

1 NIELSEN, MERKSAMER, PARRINELLO,  
 2 MUELLER & NAYLOR, LLP  
 3 JAMES R. PARRINELLO, ESQ. (S.B. NO. 63415)  
 4 CHRISTOPHER E. SKINNELL, ESQ. (S.B. NO. 227093)  
 5 2350 Kerner Boulevard, Suite 250  
 6 San Rafael, California 94901  
 7 Telephone: (415) 389-6800  
 8 Facsimile: (415) 388-6874  
 9 Email: [jparrinello@nmgovlaw.com](mailto:jparrinello@nmgovlaw.com)  
 10 Email: [cskinnell@nmgovlaw.com](mailto:cskinnell@nmgovlaw.com)

11 *Attorneys for Plaintiffs*  
 12 RON DUDUM, MATTHEW SHERIDAN,  
 13 ELIZABETH MURPHY, KATHERINE  
 14 WEBSTER, MARINA FRANCO and  
 15 DENNIS FLYNN

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

18 RON DUDUM, MATTHEW SHERIDAN,  
 19 ELIZABETH MURPHY, KATHERINE  
 20 WEBSTER, MARINA FRANCO and  
 21 DENNIS FLYNN,

22 *Plaintiffs,*

23 vs.

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

*Defendants.*

Case No. C 10-00504 SI

**REPLY IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 PRELIMINARY INJUNCTION**

HEARING DATE: March 19, 2010  
 HEARING TIME: 9:00 a.m.  
 JUDGE: Hon. Susan Illston  
 COURTROOM: 10

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1 **I. INTRODUCTION.**

2 The City concedes that restricted IRV regularly prevents thousands of voters from  
3 voting or having their votes counted in the determinative rounds of runoff elections. The  
4 City attempts to defend this serious infringement on the right to vote on three grounds:  
5 (1) there is no burden on the right to vote because all voters are permitted to rank three  
6 candidates, and they all have an equal risk that their vote will be “exhausted” in later  
7 runoff rounds; (2) it would be too costly or administratively difficult for the City to  
8 implement an IRV system that allows voters to rank every candidate on the ballot; and (3)  
9 the voters approved IRV so they are entitled to it. These arguments have no constitutional  
10 merit.

11 First, it is undisputed that the City’s restricted IRV system prohibits thousands of  
12 voters from having any vote counted in the dispositive later rounds of runoff elections.  
13 This is without doubt a serious burden on the right to vote. The City’s argument that all  
14 voters are treated equally, as they all get to rank three candidates, is really just an  
15 argument that all voters have an equal chance to be disenfranchised in the determinative  
16 runoff rounds. That does not come close to passing constitutional muster. If the City’s  
17 theory were correct (which it is not), a law that allows every citizen to vote, but then  
18 provides that ballots from 20 precincts selected at random would be thrown into the Bay,  
19 would be constitutional—on the theory that all voters faced the same risk that their vote  
20 would not be counted.

21 Second, the fact that the City may have difficulty paying for or implementing an  
22 IRV system that allows each voter to rank every candidate on the ballot, is plainly no  
23 justification for denying some voters the right to have their vote counted. It is astonishing  
24 that the City even attempts to make this argument. The right to vote is one of the most  
25 important rights citizens possess, and is not dependent on financial or administrative  
26 convenience. Even assuming for the sake of argument that the City cannot implement an  
27 IRV system that gives each voter the right to rank every candidate, that does not make  
28 restricted IRV legal. The City must conduct elections in a manner that complies with the

1 constitutional rights of its citizens. Among the City's options is a return to the  
 2 primary/runoff system used in virtually every jurisdiction in the state and country, and  
 3 which the City election machinery already implements for all state and national elections.

4 Third, the fact that City voters approved Proposition A does not insulate it from  
 5 constitutional requirements. "It is irrelevant that the voters rather than a legislative body  
 6 enacted [a law] because the voters may no more violate the Constitution by enacting a  
 7 ballot measure than a legislative body may do so by enacting legislation." *Citizens Against*  
 8 *Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981).  
 9 Indeed, while the City's opposition goes to great lengths now to attempt to show that  
 10 unrestricted IRV would be too difficult to implement, voters were told *nothing* about this  
 11 in the ballot materials mailed to them by the City in 2002. Nor were voters told that  
 12 restricted IRV (*i.e.*, limiting voters to three ranked choices) was a *fait accompli*, that it  
 13 would routinely "exhaust" thousands of votes, or that it would result in the election of  
 14 candidates with less than a majority of actual votes cast.<sup>1</sup>

15 The City's opposition is telling because it essentially concedes the following:

- 16 • San Francisco was the first city to use restricted IRV and limit a voter to ranking  
 17 three choices regardless of the number of candidates on the ballot.
- 18 • Restricted IRV has never been upheld by any court.
- 19 • Restricted IRV weighs most heavily against voters who prefer less popular  
 20 candidates with their three ranked choices; once those candidates are eliminated,  
 the voters who preferred them are prohibited from voting in later runoff rounds.
- 21 • Restricted IRV has resulted in tens of thousands of votes being "exhausted" in San  
 22 Francisco elections since 2004, denying those voters any voice in determinative  
 runoff rounds.

23 Finally, attempting to obscure the fact that thousands of voters are denied the right  
 24 to participate in determinative instant runoff rounds, the City argues that its restricted  
 25 IRV system involves only one "election" in which all voters are given not just one but three  
 26

27 <sup>1</sup> Indeed, they were told the opposite. The ballot question read: "Shall the City use  
 28 instant runoff voting to elect City officers with a majority of votes without separate runoff  
 elections?" (Plaintiffs' Request for Judicial Notice, filed 2/4/10, Ex. 3 [Dkt. #27-3] at p. 5.)



1 choices, or votes, so there is no denial of the right to vote. But this play on semantics  
2 ignores the fact that instant runoff voting is functionally a series of elections—beginning  
3 with a general election and, if no candidate receives a majority of the vote, followed by a  
4 series of “instant” runoff elections in which one candidate is eliminated each election and  
5 all votes are recounted until a winner is determined. It is undisputed that restricted IRV  
6 routinely denies thousands of voters the right to participate in later and determinative  
7 runoff election rounds.

8 Restricted IRV is unprecedented and badly flawed. The City’s opposition makes a  
9 creditable effort to defend this unorthodox system, but it is akin to putting lipstick on a  
10 pig—it dresses it up a little, but does not obscure its essence. By regularly depriving  
11 thousands of citizens of any voice in the later and determinative rounds of the runoffs,  
12 restricted IRV seriously burdens the right to vote, and is neither supported by any  
13 compelling interest nor narrowly drawn. The City claims an injunction would cause  
14 administrative difficulties, but federal courts issue preliminary injunctions to protect  
15 citizens from unconstitutional voting systems. If not now, when?

16 **II. NO COURT HAS EVER HELD RESTRICTED IRV IS CONSTITUTIONAL.**

17 The City seeks to obscure just how radical its restricted IRV system is by suggesting  
18 that its use is more widespread than is the case, and even by implying that restricted IRV  
19 has been approved by the courts. Nothing could be further from the truth.

20 San Francisco was the first city in the United States to use restricted IRV. (Katz Decl., ¶  
21 15.) The City never explicitly denies this fact, but denies its system was “novel” on the ground  
22 that Oakland, Berkeley, and Minneapolis have similar systems. Yet each of those cities  
23 adopted restricted IRV in the wake of San Francisco’s adoption—in 2002 such a system was  
24 not only “novel,” it was unprecedented. Moreover, to date those three jurisdictions *combined*  
25 have held only one restricted IRV election—in Minneapolis in November 2009. (Katz Decl., ¶  
26 15 & nn.8-9.) In other words, contrary to the subtle implication of the City, restricted IRV  
27 cannot claim the weight of widespread or long-term use.

28 The City’s implication that restricted IRV has ever been considered, much less

1 upheld, by a court is seriously misleading. As pointed out in the moving papers,  
2 Minneapolis restricts voters to three candidates, but that restriction was not addressed at  
3 all in the Minnesota Supreme Court's decision in *Minn. Voters Alliance v. City of*  
4 *Minneapolis*, 766 N.W.2d 683, 690 (Minn. 2009)—it was not even mentioned—and  
5 certainly was not upheld against constitutional challenge. In fact in describing  
6 Minneapolis's IRV system the Minnesota Supreme Court stated, "A voter may rank as  
7 many or as few candidates as she chooses." *Id.* at 686 (emphasis added). Thus there is  
8 no justification for the City suggesting that *Minnesota Voters Alliance* approved or  
9 supports the constitutionality of restricted IRV.

10 The City's reliance on *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass.  
11 1996), is also *badly* misplaced. In the first place, that case did not address a system of  
12 restricted IRV; rather, in Cambridge each voter "may mark as many choices as he  
13 pleases." *Moore v. Elec. Comm'rs of Cambridge*, 35 N.E.2d 222, 228 (Mass. 1941). *See*  
14 *also McSweeney*, 35 N.E.2d at 12 n.2 (citing to *Moore* for its detailed description of the  
15 Cambridge system). Thus, the *McSweeney* court's discussion of "exhausted" votes,  
16 disingenuously and misleadingly quoted by the City on page 12 of its Opposition, could  
17 not and did not refer to votes that were exhausted as the result of an artificial limit on the  
18 number of rankings, imposed by elections officials. Furthermore, the Court in *McSweeney*  
19 declined to apply strict scrutiny in that case because the issue presented was the  
20 constitutionality of Cambridge's system of filling vacancies on the council—not its system  
21 for elections in the first instance. The *McSweeney* court applied rational basis review  
22 because the United States Supreme Court "has applied a more relaxed standard in  
23 reviewing mechanisms for filling vacancies." *Id.* at 16.<sup>2</sup> The court recognized, however,  
24 that strict scrutiny might be appropriate if the constitutionality of Cambridge's initial  
25 system of election were presented to the court in a future case. *Id.* at 14-15.

26  
27 <sup>2</sup> The City's reliance on *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982),  
28 is improper for the same reason—it dealt only with procedures for filling vacancies, which  
the City neglects to mention.

1 **III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.**

2 **A. Strict Scrutiny Applies Because Voters Are Denied The Right To**  
 3 **Have A Vote Counted In The Dispositive Runoff Rounds.**

4 The City freely admits that the burden on the right to vote is “severe”—and subject  
 5 to strict scrutiny—when there is either a denial of the right to vote, or a dilution of the  
 6 weight of a voter’s vote. (City’s Opposition (Dkt. #26), p. 2:2-4; *see also Lemons v.*  
 7 *Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008).)<sup>3</sup> This is a critical concession, because  
 8 San Francisco voters are being denied the right to have any vote counted in the critical,  
 9 dispositive rounds of balloting.

10 The City seeks to avoid this conclusion by arguing that under restricted IRV there is  
 11 only one “election” and because each voter is allowed to rank three candidates (and  
 12 theoretically has the same chance of having his or her vote not counted in later runoff  
 13 rounds), there is no violation of the right to vote.<sup>4</sup>

14 While all voters in restricted IRV only mark their ballots once, that is just the  
 15 beginning of the analysis, and the City’s superficial construct that there is only one  
 16 “election” under restricted IRV elevates form over substance. The Court is not obligated  
 17 to accept the City’s self-serving description which totally ignores function. *Cf. People ex.*  
 18 *rel. Devine v. Elkus*, 59 Cal. App. 396, 399 (1922) (striking down a version of proportional  
 19 representation that permitted voters to cast four votes in a multi-candidate election at  
 20 which nine city councilors would be elected because the court recognized that—as a

21 \_\_\_\_\_  
 22 <sup>3</sup> In light of this concession, the City’s extensive reliance on cases upholding neutral  
 23 regulations of the time, place and manner of elections are totally inapposite. *See, e.g.,*  
 24 *Burdick v. Takushi*, 504 U.S. 528 (1992); *Fortson v. Morris*, 385 U.S. 231 (1966).

25 <sup>4</sup> It is no defense to say that voters get to cast a ballot if that ballot is not counted.  
 26 “There is more to the right to vote than the right to mark a piece of paper and drop it in a  
 27 box or the right to pull a lever in a voting booth. The right to vote includes the right to  
 28 have the ballot counted. . . . It also includes the right to have the vote counted at full value  
 without dilution or discount. . . .” *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964)  
 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). *See also* 42  
 U.S.C. § 1973l(c)(3) (Voting Rights Act) (“The terms ‘vote’ or ‘voting’ shall include all  
 action necessary to *make a vote effective* . . .” (emphasis added)); CAL. CONST. art. II § 2.5  
 (“A voter who casts a vote in an election . . . shall have that vote counted.”).

1 functional matter—voters were participating in nine separate elections, even though as a  
2 formal matter they only cast one ballot).

3 In reality IRV is a series of runoff elections, hence the name “instant runoff  
4 voting.”<sup>5</sup> IRV replaced a traditional general/runoff voting system in San Francisco. The  
5 *functional* effect of restricted IRV is *identical* to the hypothetical discussed in Plaintiffs’  
6 moving papers, in which eight candidates seek election to a single office under the City’s  
7 previous system of a November election and, if necessary, a December runoff. As  
8 Plaintiffs noted, “There can be no question whatsoever that it would be unconstitutional  
9 to deprive voters of the right to vote in the December runoff because they voted for the  
10 sixth- or seventh- or eighth-place candidates in the November general election. The  
11 system challenged at bench is no different.” (Plaintiffs’ Motion for Preliminary Injunction  
12 [Dkt. #6], p. 14:1-8.) Tellingly, the City has made no effort to distinguish restricted IRV  
13 from this hypothetical case, nor is there any principled basis for such a distinction.

14 That IRV is not just a single election but rather the functional equivalent of  
15 multiple elections, was also recognized by the Supreme Court of Minnesota, which  
16 observed that instant runoff voting “is directly analogous to the pattern of voting in a  
17 primary/general election system,” *Minn. Voters Alliance*, 766 N.W.2d at 690, that the  
18 counting of ballots “simulates a series of runoff elections” *id.* at 686, and that “the effect  
19 in terms of the counting of votes is the same.” *Id.* at 691. In fact, that similarity was  
20 critical to the holding that Minneapolis’s IRV system was *facially* constitutional.

21 In *Minnesota Voters Alliance*, the plaintiffs alleged that IRV violated the principle  
22 of one-person, one-vote, because some voters—those who chose non-eliminated  
23 candidates—had only one vote counted, while “voters who cast their first-choice vote for  
24 the eliminated candidate get a second chance to influence the election by having their  
25 second-choice votes, for a different candidate, counted in the second round.” *Id.* at 690.  
26 The court concluded that this mis-described the IRV system; rather than a single election

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5 S.F. CHARTER § 13.102 itself refers to this system as “Instant Runoff Voting.”

1 in which voters are allowed to cast multiple ballots, the court concluded that each runoff  
2 round was functionally identical to a separate election:

3 [T]his aspect of the IRV methodology is directly analogous to the pattern of  
4 voting in a primary/general election system. In a nonpartisan primary  
5 election, each voter's vote counts in determining which two candidates  
6 survive to reach the general election. In essence, those primary votes are the  
7 voters' first-choice ranking of the candidates. As a result of the primary, all  
8 but the top two candidates are eliminated. Then, in the general election,  
9 voters who voted for candidates eliminated in the primary are allowed to  
10 cast another ballot, which necessarily will be for a different candidate—  
11 presumably, their second choice. This is no different than the counting of  
12 the second-choice votes of voters for eliminated candidates in instant runoff  
13 voting. At the same time, in the general election, voters who voted in the  
14 primary for either of the two surviving candidates are allowed to vote again,  
15 and they are most likely to vote again for their choice in the primary (unless,  
16 perhaps, they were voting strategically in the primary and did not vote for  
17 their actual first choice in an effort to advance a weaker opponent for their  
18 first choice to the general election). This is the equivalent of the continuing  
19 effect of the first-choice votes for continuing candidates in instant runoff. A  
20 vote in the general election still counts and affects the election, even though  
21 it is for the same candidate selected in the primary. Appellants attempt to  
22 distinguish the primary/general election system on the basis that those  
23 elections are separate, independent events, but the effect in terms of the  
24 counting of votes is the same.

25 766 N.W.2d at 690-91 (emphasis added).

26 That IRV is the functional equivalent of a series of runoff elections is also  
27 recognized by FairVote, a leading national advocate of instant runoff voting. FairVote's  
28 website, [www.fairvote.org](http://www.fairvote.org), repeatedly likens IRV to a "series of elections." Below are just  
a sample of those statements:

- "IRV acts like a series of runoff elections in which one candidate is eliminated each election. Each time a candidate is eliminated, all voters get to choose among the remaining candidates."

FairVote.org, *New to IRV?: Frequently Asked Questions* at 2, online at  
<http://www.fairvote.org/New-to-IRV> (last visited Mar. 1, 2010) (emphasis added).

- "Q: Doesn't this give extra votes to supporters of defeated candidates?

"A: No. In each round, every voter's ballot counts for exactly one candidate. In this respect, it's just like a two-round runoff election. . . . In IRV candidates get eliminated one at a time, and each time, all voters get to select among the



1 remaining candidates. At each step of the ballot counting, every voter has exactly  
2 one vote for a continuing candidate.

3 *Id.* (emphasis added). See also FairVote.org, *How Instant Runoff Voting Works* at 1,  
4 <http://www.fairvote.org/how-instant-runoff-voting-works> (last visited Mar. 1, 2010) (“a  
5 series of runoffs are simulated . . . just as if [voters] were voting in a traditional two-round  
6 runoff election . . .”). Even the San Francisco Supervisors, who put Proposition A on the  
7 ballot and supported its adoption, noted in their ballot argument, “The ‘instant’ runoff  
8 works much like December’s ‘delayed’ runoff.” (Plaintiffs’ RJN, Ex. 3 [Dkt. #14-3], p. 7.)

9 Accordingly, the Court must reject the City’s claim that its restricted IRV involves  
10 only one election, and not a series of elections. Once the City’s “single election” argument  
11 is dispatched, it becomes clear that the City’s restricted IRV system disenfranchises voters  
12 by denying their right to have a vote counted in later runoff election rounds—by  
13 “condition[ing] the right to vote in one election on [how] that right was exercised in a  
14 preceding election.” *Ayers-Schaffner v. Distefano*, 37 F.3d 726, 727 (1st Cir. 1994). The  
15 burden imposed on Plaintiffs’ right to vote by such a restriction “is undeniably severe[.]”  
16 *Id.* at 728. See also *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003)  
17 (striking down statute that prohibited voters from voting for a successor to Governor  
18 Davis if he were recalled, unless the voter had voted on the initial question whether  
19 Governor Davis *should* be recalled). Indeed, as the *Ayers-Schaffner* court recognized,  
20 when presented with the question of whether such a system is constitutional, “the case is  
21 hardly worthy of discussion.” 37 F.3d at 727.

22 **B. Strict Scrutiny Also Applies Because Some Voters’ Votes Are**  
23 **Diluted By Being Given Less Weight Than Other Voters’.**

24 Even if the City’s characterization that there is only one “election” were accepted  
25 (which it should not be), that would still not save restricted IRV. In that case, the City’s  
26 electoral system would avoid the Scylla of vote denial and fall into the Charybdis of vote  
27 dilution. “The right to vote is protected in more than the initial allocation of the franchise.  
28 Equal protection applies as well to the manner of its exercise. Having once granted the

1 right to vote on equal terms, the State may not, by later arbitrary and disparate treatment,  
2 value one person's vote over that of another. . . . It must be remembered that 'the right of  
3 suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as  
4 effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531  
5 U.S. 98, 104-05 (2000) (quoting *Reynolds*, 377 U.S. at 555).

6 Vote dilution exists any time one voter's vote is given more weight than another's.  
7 "In determining whether an individual's vote has been diluted, 'the relevant inquiry is  
8 whether the vote of any citizen is approximately equal in weight to that of any other  
9 citizen, . . . ' . . . In other words, the question is whether one person's vote counts the same  
10 as another's." *Turner v. Dierks Sch. Dist.*, 782 F. Supp. 81, 82 (W.D. Ark. 1992) (quoting  
11 *Bd. of Est. v. Morris*, 489 U.S. 688, 701 (1989) (internal quotation marks omitted)).

12 Here again, *Minnesota Voters Alliance* is relevant. In that case, the Minnesota  
13 Supreme Court held that IRV did not "unequally weight votes," because "[e]very voter has  
14 the same opportunity to rank candidates when she casts her ballot, *and in each round*  
15 *every voter's vote carries the same value.*" 766 N.W.2d at 693 (emphasis added). That is  
16 not true of San Francisco's restricted IRV system. Because of the three-candidate limit,  
17 some voters have a greater ability to influence the election by having a vote counted in the  
18 later, dispositive rounds of balloting, while other voters' ballots are discarded and "shall  
19 not be counted in further stages of the tabulation . . . ." S.F. CHARTER § 13.102(a)(3).

20 Disingenuously, the City implies that the principle of vote dilution only "applies  
21 when the State weighs 'the votes of citizens differently, by any method or means, merely  
22 because of where they happen to live.'" (City's Opposition, p. 12 (quoting *Reynolds v.*  
23 *Sims*, 377 U.S. 533, 555 (1964)). That is not the law! While (non-racial) vote dilution  
24 arises most commonly in legislative malapportionment cases, the courts have recognized  
25 that it will exist *any time* some votes are weighted more heavily than others. *See, e.g.,*  
26 *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (striking down poll tax on  
27 the ground that it "dilute[s] a citizen's vote on account of his economic status . . . .");  
28 *Stewart v. Parish School Board*, 310 F. Supp. 1172, 1179-80 (E.D. La.) (three-judge court),

1 *aff'd*, 400 U.S. 884 (1970) (small landowners' votes were unconstitutionally diluted by  
2 law that weights the votes in a school bond election by the assessed value of property  
3 owned); *Gould v. Grubb*, 14 Cal.3d 661 (1975) (statute requiring incumbent's name to be  
4 first on the ballot "inevitably dilutes the weight of the vote of all those electors who cast  
5 their ballots for a candidate who is not" an incumbent).

6 Nor is there any merit to the City's attempt to reframe Plaintiffs' constitutional  
7 argument as a contention that there is a right to have proportional electoral results—that  
8 there is a right to elect less popular candidates—based on cases rejecting challenges to  
9 winner-take-all systems. (City's Opposition, p. 13.) Plaintiffs have never argued that they  
10 have a right to win elections; just that they have a right to have their vote counted in all  
11 elections, on equal terms. The unconstitutionality of restricted IRV stems from its denial  
12 of the right to have a vote even counted in later, dispositive rounds of voting. See S.F.  
13 CHARTER § 13.102(a)(3) ("*shall not be counted* in further stages of the tabulation . . . ."  
14 (emphasis added)). The City's contention that Plaintiffs urge otherwise is a red herring.

### 15 **C. Restricted IRV Cannot Remotely Survive Strict Scrutiny.**

16 Because strict scrutiny applies, there is no presumption that restricted IRV is  
17 constitutional; to the contrary, Defendants bear the burden of establishing that the  
18 challenged restriction is narrowly-tailored to fulfill a compelling state interest.  
19 *Democratic Party v. Reed*, 343 F.3d 1198, 1203-04 (9th Cir. 2003). This is a burden they  
20 cannot meet. In fact, the City makes virtually no effort to try, limiting its discussion of  
21 this issue to a single, cursory footnote (City's Opposition, p. 19 n.5), thereby effectively  
22 conceding that strict scrutiny cannot be met.<sup>6</sup>

23 The primary interests that the City identifies as warranting the restricted IRV  
24 system boil down to two justifications: (1) avoiding the costs of running an unrestricted

25  
26 <sup>6</sup> See *Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47, 52 (D.D.C. 2001) ("Although  
27 plaintiffs' [sic] argue that they have not abandoned any claims, those for which they  
28 provide only cursory argument are deemed conceded."), *rev'd in part on other grounds*,  
292 F.3d 849 (D.C. Cir. 2002).



1 IRV system, and (2) administrative convenience. Neither remotely qualifies as a  
2 compelling state interest. *Tashjian v. Republican Party*, 479 U.S. 208, 217-18 (1986)  
3 (statute prohibiting party from allowing independent voters to vote in party primaries  
4 could not be justified by state's desire to avoid associated increase in costs); *Fed. Elec.*  
5 *Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (administrative ease not  
6 a compelling state interest); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (administrative  
7 convenience not even sufficiently important to survive intermediate scrutiny applicable to  
8 gender-based classifications, much less strict scrutiny).

9 In its cursory footnote the City also claims that the “stability” of the City’s political  
10 system justifies the IRV system. In essence the City’s contention boils down to nothing  
11 more than a claim that, having adopted an unconstitutional system, it would be “de-  
12 stabilizing” for the City to change it—that inertia is an interest of constitutional  
13 dimension. This is not the “stability” that the Court approved in the case relied upon by  
14 the City, *Storer v. Brown*, 415 U.S. 724 (1974). *Storer* upheld a “sore” loser statute, which  
15 prevented candidates from seeking office as an independent if they were registered with a  
16 recognized political party in the year preceding the election; the “instability” that law  
17 sought to prevent was intraparty feuding—an interest not at issue here.<sup>7</sup> More instructive  
18 is *Partnoy*, which expressly *rejected* a “political stability” rationale as a justification for  
19 prohibiting voters who did not vote on the recall question from voting for Governor Davis’  
20 successor. *See also Anderson v. Celebrezze*, 460 U.S. 780, 801-05 (1983) (“stability”  
21 concerns insufficient to sustain early filing deadline for independent candidates).  
22 Accepting the City’s “stability” argument would effectively mean that a preliminary  
23 injunction could *never* be issued against restricted IRV or any other illegal city voting  
24 system—because city elections are held every November. This notion cannot be squared

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<sup>7</sup> Further, the City’s purported “stability” interest—by its nature—could not have been considered upon Proposition A’s adoption, as required by strict scrutiny, but instead was “hypothesized or invented post hoc in response to litigation.” *U.S. v. Va.*, 518 U.S. 515, 533 (1996).

1 with numerous cases granting preliminary injunctions against unconstitutional electoral  
 2 practices. *See, e.g., Matsumoto v. Pua*, 775 F.2d 1393 (9th Cir. 1985) (reversing trial  
 3 court's refusal to grant preliminary injunction against law that prohibited recalled  
 4 councilman from seeking office for two years after recall); *Nader 2000 Primary Comm.,  
 5 Inc. v. Hechler*, 112 F. Supp. 2d 575 (S.D.W. Va. 2000) (preliminary injunction forcing  
 6 state to put 3d party candidate on the ballot); *N.Y. v. County of Del.*, 82 F. Supp. 2d 12  
 7 (N.D.N.Y. 2000) (preliminary injunction ordering elections official to make polling places  
 8 accessible to disabled voters, including—if necessary—finding new polling places for an  
 9 election one month away); *Hellebust v. Brownback*, 812 F. Supp. 1136 (D. Kans. 1993)  
 10 (enjoining elections for State Board of Agriculture that did not comply with constitutional  
 11 one person, one vote principles).

12 **D. The Three Candidate Limitation Also Violates Due Process.**

13 The City concedes that “massive” disenfranchisement violates due process. (City’s  
 14 Opposition, p. 20.) Restricted IRV falls within this rule.

15 *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), discussed in Plaintiffs’ moving  
 16 papers, is instructive on this point. In that case the Court of Appeal found fundamental  
 17 unfairness in a state Supreme Court’s post-election invalidation of absentee ballots which  
 18 resulted in the disqualification of 10% of the total votes cast in a primary election. (Voters  
 19 were permitted to cast their ballot, but their votes were not counted.) The 10%  
 20 disenfranchisement at issue in *Griffin* was far less “massive” than the number of ballots  
 21 “exhausted” in later rounds of some supervisorial races, which has climbed as high as a  
 22 third of the ballots cast. *See also League of Women Voters v. Brunner*, 548 F.3d 463 (6th  
 23 Cir. 2008) (due process violation where 22% of provisional ballots not counted).

24 **IV. PLAINTIFFS FACE THE REAL THREAT OF IRREPARABLE INJURY.**

25 The City does not dispute that “[a]bridgement or dilution of a right so fundamental  
 26 as the right to vote constitutes irreparable injury.” *Cardona v. Oakland Unified School  
 27 Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992). Rather, they merely cite, without  
 28 elaboration, case law holding that irreparable harm must be “likely.” The implication that

1 Plaintiffs cannot meet this standard is preposterous.

2 The City does not dispute that tens upon thousands of ballots have been  
3 “exhausted” in supervisorial races since the restricted IRV system was first implemented  
4 in 2004—in many races more than 25% of the votes cast. (Katz Decl., ¶¶ 26-30.) Even  
5 allowing for the fact that some of those ballots will be “exhausted” voluntarily (*e.g.*, by  
6 voters who voluntarily decline to rank all three candidates), rather than by the three-  
7 candidate limit, the City nowhere denies that the impact of the three-candidate limit has  
8 been significant. And there is no reason to think that 2010 will be different. Plaintiff  
9 Katherine Webster lives in Supervisorial District #6. As of the date the complaint in this  
10 case was filed, *twenty candidates* had already filed a Statement of Intention to run for  
11 supervisor in that district in 2010. (Plaintiffs’ Request for Judicial Notice, filed 2/4/10,  
12 Exhibit 7 pts. 1 [Dkt. #14-7] & pt. 2 [Dkt. #14-8].) *Ten candidates* had already filed to  
13 run in District 10, where Plaintiff Dennis Flynn is registered. (*Id.*) Thus, it is not only  
14 likely, but virtually *inevitable* that ballots will be artificially exhausted by virtue of the  
15 three-candidate limit, and that voters in those districts will accordingly be deprived of the  
16 right to have a vote counted in later rounds of balloting. (*See also* Katz Decl., ¶¶ 26-30;  
17 *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 995-96 (N.D.  
18 Ohio 2004) (granting preliminary injunctive relief in spite of defendant election officials’  
19 claims that the harm was “speculative,”) *aff’d in part and rev’d in part on other grounds*,  
20 387 F.3d 565 (6th Cir. 2004).) To paraphrase the Sixth Circuit in *Sandusky County*  
21 *Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004), which upheld the award of  
22 a preliminary injunction against Ohio’s failure to comply with the Help America Vote Act,  
23 “a voter cannot know in advance that his or her [ballot will be exhausted by the three-  
24 candidate limit]. It is inevitable, however, that there will be such mistakes. The issues  
25 [Plaintiffs] raise are not speculative or remote; they are real and imminent.” *Id.* at 574.<sup>8</sup>

26  
27 <sup>8</sup> The weakness of the City’s suggestion that Plaintiffs lack standing is highlighted  
28 by the fact that it appears in a mere footnote. Contrary to the City’s suggestion, Plaintiffs  
need not allege that they would have ranked more than three candidates in prior elections  
to have standing. Standing to challenge an unconstitutional electoral practice “depends

1           Moreover, the City's objection that the harm to be remedied is "speculative" cannot  
 2 be squared with the City's objection that Plaintiffs waited too long to bring this suit. This  
 3 notion runs directly counter to the established rule that "[i]f petitioner has been denied a  
 4 fundamental constitutional right, the passage of time will not preclude him from relief."  
 5 *United States v. Cariola*, 323 F.2d 180, 183 (3d Cir. 1963). Further, it is only as a result of  
 6 that delay that evidence of restricted IRV's actual impacts on voters has become available,  
 7 and the "likelihood" of harm has become so crystal clear. The City would have this Court  
 8 present Plaintiffs with a Hobson's choice: move quickly and be denied relief because the  
 9 threat of harm is speculative, or move more deliberately and be denied relief on the  
 10 ground that Plaintiffs should have moved faster. The Court should reject this  
 11 unreasonable and untenable position.<sup>9</sup>

12           And finally, Plaintiffs wish to be clear: the unconstitutional harm that Plaintiffs  
 13 complain of is not that exhausted ballots "affect election results." Plaintiffs need not  
 14 establish that is the case to prevail. Rather, "[t]he injury in fact is the denial of equal  
 15 treatment[,] whether it ultimately affects the result of the election or not. *ACLU of N.M.*,  
 16 546 F.3d at 1319. Evidence of the three-candidate limitation is merely provided to  
 17 emphasize the scope of the deprivation caused by the City's restricted IRV system.

18 **V. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST STRONGLY**  
 19 **FAVOR THE AWARD OF A PRELIMINARY INJUNCTION.**

20 Plaintiffs cited numerous federal court decisions in their opening papers holding

21 not so much on the fact of past injury but on the prospect of its occurrence in an  
 22 impending or future election." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S.  
 23 289, 301 n.12 (1979). And as to future elections, Plaintiffs need not demonstrate that they  
 24 will *inevitably* be harmed—just that there is a "realistic danger" of such harm. *Id.* at 299  
 25 (One "does not have to await the consummation of the threatened injury to obtain  
 26 preventive relief."). Given the number of candidates who have already filed to run for  
 27 supervisor in 2010, and the history of thousands of exhausted ballots in City elections,  
 28 there can be little question that the danger of future disenfranchisement is "realistic." See  
 Katz Decl., ¶¶ 26-30; *Sandusky*, 387 F.3d at 574; *ACLU of N.M. v. Santillanes*, 546 F.3d  
 1313, 1318-19 (10th Cir. 2008) (individual voters had standing to challenge voter ID  
 requirement, because—while each had a photo ID—there was no way to tell in advance  
 whether those IDs might be rejected by poll workers).

<sup>9</sup> In connection with this point, it is worth noting that the City's claim that "six  
 elections" have been conducted under this system is mere puffery. None of the elections  
 conducted by the City in 2005, 2007 or 2009 implicated the three-candidate limit.

1 that protection of the right to vote is unquestionably in the public interest. *See, e.g.,*  
 2 *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir.  
 3 2006) (“There is a strong public interest in allowing every registered voter to vote.”).  
 4 Making no effort to distinguish those cases, the City instead quotes *Reynolds v. Sims* as  
 5 supporting its position that a preliminary injunction should not issue. (Opposition at 23.)  
 6 However, the City’s quote from *Reynolds* disingenuously omits the following key language  
 7 that is in the same paragraph as the language quoted by the City:

8            “[I]t would be the unusual case in which a court would be justified in not  
 9            taking appropriate action to insure that no further elections are conducted  
 10            under the invalid plan. However, under certain circumstances, such as  
 11            where an impending election is imminent and a State’s election machinery  
 12            is already in progress, equitable considerations might justify a court in  
 13            withholding the granting of immediately effective relief.”

12 *Reynolds*, 377 U.S. at 585 (emphasis added); accord *Cardona*, 785 F. Supp. at 843; *Diaz*  
 13 *v. Silver*, 932 F. Supp. 462, 466 (E.D.N.Y. 1996) (three-judge court) (a preliminary  
 14 injunction against an unconstitutional electoral system may be denied as contrary to the  
 15 public interest *when the State’s “election machinery is already in gear . . . .”*).

16            Thus, in the “usual” case, a preliminary injunction will issue to enjoin an invalid  
 17 elections system where, as here, the City’s election machinery is not “already in gear.” The  
 18 election at issue is still eight months off. The candidate filing period will not open until  
 19 July. *See* S.F. MUNI. ELEC. CODE § 200 (incorporating filing deadlines from state law);  
 20 CAL. ELEC. CODE §§ 8020(b), 10220. There is consequently no equitable justification for  
 21 denying injunctive relief to Plaintiffs, who have been diligent in filing this suit well in  
 22 advance of the November election.            Respectfully submitted,

23 Dated: March 5, 2010

NIELSEN, MERKSAMER, PARRINELLO,  
 MUELLER & NAYLOR, LLP

25 By: /s/James R. Parrinello  
 James R. Parrinello

26 By: /s/Christopher E. Skinnell  
 27 Christopher E. Skinnell  
 28 *Attorneys for Plaintiffs*