Case No. 10-17198

In the United States Court of Appeals
For the Ninth Circuit

RON DUDUM, *et al.*,
Plaintiffs and Appellants,

v.

JOHN ARNTZ, *et al.*,
Defendants and Appellees.

APPELLANTS' REPLY BRIEF

On Appeal from the United States District Court
for the Northern District of California
The Honorable Richard Seeborg, Presiding
District Court Case No. 3:10-cv-00504-RS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I.

INTRODUCTION.

Restricted Instant Runoff Voting regularly prevents thousands of voters from having any vote counted in the determinative final rounds of instant runoff elections. The City attempts to defend this serious infringement on voting rights on four grounds: (1) all voters are permitted to rank three candidates, and all therefore have an equal risk that their vote will be "exhausted" in later runoffs; (2) it would be infeasible for the City to implement an "unrestricted" IRV system that allows voters to rank every candidate; (3) even if voters were allowed to rank every candidate, some may decline; and (4) the government must be allowed to "experiment" with its Restricted IRV system.[1] These arguments lack constitutional merit.

First, the fact that the City's Restricted IRV system prohibits thousands of voters from having any vote counted in the dispositive rounds of runoff elections is unquestionably a serious burden on the right to vote. Consider again hypothetical County X, proposed in the Voters' Opening Brief, in which voters are permitted to vote in "at least three" weekly

[1] The official title of Proposition A in the 2002 ballot pamphlet, sent to all voters, was "Instant Runoff Voting," and the system was identified as such in the official ballot question presented to voters and in the measure's text. (ER0470-0484.) The City's use of the nondescript term "Ranked Choice Voting" is a litigation tactic that seeks to obscure the true nature of this system.

"quick" runoffs, but are precluded from voting in the final "quick" runoff if they have previously voted for three candidates eliminated in earlier rounds. The City has not denied that such a system would be unconstitutional, and it patently is. Instead, the City lamely responds that San Francisco's Restricted IRV system is different from the County X hypothetical, but the only real distinction is that computer technology allows San Francisco's process to be compressed into one day. This is a distinction without a constitutional difference. A violation of voting rights is not acceptable merely because it happens at high speed.

The City's related argument that all voters are treated equally because they all get to rank three candidates, ignores the crucial fact that the City's system—and the express wording of the City's Charter—prohibit some voters from having a vote counted *in the critical final round, where the winner is chosen*. This is just an argument that all voters have an equal chance to be disenfranchised. If the City's theory were correct, the County X hypothetical would be constitutional on the theory that all voters faced the same risk that their vote would not be counted. So would a law allowing every citizen to vote, but providing that ballots from 10 randomly-selected precincts would be thrown into San Francisco Bay. But the Supreme Court has held "'[t]here is more to the right to vote than the right to mark a piece

of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. … It also includes the right to have the vote counted at full value without dilution or discount.…'" *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964).

Second, that the City may not be able to implement an unrestricted IRV system does not justify denying some voters the right to have their vote counted in decisive runoff rounds. The City argues that unrestricted IRV is infeasible, and assumes, *ipse dixit*, that Restricted IRV is the only legitimate alternative. Based on this false assumption the City makes no effort to rebut the contention that the interests the City identifies in support of Restricted IRV can be served equally well by other, constitutional electoral systems. This omission is fatal to the City's position, because the Court must "tak[e] into consideration the extent to which those interests make it *necessary* to burden the [Voters'] rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("*Burdick*") (emphasis added). The City conveniently ignores other, traditional voting systems, but Supreme Court case law precludes this Court from doing likewise.

Third, the City's argument that some voters have in the past declined to rank three candidates cannot defeat the Voters' claims. The undisputed evidence is that the Voters would rank every candidate if allowed to, and a

substantial majority of San Francisco voters *have* ranked the maximum number of candidates they were permitted to rank. The fact that some other voters may choose not to do so is irrelevant, just as the fact that some voters decline to vote at all is no defense to an unconstitutional electoral system. The City loses sight of the fact that denial of the vote to a single voter is a violation of constitutional dimension.

Fourth, attempting to obscure the fact that Restricted IRV routinely denies thousands of voters the right to participate in determinative instant runoff rounds, the City argues that its system involves only one election in which all voters are given three choices, or votes, so there is no denial of the right to vote. However, this "single election" characterization is contrary to common sense and to the views of most authorities to consider IRV's operation. Even the City does not consistently stick to this characterization, and accepting it would not save Restricted IRV anyway because viewing it as a single election causes IRV (restricted or not) to violate one person, one vote principles.

Finally, the City urges it is entitled to "experiment" with its electoral system—but such experiments enjoy no immunity from constitutional

requirements,[2] and the "experimental" nature of Restricted IRV provides no basis to sustain the significant burdens this system imposes on fundamental rights.

II.

RECENT ELECTION RESULTS CONFIRM RESTRICTED IRV'S SERIOUS IMPACTS.

The district court's refusal to enjoin Restricted IRV permitted the November 2010 elections to be conducted under that system, and the supervisorial election in District 10 highlights some of the worst features of the system.[3] Twenty-one candidates ran. Five candidates received more than 11% of the vote in the initial round, but no candidate received more than 12.1%. It took 20 rounds to determine a winner, during which the top vote-getter from round one was eliminated. The ultimate winner received 4,321 votes in the final round (24.3% of the valid ballots cast), and her one surviving opponent received 3,879 votes. In that 20th and final round, 9,503 voters had no vote counted *for any candidate*!

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[2] *See Sailors v. Bd. of Educ.*, 387 U.S. 105, 109 (1967); *Hadley v. Junior College Dist.*, 397 U.S. 50, 59 (1970).

[3] *See* Appellants' Supplemental Request for Judicial Notice, filed herewith, Exhibit A, p. 5.

Restricted IRV elections were also conducted for the first time in Oakland and San Leandro. In the mayoral races of both cities, the first-round front-runner was ultimately defeated after many runoffs by a candidate who received less than a majority of the valid ballots cast. In each case thousands of ballots were exhausted, far exceeding the margin of victory.[4]

III.

NOTWITHSTANDING THE CITY'S ATTEMPT TO SOFT-PEDAL IT, THE BURDEN ON VOTING RIGHTS IMPOSED BY RESTRICTED IRV IS SEVERE, AND TRIGGERS STRICT SCRUTINY.

The City seeks to have it both ways. Throughout the Answering Brief, the City vacillates between claiming that IRV is a single election on the one hand, and implicitly accepting the Voters' "series of elections" characterization on the other, depending on the claim it seeks to refute.

When responding to the Voters' claim of vote *denial*, the City argues there is no violation because Restricted IRV constitutes only a *single*

[4] This "experimental" voting system has caught the attention of the public and the press, who are raising questions about its legitimacy. *See, e.g.*, Gottlieb, *Win or Lose: No Voting System Is Flawless, But Some Are Less Democratic Than Others*, THE NEW YORKER (July 26, 2010), p. 73; Nevius, *Ranked Choice a Rank Choice for Elections*, S.F. CHRON. (Nov. 11, 2010), p. C1; Romney, *And The Winner Is ... Who?*, L.A. TIMES (Nov. 20, 2010), p. A1; Williams, *Confusion About Oakland's Voting System May Have Affected Election*, CAL. WATCH (Nov. 8, 2010).

election in which each voter casts a ballot that is counted "at least three times" before it can be exhausted.[5] But when responding to the Voters' alternative objection—that allowing some (but not all) voters to have three votes counted in a "single election" constitutes vote *dilution*—the City discards its "single election" theory and claims there is no dilution because "*[d]uring each round of RCV tabulation*, each ballot cannot count as more than one vote for a single candidate."[6] This is, essentially, the "series of elections" theory the City rejects elsewhere.

Ultimately, whether characterized as a series of elections or a single election, the City's Restricted IRV system imposes a severe burden on voting rights and is subject to strict scrutiny. The City has never contended it could meet that standard.[7] It is only by flip-flopping opportunistically between the two that the City can claim to avoid vote denial on the one hand and vote dilution on the other.

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[5] Answering Brief, p. 20.

[6] Answering Brief, p. 27 (emphasis added). *See also id*. at 14, 20.

[7] In a footnote, the City urges that the interests it has identified are "compelling," and "would satisfy strict scrutiny." (Answering Brief, p. 33 n.17.) It never claims the narrow-tailoring prong of strict scrutiny is satisfied. *See Porter v. Bowen*, 496 F.3d 1009, 1024 (9th Cir. 2007) (state has the burden of showing less restrictive options insufficient).

A. THE POSSIBILITY OF HAVING THREE VOTES COUNTED IN EARLY ROUNDS DOES NOT JUSTIFY DENIAL OF THE RIGHT TO HAVE A VOTE COUNTED IN THE FINAL, DISPOSITIVE INSTANT RUNOFF ROUND.

The City conveniently ignores the critical flaw of Restricted IRV: that having a vote counted in early rounds and discarded—even if it is counted three times—does not justify denying citizens the right to have a vote counted *in the critical, dispositive instant runoff round* where the winner is chosen. This is vote denial, plain and simple, and it constitutes a severe burden on voting rights. *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008).[8]

1. IRV is the functional equivalent of a series of elections.

As the record amply demonstrates,[9] San Francisco's Restricted IRV system routinely results in multiple instant runoffs, sometimes as many as twenty. In each round there are different candidates, different voters, different votes cast, and different vote totals. As a matter of common sense,

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[8] The City contends strict scrutiny only applies when an "electoral system prohibits members of a *defined* group from voting in an election." (Answering Brief, p. 19 [emphasis added].) The implication is that because one cannot know in advance which voters will deprived of their vote in the final round—because everyone has an equal chance of being disenfranchised—there is no harm. That is not the law. *See ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1318-19 (10th Cir. 2008) (individual voters could challenge voter ID requirement, because—while each had a photo ID—there was no way to tell in advance whether those IDs might be rejected).

[9] ER0328-0357.

each instant runoff is the functional equivalent of a separate election. This view of IRV is embraced by the Minnesota Supreme Court, FairVote,[10] the Supervisors sponsoring Proposition A, and Dr. Jonathan Katz, political science professor at CalTech and co-director of the Caltech/MIT Voting Technology Project. As Dr. Katz logically explained:

> ... an "election" would be described as a given set of voters choosing amongst a given set of candidates. Each time the voters and the candidates change, it constitutes a new "election." Because of the elimination of candidates by round, and the exhaustion of voters' ballots (voluntarily under unrestricted IRV, in many cases involuntarily under restricted IRV), each round would constitute a separate "election."[11]

The City nevertheless contends that IRV is a single election. Beyond the City's inconsistency, discussed above, the fatal problem with the "single election" premise is that it is grounded in a result-oriented definition of "election" that cannot withstand scrutiny: a single ballot cast at a single moment in time ("election day" or marking a ballot) to fill a single office.[12]

The temporal aspect of this definition is obviously insufficient to determine what constitutes an "election." Voters routinely vote in multiple "elections" on the same day, using the same ballot. *See, e.g., People ex. rel.*

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[10] The City objects to the quotation of comments from FairVote, urging they are not legal authority. Such quotations are not binding on this Court, but they are relevant and persuasive. FairVote is the leading advocate of IRV nationwide, and intervened in *Minnesota Voters Alliance.*

[11] ER0629.

[12] *See, e.g.*, Answering Brief, pp. 14 and 25.

Devine v. Elkus, 59 Cal. App. 396, 399 (1922) (invalidating a version of proportional representation that permitted voters to cast four votes in a multi-candidate election at which nine city councilors would be elected because, functionally, voters were voting in nine separate elections).

Nor is it accurate to say that voting for a single office defines "one election." If that were correct, it would have been constitutional to exclude some voters from a runoff election if they voted for eliminated candidates in a primary under the City's preceding general/runoff system. The City has never denied that such a system would be unconstitutional.

Merely combining these two inadequate definitions does not produce an adequate one. For example, in *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003), voters were asked to vote on whether or not to recall Governor Davis, and also whom the voter preferred as a successor in the event Governor Davis was recalled. Pursuant to Elections Code § 11382, voters were required to vote on the recall question as a prerequisite to having a vote counted for a successor. Voting on the two questions took place on the same day, on the same ballot, and its purpose was to decide who would hold a single office: Governor. Like the City here, the State of California urged there was no violation because there was only one election for a single office and "that the recall and the successor election are in fact

the same process." *Id.* at 1074. The court rejected that position, concluded they were two distinct elections, and enjoined § 11382.

Also instructive is the use of instant runoff voting for overseas ballots in Alabama, Louisiana, and South Carolina. In those states, "voters cast an absentee ballot before the primary election on which they rank their preferences for the office. That ballot is counted in the primary, and then counted again in the general election for the voter's most-preferred remaining candidate." These voters cast only one ballot, at one time, for a single office, but they "unquestionably vote in more than one election in the process."[13]

The City also urges that IRV is a single election because voters cannot "change their minds" between rounds based on changing circumstances.[14] That is legally irrelevant and factually inaccurate. First, the City cites no authority for the proposition that the ability to "change one's mind" is the hallmark of separate elections. Consider again the overseas ballots in Alabama, Louisiana and South Carolina—those voters may not "change their minds" between the primary and runoff, but they vote in multiple elections just the same. Nor could a voter in *Partnoy* change his or her

[13] ER0629 (Katz Declaration).
[14] Answering Brief, p. 23.

mind regarding the recall question, based upon the results of the successor election.

Moreover, as a purely factual matter IRV asks voters: "Whom do you prefer most?" and then, "Assuming your preferred candidate were eliminated"—*i.e.*, *assuming the facts change*—"whom would you prefer instead?" It is the voters' anticipation of changed circumstances that drives the ranking process.

Finally, the City seeks to dismiss the multiple elections concept "merely as an *analogy*,"[15] but if so it is an apt analogy. In the words of the Minnesota Supreme Court: the City "attempt[s] to distinguish the primary/general election system on the basis that those elections are separate, independent events, but *the effect* in terms of the counting of votes *is the same*." *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 690-91 (Minn. 2009) ("*Minnesota Voters Alliance*") (emphasis added).[16]

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[15] Answering Brief, p. 24.

[16] This Court has long recognized, "[i]t is unusual or rare that cases are found precisely alike in the facts; but it is quite common to find a principle of law applicable by analogy and reason to varied conditions as to the facts." *Robertson v. Blaine County*, 90 F. 63, 71 (9th Cir. 1898).

2. Contrary to the City's spurious claim, exhausted ballots are not "counted" for a losing candidate; they are a nullity.

The City wrongly asserts that "exhausted" ballots are effectively counted for a "losing" candidate.[17] This argument is specious; it is disproven by: (1) the unequivocal language of the Charter;[18] (2) the sworn testimony of San Francisco's Director of Elections;[19] and (3) the Stipulation of the Parties.[20]

Furthermore, the City's official election results contradict the City's claim. For example, twenty-one candidates ran in the just-completed election for supervisorial District 10. In the final (20th) round, only two candidates remained. 4,321 votes were counted in the final round for the winner, Malia Cohen, and another 3,879 were counted for the "losing" candidate, Tony Kelly. *No votes at all* were counted for the remaining 19 candidates in that round. The voters whose rankings did not include either Ms. Cohen or Mr. Kelly (9,503 ballots, or more than those counted for Ms. Cohen and Mr. Kelley combined) had no vote counted for *any candidate* in

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[17] *See, e.g.*, Answering Brief, pp. 2, 9, 13, 21-22, 26.

[18] S.F. CHARTER § 13.102(a)(3) ("ballot shall be deemed 'exhausted,' and not counted in further stages of the tabulation, if all of the choices have been eliminated...").

[19] *See* ER0554-0555.

[20] ER0668-0670 (defining "exhausted" ballots as those "not counted in further stages of the tabulation....").

that final round. If they had, there is no way Ms. Cohen could have been deemed to have received a "majority" of the votes—which the Charter purportedly requires.[21] An exhausted ballot is a nullity.

The City also contends that "the Department's published election results for RCV elections tally exhausted ballots round-by-round. [Citation.] Since the Department keeps a running total of the these ballots according to the round of [IRV] tabulation in which they became exhausted, Appellants cannot credibly argue that the City is not 'counting' them in any given round."[22] In other words, the City argues there is no constitutional violation because it tracks how many voters it disfranchises, round by round, in the "exhausted ballots" pile. That the City would even make such an argument is remarkable. It is the "right to vote freely *for the candidate* of one's choice [that] is of the essence of a democratic society...." *Reynolds*, 377 U.S. at 555 (emphasis added).

Finally, the City's reliance on *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996), for the proposition that "exhausted" ballots do not deny voters the right to vote is disingenuous. As the City knows (because Voters and district court have pointed it out) Cambridge has an

[21] *See* S.F. CHARTER § 13.102(e).
[22] Answering Brief, p. 21 n.10.

unrestricted IRV system.[23] *McSweeney* did not and could not address votes that were "exhausted" *as the result of an artificial limit on rankings, imposed by elections officials.* "Exhaustion" under that system resulted from some voters' *voluntary* decision to not rank every candidate.[24]

B. THE CITY'S ARGUMENT THAT THERE IS NO VOTE DILUTION IS BASED, IRONICALLY, ON THE VERY "SERIES OF ELECTIONS" THEORY IT REJECTS IN DEFENDING THE VOTE DENIAL CLAIM.

Even accepting the City's position that an IRV contest is a single election does not save it. In fact, such a position undermines the constitutionality of Restricted IRV and all other IRV systems, because some voters—those who vote for continuing candidates—have only one vote counted; other voters, however, are permitted to have votes counted for three different candidates. Such vote dilution is also a severe burden. *Lemons*, 538 F.3d at 1104.

The City disputes this conclusion on the ground that "*[d]uring each round of RCV tabulation*, each ballot cannot count as more than one vote

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[23] ER0004 (Slip Op. at p. 3 n.2).

[24] Furthermore, the *McSweeney* court declined to apply strict scrutiny because the issue presented was the constitutionality of Cambridge's system of *filling vacancies*, which it held to be subject to less-rigorous scrutiny. The *McSweeney* court recognized that strict scrutiny might be appropriate if the constitutionality of Cambridge's regular system of election arose in a future case. 665 N.E.2d at 14-16.

for a single candidate."[25] Tellingly, the City's language parallels that of the Minnesota Supreme Court in *Minnesota Voters Alliance*, which rejected a *facial* vote dilution claim against *unrestricted* IRV[26] because "in each round every voter's vote carries the same value." 766 N.W.2d at 693.[27] However, the City ignores two critical facts that distinguish *Minnesota Voters Alliance* from the City's position:

- First, the basis of the *Minnesota Voters Alliance* court's holding was its view that IRV is the equivalent of a series of elections—a premise the City rejects elsewhere.
- And second, due to the three-candidate limit—it is *not the case* in San Francisco that "in each round every voter's vote carries the same value." As a matter of law and undisputed fact, some voters' ballots are "*not counted in further stages of the tabulation*, if all of the choices have

[25] Answering Brief, p. 27 (emphasis added). *See also id*. at 14, 20.

[26] Minneapolis adopted a three-candidate limit in 2009, but the Minnesota court did not even discuss that limitation. (ER0004 & 0016.) *McSweeney* and the unpublished trial court opinion in *Stephenson v. Ann Arbor Bd. of Canvassers*, No. 75-10166-AW (Mich. Cir. Ct. 1975), are inapposite for the same reason. (ER0004, 0709.)

[27] The City's argument that the Voters' *as-applied* vote dilution claim against the City's *Restricted* IRV system is "identical" to that rejected by *Minnesota Voters Alliance* is disingenuous.

been eliminated...." S.F. CHARTER § 13.102(a)(3) (emphasis added).

C. *BURDICK* DOES NOT SUPPORT THE CITY'S EFFORTS TO DOWNPLAY THE BURDEN IMPOSED BY RESTRICTED IRV.

Finally, the City claims that *Burdick* supports the contention that Restricted IRV's burden is minimal because it "upheld a complete ban on the ability to vote for certain candidates," and Restricted IRV is not a "complete ban."[28] That case does not support such a conclusion.

In *Burdick*, the Court upheld a ban on write-in voting because "the function of the election process is 'to winnow out and finally reject all but the chosen candidates,' [citation], not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].'" *Id*. (quoting *Storer v. Brown*, 415 U.S. 724, 730 & 735 (1974)). Allan Burdick, however, was entitled to have his vote counted for any candidate who was on the ballot. Unlike *Burdick*, the City's three-candidate limit has nothing to do with symbolic protest votes; it constrains the voters' ability to have any vote counted, *even for those candidates who are on the ballot*, at the decisive time when the winner is determined.

[28] Answering Brief, p. 29.

Equally meritless is the City's claim that Restricted IRV is less severe than a residency requirement, because that too is a "complete ban."[29] The courts have long distinguished voter-qualification statutes based upon citizenship, residency and age from all other restrictions on the franchise, subjecting them to lesser scrutiny. *See Hill v. Stone*, 421 U.S. 289, 298 (1975). It is undisputed that the Voters are qualified to vote in City elections. Consequently, they are entitled to have their vote counted on equal terms with all other voters, which Restricted IRV prevents.[30]

Finally, San Francisco voters' theoretical ability to avoid exhaustion by attempting to vote "strategically" does not reduce Restricted IRV's burden. Voters may not constitutionally be forced to vote the "right" way in order to have their vote counted. The lawful "regulation of elections *does not* require voters to espouse positions that they do not support[.]" *Burdick*, 504 U.S. at 438. *See also Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir. 1995) (enjoining a policy that gave voters a similar choice:

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[29] Answering Brief, pp. 16-17. Vote dilution—which the City admits is a severe burden—is, by definition, not a "complete ban" either.

[30] Nor have the courts hesitated to strike down burdensome residency requirements. *See Dunn v. Blumstein*, 405 U.S. 330 (1972).

vote "strategically" for annexation and pay a reduced sewer connection rate, or vote sincerely and pay full freight).[31]

Despite the City's efforts to downplay the effects of Restricted IRV, that system imposes a severe burden on San Francisco voters' voting rights, because it denies thousands of them the right to have a vote counted in the final, dispositive instant runoff round when City officials are elected.

IV.

EVEN IF STRICT SCRUTINY WERE NOT APPLICABLE, RESTRICTED IRV WOULD BE UNCONSTITUTIONAL UNDER THE *ANDERSON/BURDICK/CRAWFORD* BALANCING TEST BECAUSE THE CITY FAILS TO REBUT THE FACT THAT TRADITIONAL VOTING SYSTEMS WOULD SERVE ITS INTERESTS EQUALLY WELL, WITHOUT BURDENING VOTERS' RIGHTS.

Even if the burden is not deemed severe, and strict scrutiny deemed not to apply, Restricted IRV is still subject to close scrutiny under the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick*, and *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181 (2008).[32]

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[31] Moreover, as the recent District 10 election illustrates, it is far from clear citizens could correctly guess which two candidates will survive to the final round and "strategically" vote for one.

[32] The City claims the Voters' position is that *Crawford* changed the "balancing" approach of *Anderson* and *Burdick*. (Answering Brief, p. 18 n.8.) Not so. The Voters have always contended that *Crawford* is consistent with, and simply clarified, *Anderson* and *Burdick*.

Under the *Anderson/Burdick/Crawford* standard, this Court must balance the burden imposed on voting rights against the "precise interests" identified by the City as supporting Restricted IRV, considering the extent to which those interests "make it *necessary* to burden the [Voters'] rights." *Anderson*, 460 U.S. at 789 (emphasis added). Though the City seeks to downplay the burden placed on voters, that burden—even if not "severe"—is certainly substantial. And even accepting the legitimacy of the City's proffered interests, the undisputed evidence shows that Restricted IRV is not "necessary" to serve them.

In their Opening Brief, as below, the Voters demonstrated that traditional electoral systems could accomplish every legitimate interest the City identified as supporting Restricted IRV just as well as, if not better than, Restricted IRV does. Among those systems are plurality voting or a traditional general/runoff system, which are currently used within the City (and throughout the State and nation), and which could be conducted using the City's current voting equipment without further certifications or modifications.[33]

Between the ballot pamphlet and the district court, the City has identified six interests that purportedly justify IRV: (1) reducing negative

[33] ER0599, 0679.

campaigning, (2) reducing costs by eliminating the December runoff election, (3) having officers elected at higher-turnout November elections, (4) providing for stable, orderly elections, (5) preventing voter confusion, and (6) requiring City officials to receive a majority of the vote to be elected.

Reducing negative campaigning (*i.e.*, protected speech) is not a legitimate interest, and the City has rightly abandoned it.[34]

The "majority vote" requirement is a chimera—City officials are routinely elected without a majority of votes cast under Restricted IRV. Witness, for example, the recent election in District 10, in which the prevailing candidate received only 4,321 votes in the final round, out of 17,808 valid ballots cast (24.3%).[35]

And undisputed record evidence[36] establishes that other voting systems would serve each remaining interest the City identified just as well as Restricted IRV does, if not better.

The City has made *no effort* to dispute the Voters' contentions on this point. The closest the City comes to addressing the Voters' arguments is its

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[34] *See* Slip Op. at p. 22:23-24.

[35] Nor, as discussed in the Opening Brief, was this unusual.

[36] ER0240, 0255-0256, 0387, 0397-0422, 0438-0443, 0465-0469, 0522-0528, 0582-0583, 0597-0599, 0669. The City purports to "renew" its objections to Dr. Katz's testimony, but those objections are waived because the district court did not rule on them, and the City did not request a ruling on them at oral argument. *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009); ER0030-0094 (transcript of argument).

perfunctory response that Restricted IRV permits cost-savings vis-à-vis a November/December general/runoff system.[37] Notably, however, the City:

(1) never disputes that plurality voting is equally (if not more) cost-effective;[38]

(2) never addresses the comparative costs of moving the general/runoff system to coincide with the June/November system the City already conducts for state and federal elections; and

(3) never disputes that these alternative systems serve the remaining interests as well as Restricted IRV.

The City has thereby *conceded* that the burdens on voting imposed by Restricted IRV are not "necessary" to serve the interests the City seeks to advance, because other systems serve those interests equally well.[39]

Finally, the district court invented an additional interest that the City itself never advanced below, but which it has latched onto in this Court—allowing voters to express their preferences in a more "nuanced" way.[40]

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[37] Answering Brief, pp. 37-38 n.19. *See also id.* at 6 ("a run-off election system tends to cost more than RCV elections because 'having two elections is more expensive than having one election.'").

[38] *See* Opening Brief, p. 49 (citing ER0387, 0597-0599).

[39] *See Hilao v. Estate of Marcos*, 536 F.3d 980, 985 (9th Cir. 2008) (failure to dispute key point constitutes implicit concession).

[40] *See* Slip Op. at p. 26; Answering Brief, p. 1.

But, the burden is on *the City* to identify the interests that justify Restricted IRV, and the district court was limited to considering the interests identified *by the City*, rather than those it could imagine on its own.[41] Second, this is an interest "hypothesized or invented post hoc in response to litigation." *United States v. Va.*, 518 U.S. 515, 533 (1996).[42] Third, this purported interest runs contrary to case law holding that the "expressive function" of elections is secondary to the function of electing candidates. *Burdick*, 504 U.S. at 438; *NAACP v. Jones*, 131 F.3d 1317, 1323 (9th Cir. 1997). Finally, the novel notion of "nuanced" voting cannot justify denial of

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[41] *Burdick*, 504 U.S. at 434 (court must weigh the burden "against the precise interests put forward by the State...."); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 110-12 (2d Cir. 2008) (recognizing there might be legitimate reasons for refusing to use absentee ballots, but concluding the State had not put them forth and that the interest it advanced was insufficiently weighty to sustain the voting burden).

[42] The City relies on three cases for the proposition that it may rely on *post hoc* justifications: *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978), *Crawford*, and *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010). Its reliance is misplaced. *Ohralik* was a commercial speech case, which was distinguished in *In re Primus*, 436 U.S. 412 (1978), which rejected state interests advanced *post hoc* by "appellate counsel" in cases dealing with "[r]ights of political expression and association...." *Id*. at 434 and n.27. In *Crawford*, the Court cited *evidence* created after the challenged statute was passed, but the district court noted it was evidence that corroborated the *interests* motivating the Indiana Legislature *at the time of enactment*. *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 794 n.22 (S.D. Ind. 2006). And the Court has granted *certiorari* in *McComish*. Nor is the City's facile attempt to distinguish *United States v. Virginia* meritorious. Discrimination against a protected group is one way to trigger heightened scrutiny, but so is a law that infringes on fundamental rights, like that at issue here.

the right of voters to have their votes counted when it matters most—in the decisive runoff rounds.

V.

THE CITY WRONGFULLY IGNORES THE ABILITY OF TRADITIONAL ELECTORAL SYSTEMS TO SERVE THE INTERESTS RESTRICTED IRV PURPORTEDLY SERVES.

The City's defense of Restricted IRV rests on a fundamental misconception: that this Court is limited to comparing Restricted IRV to unrestricted IRV, and must take the existence of the latter as the City's only possible alternative. The City thus urges that "the courts need not review other election systems and assess their relative merits."[43]

This is a false choice. There is no merit to the City's suggestion that the Court must focus exclusively on these two novel electoral systems and turn a blind eye to traditional voting systems that would serve the City's interests without infringing on voting rights, such as plurality voting or a general/runoff system. Indeed, this proposal of willful blindness is foreclosed by Supreme Court case law, including *Anderson*.[44] Addressing the requirement that courts consider the "necessity" of burdening voters'

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[43] Answering Brief, p. 40.

[44] Even the City's own *post hoc* "nuanced voting" interest "compare[s]" Restricted IRV "to more 'traditional' election systems...." (Answering Brief, p. 1.)

rights, *Anderson* held, "*If the State has open to it a less drastic way of satisfying its legitimate interests*, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." 460 U.S. at 806 (emphasis added). Once its artificial firewall between IRV and other electoral systems is dispensed with, the City's defense crumbles, as it has made *no effort* to dispute the Voters' demonstration that other systems currently used within the City (and across the country) would serve the City's interests as well as Restricted IRV.

At issue in *Anderson* was Ohio's filing deadline for independent presidential candidates, which was seven months before the general election. Among other things, the State claimed the earlier deadline served an interest in maintaining "political stability" by preventing unsuccessful candidates at party primaries from mounting a "sore loser" bid at the general election. The Court invalidated Ohio's law, holding that "less drastic" alternatives could serve the State's interest. *Id*. at 804-05. Specifically, the Court contrasted Ohio's limitation—which burdened *every* independent candidate—with California's law, upheld in *Storer*, 415 U.S. at

24, which only restricted "independent" candidates who had recently abandoned their affiliation with a political party.[45,46]

Weber v. Shelley, 347 F.3d 1101 (9th Cir. 2003), is not contrary, and does not support the City's "willful blindness" argument. In *Weber*, a voter challenged Riverside County's use of electronic voting machines, claiming that the lack of a voter-verified paper trail made those machines vulnerable to fraud. When adopting electronic voting, Riverside County concluded it would reap certain benefits *as compared to other voting systems*. *See id*. at 11o4 (touchscreen systems "are *more accurate and more reliable than paper balloting systems*"; "*improve* the speed and accuracy of recounts"; "*increase* voter turnout" (emphasis added)). The *Weber* plaintiff did not

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[45] *Anderson*'s approach was consistent with, and cited, *Lubin v. Panish*, 415 U.S. 709 (1974), decided several years earlier. *Lubin* invalidated a filing-fee requirement, holding the fee was not "reasonably necessary" to serve the state's interests because less burdensome alternatives would suffice. *Id*. at 718-19. The City claims *Lubin* is inapt because that Court applied a "higher" level of scrutiny than (the City believes) is warranted here. (Answering Brief, p. 42.) But the *Lubin* court did not purport to apply strict scrutiny; instead, the Court's language ("reasonably necessary" to serve a "legitimate state interest") is consistent with the *Anderson/Burdick/Crawford* balancing test.

[46] In *Legislature v. Eu*, 54 Cal. 3d 492 (1991), *cert. denied*, 503 U.S. 919 (1992), the California Supreme Court applied *Anderson*'s balancing test to California's 1990 term limits measure. That court expressly held, "With respect to *Anderson's* requirement of showing the "necessity" of the particular burden imposed by the state, *we must also consider whether there are any less drastic alternatives to a lifetime ban*." *Id*. at 517 (emphasis added). *Id*. at 522-24 (considering whether the "less drastic" alternative of a ban on consecutive terms would serve the State's interests).

dispute these advantages of electronic voting. Instead, the plaintiff argued that a different interest—preventing fraud and inaccuracy—was more important than those the County identified. The *Weber* court, however, focused on the fact that electronic voting better served "the precise interests *put forward by the State*...." *Burdick*, 504 U.S. at 434 (emphasis added).[47]

In this case, the Voters have addressed *the very interests the City has identified*, and shown that *those* interests can be served equally well by other voting systems, without infringing constitutional rights.[48]

Finally, contrary to the City's claims, the Voters *have* challenged Restricted IRV in its entirety. In the Complaint, the Voters prayed for an injunction:

> prohibiting [the City] from taking any steps to conduct any elections in San Francisco using instant runoff voting where voters are prohibited from ranking every candidate on the ballot for each office.[49]

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[47] Even with respect to the interest advanced by the *Weber* plaintiff—avoiding fraud and inaccuracy—the court held that "there is no indication that the AVC Edge System is inherently less accurate, or produces a vote count that is inherently less verifiable, *than other systems*." 347 F.3d at 1105 (emphasis added).

[48] Likewise, in *Green Party v. Weiner*, 216 F. Supp. 2d 176 (S.D.N.Y. 2002)—the other case cited by the City—the plaintiffs did not argue that electronic voting machines would better serve the State's interests than paper ballots. *Id*. at 190-91.

[49] ER0925.

The Voters disclaimed a challenge to unrestricted IRV *if it could be administered*. The Court should reject the City's self-serving attempt to use that disclaimer to insulate Restricted IRV from constitutional scrutiny, while it vigorously argues that unrestricted IRV *cannot* be administered.

VI.

THE CITY'S SUGGESTION THAT SOME VOTERS WOULD NOT RANK MORE THAN THREE CANDIDATES, EVEN IF GIVEN THE CHOICE, CANNOT DEFEAT THE VOTERS' CLAIMS.

Another major premise of the City's defense is that the Voters' claim must fail because they cannot prove the exact number of voters who would rank more than three candidates if given the option. This, too, misses the mark.

The Voters have submitted un-contradicted declarations stating that they would rank every candidate for Mayor in 2011 if permitted.[50] That is sufficient.[51] At issue in this case is the fundamental, *individual* right to vote

[50] ER0486, 0490, 0495, 0499, 0503, 0508.

[51] This fact alone distinguishes *Crawford*. The district court in *Crawford* found that—unlike here—the plaintiffs had not identified *even one individual* who would be precluded from voting by the identification requirement. *Indiana Democratic Party*, 458 F. Supp. 2d at 822-23. Furthermore, *Crawford* was a *facial* challenge. It did not foreclose an *as-applied* challenge, which the Voters have brought in this case.

and to have that vote counted on equal terms with all other voters.[52] As the Seventh Circuit has held, "an election is more than just a sum total of votes. It is also about the *act* of voting—an individual's ability to express his or her political preferences at the ballot box. An official who willfully interferes with this act violates the Constitution, regardless whether the vote would have affected the election outcome." *Kozuszek v. Brewer*, 546 F.3d 485, 490 (7th Cir. 2008).

Additionally, the City's own evidence confirms that in nine of the ten supervisorial elections between 2004 and 2008 in which the three-candidate limit applied, the majority of voters—typically 70% or more—ranked the maximum number of candidates permitted.[53] Though not necessary for the Voters to prevail, this evidence emphasizes the extent of the deprivation caused by the City's Restricted IRV system.

Furthermore, that some voters may *choose* not to rank every candidate does not justify abridging the right of *others* to do so.

Finally, the Supreme Court has held that the ability to challenge an unconstitutional electoral practice "depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future

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[52] *Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (the right to vote is an individual right).

[53] ER0153-0154. Even in the tenth election, for District 6 in 2006, nearly 45% of voters ranked the maximum. *Id*.

election." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301 n.12 (1979). And the Voters need not demonstrate *inevitable* harm—just that there is a "realistic danger" of harm. *Id*. at 299. Given the thousands of exhausted ballots in past City elections—including thousands more in the recently-concluded supervisorial elections—and the fact there are already 11 candidates running for Mayor in 2011,[54] it is clear that the danger of future disenfranchisement is "realistic."[55]

VII.

RESTRICTED IRV VIOLATES DUE PROCESS.

The City concedes that widespread refusal to "count ballots that were cast" violates due process.[56] Restricted IRV falls within this rule.

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978), is instructive. In *Griffin* the First Circuit found fundamental unfairness in a state Supreme Court's post-election invalidation of absentee ballots that resulted in the

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[54] *See* http://www.sfethics.org/.

[55] ER0626-0628. The City's reference to the "exit polls" it submitted below is improper. The district court excluded those polls (ER0003), and the City has not challenged that ruling. Moreover, those polls suffered from a legion of methodological flaws, including the fact that respondents were asked whether they wished to rank more than three candidates *only* in connection with an uncompetitive election (the 2005 municipal election) in which there was an insufficient number of candidates running to forcibly exhaust ballots. (ER0232-0238, 0244-0245, 0252-0253.)

[56] Answering Brief, p. 43.

disqualification of 10% of the votes cast in a primary. (Voters were permitted to *cast* ballots, but their votes were not *counted*.) The 10% disenfranchisement at issue in *Griffin* was less "massive" than the number of ballots "exhausted" in some supervisorial races, which has climbed as high as a third of the ballots cast. *See also League of Women Voters v. Brunner*, 548 F.3d 463 (6th Cir. 2008) (violation where 22% of provisional ballots uncounted).

VIII.

CONCLUSION.

The judgment should be reversed and the case remanded for entry of an injunction against the continued use of Restricted IRV.

Respectfully submitted,

Dated: December 28, 2010 NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP

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