

STATE OF MINNESOTA

IN SUPREME COURT

A09-0182

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 Ritchie, 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.

APPELLANTS' REPLY BRIEF

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

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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.*

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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“The business of the law is to make sense of the confusion of what we call human life — to reduce it to order but at the same time to give it possibility, scope, even dignity.”¹

I. The City’s Arguments Supporting IRV Impermissably Seek to Limit Constitutional Scope of Voting Rights.

The confusion that the City of Minneapolis’s and FairVote Minnesota’s briefs² express to promote Instant Runoff Voting does not bring the possibility of a greater good but instead limits the scope of individual rights. The City’s promotion and over-simplification of “combining the general election with the primary election”³ clouds the constitutional flaws exemplified through IRV. The City does not satisfactorily answer how a voting methodology that *allows a voter to hurt* her first-choice candidate, by voting for that candidate, does not violate fundamental rights.

The City insists that “[n]o voter’s ballot is counted more than once per round nor weighted any differently from any other ballot”⁴ but fails to acknowledge the dictates of its own ordinances — that, for instance, in a

¹ Archibald MacLeish, *American Poet and Critic*, 1892-1982.

² All references in the Minnesota Voters Alliance reply brief to the “City” or “City of Minneapolis” is inclusive of the arguments of FairVote Minnesota, Inc. FairVote’s brief appears to replicate the arguments of the City, but where needed, the Minnesota Voters Alliance will specifically address FairVote’s arguments where they substantially or substantively deviate from the City’s arguments.

³ See City of Minneapolis brief at 17.

⁴ *Id.* at 18.

multiple-seat race, *all* voters of a winning candidate who exceeded the threshold have their second choice votes counted and distributed proportionately among the remaining candidates before the counting of second choice votes of other voters. Or, if a candidate fails to meet the threshold amount, the *effect* of the electors second-choice vote of an eliminated candidate(s) is to give those electors a second chance to *affect* the outcome of the election, giving those electors' ballots more weight than the electors of non-eliminated candidates who do not "vote" again. Thus, the "ballot of one elector can have a greater or less effect of another elector cast for another candidate."⁵

Though written decades ago, this Court's words speak to today's legal truths embodied in the right to vote, equal protection, the right of political association, and one-person, one vote:

When the Constitution was framed ...[a vote] was never meant that the ballot of one elector, cast for one candidate, could be of greater or less effect than the ballot of another elector cast for another candidate...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.⁶

⁵ *Brown v. Smallwood*, 130 Minn. 492, 498, 153 N.W. 953, 956 (1915).

⁶ *Id.*

IRV proposes to this Court, for the sake of economic relief,⁷ the rights of all individuals shall be diminished. IRV, through the casting of votes and through its methodology of counting, brings into doubt the complete political equality and threatens the fundamental rights of every elector. IRV is not a combining of the general and primary election as the City asserts. A general election and a primary election are fundamentally different events, held on different dates as independent events. In each event, each plurality election allows an elector's vote to always increase and never decrease his own candidate's vote share and chances of winning. In other words, voters always increase the candidate's chance of winning an election by voting for them. IRV does not.

The United States' and Minnesota's Constitutions do not contemplate this political inequality or diminishment of rights of the people for the sake of counting votes in an election contest:

The foundation of [a representative form] of government is, and always has been, unless the people have otherwise signified by their Constitution, that every elector entitled to cast his ballot stands upon a

⁷ There is no evidence in the underlying record that IRV was promoted for anything but economic relief. If any contrary record existed, the City failed to introduce it into the proceedings. Reliance during the briefing in the lower court proceedings on law review articles and conflating it with non-existent legislative history is not legislative history or proof the City promoted IRV and implemented the challenged ordinances for reasons other than economics. The Task Force Report on, IRV however, is part of the record and focuses solely on IRV costs.

complete political equality with every other elector, and that the majority of plurality of votes cast for any person or measure must prevail...The Constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office.⁸

There is no state constitutional provision for IRV. The City fails to appreciate that IRV allows electors to “cast more than one vote for any candidate for any office”⁹ – that counting the second and third choice of some voters effectively gives their ballots greater weight and dilutes the effect of those ballots cast for a non-eliminated candidates because those second or third choices may not be counted in subsequent rounds. Consequently, these

⁸ *Brown*, 130 Minn. at 498, 153 N.W. at 956. Furthermore, the fact Minneapolis amended its Charter to accommodate IRV is of no avail. The Charter may not contravene any provision of the state constitution, and presumably the federal constitution:

A city governed by a home rule charter enjoys as to local matters all the powers of the state, except when those powers have been expressly or impliedly withheld. *A.C.E. Equip. Co. v. Erickson*, 277 Minn. 457, 460, 152 N.W.2d 739, 741 (Minn.1967). Despite the broad governance authority conferred through a home rule charter, any charter provision that conflicts with state public policy is invalid. *Id.* Furthermore, all charter provisions remain subject to state law:

The power conferred upon cities to frame and adopt home rule charters is limited by the provisions that such charter shall always be in harmony with and subject to the constitution and laws of the state.

State ex rel. Town of Lowell v. City of Crookston, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (Minn.1958) (quotations omitted).

⁹ *Brown*, 130 Minn. at 499, 153 N.W. at 956.

voters have lost their influence to affect the outcome of the election for those subsequent rounds.

Finally, the City fails to appreciate the meaning of an elector's vote. The vote for a candidate is the expression of that elector's political association with that candidate. The legal principles pronounced through the Minnesota Voters Alliance's principal brief regarding the right of association, equal protection, and one-person, one vote, does not contemplate — and the Minnesota Voters Alliance never advocated — issues of “invidious racial or other classifications.”¹⁰ IRV does, however, create unconstitutional “disparities”¹¹ according to these constitutional principles. Votes are being counted differently. The votes of some are being counted more than once in a given election — while others are not.

For these reasons, IRV is unconstitutional in all respects.

II. Voters' rights cannot come second to finding a victorious candidate through IRV's methodology of counting when electors are treated unequally.

The Constitution may not limit alternative voting systems, but it forbids counting systems that allow unequal treatment of voters directly interfering with their right to political association. Under IRV, this occurs in at least three ways.

¹⁰ City's Brief at 16.

¹¹ *Id.*

First, a ballot requiring the ranking of candidates for one office or offices means the elector has cast more than one vote for that office, and those votes under IRV may or may not count them all.

Second, the City fails to recognize IRV ballots are multiple votes for an elected office, in which the counting in each round — after the first round — allows some people to vote and have more of their votes counted while others do not. The counting of each round of new votes, again and again, out-weigh and dilute the votes of the electors of non-eliminated candidates. If the Bucklin system in *Brown* found the counting of electors votes multiple times unconstitutional, then IRV must be found unconstitutional because not only does the same thing occur, but IRV counts electors' votes inequitably in second and subsequent rounds. At least under the Bucklin system, in each subsequent round, the votes of each elector were given equal weight. The problem under Bucklin resulted in 12,313 voters having cast a ballot, with an ultimate total of 18,860 votes counted determining the election contest.¹²

The City contends IRV is different because the counting methodology does not culminate with a final result of a number greater than those who cast valid ballots in the first instance — and excluding the possibility of exhausted ballots as defined in the City's ordinances. IRV is similar to the

¹² *Brown*, 153 Minn. at 497, 153 N.W. 955.

methodology of Bucklin as found in *Brown v. Smallwood* because under IRV if all votes are counted, the number would exceed the number of valid electors casting ballots. Here, the City ignores what occurs between the first round and subsequent rounds. During subsequent rounds, some voters are given multiple opportunities to have their additional choice votes counted against the non-eliminated candidate's voters' first choice candidate and their inability to further help him.¹³ This Court forbids such vote manipulation:

We do right in upholding the right of a citizen to cast a vote for the candidate of his choice unimpaired by second or additional choice votes cast by other voters.¹⁴

Third, contrary to the City's contention, a primary election followed by a general election is different from IRV because it does not require voters to make choices between candidates *before they know the result of the first election* and because all voters are allowed to participate in making a final decision during the general election. This is not true under IRV since only voters ballots with continuing candidates are counted in the final round. Their votes are equally weighted, unaffected by the votes of the other electors, and each has an equal chance of having their favored candidate winning the election with the cast of one vote per elector.

¹³ What the Supreme Court referred to as the "power to help [the candidate] is exhausted." *Brown*, 130 Minn. at 498, 153 N.W. at 956.

¹⁴ *Id.*

On the other hand, under IRV, electors must rank *all* candidates to have each vote given equal weight before they know the results of each round. Even if a voter ranks a second or third choice *and* their favored candidate is not eliminated in the first round *and* if their candidate becomes eliminated during a later round, the electors' second or third choice may never be counted because it was too late to help those candidates if those second and third choices were previously eliminated. Therefore, even if provided with multiple votes under IRV, the electors are treated unequally.

This is in direct contradiction to the City's assertion that "IRV allows voters a greater opportunity to associate with the candidates they favor through sequential choice votes."¹⁵ What the City suggests is that IRV gives voters an opportunity to *express* the candidates to whom they would politically associate with through their vote, but IRV does not give voters any opportunity — except by chance — that *any* of their second or third choices will actually be counted during the counting process.

For example, consider a voter who ranks candidates A, B, and C as A>B>C. She might have all of her votes counted. But a voter who ranks candidates as B>C>A may only have B counted even when candidate B loses.

¹⁵ City's Brief at 27-28.

Because IRV is non-monotonic, IRV does not guarantee any positive political association through her first-choice vote for her favored candidate.

The City's position and the lower court's declaration that "[e]ach voter has an equal opportunity to rank candidates and *have his or her rankings counted*" is false.¹⁶ The only time there is equitable counting under IRV is during the first round. In each succeeding round the votes are never treated equally.

The corresponding argument suggests that voters are required to either dilute the strength of their ballot by not ranking all the candidates or rank candidates they would prefer not to politically associate with through the use of their votes. The elector is thus placed in a precarious position of violating his or her own right of equal protection because other ballots would carry more weight than her own, or violate her right of association by voting for a candidate she opposes. IRV thus promotes a pressured disenfranchisement of voters because under IRV an elector does not know the outcome of her specific vote for her first-choice candidate. Simply, the elector does not know where her vote or how her vote will be counted. There is an vast number of possibilities.

The City, however, might suggest that the present system or every

¹⁶ City's Brief at 31 quoting District Court Oder at 17-18 (emphasis added).

election system has the same flaw. An elector may choose to vote or not to vote. But, under the present system the elector knows the outcome of her decision and knows exactly where her vote is going if she chooses to exercise the right to vote. The knowledge is finite and the decision is finite. The vote is counted for that candidate, and only that candidate and whomever further votes for that candidate increases the chances of that candidate winning the election.¹⁷ Under the present system, a voter does not enter a polling booth with the anguish of knowing that voting for his or her favored candidate may hurt the chance of that candidate winning the election—non-monotonicity.

III. The City’s reliance on Arrow’s Theorem is a red herring since the lower court determined IRV is non-monotonic.

The lower court found IRV as non-monotonic — meaning it is possible for a voter to hurt his or her first-choice candidate by voting for that candidate.¹⁸ The Arrow’s Theorem assumes voters rank candidates and does not apply to non-ranked voting systems. Plurality is monotonic. Nevertheless, the City makes an incorrect and irrelevant statement to the proceedings of this Court: “[t]o create these non-monotonic results, however, the creator of

¹⁷ Monotonicity mandates that as related to the ranking of candidates means, “[r]anking a candidate higher, without changing the ordering of other candidates, can never cause the candidate to lose, or ranking a candidate lower can never cause that candidate to win.” App. 246.

¹⁸ Op. at. 8; App. 21.

the hypothetical needs perfect information on exactly how many voters will rank which candidates in which order.”¹⁹ The opposite statement is true. Unless voters have perfect information on exactly how many voters will rank which candidates in which order and know how to count them as contemplated under IRV, voters can not avoid non-monotonic results of casting a ballot for their favorite candidate.

To exploit the non-monotonicity of IRV is not the issue. The issue is that without any manipulation on the part of the voter, their ballots can have a negative effect resulting in voters becoming arbitrary victims of having their ballots invalidate their express preferences. It is arbitrary because it is unknown whether it will have this effect until ballots are cast and, as the City argues, voters cannot prevent this through falsifying their preferences. Therefore, contrary to the City’s argument, not all voting systems cause a mathematical “quirk that results in unintended consequences.” IRV does, but a plurality system, for example, does not.

¹⁹ City’s Brief at 37.

IV. The “will of the people” is not reflected in the passage of the City’s ordinances when the ordinances trample the fundamental rights of all people.

The City professes that this Court must bow to the “will of the people.”²⁰ But, the people did not enact the ordinances at issue implementing IRV. Whether IRV is constitutional is for this Court to decide. For the City to suggest the City Council acted merely to implement the voters affirmation of IRV through a ballot question is disingenuous – especially since the City obtained at least one legal opinion and knew of others that concluded IRV as likely unconstitutional. Despite this legal advice, the Council presented the ballot question to the people.²¹ Furthermore, there is nothing in the record showing the City fully disclosed to the people that IRV is non-monotonic, inequitable, or that it had a questionable constitutional footing.

Nevertheless, the passage of City ordinances is equivalent to the state legislature passing laws. In both bodies, laws are passed by elected officials, but it does not immunize them from this Court finding those statutes or ordinances unconstitutional.²²

²⁰ City’s Brief at 15.

²¹ Contrary to the City’s assertion, the Minnesota Voters Alliance filed and served its amended complaint in August 2008 that included the ordinances at issue.

²² See e.g., *State v. Johnson*, 564 N.W. 2d 551 (Minn. 1994) (holding Minn. Stat. § 609.131, subd. 1 (1992) unconstitutional as legislatively enacted);

Furthermore, while the Minnesota Voters Alliance appreciates the City's reference to *Kahn v. Griffin* for the proposition that "the Minnesota Constitution does not provide greater protections to the right to vote than does the U.S. Constitution,"²³ it is not applicable here. In *Kahn*, the declaration of this court specifically applied to one certified question regarding redistricting.²⁴ Here, the effect of IRV crosses more than the fundamental rights – including the right to vote, but also the right of association, equal protection, and one-person, one-vote. And because the issues presented to this Court are those of first impression concerning IRV, the limitations of *Kahn* should not be imposed on this State's constitutional law. The Minnesota Voters Alliance expounds on basic constitutional principles on the one hand, without affecting, sacrificing, or abolishing State Supreme Court precedent on the other hand – particularly *Brown v. Smallwood*... a case from the past contemplating, envisioning, and embodying legal constitutional principles long before its time.

State v. Grossman, 636 N.W.2d 545, 551 (Minn.2001) (holding Minnesota's patterned sex offender sentence enhancement statute unconstitutional as applied to one defendant and noting the Supreme Court's doubts as to whether the statute could ever be constitutionally applied).

²³ *Kahn v. Griffin*, 701 N.W.2d 815, 836 (Minn. 2005).

²⁴ "Does the Minnesota Constitution provide greater protections to the right to vote than does the United States Constitution such that failure to hold prompt elections following decennial redistricting violates (a) the Minnesota Constitution and/or (b) Minnesota Statutes §§ 204B.135, subd. 1, and 204B.14, subd. 1a?" *Kahn*, 701 N.W.2d at 818.

V. Conclusion

IRV allows a voter to hurt his or her first-choice candidate by voting for that candidate. How can such a system prevail under current constitutional principles governing the right to vote, the right of political association, equal protection, and one-person, one-vote? How can a lower court find acceptable the risks of IRV? How can a vote not be required to be counted as “one numeric and indivisible one”? How can a vote weigh more than another person’s vote or dilute the effect of that vote? The lower court’s responses to these central questions, ultimately finding IRV constitutional, have undermined the basic understandings of constitutional law and narrowing the rights of all people in areas in which the law allows the expansion of protections of the rights at issue.

This Court should find IRV unconstitutional and reverse the lower court’s decision.

MOHRMAN & KAARDAL, P.A.

Dated: April 13, 2009.



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

Attorneys for Appellants