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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RON DUDUM, MATTHEW SHERIDAN, ELIZABETH MURPHY, KATHERINE WEBSTER, MARINA FRANCO 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. C 10-00504 SI

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

HEARING DATE: March 12, 2010
HEARING TIME: 9:00 a.m.
JUDGE: Hon. Susan Illston
COURTROOM: 10

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1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Please take notice that on March 12, 2010, at 9:00 a.m., or as soon thereafter
4 as the parties may be heard, the Plaintiffs in this action will move this Court, at the
5 United States Courthouse located at 450 Golden Gate Avenue, San Francisco,
6 California, 94102, Courtroom #10, for immediate issuance of a preliminary
7 injunction prohibiting Defendants, and all persons acting pursuant to their
8 direction and control, from using instant runoff voting in any election where voters
9 are prohibited from ranking every candidate on the ballot for each office.

10 This motion is based on the following documents: this Notice of Motion and
11 the attached Points & Authorities; the Complaint on file herein; the Declaration of
12 Dr. Jonathan Katz ("Katz Decl."), filed herewith; the Declaration of Ron Dudum
13 ("Dudum Decl."), filed herewith; the Declaration of Matthew Sheridan ("Sheridan
14 Decl."), filed herewith; the Declaration of Elizabeth Murphy ("Murphy Decl."),
15 filed herewith; the Declaration of Katherine Webster ("Webster Decl."), filed
16 herewith; the Declaration of Marina Franco ("Franco Decl."), filed herewith; the
17 Declaration of Dennis Flynn ("Flynn Decl."), filed herewith; Plaintiffs' Request for
18 Judicial Notice, filed herewith, and the Declaration of Christopher Skinnell,
19 attached thereto; and all the other papers, documents, or exhibits on file or to be
20 filed in this action, and the argument to be made at the hearing on the motion.

21 **POINTS AND AUTHORITIES**

22 **I. INTRODUCTION.**

23 The right to vote is vital to our system of democracy. By this lawsuit,
24 Plaintiffs seek to vindicate the constitutional right to vote of the citizens of San
25 Francisco, and to prevent the dilution and denial of that right in municipal
26 elections to large swaths of the City's electorate. The United States Supreme Court
27 has declared, the "right to vote freely for the candidate of one's choice is of the
28 essence of a democratic society, and any restrictions on that right strike at the

heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Indeed, the right to vote is perhaps the most fundamental right, "because [it] is preservative of all rights.'" *Id.* at 562.

Consistent with these principles, it is black-letter constitutional law that every "citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). San Francisco's current system of running municipal elections violates this fundamental precept, and its continued use must therefore be enjoined.

Since 2004 San Francisco has used an unorthodox and theretofore unprecedented "instant runoff" (or "ranked-choice") voting system to conduct most of its municipal elections. S.F. CHARTER § 13.102. Prior to the adoption of Proposition A in March 2002, a few jurisdictions nationally used instant runoff voting, by which voters are permitted to rank each of the candidates running for a given office in order of preference. The first-place votes are then tallied. If no single candidate receives 50% or more of the votes cast, the "instant runoff" begins: the candidate with the lowest number of first-place votes is eliminated, and each vote cast for that last-place candidate is redistributed to the voters' second-choice candidates. The process of elimination and redistribution continues, runoff round by runoff round, until one candidate receives 50%+1 of the votes cast.

San Francisco's instant runoff system includes an unorthodox component that was used nowhere else in this country at the time San Francisco adopted Proposition A. San Francisco permits a voter to rank only three candidates, even though there most often are more than three candidates running for a particular office.[1, 2] Once the three candidates ranked by a voter are eliminated, the voter's

[1] Following San Francisco's lead, Aspen (CO), Pierce County (WA), and Minneapolis (MN) adopted such restricted instant runoff voting in 2006 and 2007. (Katz Decl. at ¶ 15.) After running two elections each under that system, voters in Aspen and

ballot ceases to have any further effect. In the words of Proposition A, the ballot is "exhausted" (*i.e.*, extinguished), and "*shall not be counted* in further stages of the tabulation . . . ." S.F. CHARTER § 13.102(a)(3) (emphasis added). This novel feature arbitrarily and illegally deprives thousands of voters of the right to have a vote counted in later rounds of tabulation—or "runoffs"—based on whom they voted for in the early rounds.

The result of this restricted instant runoff system has been that thousands of San Francisco voters have repeatedly had their votes "exhausted" and been denied the right to vote in all runoff rounds of balloting while other voters have been allowed to participate fully. As a consequence, municipal candidates are routinely elected in San Francisco with far less than a majority of the votes cast (*contrary to what the electorate that adopted instant runoff voting was promised*), and in fact elected candidates' margin of victory is often many times smaller than the number of votes that were "exhausted." In other words, the voter disenfranchisement in later runoff rounds is routinely substantial enough to alter election results, violating a fundamental precept of democracy.

The odd and unprecedented instant runoff voting system used in San Francisco violates the equal protection and due process clauses of the Fourteenth Amendment, the First Amendment, and 42 U.S.C. § 1983. The continued use of this instant runoff voting system must be prohibited, and San Francisco enjoined from using instant runoff voting where voters are prohibited from ranking each

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Pierce County voted to repeal instant runoff voting in November 2009. (*Id.* at ¶ 15 nn. 6 & 7.) Minneapolis conducted its first restricted instant runoff election in November 2009 as well. (*Id.* at ¶ 15 n.9.) Three other cities in the Bay Area—Oakland, Berkeley, and San Leandro—are proposing to implement such a system for the very first time in November 2010. (*Id.* at ¶ 15 n.8.)

[2] The form of instant runoff voting in which voters are not allowed to rank all candidates on the ballot for a particular office is sometimes referred to herein as "restricted IRV" or "restricted instant runoff voting."

and every candidate for the office, regardless of how many run.[3]

II. FACTUAL BACKGROUND.

San Francisco voters in March 2002 approved a Charter amendment (Proposition A) that authorized instant runoff voting for municipal elections. (Request for Judicial Notice, filed herewith ["RJN"], Exhibits 1 & 3.) Proposition A authorized voters to rank as many candidates as ran for the office. S.F. CHARTER § 13.102(b) (voters can "rank a number of choices in order of preference equal to the total number of candidates for each office."). However, Proposition A further provided authorization for the San Francisco Director of Elections to limit the choices to "no fewer than three" if "the voting system, vote tabulation system or similar related equipment used by the City and County cannot feasibly accommodate choices equal to the total number of candidates running for each office[.]" *Id.* The Director of Elections has so limited the number of candidates that voters may rank. (RJN, Exhibits 4 & 5.)

A. How Instant Runoff Voting Is Conducted In San Francisco.

Under San Francisco's instant runoff voting system, all voting for designated municipal offices takes place on a single day.[4] Each voter is allowed to rank a maximum of three candidates for each office: a first choice, a second choice, and a third choice (assuming at least three candidates run, of course). Even if there are more than three candidates running for a particular office, a voter is still only permitted to rank his or her top three choices. (*Id.*; S.F. CHARTER § 13.102.)

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[3] As also noted in the complaint, the constitutionality of instant runoff voting generally remains an open question; the present lawsuit challenges only the three-candidate limitation imposed by the City & County of San Francisco.

[4] Instant runoff voting is used to elect the Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and Members of the Board of Supervisors. It is not used to elect the members of the San Francisco Board of Education or the Governing Board of the San Francisco Community College District. *Compare* S.F. CHARTER § 13.101 (listing elective municipal offices) *with* S.F. CHARTER § 13.102 (listing municipal offices to which instant runoff voting applies).

After the ballots are cast, an initial tally is conducted by the Elections Department. If a candidate receives a majority of the first-place votes, he or she is elected. If no candidate receives a majority of the first-place votes, the so-called "instant runoff" occurs. The candidate in last place, who received the fewest number of first-place votes, is eliminated, and each vote for that last-place candidate is transferred to the voter's second choice candidate. All other voters' first-place votes continue to be counted as such.[5] The votes are thus re-tabulated in the "instant runoff," *i.e.*, the second round of voting. (S.F. CHARTER § 13.102; Katz Decl. at ¶ 9.)

If no candidate exceeds 50% of the votes counted in this second round, the candidate in last place is eliminated, and each vote for that last-place candidate is transferred to the next-ranked candidate on that voter's ballot (now the voter's second or potentially third choice). (S.F. CHARTER § 13.102; Katz Decl. at ¶ 9.)

The "instant runoff" process continues, runoff round after runoff round, until one candidate gets a majority of the "continuing" (*i.e.*, non-exhausted) ballots cast. Any voter who has already voted for three last-place finishers does not get to vote in that round or in any later round of the instant runoff. This is because, under San Francisco's novel instant runoff voting system, a voter's ballot is deemed "exhausted" and of no further effect once his or her three ranked choices are used up, and that voter is not allowed to participate in subsequent rounds of the instant runoff. (S.F. CHARTER § 13.102.)

Plaintiffs believe that the constitutional deprivation of San Francisco's system is patent on its face. But that belief is further confirmed by the findings of

[5] If the votes for the bottom two (or more) candidates do not add up to the number of votes received by the next lowest candidate, more than one can be eliminated in a single round. For example, in a race with five candidates if the first round produced 10 votes for the first place candidate, 7 for the second place candidate, then 6 votes, 1 vote, and 1 vote for the remaining three candidates, the two bottom candidates would be eliminated because their combined total does not add up to six votes.

respected voting rights expert Jonathan D. Katz, Ph.D., an accomplished political science professor at the California Institute of Technology, and the co-director of the Caltech/MIT Voting Technology Project since 2005. Dr. Katz has reviewed San Francisco's restricted instant runoff system; a summary of his conclusions are as follows:

- "San Francisco's use of a Restricted Instant Runoff Voting system, where individuals are permitted to rank at most three candidates, limits the ability of some voters to equally participate in elections and regularly disenfranchises some voters.
- "This impact falls disproportionately on voters who prefer less-popular candidates.
- "The use of Restricted IRV has often resulted in the election of candidates with less than a majority of the total votes cast, and likely altered election outcomes from what would have resulted under the standard unrestricted IRV or under the traditional primary-runoff system."

(Katz Decl. at ¶ 2.)

B. Tens of Thousands Of Citizens' Votes Have Been Nullified By San Francisco's Instant Runoff Voting System.

Proposition A was first implemented in the November 2004 City elections. Since that time, tens of thousands of ballots have been "exhausted," or extinguished, in election after election. To cite just a few examples:

- In the 2004 supervisorial elections 13,144 ballots in District 5 were exhausted by the final (19th) round of balloting; 4,781 ballots were exhausted in District 1 by the fourth and final runoff round; and in District 11 there were 6,595 exhausted ballots by the sixth and final runoff round. (RJN, Exhibit 2, pp. 2-3.) In other words, 37.44%, 16.61%, and 28.46% of voters, respectively, were denied the right to

have any vote counted in the final runoff round of the balloting in those supervisorial districts.

- Similarly in 2006, 6,010 ballots were exhausted in the fourth and final runoff round for the supervisorial election in District 4—30.33% of the total votes cast. (RJN, Exhibit 2, p. 6.) And in District 6, there were 2,269 exhausted ballots by the final round, equaling 12.65% of the total ballots cast. (*Id.* at 7.)
- And most recently, in 2008, there were 5,294 exhausted ballots by the final round of balloting in supervisorial District 11—21.46% of the ballots cast. (RJN, Exhibit 2, p. 14.) And in District 3, 4,291 ballots were exhausted by the deciding seventh round, 14.26% of the total ballots cast. (*Id.* at 10-11.)

This "exhaustion" of thousands of ballots, in election after election, constitutes a massive deprivation of the citizenry's constitutional right to vote in City elections.

A collateral effect of this constitutional violation is that, in many elections, the number of exhausted votes has exceeded the vote differential between first- and second-place finishers in the last round of instant runoff voting, often by a substantial amount, depriving thousands of voters of the right to have a voice in who is elected:

- For example, in 2004, Ross Mirkarimi received 13,211 votes in the final (19th) round of the instant runoff for District 5—5,939 more than the 2d place finisher. But 13,144 voters' ballots had been "exhausted" by that round, and they had no vote which was counted in the final round—more than twice the total margin of victory. (RJN, Exhibit 2, pp. 2-3.)
- Likewise in District 4 in 2006, Ed Jew received 8,388 votes in the final (4th) round, only 801 more than the 2d place finisher, Plaintiff

Ron Dudum. (Dudum Decl. at ¶ 5.) 6,010 ballots were "exhausted" by the 4th round of the instant runoff, and no vote was counted for the voters whose ballots were "exhausted" before the 4th and final round—more than *seven times* the total margin of victory. (RJN, Exhibit 2, p. 6.)

- And most recently, in the supervisorial election for District 11 in November 2008, John Avalos won after four rounds by 1,133 votes over the 2d place finisher (10,225 vs. 9,092). By the 4th round, there were 5,294 "exhausted" ballots that were not counted—more than 4.5 times the total margin of victory. (RJN, Exhibit 2, p. 14.)

These are just a handful of the examples in City supervisorial elections since 2004, in which the number of exhausted votes exceeded the margin of victory.

These results provide indisputable evidence of the dramatic and adverse impact San Francisco's novel instant runoff voting system has on elections by extinguishing the right to vote of citizens whose first three candidate choices are eliminated. As a direct result of restricting voters to ranking a maximum of three candidates, even though more candidates were running, the San Francisco restricted instant runoff voting system caused thousands of voters' ballots to be "exhausted" and rendered of no force or effect, and in numbers which were great enough to affect the outcome of many elections.

C. In Passing Proposition A, San Francisco Voters Were Promised A Voting System That Would Provide For The Election of Candidates Who Garnered A Majority of the Votes Cast, Just Like the General-Runoff Voting System. This Promise Was Untrue.

Another aspect of the collateral damage caused by San Francisco's three-candidate limitation is that it has repeatedly resulted in the election of candidates who gathered less than a majority of the actual ballots cast. In fact, during the 2008 elections for Supervisor, all four (4) of the elections decided by instant runoff

resulted in the winner garnering less than a majority of the total votes cast;[6] and "exhausted" votes exceeded the winning margin in each of those four supervisorial elections. (RJN, Exhibit 2, pp. 8-14.)

This is not what San Francisco's voters were promised when they enacted Proposition A. Under San Francisco law, a Digest (or summary) of Proposition A was prepared by the Ballot Simplification Committee and mailed to all voters at taxpayer expense. (RJN, Exhibit 3.) Comparing the proposed instant runoff voting system to the City's existing general/runoff voting system, the Digest assured voters that a majority vote still would be required to win election, stating, for example, "A winner *would still have* to receive more than 50% of the vote" (*id.* at 5 (emphasis added)), and "This process of transferring votes to the voter's next-choice candidate and eliminating candidates with the fewest votes would be repeated until one candidate received more than 50% of the votes." (*Id.*)

This was not true—under Proposition A's restricted instant runoff voting system, a candidate need not receive 50% of the votes cast to win election, but only 50% of the "continuing" or "non-exhausted" votes. For example, in 2004 Ross Mirkarimi received 13,211 votes in the final (19th) round of the instant runoff in the contest for District 5 supervisor. That was a majority of the 26,111 remaining ("continuing, non-exhausted") ballots, but it was only 37.6% of the 35,109 ballots actually cast in that election. This is because 13,144 voters' ballots had been "exhausted" by that round, and they had no vote which was counted in the final round. This was almost as many ballots as were counted for Mr. Mirkarimi and was more than twice the total margin of victory. (RJN, Exhibit 2, pp. 2-3.)

Likewise, in 2006 Ed Jew was elected with only 42.3% of the total ballots cast, and in 2008 John Avalos was elected with only 41% of the total ballots cast.

---

[6] Normally there would only be six supervisorial seats up for election in a presidential year, but District 4 had a special election.

(*Id.* at 6 & 14.) Again, their totals were a majority of the non-exhausted, "continuing" ballots, but far from a majority of the actual ballots. Thus, by promising the voters that a majority would still be required for election, the Digest obscured the fact that many voters' ballots would be deemed "exhausted" and of no force and effect in later rounds of instant runoff voting.

D. If The Three-Candidate Limitation Is Not Enjoined San Francisco Voters Are Virtually Certain To Be Disenfranchised In The 2010 and 2011 Municipal Elections.

If the current system is not enjoined, it is a virtual certainty that voters will again be disenfranchised at the 2010 and 2011 municipal elections, just as they were in 2004, 2006, and 2008. Five supervisorial districts are up for election in 2010—Districts 2, 4, 6, 8 and 10.

The candidate filing period for the November 2010 election will open July 12. *See* S.F. MUNI. ELEC. CODE § 200 (incorporating candidate filing deadlines from state law); CAL. ELEC. CODE §§ 8020(b), 10220 (candidate filing period for non-partisan offices runs from 113 to 88 days prior to election). As of the date of this filing—more than five months before the candidate filing period—four of these five districts already have four or more candidates that have filed a Candidate Statement of Intent with the City Ethics Commission, creating a strong likelihood that voters will be disenfranchised in one or more of those Districts. (RJN, Exh. 7.)

For example, Plaintiff Matthew SHERIDAN is a resident and registered voter in District 2. He has voted in District 2 elections in the past and plans to do so in 2010. (Sheridan Decl. at ¶ 4.) Four candidates have already filed a "Candidate Intention Statement" (FPPC Form 501) with the San Francisco Ethics Commission, stating their intention to be a candidate for supervisor in District 2 at the November 2010 election. (RJN, Exhibit 7, pp. 1-4.) Moreover, with more than five months remaining until the candidate filing period opens, additional candidates are also likely to file for that seat as well. These circumstances create a

serious danger of the "exhaustion" and nullification of ballots in District 2.

Five candidates have already filed a "Candidate Intention Statement" for Supervisor in District 8 as well. (RJN, Exhibit 7, pp. 31-35.) Plaintiff Marina FRANCO is a resident and registered voter in District 8, has voted in District 8 elections in the past, and plans to do so in 2010. (Franco Decl. at ¶¶ 2-3.) With more than five months remaining until the candidate filing period opens, additional candidates are also likely to file for that seat as well. These circumstances create a serious danger of the "exhaustion" and nullification of ballots in District 8.

In District 10 there are already *ten* declared candidates. (RJN, Exhibit 7, pp. 36-45.) Plaintiff Dennis FLYNN is a resident and registered voter in District 10, has voted in District 10 elections in the past, and plans to do so again in 2010. (Flynn Decl. at ¶¶ 2-3.) With an open seat and such a large number of candidates, it is virtually certain that ballots will be exhausted and will have no force and effect as a result of the three-candidate limit.

And finally, in District 6 there are *twenty* declared candidates. (RJN, Exhibit 7, pp. 6-30.) Plaintiff Katherine WEBSTER is a resident and registered voter in District 6, has voted in District 6 elections in the past, and plans to do so again in 2010. (Webster Decl. at ¶¶ 2-3.) Yet again, with so many candidates it is a virtual certainty that ballots will be exhausted in District 6.[7]

And then, looking ahead to the 2011 election there are already three declared candidates for mayor, nearly 18 months before the candidate filing deadline and almost two years before the election. (RJN, Exhibit 7, pp. 46-48.) Each of the Plaintiffs is eligible to vote in citywide municipal elections, and each plans to vote in the November 2011 election for Mayor. (Dudum Decl. at ¶ 4; Sheridan Decl. at ¶

[7] As of this time only one candidate has filed for District 4, but there are more than five months remaining for candidates to materialize.

4; Murphy Decl. at ¶ 4; Webster Decl. at ¶ 4; Franco Decl. at ¶ 4; Flynn Decl. at ¶ 4.) Because it is an open seat (Mayor Newsom is forced out by term limits), additional candidates are almost certain to file for the office.

In sum, at the 2010 elections and beyond it is all but assured that voters will—by virtue of the City's decision to limit them to ranking only three candidates—be denied the right to have any vote counted in runoff rounds under the current instant runoff system.

III. THE THREE-CANDIDATE LIMIT VIOLATES THE FIRST AMENDMENT AND EQUAL PROTECTION.

Restrictions on the right to vote are subject to challenge under the First Amendment (right of association) and the equal protection clause of the Fourteenth Amendment. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983); *Crawford v. Marion County Elec. Bd.*, 553 U.S. ___, 128 S. Ct. 1610, 1615-16 (2008). The same "basic mode of analysis" is used for challenges under either of these provisions. *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003) (quoting *LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir. 1998)). Well-established case law governing challenges to voting procedures under those constitutional provisions compels the conclusion that the three-candidate limitation is unconstitutional.

A. The Three-Candidate Limit Is Subject To Strict Scrutiny.

Laws that give one voter's ballot greater or lesser weight than another's, and laws that permit some persons to vote but not others, are subject to strict scrutiny. *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008); *Green v. City of Tucson*, 340 F.3d 891, 899-900 (9th Cir. 2003). *See also Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-27 (1969) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)); *ACLU v. Lomax*, 471 F.3d 1010 (9th Cir. 2006) (applying strict scrutiny to strike down law requiring initiative petitions to be signed by a certain number of voters in each of 13 counties as diluting the voting rights of residents of counties

1 with larger population). Instant runoff voting, as applied in San Francisco (with
2 the three-candidate limitation) is such a law.

3 By its own terms, the San Francisco instant runoff system conducts a series
4 of "runoff" elections, one right after the other. It then proceeds to arbitrarily and
5 illegally deny some voters the right to vote in later "runoff" elections based upon
6 their failure to vote for the "right" (or most popular) candidates in earlier rounds of
7 voting. "[T]he right of suffrage can be denied by a debasement or dilution of the
8 weight of a citizen's vote just as effectively as by wholly prohibiting the free
9 exercise of the franchise." *Reynolds*, 377 U.S. at 555. No case has ever considered,
10 much less upheld, such an arbitrary and dilutive system, and its
11 unconstitutionality is patent.[8]

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[8] No case that plaintiffs have found has addressed the constitutionality of a
14 restrictive instant runoff system like San Francisco's, in which voters are limited to voting for only three candidates regardless of how many candidates seek the office. In fact, to
15 Plaintiffs' knowledge no other jurisdiction in this country had ever conducted an election
16 under such a system prior to San Francisco's adoption of Proposition A in 2002. (Katz Decl. at ¶ 15.)

17 Three decisions from other states have upheld the constitutionality of instant
18 runoff voting against the claim that it violates constitutional one-person, one-vote principles by allowing some voters but not others to have multiple votes counted in the
19 election (*i.e.*, their second place vote when their first choice is eliminated). *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009); *Stephenson v. Ann Arbor*
20 *Bd. of Canvassers*, No. 75-10166 AW (Mich. Cir. Ct. 1975), *available at* http://www.fairvote.org/library/statutes/legal/irv.htm (last visited Jan. 8, 2010); *Moore*
21 *v. Election Comm'rs of Cambridge*, 35 N.E.2d 222 (Mass. 1941). However, none of those
22 cases addressed the constitutionality of limiting voters to three choices. Two—*Stephenson* and *Moore*—addressed systems in which voters were unlimited. Moreover, one of those
23 cases—*Stephenson*—is an unpublished trial court decision. The continuing vitality of the other (*Moore*) has been questioned by the very court that decided it—the Massachusetts
24 Supreme Court—in a subsequent decision in light of the voting rights revolution effected
25 by the U.S. Supreme Court since 1941, when *Moore* was decided. *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 14-15 (Mass. 1996). And the decision in *Minnesota Voters*
26 *Alliance* upheld only the facial constitutionality of an instant runoff voting system, but left open the possibility of an as-applied challenge once a factual record could be established.
27 This case includes an as-applied challenge and a factual record. Moreover, though
28 Minneapolis likewise limits voters to ranking three candidates, that limitation was not an issue in the case.

Consider, for example, an election under the City's previous system of a November election and, if necessary, a December runoff, in which eight candidates sought a single office. There can be no question whatsoever that it would be unconstitutional to deprive voters of the right to vote in the December runoff because they voted for the sixth- or seventh- or eighth-place candidates in the November general election. The system challenged at bench is no different. Some voters (indeed thousands of them) are penalized for voting for the wrong (*i.e.,* less popular) candidates by being shut out of later runoff rounds.

Ayers-Schaffner v. Distefano, 37 F.3d 726 (1st Cir. 1994), is instructive here. In that case, a non-partisan primary election for school board was held at which three seats were up for election and voters were permitted to vote for two candidates. After the election, in response to protests by several of the candidates, the Rhode Island Board of Elections concluded that voters should have only been permitted to rank one candidate, and ordered a re-vote. The Board provided, however, that only those voters who had cast a ballot at the first, defective election could vote in the re-vote.

Several voters who were eligible to vote in the original election, but did not do so, filed suit challenging that restriction as a violation of their rights of free speech, association, equal protection, and due process. The trial court agreed and enjoined the Board of Elections from denying otherwise qualified voters the right to vote based on their failure to cast a ballot in the initial election. The Court of Appeal concurred, stating, "In its simplest form, this case asks us to decide whether a state may condition the right to vote in one election on whether that right was exercised in a preceding election. *So stated, the case is hardly worthy of discussion.*" *Id.* at 727 (emphasis added). Applying strict scrutiny, the Court of Appeals affirmed the trial court's injunction.

Closer to home, in *Partnoy v. Shelley*, cited above, the federal district court enjoined California Elections Code § 11382, which would have prohibited any

person from voting for a successor to Governor Gray Davis if he were recalled, unless the voter had voted on the preliminary question whether Governor Davis should, in fact, be recalled. 277 F. Supp. 2d at 1064. Relying on *Ayers-Schaffner*, the court also applied strict scrutiny and ordered that all eligible voters be permitted to vote for Governor Davis's successor, regardless of whether they voted on the question of whether he should be recalled.

The effect of San Francisco's unorthodox instant runoff voting system differs from that described by the *Ayers-Schaffner* and *Partnoy* courts only in this respect: Instead of "conditioning the right to vote in one election on whether that right was exercised in a preceding election[,]" *Ayers-Schaffner,* 37 F.3d at 727 (emphasis added), San Francisco conditions the right to have a ballot counted in later runoff rounds on how that right was exercised in a preceding runoff round.

If anything, this is worse, because San Francisco voters are penalized based upon the content of their decision to favor one candidate over another; those who favor and vote for less popular candidates with their three rankings are penalized by being denied the right to have a vote even counted in subsequent runoff rounds.

B. The Three-Candidate Limit Fails Strict Scrutiny Because No Compelling Interest Remotely Justifies It.

Because strict scrutiny applies, Defendants bear the burden of establishing that the challenged restriction is narrowly-tailored to fulfill a compelling state interest. *Democratic Party v. Reed*, 343 F.3d 1198, 1203-04 (9th Cir. 2003); *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007). *See also Dunn*, 405 U.S. at 343; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). This they cannot do. No "compelling interest" justifies the three-candidate limitation. Indeed, the language of the First Circuit in *Ayers-Schaffner* seems especially relevant here: "In a fresh election designed to determine which candidates are supported by a majority of the properly registered voters, *we cannot conceive of a governmental interest sufficiently strong to limit the right to vote to only a*

portion of the qualified electorate." 37 F.3d at 731 (emphasis added). *See also Partnoy*, 277 F. Supp. 2d at 1078-79.

Proposition A permitted the Director of Elections to limit the ranking of candidates if "the voting system, vote tabulation system or similar related equipment used by the City and County cannot feasibly accommodate choices equal to the total number of candidates running for each office[.]" S.F. CHARTER § 13.102. It is obviously possible to devise an instant runoff voting system that permits ranking of all the candidates—a number of states currently use instant runoff voting with ranking of all candidates for overseas military ballots; Burlington (VT), Takoma Park (MD), and Cambridge (MA) use unrestricted instant runoff voting in municipal elections; and New York City for School Board elections are conducted using unrestricted instant runoff voting. (Katz Decl. at ¶¶ 13-14.)

San Francisco's only justification for the limitation, then, is one of cost—avoiding the expense of replacing or retrofitting San Francisco's existing voting machines. Cost considerations, however, cannot justify deprivation of fundamental constitutional rights. "[S]aving money is not an interest of sufficient importance to be classified as compelling or overriding." *In re Smith*, 323 F. Supp. 1082, 1088 (Bankr. D. Colo. 1971) (citing *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669 (1965), which struck down poll taxes as unconstitutional). *See also Tashjian v. Republican Party*, 479 U.S. 208, 217-18 (1986) (statute prohibiting party from allowing independent voters to vote in party primaries could not be justified by state's desire to avoid associated increase in costs); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263-64 (1974) ("The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State"); *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (in drawing electoral districts, the desire to avoid the

cost of litigation is not a sufficiently compelling justification for drawing districts in which race is the "predominant" districting criterion).

Nor can Defendants save this limitation by proposing alternative justifications now. In applying heightened constitutional scrutiny, the asserted state interests must have been considered upon adoption, rather than "hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Because the interest underlying the three-candidate limitation is not compelling, the court need not even consider whether the limitation is narrowly-tailored to meet that interest. *See, e.g., Deida v. City of Milwaukee*, 176 F. Supp. 2d 859, 870 (E.D. Wisc. 2001) ("Under the strict scrutiny test the government is also required to choose the least restrictive means to further its articulated interest. . . . Because the City has not demonstrated that the ordinance serves compelling interests, I need not address this prong of strict scrutiny review."); *Johnson v. Miller*, 929 F. Supp. 1529, 1560 (S.D. Ga. 1996) (three-judge court), *aff'd sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997). San Francisco's three-candidate limitation is fatally flawed and must be enjoined.

IV. <u>THE THREE-CANDIDATE LIMIT VIOLATES DUE PROCESS</u>.

"A state election violates due process 'if it is conducted in a manner that is fundamentally unfair.'" *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1058 (9th Cir. 2000) (quoting *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998)). *See also Caruso v. Yamhill County*, 422 F.3d 848, 863 (9th Cir. 2005), *cert. denied sub nom., Caruso v. Oregon*, 126 S. Ct. 1786 (2006); *Duncan v. Poythress*, 657 F.2d 691, 702-03 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (1982). That describes the three-candidate limitation exactly.

The federal courts have recognized that widespread disenfranchisement of voters constitutes a fundamental unfairness. For example, in *Duncan v. Poythress*, the Fifth Circuit upheld a ruling of the trial court that state officials'

refusal to call a special election in violation of state law to fill a position on the Georgia Supreme Court violated the electors' right to due process. *See* 657 F.2d at 708. And in *Bonas v. Town of N. Smithfield*, 265 F.3d 69 (1st Cir. 2001), the First Circuit held that it was fundamentally unfair of town officials to cancel the City's 2001 municipal elections when a newly-enacted charter amendment provided that City elections would take place in even-numbered years *beginning in 2002*.

While *Duncan* and *Bonas* addressed the disenfranchisement of the entire electorate, other cases have come to the same conclusion with respect to disenfranchisement of part of the electorate as is the case here. For example, the ruling in *Ayers-Schaffner* was premised in part on due process; in support of its ruling it cited *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978), in which the Court of Appeal found fundamental unfairness in a state Supreme Court's post-election invalidation of absentee ballots which resulted in the disqualification of ten percent of the total votes cast in a primary election. Similarly, in *League of Women Voters v. Brunner*, 548 F.3d 463 (6th Cir. 2008), the Sixth Circuit found that plaintiffs sufficiently stated a claim for violation of due process where they alleged that Ohio's non-uniform rules, standards and procedures at polling places threatened widespread and arbitrary disenfranchisement of voters. *See also Reynolds*, 377 U.S. at 555 ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). And in perhaps the most famous example, the United States Supreme Court, in *Bush v. Gore*, 531 U.S. 98 (2000), enjoined a statewide recount in which a ballot might be counted in one county that would be rejected in another county as violating due process.

Likewise in this case, San Francisco's enforcement of the three-candidate limitation has disenfranchised and threatens future disenfranchisement of a substantial portion of the electorate in later runoff rounds based upon their failure to choose the "right" candidates for their top three.

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2 **V. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION.**
3 A federal "district court should grant a preliminary injunction if plaintiffs
4 show either: (1) probable success on the merits and a possibility of irreparable
5 injury; or (2) sufficiently serious questions on the merits as to make them fair
6 ground for litigation and a balance of hardships tipping decidedly in plaintiffs'
7 favor . . . These two tests are not separate, but 'merely extremes of a single
8 continuum.'" *Matsumoto v. Pua*, 775 F.2d 1393, 1395 (9th Cir. 1985) (reversing
9 district court's refusal to enter preliminary injunction against charter provision
10 that would have precluded recalled councilmen from running in the special
11 election to fill the vacancies caused by their recall) (quoting *Aleknagik Natives*
12 *Limited v. Andrus*, 648 F.2d 496, 501-02 (9th Cir. 1980)). "The district court must
13 also consider whether the public interest favors issuance of the injunction."
14 *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir.
15 2003) (en banc) (per curiam).
16 Applying these traditional equitable principles the United States Supreme
17 Court has recognized that once it is shown a governmental body's electoral system
18 is unconstitutional, "it would be the unusual case in which a court would be
19 justified in not taking appropriate action to insure that no further elections are
20 conducted under the invalid plan." *Reynolds*, 377 U.S. at 585. *See also Hamer v.*
21 *Campbell*, 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S. 851 (1966) (holding trial
22 court erred in denying preliminary injunction against a municipal election based
23 on implementation of unconstitutional poll tax and residency requirements;
24 retroactively invalidating election and ordering new ones). "This case is not one of
25 those unusual cases in which [the Court] would be justified in standing by and
26 allowing constitutional violations to go unremedied." *Johnson*, 929 F. Supp. at
27 1562 (granting preliminary injunction against illegal districting plan).
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1 **A. Plaintiffs Are Likely To Succeed On The Merits.**

2 As discussed above, well-established case law confirms that the three-
3 candidate limitation is unconstitutional. Like the challenged vote restriction
4 struck down in *Ayers-Schaffner*, "the case is hardly worthy of discussion." 37 F.3d
5 at 727.[9]

6 **B. Plaintiffs Undeniably Face The Possibility of Irreparable**
7 **Injury In The Absence Of An Injunction.**

8 Continued enforcement of the three-candidate limitation unquestionably
9 threatens Plaintiffs and all other voters in San Francisco with irreparable harm. As
10 this court has recognized, "Abridgement or dilution of a right so fundamental as
11 the right to vote constitutes irreparable injury." *Cardona v. Oakland Unified*
12 *School Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992); *Reynolds*, 377 U.S. at 562
13 (the right to vote is "'a fundamental political right, because [it] is preservative of all
14 rights'"); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986)
15 (injury to the right to vote constitutes irreparable injury); *United States v. Berks*
16 *County*, 277 F. Supp. 2d 570, 578 (E.D. Pa. 2003) (same). *See also Elrod v. Burns*,
17 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even
18 minimal periods of time, unquestionably constitutes irreparable injury."); *Goldie's*
19 *Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) ("An
20 alleged constitutional infringement will often alone constitute irreparable harm.");
21 *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1300 (C.D.
22 Cal. 2008) ("No further showing of irreparable injury is necessary when the
23 moving party has shown a probable violation of constitutional rights."); 11A
24 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2948.1
25 (2d ed. 2004) ("When an alleged deprivation of a constitutional right is involved,
26

27 [9] At the very least, there can be no doubt that Plaintiffs have raised "sufficiently
serious questions on the merits as to make them fair ground for litigation." As discussed
28 below, the balance of hardships tip[s] decidedly in plaintiffs' favor."

most courts hold that no further showing of irreparable injury is necessary.").

C. The Balance Of Hardships *Strongly* Favors Plaintiffs.

As against this irreparable harm, Defendants can only set the desire to implement instant runoff voting without the expense of replacing or retrofitting its voting machines. This desire cannot justify the dilution of Plaintiffs' fundamental right to vote or the voting rights of the rest of the San Francisco electorate. As already discussed above, the avoidance of public expenditures is not a sufficient justification for permitting the infringement of constitutional rights.

More importantly, however, Defendants need not incur whatever costs would be needed to upgrade the City's voting machines in order to conduct elections. Plaintiffs have framed their request for injunctive relief in a manner that would give the Defendants an option: the City may implement instant runoff voting in which voters are permitted to rank every candidate, or it may return to a traditional general/runoff system like that used in the years prior to the adoption of Proposition A. In fact, Proposition A expressly stated the voters' preference that such a system constitute the fall-back position in the event that instant runoff voting were unenforceable. S.F. CHARTER § 13.102(i) ("If ranked-choice, or 'instant runoff,' balloting is not used in November of 2002, and no candidate for any elective office of the City and County, except the Board of Education and the Governing Board of the Community College District, receives a majority of the votes cast at an election for such office, the two candidates receiving the most votes shall qualify to have their names placed on the ballot for a runoff election held on the second Tuesday in December of 2002.").

The City's existing voting machines are already used for traditional primary/general (or general/runoff) elections for state and federal offices, for example, for president, governor, U.S. Senate, state senate, U.S. House of Representatives, state assembly, judicial offices, etc. (RJN, Exhibits 5-6.)

D. The Public Interest Overwhelmingly Favors An Injunction.

The public interest favors issuance of the requested injunction.

Plaintiffs seek to vindicate their constitutional voting rights and the voting rights of thousands of other voters in San Francisco. In light of the fundamental nature of the right to vote, there is no doubt that protection of that right is unquestionably in the public interest. *See, e.g., Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) ("There is a strong public interest in allowing every registered voter to vote."); *NAACP State Conf. v. Cortes*, 591 F. Supp. 2d 757, 767 (E.D. Pa. 2008) (granting preliminary injunction ordering distribution of paper ballots at precincts where 50% of electronic voting machines malfunctioned and holding, "The right to vote is at the foundation of our constitutional form of government. Ultimately, all our freedoms depend on it. Protection of this right under the circumstances presented here is without question in the public interest."); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004) (three-judge court); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 438 (E.D. Mich. 2004) ("The public interest is served when citizens can look with confidence at an election process that insures that all votes cast by qualified voters are counted."); *Republican Party v. Hunt*, 841 F. Supp. 722, 732 (E.D.N.C. 1994) ("public interest requires the furtherance of the constitutional protections that attach to the franchise."); *Murphree v. Winter*, 589 F. Supp. 374, 382 (S.D. Miss. 1984) (granting injunction compelling prison officials to let pretrial detainees vote because denial violated equal protection and holding, "Clearly, the granting of this preliminary injunction will not disserve the public interest. The fundamental right to vote is one of the cornerstones of our democratic society. The threatened deprivation of this fundamental right can never be tolerated."). *See also Council of Alternative Pol. Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997) (overturning district court's denial of preliminary injunction requiring elections officials to accept minor party nominating petitions).

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VI. CONCLUSION.

As the Supreme Court has recognized, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). By limiting San Francisco voters to ranking only three candidates, however, regardless of the number running, the City has undermined this "precious" right, repeatedly disenfranchising thousands of San Francisco voters in municipal elections. An injunction must therefore issue against the continued use of this unconstitutional system.

Respectfully submitted,

Dated: February 4, 2010

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