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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 10-CV-00504 RS

REPLY BRIEF IN FURTHER SUPPORT OF NEW AMERICA FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

HEARING DATE: April 22, 2010
HEARING TIME: 1:30 pm
JUDGE: Hon. Richard Seeborg
COURTROOM: 3

According to Plaintiffs, granting this Motion would somehow "threaten[] significant prejudice" to their constitutional rights.[1] But as the Ninth Circuit en banc has admonished, "election cases are different from ordinary injunction cases" – because the public interest "is significantly affected".[2] In this momentous case, Plaintiffs seek to enjoin San Francisco's 2010

[1] Pl. Opp. 1:16.

[2] *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 919 (9th Cir.

municipal elections. Since the outcome of this lawsuit will emphatically affect the public interest, the Court should not be deprived of critical legal and factual insight into Instant Runoff Voting (IRV) – a lesser known voting system in which New America Foundation offers undisputed expertise. Consequently, the Court has compelling grounds to grant New America Foundation's Motion for leave to file its proposed amicus brief ("Amicus Brief").

Plaintiffs apparently believe that the Amicus Brief is "improper", because it includes declarations and exhibits.[3] However, that is not the standard for evaluating amicus briefs. It is settled law that a court will likely admit an amicus brief if it "will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs".[4] Furthermore, if a case involves matters of "public concern", courts exercise "great liberality" in admitting amici.[5] Here, Plaintiffs seek to enjoin a voting system (IRV) that was approved by voters nearly a decade ago – a matter of grave public concern.[6] Moreover, courts have broad discretion to admit – and judges themselves even solicit – evidence proffered by amici.[7]

2003) (en banc, per curiam) (unanimously rejecting attempt to enjoin election) (citing *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)) (emphasis added).

[3] Pl. Opp. 1:18.

[4] *Voices for Choices v. Ill. Bell Tel. Co.,* 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J.) (emphases added); accord, *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982); *Sonoma Falls Devs.,LLC v. Nev. Gold & Casinos, Inc.*, 272 F.Supp.2d 919, 925 (N.D. Cal. 2003); *Community Ass'n for Restoration of the Env't v. DeRuyter Bros. Dairy*, 54 F.Supp.2d 974, 975 (E.D. Wash. 1999). Amici need not be "completely disinterested in the outcome of a case." *State v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734 (Tenn. Ct. App. 2001). See also *Bryant v. Better Bus. Bureau of Greater Md.*, 923 F. Supp. 720, 728 (D. Md. 1996); *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993).

[5] 3B C.J.S. Amicus Curiae § 3; see also *Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734; 4 Am. Jur. 2d Amicus Curiae § 3.

[6] Id.

[7] See, e.g., *Eastman Kodak Co. v. Image Technical Svc., Inc.*, 504 U.S. 451, 495 (1992); *Ramos v. Lamm*, 639 F.2d 559, 585 (10th Cir. 1981); *Lamprecht v. FCC*, 958 F.2d 382, 396 n.6, 414 (D.C. Cir. 1992) (appellate judge sought to solicit amicus briefs on a key issue). To no surprise, neither case cited by Plaintiffs on this topic comes to their aid. In a summary footnote, *Metcalf* granted a motion to strike without elaborating its reasons; while *High Sierra Hikers Ass'n* struck evidence during the merits phase of litigation, because amici had already been granted

Consequently, this Court can exercise "great liberality" in granting this Motion.

Plaintiffs do not dispute New America's expertise in the field of electoral reform, especially with respect to IRV.[8] In their own way, Plaintiffs even concede that New America's amicus brief presents "insights, facts, and data that are not found in either parties' briefs."[9] Specifically, Plaintiffs have challenged the merits of New America's amicus brief on significant points of contention, including: (1) whether Massachusetts Supreme Court jurisprudence on IRV systems is "directly on point" to this case;[10] and (2) whether three-choice IRV has altered any

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intervenor status for the remedial phase of the litigation. *Metcalf v. Daley*, 214 F.3d 1135, 1141 n.1 (9th Cir. 2000); *High Sierra Hikers Ass'n v. Powell*, 150 F.Supp.2d 1023, 1045 (N.D. Cal. 2001); cf.Pl. Opp. 1:22-26.

[8] Among other things, New America Foundation's Amicus Brief brings to the Court's attention two important details about IRV that were not mentioned in the parties' papers: (1) Three U.S. Supreme Court justices have approvingly mentioned IRV systems, and (2) the U.S. Department of Justice has implicitly acknowledged the constitutionality of the multiple-seat form of IRV. Amicus Brief 5:14-6:3.

[9] *Voices for Choices,* 339 F.3d at 545; Pl. Opp. 2 n.1.

[10] Pl. Opp. 2 n.1. In their Opposition, Plaintiffs desperately seek to escape from a critical ruling of the Massachusetts high court: namely, if voters in an IRV election "guess wrong" and do not vote for a popular candidate, their constitutional rights have not been violated. *McSweeney v. City of Cambridge,* 665 N.E.2d 11, 14 (Mass. 1996); Amicus Brief 16:4-17; cf. Pl. Opp. 2 n.1. Since *McSweeney* rejects their core theory, Plaintiffs understandably try to distinguish it. For this reason, Plaintiffs' Opposition shrilly insists that Cambridge does not restrict the number of rankings on its ballot. Cf. Pl. Opp. 2 n.1. However, as our Amicus Brief shows, Cambridge (like San Francisco) does in fact restrict the number of rankings in its multiple-seat form of IRV. Amicus Brief 10:10-11 & Declaration of Richard DeLeon ¶ 23; contra, Pl. Opp. 2 n.1. Tellingly, Plaintiffs could not even provide the Court with a sample ballot to support their erroneous contention.

Ironically, the Massachusetts high court case of *Moore* – which Plaintiffs invoke in trying to escape from *McSweeney* – only compounds their problems. See Pl. Opp. 2 n.1 (quoting *Moore v. Elections Comm'rs of Cambridge*, 35 N.E.2d 222, 228 (Mass. 1941)). Indeed, *Moore* upheld the constitutionality of the multiple-seat (proportional representation) form of IRV. *Moore*, 35 N.E.2d at 230 ("We must not shudder every time a change is proposed.") (quoting *Johnson v. New York*, 9 N.E. 2d 30, 38 (N.Y. 1937) (upholding constitutionality of New York City's former system of multiple-seat IRV)).

Unfortunately for Plaintiffs, the *Moore* Court went further – and concluded that a city may limit the number of candidates that voters may vote for. *Moore*, 35 N.E.2d at 235. Specifically, the Massachusetts high court re-affirmed the constitutionality of "limited voting": a proportional-representation system in which "voters cast fewer votes than there are seats to be elected, thereby allowing a majority group to control the majority of seats, but not *all* seats." Limited Voting: A Simple, Compromise Proportional Voting Method, FairVote website, available at http://archive.fairvote.org/?page=565 (last visited Mar. 17, 2010) (emphases added).

Significantly, limited voting is now used as a remedy for violations of the Voting Rights

election outcome.[11] Had New America not filed its Motion, the Court would have been deprived of critical perspective on those fundamental issues.

Contrary to Plaintiffs' protestations, granting this Motion will not prejudice the parties. The Amicus Brief was filed on the same day that Defendants submitted their Opposition to Plaintiff's Preliminary Injunction Motion. In fact, Plaintiffs have already responded to the Amicus Brief: not only in their subsequent Opposition to this Motion, but also in their Reply Brief to their Preliminary Injunction Motion. In both those documents, Plaintiffs responded to the Amicus Brief's analysis on (1) the applicability of Massachusetts Supreme Court jurisprudence to this case (in Plaintiffs' Opposition)[12] and (2) whether three-choice IRV has altered any election outcomes (in Plaintiffs' Preliminary Injunction Reply Brief).[13] Simply put, Plaintiffs would not be prejudiced if the Court admits the Amicus Brief.

Finally, granting New America's Motion will not delay this litigation. Significantly, courts may admit amicus briefs at later stages of litigation – even on the "eve of summary

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Act. See, e.g., *United States v. Euclid City School Board*, 632 F.Supp.2d 740, 752 n.11 (N.D. Ohio 2009); *Moore v. Beaufort Cty., N.C.*, 936 F.2d 159, 164 (4th Cir. 1991); *Cleveland County Ass'n for Gov't by People v. Cleveland County Bd. Of Com'rs.*, 142 F.3d 468, 478 (D.C. Cir. 1998).

If a city or county may restrict the number of candidates that voters can vote for in a non-IRV election (using limited voting), it follows that it may also restrict the number of candidates that voters can rank in an IRV election. Id.; *Moore*, 35 N.E.2d at 235.

[11] See Plaintiffs' Moving Papers for Preliminary Injunction, Declaration of Jonathan Katz ¶2 (asserting that three-choice IRV "likely altered election outcomes from what would have resulted under the standard unrestricted IRV or under the traditional [two-round] runoff system.")

Significantly, the Amicus Brief shows that the methodology used by Plaintiffs' consultant was fatally flawed; that "Plaintiffs have failed to show that IRV has distorted any election outcome." Amicus Brief 19:9-10 (emphasis in original) & generally 17:5-19:12. For example, for Plaintiff Dudum's second unsuccessful race for San Francisco Supervisor, an astounding 86 percent of the ballots that were purported "exhausted" were not in fact "exhausted." Id. 18:12-23. In response, Plaintiffs now concede that they cannot prove three-choice IRV altered any election results. Pl. Reply in Support of Moving Papers 14:12-13 ("[T]he unconstitutional harm that Plaintiffs complain of is not that exhausted ballots 'affect election results.'") (emphasis in original).

[12] See n. 7 supra.; Pl. Opp. 2 n.1

[13] See n. 8 supra; Pl. Preliminary Injunction Reply Brief 14:12-13.

judgment motions" – where an amicus brief provides "unique information or perspective" that had not been provided by the parties.[14] Plaintiffs have already responded to the issues raised in the Amicus Brief, and the parties have fully briefed Plaintiffs' Preliminary Injunction Motion. Before this case was transferred, the hearing on this Motion had been scheduled concurrently with that of Plaintiffs' Preliminary Injunction Motion. By granting this Motion, the Court will gain valuable perspective as it examines the novel constitutional issues raised in this case of first federal impression.

As the Ninth Circuit recently cautioned, "Interference with impending elections is extraordinary[.]"[15] Since this case raises a matter of paramount concern to the public interest, this Court's decision could have a profound impact on the lives of not just San Francisco residents, but of the nation as a whole. By granting this Motion, the Court will benefit from New America Foundation's unique perspective and insights about IRV. Accordingly, the New America Foundation respectfully requests the Court's leave to file its Amicus Brief.

[14] *DeRuyter Bros. Dairy*, 54 F.Supp.2d at 975-76 (citing *Miller-Wohl*, 694 F.2d at 204).

[15] *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc, per curiam) (emphasis added (citing *Reynolds*, 377 U.S. at 583).

DATED: March 19, 2010

Respectfully submitted,

By: /s/ Gautam Dutta
GAUTAM DUTTA, ESQ.

Attorney for

NEW AMERICA FOUNDATION