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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

JOHN ARNTZ, Director of Elections of the
City and County of San Francisco; the
CITY & 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. 10-CV-00504-SI

**PLAINTIFFS' OPPOSITION
TO BRIEF OF NEW
AMERICA FOUNDATION AS
AMICUS CURIAE**

JUDGE: Hon. Richard Seeborg
COURTROOM: 3

1 **I. INTRODUCTION.**

2 NAF's amicus brief is peppered with citations to inadmissible hearsay and to
3 proffered amicus declarations that this Court properly declined to accept into the
4 record.¹ Those citations should be disregarded, along with the text of the brief they
5 purport to support.²

6 The remaining portions of the NAF amicus brief are riddled with
7 fundamental errors as discussed below.

8 **II. THE AMICUS BRIEFING OF NAF CONTAINS MANY *HIGHLY***
9 **MISLEADING—AND IN SEVERAL CASES FLATLY WRONG—**
10 **STATEMENTS OF LAW AND FACT.**

11 **A. NAF Blatantly Mischaracterizes Cambridge's Electoral**
12 **System.**

13 NAF's amicus brief claims that the Massachusetts Supreme Court opinion in
14 *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996), is directly on point,
15 and contrary to Plaintiffs' position, because "like San Francisco, Cambridge also
16 limits the number of candidates that voters may rank in its multiple-seat form of
17 IRV." (NAF's Proposed Amicus Brief, p. 10:10-11.) This is flat out false.

18 First, it is worth noting that this claim is based upon evidence that the Court
19 declined to accept into the record.

20 But even leaving that aside, NAF's claim is flatly contradicted by the

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22
23 ¹ With respect to hearsay, see Amicus Brief, pp. 1 n.1 (citation to newspaper article),
24 2 nn.4 & 6-10 (citation to NPR website and newspaper article), 3 n.12 (citation to
25 "studies" on NAF website), 4 nn.21-22 (same), 5 nn.24 (NAF press release) & 25 (news
26 article), 6 n.28 (articles), 10 n.48 (FairVote website), 12 nn.59-60 (NAF "study"), 15 n.62
27 (same), 16 n.66 (FairVote website) and 21 n.87 (news article). Citations to the rejected
28 declarations can be found in footnotes 13-14, 16-17, 19-20, 28, 31-32, 66, 72-77 and 83-84.

² See *Soles v. Board of Comm'rs*, 746 F. Supp. 106 (S.D. Ga. 1990) (granting
motion to strike hearsay statements in defendant's brief); *United States v. Filson*, 347
Fed. Appx. 987, 991 (5th Cir. 2009) (discussing district court's grant of a motion to strike
United States's reply brief in support of summary judgment based on its reliance on
hearsay "evidence").

1 Massachusetts Supreme Court. That Court described the Cambridge system in
2 detail in *Moore v. Elec. Comm'rs of Cambridge*, 35 N.E.2d 222 (Mass. 1941), and it
3 expressly stated that each voter “*may mark as many choices as he pleases.*” *Id.* at
4 228 (emphasis added). *See also McSweeney*, 665 N.E.2d at 649 n.2 (citing *Moore*
5 for its description of the Cambridge system). Further confirming this description,
6 the Cambridge charter and a pamphlet from the Board of Election Commissioners,
7 both available on the City of Cambridge’s website,³ *plainly* state that a voter may
8 “[m]ark as many choices as [he or she] please[s].” CAMBRIDGE CHARTER § 112
9 (“Ballots; form and contents”).

10 **B. Amicus’s Suggestion That Three Supreme Court Justices**
11 **Have Endorsed Restricted IRV Is Simply False.**

12 NAF’s implication that three Supreme Court justices have endorsed a system
13 like San Francisco’s is flat out false. (*See* Amicus Brief, p. 5.)

14 First of all, neither of the opinions cited by NAF discussed restricted IRV,
15 and both were decided years before San Francisco became the first jurisdiction in
16 the United States to adopt such a system.

17 Moreover, the case cited by NAF with respect to two of the three Justices
18 (Justices Thomas and Scalia) in fact spoke *disapprovingly* of IRV.

19 In support of its claim, NAF cites to Justice Thomas’s concurring opinion in
20 *Holder v. Hall*, 512 U.S. 874 (1994) (which Justice Scalia joined, making him the

21
22 ³ *See* http://www.cambridgema.gov/election/Proportional_Representation.cfm
23 (last visited Apr. 2, 2010). To the extent the Court has any question that the Cambridge
24 system allows voters to rank all candidates, Plaintiffs request that the Court take judicial
25 notice of these documents. Public records are properly subject to judicial notice under
26 Federal Rule of Evidence 201(b)(2). *Santa Monica Food Not Bombs v. City of Santa*
27 *Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006); *United States ex rel. Dingle v. BioPort*
28 *Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003). *See also Paralyzed Veterans of Am.*
v. McPherson, 2008 U.S. Dist. LEXIS 69542, *17 (N.D. Cal. Sept. 9, 2008) (“It is not
uncommon for courts to take judicial notice of factual information found on the world
wide web.’ *O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007).
This is particularly true of information on government agency websites, which have often
been treated as proper subjects for judicial notice.”).

1 second of the three Justices cited). In that opinion Justice Thomas said there was
2 no principled reason not to impose cumulative voting or transferable voting as a
3 remedy for violation of the Voting Rights Act, rather than single-member districts.
4 Critically, however, this statement was made in the context of Justice Thomas
5 saying that he (and Justice Scalia) did not think that Section 2 of the VRA should
6 be interpreted to allow any remedy for vote “dilution” (as opposed to denial) *at all*.
7 He elaborated:

8 . . . as the destructive effects of our current penchant for majority-
9 minority districts become more apparent, [citation], courts will
10 undoubtedly be called upon to reconsider adherence to geographic
11 districting as a method for ensuring minority voting power. Already,
12 some advocates have criticized the current strategy of creating
13 majority-minority districts and have urged the adoption of other voting
14 mechanisms—for example, cumulative voting or a system using
15 transferable votes—that can produce proportional results without
16 requiring division of the electorate into racially segregated districts.
17 [Citations.]

18 Such changes may seem radical departures from the electoral systems
19 with which we are most familiar. Indeed, they may be unwanted by the
20 people in the several States who purposely have adopted districting
21 systems in their electoral laws. But nothing in our present
22 understanding of the Voting Rights Act places a principled limit on the
23 authority of federal courts that would prevent them from instituting a
24 system of cumulative voting as a remedy under § 2, or even from
25 establishing a more elaborate mechanism for securing proportional
26 representation based on transferable votes.

27 *Id.* at 908-10 (footnotes omitted).

28 To characterize this discussion as an *endorsement* of IRV—as amicus does—
is to interpret it as saying *exactly the opposite* of what it does say. Justice Thomas
is saying that the single-member district remedy is bad, and in the future it could
get even worse—the courts could impose IRV—so the Court should stop going
down this path.

Notably, the Massachusetts Supreme Court in *McSweeney* rejected the City
of Cambridge’s effort to rely on Justice Thomas’s discussion in its assessment of

1 the constitutionality of Cambridge's system of filling vacancies. 665 N.E.2d at 15.
2 Plaintiffs respectfully suggest that the same disregard is warranted in this case.⁴

3 **C. The Claim That USDOJ Implicitly Endorsed IRV's**
4 **Constitutionality Is Likewise Baseless.**

5 Equally misleading is amicus's suggestion that the U.S. Department of
6 Justice has "implicitly" determined that restricted IRV is constitutional by entering
7 an objection to the efforts of New York City Schools to implement an alternative to
8 IRV. That objection was made under Section 5 of the Voting Rights Act (42 U.S.C.
9 § 1973c), which requires certain specified jurisdictions to obtain "preclearance" of
10 changed voting practices from the Attorney General before implementing them.
11 (Amicus Brief, pp. 5-6.)

12 NAF's argument is highly disingenuous in the first place, because the New
13 York schools use unrestricted IRV—not restricted IRV like San Francisco. (Katz
14 Decl., ¶ 14; N.Y. CLS Educ. § 2590-c(7).)

15 It is also disingenuous because under Section 5 an objection will be entered
16 any time a newly-proposed electoral system will cause "retrogression" in the
17 position of minority voters, *i.e.*, will make minority voters worse off than is the case
18 under the existing system. *Beer v. United States*, 425 U.S. 130, 141 (1975). An
19 objection does not constitute an endorsement of the existing system, but merely a
20 determination that the new system would be even worse. Critically, this
21 comparative determination is made without regard to the constitutionality of the
22 systems at issue. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 (2000)

23
24 ⁴ Justice Harlan, joined by no other justice, did make a passing favorable reference
25 to ranked voting in a footnote to a concurring opinion that addressed the ability of the
26 State of Ohio to exclude minor parties from the ballot. *Williams v. Rhodes*, 393 U.S. 23,
27 47 n.8 (1968) (Harlan, J., concurring). This reference was contained in a list of possible
28 alternative voting systems that would be more narrowly-tailored to the State's interest
than banning minor parties. Moreover, even if that single, footnote—which even in a
majority opinion would constitute the purest dicta—were relevant, Justice Harlan's
statement cannot be read as an endorsement of restricted instant runoff voting.

1 (Attorney General must grant preclearance to non-retrogressive plan “no matter
2 how unconstitutional it may be”).

3 **D. NAF Blatantly Mischaracterizes Plaintiffs’ Contentions.**

4 NAF argues its case by creating two strawmen to knock down—re-
5 characterizing Plaintiffs’ constitutional claims as something entirely different than
6 what they are.

7 First, NAF claims that Plaintiffs are arguing for a constitutional right to a
8 majority electoral system. (Amicus Brief, p. 11.) That is simply not the case. As
9 Plaintiffs’ counsel acknowledged at oral argument, a plurality system is
10 constitutional. Plaintiffs have simply noted that the voters were told they would be
11 given a majority system in enacting IRV, and that is not the case.

12 NAF then shifts gears and claims that Plaintiffs argue for a constitutional
13 right to a runoff. Not so. Again, a plurality system would be perfectly
14 constitutional. However, the voters themselves expressed a preference for a
15 general and runoff as an alternative to IRV (if unrestricted IRV proves impossible
16 to implement). S.F. CHARTER § 13.102 (“If ranked-choice, or ‘instant runoff,’
17 balloting is not used in November of 2002, and no candidate for any elective office
18 of the City and County, except the Board of Education and the Governing Board of
19 the Community College District, receives a majority of the votes cast at an election
20 for such office, the two candidates receiving the most votes shall qualify to have
21 their names placed on the ballot for a runoff election held on the second Tuesday
22 in December of 2002.”).

23 Plaintiffs do not deny that other alternatives may be constitutional. But
24 restricted IRV is not.

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1 **III. TREATING IRV ELECTIONS AS A SINGLE, UNITARY ELECTION,**
2 **RATHER THAN A SERIES OF ELECTIONS, WOULD RAISE**
3 **SERIOUS QUESTIONS REGARDING THE CONSTITUTIONALITY**
4 **OF UNRESTRICTED INSTANT RUNOFF VOTING.**

5 NAF appears to endorse the position of the City that restricted IRV is
6 constitutional because it is a single, unitary election. *See* Amicus Brief, p. 12 (“By
7 enabling voters to rank their choices in a single, decisive November election, IRV
8 ensures that the winner receives broad support across all communities.”). Not
9 only is this characterization incorrect, but if accepted it would raise serious
10 constitutional questions regarding unrestricted instant runoff voting.

11 The characterization of IRV as a series of elections has been critical to courts
12 that have upheld unrestricted IRV against constitutional one-person, one-vote
13 challenges. For example, in *Minn. Voters Alliance v. City of Minneapolis*, 766
14 N.W.2d 683 (Minn. 2009), the plaintiffs argued that IRV is a single, unitary
15 election, and that IRV is therefore unconstitutional because it allows some voters
16 to vote for multiple candidates while denying others the same opportunity.⁵ The
17 Minnesota Supreme Court rejected plaintiffs’ contention, noting, “Appellants
18 attempt to distinguish the primary/general election system on the basis that those
19 elections are separate, independent events, but the effect in terms of the counting
20 of votes is the same[,]” *id.* at 690-91, and “[u]nder IRV, only one vote per voter can
21 be counted in each round, just as in serial primary/general elections a voter may
22 vote only once per election.” *Id.* at 692. The Court concluded, “Nor does the
23 system of counting subsequent choices of voters for eliminated candidates
24 unequally weight votes. Every voter has the same opportunity to rank candidates
25 when she casts her ballot, and in each round every voter’s vote carries the same

26 _____
27 ⁵ Plaintiffs are aware that Minneapolis does limit the number of candidates that
28 can be ranked, but the Minnesota Supreme Court case did not address that feature of the
system, and in fact the court stated, “*A voter may rank as many or as few candidates as
she chooses.*” 766 N.W.2d at 686 (emphasis added).

1 value.” *Id.* at 693 (emphasis added).

2 The Michigan trial court in *Stephenson v. Ann Arbor Bd. of Canvassers*, No.
3 75-10166 AW (Mich. Cir. Ct. 1975) (see City’s Request for Judicial Notice, Exhibit 6
4 (Dkt. #27-6)), took the same approach, rejecting a one-person, one-vote challenge
5 based on the premise that each voter only had one vote counted at a time. *See id.*
6 at 6 of 10 (“Such a voter does not have his vote counted twice—it counts only once
7 and if that first preference no longer remains and is eliminated from consideration,
8 his or her second preference is the ‘counted’ vote.”).⁶

9 If this Court concludes that IRV is, in fact, a single, unitary election, it calls
10 into question the reasoning of the foregoing cases, and the constitutionality of
11 unrestricted IRV.

12 Nor would that conclusion save San Francisco’s restricted IRV system from
13 unconstitutionality. If San Francisco’s system is viewed as a single, unitary system,
14 then it is just as vulnerable to the one-person, one-vote issues rejected by the
15 Minnesota and Michigan courts as unrestricted IRV is.

16 **IV. AMICUS’S RELIANCE ON *BURDICK V. TAKUSHI* IS MISPLACED.**

17 Amicus relies heavily on *Burdick v. Takushi*, 504 U.S. 428 (1992), which
18 upheld Hawaii’s ban on write-in votes, urging that it supports the conclusion that
19 restricted IRV imposes no severe burden on the right to vote. Nothing could be
20 further from the truth.

21 The Court in *Burdick* concluded that Hawaii’s ban on write-in voting was a
22 minimal burden on the right to vote because it did not “unreasonably interfere
23 with the right of voters to associate and have candidates of their choice placed on
24

25 ⁶ See also Marron, *Issue In Election Law—One Person, One Vote, Several*
26 *Elections—Instant Runoff Voting and the Constitution*, 28 Vt. L. Rev. 343 (2004) (“*Under*
27 *the instant runoff system the voters’ ballots are counted as votes in a series of distinct*
28 *runoff elections. . . . Every voter has one and only one vote in each runoff round. A person*
whose first choice does not survive the first round has her subsequent choices counted as
a new vote in following rounds.” (emphasis added; footnote omitted)).

1 the ballot.” *Id.* at 434. Candidates’ access to the primary ballot was easily obtained
2 through a number of avenues—it was not unconstitutional for the State to put a
3 minimal time restriction on those avenues.

4 More critically, however, the Court in *Burdick* did not consider denial of the
5 right to cast a protest ballot to be equivalent to a denial of the right to cast a vote
6 for a candidate who was actually on the ballot:

7 [T]he objection to the specific ban on write-in voting amounts to
8 nothing more than the insistence that the State record, count, and
9 publish individual protests against the election system or the choices
10 presented on the ballot through the efforts of those who actively
11 participate in the system. There are other means available, however,
12 to voice such generalized dissension from the electoral process; and
we discern no adequate basis for our requiring the State to provide
and to finance a place on the ballot for recording protests against its
constitutionally valid election laws.

13 *Id.* at 441.

14 In San Francisco, by contrast, voters are not merely denied the right to
15 “protest” against the candidates—they are denied the ability to vote for duly
16 qualified candidates in the later, decisive runoff rounds. “[T]he function of the
17 election process is ‘to winnow out and finally reject all but the chosen candidates,’
18 [citation], not to provide a means of giving vent to ‘short-range political goals,
19 pique, or personal quarrel[s].’” *Id.* at 438 (quoting *Storer v. Brown*, 415 U.S. 724,
20 730 (1974)). San Francisco’s use of restricted instant runoff voting implicates the
21 proper purpose—choosing candidates—in a way that, according to the *Burdick*
22 court—write-in voting did not.

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V. CONCLUSION.

San Francisco's restricted IRV system is unconstitutional. Nothing in the NAF amicus brief establishes otherwise.

Dated: April 7, 2010

Respectfully submitted,

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