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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

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

13 *Plaintiffs,*  
14

15 vs.

16 JOHN ARNTZ, Director of Elections of  
the City and County of San Francisco; the  
CITY & COUNTY OF SAN  
17 FRANCISCO, a municipal corporation; the  
SAN FRANCISCO DEPARTMENT OF  
18 ELECTIONS; the SAN FRANCISCO  
ELECTIONS COMMISSION; and DOES  
19 1-20,

20 *Defendants.*  
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CASE NO. 10-CV-00504 SI

**NEW AMERICA FOUNDATION'S BRIEF  
AS AMICUS CURIAE IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

HEARING DATE: March 12, 2010  
HEARING TIME: 9:00 A.M.  
JUDGE: Hon. Susan Ilston  
COURTROOM: 10

[Declaration of Richard E. DeLeon; Declaration  
of Steven Hill, Declaration of Gautam Dutta,  
and Request for Judicial Notice filed  
concurrently herewith]

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. Introduction

3 *If you can't beat them, sue them.* That might as well be the motto of Plaintiffs, led by a  
4 perennial losing candidate (Ron Dudum) who mistakenly blames Instant Runoff Voting for his  
5 lack of success.<sup>1</sup>

6 Plaintiffs' specious lawsuit challenges a proven voting system that has been used by the  
7 City and County of San Francisco ("San Francisco") for six straight elections. Although  
8 Plaintiffs profess to bring this lawsuit on behalf of the public interest, their case can be summed  
9 up in two words: sour grapes.

10 Plaintiffs rush to this Court with a farfetched premise: that, somehow, San Francisco's  
11 Instant Runoff Voting ("IRV") system disenfranchises voters, because its current voting  
12 equipment does not allow voters to rank more than three choices. According to Plaintiffs, this  
13 three-choice limit has caused ballots to become "exhausted" before the final round of counting –  
14 and purportedly deprived voters of the "right" to participate in a head-to-head runoff between the  
15 final two finishers. However, Plaintiffs' flawed, error-infested analysis utterly fails to show that  
16 three-choice IRV has altered the outcome of any election.

17 It is astounding that Plaintiffs even filed this lawsuit – especially since the Massachusetts  
18 Supreme Court has already rejected a virtually identical claim.<sup>2</sup> In a seminal 1996 case involving  
19 an as-applied challenge, the justices unanimously upheld an IRV system's constitutionality, even

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23 <sup>1</sup> "Three-Candidate Limit in SF Voting System Unconstitutional, Suit Says," Courthouse  
24 News Service, Feb. 8, 2010 ("[Plaintiff] Dudum attributes his loss to the [IRV] voting system[.]" )  
(emphases added), RJN Ex. 1, available at  
<http://www.courthousenews.com/2010/02/08/24499.htm> (last visited Feb. 25, 2010).

25 <sup>2</sup> McSweeney v. City of Cambridge, 665 N.E.2d 11, 13-15 (Mass. 1996). Tellingly,  
26 Plaintiffs' Moving Papers confine McSweeney to a fleeting footnote. Plaintiffs' Moving Papers  
27 13 n.8. Contrary to Plaintiffs' obfuscations, the Massachusetts Supreme Court has twice upheld  
28 the constitutionality of Cambridge's IRV system, in 1941 and 1996. McSweeney, 665 N.E.2d 11  
(upholding Cambridge's IRV system against an as-applied challenge in 1996); Moore v. Election  
Comm'rs of Cambridge, 309 Mass. 303, 331, 35 N.E.2d 222 (Mass. 1941) (upholding  
Cambridge's IRV system in 1941); cf. Plaintiffs' Moving Papers 13 n.8.

1 where some ballots had become “exhausted” (*McSweeney v. City of Cambridge*).<sup>3</sup> Furthermore,  
2 last year the Minnesota Supreme Court unanimously upheld the constitutionality of Minneapolis’  
3 three-choice<sup>4</sup> IRV – the exact form of IRV that Plaintiffs now challenge (*Minnesota Voters*  
4 *Alliance*).<sup>5</sup>

## 6 **II. Factual Background**

7 In order to understand why 55 percent of San Francisco voters approved IRV in 2002, it is  
8 important to place IRV in the context of other voting methods and to compare it with two-round  
9 runoff elections (which San Francisco used before 2004).<sup>6</sup>

10 Before IRV was adopted, candidates for San Francisco offices competed in a first-round  
11 election in November.<sup>7</sup> If a candidate won a majority of ballots cast (50 percent plus 1), that  
12 candidate was elected.<sup>8</sup> If no candidate won a majority of votes at the November general  
13 election, the top two votegetters faced off in a separate December runoff election.<sup>9</sup> Very often,  
14 voter turnout for the December runoff elections dropped precipitously from November. For  
15 example, in 2000, voter turnout for the November general election was 66 percent.<sup>10</sup> By contrast,  
16 voter turnout for the subsequent December runoff election was 33 percent – a 50 percent drop in  
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18

19  
20 <sup>3</sup> McSweeney, 665 N.E.2d at 13-15.

21 <sup>4</sup> Sample Minneapolis Ballot, RJN Ex. 2, available at  
[http://minnesota.publicradio.org/features/2009/05/IRV\\_Ballots.pdf](http://minnesota.publicradio.org/features/2009/05/IRV_Ballots.pdf) (last visited Feb. 25, 2010).

22 <sup>5</sup> Minn. Voters Alliance v. City of Minneapolis, 766 N.W.2d 683 (Minn. 2009) (“Voters  
23 Alliance”). Tellingly, the Voters Alliance plaintiffs did not even try to claim that three-choice  
IRV was unconstitutional.

24 <sup>6</sup> “San Francisco Successfully Uses Ranked Choice Voting for Citywide Elections,” Nov.  
2005, available at <http://www.sfrcv.com/> (last visited Feb. 26, 2010); Joint FairVote/New  
25 America Study, “How IRV Boosts Voter Turnout”, RJN Ex. 3, available at  
[http://irvinla.org/latest\\_news/how-irv-boosts-voter-turnout](http://irvinla.org/latest_news/how-irv-boosts-voter-turnout) (last visited Feb. 25, 2010).

26 <sup>7</sup> Id.

27 <sup>8</sup> Id.

28 <sup>9</sup> Id.

<sup>10</sup> Id.

1 voter participation.<sup>11</sup>

2 This race was not unusual: voter turnout for the December runoff elections was typically  
3 low and even more so in San Francisco's most socio-economically diverse neighborhoods.<sup>12</sup>

4 Most elections in the United States, including elections for state legislatures, the White  
5 House, Congress and governors' offices, are plurality elections – where the highest votegetter  
6 wins, even if he or she does not win a majority.<sup>13</sup> In races with multiple candidates, winning  
7 candidates often win elected office with less than a majority of votes cast.<sup>14</sup> For these races, this  
8 means that a majority of voters have cast their ballots for losing candidates. While the most  
9 obvious example of this phenomenon occurred in the 2000 Presidential election, the winner of the  
10 1992 and 1996 presidential elections also won office with a plurality of votes cast.<sup>15</sup>

11 Any voting method produces what are known as “effective” votes, votes which ultimately  
12 elect a candidate, and “wasted” votes, which are ballots cast for losing candidates.<sup>16</sup> Plurality  
13 elections produce the most “wasted” (ineffective) votes of all election methods.<sup>17</sup> Just weeks ago,  
14 the Republican gubernatorial primary in Illinois was won by a candidate with barely 20 percent of  
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19 <sup>11</sup> Id.

20 <sup>12</sup> “Instant Runoff Voting and Its Impact on Racial Minorities”, New America Foundation &  
21 FairVote, June 2008, RJN Ex.4, available at  
22 <http://irvinla.org/sites/irvinla.org/files/IRV%20and%20race%20memo-FINAL.pdf> (last visited  
23 Feb. 25, 2010). High-profile mayoral elections which resulted in December runoffs were the only  
24 exception to this rule (e.g., Dec. 2003 mayoral runoff election between Gavin Newsom and Matt  
25 Gonzalez). “Historical Voter Turnout”, San Francisco Department of Elections website, available  
26 at [http://www.sfgov.org/site/elections\\_index.asp?id=61511](http://www.sfgov.org/site/elections_index.asp?id=61511) (last visited Feb. 25, 2010).

27 <sup>13</sup> Decl. of Richard E. DeLeon ¶ 12, Feb. 26, 2010. (“DeLeon Decl.”)

28 <sup>14</sup> Id.

<sup>15</sup> Bill Clinton won with 43 percent and 49 percent in 1992 and 1996, respectively; George  
W. Bush won with 48 percent in 2000. David Leip, ATLAS OF U.S. PRESIDENTIAL ELECTIONS,  
2008 PRESIDENTIAL GENERAL ELECTION RESULTS (2005), available at  
<http://uselectionatlas.org/RESULTS> (last visited Feb. 20, 2010).

<sup>16</sup> DeLeon Decl. ¶ 12.

<sup>17</sup> Id.

1 the vote, meaning that approximately 80 percent of voters cast “wasted” ballots.<sup>18</sup> This is how  
2 most elections in the United States are conducted. In essence, two-round runoff elections consist  
3 of two back-to-back plurality elections.<sup>19</sup>

4 Plurality elections limit voters to just one ranking. Voters in San Francisco’s Instant  
5 Runoff Voting elections may rank three candidates—or three times as many as the choices  
6 provided in a typical plurality election.  
7

8 Three-choice IRV is superior to one-choice plurality elections for a number of reasons.  
9 Instant Runoff Voting provides voters with more choices, increases every voter’s chance of  
10 casting an effective ballot, increases the total number of effective ballots cast in any given  
11 election, and enables elections to be held when voter turnout tends to be highest.<sup>20</sup> Equally  
12 important, IRV has increased voter turnout for San Francisco’s decisive elections and has  
13 maximized voter participation, especially in the city’s most socio-economically diverse  
14 neighborhoods.<sup>21</sup>

15  
16 Successfully used in a number of cities and countries (including the United Kingdom,  
17 Ireland, and Australia) across the globe, IRV has been used in San Francisco since 2004.<sup>22</sup> This  
18 November, the cities of Oakland, Berkeley, and San Leandro will implement IRV for their  
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20 <sup>18</sup> “Illinois Gubernatorial Election, 2010”, Wikipedia, RJN Ex. 6, available at  
21 [http://en.wikipedia.org/wiki/Illinois\\_gubernatorial\\_election\\_2010](http://en.wikipedia.org/wiki/Illinois_gubernatorial_election_2010) (last visited Feb. 25, 2010).

22 <sup>19</sup> Although the runoff election seeks to produce a majority winner between the two leading  
23 candidates, write-in candidates and blank ballots (undervotes) could deprive the winning  
24 candidate of an absolute majority. DeLeon Decl. ¶ 12 n.1.

25 <sup>20</sup> DeLeon Decl. ¶ 11.

26 <sup>21</sup> “Instant Runoff Voting and Its Impact on Racial Minorities” p.2, New America  
27 Foundation & FairVote, June 2008, RJN Ex. 4, available at  
28 <http://irvinla.org/sites/irvinla.org/files/IRV%20and%20race%20memo-FINAL.pdf> (last visited  
Feb. 24, 2010).

<sup>22</sup> “New America Foundation Commends Berkeley for Support of Instant Runoff Voting,”  
Feb. 10, 2010, RJN Ex. 5, available at  
[http://politicalreform.newamerica.net/pressroom/2010/new\\_america\\_foundation\\_commends\\_berkeley\\_for\\_support\\_of\\_instant\\_runoff\\_voting](http://politicalreform.newamerica.net/pressroom/2010/new_america_foundation_commends_berkeley_for_support_of_instant_runoff_voting) (last visited Feb. 25, 2010).

1 municipal elections.<sup>23</sup> Last week, two prominent lawmakers introduced legislation to enable  
2 California counties to use IRV to fill congressional and state legislative vacancies.<sup>24</sup>

3 Although Plaintiffs claim they are only challenging three-choice IRV, Plaintiffs are really  
4 seeking to repeal<sup>25</sup> IRV – and thereby repudiate the will of San Francisco voters. In so doing,  
5 Plaintiffs seek to burden voters with inferior plurality elections that will reduce voter  
6 participation, shrink voter choices, and decrease the number of voters who cast effective ballots.  
7 Yet, as we will show, Plaintiffs fail to provide any legal or factual support for their extraordinary  
8 allegations.  
9

### 10 **III. IRV’s Constitutionality Is Beyond Doubt**

11 The constitutionality of Instant Runoff Voting systems is beyond doubt. Since 1941, two  
12 state supreme courts and a Michigan court have repeatedly upheld the constitutionality of IRV  
13 systems against both facial and as-applied challenges.<sup>26</sup> Indeed, three U.S. Supreme Court  
14 justices have approvingly mentioned IRV systems.<sup>27</sup> Furthermore, the U.S. Department of Justice  
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17 <sup>23</sup> Id.

18 <sup>24</sup> “Sen. Hancock & Asm. Eng Introduce IRV Special Election Bills”, New America  
19 Foundation press release, Feb. 23, 2010, RJN Ex. 7, available at  
[http://politicalreform.newamerica.net/pressroom/2010/senator\\_hancock\\_and\\_assemblymember\\_eng\\_introduce\\_sb\\_1346\\_and\\_ab\\_2732](http://politicalreform.newamerica.net/pressroom/2010/senator_hancock_and_assemblymember_eng_introduce_sb_1346_and_ab_2732)

20 <sup>25</sup> “Three-Candidate Limit in SF Voting System Unconstitutional, Suit Says,” Courthouse  
21 News Service, Feb. 8, 2010 (“Plaintiff Ron Dudum ... says the [IRV] system is confusing to  
22 voters no matter how many times it’s explained.”). RJN Ex. 1, available at  
<http://www.courthousenews.com/2010/02/08/24499.htm> (last visited Feb. 25, 2010). In their  
23 Moving Papers, Plaintiffs in effect make San Francisco a settlement offer of “return[ing] to a  
24 traditional [two-round] runoff system like that used in the years prior to the adoption of [IRV]”.  
25 Plaintiffs’ Moving Papers 21:11-21:14 (emphases added).

26 <sup>26</sup> See, e.g., Voters Alliance, 766 N.W.2d 683 (Minn. 2009) (facial constitutional challenge);  
27 McSweeney, 665 N.E.2d 11 (as-applied constitutional challenge) (re-aff’g Moore, 309 Mass. 303,  
28 35 N.E.2d 222) (Cambridge’s multiple-seat form of IRV is known as “Plan E”); see also  
Stephenson v. Ann Arbor Bd. of Canvassers, No. 75-10166 AW (Mich. Cir. Ct. Nov. 1975) (as-  
applied constitutional challenge) (cited by Voters Alliance, 766 N.W.2d at 690), RJN, Ex. 8,  
available at <http://archive.fairvote.org/?page=397> (last visited Feb. 20, 2010).

In 1941, Cambridge, Massachusetts first began using a multiple-seat (proportional representation) form of IRV (“Plan E”) for its municipal elections. See Moore, 35 N.E.2d 222.

<sup>27</sup> See, e.g., Holder v. Hall, 512 U.S. 874, 910 (1994) (Thomas, J.; Scalia, J., concurring)



1 has implicitly acknowledged the constitutionality of the multiple-seat form of IRV, when it  
2 denied federal Voting Rights Act pre-clearance to New York City’s 1999 attempt to eliminate  
3 multiple-seat IRV.<sup>28</sup>

4 In 2002, voters adopted IRV by approving an amendment to the San Francisco Charter.<sup>29</sup>  
5 While that amendment required that voters be permitted to rank as many candidates as they  
6 wished, it carved out one important exception:  
7

8 [I]f the voting system, vote tabulation system or similar or related equipment used  
9 by [San Francisco] cannot feasibly accommodate choices equal to the total number  
10 of candidates running for each office, then the Director of Elections may limit the  
11 number of choices a voter may rank to no fewer than three.<sup>30</sup>

12 At the time San Francisco implemented IRV, its existing voting equipment could not  
13 “feasibly accommodate” more than three IRV choices.<sup>31</sup> Significantly, that voting equipment  
14 offered two valuable benefits: (1) it gave voters the chance to correct errors in their first-choice  
15

16  
17 (citing with approval “transferable votes” [i.e., choice voting, the multiple-seat form of IRV] as a  
18 remedy for violations of § 2 of the Voting Rights Act); Williams v. Rhodes, 393 U.S. 23, 47 n.8  
19 (1968) (Harlan, J., concurring) (“Alternatively, the voter could be given the right, at the general  
election, to indicate both his first and his second choice for the Presidency – if no candidate  
received a majority of first-choice votes, the second-choice votes could then be considered.”).

20 <sup>28</sup> Robert Richie, Douglas Amy, Frederick McBride, “How Proportional Representation Can  
Empower Minorities and the Poor,” Nov. 2000, RJN Ex. 9, p. 3 of 5, available at  
21 <http://www.mtholyoke.edu/acad/polit/damy/articles/empower.htm> (last visited Feb. 24, 2010)  
22 (“Also in 1999, the DOJ denied pre-clearance to New York City after the legislature voted to  
replace choice voting [i.e., multiple-seat IRV] (a fully proportional voting system) with limited  
23 voting (a less proportional system) for electing the city’s local school boards; choice voting had  
elected a significantly higher percentage of racial minorities to school boards than had been  
elected to other legislative bodies in the city.”). Subsequently, New York City disbanded its  
24 elected school board for unrelated reasons. DeLeon Decl. ¶ 24; “The Brief Life and Impending  
Death of a Board of Education,” N.Y. TIMES, Aug. 8, 2009, available at  
25 <http://www.nytimes.com/2009/08/08/education/08board.html> (last visited Feb. 25, 2010).

26 <sup>29</sup> S.F. CHARTER § 13.102 (2002), RJN Ex. 12, available at  
<http://library.municode.com/index.aspx?clientId=14130&stateId=5&stateName=California> (last  
27 visited Feb. 25, 2010).

28 <sup>30</sup> Id. § 13.102(b) (emphases added).

<sup>31</sup> Decl. of Steven Hill (“Hill Decl.”) ¶ 5.

1 IRV rankings at the polling station, and (2) it made it possible for San Francisco to report  
2 election-night results for the voters' first-choice IRV rankings.<sup>32</sup> Ironically, Plaintiffs now claim  
3 that those very safeguards constitute a constitutional violation.

4 **A. Standard of Review**

5 Plaintiffs' entire case turns on only one issue: whether three-choice IRV imposes a  
6 "severe" burden on the right to vote.<sup>33</sup> As this brief will show, three-choice IRV does not impose  
7 any such burden. In fact, IRV strengthens every voter's right and ability to vote for candidates of  
8 his or her choice.

9  
10 As the Minnesota high court noted in *Voters Alliance*, the U.S. Supreme Court has laid  
11 down two touchstones for examining election laws: (1) States (and local governments,<sup>34</sup> to the  
12 extent permitted by the states) "have authority to establish their own election processes,"<sup>35</sup> and (2)  
13 election regulations may "impose some level of restrictions on the right to vote and the  
14 concomitant right to political association."<sup>36</sup> If strict scrutiny is not triggered, a court need only  
15 examine whether any "important regulatory interests" can justify a given election regulation.<sup>37</sup>

16  
17 Significantly, strict scrutiny cannot be invoked, unless a government imposes a "severe"  
18 burden on the right to vote.<sup>38</sup> As a matter of law, a voting regulation that imposes some burden or

19  
20 \_\_\_\_\_  
21 <sup>32</sup> San Francisco's current IRV voting equipment also affords these significant benefits. *Id.*  
¶ 6.

22 <sup>33</sup> *Wash. State Grange v. Wash. Republican Party*, 128 S.Ct. 1184, 1190-91 (2008).

23 <sup>34</sup> Charter cities may adopt Instant Runoff Voting for their elections, pursuant to the  
authority accorded to charter cities and counties by the California Constitution. CAL. CONST. art.  
24 XI, § 5(b); see also *Edelstein v. San Francisco*, 29 Cal. 4th 164, 173, 56 P.3rd 1020 (Cal. 1992).

25 <sup>35</sup> *Voters Alliance*, 766 N.W.2d at 689 (citing *Wash. State Grange*, 128 S.Ct. at 1190); see  
also *United States v. Salerno*, 481 U.S. 739, 745 (1987).

26 <sup>36</sup> *Voters Alliance*, 766 N.W.2d at 689 (emphases added) (citing *Anderson v. Celebrezze*,  
460 U.S. 780, 788 (1983)).

27 <sup>37</sup> *Anderson*, 460 U.S. at 788 (quoted by *Voters Alliance*, 766 N.W.2d at 696-97).

28 <sup>38</sup> *Wash. State Grange*, 128 S.Ct. at 1190; *Crawford*, 128 S.Ct. at 1622-23; *Burdick v.*  
*Takushi*, 504 U.S. 428, 433-34 (1992); see also *Voters Alliance*, 766 N.W.2d at 689.

1 affects a limited number of voters will not trigger strict scrutiny; because such a regulation would  
2 not impose a “severe” burden.<sup>39</sup> We will now apply these precepts to three-choice IRV.

3 **B. IRV Does Not Trigger Any Heightened Scrutiny**

4 Tellingly, both the Massachusetts and Minnesota Supreme Courts have refused to apply  
5 any heightened scrutiny for constitutional challenges against IRV (in *McSweeney* and *Voters*  
6 *Alliance*, respectively).<sup>40</sup> In *McSweeney*, the Massachusetts high court not only refused to apply  
7 strict scrutiny to an as-applied challenge, but emphatically rejected the notion that IRV “derogates  
8 from the fundamental right to vote or denies each citizen the right to have his or her vote counted  
9 equally.”<sup>41</sup>

10  
11 Furthermore, in *Voters Alliance*, the Minnesota high court – which upheld the use of  
12 Minneapolis’ three-choice IRV – rejected the notion that IRV violates the Equal Protection  
13 Clause under either *Reynolds v. Sims*<sup>42</sup> or *Bush v. Gore*:<sup>43</sup>

14  
15 In addition to arguing that IRV violates the rights to vote and to political  
16 association, appellants argue it violates their right to equal protection. This claim  
17 appears to be based primarily on the arguments about unequal weighting of votes,  
18 and as we have seen, there is no unequal weighting in the IRV system for single-  
19 seat races or in multiple-seat races[.]. Appellants’ equal protection claim fails as  
20 well because it is not supported by the legal authority on which it is premised,  
21 specifically, the Supreme Court’s one-person, one-vote jurisprudence and [Bush v.](#)

22  
23 \_\_\_\_\_  
24 <sup>39</sup> Burdick, 504 U.S. at 433-34; Crawford v. Marion County Election Bd., 128 S.Ct. 1610,  
1622-23 (2008); see also Voters Alliance, 766 N.W.2d at 689.

25 <sup>40</sup> Voters Alliance, 766 N.W.2d at 696-97 (citing Wash. State Grange v. Wash. Republican  
Party, 128 S.Ct. 1184, 1190-91 (2008); Crawford, 128 S.Ct. at 1622-23; Anderson, 460 U.S. at  
26 788); accord, McSweeney, 665 N.E.2d at 14-15.

27 <sup>41</sup> Id. at 13-15.

28 <sup>42</sup> 377 U.S. 533 (1964).

<sup>43</sup> 531 U.S. 98 (2000).

1 [Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 \(2000\)](#) (per curiam).

2 Although the Court's one-person, one-vote cases do address the general  
3 issue of unequal weighting of votes, they are inapposite here. The one-person, one-  
4 vote cases had their origin in the malapportionment of legislatures. See [Reynolds](#)  
5 [v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 \(1964\)](#). That is, the number  
6 of voters in some districts electing one legislator was several multiples higher than  
7 in other districts, meaning that a vote in the smaller population district had more  
8 impact in terms of electing a legislator than a vote in the more populous district.  
9 See *id.* at 562-63, 84 S.Ct. 1362. No such vote inequality is created by IRV.

10  
11 In addition, appellants contend that, under IRV, some votes are counted  
12 differently than others, and the system therefore violates the equal protection  
13 principles articulated in Bush. We agree with the district court that Bush is not  
14 controlling here. The essence of the equal protection problem addressed in Bush  
15 was that because there were no established standards under Florida law for  
16 discerning voter intent, in the recount process ballots were being judged differently  
17 from county to county, and even within individual counties. See Bush, 531 U.S. at  
18 106, 121 S.Ct. 525. In contrast, in the IRV system, every ballot and every vote is  
19 counted by the same rules and standards.<sup>44</sup>

20  
21  
22 Predictably, Plaintiffs will try to escape the on-point holdings of *McSweeney* (Mass.  
23 Supreme Court)<sup>45</sup> and *Voters Alliance* (Minn. Supreme Court).<sup>46</sup> First, they will seek to  
24 distinguish *Voters Alliance* on two grounds: (1) *Voters Alliance* dealt with only a facial  
25

26 <sup>44</sup> *Voters Alliance*, 766 N.W.2d at 698 (citing *Reynolds v. Sims*, 377 U.S. 533, 562-63  
(1964); *Bush v. Gore*, 531 U.S. 98, 106 (2000) (per curiam)).

27 <sup>45</sup> *McSweeney*, 665 N.E.2d 11.

28 <sup>46</sup> *Voters Alliance*, 766 N.W.2d 683.

1 constitutional challenge, while Plaintiffs have brought both a facial and an as-applied challenge,  
2 (2) *Voters Alliance* did not rule on whether a government could limit voters to a maximum of  
3 three IRV choices.<sup>47</sup> Neither excuse suffices. While it did not specifically address the issue of  
4 how many IRV choices must be offered to voters, *Voters Alliance* offers persuasive authority on  
5 both facial and as-applied challenges with regard to any IRV system.  
6

7 Since *McSweeney* rejected their legal theory, Plaintiffs will try their utmost to convince  
8 this Court not to rely on that Massachusetts high court decision. Toward that end, Plaintiffs may  
9 parrot their consultant’s incorrect claim: that Cambridge, Massachusetts allows voters to rank  
10 “unlimited” choices.<sup>48</sup> Yet, like San Francisco, Cambridge also limits the number of candidates  
11 that voters may rank in its multiple-seat form of IRV.<sup>49</sup> Plaintiffs ignore the inescapable import  
12 of *McSweeney* and *Voters Alliance* at their peril.<sup>50</sup>  
13

#### 14 **IV. A Litany of Concocted Constitutional Rights**

15 In seeking to re-litigate *McSweeney* and *Voters Alliance*, Plaintiffs have in effect claimed  
16 that three-choice IRV imposes a “severe” burden on two constitutional “rights”:

- 17 1. The “right” to elect a majority winner
- 18 2. The “right” to participate in a two-person runoff election

#### 19 **A. IRV and Majority Winners**

20 Plaintiffs first quibble that IRV “has repeatedly resulted in the election of candidates who  
21  
22

23 \_\_\_\_\_  
24 <sup>47</sup> Cf. Plaintiffs’ Moving Papers 13 n.8.

25 <sup>48</sup> Id.; Plaintiffs’ Decl. of Dr. Jonathan Katz ¶ 14. Contrary to Plaintiffs’ consultant’s  
26 Declaration, Cambridge does not have unlimited-choice IRV. For instance, the city restricts  
27 voters to 10 IRV choices for its six-person school board elections. Cambridge sample ballot, RJN  
28 Ex. 10, available at <http://archive.fairvote.org/media/irv/2001school.pdf> (last visited Feb. 25,  
2010).

<sup>49</sup> Id.

<sup>50</sup> Cf. Plaintiffs’ Moving Papers 13 n.8.

1 gathered less than a majority[.]”<sup>51</sup> While their claims are factually flawed, there is no  
2 constitutional right to elect a majority winner. Indeed, the U.S. Constitution does not require that  
3 the President be elected with a majority – or even a plurality<sup>52</sup> – of the popular vote.<sup>53</sup>

4 Remarkably, three of the past six Presidential elections were not won by a majority winner: Bill  
5 Clinton (1992, 1996) and George W. Bush (2000).<sup>54</sup>

6  
7 Currently, the most widely used electoral method in California is the plurality system,  
8 where the top votegetter wins, even if he or she has not won a majority of the vote. In 2003,  
9 Arnold Schwarzenegger was elected California Governor without receiving a majority.<sup>55</sup>

10 Unlike plurality systems, San Francisco’s IRV system ensures that voters have the  
11 opportunity to elect a majority winner – a vast improvement over the nation’s predominant,  
12 plurality election system. Significantly, before it adopted IRV, San Francisco had used a  
13 plurality-based, two-person runoff system. That is, if no one won a majority in the November  
14 first-round election, the top two votegetters would advance to a December runoff election.  
15

16 Ironically, Plaintiff Ron Dudum’s pre-IRV campaign for San Francisco Supervisor  
17 spotlighted a notorious drawback of the two-round runoff system: the “top two” votegetters  
18 might not even receive a majority mandate. In the first-round of that November 2002 election,  
19 the top two votegetters did not even win a majority of the vote between them: Plaintiff Dudum  
20 finished second with 22.9 percent of the vote, while Fiona Ma finished first with 23.6 percent of  
21

22  
23 <sup>51</sup> Id. 8:25-8:26.

24 <sup>52</sup> See generally Bush v. Gore, 531 U.S. 98 (2000).

25 <sup>53</sup> U.S. CONST. art. II, § 1; see also Edelstein, 29 Cal. 4th at 183, 56 P.3rd 1020 (Cal. 2002).

26 <sup>54</sup> Edelstein, 29 Cal. 4th at 183, 56 P.3rd 1020; “Atlas of U.S. Presidential Elections,”  
27 available at <http://uselectionatlas.org/RESULTS/> (last visited Feb. 25, 2010).

28 <sup>55</sup> The 2003 recall election results, available at [http://en.wikipedia.org/wiki/California\\_gubernatorial\\_recall\\_election,\\_2003#Results](http://en.wikipedia.org/wiki/California_gubernatorial_recall_election,_2003#Results) (Gov. Schwarzenegger received 48.6 percent of votes cast in the race to succeed Gov. Gray Davis) (last visited Feb. 25, 2010).

1 the vote.<sup>56</sup> In other words, nearly 54 percent of the voters preferred someone *other than the top*  
2 two votegetters.

3 Equally significant, the two-round runoff system frequently failed to produce winners  
4 with a majority mandate. During Plaintiff Dudum’s unsuccessful 2002 race, voter turnout  
5 dropped nearly 20 percent between the November first-round election and the December runoff  
6 election.<sup>57</sup> When compared against the total number of voters who participated in November, the  
7 runoff winner (Fiona Ma) did not win a majority of the November turnout.<sup>58</sup>

8 Similarly, in 2002 San Francisco voter turnout plummeted by an average of 42.3 percent  
9 between the November 2000 first-round election and the December 2000 runoff election.<sup>59</sup>  
10 Again, when compared against the total number of voters who participated in November, the  
11 runoff winners received a low of 28 percent and a high of 45 percent of the November turnout –  
12 with most races in the lower end of this range.<sup>60</sup> All too often, two-round runoff winners fall  
13 short of winning a majority mandate.

14 By enabling voters to rank their choices in a single, decisive November election, IRV  
15 ensures that the winner receives broad support across all communities. In contrast to plurality or  
16 two-round runoff systems, San Francisco’s three-choice IRV has tripled voters’ choices in  
17 municipal elections. Consider a hypothetical election using San Francisco’s previous two-round  
18

19  
20  
21 <sup>56</sup> San Francisco Department of Elections, Results Summary Nov. 2002, RJN Ex. 11,  
available at [http://www.sfgov.org/site/elections\\_index.asp?id=61487](http://www.sfgov.org/site/elections_index.asp?id=61487) (last visited Feb. 25, 2010).

22 <sup>57</sup> San Francisco Department of Elections, Results Summary Dec. 2002, RJN Ex. 13,  
available at [http://www.sfgov.org/site/elections\\_index.asp?id=61485](http://www.sfgov.org/site/elections_index.asp?id=61485) (last visited Feb. 25, 2010).

23 <sup>58</sup> Specifically, 18,078 voters participated in the Nov. 2002 first-round election. In contrast,  
24 only 14,751 participated in the Dec. 2002 runoff election (Ma received 8,289 of those votes).  
25 When she won in Dec. 2002, Ma thus received 8,289 (46 percent) of the total number of votes  
(18,078) that had been cast in the Nov. 2002 first-round election. RJN Ex. 11 & 13, supra notes  
56 & 57.

26 <sup>59</sup> Joint FairVote/New America Study, “How IRV Boosts Voter Turnout”, RJN Ex. 3,  
27 available at [http://irvinla.org/latest\\_news/how-irv-boosts-voter-turnout](http://irvinla.org/latest_news/how-irv-boosts-voter-turnout) (last visited Feb. 25,  
2010).

28 <sup>60</sup> Id.

1 runoff system (i.e., the voting system that was used before voters chose to adopt IRV):

2           Suppose 100 voters cast ballots in a November first-round election with three  
3 candidates (A, B, C). Here are the results from this first-round election:

4           A:     49 votes

5           B:     46 votes

6           C:     5 votes

7  
8           Since no one garnered a majority (51 votes), C is eliminated because he finished  
9 last. The contest then goes to a second-round (runoff) election between the top  
10 two finishers (A and B).

11           Now suppose only 70 of the original 100 voters return to a December second-  
12 round (runoff) election between A and B. (That is, voter turnout for the December  
13 election drops 30 percent.)<sup>61</sup>

14  
15           In this runoff election, only 30 of A's original 49 voters turn out to vote; only 36  
16 of B's 46 voters turn out; and only 4 of C's voters turn out (all of C's voters would  
17 have voted for A as a second choice). Here are the results from the December  
18 runoff election:

19           A:     34 votes (30 of A's 49 first-round voters, plus 4 of C's first-round voters)

20           B:     36 votes (36 of B's 46 first-round voters)

21  
22           As a result, B wins the runoff election with a "majority" (36 votes out of 70, or 51 percent) of the  
23 vote – even though he did not receive a majority (51 votes) of the 100 votes that had been  
24 originally cast in the first-round election. Instead, B wins with only 36 of the 100 original, first-  
25 round votes.

26  
27 <sup>61</sup> This hypothetical actually minimizes the drop in voter turnout. In fact, San Francisco's  
28 average turnout plummeted by an average of 42.3 percent between the November 2000 first-  
round election and the December 2000 runoff election. Id.



1 In contrast, IRV makes it easier for voters to elect a majority winner, by allowing them to  
2 rank their top three choices in one election, not two. Let's re-run the previous election with San  
3 Francisco's three-choice IRV:

4 Suppose 100 voters vote for their first, second, and third choices in a November  
5 IRV election with three candidates (A, B, C). Here are the results from the first  
6 round of counting:  
7

8 A: 49 first-choice rankings

9 B: 46 first-choice rankings

10 C: 5 first-choice rankings

11 Since no one garnered a majority (51 votes), C is eliminated because he finished  
12 last.

13 The contest then goes to an "instant runoff" between the top two finishers (A and  
14 B). This time, all 5 of C's voters have marked A as their second choice. Here are  
15 the results from the second round of counting:  
16

17 A: 54 votes (49 of A's first-round voters, plus 5 of C's first-round voters)

18 B: 46 votes (all 46 of B's first-round voters)

19 As a result, A wins the "instant" runoff, with an absolute majority: 54 votes of the 100 votes that  
20 had been cast.

21 Unlike San Francisco's previous two-round runoff system, IRV enabled all 100 original  
22 voters to successfully choose an absolute majority winner. In contrast to B's 36-vote "majority"  
23 in a December runoff, A wins an IRV election with an absolute majority of all voters: 54  
24 effective votes out of all 100 ballots cast.  
25

26 Since 2004, San Francisco's three-choice IRV system has enabled thousands of voters to  
27  
28

1 participate in the one election that counts.<sup>62</sup> As a result, more votes were cast in the decisive  
2 election, and winners received more votes (both in absolute terms and as a percentage of the vote)  
3 than winners in December’s “delayed” runoffs – and especially more than winners in  
4 conventional plurality elections. If Plaintiff Dudum and his fellow litigants wish to drag San  
5 Francisco back to two-round runoffs,<sup>63</sup> they are free to exercise a quintessentially Californian  
6 right: to convince the voters to repeal IRV.  
7

8 **B. No Constitutional “Right” To a Two-Person Runoff Election**

9 At its core, Plaintiffs’ Complaint boils down to one question: Do voters have a  
10 constitutional right to participate in a two-person runoff election? No legal authority whatsoever  
11 supports such an outlandish theory.

12 In Plaintiffs’ own words, three-choice IRV allegedly violates constitutional rights,  
13 because

14 some voters are permitted to have votes cast in all rounds of the instant runoff  
15 under the instant runoff voting system, while other voters – whose ballots are  
16 “exhausted” – are deprived of the right to vote in later and dispositive rounds.”<sup>64</sup>

17 \*\*\*\*\*

18 [IRV] deni[es] some voters the right to vote in later “runoff” elections based upon  
19 their failure to vote for the “right” (or most popular) candidates in earlier rounds of  
20 voting.<sup>65</sup>

21 In other words, a constitutional violation occurs every time a voter “guesses wrong” and does not

22  
23  
24 <sup>62</sup> Joint FairVote/New America Study, “How IRV Boosts Voter Turnout,” RJN Ex. 3  
25 (available at [http://irvinla.org/latest\\_news/how-irv-boosts-voter-turnout](http://irvinla.org/latest_news/how-irv-boosts-voter-turnout)).

26 <sup>63</sup> Plaintiffs’ Moving Papers 21:11-14 (Plaintiffs offer San Francisco the “option” of  
27 “return[ing] to a traditional [two-round] runoff system like that used in the years prior to the  
28 adoption of Proposition A.”) (emphasis added).

<sup>64</sup> Compl. ¶¶ 36, 40 (emphases added).

<sup>65</sup> Plaintiffs’ Moving Papers 13:5-13:7 (emphases added).

1 vote for the “right” (i.e., most popular) candidates.

2 Yet much to Plaintiffs’ chagrin, the Massachusetts Supreme Court has already rejected a  
3 “guessing wrong” argument nearly identical to that of Plaintiffs. Since 1941, Cambridge has used  
4 a multiple-seat, restricted-choice form of IRV.<sup>66</sup> In *McSweeney*,<sup>67</sup> a losing City Council  
5 candidate complained that, because some voters “guessed wrong” and did not vote for a winning  
6 candidate, IRV must have violated their constitutional rights. Rejecting his argument, the high  
7 court unanimously held “guessing wrong” in an IRV election was no different than “guessing  
8 wrong” in a two-round runoff election:  
9

10 ...[Plaintiff] is referring to those ballots that were "exhausted." It is not correct to  
11 say that those ballots are "not counted at all." They too are read and counted; they  
12 just do not count toward the election of any of the nine successful candidates.

13  
14 Therefore it is no more accurate to say that these ballots are not counted than to  
15 say that the ballots designating a losing candidate in a two-person, winner-take-all  
16 race [i.e., two-person runoff election] are not counted.<sup>68</sup>

17 Simply put, there is no constitutional right against “guessing wrong” in any election system.

18 To be sure, supporters of third-party candidates Ross Perot (in 1992) or Ralph Nader (in  
19 2000) would have welcomed a constitutional right to vote in a three-choice IRV election, rather  
20

21 <sup>66</sup> Contrary to Plaintiffs’ consultant’s Declaration, Cambridge does not have unlimited-  
22 choice IRV. For instance, it restricts voters to 10 IRV choices for its six-person school board  
23 elections. DeLeon Decl. ¶ 23; Cambridge sample ballot, RJN Ex. 10, available at  
<http://archive.fairvote.org/media/irv/2001school.pdf> (last visited Feb. 25, 2010); contra, Plaintiffs’  
Declaration of Dr. Jonathan Katz ¶ 14.

24 <sup>67</sup> *McSweeney*, 665 N.E.2d at 14.

25 <sup>68</sup> *Id.* at 14 (emphases added). Since there is no constitutional right to participate in a two-  
26 person runoff election, neither *Ayers-Schaffner v. Distefano* nor *Partnoy v. Shelley* apply to this  
27 case. *Ayers-Schaffner v. Distefano*, 37 F.3d 726 (1st Cir. 1994) (all voters have a constitutional  
28 right to participate in an election, irrespective of whether or not they participated in any previous  
election); *Partnoy v. Shelley*, 277 F.Supp.2d 1064 (S.D.Cal. 2003) (all voters have a  
constitutional right to vote on a ballot question, irrespective of whether or not they voted on a  
previous ballot question); contra, Plaintiffs’ Moving Papers 14:9-15:12.

1 than the one-choice, plurality voting system that had been previously used in San Francisco.  
2 Because they were banned from ranking more than one choice, many Perot and Nader voters  
3 anguished over a “guessing game” of trying to strategically assess the influence of their votes on  
4 the ultimate outcome. Judging by the results, thousands of them guessed badly.

## 5 **V. Plaintiffs’ Fatally Flawed Report**

6 Undeterred by the unrelenting weight of case law, Plaintiffs disingenuously claim that  
7 three-choice IRV has distorted past election outcomes. In a report riddled with errors, Plaintiffs’  
8 consultant Jonathan Katz sweepingly claims that three-choice IRV has

9 likely altered election outcomes from what would have resulted under the standard  
10 unrestricted IRV or under the traditional [two-round] runoff system.<sup>69</sup>

11 As evidence of such an “altered” outcome, Plaintiffs point to Plaintiff Dudum’s 2006 failed  
12 campaign for San Francisco Supervisor. (Significantly, Plaintiff Dudum did not receive the  
13 highest number of first-choice rankings in that race.<sup>70</sup>) Specifically, Plaintiffs claim that 6,010  
14 ballots were “exhausted” and therefore not counted in the final, two-person IRV runoff between  
15 the top two finishers (Plaintiff Dudum and Ed Jew):

16 6,010 ballots were “exhausted” by the 4<sup>th</sup> round of the instant runoff, and no vote  
17 was counted for the voters whose ballots were “exhausted” before the 4<sup>th</sup> and final  
18 round – more than seven times the total margin of victory.<sup>71</sup>

19 The methodology behind Plaintiffs’ data is fatally flawed. As award-winning San  
20 Francisco political scientist Dr. Richard DeLeon noted,<sup>72</sup> Plaintiffs’ consultant incorrectly added

21  
22  
23  
24  
25 <sup>69</sup> Plaintiffs’ Katz Decl. ¶ 2.

26 <sup>70</sup> Winning candidate Ed Jew received 5,184 first-choice rankings, while Plaintiff Dudum  
27 received 5,134 first-choice rankings. San Francisco Dept. of Elections, available at  
[http://www.sfgov.org/site/elections\\_index.asp?id=61583](http://www.sfgov.org/site/elections_index.asp?id=61583) (last visited Feb. 25, 2010).

28 <sup>71</sup> Plaintiffs’ Moving Papers 8:1-8:4.

<sup>72</sup> Dr. DeLeon is Professor Emeritus at San Francisco State University, where he taught

1 the following three types of ballots to his category of “exhausted” ballots:<sup>73</sup>

- 2 (1) “undervote” – a ballot cast in which a voter voted in one race (e.g., President),  
3 but abstained from voting in another race (e.g., San Francisco Supervisor)  
4  
5 (2) “overvote” – whether in IRV or non-IRV elections, a ballot that is invalidated  
6 because a voter erroneously marked more than one candidate (e.g., a voter  
7 erroneously marks John McCain and Barack Obama as his or her first choice  
8 for President)  
9  
10 (3) ballots in which voters chose to mark fewer than 3 choices. This is analogous  
11 to not voting in the second (runoff) round of a two-round runoff election  
12 (which San Francisco used before adopting IRV).

13 Astoundingly, a whopping 86 percent of Plaintiffs’ purported “exhausted” ballots – 5,183 out of  
14 6,010 – were not in fact “exhausted” during Plaintiff Dudum’s unsuccessful 2006 race:<sup>74</sup>

- 15 (a) 2,171 of the 6,010 so-called “exhausted” ballots were, in fact, from  
16 undervotes and overvotes.  
17  
18 (b) Additionally, 3,012 of the ballots did not contain three rankings and were  
19 “voluntarily” exhausted. Namely, the voters voluntarily chose not to rank a  
20 second or third choice.  
21  
22 (c) In other words, 5,183 of the 6,010 “exhausted” ballots were not actually  
23 “exhausted.” Ranking candidates is an option, and voters are under no  
24 obligation to use all their rankings.

25 political science for 35 years with a focus on American government and urban politics. He is the  
26 founder of the Public Research Institute at San Francisco State University and served as Director  
27 from 1984 to 1994. He is the author of numerous journal articles and book chapters about urban  
28 politics and politics in San Francisco, and has conducted and reported on research specifically  
about IRV. (DeLeon Decl. ¶¶ 5-8.)

<sup>73</sup> Id. at ¶ 18.

<sup>74</sup> Id. at ¶ 21.

1 Furthermore, Dr. DeLeon, who has studied San Francisco’s elections for decades, observed that it  
2 would have been a “political impossibility” for Plaintiff Dudum to have won his 2006 race.<sup>75</sup>

3 (d) Due to political realities, Plaintiff Dudum would not have won his 2006  
4 election, irrespective of the number of “exhausted ballots”. Based on the  
5 actual<sup>76</sup> rankings of voters in that election, Plaintiff Dudum received  
6 insufficient support from the largest demographic voting bloc (Asian  
7 Americans) in San Francisco’s 4<sup>th</sup> Supervisorial District.  
8

9 Dr. DeLeon’s analysis underscores one unmistakable fact: Plaintiffs have failed to show  
10 that IRV has distorted any election outcome. Indeed, Plaintiffs’ report is riddled with a glaring  
11 number of factual errors<sup>77</sup> that not only strain credulity, but undermine the very foundation of  
12 Plaintiffs’ case.  
13

#### 14 **VI. Legitimate Interests Support the Use of Three-Choice IRV**

15 In sum, Plaintiffs have utterly failed to show that three-choice IRV has imposed any  
16 burden (“severe”<sup>78</sup> or otherwise) on the voters – and the U.S. Supreme Court would agree. In an  
17 analogous case, the high court gave wide berth to state election regulations. In *Burdick v.*  
18 *Takushi*, the high court held any election regulation that imposed “reasonable, non-discriminatory  
19 restrictions” would be “presumptively valid”.<sup>79</sup> By allowing states to ban write-in candidates,  
20

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21 <sup>75</sup> Id. at ¶ 21-22.

22 <sup>76</sup> Plaintiffs’ consultant incorrectly states that such data are not available. DeLeon Decl. ¶  
19; contra, Plaintiffs’ Katz Decl. ¶ 27.

23 <sup>77</sup> Among other things, Plaintiffs’ consultant inaccurately states that Aspen, Colorado (a)  
24 restricts the number of rankings voters may use, and (b) “repealed” IRV in 2009. IRV remains in  
25 effect in Aspen, which allows voters to use unlimited rankings. DeLeon Decl. ¶ 25. For a  
complete recitation of Plaintiffs’ consultant’s factual errors, see id. ¶¶ 18-26.

26 <sup>78</sup> Burdick, 504 U.S. at 433-34; Crawford v. Marion County Election Bd., 128 S.Ct. 1610,  
1622-23 (2008); see also Voters Alliance, 766 N.W.2d at 689.

27 <sup>79</sup> Burdick, 504 U.S. at 441, 428 (quoting Anderson, 460 U.S. at 788); see also Edelstein, 29  
28 Cal. 4th at 173, 56 P.3d 1020 (under the California Constitution, charter cities may regulate their  
elections by barring voters from voting for write-in candidates during two-person runoff

1 *Burdick* effectively ruled that state election regulations may restrict the voters' choice of  
2 candidates, as long as the states proffered "important regulatory interests."<sup>80</sup>

3 *Burdick* robs Plaintiffs' lawsuit of its raison d'être. Indeed, limiting a voter to three IRV  
4 choices is child's play compared to banning voters outright from voting for certain candidates.  
5 What is more, the Minnesota Supreme Court recognized that three-choice IRV promotes a host of  
6 "legitimate interests":  
7

8 Reducing the costs and inconvenience to voters, candidates, and taxpayers by  
9 holding one election, increasing voter turnout, encouraging less divisive  
10 campaigns, and fostering greater minority representation in multiple-seat elections  
11 are all legitimate interests for the City to foster.<sup>81</sup>

12 In addition, the Minnesota high court took note of three additional interests that IRV could serve:  
13

- 14 (1) IRV promotes the election of candidates with majority mandates, eliminating  
15 plurality winners in one-seat races;  
16 (2) IRV eliminates the "spoiler" effect of third-party candidacies; and  
17 (3) IRV helps insure more diverse representation by promoting minority  
18 representation in multiple-seat races.<sup>82</sup>

19 Finally, San Francisco had a "legitimate interest" to limit voters to a maximum of three  
20

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21 elections). San Francisco allows voters to rank write-in candidates in its IRV elections. S.F.  
22 CHARTER § 13.102(b), RJN Ex. 12 ("The [IRV] ballot shall in no way interfere with a voter's  
ability to cast a vote for a write-in candidate.").

23 <sup>80</sup> Burdick, 504 U.S. at 428 (quoted by Voters Alliance, 766 N.W.2d at 689).

24 <sup>81</sup> Voters Alliance, 766 N.W.2d at 697 (emphases added). See also McSweeney, 665 N.E.2d  
25 at 15 ("Indeed, [multiple-seat IRV], far from seeking to infringe on each citizen's equal franchise,  
seeks more accurately to reflect voter sentiment and "to provide for the representation of minority  
26 groups in the municipal council or to enlarge the possibility of a voter's being represented therein  
27 by giving [the voter] an opportunity to express more than one preference among candidates."  
This purpose is not a derogation from the principle of equality but an attempt to reflect it with  
more exquisite accuracy") (emphases added) (quoting Moore, 309 Mass. at 324, 331, 35 N.E.2d  
222).

28 <sup>82</sup> Id.

1 IRV rankings. In 2004, when San Francisco implemented IRV, the existing voting equipment  
2 could not handle more than three IRV choices.<sup>83</sup> San Francisco decided to continue using that  
3 voting equipment, because the equipment (1) gave voters the chance to correct errors in their  
4 first-choice IRV rankings at the polling station, and (2) made it possible for San Francisco to  
5 report election-night results for the voters' first-choice IRV rankings.<sup>84</sup> Both interests –  
6 preventing voter disenfranchisement and ensuring timely tabulation and reporting of election  
7 results – amply qualify as “legitimate interests” served by three-choice IRV. Therefore, San  
8 Francisco’s three-choice IRV did not – and does not – violate any rights protected under the First  
9 or Fourteenth Amendments, whether under the Equal Protection Clause or Due Process Clause.<sup>85</sup>

## 11 VII. Conclusion

12 While they are constitutionally entitled to their opinions about IRV, Plaintiffs have  
13 brought their case to the wrong forum. At best, Plaintiffs’ fatally flawed lawsuit levies a political  
14 argument against IRV – which the voters, and not a court, should decide. Far from defending any  
15 constitutional rights, Plaintiffs’ disingenuous agenda becomes readily apparent. Namely, Plaintiff  
16 Dudum and his fellow litigants wish to foist<sup>86</sup> two-round runoff elections on San Francisco – the  
17 same, problematic voting system that an absolute majority of voters abolished<sup>87</sup> nearly a decade  
18 ago.  
19

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21 <sup>83</sup> At the time IRV was implemented, San Francisco was using the following voting  
22 equipment: Optech Eagles, manufactured by ES&S. That equipment could not machine-count  
23 more than three IRV rankings. Hill Decl. ¶¶ 5-6.

24 <sup>84</sup> See *id.*

25 <sup>85</sup> Burdick, 504 U.S. at 428-29. Moreover, since Plaintiffs have failed to show that three-  
26 choice IRV has disenfranchised any voters, the extensive Due Process Clause jurisprudence  
27 invoked by Plaintiffs does not apply to this case. Contra, Plaintiffs’ Moving Papers 17:17-18:27.

28 <sup>86</sup> In their Moving Papers, Plaintiffs in effect make San Francisco a settlement offer of  
“return[ing] to a traditional [two-round] runoff system like that used in the years prior to the  
adoption of [IRV]”. Plaintiffs’ Moving Papers 21:11-21:14 (emphases added).

<sup>87</sup> “San Francisco Successfully Uses Ranked Choice Voting for Citywide Elections,” Nov.  
2005, available at <http://www.sfrcv.com/> (last visited Feb. 25, 2010).



