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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

**PLAINTIFFS' RESPONSE TO
DEFENDANTS'
EVIDENTIARY OBJECTIONS
TO THE DECLARATION OF
JONATHAN KATZ, Ph.D.**

HEARING DATE: March 19, 2010
HEARING TIME: 9:00 a.m.
JUDGE: Hon. Susan Illston
COURTROOM: 10

1 Plaintiffs hereby submit their responses to Defendants' objections to the
 2 Declaration of Jonathan Katz, Ph.D., filed February 4, 2010, in support of Plaintiff's
 3 motion for preliminary injunction:

4 **1. Objections to ¶ 10 of Katz Declaration.**

DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
<p>7 1(1). FRE 702: Professor Katz's 8 statements do not "assist the trier of 9 fact," <i>see</i> Fed. R. Evid. 702, because San 10 Francisco's ranked-choice voting ("RCV") 11 system may be understood by non- 12 experts without any "scientific, technical, 13 or other specialized knowledge," <i>see id.</i> 14 Since 2004, hundreds of thousands of 15 San Francisco voters – without expert 16 assistance—have used the City's RCV 17 system in six municipal elections to 18 select their local officials. The City's RCV 19 system, and the implications of the 20 rankings it permits, is a matter of 21 common knowledge in San Francisco.</p>	<p>This objection is bizarrely off-point. Dr. Katz is a nationally recognized expert in election systems and voting rights. Paragraph 10 of the Katz Declaration does not discuss San Francisco's restricted IRV system at all. Rather, it discusses <u>unrestricted</u> IRV, as used in other jurisdictions, including concerns in the academic literature about problems with "exhausted" ballots and the fact that some jurisdictions using IRV even require that voters rank every candidate. This paragraph properly provides context regarding the use and characteristics of IRV generally, by way of contrast to the novel form of IRV used in San Francisco.</p> <p>Moreover, the finder of fact with respect to the pending motion for preliminary injunction—as well as the eventual trial of this action, if any—will be the Court, rather than a jury. Any objection that</p>

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DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
	<p>expert testimony will not assist the trier of fact is “largely irrelevant in the context of a bench trial.” <i>Deal v. Hamilton County Bd. of Educ.</i>, 392 F.3d 840, 852 (6th Cir. 2004). <i>See also Gibbs v. Gibbs</i>, 210 F.3d 491, 500 (5th Cir. 2000); <i>United States v. Brown</i>, 415 F.3d 1257, 1268 (11th Cir. 2005) (“traditional barriers to opinion testimony” are relaxed by the Federal Rules of Evidence, and “are even more relaxed in a bench trial situation, where the judge is serving as factfinder and we are not concerned about ‘dumping a barrage of questionable scientific evidence on a jury.’”). The Court will be able to consider the testimony that it does find helpful and disregard the rest.</p> <p>Finally, Defendants provide no support whatsoever for their bald assertion that the “implications of the rankings [restricted RCV] permits, is a matter of common knowledge in San Francisco.” In fact, it is highly doubtful that the average voter is remotely aware that tens of thousands of ballots have been exhausted</p>

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DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
	<p>in San Francisco elections as a result of restricted IRV. What we do know is this: the ballot handbook mailed by the City to all voters in 2002 did not mention that the City's elections machinery was incapable of allowing voters to rank every candidate on the ballot, that therefore passage of Proposition A would mean voters would necessarily be limited to ranking only three candidates, and that as a result votes would be routinely "exhausted" in later rounds of voting.</p>
<p>1(2). FRE 702: Professor Katz's opinion that the concerns he discussed "cause[d] some jurisdictions that use IRV to require voters to rank all candidates in the race" are not "based upon sufficient facts or data," <i>see</i> Fed. R. Evid. 702(1). His declaration does not disclose the basis for this conclusion.</p>	<p>Dr. Katz has cited a specific example of a jurisdiction that expressly forces voters to rank every possible candidate—elections for the Australian House of Representatives. Moreover, Dr. Katz has cited two authorities—on which he may properly rely in forming his opinions, <i>see</i> Fed. R. Evid. 703—written by respected scholars, that discuss Australian elections.</p>
<p>2. FRE 602: As a layperson, Professor Katz's statement that <i>his</i> concerns "cause[d] some jurisdictions that use IRV</p>	<p>Dr. Katz's testimony is not offered as a layperson.</p>

DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
<p>1 2 3 to require voters to rank all candidates in 4 the race" are inadmissible because he 5 lacks personal knowledge of the bases for 6 other jurisdictions' decisions to use 7 "unrestricted" IRV. 8</p>	
<p>9 3. FRE 403: To the extent that 10 Professor Katz's statements have any 11 probative value, such value is 12 substantially outweighed by their 13 "confusion of the issues" and 14 "misleading" nature. For example, 15 Professor Katz mischaracterizes the 16 City's RCV system as not "counting" 17 votes even though there is no dispute 18 that it provides voters with the 19 opportunity to select up to three 20 candidates for a single office and there is 21 no dispute that the RCV tabulation 22 process "counts" every ballot. 23 24 25 26 27 28</p>	<p>This objection is meritless. Again, the finder of fact with respect to the pending motion for preliminary injunction—as well as the eventual trial of this action, if any—will be the Court, rather than a jury. Objections under FRE 403 on the basis of confusion or prejudice are inappropriate in the context of a bench trial. <i>United States v. Caudle</i>, 48 F.3d 433, 435 (9th Cir. 1995); <i>Gulf States Utilities Co. v. Ecodyne Corp.</i>, 635 F.2d 517, 519-20 (5th Cir. 1981); <i>Schultz v. Butcher</i>, 24 F.3d 626, 631-32 (4th Cir. 1994). <i>See also</i> <i>Saltzburg, Capra, and Martin</i>, 1-403 <i>Federal Rules of Evidence Manual</i> § 403.02 (MB/Lexis 2009) (available on Lexis Nexis) ("an objection on the ground that evidence would be confusing has no place in a bench trial. Nor would it be a good idea even to suggest that the Trial</p>

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DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
	<p>Judge should exclude evidence because it would confuse the Judge.”).</p> <p>The City’s objection based on the claim that testimony is “misleading” is even more obviously inappropriate—indeed, frivolous. The plain text of FRE 403 provides for the exclusion of testimony that may be “misleading [to] <i>the jury</i>.” <i>Id.</i> (emphasis added).</p> <p>With respect to the City’s example of purportedly “confusing” or “misleading” testimony, Dr. Katz’s testimony is consistent with the plain language of S.F. Charter § 13.102, which provides that an exhausted ballot “<i>shall not be counted</i> in further stages of the tabulation” S.F. CHARTER § 13.102(a)(3) (emphasis added).</p>

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2. Objections to Part of § 16 (“By using Restricted IRV [jurisdictions] can use their old optical scan equipment with minor modifications for both the local Restricted IRV elections as well as the non-IRV elections for state and Federal offices and ballot measures.”).

DEFENDANTS’ OBJECTION	PLAINTIFFS’ RESPONSE
<p>1. FRE 702: Professor Katz is not qualified to render an opinion on the ability of San Francisco to modify its voting equipment to accommodate “unrestricted” RCV elections because he has no “knowledge, skill, experience, training, or education,” <i>see</i> Fed. R. Evid. 702, regarding election administration, the requirements of California election law, voting system hardware and software, or most importantly—San Francisco’s optical scan voting machines.</p>	<p>Dr. Katz is an expert on voting technology and “a member of the Caltech/MIT Voting Technology Project, serving as co-director since October 1, 2005.” (Katz Decl., ¶ 5.) He has also “testified or consulted in numerous elections cases involving . . . the evaluation of voting systems.” (<i>Id.</i> at ¶ 7.)</p> <p>Moreover, it is a matter of public record—on which Dr. Katz may properly rely in forming his opinions, <i>see</i> Fed. R. Evid. 703—that “Once it became clear that the City would continue to use its optical scan system, the discussions focused on financial aspects of implementing RCV, and, even more critically, the timeframe in which the implementation would take place. [¶] ES&S realized that its current paper ballot system could not provide voters the opportunity to rank all</p>

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DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
	<p>candidates that qualified for the ballot. . . .</p> <p>Thus, the City agreed to have its system modified to allow voters three rankings among the qualified candidates appearing on the RCV ballot.” (Plaintiffs’ Request for Judicial Notice, filed 2/4/10, Exhibit 5 [Dkt. #14-5], p. 1 (reported submitted to the Secretary of State by the City of San Francisco regarding the City’s implementation or instant runoff voting).)¹</p> <p>Moreover, Defendant Arntz’s own declaration makes clear that the same machines are being used for non-IRV elections as are used for IRV elections. <i>See generally</i> Arntz Decl., ¶¶ 20-63.</p>
<p>2. FRE 602: Nor can Professor Katz offer this testimony as a layperson, because he has made no showing that he has any personal knowledge of San Francisco’s optical scan equipment.</p>	<p>Professor Katz’s testimony is not offered as a layperson.</p>

1 **3. ¶¶ 17-25 (Restricted Instant Runoff Voting In San Francisco)**

DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
<p>2</p> <p>3</p> <p>4 1(1). FRE 702: Professor Katz's</p> <p>5 discussion of a hypothetical example of</p> <p>6 an "unrestricted" vs. "restricted" IRV</p> <p>7 election does not "assist the trier of fact,"</p> <p>8 see Fed. R. Evid. 702, because San</p> <p>9 Francisco's RCV system may be</p> <p>10 understood by non-experts without any</p> <p>11 "scientific, technical, or other specialized</p> <p>12 knowledge," see <i>id.</i> Since 2004,</p> <p>13 hundreds of thousands of San Francisco</p> <p>14 voters – without expert assistance – have</p> <p>15 used the City's RCV system in six</p> <p>16 municipal elections to elect their local</p> <p>17 officials. The City's RCV system, and the</p> <p>18 implications of the rankings it permits, is</p> <p>19 a matter of common knowledge in San</p> <p>20 Francisco.</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p>	<p>This objection is frivolous. Dr. Katz has</p> <p>simply provided an illustrative example</p> <p>of how unrestricted IRV and restricted</p> <p>IRV works and how it <u>could</u> lead to</p> <p>different results in an election, as a means</p> <p>of aiding the Court in understanding the</p> <p>potentially dilutive effect of the three-</p> <p>candidate limit. He has not suggested,</p> <p>however, that this hypothetical provides</p> <p>direct evidence of what has or will occur</p> <p>in any specific election in San Francisco.</p> <p><i>See, e.g., United States v. Davis</i>, 397 F.3d</p> <p>173 (3d Cir. 2004) (not improper to admit</p> <p>police officer's expert opinion about most</p> <p>likely interpretation of a hypothetical</p> <p>state of facts).</p> <p>Moreover, as discussed above, any</p> <p>objection that expert testimony will not</p> <p>assist the trier of fact is "largely irrelevant</p> <p>in the context of a bench trial." <i>Deal v.</i></p> <p><i>Hamilton County Bd. of Educ.</i>, 392 F.3d</p> <p>840, 852 (6th Cir. 2004). The Court will</p>

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28 ¹ The City has not objected to the Court taking judicial notice of this document.

DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
	be able to consider the testimony that it does find helpful and disregard the rest.
<p>1 2 3 4 5 6 1(2). FRE 702: Professor Katz's 7 analysis of hypothetical election results 8 are not the "product of reliable principles 9 and methods," <i>see</i> Fed. R. Evid. 702(2), 10 and reflect no "more than subjective 11 belief or unsupported speculation," <i>see</i> 12 <i>Daubert v. Merrell Dow</i> 13 <i>Pharmaceuticals, Inc.</i>, 509 U.S. 579, 590 14 (1993). In a separate case, a Washington 15 State Superior Court concluded that 16 Professor Katz improperly assumed facts 17 "that determin[e]d the outcome [he] 18 obtain[ed]." <i>See</i> Request for Judicial 19 Notice, Exh. 7, at 16 (<i>Borders v. King</i> 20 <i>County</i>, No. 05-2-00027-3 (Wash. Sup. 21 Ct. Jun. 24, 2005) (final judgment)). 22 Professor Katz does the same here, by 23 making the following assumptions: (a) 24 significant numbers of voters would rank 25 more than three candidates if provided 26 the opportunity to do so, Katz Decl. ¶¶ 27 17-18; and (b) voters that cast ballots in 28 primary elections always return in vote in</p>	<p>This objection is bogus. Again, Dr. Katz has provided an illustrative example of how unrestricted IRV and restricted IRV work and how they <u>could</u> lead to different results in an election, as a means of aiding the Court in understanding the potentially dilutive effect of the three-candidate limit. He has not suggested, however, that this hypothetical provides direct evidence of what has or will occur in any specific election in San Francisco. <i>See, e.g., United States v. Davis</i>, 397 F.3d 173 (3d Cir. 2004) (not improper to admit police officer's expert opinion about most likely interpretation of a hypothetical state of facts).</p>

DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
<p>runoff elections in the same numbers, <i>id.</i> ¶ 23 n.14.</p>	
<p>1(3). FRE 702: Professor Katz's hypothetical is not "based upon sufficient facts or data," <i>see</i> Fed. R. Evid. 702(1). The actions and voter preferences that he assumes in his example are not informed by any actual past local election results, or any empirical studies or surveys of how San Francisco voters would behave in an IRV system in which voters could rank as many choices as there are candidates on the ballot.</p>	<p>Again, Dr. Katz has provided an illustrative example of how unrestricted IRV and restricted IRV work and how they <u>could</u> lead to different results in an election, as a means of aiding the Court in understanding the potentially dilutive effect of the three-candidate limit. He has not suggested, however, that this hypothetical provides direct evidence of what has or will occur in any specific election in San Francisco. <i>See, e.g., United States v. Davis</i>, 397 F.3d 173 (3d Cir. 2004) (not improper to admit police officer's expert opinion about most likely interpretation of a hypothetical state of facts).</p>
<p>2. FRE 403: To the extent that Professor Katz's statements have any probative value, that value is substantially outweighed by their "confusion of the issues" and "misleading" nature. For example, he</p>	<p>The finder of fact with respect to the pending motion for preliminary injunction—as well as the eventual trial of this action, if any—will be the Court, rather than a jury. As already discussed above, objections under FRE 403 on the</p>

DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
<p>equates “strategic voting”—a theoretical voting tactic that could be used in many types of elections, RCV or otherwise— with “misreporting of election results”— even though those two concepts are completely distinct.</p>	<p>basis of confusion, prejudice or “misleading the jury” are inappropriate in the context of a bench trial.</p> <p>Finally, in a blatant and wrong-headed attempt to discredit Dr. Katz’s testimony, Defendants have misquoted and misrepresented his testimony in their example of purportedly misleading and confusing testimony. Dr. Katz did not equate “strategic voting” with “misreporting of election results”; he equated it with a voters’ voluntary “misreporting of preferences in an election”, <i>i.e.</i>, by insincerely voting for candidates other than those actually preferred by the voter. This is exactly the definition of “strategic voting.”</p>

4. ¶¶ 26-30 (San Francisco’s IRV Election Results).

DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
<p>1. FRE 702: Professor Katz’s statements do not “assist the trier of fact,” <i>see</i> Fed. R. Evid. 702, because San Francisco’s RCV system may be</p>	<p>This objection is meritless. There is no jury here, the finder of fact with respect to the pending motion for preliminary injunction—as well as the eventual trial of</p>

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DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
<p>understood by non-experts without any “scientific, technical, or other specialized knowledge,” <i>see id.</i> Since 2004, hundreds of thousands of San Francisco voters – without expert assistance – have used the City’s RCV system in six municipal elections to elect their local officials. The City’s RCV system, and the implications of the rankings it permits, is a matter of common knowledge in San Francisco. This objection particularly applies here because Professor Katz’s analysis in this section of his declaration is no more than the calculation of percentages based upon publicly available election results.</p>	<p>this action, if any—will be the Court. Any objection that expert testimony will not assist the trier of fact is “largely irrelevant in the context of a bench trial.” <i>Deal v. Hamilton County Bd. of Educ.</i>, 392 F.3d 840, 852 (6th Cir. 2004). Plaintiffs are confident that the Court will be able to consider the testimony that it does find helpful and disregard the rest.</p> <p>Furthermore, Defendants provide no support whatsoever for their bald assertion that the “implications of the rankings [restricted RCV] permits, is a matter of common knowledge in San Francisco.” In fact, it is highly doubtful that the average voter is aware that tens of thousands of ballots have been exhausted in San Francisco elections and, as discussed above, that fact was never even mentioned to the voters in the ballot handbook materials sent them by the City prior to the 2002 election in which Proposition A was passed.</p> <p>And finally, Dr. Katz’s “calculation of</p>

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DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
	<p>percentages” support and is intertwined with his opinions in these paragraphs, for example, that the exhaustion of 27.3% of the ballots by the fourth round of balloting in the 2006 supervisorial race for District 4 “strongly suggests that some voters were excluded because they failed to correctly forecast the final round, so all three of their ranked candidates were eliminated.” (Katz Decl., ¶ 25.)</p>
<p>2. FRE 403: To the extent that Professor Katz’s statements have any probative value, that value is substantially outweighed by their “confusion of the issues” and “misleading” nature. For example, ballots may become “exhausted” for many reasons, not necessarily because a voter ranked three candidates – none of whom were the last two candidates to survive RCV tabulation. <i>See</i> Arntz Decl. ¶ 12. A ballot can be exhausted in the manner that Professor Katz suggests – where a voter ranks three candidates and each of those candidates is</p>	<p>The finder of fact with respect to the pending motion for preliminary injunction—as well as the eventual trial of this action, if any—will be the Court, rather than a jury. As already discussed above, objections under FRE 403 on the basis of confusion, prejudice or “misleading the jury” are inappropriate in the context of a bench trial.</p>

DEFENDANTS' OBJECTION	PLAINTIFFS' RESPONSE
<p>1 2 3 eliminated during the tabulation 4 process. <i>See id.</i> However, many ballots 5 are also exhausted when a voter chooses 6 to rank only one or two candidates, and 7 those candidates are eliminated during 8 the RCV tabulation. <i>See id.</i> But in either 9 instance, Professor Katz's statement that 10 "voters who cast . . . exhausted ballots 11 were disenfranchised" is clearly 12 misleading.</p>	

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15 Dated: March 5, 2010

14 Respectfully submitted,
15 NIELSEN, MERKSAMER, PARRINELLO,
16 MUELLER & NAYLOR, LLP

17 By: /s/James R. Parrinello
18 James R. Parrinello

19 By: /s/Christopher E. Skinnell
20 Christopher E. Skinnell
21 *Attorneys for Plaintiffs*