger number of rankings. ER 762-63, 899. But such a ballot could not be read by the City's voting machines, and given the strict regulation of ballot language and fonts, any such ballot would be far too large to fit into any machine. ER 741-42, 762-63.

- *Insufficient Time to Test Voting Machines*: Allowing unlimited rankings also could overload the Department's pre-election testing of voting machines. If the City used an RCV ballot with as many as two dozen choices, the larger ballots would necessarily reduce the thoroughness of pre-election testing of voting machines. ER 768.
- *Logistics of Elections Preparation:* More generally, allowing unlimited choices would seriously disrupt the City's systematic preparation for each election. The City does not know how many candidates will be on the November ballot until the candidate filing deadline in mid-August, and the number of candidates would affect the amount of paper the Department needs, the design of the ballot (which also must be approved by the Secretary of State), the size and complexity of the Election Day operation, and the mandatory post-election canvass. ER 757-58, 763-66.

In sum, a number of important and compelling interests weigh against the City's use of unlimited-choice RCV contests in light of the current technology. Recognizing these insurmountable difficulties, the voters expressly approved the use of a three-candidate version of RCV, and the City has used that system for the past seven years.

B. As the text of Proposition A explicitly provided, the City may use a three-candidate version of RCV when it is infeasible to allow voters to rank more candidates.

Appellants urge the Court to ignore all of the important governmental interests listed above because they were not included in the ballot arguments submitted in favor of Proposition A in 2002. There are three serious flaws with their suggested approach. First, Appellants' case challenges San Francisco's three-candidate "limit," not RCV generally, ER 914 at n.2, and the interests that they selectively discuss pertain only to the latter. Second, there is no need to resort to the ballot arguments to determine the governmental interests advanced by San Francisco's three-candidate implementation – because the *text* of the law answers the question. Third, consistent with recent Supreme Court and Ninth Circuit law, the Court may consider any government interests supporting three-candidate RCV, even if those were not identified in the Voter Information Pamphlet.

First, by focusing on the interests that may underlie RCV in general, Appellants conveniently ignore that they are only challenging San Francisco's three-candidate "limit" on RCV rankings, not RCV generally. ER 914 n.2. Throughout their briefing in the district court and this Court, Appellants repeatedly state that the principal issue of their case is whether the City's "restricted" RCV system is unconstitutional. *See, e.g.*, Br. at 8. But the ballot arguments highlighted by Appellants simply do not speak to the three-candidate option. They were made to support RCV in general, not the ability to implement the voting system in a three-candidate fashion.[18]/[19]

[18] In the district court, Appellants made the half-hearted argument that the failure of the Voter Information Pamphlet materials to fully discuss the possibility of the three-candidate option constituted a violation of due process. But the court rightly concluded that this argument also had no merit. ER 28-29 (Slip Op. at 27:11-28:4). Appellants do not challenge that conclusion here.

[19] Even if the Appellants were properly challenging the policy justifications for RCV, they fail to raise serious questions regarding its cost-savings. *See* Br. at

Second, the justification for San Francisco's three-candidate RCV was set forth in the text of the proposition itself, which explains the purpose of the three-candidate "limit" – thus avoiding the need to consult the ballot pamphlet materials to determine what other interests it may also serve. *Cf. Frisby v. Schultz*, 487 U.S. 474, 477, 484 (1988) (referring to text of anti-picketing ordinance to determine the interests it serves). As the text of Proposition A explicitly provides, the Director of Elections may decide to permit voters to rank only up to three candidates "if the voting system, vote tabulation system or similar or related equipment used by the City and County cannot feasibly accommodate choices equal to the total number of candidates running for each office." ER 676. As this Charter section recognizes, while there may be a preference for allowing a greater number of rankings, the feasibility of the voting system must be taken into account when implementing RCV. And for the reasons set forth above, the City's RCV system cannot feasibly accommodate more than the three choices it currently provides, without potentially compromising the accuracy and reliability of San Francisco's municipal elections.

Lastly, the interests served by Proposition A are not restricted solely to those included in the materials distributed to the voters – or even the text of the proposition. Under both Ninth Circuit and Supreme Court case law, this Court need not limit itself to the interests advanced in the City's Voter Information Pamphlet. In a recent case examining an Arizona public financing program enacted by the voters, the Ninth Circuit did not limit itself to the findings included in the measure itself. *See McComish v. Bennett*, 611 F.3d 510, 514-16 (9th Cir. 2010). The court also reviewed related political events, some occurring several

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49. It is undisputed that an additional run-off election in a City-wide race would require San Francisco to spend approximately $3 million. SER 21; ER 591-92 (Transcript at 76:3-77:14). Holding an additional election would require the City to expend more money than it does on its current elections.

years before the enactment of that state's public financing program. *Id.* at 514. And in *Crawford*, the Court did not distinguish between the governmental interests the State of Indiana advanced at the time it enacted its voter-identification law and those articulated during litigation. Indeed, the Court relied significantly on a report issued by the Commission on Federal Election Reform *after* the enactment of the Indiana voter-identification law. *Crawford*, 553 U.S. at 193-97. To the extent that the interests underlying the three-candidate limit are not explicit in the text of the measure itself, the City is free to amplify and explain those interests during the course of this litigation, and it has done so.[20]

Such a limitation would be inappropriate given the context of elections administration where practicalities are paramount. The City's decision to implement a three-candidate RCV was an administrative one based on actual experience with the voting system, so the City could not have realistically set forth all the rationales in the Voter Information Pamphlet. *Cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("original motivation" of ban on certain solicitation of clients by lawyers "does not detract from the force of the other interests the ban continues to serve"). As discussed above, the City's decision took into account complex considerations regarding the capabilities of available voting machines, the Secretary of State's certification system, and voters' responses to sample ballots. Requiring that all these government interests should have been

[20] Appellants' citation to *United States v. Virginia*, 518 U.S. 515, 532-33 (1996), is inapposite. *See* Br. at 45 n.66. There, the Court stated when defending "official classification based on *gender*," the defendant's "justification[s] must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* (emphasis added). Plainly, San Francisco's three-candidate version of RCV does not discriminate against voters on the basis of any protected class. Their citation to *Green Party v. Garfield*, 648 F. Supp. 2d 298, 350-51 (D. Conn. 2009) is similarly irrelevant because that district court was applying strict scrutiny, not the appropriate level of scrutiny here.

spelled out in the voter information pamphlet before the Department had any real-world experience implementing RCV would impose an unrealistic burden on the City.

C. Weighing the merits of different election systems is a legislative task.

Once a local jurisdiction has made a decision to implement its elections in a reasonable and nondiscriminatory manner, the courts need not review other election systems and assess their relative merits. As the Ninth Circuit has acknowledged, weighing "the pros and cons of various balloting systems" is best left to "democratically-elected representatives." *Weber*, 347 F.3d at 1107. "So long as their choice is reasonable and neutral, it is free from judicial second-guessing." *Id.* "[S]tates are entitled to broad leeway in enacting reasonable, even-handed legislation to ensure that elections are carried out in a fair and orderly manner." *Id.* at 1105.

In *Weber*, the plaintiff challenged Riverside County's decision to adopt a touch-screen voting system instead of a "traditional" paper ballot system. *Id.* at 1102-03. The plaintiff alleged that the use of the touch-screen system was unconstitutional because the lack of a hard-copy paper ballot results in the lack of audit trail, thus rendering the entire system more vulnerable to fraud and manipulation. *Id.* at 1104-05. Like Appellants, the plaintiff argued that the county could deploy different equipment – adding a printer to the touch-screen machines that could generate a paper trail – than the one used by the county. *Id.* at 1107. But the Ninth Circuit rejected the plaintiff's invitation to weigh the "pros and cons" of that system against the system that the county had already chosen. *Id.* As the Court explained, the proper judicial inquiry is not whether there may be other alternatives, but whether "the Constitution forbids [the] choice" the jurisdiction

made. *Id.* The same rule applies here, where what Appellants seek from the Court is even more striking than the request rejected in *Weber* – not the simple attachment of another device to existing equipment, but a wholesale switch from a one-step RCV election to a two-stage general/run-off election system. That would be a dramatic shift in how San Francisco conducts its elections, even if the City could use the same voting machines to do so.

Mindful of the type of practical concerns and technological constraints described here, the voters of San Francisco, like legislators in several other jurisdictions that have adopted RCV, chose to adopt an RCV system that permitted the City to limit the number of candidates a voter may rank. By their 2002 vote, the voters decided that RCV with three choices was an improvement over the previous system of conducting separate runoff elections where each voter could register only one preference in each election. For the reasons set forth above, the Constitution does not forbid that choice. *See Green Party of N.Y. v. Weiner*, 216 F. Supp. 2d 176, 190-91 (S.D.N.Y. 2002) (the "debate" regarding which election system should be used "is for the elected representatives of the people to decide, after balancing the pros and cons of different systems against their expense").

Appellants rely on *Lubin* for the proposition that this Court must examine the alternatives to RCV in assessing whether the City's three-candidate version is constitutional.[21] Br. at 60-61. But *Lubin* is inapplicable here. In *Lubin*, the Court struck down a candidate filing fee required of all candidates before they could seek office. 415 U.S. at 717-18. But as an election regulation, that requires payment of

[21] For example, Appellants urge the Court to compare RCV to plurality voting. Br. at 51 (citing ER 255). In the proceedings below, Appellees objected to these statements in favor of plurality voting as outside of the scope of Appellants' expert disclosure, *see* Fed. R. Civ. P. 26(a)(2), 37(c)(1), and renew their objections here. SER 96-98; *see also* ER 267-74 (expert disclosure).

a fee – like a poll tax, it "unreasonably deprive[s]" persons of the ability to participate in an election and thus constitutes a severe burden. *See Lemons*, 538 F.3d at 1104. Consequently, it is subject to much higher scrutiny than San Francisco's three-candidate RCV. *See Harper*, 383 U.S. at 666 ("a State violates the Equal Protection Clause of the Fourteenth Amendment *whenever* it makes the affluence of the voter or payment of any fee an electoral standard") (emphasis added); *Hussey*, 64 F.3d at 1265-66 (describing *Harper* as applying "close" scrutiny). In those instances, a court may engage in a more probing analysis of whether other options – such as filing a sufficient number of signatures in lieu of fees – address the governmental interest at hand. *See Lubin*, 415 U.S. at 718-19. But since San Francisco's RCV system does not, of course, restrict anyone's participation on the basis of wealth or payment of a fee, *Lubin* – and its higher scrutiny – is not applicable here.

V. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' REDUNDANT DUE PROCESS CLAIM

The Court should deny Appellants' due process claim because voting systems implicate due process concerns only in rare circumstances, and those circumstances are not present here. "The Due Process Clause is implicated . . . in the *exceptional case* where a state's voting system is fundamentally unfair." *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (emphasis added). Substantive due process claims may apply to elections in four circumstances: (1) where election procedures discriminate against a discrete group of voters; (2) where elections officials do not hold an election, resulting in complete disenfranchisement; (3) where elections officials willfully seek to obtain fraudulent results, such as "stuffing" the ballot box; and (4) where election officials provide the voters with ballot materials that are misleading. *See Nolles v. State*

Comm. for Reorganization of School Dists., 524 F.3d 892, 898-99 (8th Cir. 2008); *Caruso*, 422 F.3d at 862-63.

Appellants' due process claim fails because they do not allege any of these theories. Instead, Appellants essentially restate their previous theory that San Francisco's RCV system disenfranchises voters. But, as previously discussed, the City's three-candidate RCV system does not prevent any voter from actually casting a ballot, nor does the occurrence of "exhausted" ballots mean that any vote did not "count." The cases cited by Appellants are inapposite; the courts in those cases found due process violations in extreme situations where governments denied voters the opportunity to cast ballots or did not count ballots that were cast.[22] *See Bonas v. Town of N. Smithfield*, 265 F.3d 69, 75 (1st Cir. 2001) (refusing to hold election); *Duncan v. Poythress*, 657 F.2d 691, 703-04 (5th Cir. 1981) (refusing to call special election); *Ayers-Schaffner*, 37 F.3d at 731 (prohibiting qualified voters from participating in second, "make-up" election); *League of Women Voters*, 548 F.3d at 478 (inadequate voting equipment and polling place procedures resulted in "massive" denial of opportunity to cast ballots). Appellants have not alleged – nor could they – that San Francisco's RCV system prevents voters from casting ballots or having those ballots counted. Their due process claim thus fails as a matter of law.

[22] Appellants incorrectly cite *Bush v. Gore*, 531 U.S. 98 (2000), for the proposition that county-by-county variation in recount standards violates due process. Br. at 63. The Court had in fact concluded that those differing standards resulted in a violation of equal protection. *Bush*, 531 U.S. at 103. Even with this clarification, *Bush v. Gore* is inapposite because it is undisputed that the City's RCV system tabulates all ballots in the identical manner.

VI. SINCE APPELLANTS CANNOT PREVAIL ON THEIR CLAIMS, NO INJUNCTION OR DECLARATORY JUDGMENT IS NECESSARY.

For the reasons set forth above, the district court properly granted summary judgment for Appellees on all claims, and this Court should deny Appellants' request for injunctive relief. *Cf. Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 710-11 (9th Cir. 1997) (plaintiff not entitled to injunctive relief where "no constitutional injury on the merits as a matter of law"). Similarly, the Court should not grant declaratory relief, where there is no need to "delineate[] important rights and responsibilities." *Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency*, 966 F.2d 1292, 1299 (9th Cir. 1992).

CONCLUSION

The judgment of the district court should be affirmed.

Dated: December 7, 2010

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 13,431 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 7, 2010.

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PROOF OF SERVICE

I hereby certify that on December 7, 2010, I electronically filed the foregoing **APPELLEES' ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

Executed December 7, 2010, at San Francisco, California.

s/*Pamela Cheeseborough*
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