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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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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

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I. INTRODUCTION.

The City concedes that restricted IRV regularly prevents thousands of voters from voting or having their votes counted in the determinative rounds of runoff elections. The City attempts to defend this serious infringement on the right to vote on three grounds: (1) there is no burden on the right to vote because all voters are permitted to rank three candidates, and they all have an equal risk that their vote will be "exhausted" in later runoff rounds; (2) it would be too costly or administratively difficult for the City to implement an IRV system that allows voters to rank every candidate on the ballot; and (3) the voters approved IRV so they are entitled to it. These arguments have no constitutional merit.

First, it is undisputed that the City's restricted IRV system prohibits thousands of voters from having any vote counted in the dispositive later rounds of runoff elections. This is without doubt a serious burden on the right to vote. The City's argument that all voters are treated equally, as they all get to rank three candidates, is really just an argument that all voters have an equal chance to be disenfranchised in the determinative runoff rounds. That does not come close to passing constitutional muster. If the City's theory were correct (which it is not), a law that allows every citizen to vote, but then provides that ballots from 20 precincts selected at random would be thrown into the Bay, would be constitutional—on the theory that all voters faced the same risk that their vote would not be counted.

Second, the fact that the City may have difficulty paying for or implementing an IRV system that allows each voter to rank every candidate on the ballot, is plainly no justification for denying some voters the right to have their vote counted. It is astonishing that the City even attempts to make this argument. The right to vote is one of the most important rights citizens possess, and is not dependent on financial or administrative convenience. Even assuming for the sake of argument that the City cannot implement an IRV system that gives each voter the right to rank every candidate, that does not make restricted IRV legal. The City must conduct elections in a manner that complies with the

constitutional rights of its citizens. Among the City's options is a return to the primary/runoff system used in virtually every jurisdiction in the state and country, and which the City election machinery already implements for all state and national elections.

Third, the fact that City voters approved Proposition A does not insulate it from constitutional requirements. "It is irrelevant that the voters rather than a legislative body enacted [a law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley,* 454 U.S. 290, 295 (1981). Indeed, while the City's opposition goes to great lengths now to attempt to show that unrestricted IRV would be too difficult to implement, voters were told *nothing* about this in the ballot materials mailed to them by the City in 2002. Nor were voters told that restricted IRV (*i.e.,* limiting voters to three ranked choices) was a *fait accompli*, that it would routinely "exhaust" thousands of votes, or that it would result in the election of candidates with less than a majority of actual votes cast.[1]

The City's opposition is telling because it essentially concedes the following:

- San Francisco was the first city to use restricted IRV and limit a voter to ranking three choices regardless of the number of candidates on the ballot.
- Restricted IRV has never been upheld by any court.
- Restricted IRV weighs most heavily against voters who prefer less popular candidates with their three ranked choices; once those candidates are eliminated, the voters who preferred them are prohibited from voting in later runoff rounds.
- Restricted IRV has resulted in tens of thousands of votes being "exhausted" in San Francisco elections since 2004, denying those voters any voice in determinative runoff rounds.

Finally, attempting to obscure the fact that thousands of voters are denied the right to participate in determinative instant runoff rounds, the City argues that its restricted IRV system involves only one "election" in which all voters are given not just one but three

[1] Indeed, they were told the opposite. The ballot question read: "Shall the City use instant runoff voting to elect City officers with a majority of votes without separate runoff elections?" (Plaintiffs' Request for Judicial Notice, filed 2/4/10, Ex. 3 [Dkt. #27-3] at p. 5.)

choices, or votes, so there is no denial of the right to vote. But this play on semantics ignores the fact that instant runoff voting is functionally a series of elections—beginning with a general election and, if no candidate receives a majority of the vote, followed by a series of "instant" runoff elections in which one candidate is eliminated each election and all votes are recounted until a winner is determined. It is undisputed that restricted IRV routinely denies thousands of voters the right to participate in later and determinative runoff election rounds.

Restricted IRV is unprecedented and badly flawed. The City's opposition makes a creditable effort to defend this unorthodox system, but it is akin to putting lipstick on a pig—it dresses it up a little, but does not obscure its essence. By regularly depriving thousands of citizens of any voice in the later and determinative rounds of the runoffs, restricted IRV seriously burdens the right to vote, and is neither supported by any compelling interest nor narrowly drawn. The City claims an injunction would cause administrative difficulties, but federal courts issue preliminary injunctions to protect citizens from unconstitutional voting systems. If not now, when?

II. NO COURT HAS EVER HELD RESTRICTED IRV IS CONSTITUTIONAL.

The City seeks to obscure just how radical its restricted IRV system is by suggesting that its use is more widespread than is the case, and even by implying that restricted IRV has been approved by the courts. Nothing could be further from the truth.

San Francisco was the first city in the United States to use restricted IRV. (Katz Decl., ¶ 15.) The City never explicitly denies this fact, but denies its system was "novel" on the ground that Oakland, Berkeley, and Minneapolis have similar systems. Yet each of those cities adopted restricted IRV in the wake of San Francisco's adoption—in 2002 such a system was not only "novel," it was unprecedented. Moreover, to date those three jurisdictions *combined* have held only one restricted IRV election—in Minneapolis in November 2009. (Katz Decl., ¶ 15 & nn.8-9.) In other words, contrary to the subtle implication of the City, restricted IRV cannot claim the weight of widespread or long-term use.

The City's implication that restricted IRV has ever been considered, much less

upheld, by a court is seriously misleading. As pointed out in the moving papers, Minneapolis restricts voters to three candidates, but that restriction was not addressed at all in the Minnesota Supreme Court's decision in *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 690 (Minn. 2009)—it was not even mentioned—and certainly was not upheld against constitutional challenge. In fact in describing Minneapolis's IRV system the Minnesota Supreme Court stated, "*A voter may rank as many or as few candidates as she chooses.*" *Id.* at 686 (emphasis added). Thus there is no justification for the City suggesting that *Minnesota Voters Alliance* approved or supports the constitutionality of restricted IRV.

The City's reliance on *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996), is also *badly* misplaced. In the first place, that case did not address a system of restricted IRV; rather, in Cambridge each voter "may mark as many choices as he pleases." *Moore v. Elec. Comm'rs of Cambridge*, 35 N.E.2d 222, 228 (Mass. 1941). *See also McSweeney*, 35 N.E.2d at 12 n.2 (citing to *Moore* for its detailed description of the Cambridge system). Thus, the *McSweeney* court's discussion of "exhausted" votes, disingenuously and misleadingly quoted by the City on page 12 of its Opposition, could not and did not refer to votes that were exhausted as the result of an artificial limit on the number of rankings, imposed by elections officials. Furthermore, the Court in *McSweeney* declined to apply strict scrutiny in that case because the issue presented was the constitutionality of Cambridge's system of filling vacancies on the council—not its system for elections in the first instance. The *McSweeney* court applied rational basis review because the United States Supreme Court "has applied a more relaxed standard in reviewing mechanisms for filling vacancies." *Id.* at 16.[2] The court recognized, however, that strict scrutiny might be appropriate if the constitutionality of Cambridge's initial system of election were presented to the court in a future case. *Id.* at 14-15.

[2] The City's reliance on *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), is improper for the same reason—it dealt only with procedures for filling vacancies, which the City neglects to mention.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Strict Scrutiny Applies Because Voters Are Denied The Right To Have A Vote Counted In The Dispositive Runoff Rounds.

The City freely admits that the burden on the right to vote is "severe"—and subject to strict scrutiny—when there is either a denial of the right to vote, or a dilution of the weight of a voter's vote. (City's Opposition (Dkt. #26), p. 2:2-4; *see also Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008).)[3] This is a critical concession, because San Francisco voters are being denied the right to have any vote counted in the critical, dispositive rounds of balloting.

The City seeks to avoid this conclusion by arguing that under restricted IRV there is only one "election" and because each voter is allowed to rank three candidates (and theoretically has the same chance of having his or her vote not counted in later runoff rounds), there is no violation of the right to vote.[4]

While all voters in restricted IRV only mark their ballots once, that is just the beginning of the analysis, and the City's superficial construct that there is only one "election" under restricted IRV elevates form over substance. The Court is not obligated to accept the City's self-serving description which totally ignores function. *Cf. People ex. rel. Devine v. Elkus*, 59 Cal. App. 396, 399 (1922) (striking down 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 the court recognized that—as a

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[3] In light of this concession, the City's extensive reliance on cases upholding neutral regulations of the time, place and manner of elections are totally inapposite. *See, e.g., Burdick v. Takushi*, 504 U.S. 528 (1992); *Fortson v. Morris*, 385 U.S. 231 (1966).

[4] It is no defense to say that voters get to cast a ballot if that ballot is not counted. "'There 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) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). *See also* 42 U.S.C. § 1973*l*(c)(3) (Voting Rights Act) ("The terms 'vote' or 'voting' shall include all action necessary to *make a vote effective* . . . ." (emphasis added)); CAL. CONST. art. II § 2.5 ("A voter who casts a vote in an election . . . shall have that vote counted.").

functional matter—voters were participating in nine separate elections, even though as a formal matter they only cast one ballot).

In reality IRV is a series of runoff elections, hence the name "instant runoff voting."[5] IRV replaced a traditional general/runoff voting system in San Francisco. The *functional* effect of restricted IRV is *identical* to the hypothetical discussed in Plaintiffs' moving papers, in which eight candidates seek election to a single office under the City's previous system of a November election and, if necessary, a December runoff. As Plaintiffs noted, "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." (Plaintiffs' Motion for Preliminary Injunction [Dkt. #6], p. 14:1-8.) Tellingly, the City has made no effort to distinguish restricted IRV from this hypothetical case, nor is there any principled basis for such a distinction.

That IRV is not just a single election but rather the functional equivalent of multiple elections, was also recognized by the Supreme Court of Minnesota, which observed that instant runoff voting "is directly analogous to the pattern of voting in a primary/general election system," *Minn. Voters Alliance*, 766 N.W.2d at 690, that the counting of ballots "simulates a series of runoff elections" *id.* at 686, and that "the effect in terms of the counting of votes is the same." *Id.* at 691. In fact, that similarity was critical to the holding that Minneapolis's IRV system was *facially* constitutional.

In *Minnesota Voters Alliance*, the plaintiffs alleged that IRV violated the principle of one-person, one-vote, because some voters—those who chose non-eliminated candidates—had only one vote counted, while "voters who cast their first-choice vote for the eliminated candidate get a second chance to influence the election by having their second-choice votes, for a different candidate, counted in the second round." *Id.* at 690. The court concluded that this mis-described the IRV system; rather than a single election

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[5] S.F. CHARTER § 13.102 itself refers to this system as "Instant Runoff Voting."

in which voters are allowed to cast multiple ballots, the court concluded that each runoff round was functionally identical to a separate election:

> [T]his aspect of the IRV methodology is directly analogous to the pattern of voting in a primary/general election system. In a nonpartisan primary election, each voter's vote counts in determining which two candidates survive to reach the general election. In essence, those primary votes are the voters' first-choice ranking of the candidates. As a result of the primary, all but the top two candidates are eliminated. Then, in the general election, voters who voted for candidates eliminated in the primary are allowed to cast another ballot, which necessarily will be for a different candidate—presumably, their second choice. This is no different than the counting of the second-choice votes of voters for eliminated candidates in instant runoff voting. At the same time, in the general election, voters who voted in the primary for either of the two surviving candidates are allowed to vote again, and they are most likely to vote again for their choice in the primary (unless, perhaps, they were voting strategically in the primary and did not vote for their actual first choice in an effort to advance a weaker opponent for their first choice to the general election). This is the equivalent of the continuing effect of the first-choice votes for continuing candidates in instant runoff. A vote in the general election still counts and affects the election, even though it is for the same candidate selected in the primary. Appellants attempt 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.

766 N.W.2d at 690-91 (emphasis added).

That IRV is the functional equivalent of a series of runoff elections is also recognized by FairVote, a leading national advocate of instant runoff voting. FairVote's website, www.fairvote.org, repeatedly likens IRV to a "series of elections." Below are just a sample of those statements:

- "IRV acts like a series of runoff elections in which one candidate is eliminated each election. Each time a candidate is eliminated, all voters get to choose among the remaining candidates."

FairVote.org, *New to IRV?: Frequently Asked Questions* at 2, online at http://www.fairvote.org/New-to-IRV (last visited Mar. 1, 2010) (emphasis added).

- "Q: Doesn't this give extra votes to supporters of defeated candidates?

  "A: No. In each round, every voter's ballot counts for exactly one candidate. In this respect, it's just like a two-round runoff election. . . . In IRV candidates get eliminated one at a time, and each time, all voters get to select among the

remaining candidates. At each step of the ballot counting, every voter has exactly one vote for a continuing candidate.

Id. (emphasis added). *See also* FairVote.org, *How Instant Runoff Voting Works* at 1, http://www.fairvote.org/how-instant-runoff-voting-works (last visited Mar. 1, 2010) ("a series of runoffs are simulated . . . just as if [voters] were voting in a traditional two-round runoff election . . ."). Even the San Francisco Supervisors, who put Proposition A on the ballot and supported its adoption, noted in their ballot argument, "The 'instant' runoff works much like December's 'delayed' runoff." (Plaintiffs' RJN, Ex. 3 [Dkt. #14-3], p. 7.)

Accordingly, the Court must reject the City's claim that its restricted IRV involves only one election, and not a series of elections. Once the City's "single election" argument is dispatched, it becomes clear that the City's restricted IRV system disenfranchises voters by denying their right to have a vote counted in later runoff election rounds—by "condition[ing] the right to vote in one election on [how] that right was exercised in a preceding election." *Ayers-Schaffner v. Distefano*, 37 F.3d 726, 727 (1st Cir. 1994). The burden imposed on Plaintiffs' right to vote by such a restriction "is undeniably severe[.]" *Id.* at 728. *See also Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1072 (S.D. Cal. 2003) (striking down statute that prohibited voters from voting for a successor to Governor Davis if he were recalled, unless the voter had voted on the initial question whether Governor Davis *should* be recalled). Indeed, as the *Ayers-Schaffner* court recognized, when presented with the question of whether such a system is constitutional, "the case is hardly worthy of discussion." 37 F.3d at 727.

B. Strict Scrutiny Also Applies Because Some Voters' Votes Are Diluted By Being Given Less Weight Than Other Voters'.

Even if the City's characterization that there is only one "election" were accepted (which it should not be), that would still not save restricted IRV. In that case, the City's electoral system would avoid the Scylla of vote denial and fall into the Charybdis of vote dilution. "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the

right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. . . . It must be remembered that '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.'" *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (quoting *Reynolds*, 377 U.S. at 555).

Vote dilution exists any time one voter's vote is given more weight than another's. "In determining whether an individual's vote has been diluted, 'the relevant inquiry is whether the vote of any citizen is approximately equal in weight to that of any other citizen, . . .' . . . In other words, the question is whether one person's vote counts the same as another's." *Turner v. Dierks Sch. Dist.*, 782 F. Supp. 81, 82 (W.D. Ark. 1992) (quoting *Bd. of Est. v. Morris*, 489 U.S. 688, 701 (1989) (internal quotation marks omitted)).

Here again, *Minnesota Voters Alliance* is relevant. In that case, the Minnesota Supreme Court held that IRV did not "unequally weight votes," because "[e]very voter has the same opportunity to rank candidates when she casts her ballot, *and in each round every voter's vote carries the same value.*" 766 N.W.2d at 693 (emphasis added). That is not true of San Francisco's restricted IRV system. Because of the three-candidate limit, some voters have a greater ability to influence the election by having a vote counted in the later, dispositive rounds of balloting, while other voters' ballots are discarded and "shall not be counted in further stages of the tabulation . . . ." S.F. CHARTER § 13.102(a)(3).

Disingenuously, the City implies that the principle of vote dilution only "applies when the State weighs 'the votes of citizens differently, by any method or means, merely because of where they happen to live.'" (City's Opposition, p. 12 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). That is not the law! While (non-racial) vote dilution arises most commonly in legislative malapportionment cases, the courts have recognized that it will exist *any time* some votes are weighted more heavily than others. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (striking down poll tax on the ground that it "dilute[s] a citizen's vote on account of his economic status . . . ."); *Stewart v. Parish School Board*, 310 F. Supp. 1172, 1179-80 (E.D. La.) (three-judge court),

aff'd, 400 U.S. 884 (1970) (small landowners' votes were unconstitutionally diluted by law that weights the votes in a school bond election by the assessed value of property owned); *Gould v. Grubb*, 14 Cal.3d 661 (1975) (statute requiring incumbent's name to be first on the ballot "inevitably dilutes the weight of the vote of all those electors who cast their ballots for a candidate who is not" an incumbent).

Nor is there any merit to the City's attempt to reframe Plaintiffs' constitutional argument as a contention that there is a right to have proportional electoral results—that there is a right to elect less popular candidates—based on cases rejecting challenges to winner-take-all systems. (City's Opposition, p. 13.) Plaintiffs have never argued that they have a right to win elections; just that they have a right to have their vote counted in all elections, on equal terms. The unconstitutionality of restricted IRV stems from its denial of the right to have a vote even counted in later, dispositive rounds of voting. *See* S.F. CHARTER § 13.102(a)(3) ("*shall not be counted* in further stages of the tabulation . . . ." (emphasis added)). The City's contention that Plaintiffs urge otherwise is a red herring.

C. Restricted IRV Cannot Remotely Survive Strict Scrutiny.

Because strict scrutiny applies, there is no presumption that restricted IRV is constitutional; to the contrary, 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). This is a burden they cannot meet. In fact, the City makes virtually no effort to try, limiting its discussion of this issue to a single, cursory footnote (City's Opposition, p. 19 n.5), thereby effectively conceding that strict scrutiny cannot be met.[6]

The primary interests that the City identifies as warranting the restricted IRV system boil down to two justifications: (1) avoiding the costs of running an unrestricted

[6] *See Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47, 52 (D.D.C. 2001) ("Although plaintiffs' [sic] argue that they have not abandoned any claims, those for which they provide only cursory argument are deemed conceded."), *rev'd in part on other grounds*, 292 F.3d 849 (D.C. Cir. 2002).

IRV system, and (2) administrative convenience. Neither remotely qualifies as a compelling state interest. *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); *Fed. Elec. Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (administrative ease not a compelling state interest); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (administrative convenience not even sufficiently important to survive intermediate scrutiny applicable to gender-based classifications, much less strict scrutiny).

In its cursory footnote the City also claims that the "stability" of the City's political system justifies the IRV system. In essence the City's contention boils down to nothing more than a claim that, having adopted an unconstitutional system, it would be "de-stabilizing" for the City to change it—that inertia is an interest of constitutional dimension. This is not the "stability" that the Court approved in the case relied upon by the City, *Storer v. Brown*, 415 U.S. 724 (1974). *Storer* upheld a "sore" loser statute, which prevented candidates from seeking office as an independent if they were registered with a recognized political party in the year preceding the election; the "instability" that law sought to prevent was intraparty feuding—an interest not at issue here.[7] More instructive is *Partnoy*, which expressly *rejected* a "political stability" rationale as a justification for prohibiting voters who did not vote on the recall question from voting for Governor Davis' successor. *See also Anderson v. Celebrezze*, 460 U.S. 780, 801-05 (1983) ("stability" concerns insufficient to sustain early filing deadline for independent candidates). Accepting the City's "stability" argument would effectively mean that a preliminary injunction could *never* be issued against restricted IRV or any other illegal city voting system—because city elections are held every November. This notion cannot be squared

[7] Further, the City's purported "stability" interest—by its nature—could not have been considered upon Proposition A's adoption, as required by strict scrutiny, but instead was "hypothesized or invented post hoc in response to litigation." *U.S. v. Va.*, 518 U.S. 515, 533 (1996).

with numerous cases granting preliminary injunctions against unconstitutional electoral practices. *See, e.g., Matsumoto v. Pua*, 775 F.2d 1393 (9th Cir. 1985) (reversing trial court's refusal to grant preliminary injunction against law that prohibited recalled councilman from seeking office for two years after recall); *Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575 (S.D.W. Va. 2000) (preliminary injunction forcing state to put 3d party candidate on the ballot); *N.Y. v. County of Del.*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000) (preliminary injunction ordering elections official to make polling places accessible to disabled voters, including—if necessary—finding new polling places for an election one month away); *Hellebust v. Brownback*, 812 F. Supp. 1136 (D. Kans. 1993) (enjoining elections for State Board of Agriculture that did not comply with constitutional one person, one vote principles).

D. The Three Candidate Limitation Also Violates Due Process.

The City concedes that "massive" disenfranchisement violates due process. (City's Opposition, p. 20.) Restricted IRV falls within this rule.

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978), discussed in Plaintiffs' moving papers, is instructive on this point. In that case 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 10% of the total votes cast in a primary election. (Voters were permitted to cast their ballot, but their votes were not counted.) The 10% disenfranchisement at issue in *Griffin* was far less "massive" than the number of ballots "exhausted" in later rounds of 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) (due process violation where 22% of provisional ballots not counted).

IV. PLAINTIFFS FACE THE REAL THREAT OF IRREPARABLE INJURY.

The City does not dispute that "[a]bridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury." *Cardona v. Oakland Unified School Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992). Rather, they merely cite, without elaboration, case law holding that irreparable harm must be "likely." The implication that

Plaintiffs cannot meet this standard is preposterous.

The City does not dispute that tens upon thousands of ballots have been "exhausted" in supervisorial races since the restricted IRV system was first implemented in 2004—in many races more than 25% of the votes cast. (Katz Decl., ¶¶ 26-30.) Even allowing for the fact that some of those ballots will be "exhausted" voluntarily (*e.g.*, by voters who voluntarily decline to rank all three candidates), rather than by the three-candidate limit, the City nowhere denies that the impact of the three-candidate limit has been significant. And there is no reason to think that 2010 will be different. Plaintiff Katherine Webster lives in Supervisorial District #6. As of the date the complaint in this case was filed, *twenty candidates* had already filed a Statement of Intention to run for supervisor in that district in 2010. (Plaintiffs' Request for Judicial Notice, filed 2/4/10, Exhibit 7 pts. 1 [Dkt. #14-7] & pt. 2 [Dkt. #14-8].) *Ten candidates* had already filed to run in District 10, where Plaintiff Dennis Flynn is registered. (*Id.*) Thus, it is not only likely, but virtually *inevitable* that ballots will be artificially exhausted by virtue of the three-candidate limit, and that voters in those districts will accordingly be deprived of the right to have a vote counted in later rounds of balloting. (*See also* Katz Decl., ¶¶ 26-30; *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 995-96 (N.D. Ohio 2004) (granting preliminary injunctive relief in spite of defendant election officials' claims that the harm was "speculative,"), *aff'd in part and rev'd in part on other grounds*, 387 F.3d 565 (6th Cir. 2004).) To paraphrase the Sixth Circuit in *Sandusky County Democratic Party v. Blackwell,* 387 F.3d 565 (6th Cir. 2004), which upheld the award of a preliminary injunction against Ohio's failure to comply with the Help America Vote Act, "a voter cannot know in advance that his or her [ballot will be exhausted by the three-candidate limit]. It is inevitable, however, that there will be such mistakes. The issues [Plaintiffs] raise are not speculative or remote; they are real and imminent." *Id.* at 574.[8]

[8] The weakness of the City's suggestion that Plaintiffs lack standing is highlighted by the fact that it appears in a mere footnote. Contrary to the City's suggestion, Plaintiffs need not allege that they would have ranked more than three candidates in prior elections to have standing. Standing to challenge an unconstitutional electoral practice "depends

Moreover, the City's objection that the harm to be remedied is "speculative" cannot be squared with the City's objection that Plaintiffs waited too long to bring this suit. This notion runs directly counter to the established rule that "[i]f petitioner has been denied a fundamental constitutional right, the passage of time will not preclude him from relief." *United States v. Cariola*, 323 F.2d 180, 183 (3d Cir. 1963). Further, it is only as a result of that delay that evidence of restricted IRV's actual impacts on voters has become available, and the "likelihood" of harm has become so crystal clear. The City would have this Court present Plaintiffs with a Hobson's choice: move quickly and be denied relief because the threat of harm is speculative, or move more deliberately and be denied relief on the ground that Plaintiffs should have moved faster. The Court should reject this unreasonable and untenable position.[9]

And finally, Plaintiffs wish to be clear: the unconstitutional harm that Plaintiffs complain of is not that exhausted ballots "affect election results." Plaintiffs need not establish that is the case to prevail. Rather, ""[t]he injury in fact is the denial of equal treatment[,]" whether it ultimately affects the result of the election or not. *ACLU of N.M.*, 546 F.3d at 1319. Evidence of the three-candidate limitation is merely provided to emphasize the scope of the deprivation caused by the City's restricted IRV system.

V. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST STRONGLY FAVOR THE AWARD OF A PRELIMINARY INJUNCTION.

Plaintiffs cited numerous federal court decisions in their opening papers holding

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not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301 n.12 (1979). And as to future elections, Plaintiffs need not demonstrate that they will *inevitably* be harmed—just that there is a "realistic danger" of such harm. *Id.* at 299 (One "does not have to await the consummation of the threatened injury to obtain preventive relief."). Given the number of candidates who have already filed to run for supervisor in 2010, and the history of thousands of exhausted ballots in City elections, there can be little question that the danger of future disenfranchisement is "realistic." *See* Katz Decl., ¶¶ 26-30; *Sandusky*, 387 F.3d at 574; *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1318-19 (10th Cir. 2008) (individual voters had standing to 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 by poll workers).

[9] In connection with this point, it is worth noting that the City's claim that "six elections" have been conducted under this system is mere puffery. None of the elections conducted by the City in 2005, 2007 or 2009 implicated the three-candidate limit.

that protection of the right to vote 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."). Making no effort to distinguish those cases, the City instead quotes *Reynolds v. Sims* as supporting its position that a preliminary injunction should not issue. (Opposition at 23.) However, the City's quote from *Reynolds* disingenuously omits the following key language that is in the same paragraph as the language quoted by the City:

> "[I]t would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, *such as where an impending election is imminent and a State's election machinery is already in progress*, equitable considerations might justify a court in withholding the granting of immediately effective relief."

Reynolds, 377 U.S. at 585 (emphasis added); *accord Cardona*, 785 F. Supp. at 843; *Diaz v. Silver*, 932 F. Supp. 462, 466 (E.D.N.Y. 1996) (three-judge court) (a preliminary injunction against an unconstitutional electoral system may be denied as contrary to the public interest *when the State's "election machinery is already in gear . . . ."*).

Thus, in the "usual" case, a preliminary injunction will issue to enjoin an invalid elections system where, as here, the City's election machinery is not "already in gear." The election at issue is still eight months off. The candidate filing period will not open until July. *See* S.F. MUNI. ELEC. CODE § 200 (incorporating filing deadlines from state law); CAL. ELEC. CODE §§ 8020(b), 10220. There is consequently no equitable justification for denying injunctive relief to Plaintiffs, who have been diligent in filing this suit well in advance of the November election.

Respectfully submitted,

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