DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
JONATHAN GIVNER, State Bar #208000
ANDREW SHEN, State Bar #232499
MOLLIE LEE, State Bar #251404
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4694
Facsimile: (415) 554-4745
E-Mail: jon.givner@sfgov.org

Attorneys for Defendants
JOHN ARNTZ, CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO DEPARTMENT OF ELECTIONS and SAN FRANCISCO ELECTIONS COMMISSION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RON DUDUM, MATTHEW SHERIDAN, ELIZABETH MURPHY, KATHERINE WEBSTER, MARINA FRANCO and DENNIS FLYNN,

Plaintiffs,

vs.

JOHN ARNTZ, Director of Elections of the City and County of San Francisco; the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; the SAN FRANCISCO DEPARTMENT OF ELECTIONS; the SAN FRANCISCO ELECTIONS COMMISSION; and DOES 1-20,

Defendants.

Case No. CV 10-00504 SI

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: March 19, 2010
Time: 9:00 a.m.
Place: Courtroom 10
The Honorable Susan Illston

Trial Date: N/A

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 1
BACKGROUND 3
I. San Francisco's Department of Elections 3
II. Proposition A and the Adoption of Ranked Choice Voting 4
III. Implementation of San Francisco's RCV System 5
ARGUMENT 7
I. The City's Three-Choice RCV System Does Not Violate The First Amendment Or Equal Protection 8
A. San Francisco's Three-Choice System Is Not Subject To Strict Scrutiny Because It Does Not Impose A Severe Burden On Voters 9
1. San Francisco's Three-Choice Limit In RCV Contests Does Not Deny Any Voter The Right To Vote In Any Contest. 9
2. San Francisco's Three-Choice Limit In RCV Contests Does Not Violate The Principle Of "One Person, One Vote." 12
B. San Francisco's Three-Choice Limit Is a Reasonable, Non-Discriminatory Restriction Justified By Important Regulatory Interests. 15
II. The City's Three-Choice RCV System Does Not Violate Due Process 20
III. Plaintiffs Will Not Suffer Irreparable Injury If San Francisco Continues To Use The Election System The Voters Adopted Eight Years Ago 21
IV. The Balance of Hardships and Public Interest Strongly Favor Denying Plaintiffs' Motion. 22
CONCLUSION 25

TABLE OF AUTHORITIES

Federal Cases

Ayers-Schaffner v. DiStefano
37 F.3d 726 (1st Cir. 1994) 11

Bonas v. Town of N. Smithfield
265 F.3d 69 (1st Cir. 2001) 20

Bullock v. Carter
405 U.S. 134 (1972) 15

Burdick v. Takushi
504 U.S. 428 (1992) 2, 8, 10, 15

Caribbean Marine Servs. Co., Inc. v. Baldridge
844 F.2d 668 (9th Cir. 1988) 21

Carrington v. Rash
380 U.S. 89 (1965) 9

Caruso v. Yamhill County
422 F.3d 848 (9th Cir. 2005) 20

Citibank v. Citytrust
756 F.2d 273 (2d Cir. 1985) 21

Duncan v. Poythress
657 F.2d 691 (5th Cir. 1981) 20

Dunn v. Blumstein
405 U.S. 330 (1972) 9, 12

Fed. Trade Comm'n v. Affordable Media, LLC
179 F.3d 1228 (9th Cir. 1999) 22

Fed. Trade Comm'n v. World Wide Factors, Ltd.
882 F.2d 344 (9th Cir. 1989) 22

Fortson v. Morris
385 U.S. 231 (1966) 1

Graham v. Fong Eu
403 F. Supp. 37 (N.D. Cal. 1975) 13

Green Party of N.Y. v. Weiner
216 F. Supp. 2d 176 (S.D.N.Y. 2002) 19

Green v. City of Tucson
340 F.3d 891 (9th Cir. 2003) 12

Griffin v. Burns
570 F.2d 1065 (1st Cir. 1978).....20

Holt Civic Club v. City of Tuscaloosa
439 U.S. 60 (1978).....9

League of Women Voters v. Brunner
548 F.3d 463 (6th Cir. 2008) 20

Lemons v. Bradbury
538 F.3d 1098 (9th Cir. 2008) 2, 9, 15

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992).....21

Nolles v. State Comm. for Reorganization of School Dists.
524 F.3d 892 (8th Cir. 2008) 20

Oakland Tribune, Inc. v. Chronicle Pub. Co.
762 F.2d 1374 (9th Cir. 1985) 21

Partnoy v. Shelley
277 F. Supp. 2d 1064 (S.D. Cal. 2003).....11

Purcell v. Gonzalez
549 U.S. 1 (2006).....22

Reynolds v. Sims
377 U.S. 533 (1964).....12, 23

Rodriguez v. Popular Democratic Party
457 U.S. 1 (1982).....1

Rubin v. City of Santa Monica
308 F.3d 1008 (9th Cir. 2002) 8, 18

Sailors v. Board of Ed. of Kent Cty.
387 U.S. 105 (1967).....1, 8

Southwest Voter Registration Educ. Project v. Shelley
344 F.3d 914 (9th Cir. 2003) 22, 24

Storer v. Brown
415 U.S. 724 (1974).....8, 15, 19

Weber v. Shelley
347 F.3d 1101 (9th Cir. 2003) 1, 8

Whitcomb v. Chavis
403 U.S. 124 (1971).....13

Williams v. Virginia State Board of Elections
288 F.Supp. 622 (E.D. Va. 1968).....13

Winter v. Natural Resources Defense Council, Inc.
129 S.Ct. 365 (2008).....7, 20

State Cases

Edelstein v. City and County of San Francisco
29 Cal.4th 164 (2002).....1

McSweeney v. City of Cambridge
665 N.E.2d 11 (Mass. 1996).....11

Mervynne v. Acker
189 Cal. App. 2d 558 (1961).....23

Minnesota Voters Alliance v. City of Minneapolis
766 N.W.2d 683 (Minn. 2009).....13, 14, 15

Stephenson v. Ann Arbor Bd. of Canvassers
No. 75-10166 AW (Mich. Cir. Ct. Nov. 1975).....14

Wilson v. Eu
54 Cal.3d 546 (1991).....18

State Statutes & Codes

California Elections Code
Section 13203.....18
Section 13204.....18
Section 13211.....18
Section 13212.....18
Sections 19201-19207.....6, 16
Section 19201.....4
Section 19201(a).....3
Section 19204.....4
Section 19213.....4

Other References

Berkeley Municipal Code
Section 2.14.030(A) 5

Minneapolis Municipal Code
Section 167.30 5

Oakland City Charter
Section 1105(k)(1) 5

San Francisco Charter
Section 13.102 ..... 1, 5, 15

INTRODUCTION

In 2002, to address low voter turnout, reduce negative campaigning, lower the cost of elections and make them more efficient, the voters of the City and County of San Francisco (the "City") adopted a system of ranked-choice voting ("RCV") to elect their local officials. The City's RCV system gives all voters precisely the same voting opportunity: it allows each voter to rank up to three candidates in a single race, providing voters with the chance to express their preferences for multiple candidates in an efficient manner. Eight years later, after six RCV elections, Plaintiffs now challenge San Francisco's RCV voting system as unconstitutional because they say three choices is not enough.

The gravamen of Plaintiffs' complaint is a policy disagreement, not a constitutional injury. While Plaintiffs may dislike the City's three-choice limit on the number of candidates that voters may rank in a single race, the Constitution does not require what Plaintiffs seek. 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 v. Board of Ed. of Kent Cty.*, 387 U.S. 105, 111 (1967). 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, 1107 (9th Cir. 2003). And 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 (1966) (upholding system allowing Georgia state legislature to choose Governor when no candidate receives majority in general election); *Rodriguez*, 457 U.S. 1 (upholding state system that filled legislative vacancies in election open only to members of one political party); *Edelstein v. City and County of San Francisco*, 29 Cal.4th 164, 183 (2002) ("Plurality rule is not anathema to the federal or state Constitutions," and two-tier runoff system is "presumptively valid").

Here, Plaintiffs challenge the voter-approved provision in the City's Charter that allows voters to rank up to three candidates, but no more, if the City's voting system cannot feasibly accommodate a greater number of rankings. *See* S.F. Charter § 13.102(b) (Defendants' Request for Judicial Notice ["RFJN"], Ex. 1). But Plaintiffs are not likely to prevail on the merits of this challenge. Plaintiffs argue that the three-candidate limit is subject to strict scrutiny, but the Supreme Court applies strict

scrutiny to voting regulations only where they impose a *severe burden* on voters. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992). And the Court has only found severe burdens in two situations: when a government completely prohibits voters from participating in an election or when a government dilutes votes in contravention of the "one person, one vote" principle. *See Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008). Neither is the case here. While Plaintiffs argue that some voters are deprived the right to "vote" in separate runoff elections when their ballots are exhausted during the tabulation process, that argument fundamentally misunderstands RCV. Voting occurs when a voter records his or her candidate preferences on the ballot; the RCV tabulation system merely tallies those preferences and announces a result. RCV elections have only one ballot, voters have only one opportunity to mark their selections, and all voter selections are tabulated according to the same rules and procedures. The City's RCV system does not prohibit anyone from voting and counts each voter's ballot in the same manner.

Because the City's three-choice RCV system does not impose any burden at all, much less a severe burden, it passes constitutional muster as long as it is nondiscriminatory and serves important government interests. *See Burdick*, 504 U.S. at 434. Here, the City's decision to limit each voter to three choices rests on a number of wholly legitimate considerations. Most importantly, the City's current voting system is technologically unable to handle an RCV contest with a large number of choices on each ballot, and the California Secretary of State has never certified a voting system that can. Even if it were possible to overcome the technological constraints, an RCV system with unlimited rankings would create significant logistical challenges for the City and voters alike, increasing both the costs and the risk of error in each election. The City offers each voter up to three choices because offering an unlimited number of choices is simply not something it can do.

Plaintiffs have not demonstrated irreparable injury, and the balance of hardships and the public interest weigh strongly against a preliminary injunction here. Plaintiffs propose an all-or-nothing proposition: either voters should be able to rank an unlimited number of candidates or they should only be allowed to rank one candidate in each stage of a two-tier runoff. But the Constitution does not require, or indeed, empower, the Court to engage in such policy-making regarding election administration, and the people of San Francisco would bear the burden either way. The City currently

cannot offer unlimited choices in every race, and returning to the two-step runoff system would deprive the voters of their chosen system of electing their leaders – at a potential cost of millions of dollars. For these reasons, the Court should deny the motion for preliminary injunction.

BACKGROUND

I. SAN FRANCISCO'S DEPARTMENT OF ELECTIONS

The City's Department of Elections (the "Department") conducts all federal, state and local elections in San Francisco. The Department serves more than 450,000 registered voters and manages approximately 560 polling places during each election – all with only 16 permanent employees. *See* Declaration of John Arntz ("Arntz Decl.") ¶ 3. At each election, the Department must ensure that the City meets all applicable legal deadlines, that it has adequate staff and equipment to provide election services, that the recording and tabulation of votes is accurate and secure, and that voting equipment and polling places are usable and accessible to voters. *See id.* ¶ 5.

Federal, state and local law closely regulate and prescribe nearly every aspect of the Department's operations to ensure that San Francisco's elections are fair and functional. In compliance with these laws, the Department must adhere to a strict schedule to complete essential tasks for each election, including: ordering ballot supplies; preparing and printing ballots; mailing overseas and other vote-by-mail (absentee) ballots; printing and distributing information to the voters; training up to 300 temporary employees and 3,000 poll workers; testing the accuracy of every voting machine that will be used in the election; counting and tabulating votes; and conducting a mandatory post-election hand count to verify election results. *See id.* ¶ 3.

The City's voting system uses two kinds of voting equipment – touch-screen machines and optical scan machines that tabulate paper ballots. *See id.* ¶¶ 27-31. Most San Francisco voters – approximately 99% – record their votes on paper ballots, and those ballots are scanned through optical scan machines that record and tabulate the voters' selections. *See id.* ¶ 27.

Like most jurisdictions in California, the Department did not create its own voting system. *See id.* ¶ 20. Rather, the Department contracts with a private vendor for voting equipment hardware, software and ballot formatting. *See id.* Under State law, the Department cannot use a voting system unless it has been approved by the California Secretary of State. *See* Cal. Elec. Code § 19201(a). For

that reason, the Department's voting machines, software and ballot design undergo rigorous examination, including a public hearing, and must be certified by the Secretary of State before they are used in any election. *See id.* §§ 19201, 19204, 19213. Similarly, any proposed change to the City's voting system must undergo further testing and approval by the Secretary of State before the Department may use the modified system.

II. PROPOSITION A AND THE ADOPTION OF RANKED CHOICE VOTING

Before March 2002, the City's Charter provided that if no candidate received a majority of the votes cast in a general election for a municipal office, the City would hold a subsequent runoff election between the two candidates receiving the highest number of votes. *See* Arntz Decl. ¶ 13. After a series of public hearings, the San Francisco Board of Supervisors submitted a Charter amendment to the voters that would require the use of RCV to elect City elective officers, including the Mayor, members of the Board of Supervisors, the District Attorney and others. *See id.*, Ex. 2 at 37. According to the official ballot argument in support of the measure, the purposes of the RCV system were to "increase voter turnout during decisive elections," "save millions of tax dollars," reduce negative campaigning and "make our elections more EFFICIENT and LESS EXPENSIVE." *Id.* at 38. The proponents explained that voter turnout in runoff elections was often low because those elections were held during the December holiday season, and indeed, the voter turnout in the most recent runoff had been under 20 percent. *Id.* In the Voter Information Pamphlet, the City Controller estimated that RCV "would save the City a net amount of approximately $1.6 million annually . . . by eliminating the need for run-off elections." *Id.* at 37. In March 2002, the voters approved the Charter amendment and adopted RCV as their chosen method of electing local officials. *See* Arntz Decl. ¶ 13.

Since 2004, the City has used RCV in local elections every November. Under this system, each voter can rank up to, but no more than, three candidates in each RCV contest. After the polls close, the Department tabulates the first-choice rankings of all the voters, and if any candidate receives more than 50% of the first-choice rankings, that candidate wins the race. If no candidate receives more than 50% of the first-choice rankings, the candidate who received the fewest number of first-choice rankings is eliminated from the contest, and voters who selected that candidate as their first choice have their selection transferred to their second choice. The Department then re-tabulates the

results, and if any candidate is the top choice in more than 50% of the ballots, that candidate wins the race. If no candidate has over 50%, the process of eliminating candidates and transferring choices is repeated until one candidate has a winning majority. *See* Arntz Decl. ¶ 9.

In the course of this tabulation process, ballots may become "exhausted." Plaintiffs' complaint focuses on one way a ballot can be "exhausted" – where a voter ranks three candidates and each of those candidates is eliminated before the final round of tabulation. *See id.* ¶ 12. But many ballots are also exhausted when a voter chooses to rank only one or two candidates, and those candidates are eliminated during the RCV tabulation. *See id.* In sum, not every ballot that the Department has reported as exhausted fits Plaintiffs' assumptions.

III. IMPLEMENTATION OF SAN FRANCISCO'S RCV SYSTEM

The voter-approved Charter amendment contemplated that it might not be feasible to allow voters to rank as many choices as there are candidates in a race. San Francisco elections often have a large number of candidates. Since 2004, the City has had six RCV elections with nine or more candidates, and one contest had 22 candidates on the ballot. *See id.* ¶ 40. Charter section 13.102 allows the Department to provide voters with three choices in each RCV contest "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." S.F. Charter § 13.102(b). As permitted by this provision, the City has offered voters three choices in RCV races because the City's voting systems have been unable to accommodate more choices per voter.[1] There are a number of reasons for this limitation, including:

- The hardware and software used in San Francisco elections cannot read or tabulate ballots with more than three choices in RCV contests. *See* Arntz Decl. ¶ 51. The voting machines

[1] Although Plaintiffs repeatedly characterize the City's RCV system as "novel" because it does not provide more than three rankings, *see* Mot. at 8, the limitation is actually common in the U.S. municipalities like San Francisco that use RCV. *See* Oakland City Charter § 1105(k)(1) (requiring City Clerk to provide at least three choices on the ballot if "cannot feasibly accommodate a number of rankings on the ballot equal to the number of candidates") (RFJN, Ex. 2); Berkeley Municipal Code § 2.14.030(A) ("The ranked choice voting ballot shall allow voters to rank three choices. The City Council may set a higher number of rankings by resolution . . .") (RFJN, Ex. 3); Minneapolis Municipal Code § 167.30 ("When there are three (3) or more qualified candidates, a ballot must allow a voter to rank at least three (3) candidates for each office in order of preference and must also allow the voter to add write-in candidates.") (RFJN, Ex. 4).

physically have only three "scan heads," which means they can record only three columns of data on any single ballot, and they lack the capacity to tabulate results for a single contest from multiple ballot cards. *See id.* ¶¶ 51, 52.

- Even if a voting system capable of allowing voters unlimited rankings could be created, the City could not use it without approval from the Secretary of State, following a public examination. *See* Arntz Decl. ¶¶ 22-26, 54; Cal. Elec. Code §§ 19201-19207. Only three voting systems companies currently have systems in use that have been certified by the Secretary of State, and the Secretary of State has never certified a RCV voting system with more than three choices per contest. *See* Arntz Decl. ¶¶ 22, 23.
- Aside from the technological and regulatory barriers, offering voters as many as 22 choices in any given race would be infeasible because it would require the City to use either multiple cards or a giant single-card ballot for each race. *See id.* ¶¶ 50, 52. Neither possibility could be read by the City's voting machines – or by any voting machine that has been certified by the Secretary of State – and both would lead to significant voter confusion and longer lines at polling places. *See id.* ¶¶ 22, 51, 52, 55. Additionally, using multiple cards would dramatically increase the cost and logistical complexity of running each election and would undermine the accuracy of voting records because of the risk that cards might be physically separated 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. *See id.* ¶ 52.
- Allowing unlimited rankings also could overload the Department's pre-election testing of voting machines, which begins about 50 days before the election and now takes more than 20 days to complete. *See id.* ¶¶ 45, 56. A much larger RCV ballot would require additional testing, and would likely lead to more errors in the system, ultimately reducing the effectiveness of pre-election testing of voting machines. *See id.* ¶ 56.

Even with a three-choice limit, it took the City over two years to switch to an RCV voting system. Proposition A required implementation of the system in time for the November 2003 election, but changing the City's voting machines to create an RCV system proved technologically difficult, and

the City's voting system vendor informed the City that rushing to modify the system in time for the 2003 election would greatly increase the chance of errors. *See id.* at ¶ 16. The vendor did not meet the 2003 deadline, and the Secretary of State declined to approve any RCV voting system – including the City's proposal to manually count the ballots without machines – for November 2003. *See id.* ¶¶ 16, 17. The City began using RCV in its municipal elections in November 2004. *See id.* ¶ 19.

Following the voters' mandate, the City has now used RCV in six municipal elections. Every elected official currently serving the City was chosen in an RCV election. *See id.* ¶ 19. In that time, the Department has received almost no complaints from voters that they were offered too few choices on the ballot – until this litigation. *See id.* ¶ 64.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374-75 (2008) (rejecting the "too lenient" Ninth Circuit standard that Plaintiffs rely upon here). Plaintiffs fall short on every element of the test. Plaintiffs are not likely to succeed on the merits of either of their constitutional arguments. First, Plaintiffs' First Amendment and Equal Protection claims fail because the City's three-choice RCV system does not impose any burden, much less a severe burden, as that term has been applied by the Supreme Court and the Ninth Circuit. The three-choice limit is a reasonable, nondiscriminatory regulation that is justified by a number of important government interests. Second, the RCV system does not violate Due Process because it is not fundamentally unfair. Moreover, even if Plaintiffs' claim had some merit, the balance of hardships tips strongly against preliminary relief here. Enjoining San Francisco from using the voters' chosen election system for the November 2010 municipal election would require the City either to do the near-impossible by allowing unlimited choices in every RCV race or to disregard the voters' express decision to use an RCV system instead of a two-tier runoff.

I. THE CITY'S THREE-CHOICE RCV SYSTEM DOES NOT VIOLATE THE FIRST AMENDMENT OR EQUAL PROTECTION.

Plaintiffs are not likely to prevail on the merits of their First Amendment and Equal Protection challenge to the City's three-choice RCV system. Not every burden or limit on voting is constitutionally suspect. "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*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly drawn to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id*. "Viable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility," *Sailors*, 387 U.S. at 110-11, and it is up to the people of San Francisco "to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing." *Weber*, 347 F.3d at 1107 (footnote omitted).

Consequently, in challenges to voting regulations under the First Amendment and the Equal Protection Clause, the level of judicial scrutiny depends on the character and magnitude of the burden on voters. Regulations imposing *severe* burdens are subject to strict scrutiny and must be narrowly tailored to advance a compelling government interest. *See Burdick*, 504 U.S. at 434. But lesser burdens trigger less exacting review and the government's regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. *See id.* "Courts will uphold as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002). "Because the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions, a party challenging such a regulation bears a heavy constitutional burden." *Id*. at 1017 (internal citations and quotations omitted).

Here, the City's reasonable limit on the number of choices offered to each voter in RCV contests is not subject to strict scrutiny because it does not impose any burden, much less a severe

burden. And because the three-choice limit is a reasonable, nondiscriminatory restriction and serves a number of important government interests, the regulation is plainly constitutional.

A. San Francisco's Three-Choice System Is Not Subject To Strict Scrutiny Because It Does Not Impose A Severe Burden On Voters.

Plaintiffs allege that San Francisco's three-choice RCV system imposes a "severe" burden because it does not permit an unlimited number of rankings in RCV races. But this alleged flaw is not even close to the type of burden that merits strict scrutiny. The Supreme Court has applied strict scrutiny to only two types of voting regulations:

> 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 (internal quotations and citations omitted). Under this two-pronged approach, strict scrutiny does not apply here because, as explained below, San Francisco's RCV system neither deprives voters from participating in an election nor contravenes the principle of "one person, one vote."

1. San Francisco's Three-Choice Limit In RCV Contests Does Not Deny Any Voter The Right To Vote In Any Contest.

San Francisco's implementation of RCV does not deny any resident the right to vote in an election. All voters are able to express their preferences for candidates to the same degree, and the City counts each ballot according to the same rules. Under this first prong of the Supreme Court's jurisprudence, the Court has applied strict scrutiny only when an electoral system prohibits members of a particular class from voting in an election. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement); *Carrington v. Rash*, 380 U.S. 89 (1965) (members of armed forces); *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978) (canvassing the Court's "voting qualifications cases" and noting that "a common characteristic emerges: The challenged statute in each case denied the franchise to individuals who were physically resident within the geographic boundaries of the governmental entity concerned."). San Francisco's RCV system does not bar any class of persons from voting. Every voter has an equal opportunity to indicate up to three choices on

his or her ballot, including qualified write-in candidates. The Department treats all those ballots exactly the same, counting the first-choice selections and re-distributing selections as candidates are eliminated.

There is no legal basis for Plaintiffs' argument that the City's three-choice limit on candidate rankings constitutes a severe burden. No "severe" burden exists when a local election system restricts who a voter can select on the ballot, as long as the voter can participate in the election on equal terms with other voters. For instance, in *Burdick*, *supra*, the Supreme Court upheld Hawaii's prohibition on write-in votes against a challenge by a voter who claimed 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. The Court noted that "[e]lection laws will invariably impose some burden upon individual voters," *id.* at 433, and explained that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Id.* at 441. 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 even though their choices were limited. *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. Plaintiffs argue that voters whose ballots are exhausted during the RCV tabulation process are deprived the right to "vote" during the tabulation process because an election that uses RCV is a "series of 'runoff' elections, one right after the other." Plaintiffs' Motion for Preliminary Injunction ("Mot.") at 13. But that argument unfairly mischaracterizes the RCV system, and relies on a fundamental misunderstanding of what the "vote" consists of. RCV elections in San Francisco have only one ballot, voters have only one opportunity to mark their selections, all voter selections are tabulated according to the same rules and procedures, and the Department tabulates and announces final results only once. The RCV tabulation system re-distributes and re-tallies rankings during the tabulation process, often resulting in several rounds of tabulation, but the tabulation process is not when "voting" occurs; no new votes are cast

during that process. No voter is allowed to select more choices than any other, and no voter's choices are counted differently from any other's. *See* Arntz Decl. ¶ 11.

Two decisions cited by Plaintiffs – *Ayers-Schaffner v. DiStefano*, 37 F.3d 726 (1st Cir. 1994), and *Partnoy v. Shelley*, 277 F. Supp. 2d 1064 (S.D. Cal. 2003) – highlight the difference between San Francisco's RCV system and a multiple-election system. In *Ayers-Schaffner*, the Rhode Island Board of Elections sought to exclude otherwise eligible voters from voting in an election held to remedy a prior, invalid election because those voters had not participated in the first election. The court enjoined the exclusion because prohibiting voters from voting in the "fresh" makeup election imposed a severe burden on the right to vote. 37 F.3d at 730-31. And in *Partnoy*, 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. 277 F. Supp. 2d at 1078-79. Together, these two decisions stand for the uncontroversial – but, for purposes of this case, entirely irrelevant – proposition that the government cannot exclude voters from participating in an election because the voters did not participate in an earlier election or contest. In *Ayers-Schaffner*, there were two separate elections for a local school board, and the court flatly disapproved of making the ability to participate in the second election contingent on participation in the first. In *Partnoy*, two separate matters appeared on a single ballot – whether the current Governor should be recalled and, if so, who should be the next Governor. Voters' ability to vote for a candidate was conditioned on their having voted on whether to recall the current Governor. Here, in contrast, an RCV election is a single contest – not a series of elections – with only one question before the voters. Every voter has an equal opportunity to cast a ballot in that contest. Unlike in *Ayers-Schaffner*, no San Francisco voters are excluded from voting in RCV elections. And unlike in *Partnoy*, a voter's ranking of candidates for one office is not a condition on the ability of the voter to rank candidates for another office in a separate race.

The high court in Massachusetts made this point in a challenge to Cambridge's election system. In *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996), 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, among other legal arguments, he challenged Cambridge's treatment of "exhausted" ballots. *Id.* at 652 & n.7. Like Plaintiffs here, the candidate in *McSweeney* argued that the city's voting system was constitutionally suspect because it did not "count" exhausted ballots. But 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 nine 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. at 652. While the court ultimately denied the plaintiff's claim on another basis, *id.* at 654-55, the court's reasoning applies here as well.

Because the City's RCV system does not prohibit anyone from casting ballots, and does not prohibit the ranking of any candidate on the ballot, it does not severely burden the right to vote and trigger strict scrutiny. Plaintiffs' allegations, while inventive, mischaracterize San Francisco's RCV system. Like any other election system, it allows each voter to cast a single vote per contest. But unlike many election systems, where each voter is limited to a single selection for one candidate, each vote in a San Francisco RCV election can consist of the selection and ranking of up to three candidates. If anything, San Francisco's RCV system enlarges voters' options and range of choices. The fact that it allows each voter to register preferences for three candidates, rather than just one, certainly does not constitute a severe burden.

2. San Francisco's Three-Choice Limit In RCV Contests Does Not Violate The Principle Of "One Person, One Vote."

Plaintiffs fare no better under the second prong of the "severe burden" analysis, because San Francisco's implementation of RCV also does not violate the principle of "one person, one vote." Under the "one person, one vote" principle, courts have applied strict scrutiny to election laws that "dilut[e] the voting power of some qualified voters within the electoral unit." *Green v. City of Tucson*, 340 F.3d 891, 900 (9th Cir. 2003). The principle applies when the State weighs "the votes of citizens differently, by any method or means, merely because of where they happen to reside." *Reynolds v. Sims*, 377 U.S. 533, 563 (1964). But San Francisco does not weigh votes differently at all. The three-choice limit applies to *all* voters, and all ballots are subject to the same method of tabulation.

The Constitution protects the "right to participate in elections on an equal basis with other citizens in the jurisdiction," *see Dunn*, 405 U.S. at 336, but the Constitution does not require what Plaintiffs demand – that their votes for less popular candidates be as *effective* as votes for more popular candidates. In *Graham v. Fong Eu*, 403 F. Supp. 37 (N.D. Cal. 1975), a three-judge court rejected a challenge to the winner-take-all Republican presidential primary system in California that awards all California delegates to the winner rather than apportioning delegates based on the number of votes that each candidate receives. Like Plaintiffs here, the plaintiff argued that the election process "disenfranchise[d] those who support losers, since they ha[d] no representative of their own, and at the same time overrepresent[ed] those who support winners, since they receive[d] all of the legislative seats with less than all of the popular vote." *Id.* at 43. The *Graham* court rejected that argument because those results "are simply consequences of losing elections." *Id.* (discussing *Whitcomb v. Chavis*, 403 U.S. 124 (1971)).

The court in *Graham* relied on the rejection of a similar argument in *Williams v. Virginia State Board of Elections*, 288 F.Supp. 622 (E.D. Va. 1968), *aff'd mem.*, 393 U.S. 320 (1969). In *Williams*, the plaintiffs similarly challenged Virginia's winner-take-all Presidential elector system because it "overvalu[ed] the votes of those who voted for the plurality winner and discard[ed] the votes cast for losers." *Graham*, 403 F. Supp. at 46. *Williams* upheld Virginia's winner-take-all system because every vote had "equal weight in the election itself" and thus did "not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote." *Id.* (quoting *Williams*, 288 F.Supp. at 627).

Graham and *Williams* thus instruct that ineffective votes for unpopular candidates do not "disenfranchise" the voters that cast them and do not receive less "weight" than votes for more popular candidates. Voters who select less popular candidates – under RCV or under a winner-take-all system – are treated no differently from voters who select more popular candidates. A voting system that counts every ballot on equal terms does not burden the right to vote just because every ballot does not support the eventual winning candidate.

The Minnesota Supreme Court rejected a similar "one person one vote" argument last year in a constitutional challenge to Minneapolis' RCV system. *Minnesota Voters Alliance v. City of*

Minneapolis, 766 N.W.2d 683 (Minn. 2009). In Minneapolis, RCV proceeds in the exact same manner as San Francisco's RCV, and Minneapolis uses a three-choice ballot just like San Francisco.[2] *Id.* at 686-87. 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. In other words, 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: "[e]very 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.

Here, Plaintiffs' argument is the mirror image of the "unequal weighting" argument considered and rejected in *Minnesota Voters Alliance*. Plaintiffs argue that San Francisco's system unequally benefits some voters because some voters who rank three candidates will have "exhausted" ballots after the elimination of those candidates, while other voters who rank as few as one candidate may not have their ballots exhausted. *See* Mot. at 13. But as the *Minnesota Voters Alliance* court explained, no burden results from the tabulation and elimination of choices in an RCV ballot. Each voter has the same opportunity to rank up to three candidates, and each voter's rankings are tabulated on the same basis. The fact that some ballots may be exhausted or different ballots may be tabulated differently as candidates are eliminated from contention does not mean that votes go uncounted or that some votes receive greater weight. *See also Stephenson v. Ann Arbor Bd. of Canvassers*, No. 75-10166 AW (Mich. Cir. Ct. 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.") (RFJN, Ex. 6).

[2] *See* City of Minneapolis Website, http://www.voteminneapolis.org/faq.html ("In 2009, Minneapolis voters may rank up to three candidates for single and multiple seat municipal offices. Each ballot will have three columns.") (RFJN, Ex. 5).

In sum, the City's three-choice system imposes, at most, a limited burden. Every qualified voter has an equal opportunity to cast a ballot ranking the top three candidates of his or her choice. The three-choice system does not weigh votes differently depending on voter characteristics. The occurrence of "exhausted" ballots does not mean that some votes do not "count" or that others receive greater weight, for the City's RCV system counts them all in the same way. The three-choice limit does not impose a severe burden and is not subject to strict scrutiny.

B. San Francisco's Three-Choice Limit Is a Reasonable, Non-Discriminatory Restriction Justified By Important Regulatory Interests.

For the reasons discussed above, giving the City the authority to limit the number of candidates a voter may rank – when it is not feasible to offer unlimited rankings – is a reasonable non-discriminatory restriction.[3] *See Burdick*, 504 U.S. at 434. As such, it need only be justified by important regulatory interests. That test is easily satisfied here. "[T]he State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters." *Id.* Such restrictions are "*presumptively valid*, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting" the scheme. *Id.* at 441 (emphasis added). Here, the City's three-choice limit is justified by a number of important – indeed, compelling – interests related to the orderly administration of elections. *See Storer*, 415 U.S. at 736 (the "State's interest in the stability of its political system" is "not only permissible, but compelling"); *Lemons*, 538 F.3d at 1104 (the State's interest "in the orderly administration of elections [is] weighty and undeniable").[4]

[3] Plaintiffs do not challenge the Department's determination under the City Charter that the City's voting system "cannot feasibly accommodate choices equal to the total number of candidates." *See* S.F. Charter § 13.102. Rather, Plaintiffs only attack the constitutionality of the three-choice limit, which, as discussed, is justified by the City's important regulatory interests.

[4] Plaintiffs do not challenge San Francisco's choice to adopt RCV elections, only the three-choice limit. Mot. at 4 n.3. Nor would such a challenge be successful, because RCV imposes no burden on voters and serves a number of legitimate interests. *Minnesota Voters Alliance*, 766 N.W.2d at 697 ("Reducing the costs and inconvenience to voters, candidates, and taxpayers by holding only one election, increasing voter turnout [and] encouraging less divisive campaigns . . . are all legitimate interests for the City to foster. . . . [I]t is plausible that [RCV] may advance one or more of these interests, . . . [and] that possibility is sufficient to justify any minimal burden imposed by [RCV]."); *Bullock v. Carter*, 405 U.S. 134, 145 (1972) (State has a "legitimate," understandable and proper

Offering an unlimited number of choices in each RCV contest, as Plaintiffs demand, is currently not feasible. In recent years, San Francisco contests for local elective office have drawn as many as 22 candidates per contest. *See* Arntz Decl. ¶ 40. The City's current voting system cannot read or tabulate results from ballots where voters rank so many choices. And any new system would need approval from the California Secretary of State. Even if it were technologically viable, such a system would likely be expensive and operationally difficult, and would require confusing and unmanageable ballots. As summarized below, there are many reasons that offering unlimited choices could jeopardize election integrity and the orderly administration of elections:

- *Limited Capability of Current Voting Machines:* San Francisco's voting machines – purchased by the City for $12 million after a three-year public selection process – simply cannot read more than three ranking columns in any single contest. *See id.* ¶¶ 20-21, 28, 51, 53. The City uses optical scan machines to tabulate all votes cast in City elections. *See id.* ¶¶ 28-31. The machines have only three "scan heads," which means they cannot read more than three columns on any single ballot card. *See id.* ¶¶ 28, 31. For these machines to read and tabulate results for an RCV contest with 22 candidates and unlimited rankings – like in the 2004 contest for District 5 Supervisor – each voter's ballot would have to include eight separate cards or four double-sided cards (one card with three columns for choices 1-3, another card for choices 4-6, and so on). *See id.* ¶ 52. But the City's voting machines would not be able to process such a ballot, because the machines' software is technologically incapable of tabulating results in a single contest across multiple ballot cards. *See id.*
- *Uncertainty about Secretary of State Certification for New Voting Systems:* Even if such a voting system could be created, the City could not use it without approval from the Secretary of State, following a rigorous public examination process. *See* Arntz Decl. ¶¶ 22-26, 54; Cal. Elec. Code §§ 19201-19207. Only three voting systems companies currently have systems in use that have been certified by the Secretary of State for use in RCV or non-RCV elections,

---

interest in "assur[ing] that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections").

and only two responded to the City's 2004 request for bidders able to support San Francisco's RCV system. *See* Arntz Decl. ¶¶ 23, 41. The Secretary of State has never certified a voting system with more than three choices per contest. *See id.* ¶ 22. Any claim that the State would permit a system with unlimited choices is entirely speculative. And even if the State would do so, it is impossible to know how long the certification process would take, so any claim that the City could successfully pursue such certification is equally speculative. *See id.* ¶ 25.

- *Cost, Burden and Risk of Error from Using Multiple Ballot Cards:* The unlimited-selection system that Plaintiffs propose would require the City to use either multiple cards in each contest or a giant single-card ballot, and even putting aside the fundamental mechanical problem discussed above, both possibilities are infeasible. Multiple-card contests would create a precarious scenario that would dramatically increase the cost, burden and, most importantly, the risk of tabulation error in the election. When contests are limited to a single card, as in the City's current RCV system, each ballot card is a complete record of the voter's choice in that contest. *See id.* ¶ 52. If voters could 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. *See id.* This would create serious risks of error in any recount and in the City's mandatory post-election hand count of selected precincts. *See id.* An eight-card contest also could double or triple the amount of paper the Department would have to manage, transport to and from polling places, and store before and after the election. *See id.* The Department already faces challenges storing and moving over a million ballot cards to and from over 550 polling places on Election Day. *See id.* An eight-card contest would require the Department to hire more staff and rent more vehicles and storage space, which would significantly increase the cost and logistical complexity of running each election. *See id.*
- *Physical Design Limitations for Single Voting Cards:* Because multiple-card contests are not feasible, the only other option would be a single ballot card that allows the voter to rank as many as 22 candidates plus write-in candidates. But that would require either an 8-foot-long

ballot with 23 columns or a massive 23-by-23 matrix with 529 bubble choices for each voter. *See* Arntz Decl. ¶ 50 & Ex. 7 (example of how a 23-choice ballot card might be designed). Neither possibility could be read by the City's voting machines – or by any voting machine that has been certified by the Secretary of State. *See id.* ¶ 50-52. Indeed, given the strict regulation of ballot language and fonts, any such ballots probably would be far too large even to fit into any machine. *See, e.g.*, Cal. Elec. Code §§ 13203 ("OFFICIAL BALLOT" must appear in 30-point font); 13204 (requiring detailed instructions on each ballot); 13211 (specifying font size of candidate names); 13212 (requiring space for write-in candidates).

- *Voter Confusion:* Aside from all these problems, either a single 23-choice ballot card or a multiple-card ballot would lead to significant voter confusion that could undermine the integrity of RCV elections. 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 currently uses. *See* Arntz Decl. ¶ 41 & Ex. 6. The problem would be magnified with the large ballot that Plaintiffs request. *See Rubin*, 308 F.3d at1017 (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").
- *Insufficient Time to Test Voting Machines*: Even if it were feasible, allowing unlimited rankings could overload the Department's pre-election testing of voting machines. The testing process cannot begin until approximately 50 days before the election, and it currently takes 20 to 25 days to complete. *See id.* ¶¶ 45, 56. If the City used an RCV ballot with as many as two dozen choices, the testing would have to include more ballot cards and more rankings, and the variety of possible permutations would likely lead to more errors in the system, each of which would take time to correct. *See id.* ¶ 56. Because of other pre-election deadlines, the larger ballots would necessarily reduce the thoroughness of pre-election testing of voting machines. *See id.*
- *Logistics of Elections Preparation:* More generally, allowing unlimited choices could wreak havoc on the City's systematic preparation for each election. "[P]reparing for elections is a complex and 'sequential' process, requiring various tasks be performed before others may

begin," and "[e]arly delays in one function can impact all other functions." *Wilson v. Eu*, 54 Cal.3d 546, 548 (1991). The City does not know how many candidates will be on the November ballot until mid-August – well into the election preparation process, and weeks after the Department orders ballot paper. *See* Artnz Decl. ¶ 33. Providing a specific number of candidate choices on each ballot – when that number is not known until August – 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. In the context of an election, where every step must be systematized to prevent a cascade of interrelated problems, last-minute changes and system overloads are not only costly but also create the risk of errors that could jeopardize the entire election. *See Storer*, 415 U.S. at 730 (States may enact "substantial regulation" of elections to ensure that "some sort of order, rather than chaos, is to accompany the democratic process.").

In sum, a number of important interests weigh against the City's use of unlimited-choice RCV contests in light of the current technology. 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. 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) ("It may or may not be desirable for New York to purchase more or newer voting machines, or to adopt some more modern technology for conducting elections. . . . But that debate is for the elected representatives of the people to decide, after balancing the pros and cons of different systems against their expense.").[5]

[5] Although the Court should not apply strict scrutiny here for the reasons discussed in Part I(A) above, the City's interests in limiting the number of RCV rankings in each contest would easily satisfy strict scrutiny as well. In light of the "profound consequences for the entire citizenry" in electoral stability, *Storer*, 415 U.S. at 736, the City's many interests justifying the City's three-choice limit are not only important, but compelling. And the three-choice limit, which the City's Charter allows only when it is not feasible to permit voters to rank more candidates, is narrowly tailored to this interest in electoral stability.

II. THE CITY'S THREE-CHOICE RCV SYSTEM DOES NOT VIOLATE DUE PROCESS.

Plaintiffs are similarly unlikely to prevail on their claim that the City's three-choice RCV system violates the Due Process Clause. 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 applies 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 v. Yamhill County*, 422 F.3d 848, 862-63 (9th Cir. 2005).

Plaintiffs' due process claim fails because they do not allege any of these theories. While Plaintiffs assert that San Francisco's RCV system results in "widespread disenfranchisement," Mot. at 17, the City's three-choice 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 Plaintiffs are all 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. *See Bonas v. Town of N. Smithfield*, 265 F.3d 69 (1st Cir. 2001) (refusing to hold election); *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981) (refusing to call special election); *Griffin v. Burns*, 570 F.2d 1065, 1070 (1st Cir. 1978) (invalidation of absentee ballots); *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). Plaintiffs have not alleged – nor could they – that San Francisco's RCV system prevents voters from casting ballots or having those ballots counted according to uniform and neutral rules. Plaintiffs' assertion that ranking up to three candidates is constitutionally infirm because it does not permit even more choices is not a concern protected by due process.

III. PLAINTIFFS WILL NOT SUFFER IRREPARABLE INJURY IF SAN FRANCISCO CONTINUES TO USE THE ELECTION SYSTEM THE VOTERS ADOPTED EIGHT YEARS AGO.

A preliminary injunction may only be granted when the moving party has demonstrated a real likelihood of irreparable injury or harm. *Winter*, 129 S.Ct. at 375. "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co., Inc. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original; internal citations omitted). A preliminary injunction cannot issue based only on the possibility of some remote future injury because "injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 129 S.Ct. at 375-76.

Plaintiffs' claims of irreparable injury are belied by their years of delay in challenging the City's now-established voting system. Because interim injunctions "are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights," a plaintiff's delay "tends to indicate at least a reduced need for such drastic, speedy action." *Citibank v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). Each of the plaintiffs has been an active San Francisco voter since at least 2006, yet they have not challenged the law until now, eight years and six City RCV elections after the passage of Proposition A. Such a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).[6]

And to the extent Plaintiffs allege that they will be irreparably injured because the City's three-choice limit theoretically "could affect the outcome" of local elections, *see* Mot. at 8, that hypothetical possibility does not give rise to any irreparable harm. First, it is pure speculation whether San

[6] Although they have voted in San Francisco in the past, none of the plaintiffs have alleged injury sufficient to establish standing. To establish standing, Plaintiffs must sufficiently allege an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations and citations omitted). None of the declarations submitted in support of the instant motion claim that Plaintiffs would have ranked *more* than three candidates at a past RCV election, or plan to do so in this November's election. They fail to provide *any* evidence of the injury they claim to have suffered or will suffer in the future.

Francisco's three-choice limit actually has changed the outcome of any election or is likely to do so in future elections. As described in Defendants' objections to the testimony of Jonathan Katz, Plaintiffs' statements to that effect are based on an incorrect understanding of what it means to "exhaust" a ballot, and rely heavily on uninformed assumptions and questionable methodologies employed by their purported expert. *See* Defendants' Evidentiary Objections to Declaration of Jonathan Katz at 2-6. Plaintiffs' assertions of "dramatic and adverse impacts" do not distinguish between ballots exhausted because of the three-candidate limit and ballots exhausted for other reasons. Mot. at 8. Nor are those statements supported by any evidence of how voters would have acted if they could have ranked more candidates. Plaintiffs reach their conclusion by *assuming* what voters would have done, and such speculation does not support a finding of irreparable injury. *See Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919-20 (9th Cir. 2003) (en banc) (affirming denial of preliminary injunction because despite "legitimate[] concern[s] that use of the punch-card system will deny the right to vote to some voters who must use that system . . . , it is merely a speculative possibility, however, that any such denial will influence the result of the election.").

Even if there were some basis for Plaintiffs' conclusion, the notion that the structure of an election system theoretically *could* affect the outcome of an election is a long-accepted fact of life in a democracy. The candidate who prevails in a plurality election (like California's Governor's race) would not necessarily win the same race if she had to run head-to-head against the second-highest vote-getter in a two-step runoff system. Choosing one system over another always could affect who wins future elections or by how much. But the mere fact that different election systems might produce different outcomes does not mean that any particular system causes constitutional injury to the voters.

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST STRONGLY FAVOR DENYING PLAINTIFFS' MOTION.

In "balanc[ing] the hardships of the public interest against a private interest, the public interest should receive greater weight." *Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) (quoting *Fed. Trade Comm'n v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989)). In the elections context, the Court should act with particular caution because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and

consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). For these reasons, the Supreme Court has counseled caution in the type of relief to be granted in cases affecting elections:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds, 377 U.S. at 585.

These principles strongly counsel against an injunction in this case. Plaintiffs' motion attempts to force the Court (and ultimately the City) into a false choice – permit voters to rank an unlimited number of candidates or permit them to select only one candidate in each round of a two-tier runoff. But both of these options would significantly harm the City and its voters. For the reasons described in section I(B), above, changing immediately to a system with an unlimited number of RCV choices in the November 2010 election is not feasible for Defendants. *See also* Mot. at 11 (predicting large numbers of candidates in upcoming local elections). The City's voting system could not operate in such an election, and no voting system certified by the Secretary of State could. And the City could not overcome the many logistical and technical challenges that would accompany a new and novel ballot, the design of which also would require Secretary of State approval. The burden of an injunction on Defendants would therefore be tremendous.

Plaintiffs' alternative suggestion that the City return to a two-step runoff system (or even a plurality system) is similarly untenable because it would ignore the voters' will, reversing the decision of San Francisco's voters about how they spend their own tax dollars and elect their own representatives. Eight years ago, the voters unequivocally stated their desire to elect local leaders using a RCV system. This choice is worthy of respect. In California, "[t]he exercise of initiative and referendum is one of the most precious rights of our democratic process," *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563 (1961), and San Francisco voters exercised those by rights by approving RCV. Reversing San Franciscans' decision about the conduct of their own elections undermines the public interest almost by definition.

In addition to these serious concerns, a sudden return to the old runoff system would be expensive and potentially confusing for the voters. The Department's resources would be stressed during the period between the general and runoff elections, when its staff would be completing the mandatory post-election hand count while simultaneously preparing and printing ballots, testing voting machines, arranging polling places, training poll workers and distributing absentee ballots for the runoff election. *See* Arntz Decl. ¶¶ 58-61. The quick turnaround would be particularly difficult because the Department now uses two machines in every polling place, as opposed to the single machine the City used in 2003, when San Francisco last had a two-step runoff. *See id.* ¶ 60. Holding a December runoff would cost the City over $3 million in a City-wide race or $300,000 in each district race – in direct contravention of the voters' desire when they passed Proposition A and particularly troubling in the midst of an extraordinary budget crisis. *See id.* ¶ 58.

Additionally, if the Court grants a preliminary injunction ordering a return to runoff elections, and the City later prevails on summary judgment or after a trial, the voters of San Francisco would be subject to different election procedures in successive elections. That kind of drastic back-and-forth may confuse voters, and voter confusion is a burden of the most fundamental kind. And more practically, just explaining the changes to the voters would impose significant costs on the City. In the first years of its use, the City spent millions of dollars educating the public about RCV – including over $750,000 in 2004 alone. *See* Arntz Decl. ¶ 62. A preliminary injunction, particularly on followed by a judgment in favor of Defendants, could require similar spending to educate the public.

"[E]lection cases are different from ordinary injunction cases, and "[i]nterference with impending elections is extraordinary." *Shelley*, 344 F.3d at 919. There is no basis for such extraordinary intervention in this case, which boils down to little more than a policy dispute about the mechanics of the City's elections.

/ / / /

/ / / /

/ / / /

/ / / /

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: February 26, 2010

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
JONATHAN GIVNER
ANDREW SHEN
MOLLIE LEE
Deputy City Attorneys

By: /s/
JONATHAN GIVNER

Attorneys for Defendants JOHN ARNTZ, CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO DEPARTMENT OF ELECTIONS and SAN FRANCISCO ELECTIONS COMMISSION