

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**A09-0182**

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**Minnesota Voters Alliance, John Malone, Ronald D. Moey,  
Laura L. Morales, Craig Bartlett, Karen Evelyn Mathias, and  
Daniel John Mathias,**

**Appellants,**

**v.**

**The City of Minneapolis, a municipality incorporated under  
the laws of the State of Minnesota; R.T. Rybak in his official capacity  
as Mayor, or his successor,**

**Respondents,**

**Mark Richie, in his official capacity as the Secretary of State for the  
State of Minnesota or his successor, et al.,**

**Defendants,**

**and**

**FairVote Minnesota, Inc.,**

**Respondent.**

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**APPELLANTS' PRINCIPAL BRIEF**

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To: Clerk of the Supreme Court  
Minnesota Judicial Center  
Saint Paul, Minnesota 55155

Erick G. Kaardal, No. 229647  
Mohrman & Kaardal, P.A.  
33 South Sixth Street, Suite 4100  
Minneapolis, Minnesota 55402  
Telephone: 612-341-1074

Dated: March 27, 2009

*Attorneys for Appellants*

Susan L. Segal  
Lisa M. Needham  
Assistant City Attorney  
City of Minneapolis  
333 South Seventh Street, Suite 300  
Minneapolis, Minnesota 55402

*Attorneys for Respondents  
The City of Minneapolis, et al.*

Kelly Fallows  
25 East 25<sup>th</sup> Street, Apt. 5  
Minneapolis, Minnesota 55404

*Attorney for Amici Curiae*

James E. Dorsey  
Nicole M. Moen  
Fredrikson & Byron, P.A.  
200 South Sixth Street, Suite 3000  
Minneapolis, Minnesota 55402

Keith J. Halleland  
Halleland, Lewis, Nilan & Johnson  
220 South Sixth Street, Suite 600  
Minneapolis, Minnesota 55402

*Attorneys for Respondent  
FairVote Minnesota, Inc.*

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## ISSUES PRESENTED

1. In *Brown v. Smallwood*, the Minnesota Supreme Court found that a vote must be counted as one, and that vote cannot be defeated or its effect lessened, except by the vote of another voter voting for one. In Instant Runoff Voting, voters cast multiple votes. In tabulating votes in each round where candidates are eliminated or surplus votes redistributed, some second-choice votes are counted; others are not. When a vote is cast that has a greater or lesser effect or weight than the vote of another when counted do the principles of *Brown* apply, thereby invalidating IRV as unconstitutional?

### **Constitutional Provisions Implicated:**

U.S. Const. amend. I and XIV, § 1.

Minn. Const. art. I, § 2 and VII, §§ 1 and 6.

### **Apposite Case Law:**

*Brown v. Smallwood*, 130 Minn. 492, 153 N.W. 953 (1915).

### **Lower Court Holding:**

The lower court found that *Brown v. Smallwood* did not apply to the Instant Runoff Voting election system adopted and implemented by the City of Minneapolis.

2. A vote represents a person's intent to elect and politically associate with a favored candidate. A voting system allows ranking of candidates through casting multiple votes. If a threshold number electing a candidate is not achieved, a winner is determined through counting succeeding choice votes from those ballots cast for eliminated candidates. When the system causes a voter to unwittingly hurt her favored candidate by simply choosing that candidate first – thereby contradicting her original intent – due to the counting of the succeeding secondary choice votes of others — are constitutional principles of equal protection, the right to associate, and one-person, one-vote violated?

#### **Constitutional Provisions Implicated:**

U.S. Const. amend. I and XIV, § 1.

Minn. Const. art. I, § 2 and VII, §§ 1 and 6.

#### **Apposite Case Law:**

*Brown v. Smallwood*, 130 Minn. 492, 153 N.W. 953 (1915);

*Reynolds v. Sims*, 377 U.S. 533 (1964);

*Bush v. Gore*, 531 U.S. 98 (2000).

#### **Lower Court Holding:**

The lower court held no constitutional rights violated. The lower court found that Instant Runoff Voting is non-monotonic; that is, a voter's vote for a particular candidate could harm, rather than help, that candidate. If a vote for a candidate might work against that candidate to the extent the risk exists, it applies to all voters equally. In addition, the court found the votes as counted did not have a greater weight over that of another to cause the dilution of another voter's vote.

3. In a multiple-seat election, if a candidate meets a threshold number to win a seat, all the second-choice votes of those voters are counted and proportionally redistributed to the remaining un-elected candidates. Having already successfully chosen a winner, those same voters have their second-choice votes tabulated before other votes in the second candidate's election. Is a system that allows for votes of some to weigh more or have greater value than other votes cast violative of constitutional principles protecting the voters rights?

**Constitutional Provisions Implicated:**

U.S. Const. amend. I and XIV, § 1.

Minn. Const. art. I, § 2 and VII, §§ 1 and 6.

**Apposite Case Law:**

*Brown v. Smallwood*, 130 Minn. 492, 153 N.W. 953 (1915);

*Reynolds v. Sims*, 377 U.S. 533 (1964);

*Bush v. Gore*, 531 U.S. 98 (2000).

**Lower Court Holding:**

The lower court held no constitutional rights were violated. Neither the United States Constitution nor the Minnesota Constitution or any case law requires that each vote be counted as one numeric and indivisible whole. Further, if a vote for a candidate might work against that candidate to the extent the risk exists, it applies to all voters equally.

## STATEMENT OF THE CASE

### **Expedited Review Granted to Challenge the Constitutionality of Instant Runoff Voting**

The Minnesota Voters Alliance<sup>1</sup> commenced the instant action in Hennepin County District Court before the Honorable George F. McGunnigle. After his decision, the Minnesota Voters Alliance filed an appeal with the Minnesota Court of Appeals, both the City of Minneapolis and the Alliance petitioned this Court for expedited review. The court granted their request.<sup>2</sup>

In 2008, the Minneapolis City Council adopted ordinances implementing a voting system referred to as Single Transferable Voting or Instant Runoff Voting — IRV. IRV replaced the previous plurality voting system. The City intends to use IRV in the 2009 elections. The Minnesota Voters Alliance action challenged IRV's constitutionality under the United States and Minnesota Constitutions seeking declaratory relief.

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<sup>1</sup> References to the “Minnesota Voters Alliance” is inclusive of all appellants.

<sup>2</sup> *Minnesota Voters Alliance, et al. v. The City of Minneapolis, et al.*, A09-182, Order (March 17, 2009). On March 3, 2009, the Court of Appeals granted the motion for the participation of amici curiae Brett Anderson and Kelly Fallows. It is anticipated only one amicus brief will be filed as inferred in the order.

The Minnesota Voters Alliance asserts IRV violates the fundamental rights protected under the United States and Minnesota Constitutions including the right to vote, political association, equal protection, and the principle of one-person, one-vote. Although the State Supreme Court promulgated in 1915 specific unifying principles of interpretation regarding voting rights and voting systems in *Brown v. Smallwood*, withstanding the test of time, some of the arguments presented here are a matter of first impression for the courts of this state and the courts of this nation.

Soon after the Complaint was filed, FairVote Minnesota, Inc., an advocate of IRV, requested to intervene and did so without objection from the Minnesota Voters Alliance.

Upon the filing of cross-motions for summary judgment and simultaneous briefing, the lower court issued an opinion on January 13, 2009 declaring IRV constitutional and granted the City's and FairVote's motions for summary judgment. The lower court did not find constitutional rights violated under the implementation of IRV. This appeal followed.

## STATEMENT OF FACTS

**“Facts which at first seem improbable will, even on scant explanation, drop the cloak which has hidden them and stand forth in naked and simple beauty.”<sup>3</sup>**

**A. The procedural order of the lower court required the filing of a separate statement of undisputed facts. The City failed to submit or oppose the submissions of the Minnesota Voters Alliance.**

Upon the filing of the cross-motions for summary judgment, Judge McGunnigle issued an order requiring each party to submit a *separate* Statement of Undisputed Facts.<sup>4</sup> The order specifically required the moving party to submit a separate statement of undisputed facts with identified sources.<sup>5</sup> The court also included a sample of how the submittal should appear.<sup>6</sup> Likewise, the order required the non-moving party to respond in-kind either agreeing or disagreeing with each fact.<sup>7</sup>

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<sup>3</sup> Galileo Galilei, *Dialogues Concerning Two New Sciences, Day 1* 1638.

<sup>4</sup> *E.g., Minnesota Voters Alliance v. The City of Minneapolis*, No. 27 CV 08-3546 (Henn. Cty. Dist. Ct. July 18, 2008); App. at 68-69.

<sup>5</sup> *Id.* Op. at 1; App. at 68.

<sup>6</sup> *Id.* App. at 70.

<sup>7</sup> *Id.*

The order specifically stated “[a]ny fact included in the Statement of Undisputed Facts filed by the moving party, and not specifically disputed (in the manner herein provided), by the non-moving party in its Response to Statement of Undisputed Facts, shall be deemed to be undisputed for the purposes of the above-mentioned Summary Judgment Motion.”<sup>8</sup>

The Minnesota Voters Alliance served and submitted its Statement of Undisputed Facts.<sup>9</sup> The City did not. Furthermore, the City did not serve upon the Minnesota Voters Alliance or file with the lower court a response to its Statement of Undisputed Facts as the order required. Therefore, under the lower court’s own order, the Minnesota Voters Alliance Statement of Facts control.

This Court might perceive this pronouncement of the City’s procedural hiccup as “petty.” However, the significance becomes apparent when analyzing the summary judgment procedure the lower court applied to the Minnesota Voters Alliance motion for declaratory relief.

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<sup>8</sup> *Id.* App. 68-69.

<sup>9</sup> App. at 105-112.

The Minnesota Voters Alliance disagrees with the lower court’s characterization or accusation of “belated introduction of mathematical theory and undisclosed expert testimony.”<sup>10</sup> First, contrary to this characterization, it is not necessary for the word “monotonicity” or “monotonic” to be explicit in the complaint, although the general concepts of “non-monotonicity” were expressed in the Amended Complaint.<sup>11</sup> In fact, the Amended Complaint gave sufficient notice to City that the non-monotonic characteristic of IRV were one of the bases for the constitutional challenges pled.

Second, there is no record of a scheduling order requiring disclosure of experts.

Third, the experts were in response to the City’s and FairVote’s memoranda, considering their failure to submit a separate statement of undisputed facts and disclosure to the court of IRV’s factual flaws.

Fourth, there is nothing in the record to reflect the City and FairVote were unaware of IRV’s fundamental flaw — that it is non-monotonic. But for the Minnesota Voters Alliance’s appropriate and aggressive response to expose this flaw — in language never before

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<sup>10</sup> Op. at 2; App. at 15.

<sup>11</sup> Op. at 2; App. at 15; See Amended Complaint at ¶¶ 42, 80, 81, 93, and 94, App. pp. 51, 56-57, 58.

used in a Minnesota court or any other court nationally — the City and FairVote may never have admitted as fact that IRV is non-monotonic. Yet, the City and FairVote belatedly did so. Failure of this disclosure would have led to an omission of a material fact for the Court to consider in an admittedly important constitutional case. Such omission would have been in turn a failure of our legal adversarial system.

Nevertheless, the lower court postponed the original summary judgment hearing to allow the City and FairVote to submit additional supplemental affidavits as surreplies to the Minnesota Voters Alliance's responsive arguments and expert affidavits.

**B. The City's ordinances implementing IRV reflect technical language for municipal election laws in Minnesota.**

In 2006, the people of Minneapolis voted and passed a referendum in favor of abandoning the City's plurality system of voting for IRV. The City subsequently amended its Charter to change<sup>12</sup> the methodology of electing the Mayor, City Council members, Park and

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<sup>12</sup> Instant Run-Off Voting Task Force Final Report dated May 9, 2006 at p. 1; App. at 162 (full report, App. at 162-207).

Recreation Board members, the Library Board, and the Board of Estimate and Taxation.<sup>13</sup> The amended Charter, Section 5B now reads:

The elected officers shall be elected by the method of Single Transferable Vote, sometimes known as Ranked Choice Voting or Instant Runoff Voting. The City Council shall, by ordinance, establish the ballot format and rules for counting the votes....<sup>14</sup>

The record is devoid of the City's stated interests in seeking a change in the methodology of elections. Although the City Council in March 2006 passed a resolution creating a task force to "examine the practicality of Instant Runoff Voting as a method of electing officers," its report references five meetings to discuss the following topics:

- How IRV works from a voter's perspective as well as how votes are counted;
- The legal and constitutional challenges that may apply;
- How general election law and statutory authorities would apply if IRV were adopted by Minneapolis;
- Voter and Pollworker education;

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<sup>13</sup> The Charter amendment occurred after the passage of a November 2006 ballot question: "Should the City of Minneapolis adopt Single Transferable Vote, sometimes known as Ranked Choice Voting or Instant Runoff Voting as the method for electing ... without a separate primary election with ballot format and rules for counting votes adopted by ordinance." Amended Complaint at ¶ 23; App. at 47; Statement of Undisputed Facts, App. 105 ("SoUF, App. ---").

<sup>14</sup> Minneapolis Charter Chapter 2, Section 5B (2008); SoUF, App. 105.

- Equipment and technological requirements to implement IRV; and
- Progress made on implementation by other jurisdictions who have adopted IRV.<sup>15</sup>

There is nothing in the present record or the Task Force Report to suggest public comment or the rationale to support Instant Runoff Voting. As the May 9, 2006 Report stated, "...members believe our purpose is not to debate the merits of Instant Runoff Voting..."<sup>16</sup>

Thus, based on the record, it appears that the City in enacting and implementing the ordinances never analyzed nor considered the non-monotonic characteristics of IRV and never analyzed nor considered IRV's possible unconstitutionality – despite two Attorney General's letters indicating constitutional issues. App. 218-23 (August 23, 2007); 224-8 (February 10, 2003).<sup>17</sup>

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<sup>15</sup> SoUF, App. 107; Instant Run-Off Voting Task Force Final Report dated May 9, 2006 at p. 1; App. 162.

<sup>16</sup> SoUF, App. 106.

<sup>17</sup> The Minneapolis City Attorney Burt Osborne also raised concerns over the constitutionality of IRV in a letter dated January 3, 2006. He stated "...the City of Minneapolis appears to be precluded from adopting a preferential voting system generally unless such a system is provide for by the Minnesota Constitution pursuant to *Brown v. Smallwood*, 153 N.W. 953, 957 (Minn. 1915)." App. 65-66.

**C. Minneapolis City Council Enacts Ordinances to Implement IRV.**

- 1. The ordinance definitions use technical terms such as “surplus votes” and “fractions” and are the basis for the constitutional claims.**

The ordinance uses technical definitions to modify the counting of a person’s one “whole” vote. The technical terms defined for use are “threshold,” “surplus,” “surplus fraction,” “transfer value,” and “transferable vote.” For example:

*Threshold* means the number of votes sufficient for a candidate to be elected. In any given election, the threshold equals the total votes counted in the first round ...divided by the sum of one (1) plus the number of offices to be filled and adding one (1) to the quotient, disregarding any fractions.  $\text{Threshold} = (\text{Total votes cast}) / (\text{Seats to be elected} + 1) + 1$ .<sup>18</sup>

*Surplus* means the total number of votes cast for an elected candidate in excess of the threshold.<sup>19</sup>

*Surplus fraction* of a vote means the surplus divided by the total votes cast for the elected candidate, calculated to four (4) decimal places.  $\text{Surplus fraction of a vote} = (\text{Surplus}) / (\text{Total votes cast for elected candidate})$ .

*Transfer value* means the fraction of a vote that a transferred ballot will contribute to the next ranked continuing candidate on that ballot. The transfer value of a vote cast for an elected candidate is calculated by multiplying the surplus fraction of

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<sup>18</sup> Minneapolis Ord. § 167.20 (Minn.)(2008); SoUF, App. 107.

<sup>19</sup>*Id.*

each vote by its current value. The transfer value of a vote cast for a defeated candidate is the same as its current value.

*Transfer vote* means a vote or a fraction of a vote for a candidate who has been either elected or defeated.<sup>20</sup>

This ordinance language is the basis for the constitutional claims.

**2. The implementation of Single-Seat Single Transferable Vote Tabulations Under IRV adds to the foundation of the Minnesota Voters Alliance constitutional challenge.**

Under Minneapolis’ ordinance scheme for election contests, an eligible voter will *rank* candidates in the order of preference casting several “choice-votes” depending on the number of available seats sought. For instance, in a mayoral election, the contest is a single seat election. With three candidates running for that office the counting of ranked choices is reflected as the following example — referred to as “single-seat single transferable vote method of tabulation:”<sup>21</sup>

Candidate	First-Ranked Choice
Independent	38
Democrat	18
Republican	44
Total	100

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<sup>20</sup> Minneapolis Ord. § 167.20 (Minn.) (2008).

<sup>21</sup> Minneapolis Ord. § 167.60 (Minn.) (2008).

The threshold number for a candidate's election in this example is 51. (Total number of votes cast,  $(100 / \text{seats to be elected } (1) + 1) = 50 + 1 =$  threshold 51).

Since none of the candidates met the “threshold,”<sup>22</sup> the next step is followed with the elimination of the Democrat as the defeated candidate— because he had the fewest number of first-ranked choices. His second-ranked choices are “transferred to each ballot’s next-ranked continuing candidate.”<sup>23</sup> For this example, of the 18 second-ranked choice votes, 15 are for the Independent and 3 are for the Republican. The transferred vote result finds the Independent winning the election contest with 53 — exceeding the threshold — versus the Republican’s 47.

Under this scheme, if neither candidate reached the threshold number of 51, “*the candidate with the most votes must be elected.*”<sup>24</sup> This is the same standard used for current elections – a winner is determined by plurality, i.e. the candidate who receives the *most votes*.

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<sup>22</sup> Minneapolis Ord. § 167.60 (1)b (Minn.) (2008).

<sup>23</sup> Minneapolis Ord. § 167.60 (1)d (Minn.) (2008).

<sup>24</sup> Minneapolis Ord. § 167.60 (1)d (Minn.) (2008) (emphasis added).

**3. IRV implementation for multiple-seat contests provides another basis for constitutional claims.**

The Minneapolis scheme for an election contest under its ordinances governing multiple-seat elections on the same ballot<sup>25</sup> also introduces the use of “surplus votes:”<sup>26</sup>

*Surplus* means the total number of votes cast for an elected candidate in excess of the threshold.<sup>27</sup>

The tabulation under certain circumstance will also involve surplus *fractions* of a vote.<sup>28</sup>

For illustration, the following is an example and, for simplification, only two elected seats are to be filled:<sup>29</sup>

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<sup>25</sup> Minneapolis Ord. § 167.70 (Minn.) (2008).

<sup>26</sup> Minneapolis Ord. § 167.70(1) b (Minn.) (2008).

<sup>27</sup> *Id.*

<sup>28</sup> Minneapolis Ord. § 167.20 (Minn.) (2008).

<sup>29</sup> Depending on the number of seats available for elected office in Minneapolis, the threshold numbers mathematically calculated will change. For instance, for a one-seat race, the threshold number needed is  $1/2$  (total number of votes) + 1 – a majority. For multiple seat races, the threshold number will be less than a majority: two-seat elections  $1/3$  (total number of votes) + 1; three-seat elections  $1/4$  (total number of votes) + 1; and so forth. See Instant Run-Off Voting Task Force Report dated May 9, 2006 at p. 13.

	First-Ranked Choice
Republican	4000
Democrat	3000
Independent	2000
Green	1000
Total	10000

The initial tabulation shows 10000 votes and assumes there are no defective ballots or write-in ballots.

To establish the threshold, since this is a race for two seats, it is calculated by taking the total number of first-ranked choices divided by number of seats to be filled and then adding one. Thus, the number of votes needed for this two-seat race is  $1/3$  of 10000 + 1 or 3334.3.<sup>30</sup> Since the fraction is eliminated, 3334 is the threshold number to reach to obtain an elected seat in this two-seat contest.

Here, the first of two elected seats is filled because the Republican, with 4000 first-choice votes, exceeded the threshold of 3334. To declare the second candidate as an elected official, this candidate too must reach the threshold number of 3334.

The next step requires the calculation of the first elected candidate's *surplus votes* — as the proportion of that candidate's votes beyond the threshold. The proportion is calculated by taking the

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<sup>30</sup> 10000 divided by 3 (two seats plus one) = 3333.3 + 1 = 3334.3.

number of first-choice votes for the Republican — 4000 — subtracting the threshold number — 3334 — divide his total number of first-choice votes — 4000 or  $(4000-3334) / 4000 =$  surplus proportion, that is .1665 or 16.65%. Taking the surplus proportion calculation times the total of first-choice votes received results in the number of votes to be transferred —  $.1665 \times 4000 = 666$ .

The second step requires the Republican’s surplus 666 votes to be reallocated among the remaining candidates, based upon the percentage of the *second choice votes of all 4000 of the Republican’s first choice ballots*.<sup>31</sup> The transfer is completed by removing 666 first-choice “surplus” votes from the Republican to ensure the candidate has exactly the threshold number of 3334. (This is done to ensure, according to the Respondents’ particular world view, that there are “no wasted votes.”) These 666 votes in turn are added proportionality according to the *second choice votes of all 4000 of the Republican’s first choice ballots* to the remaining candidates:

	1 <sup>st</sup> -Ranked Choice	2 <sup>nd</sup> -Ranked Choice	Calculation	Transferred Vote
Republican	4000	---		
Democrat	3000	0	$0 \times .1665 = 0$	0
Independent	2000	3000	$3000 \times .1665 =$	499.5
Green	1000	1000	$1000 \times .1665 =$	166.5

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<sup>31</sup> Emphasis added.

The transferred vote in this example also results in a *fractioned vote* — *one-half vote value for two candidates*,<sup>32</sup> the Green and the Independent.

After the above calculations are made, the transferred vote or redistribution of votes, the result of which is reflected as follows:

	1 <sup>st</sup> Ranked Choice	Transferred Vote/Redistribution	Recount Total
Republican	4000	-666	3334
Democrat	3000	0	3000
Independent	2000	+ 499.5	2499.5
Green	1000	+ 166.5	1166.5
Total	10000		10000

With the transfer of votes, because no other candidate reached the threshold of 3334, a further step is necessary. Here, because after the transfer of votes, the Green party has the fewest number of votes, she is considered defeated. Her whole and fractionalized number of 1166.5 votes, including the votes transferred from the Republican, will then be transferred according to the identified second-choice votes on those ballots. It is then re-totaled reflecting a transferred or redistributed total and assuming for this example, zero second-ranked votes went to the Republican:

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<sup>32</sup> Emphasis added.

	1 <sup>st</sup> Ranked Choice	Transferred Vote/ Redistribution	Recount Total	Transfer of 2 <sup>nd</sup> Ranked Vote	Recount Total
Republican	4000	-666	3334	0	3334
Democrat	3000	0	3000	+166.5	3116.5
Independent	2000	+ 499.5	2499.5	+1000	3499.5
Green	1000	+ 166.5	1166.5	- 1166.5	0
Total	10000		10000		10000

In this example, the Independent garnered sufficient second-ranked votes to exceed the threshold with 3499.5. Had no one reached the threshold number, the process would continue.<sup>33</sup>

#### **D. IRV is Non-Monotonic.**

Procedurally, after the submission of simultaneous opening summary judgment memoranda, the Minnesota Voters Alliance filed expert affidavits with its response memorandum — filed simultaneously with the City’s and FairVote’s responsive memoranda. The Minnesota Voters Alliance affidavits affirmed the fundamental flaws of IRV as non-monotonic — that a voter can hurt his or her first-choice candidate by voting for that candidate.<sup>34</sup>

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<sup>33</sup> Minneapolis Ord. § 167.70 (1) a – f (Minn.) (2008).

<sup>34</sup> Op. at 7; App. 20.

For instance, Minnesota Voters Alliance expert defined

“monotonicity”— as related to the ranking of candidates -- as:

Ranking a candidate higher, without changing the ordering of other candidates, can never cause the candidate to lose, nor ranking a candidate lower can never cause that candidate to win.<sup>35</sup>

The submitted affidavits clarified how and why IRV is non-monotonic. For instance, in a single seat election contest under the Minneapolis system consider the following:

Six voters have cast their votes for candidates A, B, and C:

#voters	Votes 1 <sup>st</sup> /2 <sup>nd</sup> /3 <sup>rd</sup>
6	B>A>C
5	C>B>A
4	A>C>B

Candidates			
round	A	B	C
1	4	6	5
A eliminated – votes transfer to C			
2	X	6	9
C wins			

Here, candidate C wins this contest because candidate A is eliminated in round one, giving four more votes to candidate C, resulting in six votes for B and nine votes for C in round two.<sup>36</sup>

But if two additional new voters whose real preferences are candidates B > A > C vote their real preferences, then the two voters’

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<sup>35</sup> Affidavit of Steven J. Brams ¶ 2; App. 271; See Affidavit of Kathy Dopp ¶ 52; App. 311.

<sup>36</sup> Dopp Aff. ¶¶ 53-54; App. 311.

least favorite candidate C wins with eight votes for B and nine votes for C.<sup>37</sup>

#voters	Votes 1 <sup>st</sup> /2 <sup>nd</sup> /3 <sup>rd</sup>
8	B>A>C
5	C>B>A
4	A>C>B

Candidates				
round	A	B	C	
1	4	8	5	A eliminated – votes transfer to C
2	X	8	9	C wins

On the other hand, if these same two voters vote A>C>B (rank their second favorite candidate A first and their favorite candidate last or not at all) then their favorite candidate B wins.<sup>38</sup>

#voters	Votes 1 <sup>st</sup> /2 <sup>nd</sup> /3 <sup>rd</sup>
6	B>A>C
5	C>B>A
6	A>C>B

Candidates				
round	A	B	C	
1	6	6	5	C eliminated – votes transfer to B
2	6	11	X	B wins

This occurs because C, the two voters' least favorite candidate, loses the first round causing their favorite candidate B to win.

In short, if these two voters want their first choice candidate B to win, they must *not* rank B as their first choice and must rank candidate B as their *last choice or not at all*.

Similarly, in a multi-seat election contest the following examples show the Minneapolis Single Transfer Voting system as non-monotonic.

<sup>37</sup> Dopp Aff. ¶¶ 56; App. 311.

<sup>38</sup> Dopp Aff. ¶¶ 57-58; App. 311-12.

In this election, 24,998 voters have cast their votes for candidates AA, A, B, and C.

#voters	ballot ranking
4500	AA > C
4500	AA > B
7997	A > B
4000	B > C
2000	C > A
2001	C > B
24998	

2 Seat Election		candidates				
round	threshold	AA	A	B	C	
1	8334	9000	7997	4000	4001	AA wins a seat
distribute winner's excess votes		-666		333	333	
eliminate lowest scorer B		8334	7977	4333	4334	
distribute loser's votes		W		-4333	4000	333 ballots exhausted
2	5438		7977	0	8334	C wins a seat

Then two additional voters whose favorite candidate is candidate A come to the polls to vote, but the two voters' favorite candidate loses,

#voters	ballot ranking
4500	AA > C
4500	AA > B
7997	A > B
4000	B > C
2000	C > A
2001	C > B
2	A
25000	

2 Seat Election		candidates				
round	threshold	AA	A	B	C	
1	8334	9000	7999	4000	4001	AA wins 1st seat
distribute winner's excess votes	0	-666		333	333	
eliminate lowest scorer B	25000	8334	7999	4333	4334	
distribute loser's votes		W		-4333	4000	333 ballots exhausted
2	5445		7999	0	8334	C wins 2nd seat

and candidate C wins the 2<sup>nd</sup> seat as before. If, however, the same two voters vote for candidate B instead of their real preference for A, then their favorite candidate A wins.<sup>39</sup>

<sup>39</sup> Dopp Aff. ¶¶ 60-62; App. 312-13.

#voters	ballot ranking
4500	AA > C
4500	AA > B
7997	A > B
4000	B > C
2000	C > A
2001	C > B
2	B

25000

2 Seat Election		candidates				
round	threshold	AA	A	B	C	
1	8334	9000	7997	4002	4001	AA wins 1st seat
distribute winner's excess votes		-666		333	333	
eliminate lowest scorer C		8334	7997	4335	4334	
distribute loser's votes		W	2000	2001	-4334	333 ballots exhausted
2	5445		9997	6336	0	A wins 2nd seat

In short, IRV is non-monotonic because *increasing* a vote for a candidate can cause that candidate to *lose*, whereas *decreasing* a vote for the same candidate can cause that candidate to *win*. Therefore, a voter cannot know how to cast a vote in a manner that will help a favored candidate win a public office because voting for that candidate, despite increasing that candidate's first-choice tally, may in fact cause that candidate to lose.

Professor Steven Brams, a second Minnesota Voters Alliance expert, is a New York University political scientist and author of many books on alternative voting systems. Professor Brams confirmed IRV

under the Minneapolis ordinances is non-monotonic. His example is illustrated as follows:

As a first example, assume that there are four candidates, with 21 voters in the following four ranking groups:

Ranking Groups	Number of Votes	Candidate Rankings
I.	7	A – B – C – D
II.	6	B – A – C – D
III.	5	C – B – A – D
IV.	3	D – C – B – A
<b>Total</b>	21 (threshold is 11)	

Because no candidate has met the threshold of 11 first-place votes, the lowest first-choice candidate with 3 votes, D, is eliminated on the first round, and class IV's 3 second-place votes go to C, giving C  $5+3 = 8$  votes.<sup>40</sup>

Because none of the remaining candidates has a majority at this point, B, with the new lowest total of 6 votes, is eliminated next, and Class II's second-place votes go to A, who is elected with a total of  $6+7 = 13$  votes.<sup>41</sup>

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<sup>40</sup> Brams Aff. ¶ 6, I a-b; App. 272.

<sup>41</sup> Brams Aff. ¶ 6, I, b; App. 272.

Second, now assume that the 3 class IV voters raise A from last to first place, so their ranking is ADCB, giving A a total of  $3 + 7 = 10$  first-choice votes rather than 7.<sup>42</sup> Candidate D is eliminated. Then, Candidate C becomes the new lowest candidate with 5 votes; C's elimination results in the transfer of Class III's votes to B, who is elected with  $6+5 = 11$  votes.<sup>43</sup> Thus, when the 3 class IV voters raise candidate A from their last choice to their first choice — without changing their ranking of the other three candidates — they cause their voted-for candidate A to lose; B is elected instead.<sup>44</sup>

Thus, the second example illustrates another paradoxical aspect of IRV— raising a candidate in a voter's preference order can actually hurt that candidate.<sup>45</sup> This is another non-monotonic feature of IRV. *Candidate 'A' loses when he or she moves up in the rankings of some*

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<sup>42</sup> Brams, Supplemental Affidavit, Correction to Original Affidavit. The example is from Steven J. Brams, *Mathematics and Democracy: Designing Better Voting and Fair-Division Procedures*, 44-45, example A2.4 (Princeton University Press 2008).

<sup>43</sup> Brams Aff. ¶ 6, II, a; App. 272.

<sup>44</sup> *Id.*

<sup>45</sup> Brams Aff. ¶ 8 and 9; App. 273.

*voters or receives more first-place votes. IRV's non-monotonicity can occur with as few as three candidates and less than 20 votes.*<sup>46</sup>

## STANDARD OF REVIEW

### 1. For Summary Judgment.

Summary judgment under Minn. R. Civ. P. 56 may be granted in an action for declaratory judgment if all material facts are undisputed and the moving party is entitled to judgment as a matter of law. Cross-motions for summary judgment briefs in constitutional cases are useful to the court when they indicate a basic agreement concerning the legal claims as well as present undisputed material facts which are material and dispositive. Under Rule 56, the trial court must consider all the non-moving party's undisputed material facts before granting judgment to the moving party as a matter of law.

Therefore, the lower court erred, by insisting, on the one hand, that IRV is non-monotonic and then, on the other hand, dismissing the facts the Minnesota Voters Alliance presented to support its legal claims as "hypothetical." The lower court also erred when it claimed

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<sup>46</sup> *Id.*

Minnesota Voters Alliance had “presented no evidence”<sup>47</sup> to support its claims for declaratory relief. It is difficult to understand, in light of the agreement of the parties and expert affidavits confirming that IRV is non-monotonic, why the lower court, in an apparent abridgement of Rule 56, refused to consider all the undisputed material facts before granting summary judgment to the City.

On appeal from a lower court’s decision on cross-motions for summary judgment, this Court will determine: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law.<sup>48</sup> This Court reviews the evidence in the light most favorable to the party against whom summary judgment was granted<sup>49</sup> — here, the Minnesota Voters Alliance.

## **2. For Declaratory Judgment.**

On appeal from a declaratory judgment action, where the trial court applied the law to undisputed facts, the issues are reviewed as

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<sup>47</sup> Op. at 18.

<sup>48</sup> *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990).

<sup>49</sup> *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993).

questions of law.<sup>50</sup> Here the facts are undisputed and the challenge is the constitutionality of certain municipal ordinances implementing IRV as a general municipal election system and its effect on constitutional rights under the United States and Minnesota Constitutions.

### **3. Constitutional Challenges to Municipal Ordinances.**

This Court reviews questions of law regarding its interpretation and its application to undisputed facts de novo;<sup>51</sup> however, a municipal ordinance is presumed constitutional and the burden of proving that it is unconstitutional rests on the party claiming it is invalid.<sup>52</sup>

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<sup>50</sup> *Waste Recovery v. County of Hennepin*, 475 N.W.2d 892, 894 (Minn.App. 1991), *pet. for rev. denied* (Minn. Dec. 9, 1991).

<sup>51</sup> *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 306-07 (Minn.App.2007).

<sup>52</sup> *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955); *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (2001).

## ARGUMENT

### Summary of Argument

**“Those who cast votes decide nothing. Those who count votes decide everything” — Josef Stalin.<sup>53</sup>**

Instant Runoff Voting is non-monotonic.<sup>54</sup> In other words, it is possible for a voter to hurt his or her first-choice candidate by voting for that candidate.<sup>55</sup> It is antithetical to United States and Minnesota constitutional principles governing the right to vote when one vote is weighted over that of another; when one vote is diluted for the benefit of another; when the second choice vote of one voter harms the first choice vote of another voter; when casting a vote for a preferred candidate may harm the chances for that candidate to win office; when

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<sup>53</sup> Attributed to Josef Stalin (1879-1953); *See, Coleman v. Ritchie*, 758 N.W.2d 306, 309 (Minn. 2008) (Page, J. dissenting) (“Josef Stalin is alleged to have once said, ‘I consider it completely unimportant who ... will vote, or how; but what is extraordinarily important is this—who will count the votes, and how.’”); App. at 10.

<sup>54</sup> “All experts agree that IRV is non-monotonic....” Op. at 8; App. 21. Unlike plurality which is monotonic: In each plurality election as each voter sequentially enters the voting booth and casts a ballot, the voter adds one to the total sum of his candidate’s tally, thus increasing the voters’ candidate’s vote share (the total sum of the candidate’s tally divided by the sum of all the other candidates’ total sums). Thus, in plurality a voters’ vote always increases and never decreases his own candidate’s vote share and chances of winning in the final result. As a result, plurality elections are always monotonic because voters always increase their candidate’s chance to win an election by voting for them.

<sup>55</sup> Op. at 7; App. 20.

fractions of a vote go to different candidates; and when a “surplus” proportional value goes to second choice votes of voters who voted for winners in multiple-seat elections which other voters do not receive.

The Minnesota Voters Alliance appeals the decision of the lower court declaring the City’s IRV as constitutional. The challenge is necessary because the lower court determined:

- that an adopted system of voting through ranking of municipal candidates — IRV— does not infringe upon the right to vote even though the lower court found the system non-monotonic —i.e., “a voter [can] hurt his or her first choice candidate by voting for that candidate;”<sup>56</sup>
- that IRV’s non-monotonic characteristics and fractional votes do not violate a person’s right to political association;<sup>57</sup>
- that the fact “a voter [can] hurt his or her first choice candidate by voting for that candidate”<sup>58</sup> is an acceptable “risk” because it applies to all<sup>59</sup> and, therefore, it is not violative of equal protection;<sup>60</sup>

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<sup>56</sup> *Minnesota Voters Alliance v. City of Minneapolis*, No. 27 CV 08-35, op. at 7 (Minn. Henn. Cty. Dist. Ct. Jan. 13, 2009); App. at 20; *see also*, Op. at 8; App. 21.

<sup>57</sup> Op. at 16; App. 29.

<sup>58</sup> Op. at 7; App. 20; *see also*, Op. at 8; App. 21.

<sup>59</sup> Op. at 19; App. at 32.

<sup>60</sup> Op. at 16; App. at 29.

- that a vote is not required to be counted as “one numeric and indivisible whole;”<sup>61</sup>
- that it is constitutionally acceptable for the fractioning of votes in the redistribution of second-choices of all voters of a winning candidate in multiple-seat races according to a mathematic formulation based upon surplus votes of the winning candidate;<sup>62</sup>
- that a vote can be constitutionally diluted giving another greater weight in subsequent rounds of counting<sup>63</sup> -- thus not violating equal protection;
- that ranking of candidates is not multiple vote making because under IRV it is “impossible” to cast multiple votes “for” or “against” any particular candidate -- thus it is not a violation of the principle of one-man, one-vote;
- all of which led to the neutralization if not the evisceration as applicable precedent the principles of this Court’s *Brown v. Smallwood*, including the determination that a vote must be counted as one, and that a vote cannot be defeated or its effect lessened, except by the vote of another elector voting for one.<sup>64</sup>

The people of Minneapolis passed a referendum to change the previous constitutional plurality system of voting. They did not however, expect nor anticipate the City’s Council’s adoption of ordinances that infringe upon the fundamental rights of all voters —

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<sup>61</sup> Op. at 4-6; App. at 37-39.

<sup>62</sup> Op. at 18; App. 31.

<sup>63</sup> Op. at 20; App. at 53

<sup>64</sup> *Brown v. Smallwood*, 130 Minn. 492, 153 N.W. 953 (1915).

violating the right to vote, equal protection, political association, and the principle of one-man, one-vote.

The Minnesota Voters Alliance brought to the lower court constitutional issues and analysis of first impression that the court subsequently dismissed. But in so doing, the lower court also failed to follow its own procedures necessary under summary judgment and declaratory judgment practice. For instance, the lower court contradicted itself by refusing to consider undisputed material facts characterizing them as “hypothetical” and then granting the City a declaratory judgment that IRV is constitutional. As a result, the lower court’s constitutional analysis suffered.

Further, the lower court misapplied *Brown v. Smallwood*. Election regulations are necessary to ensure fairness, honesty, and order --and as such do impose some burdens upon voters. But, the principles embodied in the 1915 *Brown* decision *have not lost* their underlying vitality in applying voters’ rights to voting systems. Here, 94 years later in 2009, the Minneapolis ordinances are subject to an analysis of strict scrutiny for the burdens they impose on an individual’s right to vote, political association, equal protection, and one-person , one-vote.

Contrary to the lower court’s analysis, because fundamental rights are implicated, the City must, but has failed, to provide a compelling interest to severely restrict those rights. Social and economic regulatory efforts are not compelling interests narrowly tailored to justify the infringement of fundamental rights present here.

### **RELIEF REQUESTED**

This Court should declare Instant Runoff Voting as unconstitutional. The lower court’s opinion should be reversed and the Minnesota Voters Alliance summary judgment motion for declaratory judgment granted.

**I. Once the lower court accepts as fact IRV is non-monotonic it cannot later dismiss undisputed examples of its implementation as “hypothetical” in a facial challenge to the ordinances’ constitutionality.**

“All experts agree that IRV is non-monotonic...”<sup>65</sup> The lower court adopted nonmonotonicity as a fact — a voter can hurt his or her first choice candidate by voting for that candidate.<sup>66</sup>

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<sup>65</sup> Op. at 8; App. 21.

<sup>66</sup> Op. at 7; App. 20.

An actual election utilizing IRV has not occurred in Minneapolis. Nevertheless, the ordinances implementing IRV and the examples relied upon by the City as factually undisputed, at least in part<sup>67</sup> adopted by the lower court to describe the operation and functioning of candidate ranking and counting are not “hypothetical.” The lower court, without a factual determination, implies that illustrations of the City’s implementation of IRV utilized by the Minnesota Voters Alliance to support its facial constitutional challenge to IRV are “hypothetical” or “imaginary cases.”<sup>68</sup>

The illustrations show, however, the actual function of “surplus votes,”<sup>69</sup> “surplus fraction of a vote,”<sup>70</sup> “transfer value” relating to a “fractioned vote transferred,”<sup>71</sup> or the “transfer vote” as it relates to a

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<sup>67</sup> As previously stated, although the Minnesota Voters Alliance submitted a separate statement of the facts unchallenged by the City as required under the lower court’s order of July 2008, App. 68-69, the court decision gives no indication it examined the Alliance’s facts in accordance with the court’s own order and under summary judgment and declaratory judgment procedural and legal analysis.

<sup>68</sup> See *Washington State Grange v. Washington State Republican Party*, -- U.S. --, 128 S.Ct. 1184, 1190-91 (2008).

<sup>69</sup> App. 107; Minneapolis Ord. § 167.20 (Minn.) (2008).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

vote or fraction of a vote<sup>72</sup> -- all of which are defined under City ordinances for IRV operation. Furthermore, the City enhanced the operational understanding of the ordinances through its own illustrations in their briefs and in the record.

When a court asserts that no constitution or any case law requires a “vote to be counted as on numeric and indivisible one,”<sup>73</sup> the lower court cannot later assert that examples used for facial constitutional challenges as “hypothetical” when the ordinances specifically contemplate, for example, the use of fractions of votes. In short, this case is not a hypothetical or imaginary case even though no actual election has taken place. The undisputed illustrations simply show how an IRV election occurs under the City’s adopted ordinances and definitions.

Finally, if the lower court considered this case being a “hypothetical” or an “imaginary” case, then it could not, as a matter of the very law the court relies upon, grant the City summary judgment

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<sup>72</sup> *Id.*

<sup>73</sup> *Op.* at 18, *App.* 31.

and declare that IRV is constitutional; that lower court decision would have had to wait for another day as well.<sup>74</sup>

**II. Stare decisis of Minnesota Supreme Court doctrine as delineated in *Brown v. Smallwood* is applicable to interpreting the right to vote and to determine the constitutionality of all election methodologies under Minnesota's Constitution.**

If stare decisis means anything, it is to use and derive reasoning from structures and relationships of the past to provide the means of building toward a rationally consistent, comprehensive, and fairly serviceable law of rights. Thus, if we are to take seriously the noble words of our past, we must pronounce them with emphasis and without apologetic hesitation.”<sup>75</sup>

The 1915 State Supreme Court in *Brown v. Smallwood*, did provide the foundation of serviceable law, as does the prodigy of United States cases in the development of rights enumerated and unenumerated as inherited by the people protected within the

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<sup>74</sup> The parties have repeatedly conferred and agreed that a pre-election declaratory action is preferable to a post-election election contest where the results of actual elections would hold in the balance.

<sup>75</sup> Charles L. Black, Jr., *A New Birth of Freedom, Human Rights, Named & Unnamed*, 36 (Grosser/Putnam 1997).

provisions of the federal and state constitutions.<sup>76</sup> As the Ninth

Amendment of the United States Constitution dictates:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

To look within the Ninth Amendment, it appears at first blush as barren, but the rights “retained by the people” are not of the Ninth Amendment of itself, but within the evolution of the law. “In a free country” no right is more precious than the right to vote, and all other rights are illusory if the “right to vote is undermined.”<sup>77</sup>

Therefore, when the lower court suggests the Minnesota Voters Alliance cannot meet the facial challenge of IRV because of constraints that “[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people,”<sup>78</sup> it must be remembered that

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<sup>76</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 489 (1965) (“The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.”)

<sup>77</sup> *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

<sup>78</sup> Op. at 9, App. 22, quoting *Crawford v. Marion County Election Board*, ---U.S. ---, 128 S.Ct. 1610, 1621 (2008); see also, Op. at 10, App. 23.

the people did not bargain for a system of voting that undermines the most precious of rights — the right to vote.

The *Brown* State Supreme Court understood the implications and application of this concept:

...[I]ndicative of the idea, which permeates all legal thought, [is] that when a voter votes for the candidate of his choice, his vote must be counted one, and it cannot be defeated or its effect lessened, except by the vote of another elector voting for one.”<sup>79</sup>

Under IRV, a voter makes ranked choices of candidates. If the voter ranks three candidates, that voter has “voted”— by expressing his preference<sup>80</sup> — three times for other candidates. The first choice is the favored candidate, a vote when counted is intended to help that candidate get elected. But, if in the round counted, the voter’s favored first choice does not meet the threshold number to be elected, two things happen. If a voter’s first choice candidate is not eliminated, the voter has exhausted his chance to further influence the election. But if the candidate is eliminated (having the lowest tallied vote count), the voter’s other choices will then be sequentially counted as votes and counted for other remaining candidates.

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<sup>79</sup> *Brown v. Smallwood*, 130 Minn. at 501, 153 N.W. at 957.

<sup>80</sup> Bryan A. Garner, *Black’s Law Dictionary*, 1606 (8<sup>th</sup> ed. Thomson/West 2007).

Two observations are made regarding IRV that are contrary to the State Supreme Court precedent of *Brown*. First, when “ranking candidates” the voter has cast more than one vote.

Second, the voter’s initial counted vote to help his favored candidate to win the election is exhausted.<sup>81</sup> While these voters have exhausted their one opportunity to help elect their preferred candidate their vote *is not counted again* in subsequent rounds. Yet other voters of eliminated candidates do have their votes counted again — their second or third effort to influence the outcome of an election. Therefore, the determining factor of whether a non-eliminated candidate is elected rests with the second or third vote of others.

How does this differ from primary elections? In a primary election, all voters vote for a preferred candidate. All votes are counted once and, therefore, all votes are exhausted at once. Each vote is equally weighted allowing the voter to help advance that preferred candidate thereby, giving the voter the effectiveness of his or her vote to advance a particular political belief. No second set of voters — for example under IRV, voters of an eliminated candidate — are given a

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<sup>81</sup> The use of the word “exhausted” is not given the same meaning nor used in the same context as the City’s IRV definition for an “exhausted ballot.” Here, “exhausted” is given its ordinary meaning: “to use up: consume entirely.” Henry Bosley Woolf, *Webster’s New Collegiate Dictionary* 397 (G. & C. Merriam Co. 1981).

second chance, with a second set of votes, to influence the outcome of an election over those who have exhausted their vote because they voted for their preferred candidate who had more votes than the eliminated candidate.

When the separate general election occurs, *all voters* vote for their preferred candidate of those candidates advanced, and all votes are counted once and exhausted at once. No voter or group of voters has a second chance in the same election to cast another vote to influence the ultimate outcome of a race over another voter's inability to further advance the election contest.

In short, under IRV, certain opponents of one candidate are permitted through their subsequent second and third choice votes, to marshal votes against an opponent.<sup>82</sup> This is not a grand conspiracy, but the second or third choices of voters of an eliminated candidate are counted as another vote for different candidates, gives that voter's vote more value — more weight — than the exhausted vote of the voter cast for a non-eliminated candidate, thus diluting the value, the weight, *the effectiveness*<sup>83</sup> of that vote. IRV is thus contrary to the precedent of the

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<sup>82</sup> See, Opinion letter of State of Minnesota Attorney General dated August 23, 2007, App. 107-08.

<sup>83</sup> *Williams*, 393 U.S. at 30.

*Brown* State Supreme Court when it declared a ballot of one voter could not have a greater or lesser effect than the ballot of another voter:

When the Constitution was framed, and as used in it, the word 'vote' meant a choice for a candidate ... Since then it has meant nothing else. It was never meant that the ballot of one elector, cast for one candidate, could be of greater or less effect than that of another elector cast for another candidate. It was to have the same effect.<sup>84</sup>

The *Brown* court further explained how voters' second and third votes counted in the same election influence the outcome of an election by diminishing the right of other voters:

It was never thought that with four candidates one elector could vote for the candidate of his choice, and another elector could vote for three candidates against him. The preferential system directly diminishes the right of an elector to give an effective vote for the candidate of his choice. If he votes for him once, his power to help is exhausted. If he votes for other candidates he may harm his choice, but cannot help him. Another candidate may vote for three candidates opposed to him.<sup>85</sup>

Giving a vote a "greater or less effect" is to give a vote greater weight or to dilute a vote. Another example of this concern and constitutional infirmity is found under IRV's multiple-seat election ordinances and the effect of a winning candidate's surplus votes. The lower court avoided the "surplus vote" analysis entirely -- merely

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<sup>84</sup> *Brown*, 130 Minn. at 498, 153 N.W. at 956.

<sup>85</sup> *Id.*

stating the “right to equal protection is not violated by ... surplus votes.”<sup>86</sup>

In multiple-seat elections, all voters who cast their first choice with the winning candidate have *all of their second-choice votes counted* and redistributed proportionately among the remaining candidates. Thus, the voters of winning candidates get a *second opportunity* to influence the outcome of the election contest for the next seat while all voters of non-eliminated candidates have had one opportunity to vote for a preferred first choice, and that influence as one vote is exhausted.

Using the lower court’s adopted findings of fact in multiple-seat elections (where multiple candidates are elected) illustrates this point of weighted and diluted votes and the City’s ordinance use of “fractioned votes.”

Under IRV, a candidate is elected if he meets the threshold number of votes cast in that election:<sup>87</sup>

...In any given election, the threshold equals the total votes counted in the first round after removing partially defective ballots, divided by the sum of 1 plus the number of offices to be filled in adding 1 to the quotient, disregarding any fractions. Threshold (=) (Total Votes Cast)/(Seats to be elected +1) +1.

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<sup>86</sup> Op. at 18; App. 31.

<sup>87</sup> Minneapolis Ord. § 167.20 (Minn.) (2007).

In an election of four candidates running for two seats on a board, 10000 voters cast ballots. Here, the threshold for election is 3334 votes  $[(10000 \text{ votes}/(2 \text{ seats} + 1)) = 3333 + 1 = 3334]$ . This amount is less than a majority. Assuming no defective ballots, the first round appears as:

Candidate A: 4000	Candidate B: 3000
Candidate C: 2000	Candidate D: 1000

Because candidate A reached the threshold, he wins one of the two seats.

Candidate A's surplus of 666 votes (4000 - 3334) are reallocated among the remaining candidates, *based upon the percentage of second choice votes on all 4000 of candidate A's first choice ballots.*

If, for example, Candidate B received 2400 second choice votes on those 4000 ballots (i.e. 60%), candidate C received 1,200 second place votes (30%) and Candidate D received 400 second choice votes (10%), the 666 surplus votes would be reallocated as follows: Candidate B, 399.6 votes (60%); Candidate C, 199.8 votes (30%); and Candidate D, 66.6 votes (10%). After reallocation, Candidate B has 3339.6 votes (3000 + 399.6 = 3339.6); Candidate C has 2199.8 (2000 + 199.8 = 2199.8); and Candidate D has 1066.6 (1000 + 66.6). Candidate B has been elected.

If, however, Candidate B had been named as the second choice on only 1200 of Candidate A's ballots, he would have been allocated only 199.8 votes for a total of 3199.8, less than the threshold. In that event, the remaining candidate with the fewest first and reallocated second choice votes would be eliminated and all of that candidate's votes would be reallocated using the method described above for a single-seat election.<sup>88</sup>

Thus, in this example, IRV introduces "fractioned surplus votes" — ".6", and ".8". As the City's Ordinances define "surplus fraction of a vote" it means "the surplus divided by the total votes cast for the elected candidate, calculated to four (4) decimal places."<sup>89</sup> Also with the transfer, the value of the vote is diluted: "*Transfer value* means the *fraction of a vote*<sup>90</sup> that a transferred ballot will contribute to the next ranked continuing candidate on that ballot..."<sup>91</sup>

If a vote is a voter's intent of electing a preferred candidate, how can that preference be divided — transferred in fractions — among

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<sup>88</sup> Op. at 5-6; App. 18-19.

<sup>89</sup> Minneapolis Ord. § 167.20 (Minn.) (2008).

<sup>90</sup> Emphasis added here.

<sup>91</sup> *Id.*

other candidates ? And, if a vote is intended to associate that voter with the particular philosophy of that preferred candidate, how can a voter express that preferred political association with a vote divided by a government official among more than one candidate? Does the voter know where his or her fractionalized vote is going before it is divided?

A more cynical court might ask whether the voter cared. A court might further suggest the fractionalization of a vote is too de minimis to affect the counting of votes and an election outcome. But, counting whole votes as a numeric one in a plurality election contest in Minnesota is difficult in and of itself.<sup>92</sup>

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<sup>92</sup> Furthermore, IRV would conflict with Minn. Stat. § 209.02 governing election contests of “question[s] over who received the largest number of votes legally cast...” See *State ex rel Town of Lowell v. City of Crookston*, 91 N.W.2d 81, 83 (Minn. 1988).

Any eligible voter, including a candidate, may contest in the manner provided in this chapter: (1) the nomination or election of any person for whom the voter had the right to vote if that person is declared nominated or elected to the senate or the house of representatives of the United States, or to a statewide, county, legislative, municipal, school, or district court office; or (2) the declared result of a constitutional amendment or other question voted upon at an election. The contest may be brought over an irregularity in the conduct of an election or canvass of votes, over the question of who received the largest number of votes legally cast, over the number of votes legally cast in favor of or against a question, or on the grounds of deliberate, serious, and material violations of the Minnesota Election Law.<sup>92</sup>

Furthermore, the fractioned vote is not like an invalid ballot or invalid absentee ballot, but reflects a legally cast whole vote. Thus, IRV on a number of different levels fails to allow voters to cast their votes effectively.

In the instant case, the lower court contends the voter has “only the opportunity to vote for or against *one candidate per round*.”<sup>93</sup> But it fails to recognize in each round of counting, the voters whose second and third choices are being counted, are having additional opportunities in each round to have different votes count for or against the other remaining candidates. The remaining electors of the remaining candidates have already exhausted their opportunities to influence the outcome of the election:

We reached the conclusion that a system of voting, giving the voter the right to vote for a candidate of his first choice, and

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This particular election law would therefore not cover Minneapolis’ adopted election system. Under IRV election system, a preferential majority is contemplated with the first-ranked, second-ranked, or third-ranked votes counted to achieve that preferential majority, transfer of votes, surplus votes, and fractional votes, all foreign to the concept of “who received the largest number of votes.” The existing election contest statute involving issues related to who received the *largest number of votes* is consistent with Minnesota Supreme Court doctrine regarding plurality counts as mandated by the Minnesota Constitution, requiring no “majority” of votes to obtain elected office. *Brown*, 153 N.W. at 957.

<sup>93</sup> Op. at 23; App. 36.

against the first choice of another voter, and, in addition, by a manipulation of second and additional choice votes, vote for different candidates all against the first choice of such other voter to a number of times limited only by the number of candidates, was contrary to the intent of the Constitution.<sup>94</sup>

The principles expressed in *Brown* go to the heart of the constitutional claims of the Minnesota Voters Alliance against IRV as violating voting rights, equal protection, the right to associate, and one-person, one-vote.

### **The right of political association is violated under IRV.**

There is no dispute the right to associate is a fundamental right protected under the United States and Minnesota Constitutions:

The right of individuals to associate for the advancement of political beliefs, and the right of qualified voters regardless of their political persuasion, to cast their vote effectively ... [is a right] .. more precious in a free country ... [that] other rights, even the most basic, are illusory if the right to vote is undermined.<sup>95</sup>

Although overlapping, there exists the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Thus, the right to vote derives from the right of

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<sup>94</sup> *Brown*, 130 Minn. at 508, 153 N.W. at 959.

<sup>95</sup> *Williams*, 393 U.S. at 30-31.

association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment.<sup>96</sup>

The lower court suggests, however, that the right of political association does not operate “somewhat like a marriage – a right to associate with one, and only one, other person.”<sup>97</sup> IRV makes the right more like “free-love.” With surplus vote transfers, the right of political association is impeded in two ways. First, in multiple-election contests, where all the electors of the winning candidate get their second-choice votes counted and proportionately distributed among the remaining candidates, the right of political association runs afoul and is detrimental to other voters who do not have their second-choice votes counted at all.

Second, the ordinances anticipate fractioned votes distributed among other candidates. While mathematically convenient, it causes a preferred vote to be fractioned among other candidates. Thus, regardless of the voter’s intended political association, the later allocation among other political philosophies is hardly a right of political association of any kind.

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<sup>96</sup> *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Bates v. Little Rock*, 361 U.S. 516, 522-523 (1960); *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958).

<sup>97</sup> Op. at 16; App. 29.

**III. IRV as a voting system necessarily implicates fundamental rights requiring the imposition of a strict scrutiny analysis.**

**A. The fundamental right of equal protection is violated when votes are unequally weighted and diluted under IRV as an election system.**

The Fourteenth Amendment to the United States Constitution guarantees that no state will “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1. The Minnesota Constitution likewise guarantees that “[n]o member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.” Minn. Const. Art. I, § 2. Minnesota courts have stated that “[b]oth clauses have been analyzed under the same principles and begin with the mandate that all similarly situated individuals shall be treated alike, but only ‘invidious discrimination’ is deemed constitutionally offensive.”

Since the Minnesota Constitution grants a person the right to vote, it must also grant each person an *equal right to vote* that is, *equally weighted votes*.<sup>98</sup> The “equal weight” requirement is usually

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<sup>98</sup> See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). (Lines cannot be drawn inconsistent with the Equal Protection Clause of the Fourteenth Amendment once the franchise is granted to the electorate.)

associated with issues relating to reapportionment of legislative districts — the “one person, one vote” principle.<sup>99</sup>

But since the Supreme Court’s *Bush v. Gore*<sup>100</sup> decision, the protections afforded to the right to vote go beyond disenfranchisement and malapportionment to include both the franchise and the manner of its exercise.<sup>101</sup> Thus, a person cannot be enfranchised unequally:

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. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”). 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.” *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).<sup>102</sup>

The lower court criticizes the Minnesota Voters Alliance use of *Bush v. Gore*. The court asserted the principles expressed as limited

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<sup>99</sup> This principle first arose in *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

<sup>100</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>101</sup> *Id.* at 104.

<sup>102</sup> *Id.* at 104-05.

only to the “present circumstances” of the Florida recount.<sup>103</sup> In the first instance,, the principles expressed in *Bush v. Gore* are derived as the above-quotation from *Bush* suggests — from the existing precedents of *Harper* and *Reynolds*. But the lower court later finds that *Bush* is unlike the instant IRV dispute because the *Bush* Court “was concerned that ballots were being counted in different ways....”<sup>104</sup> That *is* the Minnesota Voters Alliances’ contention— under IRV, votes are being counted differently. Votes are weighted and diluted. Votes are counted of some voters, while others are not.

When one group of voters have their second or third ranked choices counted again, their votes are counted as a vote for the advancement of another candidate at the same time other voters are unable to further advance the election of their own preferred candidate.

In other words, IRV disenfranchises and unequally treats that group of voters who have no effective way beyond their first cast and counted vote (for non-eliminated candidates) to advance their political beliefs, when others are allowed to determine the final outcome of the

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<sup>103</sup> Op. at 17, App. 30.

<sup>104</sup> Op. at 18; App. 31.

election contest. It is a violation of the equal protection clauses of the United States and Minnesota Constitutions.

The lower court found no vote dilution (or weighted vote: “[a] voter who chooses not to rank a second-choice candidate has no different opportunity to vote than anyone else.”<sup>105</sup> But the court did not address the underlying paradox of IRV —that in IRV, voters are forced to either dilute the effective strength of their ballot by not ranking all the candidates, or rank candidates they do not prefer to associate with at all. Thus, the voter must either violate their right to equal protection because other ballots would carry more weight, or violate his own rights of association, by having to “vote” for a candidate he or she opposes.

**B. In multiple-seat elections, the constitutional infirmities become exponential.**

In another example regarding multiple seat elections, *all winning candidate voters* have their votes counted *again* when a surplus occurs. Under Minneapolis’ IRV ordinances, when the transfer of surplus votes happens, the winning candidate voters have their second ranked choices counted *and distributed proportionately to other candidates* to help those candidates gain the necessary votes to reach the threshold

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<sup>105</sup> Op. at 20; App. 33.

number to get elected. Within that transfer, fractions of their votes are then distributed, again among the candidates.

These fractions are effectively being counted twice – once for the winning candidate, then discounted as surplus, and then counted again for the second choice. Meanwhile, other voters have only had their first vote counted – and may only have their first vote counted if the counting of the surplus results in a second winning candidate.

United States Supreme Court Justice William O. Douglas, favorably weighed in on the value of a vote as quoted in *Reynolds v.*

*Sims*.<sup>106</sup>

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.<sup>107</sup>

The Minnesota Voters Alliance sought to take the language of the law as given, as co-inheritors of the law, to move it in the direction of a rational coherent protection of the basic right to vote co-existing with the right of political association for the advancement of political beliefs.

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<sup>106</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>107</sup> *Reynolds*, 377 U.S. at 562, quoting *South v. Peters*, 399 U.S. 276, 279 (1950).

It should not be impaired for the convenience of counting or economic interests. In short, it is “[t]he Law in Quest of Itself.”<sup>108</sup>

But the lower court did not believe the “full value” of a vote is protected or protectable:

“[The Minnesota Voters Alliance is] unable to point to any provision of the United States or Minnesota Constitutions any (sic) or case law requiring each vote to be counted as a numeric and indivisible whole.”<sup>109</sup>

Textually, upon examination of the United States and Minnesota Constitutions, the lower court’s point is made since no provision specifically states a vote count as a whole numeric “one.” Thus, the lower court’s statement suggests that any voting system that contemplates allocating a voter’s intent to give a candidate a whole value preference to help get her elected may be diminished or divided among many candidates because it is an acceptable “risk”<sup>110</sup> of the

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<sup>108</sup> Lon Fuller, *The Law in Quest of Itself* (Boston: Beacon Press 1966) (Fuller examines legal positivism and natural law defining legal positivism as the viewpoint that draws a distinction “between the law that is and the law that ought to be...” (p.5) and interprets natural law as that which tolerates a combination of the two. He also explores the effects of positivism’s continued influence on American legal thinking and concludes that law as a principle of order is necessary in a democracy.)

<sup>109</sup> Op. at 18; App. 31.

<sup>110</sup> Op. at 19; App. 32.

voting system. Thus, for the lower court, the “risk” is inherently part of IRV, and because every one is exposed to the same harm, it is an accepted burden on the voter:

“...there is some risk that a vote for a particular candidate might work against that candidate. To the extent the risk exists, it applies to all voters equally.”

However, the lower court’s “risk” argument begs the question:

When did it constitutionally become an acceptable risk that a vote for a candidate might harm that candidate’s chance of winning the election?

The expounded principles protecting the right to vote find otherwise.

For if a person has the right to vote, the voters surely have the right to

have that vote counted, short of an invalid ballot — as one — fully

knowing the vote is not harming the opportunity of the voter’s

preferred candidate to get elected.

**C. Strict scrutiny review of Minneapolis’ IRV election methodology is required since it burdens fundamental constitutional rights.**

It is undisputed that the right to vote is a fundamental right under the Minnesota and United States Constitutions.<sup>111</sup> As the

Minnesota Supreme Court has proclaimed:

“No right is more precious in a free country than that of having a voice in the election of those who make laws under

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<sup>111</sup> *Kann v. Griffin*, 701 N.W.2d 815, 831 (Minn. 2005).

which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. \* \* \* The right to vote \* \* \* is fundamental and personal right to the preservation of self government. \* \* \* Indeed, it is this paramount importance of the right to vote that imbues the state with a compelling interest in preserving the orderliness and integrity of the election process.”<sup>112</sup>

Likewise, the right to associate for political purposes is a fundamental constitutional right.<sup>113</sup>

It is understood, however, that the right to vote and the right to associate for political purposes are not absolute.<sup>114</sup> Despite election regulations to ensure fairness, honesty, and order,<sup>115</sup> which do impose some burdens upon voters in Minnesota, the ordinances at issue must serve some stated compelling interest and act in the least drastic way to accomplish the stated purpose.<sup>116</sup>

In this regard, United States Supreme Court cases provide guidance regarding review of regulations impeding fundamental rights.

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<sup>112</sup> *Id.* at 831 n. 16 (citations omitted).

<sup>113</sup> *Minnesota Fifth Congressional Dist. Independent-Republican Party v. State ex rel. Spannaus*, 295 N.W.2d 650, 654 (Minn. 1980).

<sup>114</sup> *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

<sup>115</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

<sup>116</sup> *Minnesota Fifth Congressional Distr. Independent-Republican Party*, 295 N.W.2d at 654.

Here, this Court must weigh the character and magnitude of the asserted injury to the protected fundamental rights and the precise interests put forward by the City of Minneapolis as justifications for the burdens imposed through its ordinances.<sup>117</sup> When those rights are severely restricted, the ordinance must be narrowly tailored to advance a compelling City interest.<sup>118</sup>

The Minnesota Constitution expressly grants a person the right to vote. Article VII, Section 1:

Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote....

Likewise, Article VII, Section 6 further declares “[e]very person who by the provisions of this article is entitled to vote at any election ....” The uncomplicated provisions of the state’s constitution defined for the Minnesota Supreme Court the meaning of choice for a candidate through an elector’s vote and its effect to elect a public official: “The right to vote \* \* \* is a fundamental and personal right essential to the

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<sup>117</sup> *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789; *Anderson*, 460 U.S. at 789 (“[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that Plaintiff seeks to vindicate.”)

<sup>118</sup> *Id.*; *Minnesota Fifth Congressional Distr. Independent-Republican Party*, 295 N.W.2d at 654.

preservation of self-government.”<sup>119</sup> Indeed, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>120</sup>

Thus, it is of paramount importance that the right to vote is seen to imbue the state and any city with a compelling interest in preserving the orderliness and integrity of the election process.<sup>121</sup> The integrity of the election process is undermined when the means to the end, IRV, infringes, impedes, and diminishes the fundamental rights of all voters.

Finally, there is nothing in the record suggesting the City defined any compelling interest to narrow the deleterious effects of the IRV ordinances upon the fundamental rights of the voters.

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<sup>119</sup> *State ex rel. South St. Paul v. Hetherington*, 240 Minn. 298, 303, 61 N.W.2d 737, 741 (1953).

<sup>120</sup> *Burson v. Freeman*, 504 U.S. 191, 199 (1992) quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>121</sup> *See, Burson*, 504 U.S. at 199.

**D. Cases of other jurisdictions are not persuasive or binding on this Court's interpretation of the United States and Minnesota Constitutions.**

The lower court cites three cases in its opinion that uphold IRV with no opinion of their precedential worth. Nevertheless, none of the cases are apposite.

The unpublished Michigan lower court decision of *Stephenson v. Ann Arbor Bd. of Canvassers*<sup>122</sup> is not persuasive. First, unpublished decisions are not precedential and not controlling.<sup>123</sup>

Second, the *Stephenson* decision is based solely on equal protection rights as related to “classifications of voters.” Minnesota Voters Alliance’s equal protection arguments are not made based on “classifications” but the disparity of the manner of the exercise of the franchise as contemplated through the imposed Minneapolis ordinances and therefore, the effectiveness of that vote: “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote ...”<sup>124</sup> Furthermore, there is no discussion or analysis in *Stephenson* on

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<sup>122</sup> No. 75-10166 AW (Mich. Cir. Ct. 1975).

<sup>123</sup> *State ex rel Hatch v. Employers Ins. of Wassau*, 644 N.W.2d 820, 828 (Minn. App. 2002); Minn. Stat. § 480A.08.

<sup>124</sup> *Bush v. Gore*, 531 U.S. at 104- 05.

the non-monotonicity of IRV. Therefore, the decision is unpersuasive and does not hold precedential value.

The lower court also cites an Ohio case, *State ex rel. Sherrill v. Brown*,<sup>125</sup> and a Massachusetts case *McSweeney v. City of Cambridge*<sup>126</sup> as apposite to the instant case. Neither case involved IRV system as implemented by Minneapolis. None of the opinions suggests those systems adopting surplus votes, transfer votes, or transfer value of a fraction vote. The opinions are further devoid of any arguments relating to monotonicity nor do they contain governmental admission that the voting system adopted are non-monotonic.

Here, the court and the parties admit the Minneapolis IRV election system does violate the monotonicity test, in which more first place votes can *hurt*, rather than help a candidate and in turn cause that candidate to lose the election.

More importantly, none of the cases have the respective State Supreme Courts defining the applicability of a preferential voting system as does Minnesota in *Brown v. Smallwood*. In the instant case, Minnesota Voters Alliance *has found* where and why IRV violates the

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<sup>125</sup> *State ex rel. Sherrill v. Brown*, 99 N.E.2d 779 (Ohio 1951).

<sup>126</sup> *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996).

Minnesota Constitution and the United States Constitution. The non-monotonic election system violates the voter's fundamental rights and cannot stand the scrutiny of constitutional review.

### Conclusion

The Minnesota Supreme Court's seminal decision in *Brown v. Smallwood* reflects forethought for the generations regarding the concepts of the "effective vote" and "weighted vote."<sup>127</sup> The constitutional principles of *Brown* were recognized by the United States Supreme Court 85 years later. As the United States Supreme Court recognized, a person cannot be *enfranchised* unequally including the manner of its exercise: "[O]nce 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."<sup>128</sup> Any electoral methodology introduced, such as Minneapolis' IRV, must be analyzed through *Brown's* doctrine – that is as an analysis of the City's election system's burden on the effectiveness or the right to vote and its value or weight when compared to that of another. The principle of stare decisis demands it.

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<sup>127</sup> *Brown*, 153 N.W. at 956, 957.

<sup>128</sup> *Bush*, 531 U.S. at 104-05.

The circumstances of the instant action are the same as those dealt with 90 years ago — an election methodology and the impact on the right to vote because of the manner of exercise of an election methodology. The “judicial mind” of the Minnesota Supreme Court “has been applied to and passed upon the precise question” - then, and for this Court’s determination, now<sup>129</sup> — does the methodology cause an elector’s vote cast for a candidate to have greater or lesser effect or weight than the vote of another elector? The affirmative answer implicates the infringement on the right to vote, the right to political association, equal protection, and the principle of one-man, one vote, rendering the governing Minneapolis ordinances unconstitutional.

This honorable Court should rule accordingly.

**MOHRMAN & KAARDAL, P.A.**



Dated: March 27, 2009

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Erick G. Kaardal, #229647  
33 South Sixth Street, Suite 4100  
Minneapolis, Minnesota 55402  
Telephone: (612) 341-1074

*Attorneys for Appellants*

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<sup>129</sup> *Fletcher v. Scott*, 201 Minn. 609, 613, 277 N.W. 270, 272 (1938) (“The rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question.”)

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**A09-0182**

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**Minnesota Voters Alliance, John Malone, Ronald D. Moey,  
Laura L. Morales, Craig Bartlett, Karen Evelyn Mathias, and  
Daniel John Mathias,**

**Appellants,**

**v.**

**The City of Minneapolis, a municipality incorporated under  
the laws of the State of Minnesota; R.T. Rybak in his official capacity  
as Mayor, or his successor,**

**Respondents,**

**Mark Richie, in his official capacity as the Secretary of State for the  
State of Minnesota or his successor, et al.,**

**Defendants,**

**and**

**FairVote Minnesota, Inc.,**

**Respondent.**

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**LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE**

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I, Erick G. Kaardal, certify that the Appellants' Principal Brief complies with Local Rule 7.1(c).

I further certify that, in preparation of this motion/memorandum, I used Microsoft Word 2003, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 8,578 words.

**MOHRMAN & KAARDAL, P.A.**

Dated: March 27, 2009

By



Erick G. Kaardal (229647)

William F. Mohrman (168816)

33 South Sixth Street, Suite 4100

Minneapolis, MN 55402

Telephone: 612-341-1074

Facsimile: 612-341-1076

*Attorneys for Appellants*