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8   UNITED STATES DISTRICT COURT

9   NORTHERN DISTRICT OF CALIFORNIA

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11 RON DUDUM, MATTHEW SHERIDAN,   CASE NO. 10-CV-00504 SI
    ELIZABETH MURPHY, KATHERINE
12 WEBSTER, MARINA FRANCO and   **DECLARATION OF RICHARD E.**
    DENNIS FLYNN,   **DELEON IN SUPPORT OF NEW**
13   **AMERICA FOUNDATION'S BRIEF AS**
              Plaintiffs,   **AMICUS CURIAE**
14
                                          JUDGE: Hon. Susan Ilston
      vs.   COURTROOM: 10
15
    JOHN ARNTZ, Director of Elections of
16 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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                                          DECLARATION OF RICHARD E. DELEON
                                          10-CV-00504-SI

I, RICHARD E. DeLEON, Ph.D., hereby declare that the following is true:

1.   I am Professor Emeritus and former Chair of the Political Science Department at San Francisco State University.

2.   I am a nationally recognized expert on urban politics and San Francisco politics and have conducted studies about the effects of Instant Runoff Voting in San Francisco. I served as a consultant for the 1995 San Francisco Elections Task Force and (with my colleague, Lisel Blash) established the district boundary lines for the San Francisco Board of Supervisor districts which were approved by the voters as Proposition G in 1996. In 1998, I received a Certificate of Honor from the San Francisco Board of Supervisors for my various contributions to the city over the course of my career at San Francisco State University.

3.   I have read the Complaint filed in this matter and the Declaration of Dr. Jonathan Katz in Support of Plaintiffs' Motion for Preliminary Injunction.

4.   After evaluating the Complaint and Declaration and reviewing related data and research, I have come to two pertinent conclusions:

- This is a frivolous lawsuit; and
- Dr. Katz's Declaration in support of that lawsuit is based on a superficial analysis of inadequate and incomplete data leading to conclusions that are highly questionable, misleading, and untrustworthy.

ADDITIONAL QUALIFICATIONS

5.   I am Professor Emeritus at San Francisco State University, where I taught political science for 35 years with a focus on American government and urban politics. I am the author of the award-winning *Left Coast City*, a book on San Francisco politics.

6.   I received my B.A. from the University of California at Berkeley; my M.A. from San Francisco State College; and my Ph.D. from Washington University, St. Louis, Missouri.

7.   I am the Founder of the Public Research Institute at San Francisco State University and served as the Director of the Institute from 1984-1994.

8.   I am the author of numerous journal articles and book chapters about urban politics and politics in San Francisco, and have conducted and reported on research specifically about Instant Runoff Voting in San Francisco, including (as co-author) "The Campaign for Proposition H and Preference Voting in San Francisco, 1996," *Representation*, Vol. 35, No. 4 (Winter 1998), 265-74; and "San Francisco and Instant Runoff Voting: An Analysis of the San Francisco State University/Public Research Institute Exit Poll Data Assessing Voter Opinions about Ranked

Choice Voting in the November 2004 Board of Supervisors Elections" (unpublished manuscript, posted on a widely used local political website.)

9. I have served as a paid or *pro bono* consultant to The Brookings Institution; the Rockefeller Institute; the U.S. Department of Housing and Urban Development; City of Brisbane; State and Local Partnership for the Arts; San Francisco City Planning Department; San Francisco Charter Revision Commission; San Francisco Mayor's Office of Community Development; San Francisco State University Human Relations Commission; San Francisco Department of Public Works; San Francisco Water Department; San Francisco Elections Task Force; San Francisco Foundation; San Francisco Examiner, and the Vermont State Senate, among other institutions and organizations.

ADVANTAGES OF USING INSTANT RUNOFF VOTING

10. Instant Runoff Voting is an established voting method well known to political scientists. Instant Runoff Voting, or IRV for short, is also known as Ranked Choice Voting, Preference Voting and the Alternative Vote. The American Political Science Association uses IRV to elect its president. IRV is used in a number of cities in the United States as well as in the states of Louisiana, Arkansas and South Carolina for overseas voters; in Australia; and is used to elect the Mayor of London and the presidents of Ireland and Sri Lanka. Roberts Rules of Order includes IRV as one of its recommended methods of elections. The Academy of Motion Picture Arts and Sciences will use Instant Runoff Voting this year to determine the winner of its "Best Picture" Oscar award. Two bills to allow the use of Instant Runoff Voting to fill vacancies in public offices have recently been introduced into the California Legislature.

11. IRV has a number of advantages over two-round runoff elections. In two-round runoff elections, there is often a huge drop off in voter turnout between the two elections. This means that relatively few voters participate in the decisive second election. IRV combines the two elections into one, which is held when voter turnout is highest. IRV eliminates the potential for "spoiler" candidacies and creates a dynamic which discourages negative campaigning. By combining two elections into one, IRV also reduces the amount of money needed to run for office and saves municipalities the expense of administering two separate elections held only months apart.

12. Any voting method produces what are known as "effective" votes, votes which ultimately elect a candidate, and "wasted" votes, which are ballots cast for losing candidates. Plurality elections, where candidates win by receiving more votes than other candidates, produce

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the most wasted or ineffective votes. For example, consider a three way race between candidates A, B and C. If candidates A and B each receive 30% of the vote and candidate C receives 40% of the vote, candidate C wins the election and 60% of the voters—a clear majority—have cast ineffective ballots and are essentially denied representation. This is how most elections in the United States are conducted. Two round-runoff elections are, in essence, two plurality elections held back to back.[1] Instant Runoff Voting increases the number of effective ballots cast and does so when voter turnout is highest.

INSTANT RUNOFF VOTING IN SAN FRANCISCO

13.   Prior to using Instant Runoff Voting, candidates for city offices in San Francisco ran for election in November. If a candidate won a majority of ballots cast (50% +1), that candidate was elected. If no candidate won a majority of votes at the November general election, the two leading candidates competed again in a separate December runoff election. Very often, voter turnout for the December runoff elections dropped precipitously from November. For example, in 2000, voter turnout for the November general election was 66%. By contrast, voter turnout for the subsequent December runoff election was 33%, a 50% drop in voter participation.

14.   This drop in voter turnout was particularly noticeable in San Francisco's poorest and most ethnically diverse neighborhoods. Analysis of voter turnout after San Francisco adopted IRV demonstrated that voter participation from these neighborhoods in the decisive November election skyrocketed by approximately 300% when compared to participation in the December runoffs before IRV was used.

15.   San Francisco is a very diverse city with sizable Asian American, Latino and African American populations. In 2008, using IRV, the city elected the most diverse Board of Supervisors in its history.

16.   IRV has cut down on negative campaigning and has encouraged cooperation and civility among candidates. In 2004, *The New York Times* ran an article about San Francisco's first use of IRV under the headline "New Runoff System in San Francisco Has the Rival Candidates Cooperating."

MISTAKES, FLAWS AND OMISSIONS IN THE KATZ DECLARATION

17.   Dr. Katz's conclusions are based on erroneous information and demonstrate a shocking lack of familiarity with San Francisco's electoral process.

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[1] Although the runoff election seeks to produce a majority winner between the two leading candidates, write-in candidacies could deprive the winning candidate of a majority.

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1   18.   At the heart of this lawsuit, which I would characterize as frivolous, are Dr. Katz's

2   conclusions based on the number of exhausted ballots in each election. An exhausted ballot can

3   best be defined as aballot cast for candidates who were eliminated before the final round of

4   tabulation. However, Dr. Katz uses figures for exhausted ballots that are obviously inaccurate.

5   Dr. Katz apparently does not understand that the San Francisco Department of Elections (DOE)

6   has, over time, used varying definitions of "exhausted ballots." For example, in 2004 and 2006

7   the Department included both undervotes and overvotes in the first round of IRV tabulation as

      "exhausted ballots." There are two kinds of undervotes, specific and general. Specific undervote:

8   In San Francisco's IRV system, a voter might choose to vote in the Board of Supervisors election

9   and select his or her favorite candidate as rank 1 but decline to specify any second or third

10   choices. On that voter's ballot, the blank entries for the voter's second-ranked and third-ranked

      candidates would be classified as undervotes – votes that could have been cast but were not.

11   General undervote ("roll-off"): Instances of a voter choosing not to rank any of the candidates –

12   in effect, casting three undervotes for that office—are called "roll-off" by many political

13   scientists. To use a familiar example, a voter might vote for president or governor but abstain (or

14   "roll off") from voting at all in the Board of Supervisors election. An overvote occurs, on the

15   other hand, when a voter casts two or more votes for the same candidate in the same election,

16   invalidating the vote for that office. The major point of these distinctions is that neither general

17   undervotes nor overvotes should be counted as "exhausted" votes in the precise sense Dr. Katz

      intends, namely, as votes that might have specified a different candidate preference ordering

18   under an unrestricted IRV system but which were peremptorily discarded as exhausted because of

19   the maximum three rankings allowed by the current system. In addition, given Dr. Katz's

20   argumentative use of the term, there are two other types of votes that should be excluded from

21   those officially classified as "exhausted" by the DOE: ballots in which only one candidate was

22   ranked, and ballots in which only two candidates were ranked. It is difficult to contend that a

      voter's choices were unfairly restricted to a maximum of three if the voter declined to use his or

23   her full allotment under the current system. In short, Dr. Katz failed to cull out these spurious

24   types of "exhausted" ballots from those that are at least theoretically germane to his arguments.

25   The only category of exhausted ballots that does seem potentially germane is one in which (a) a

26   voter chooses to vote in the Board of Supervisors election (no "roll-off"), and (b) the voter ranks

27   the maximum of three different candidates, and (c) all of the voter's most favored three

28   candidates are eliminated in passes leading up to the final count. By uncritically accepting the

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DOE's total count of exhausted ballots as the definitive one in his assessment, however, Dr. Katz, mistakenly and misleadingly dumps all the different types of exhausted ballots discussed above into a single undifferentiated pile and then points to it (in his Table 2, for example) as evidence for his case against San Francisco's IRV system. That evidence, for the reasons stated above and demonstrated empirically below in paragraph 19A, is extremely weak and unreliable – too weak and unreliable to justify a serious lawsuit.

19.   Dr. Katz could have conducted a more credible and scientifically defensible analysis if he had used available ballot image voting data to study exhausted ballots rather than relying solely on DOE's summary tabulations. Answering the question of whether or not voters have ranked the maximum of three candidates is of critical importance in determining whether the voter's ballot is exhausted voluntarily or as a consequence of the limited number of rankings available. A review of the ballot images would reveal all of the voters' rankings and would allow for a precise calculation of how many ballots were exhausted due to voters voluntarily choosing to rank one or two candidates. Various studies, including my own research, have found that many voters do not rank all three candidates, as is their right. Further, detailed and verifiable ballot-image data about *how* individual voters rank candidates on their ballots provides valuable information which can be useful in assessing and predicting voter behavior and election results. Yet Dr. Katz reveals his lack of familiarity with San Francisco's election administration and electoral process where he states, in paragraph 27 of his Declaration, that he cannot explain the actual San Francisco results in the same way he explains his hypothetical examples because "we do not observe the complete rankings of the voters, but only the totals after each round of counting." In fact, the complete rankings, in the form of ballot image data for individual voters, have been available from the San Francisco Department of Elections. Dr. Katz's failure to base his analysis on such ballot image data undercuts his claims and renders his conclusions unreliable, untrustworthy, and nearly worthless for any serious assessment of the city's IRV system.

19A.   **Analysis of the November 2004 Board of Supervisors (BOS) election in District 5 using ballot-image data**: To illustrate the importance of using ballot-image data rather than summary tabulations in drawing conclusions about exhausted ballots and the fairness of San Francisco's IRV system, I used ballot image data obtained from the DOE in 2004 in my own study of exhausted votes in one of the elections heavily featured in Dr. Katz's assessment. My results do not favor the plaintiffs' case or provide any credible basis for a lawsuit.

In paragraph 28 of his declaration, Dr. Katz states that "perhaps the most difficult case faced by

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some voters in San Francisco using Restricted IRV was the election for the District 5 Supervisor in 2004." In paragraphs 28-30, he specifically cites the DOE count of 13,144 exhausted ballots in that election as evidence of the alleged harmful effects of the maximum three rankings restriction in discriminating against voters who support unpopular candidates. Given the great import of this case in Dr. Katz's overall negative assessment of the city's use of IRV, it is important to provide a detailed analysis of the actual ballot-image voting data for this particular election, which Dr. Katz himself did not do.

Based on my own analysis of the complete set of the DOE's official ballot-image data for District 5 in the November 2004 election, here are my principal conclusions:

(1) Of the 13,144 ballots the DOE labeled "exhausted" at the end of pass 19 (when candidate Mirkarimi was declared winner by gaining 50.6% of the continuing 26,111 votes cast either for Mirkarimi, Haaland, or Feldstein):

(a) 3,752 of those 13,144 exhausted ballots (28.5% of the total) were cast by voters who did not vote at all in the BOS District 5 race (this is the "roll-off" discussed earlier);

(b) 1,976 of those 13,144 exhausted ballots (15.0% of the total) were cast by voters who did vote in the BOS District 5 race but who ranked only one candidate – i.e., were cast by voters who voluntarily exhausted their own ballot by choosing not to rank a second or third candidate;

(c) 917 of those 13,144 exhausted ballots (7.0% of the total) were cast by voters who did vote in the BOS District 5 race but ranked only two candidates – i.e., were cast by voters who voluntarily exhausted their own ballot by choosing not to rank a third candidate.

(2) Thus, based on my analysis of the actual DOE ballot-image data, these calculations mean that only 6,499 of the 13,144 officially exhausted ballots (13,144 minus 3,752 minus 1,976 minus 917 = 6,499) – 49.4% of the total – could even possibly have been the result of the city's maximum three rankings restriction. Because of Dr. Katz's failure to analyze the available ballot-image data and because of his uncritical reliance solely on DOE's summary tabulations, he overstated the outermost possible effects of the maximum three restriction by a factor of two (13,144 versus 6,499).

(3) My further analysis of the data showed that only 5,963 of the 6,499 "involuntarily" exhausted ballots were cast by voters who voted in the BOS District 5 race and who ranked the maximum of three candidates. By looking in detail at the actual voter rankings

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for the remaining 536 ballots (6,499 minus 5,963 = 536), I found that all involved some combination of a valid DOE code for a candidate and DOE codes for an overvote and/or an undervote. An example would be: rank1 = undervote, rank2 = Mirkarimi, rank3 = undervote. These kinds of voter rankings were classified by DOE as exhausted (and were included in the total of 13,144). But clearly these 536 ballots were not cast by voters who ranked the maximum of three candidates and yet still saw their ballot "involuntarily" discarded as exhausted prior to the final count in pass 19. In other words, based on my own analysis, the best estimate of the outermost possible effects of the maximum three restriction is 5,963 ballots, not the wildly inflated 13,144 ballots claimed by Dr. Katz.

(4)   In the preceding paragraph, I use the term "outermost possible effects" for a good reason. To wit, given the facts that 1,976 of the officially exhausted ballots ranked only one candidate, and that 917 of them ranked only two, it seems entirely reasonable to me that a very large percentage, possibly a majority, of those 5,963 voters whose ballots were classified as exhausted (despite ranking the maximum of three candidates) would have voluntarily stopped at ranking just those three even if there had been no restriction on the number of rankings allowed. Given these facts and plausible assumptions, I would estimate the maximum number of possible involuntarily exhausted ballots in this case to be in the range of 2,000 to 3,000 at most, not Dr. Katz's ill-informed and misleading estimate of 13,144. In sum, Dr. Katz's original number of 13,144 has dwindled rapidly to become very small and scientifically insignificant as evidence for the claims Dr. Katz has made.

(5)   If Dr. Katz's reported statistics are so wildly and misleadingly off the mark in District 5 – a case he himself highlighted as the most important evidence for his arguments against IRV – then there is no reason to place any trust in his similar statistical analyses of other districts and other elections, as summarized in his Table 2.

(6)   Finally, my own analysis of the District 5 election data does not even take into account (a) what substantive impact, if any, such a likely small number (two to three thousand at most) of involuntarily exhausted ballots might have had on the actual outcome, or, much more importantly, (b) what that impact might have been compared to the demonstrably large and racially/ethnically discriminatory impacts often caused by significantly reduced voter turnouts in traditional runoff elections.

20.   Dr. Katz also is incorrect when he claims, in paragraph 29 of his Declaration, that his Table 2 presents relevant information "for all San Francisco elections in which there was not a

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first round winner, so that there really was an 'instant runoff.'" In fact, Dr. Katz omits information here about the 2005 Assessor's race. While perhaps accidental, this is nonetheless a troubling omission since the inclusion of this election in Dr. Katz's data would further undermine his claims because, in this race, the margin of victory was greater than the number of exhausted ballots.

21. Equally troubling is Dr. Katz's claim that the outcome in the 2006 supervisorial race in District 4, involving Plaintiff Dudum, "could have easily changed" given the margin of victory in the race and the number of "exhausted ballots." This dubious claim rests once again on the same kind of superficial analysis of DOE's summary tabulations which Dr. Katz used to draw similarly inaccurate and misleading conclusions regarding District 5, discussed above. I have reviewed an "Analysis of San Francisco 2006 District 4 Supervisor Contest," conducted by researcher David Cary (a true and accurate copy of which is attached as Exhibit 14 to the Declaration of Gautam Dutta), who holds both a Masters in Mathematics and an MBA from UC Berkeley, and Rob Richie, the Executive Director of FairVote, a non-partisan, non-profit election reform organization. This analysis, based on a review of superior, ballot image, data, reveals that Dr. Katz failed to take into account that 2,171 of the 6,010 so-called "exhausted" ballots were, in fact, from roll-off and overvotes. Additionally, 3,012 of ballots did not contain three rankings and were voluntarily exhausted. In other words, 5,183 of the 6,010 "exhausted" ballots were not exhausted due to the limitations of rankings. Furthermore, Dr. Katz's bold claim, based on flimsy data, that the result "could have easily changed" inexplicably ignores important realities about San Francisco politics, specifically the racial/ethnic composition of the electorate in this District and the local salience of racial and ethnic identity politics. District 4 has the highest percentage of Asian American voters in San Francisco. My studies of San Francisco elections reveal that Asian Americans, much more so than voters in some other racial/ethnic groups, have a strong tendency to support candidates of their own race or ethnicity above and beyond considerations of ideology. Plaintiff Dudum, who is not of Asian descent, competed against three Asian American candidates, including the winning candidate Ed Jew. Not only could one readily hypothesize that it would have been incredibly unlikely, given the strong tendencies of Asian America voters to support Asian American candidates, for Dudum to have won, but this theory is supported by the Cary-Richie analysis based on the actual rankings of voters in District 4. A review of these rankings demonstrate that Plaintiff Dudum was not the second strongest candidate in the race in terms of overall support, but finished second only because voters' preferences were spread among

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the other Asian American candidates. The Cary-Richie analysis demonstrates that if candidate Jew were eliminated from the election, based on the voters' rankings, candidate Mak would still defeat Plaintiff Dudum. Furthermore, this analysis demonstrates that if both Jew and Mak were eliminated from the contest, candidate Chan would also defeat Plaintiff Dudum. Finally, Plaintiff Dudum's likelihood of success would not have increased if voters had the option of using additional rankings. According to the Cary-Richie analysis, in order for Plaintiff Dudum to have won in the final round of IRV tabulation against candidate Jew, Dudum would have had to have won 96.9% of the additional rankings and only 3.1% of the additional rankings could have resulted in undervotes, overvotes, or transfers to Jew. Dr. Katz, as noted, failed to conduct this kind of rigorous and essential analysis of actual voter rankings and ballot transfers.

22.   Dr. Katz places much emphasis on instances where, he claims, the margin of exhausted ballots exceeds the margin of victory. As demonstrated specifically in the context of the 2006 District 4 race, this can be an absolutely irrelevant consideration. Furthermore, once the roll-off and overvotes are removed from the total of exhausted ballots, a more accurate estimate of the number of involuntarily exhausted ballots emerges. Using these more accurate figures, the differences between the number of exhausted ballots and the margin of victory shrinks dramatically in a number of the races cited by Dr. Katz. This difference shrinks further still when we consider those ballots exhausted because voters voluntarily chose to rank fewer than three candidates. While there may be a remote mathematical possibility that involuntarily exhausted ballots could affect the outcome of these races, in my opinion it would be highly improbable in San Francisco's political reality. Changing the outcome of these races would have required an unlikely and overwhelming number of voters whose ballots were exhausted to choose the second place finisher as their preferred candidate. If this dubious claim is the basis of Plaintiff's lawsuit, the lawsuit has no basis in accepted political science methodology.

23.   Dr Katz makes a number of other errors in his Declaration. Dr. Katz incorrectly states that San Francisco was the first jurisdiction in the United States to restrict the number of rankings allowed with Instant Runoff Voting. In fact, in the 20th century a number of jurisdictions throughout the United States used IRV with limited rankings. Cambridge, Massachusetts, which has been using a Ranked Choice voting method since 1941 restricts the number of rankings allowed, contrary to Dr. Katz's claim that Cambridge does not restrict rankings.

24.   Dr. Katz is also incorrect when he claims that New York City uses a Ranked

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Choice voting method for its community school board elections and does not restrict rankings. In fact, the last such election was in 1999.

25.   Dr. Katz incorrectly claims that Aspen voters "repealed" IRV in 2009. In fact, an advisory measure about retaining IRV lost at the polls by six votes. It is up to the Aspen City Council to decide whether a binding measure will be placed on the ballot. Dr. Katz also incorrectly claims that Aspen restricts the number of rankings voters may use; there are no restrictions.

26.   Dr. Katz is incorrect when he claims that Minneapolis, Oakland, Berkeley and San Leandro adopted IRV with restricted rankings; rather, these cities, like San Francisco, restrict the number of rankings for purposes of election administration.

I declare under penalty of perjury and the laws of the United States that the foregoing is true and correct and are based on my personal knowledge except for matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on February 26, 2010, in Castro Valley, California.

/s/ Richard E. DeLeon

RICHARD E. DeLEON

I, Gautam Dutta, the e-filer of this document, attest that the signatory has authorized me to file this document on his behalf.

Dated: February 26, 2010   /s/ Gautam Dutta

GAUTAM DUTTA

Attorney for Amicus Curiae,

New America Foundation

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