

No. A09-0182

State of MinnesotaIn Supreme Court

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

Appellants,

vs.

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.

and

FairVote Minnesota, Inc.,

Intervenor-Respondent.

RESPONDENTS' BRIEF

Susan L. Segal (#137157)
Peter W. Ginder (#35099)
Lisa Needham (#326999)
Minneapolis City Attorney's Office
333 South Seventh Street, Suite 300
Minneapolis, MN 55402
(612) 673-2429

Attorneys for Respondents

Keith Halleland, Esq.
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4501

James Dorsey, Esq.
Fredrikson & Byron, P.A.
200 South Sixth Street
Suite 4000
Minneapolis, MN 55402-1425

Attorneys for Intervenor-Respondent

Erick G. Kaardal (#229647)
Mohrman & Kaardal, P.A.
33 South Sixth Street, Suite 4100
Minneapolis, MN 55402
(612) 341-1074

Attorney for Appellants

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STATEMENT OF ISSUES

Appellants have asserted three issues on this appeal. Respondent City would phrase those three issues as follows:

1. **Does the Minneapolis Instant Runoff Voting system, which allows voters to rank their candidate preferences on a single ballot, impermissibly “weight” ballots and, if so, does this render the system unconstitutional on a facial challenge?**

The District Court found that Instant Runoff Voting did not “weight” ballots and that the methodology for counting ranked choices or preferences was constitutional under both the state and federal constitutions.

Apposite Authorities:

Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184 (2008)

Crawford v. Marion County Election Board, 128 S.Ct. 1610 (2008)

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1996)

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

2. **Is the Minneapolis Instant Runoff Voting system unconstitutional on a facial challenge based on the mathematical hypothetical that it is “non-monotonic?”**

The District Court held that the mathematical theory of “monotonicity” is not relevant to determining the constitutionality of a voting system and that the Minneapolis Instant Runoff Voting system was constitutional under both the state and federal constitutions.

Apposite Authorities:

Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184 (2008)

Crawford v. Marion County Election Board, 128 S.Ct. 1610 (2008)

Minneapolis Charter ch. 2

Minneapolis Code of Ordinances ch. 167

3. **Is the Minneapolis Instant Runoff Voting system unconstitutional on a facial challenge because, in a multiple-seat election, it allows second (or subsequent) choice rankings of the voters who have selected the first identified winner to be counted in subsequent rounds based on the number of “surplus votes” in excess of the threshold number needed to win?**

The District Court held that multiple-seat Instant Runoff Voting elections were constitutional under both the Minnesota and United States Constitutions.

Apposite Authorities:

Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184 (2008)

Crawford v. Marion County Election Board, 128 S.Ct. 1610 (2008)

Minneapolis Charter ch. 2

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 6, 2009, the voters of the City of Minneapolis (City) passed a referendum by a nearly two-to-one margin amending the City Charter to adopt a method for electing the Mayor, City Council, Park and Recreation Board, and the Board of Estimate and Taxation at a single general election, thereby eliminating the need for primary elections for those positions. This method, known as Instant Runoff Voting (IRV), allows voters to rank, in order of preference, multiple candidates on a single ballot. Appellant filed the instant lawsuit seeking a declaratory judgment that the City's adoption of IRV violated the Minnesota and United States Constitutions.¹ Intervenor-Respondent FairVoteMN later joined the lawsuit with the consent of both Appellants and Respondent City. All parties agreed there were no disputed issues of material fact in dispute in the matter and submitted simultaneous cross-motions for summary judgment pursuant to Rule 56 of the Minnesota Rules of Civil Procedure.

Appellants, however, introduced a new claim, not in their motion for summary judgment, but only in their response to the City's motion, that IRV was unconstitutional based on the theoretical principle of "monotonicity," one part of a mathematical theorem known as Arrow's Theorem. Appellants submitted affidavits from purported experts on the issue with their memorandum in opposition to the City's summary judgment motion. The District Court, the Honorable George F. McGunnigle presiding, granted Respondents

¹ Appellants also contended that the City was pre-empted by state law from implementing IRV. Appellants did not appeal the District Court's ruling against them on this issue.

the opportunity to submit responsive expert affidavits, and allowed all parties to submit additional briefs.²

On January 13, 2009, the District Court denied Appellant's motion and granted summary judgment in favor of the City on all counts. This appeal followed.

On March 17, 2009, this Court granted the Joint Petition of Respondents and Intervenor-Respondent for Accelerated Review.³

CITY DEADLINE FOR CONDUCTING A PRIMARY

This Court, in its grant of the Joint Petition for Accelerated Review, ordered the City to inform the Court of the date by which a decision of the Court would be necessary if the City were required to hold a primary election for offices with terms expiring in January 2010. As explained below, the City would need to be informed by June 11, 2009, in order to comply with notice of candidate filing requirements.

When City voters passed the referendum in November, 2006, and adopted IRV, doing so eliminated City primary elections. In order for the City to reinstate a primary, the City must explicitly pass an ordinance or resolution providing that the primary would be conducted under state law. That must take place no later than three months before the

² The City does not object to consideration of Appellant's "monotonicity" argument and wants a full record available to this Court. The City, however, wishes to preserve its objection to consideration of one of the "expert" affidavits submitted by Appellants to the District Court, the Affidavit of Kathy Dopp (Appellants' Appendix at 302-365). Ms. Dopp is not a qualified expert. *See* Respondents' Reply Memorandum at 6-7 (Respondents' Appendix at 168-169). The District Court reached no ruling on the qualifications of Ms. Dopp as an expert witness.

³ The Petition for Accelerated Review was not opposed by Appellants.

municipal general election, or August 4, 2009. However, there are additional statutory requirements, particularly regarding filing dates, that push the date significantly earlier.

Based on the timeline below, the June 12, 2009, Council Meeting is the last date where the City Council could vote to switch to a traditional primary/general election format instead of using IRV. Thus, the City would need to be notified of any ruling from this Court requiring the City to conduct a primary by no later than June 11, 2009.

This timeline is based on the following:

1. The filing period for candidates, as set by the City Council in January 2009 and as established by the Secretary of State in accordance with the requirements set out in Minn. Stat. §205.13, Subd. 1a, is **July 7 -21, 2009**. (See Secretary of State's election calendar at: <http://www.sos.state.mn.us/home/index.asp?page=239>).
2. In accordance with Minn. Stat. §205.13, Subd. 2, the municipal clerk must publish and post filing dates at least two weeks before the candidate filing period. The notice must specify if there is a primary and the type of election the City will be conducting. The publication deadline is **June 23, 2009**.
3. The regularly scheduled meeting of the City Council immediately preceding the publication deadline is **June 12, 2009**. Action of the City Council is required to direct the City Clerk to publish the notice of candidate filing dates, announcing that there will be a primary election.

STATEMENT OF THE FACTS

This matter proceeded without factual disagreement and the following facts are therefore undisputed.⁴

The City of Minneapolis is a home rule charter city of the first class. The City conducts municipal elections every four years in odd-numbered years, electing officers for the positions of Mayor, City Council, Minneapolis Park and Recreation Board (“Park Board”) and the Minneapolis Board of Estimate and Taxation (“Board of Estimate”). The elections for Mayor and City Council are single-seat elections. *See* Minneapolis Charter ch. 2 §§1-4; ch. 15 § 1; ch.16 § 1. (Respondents’ Appendix at 32, 205-209).

The Park Board has three “at-large” city-wide Commissioners elected in a multiple-seat race and six Commissioners representing each of the six individual park districts who are elected in single-seat elections. *See* Minneapolis Charter ch. 16 § 1. (Respondents’ Appendix at 205) The Board of Estimate and Taxation includes two

⁴ Appellants seek to raise an issue in their brief about which party’s recitation of undisputed facts should control. This is an argument without purpose, however, because all parties agree that there are no material facts in dispute in this case. Moreover, Appellants’ claim is wrong. The City both provided the District Court with its own recitation of undisputed facts in support of the City’s summary judgment motion and responded to Appellants’ Statement of Undisputed Facts in the City’s opposition to Appellants’ motion. *See* pp. 4-6 of City’s Memorandum in Support of Summary Judgment (Respondents’ Appendix at 4-6); City’s Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment at 3 (Respondents’ Appendix at 140). Notably, Appellants never provided a specific objection to the City’s recitation of undisputed facts below and never raised an issue before the District Court concerning which party’s recitation should control. Not only is this issue without consequence, Appellants are barred from raising the issue because they failed to raise it before the District Court. *See, e.g., Sarafolean v. Kauffman*, 547 N.W.2d 417, 421 (Minn. Ct. App. 1996); *Aesoph v. Golden*, 367 N.W.2d 639, 643 (Minn. Ct. App. 1995).

members elected city-wide every four years in a multiple-seat election. *See* Minneapolis Charter ch. 15 § 1 (Respondents' Appendix at 205-209).

On November 6, 2006, the following ballot language appeared on the general election ballot in the City of Minneapolis:

Should the City of Minneapolis adopt Single Transferable Vote, sometimes known as Ranked Choice Voting or Instant Runoff Voting, as the method for electing the Mayor, City Council, and members of the Park and Recreation Board, Library Board, and Board of Estimate and Taxation without a separate primary election and with ballot format and rules for counting votes adopted by ordinance?

See "Elections Committee Agenda of August 4, 2006" (Respondents' Appendix at 29).

Voters approved the ballot measure by a 65-35% margin. *See* "Hennepin County Official Election Results" (Respondents' Appendix at 31). The referendum required the City Council to amend Chapter 2 of the City Charter to delete the provision for primary elections and add a new Section 5B as follows:

Section 5B. Voting Method. 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. The method shall be used for the first municipal election after adoption and all subsequent elections unless the City Council certifies, by ordinance, no later than four months prior to the election that the City will not be ready to implement the method in that election. Such certification must include the reasons why the City is not ready to implement the method.

See Minneapolis Charter Chapter 2, Section 5B (Respondents' Appendix at 34).

Prior to the IRV charter amendments, municipal elections were conducted through a primary and a general election. The primary and general elections for the position of

Mayor and City Council were conducted on a nonpartisan basis.⁵ The two top vote getters in a primary election would be the final candidates for the position in the general election, regardless of whether they were members of the same political party.

On April 18, 2008, the City Council passed a comprehensive ordinance detailing the procedures for conducting municipal elections under the instant runoff voting method approved by the voters in the 2006 referendum. A copy of the ordinance is attached in the Appendix. (Respondents' Appendix at 71-80). The ordinance details the method of tabulation for single seat and multiple seat elections. *See* Minneapolis Code of Ordinances ("M.C.O.") Ch. 167.60, 167.70.⁶ (Respondents' Appendix at 74-77).

Instant Runoff Voting eliminates the need for primary elections by offering voters

⁵Appellants argued before the District Court that the constitution requires a plurality election system and the fact that IRV requires a majority of votes to win makes IRV unconstitutional. Appellants have not pursued this argument on appeal but, nevertheless, continue to refer incorrectly to the City's pre-IRV form of elections as a "plurality system." *See* App. Brief at 6. As the City detailed in its briefs to the District Court, the general election ballot for single seat positions has never had more than two candidates per position and, consequently, there has always been a majority vote requirement in Minneapolis municipal elections under the pre-IRV system, the same as under IRV. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 4-5 (Respondents' Appendix at 141-142).

⁶ Without foundation, and for the first time on appeal, Appellants allege that those City voters who overwhelmingly approved IRV did not "expect nor anticipate the City Council's adoption of ordinances that infringe upon the fundamental rights of all voters." App. Brief at 28. Aside from being wrong on the issue of infringement, this claim also wrongly implies that the ordinance departs from the IRV system mandated by the referendum. Appellants have never before contended that the ordinance passed by the City differs from the intent of the referendum question, and are barred from doing so here. In addition, Appellants commenced this lawsuit in December, 2007, some five months prior to the passage of the ordinance. Appellants are therefore incorrect in intimating that their lawsuit is somehow based only on specific features of the City's ordinance.

the opportunity to rank, in order of preference, their favored candidates on a single ballot. The choices are then counted in a series of rounds or “instant runoffs.” A threshold number of votes is needed for a candidate to be elected. *See* Defendants’ Memorandum in Support of Motion for Summary Judgment at 6 (Respondents’ Appendix at 6)

“Threshold” is defined in City Ordinance 167.20 as follows:

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 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. $\text{Threshold} (=) (\text{Total Votes Cast}) / (\text{Seats to be elected} + 1) + 1$.

M.C.O. Ch. 167.20 (Respondents’ Appendix at 72-73).

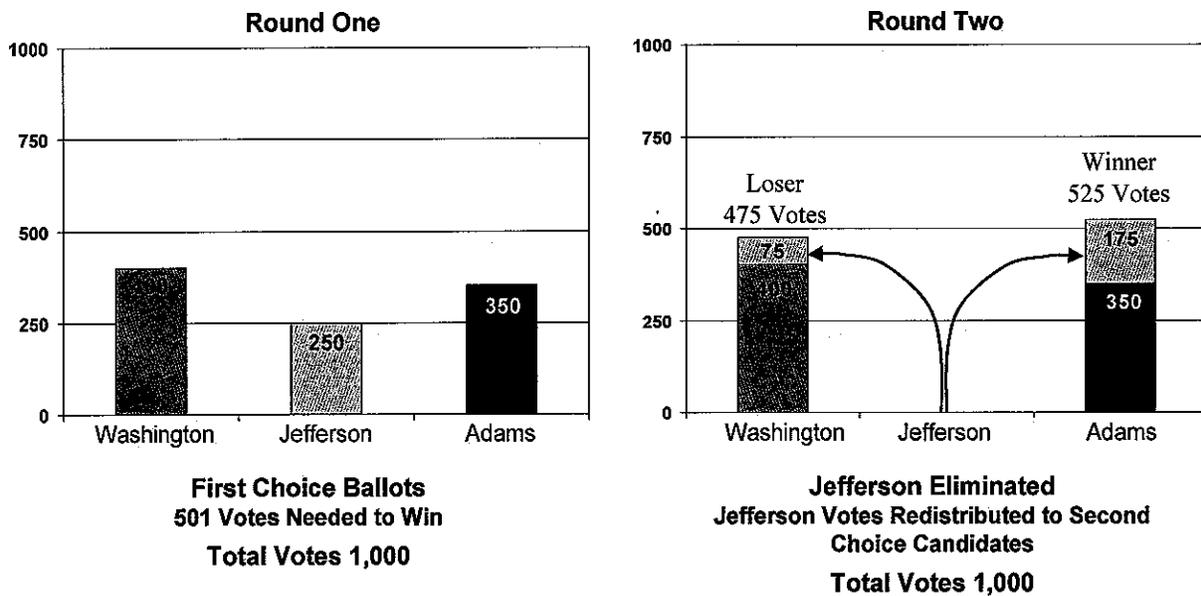
In a single seat election, such as for mayor, the threshold number is a majority of the votes cast. A candidate who receives a majority of first choice rankings in the first round is declared the winner, without the need for further election rounds. M.C.O. Ch. 167.60. (Respondents’ Appendix at 74).

If no candidate receives a majority of first choice rankings on the first round, the candidate who received the lowest number of first choice rankings is eliminated. Those who cast first choices for the eliminated candidate have their second choice rankings counted in the second round. For those voters whose candidate is continuing, their first choice ranking is still counted in the second round. In the second round, the election officials count the first choice rankings cast for the continuing candidates, along with the second choice rankings of the voters who voted for the eliminated candidate as their first choice. If no candidate reaches the threshold number – a majority – on the second round,

a third round is initiated, and subsequent rounds are initiated until a candidate reaches the threshold number of votes.

The single seat IRV system can be illustrated through the following example: If there were an election with three candidates, Washington, Jefferson and Adams, and 1,000 voters, the threshold number needed to win the election would be a simple majority of 501 votes. If Washington received 400 first choice rankings, Jefferson received 250 and Adams received 350, no candidate would win on the first round. The lowest vote-getter, Jefferson, would be eliminated and first choice voters for Jefferson would have their second choice rankings applied. If 175 of the Jefferson voters had ranked Adams as their second choice and 75 had ranked Washington as their second choice, Adams would be declared the winner of the election in the second round with a combined total of 525 votes (350 first choice rankings and 175 second choice rankings).

IRV Single Seat Election



A voter's ballot is only counted once per round. If a voter skips a ranking on his or her ballot for a particular round, the voter's ballot will not be counted in that round.⁷ See generally, M.C.O. Ch. 167.60 (Respondents' Appendix at 74).

In multiple-seat elections (i.e., those in which multiple candidates will win), such as those for the Board of Estimate and the Park Board, the process is basically the same. The only difference is that there is a provision for a proportional transfer of surplus "votes" for the first identified winner so that effect can still be given to the second choices of those voters in these multiple seat elections and the votes for the first winner in excess of the threshold needed to win are not "wasted." See M.C.O. ch. 167.70 (Respondents' Appendix at 75-77).

IRV is applied in multiple seat elections as follows: Assuming an election with two open positions and 10,000 voters, the threshold to be elected is 3,334 votes $[(10,000 \text{ votes} / (2 \text{ seats} + 1)) = 3,333 + 1 = 3,334]$. See Minneapolis City Ordinance 167.20. Assume further that there are four candidates who receive the following first choice rankings:

- Candidate A: 4,000

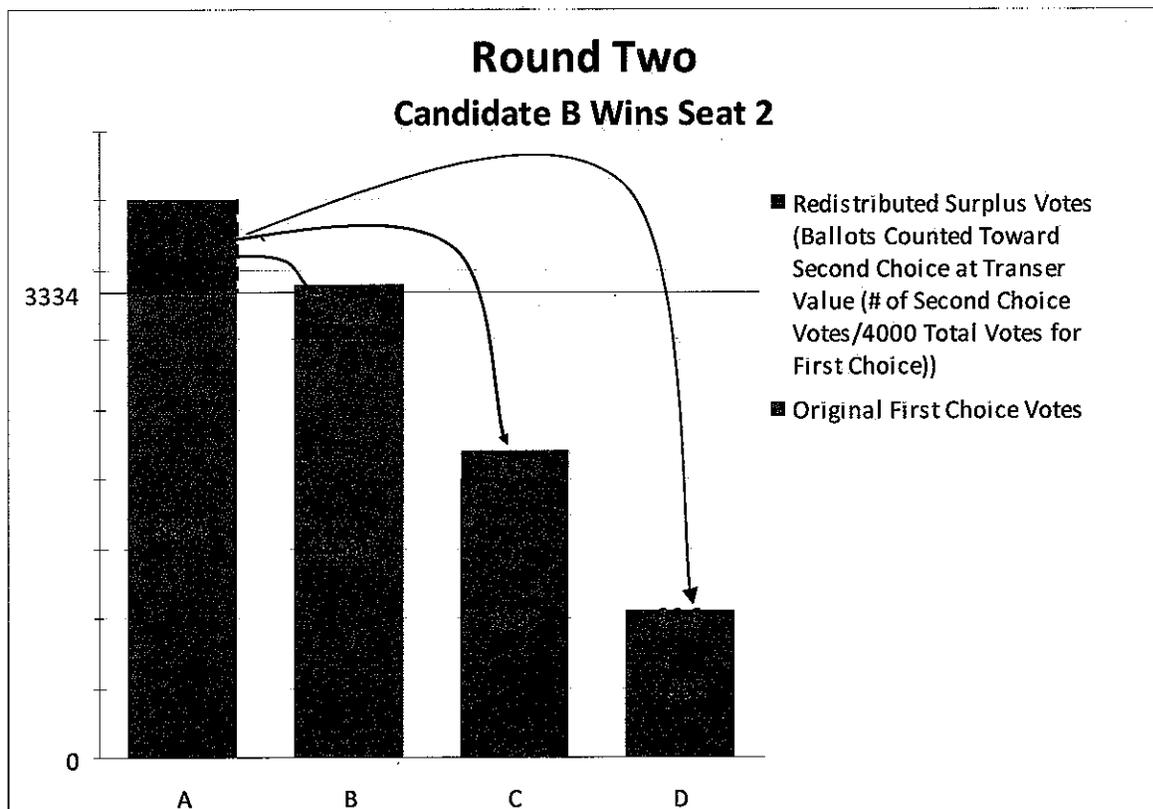
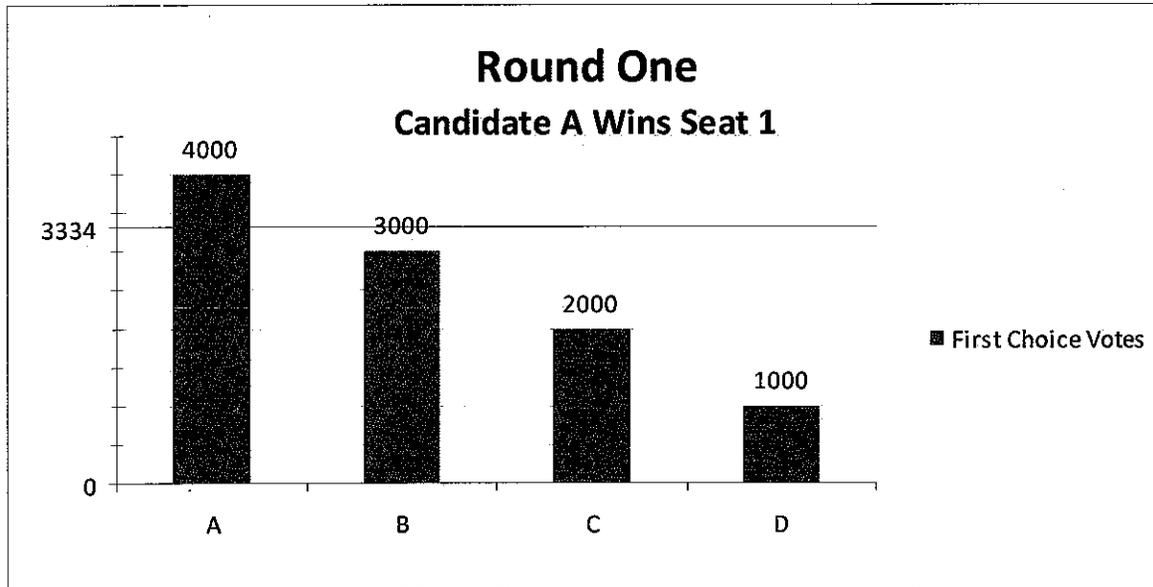
⁷ The Minneapolis IRV system provides great flexibility to voters in deciding whether to cast choice ballots or how many rankings they wish to include. A voter is allowed to cast a first choice for their favorite candidate and no subsequent choices. They also can skip one ranking and their ballot will not be spoiled. M.C.O. 167.60 (2); 167.70 (2) (Respondents' Appendix at 74, 77). Appellants argued before the District Court that IRV violated freedom of association because it required voters to cast choice ballots for candidates whose views were opposed by the voter. This is not the case. Voters retain complete control over the choices they make and are not required to cast anything but a first choice ranking. Appellants apparently concede this issue and have not raised it on this appeal.

- Candidate B: 3,000
- Candidate C: 2,000
- Candidate D: 1,000

If none of the candidates had reached the threshold of 3,334 votes, Candidate D would have been eliminated as the candidate with the fewest votes. Those votes would be redistributed in accordance with the IRV method described above. But here, Candidate A reached the threshold and therefore wins one of the two seats. Candidate A's surplus of 666 votes (the number of votes in excess of the threshold) are reallocated *pro rata* among the remaining candidates, based on the distribution of second choice rankings of the 4,000 voters who cast first choice rankings for Candidate A (based on the percentage who cast second choice rankings for B, C and D). If, for example, Candidate B received 2,400 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. After reallocation, Candidate B has 3,339.6 votes ($3000 + 399.6 = 3,339.6$); Candidate C has 2,199.8 ($2,000 + 199.8 = 2,199.8$); and Candidate D has 1066.6 ($1,000 + 66.6$). Candidate B has been elected.

This example can be illustrated in a chart as follows:

Multiple Seat Election – Two Seats to be Elected
Threshold Number of Votes Needed to Win: 3334



If, however, Candidate B had been named as the second choice on only 1,200 of Candidate A's ballots, he would have been allocated only 199.8 votes for a total of 3,199.8, 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 methods described above.⁸

STANDARD OF REVIEW

A. **Upon Appeal from a Summary Judgment, this Court Reviews Issues of Law *De Novo***

As the District Court noted, “[s]ummary judgment is not a disfavored procedural shortcut, but rather is an integral part of the Rules of Civil Procedure, which are designed to secure a just, speedy and inexpensive determination of every action. Order at 7 (Appellants’ Appendix at 20), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). This is particularly true where, as here, the parties have proceeded on cross-motions for summary judgment.

A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03; *Celotex Corp.*, 477 U.S. at 322.

⁸ This is the example the District Court included in its statement of undisputed facts. It mirrors the explanation of IRV provided by Appellants in their Memorandum in Support of their Motion for Summary Judgment. (Appellants’ Appendix at 83-86).

No genuine issue of material fact exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The burden of establishing that a genuine issue of material fact exists is on the party opposing the motion. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

When facts are undisputed and only questions of application of law remain, this Court reviews those questions of law *de novo*.⁹ See *Mutual Service Cas. Ins. Co. v. League of Minnesota Cities Ins. Trust*, 659 N.W.2d 755, 758 (Minn. 2003).

B. To Succeed on a Facial Challenge to the Constitutionality of a Municipal Charter Provision, Appellants Must Overcome the Legal Presumption that the Charter Provision is Constitutional and Must Establish that the Minneapolis Instant Runoff Voting System is Unconstitutional in All Possible Applications.

This case involves a facial challenge to a provision of the City of Minneapolis Charter. Charter provisions and municipal ordinances are entitled to a presumption of

⁹ Appellants argue that the District Court erred because it failed to consider all “material facts” in granting summary judgment in favor of the City. As evidence for this argument, Appellants cite the District Court’s statement that Appellants presented “no evidence” to support their claims for declaratory relief. See App. Brief at 23-24. Appellants, however, fail to quote the entire sentence from the District Court’s Memorandum, which states: “There is no evidence before the Court that any voter is more likely to incur this risk [non-monotonicity] than any other voter, or that the risk has unequal application.” Order at 19 (Appellants’ Appendix at 32) It is clear that the District Court, in its thorough and scholarly analysis of the issues raised in this case, considered all arguments put forward by Appellants, including the material on “monotonicity.” The District Court merely concluded, and properly so, that Appellants’ “claim that non-monotonicity equals unconstitutionality has no support in the law.” *Id.*

constitutionality and the burden on Appellants is to prove that the provisions are “unreasonable.” *State v. Perry*, 130 N.W.2d 343, 345 (1964). To prevail, Appellants must show that the ordinance “has no substantial relationship to public health, safety, morals, or general welfare.” *County of Freeborn v. Claussen*, 203 N.W.2d 323, 326 (1972) (citation omitted). Under established Minnesota jurisprudence, the Courts will not interfere with legislative discretion if there is evidence of reasonableness even if that evidence is “debatable.” *State v. Modern Box Makers, Inc.*, 13 N.W.2d 731, 734 (1944).

On a facial challenge to the constitutionality of a charter provision or ordinance, the burden on the challenger is even heavier. Appellants have the burden of not only overcoming the presumption of constitutionality, but of demonstrating that the provision is unconstitutional in **all** possible applications. *See Crawford v. Marion County Election Board*, 128 S.Ct. 1610, 1621 (2008). *See also Soohoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (stating that facial challenge to constitutionality of statute requires a showing that no set of circumstances exists under which the statute would be valid.).

Facial challenges are disfavored by the United States Supreme Court for strong policy reasons. *See Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1191 (2008). Facial claims often rest on speculation and thereby raise the risk of premature interpretation of statutes on the basis of slim factual records. *Id.* Perhaps most importantly, facial challenges “threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Id.* Minneapolis voters expressed a strong preference

for IRV by an almost two-to-one margin in the 2006 referendum, and that expression of “the will of the people” should not be overturned on the basis of mere speculation. *See id.* at 1193 (stating the fact that facial challenges are disfavored is “especially true” when voters themselves, rather than elected representatives, enacted provision in question). Appellants have not satisfied the requisite burden and the District Court was correct in granting the City’s motion for summary judgment.

C. Strict Scrutiny is not Applicable in this Case.

Appellants contend that strict scrutiny of IRV is warranted because it burdens voting rights and the right to vote is fundamental. *See App. Brief at 52-55.* As the District Court correctly noted, “not every law that imposes a burden on the right to vote is subject to strict scrutiny.” *See Order at 11 (citing Burdick v. Takushi, 504 U.S. 428, 433 (1992)). (Appellants’ Appendix at 24).* The degree of scrutiny of an election law rests upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights. *See Order at 9 (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)) (Appellants’ Appendix at 22).* A strict scrutiny standard of review is only appropriate if the burden on constitutional rights is found to be severe. *Id.* at 10 (citing *Norman v. Reed, 502 U.S. 279, 288-89 (1992) (Appellants’ Appendix at 23).*

The United States Supreme Court has recently addressed the specific issue of burden in the context of voting rights. *See generally Crawford v. Marion County Election Board, supra.* In that case, Indiana enacted a law requiring voters to present photo identification when voting. *See Crawford at 1613.* The Court acknowledged that such a

requirement did indeed impose a burden, but ultimately concluded that the burden was insufficient to warrant a facial attack on the statute. *Id.* at 1623. The *Crawford* decision makes absolutely clear that, even though the right to vote is a fundamental right, cases questioning the constitutionality of voting regulations are not automatically entitled to strict scrutiny, even if the regulation imposes a controversial burden like requiring voters to show a photo identification card as a precondition to being able to exercise their right to vote. *Id.*

This case presents no evidence of an unconstitutional burden on the fundamental right to vote, let alone a “severe” burden. Appellants in this case have presented the Court with nothing but speculation that the Minneapolis IRV system imposes any burden on freedom of association, equal protection or is inconsistent with court precedent discussing the principle of “one person, one vote.” This case presents no issues of invidious racial or other classifications or disparities. Appellants’ only equal protection argument is based on the highly contentious decision of the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000), which by its own express terms was limited in its scope and application only to that particular case. The District Court correctly distinguished this case from the Supreme Court’s concerns in *Bush v. Gore*: there is no evidence presented (nor could there be) that identical votes will be counted differently from each other under IRV.

Without evidence of a burden on voting rights, the lower court was correct in concluding that strict scrutiny is not applicable. Moreover, as explained in greater detail

below, Respondents are entitled to prevail in this case regardless of the level of scrutiny applied.

ARGUMENT

Appellants assert three issues on this appeal.¹⁰ First, Appellants claim that votes are weighted differently because a first choice of one voter may be counted in a round along with a second choice of another voter and that this violates constitutional principles of “one person, one vote.” Second, Appellants attempt to elevate a principle of mathematical theory, “monotonicity,” to constitutional status and argue that violation of this hypothetical principle renders IRV unconstitutional. Finally, Appellants claim that the IRV system for managing multiple seat elections violates the state and federal constitutions because the second choice ranking of the voters who have selected the first identified winner may be counted in subsequent rounds on a proportionate basis. Appellants, however, fail to demonstrate any infringement of fundamental voting rights.

Appellants try to paint a picture of the Minneapolis IRV system as a sinister Stalinesque system that promotes infidelity through suspicious transfers of votes contrary to a voter’s true wishes. IRV simply provides for – as its name implies – an efficient method of combining primaries and a general election by utilizing an instant runoff

¹⁰ In footnote 92 of their brief, Appellants contend that IRV conflicts with Minnesota’s election contest provision, Minn. Stat. § 209.02. App. Brief at 42. Appellants did not raise this issue in its Notice of Appeal. It cannot therefore be considered by this Court. Furthermore, as the City noted below, IRV does not conflict with the election contest provision; voters would be free to bring an election contest pursuant to Minnesota law to challenge any and all results under IRV. *See* Defendants’ Memorandum in Support of Motion for Summary Judgment at 26-27 (Respondents’ Appendix at 26-27).

methodology. The alleged flaws of IRV complained of by Appellants are common to any election methodology, including the traditional primary and general election “plurality” system favored by Appellants. While multiple seat elections are handled in a slightly different fashion for the purpose of tabulating votes, the multiple seat IRV methodology is nevertheless wholly consistent with the federal and state constitutions. The District Court was correct in its application of the undisputed facts to the law and this Court should affirm that decision.

I. INSTANT RUNOFF VOTING, WHICH ALLOWS VOTERS TO RANK THEIR CANDIDATE PREFERENCES ON A SINGLE BALLOT, DOES NOT IMPERMISSIBLY “WEIGHT” BALLOTS AS ALLEGED BY APPELLANTS; IS CONSTITUTIONAL UNDER THE STATE AND FEDERAL CONSTITUTIONS AND IS CONSISTENT WITH THE *BROWN V. SMALLWOOD* DECISION.

The first issue asserted by Appellants involves allegations that IRV results in differential “weighting” of choice rankings in violation of this Court’s precedent in *Brown v. Smallwood* and the constitution. Appellants’ arguments are based on confusion and do not address the reality of the Minneapolis IRV system. The system is different in all constitutionally significant respects from the system struck down in the *Brown v. Smallwood* case. IRV operates in rounds. No voter’s ballot is counted more than once per round nor weighted any differently from any other ballot. Moreover, to the extent Appellants are arguing that the *Brown* decision established some broader constitutional principle under the Minnesota constitution, striking down all possible ranked choice voting systems, such a broad reading is unwarranted and would be contrary to established jurisprudence relating to constitutional interpretation.

A. The Lower Court Correctly Held that IRV is Constitutional under the *Brown v. Smallwood* Decision.

There is only one provision in the Minnesota Constitution that directly references voting rights. The plain text of this provision simply states that “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 in that precinct.” Minn. Const. Art. VII, § 1. This provision addresses eligibility to vote. There are no provisions of the Minnesota Constitution that address the issue of voting methodology.¹¹

The lone Minnesota appellate decision addressing constitutional issues surrounding a preferential voting system is the 1915 decision of this Court in *Brown v. Smallwood*, 153 N.W. 953 (1915). In *Brown*, the Minnesota Supreme Court was asked to render judgment on the constitutionality of a preferential voting system known as the “Bucklin” system adopted by Duluth to elect municipal judges. 153 N.W. at 954. That system was described by the Court in *Brown* as follows:

All candidates go upon the official ballot by petition. The ballot provides for first choice, second choice and additional choice votes. If the result of the first choice is a majority for a candidate, he is elected. If a count of the

¹¹ It is instructive to note, by contrast, that other state constitutions such as the constitutions for Rhode Island, South Carolina and Florida do contain express requirements on methodology. *See, e.g.*, R.I. Const. Art. 4 § 2 (“Election by plurality. -- In all elections held by the people for state, city, town, ward or district officers, the person or candidate receiving the largest number of votes cast shall be declared elected.”); S.C. Const. Art. IV § 5 (“In the general election for Governor, the person having the highest number of votes shall be Governor.”); Fla. Const. art. VI § 1 (“General elections shall be determined by a plurality of votes cast.”). The absence of such restrictive language in the Minnesota Constitution is significant.

first choice votes brings no majority, the second choice votes are added to the first choice votes, and if a candidate then has a majority of the first and second choice votes, he is elected. If there is not a majority, the first and second choice votes are added to the additional choice votes, and the candidate having a plurality is elected. Each voter may vote as many additional choice votes as he chooses, less the first and second choice votes; that is, he may vote as many additional choice votes as there are candidates, less two. In this case, there were four candidates, each voter had two additional votes, or a total of four votes. No voter can vote more than one vote for any candidate. He is not required to vote a second choice or additional choices.

Brown at 955. Under the Bucklin system, if there was not a majority candidate after the first choice ballots were counted, second choices were added to the first choices so that multiple choices of a single voter would be counted in a single round to create an artificial majority. This aggregation of multiple choices of individual voters in a single round resulted in more “votes” being counted than the number of voters who cast ballots.¹² It is this aggregation of a voter’s choices, which causes a cascading of support for or against particular candidates, that was ruled unconstitutional by this Court in 1915. *See Brown* at 956.

The Bucklin system that the Court overturned in *Brown* is markedly different from the Minneapolis IRV mechanism. The Bucklin method does not simulate a series of runoffs, as does IRV. *See* Brian P. Marron, *One Person, One Vote, Several Elections? Instant Runoff Voting and the Constitution*, 28 Vt. L. Rev. 343, 366 (2004). In each of these rounds of IRV “every voter has one and only one vote.” 28 Vt. L. Rev. at 366; *See*

¹² In the election at issue in *Brown*, where 12,313 votes were cast, 18,860 votes were counted. 153 N.W. at 955.

also *Stephenson v. Ann Arbor Board of Canvassers*, No. 75-10166 AW (Mich. Cir. Ct. 1975) (Respondents' Appendix at 132).

One needs only look to the City's ordinance regarding IRV to understand the simple fact that ballots are ranked, and each ranking only counts once in each round of counting:

Ranked-choice voting means an election method in which voters rank candidates for an office in order of their preference and the ballots are counted in rounds that, in the case of a single-seat election, simulate a series of runoffs until one (1) candidate meets the threshold, or until two (2) candidates remain and the candidate with the greatest number of votes is declared elected. In the case of multiple-seat elections, a winning threshold is calculated, and votes, or fractions thereof, are distributed to candidates according to the preferences marked on each ballot as described in section 167.7 of this chapter.

M.C.O. 167.20 (Respondents' Appendix at 72-73) Appellants attempt to confuse the issue with overly complicated explanations of the process, but the process is clear on its face. The concerns of the court in *Brown*, whereby ranked choices of a single voter were aggregated in a single round, are not applicable here.

The differences between the Minneapolis IRV system and the system overturned in *Brown* can be demonstrated most easily through an illustration. The first chart shows how votes would be tallied under the Bucklin method overturned in *Brown*:

Candidate	1st Choice Ballots	2nd Choice Ballots	3rd Choice Ballots	Total Vote Tally under Bucklin Method
Washington	400	350	375	1125
Adams	350	375	350	1075
Jefferson	250	275	275	800
Total	1,000	1,000	1,000	3,000

Since none of the three candidates obtained a majority of first choice votes, the Bucklin system would require the second choice votes to be added to the first choice votes, with the result that Washington would have a “vote” total of 750 (400 + 350), Adams would have 725 “votes” (350 + 375) and Jefferson would have 525 “votes” (250 + 275). In this example, as in *Brown*, since none of the candidates has a majority of the first and second choices, third choices are added to the first and second choices. The winner is the candidate with a plurality of the votes. In the example, Washington would win with a plurality “vote” of 1,125 even though there were only 1,000 voters. The Court found the Bucklin system as adopted in Duluth unconstitutional because it resulted in the anomaly of counting more “votes” than there were voters in the election.

The Minneapolis IRV system functions much differently. In the example above, Washington won under the Bucklin system when third choices were added to the first and second choices of the voters. Under IRV, a voter’s ballot is only counted once per round. The ranked choices of a single voter are never aggregated. In the example, there was no

first round winner because none of the three candidates received a majority of the first choice votes cast (50% of votes cast + 1). In this case, IRV would require elimination of the candidate who received the lowest number of votes, which in our example is Jefferson. For those voters who chose Jefferson as their first choice, their first choice ballots would be eliminated and their second choice ballots would be counted. Of the 225 Jefferson voters, 75 cast second choice ballots for Washington and 175 cast second choice ballots for Adams. These second choice ballots would be counted along with the first choice votes for Washington and Adams as follows:

Candidate	Vote totals after elimination of Jefferson
Washington	400 + 75 (from Jefferson voters) = 475
Adams	350 + 175 (from Jefferson voters) = 525
Jefferson - eliminated	Votes for Jefferson are redistributed to the Jefferson voters' second choice candidates as set out above
Vote Total for Second Round	1,000

Under IRV, Adams would win in the second round with a total of 525 votes. The total votes counted in the second round is 1,000, the same as the number of voters. No ballot is counted more than once in any round. IRV preserves “a voting of *man* against *man*” and avoids the defects in the preferential voting scheme at issue in the *Brown* case.

Appellants argue for a very broad reading of the *Brown* decision. Appellants seem to argue that *Brown* bars all ranked choice systems and created a new standard for judging voting systems under the Minnesota constitution. By its own terms, however, the

decision cannot be read that broadly. As noted by the District Court, this Court stated in

Brown:

We have no quarrel with them [other preferential systems]. Our concern is with the constitutionality of the act before us and not with the goodness of other systems or with defects in our own.

Order at 21-22 (citing *Brown* at 957). (Appellants' Appendix at 34-35).

Finally, Appellants attempt to elevate the phrase in *Brown* of "voting man against man" as a standard under the Minnesota Constitution that is more restrictive than the federal constitution. Such an interpretation is contrary to established jurisprudence. This Court has indicated, on numerous occasions, that it will not "cavalierly" interpret a provision of the state constitution to afford different protections than the United States Constitution:

We have acknowledged that it is a significant undertaking to independently interpret a provision of our state constitution to allow greater protection of our citizens' rights, particularly when there exists a federal counterpart provision with identical or substantially similar language and there are Supreme Court precedents interpreting that language. *Gomez*, 542 N.W.2d at 30. We have repeatedly stated that we will not "cavalierly construe our state constitution more expansively than the United States Supreme Court has construed the federal constitution." *State v. Fuller*, 374 N.W.2d 722, 726-27 (Minn.1985); see also *State v. Carter*, 697 N.W.2d 199, 210 (Minn.2005); *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn.2004); *Wiegand*, 645 N.W.2d 125, 132 (Minn.2002); *Harris*, 590 N.W.2d at 98; *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn.1993); and *State v. Gray*, 413 N.W.2d 107, 111 (Minn.1987). Generally, we do not independently apply our state constitution absent language, concerns, and traditions unique to Minnesota. *Harris*, 590 N.W.2d at 97-98.

Kahn v. Griffin, 701 N.W.2d 815, 825 (Minn. 2005). The broad reading of *Brown* urged by Appellants is particularly inappropriate where, as here, there are no provisions in the

Minnesota Constitution suggesting such a limitation on alternative voting systems. As set out above, the only express requirements in the Minnesota Constitution is that voters be at least eighteen years of age and have been citizens for at least thirty days. *See above* at 22

IRV is consistent with this Court's precedent in the *Brown* decision. The District Court's decision is correct and should be upheld by this Court.

B. The Ranked Choice Methodology of IRV Preserves the Principle of "One Person, One Vote" and does not "Weight" Ballots Differently.

Appellants argue that IRV is unconstitutional because of the very essence of the system – that choices are counted in sequential rounds. Appellants allege that this somehow results in differential "weighting" of one voter's ballot against another depending on whether the voter has cast a choice for a candidate who will be eliminated in a round. Appellants' argument is based on a fundamental mischaracterization of the voting system. Appellants' attempts to distinguish the differences between a primary/general election system and IRV only serve to reaffirm the basic similarities.

Appellants' central complaint appears to be that under IRV a voter's first ranked choice for their favorite candidate is "exhausted" if that favored candidate is eliminated in a round.¹³ Under IRV, that voter's second ranked choice would be counted in the next

¹³ Appellants make clear in their brief that they are using the term "exhausted" in this context to mean just that a particular ranked choice (not a voter's whole ballot) is "exhausted" and the voter's next ranking is counted. *See* App. Brief at 36, fn. 81. The term "exhausted" as used in the Minneapolis Ordinance implementing IRV refers to those circumstances when a ballot is deemed "exhausted" and will not be considered in subsequent rounds. M.C.O. Section 167.20 (Respondents' Appendix at 71).

round. While this can and does happen under IRV, this is no different than what occurs in any primary/general election system. In a primary, a voter can cast his or her ballot for their favored candidate. This primary ballot is the same as casting a “first choice” in the first round of an IRV election. If that favored candidate does not garner enough votes in the primary to make it on the ballot in the general election, the voter has lost the opportunity to vote for that favored candidate and the voter’s “first choice” is “exhausted.” The voter in the general election will have to vote (if they choose to exercise this right) for their “second choice” candidate in the general election. This is exactly what happens in the second round of an IRV election, if a voter’s first choice candidate is eliminated because the candidate received the lowest number of votes. In the next round, the voter’s ranking for their “second choice” candidate is counted.

No rights of association or otherwise are put at risk because of the IRV system. The impacts complained of by Appellants are characteristics of all election systems. If you vote for a losing candidate, your vote can be said to be of less “weight” than the votes of those voting for the winning candidate. This is not unconstitutional. This is what happens in elections.

Appellants also complain that IRV allegedly allows voters to use choice rounds to “marshal votes against an opponent.” App. Brief at 37. The City notes once again that IRV does not allow the cascading effect of aggregation – adding together the choice rankings of a single voter that was invalidated in *Brown*. In any round, each voter has only one vote, “man against man.” While a voter’s first choice may be counted in the

same round as another voter's second choice, each voter's choice is counted once per round and is accorded the same weight as any other ballot. The counting is reset to zero for each round. There is no echo chamber effect or dilution or differential weighting of any ballot against another.

Appellants cannot demonstrate any situation where one voter's ballot is weighted differently from another voter's other than the fact – true in all elections – that a vote for a winner helps elect the winner, while a vote for a losing candidate can be said to have essentially no weight in the final outcome of an election. IRV is consistent with this Court's ruling in *Brown* and Appellant's arguments of impermissible "weighting" of votes are without merit.

C. IRV Does Not Violate Voter's Rights of Freedom of Association or Equal Protection and is Entitled to a Presumption of Constitutionality.

In addition to their arguments under *Brown*, Appellants allege violations of the rights of freedom of association and equal protection. Appellants again, however, fail to demonstrate how IRV violates either of these rights.

i. IRV does not Violate the Constitutional Right to Associate.

Without citing to any provision of the federal or state constitutions or apposite case law, Appellants assert that IRV violates the right to associate. App. Brief at 44-45. Appellants' analysis seems limited to their assertion that IRV is akin to "free love." *Id.* at 45. While intended as a retort to the District Court's opinion, Appellants' characterization of IRV highlights the fact that, instead of restricting freedom of association, IRV allows voters a greater opportunity to associate with the candidates they favor through sequential

choice votes. Voters can avoid the “wasted vote” dilemma used to convince voters to cast their ballot for a “least objectionable” candidate who may be more likely to win instead of voting for their favorite candidate, fearing that they are just helping their “most objectionable” candidate win. *See, e.g., McSweeney v. City of Cambridge*, 665 N.E.2d 11, 13 (Mass. 1996) (“An impetus for alternatives to winner-take-all systems is to remove the perceived unfairness of having the preferences of those voting for nonplurality candidates totally ignored. This is sometimes referred to as the problem of the “wasted” ballot, and the identification of this problem as a defect in eliciting the wishes of the voters goes back at least to 1861 and John Stuart Mill’s *Considerations on Representative Government*.”)

Appellants cite to no “freedom of association” voting cases in support of their argument. Typical freedom of association cases regulate rights to affiliate with political parties. An examination of those cases makes clear that the constitutional freedom to associate is not implicated here. *See, e.g., New York State Bd. Of Elections v. Lopez Torres*, 128 S.Ct. 791, 797 (2008) (holding that political party has First Amendment right to limit membership and choose a candidate-selection process that will produce nominee who best represents its political platform); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363, (1997) (holding that Minnesota law restricting minor party from “fusion” whereby minor party sought to list a major party candidate as its own candidate on the ballot as well did not restrict ability of minor party to endorse, support, or vote for anyone they wish); *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986) (stating that

voters are not denied freedom of association simply because they must channel expressive activity into a campaign at the primary in order to obtain enough votes to appear on the ballot in the general election); *Anderson v. Celebrezze*, 460 U.S. 780, 787-788 (1983) (stating that exclusion of minor-party candidates from ballot burdens voters' freedom of association because election campaign is platform for expression of views).

Notably, the Supreme Court looks with great disfavor on attempts to restrict candidate access to the ballot, thereby restricting a voter's associational choices. See *Anderson* at 781 ("A burden that falls unequally on independent candidates or on new or small political parties impinges, by its very nature, on associational choices protected by the First Amendment and discriminates against those candidates and voters whose political preferences lie outside the existing political parties."); *Illinois State Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (finding that the freedom to associate as a political party has "diminished practical value" if the party can be kept off the ballot and further finding that by limiting the choices available to voters, the State impairs the voters' ability to express their political wishes). Here, IRV expands the opportunity for new or small political parties to compete because of the elimination of primaries and the ranked choice voting system. See, e.g., Roberta A. Yard, *American Democracy and Minority Rule: How the United States Can Reform its Electoral Process to Ensure "One Person, One Vote"*, 42 Santa Clara L. Rev. 185, 217 (2001) (noting that instant runoff voting makes it easier for third party and independent candidates to get votes). Appellants argue that the constitution mandates a traditional election system with

a primary, while City voters have expressed a clear desire, via referendum, to allow minor political parties greater access to the ballot and allow voters to more fully express their desire to affiliate with multiple candidates. The City's IRV system does not violate the freedom of association.

ii. IRV does not violate the Equal Protection clause of the United States Constitution

Appellants' equal protection argument rests almost entirely upon the holding in *Bush v. Gore*, 531 U.S. 98 (2000). Appellants continue to ignore the Supreme Court's own caution in that case, where the Court explicitly stated that the holding of *Bush v. Gore* must be limited to that case, and that case alone: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." 531 U.S. at 109.

A review of decisions from the Eighth Circuit Court of Appeals and the Minnesota courts show that the courts in this jurisdiction have taken the Supreme Court's admonishment seriously. *Bush v. Gore* has been cited only once in the Eighth Circuit (for cases originating in Minnesota) and once by the Minnesota Supreme Court. See *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 866 (8th Cir. Minn. 2001) (relying upon *Bush* for the unrelated and uncontroversial proposition that the distribution of powers among the branches of a state's government raises no questions of federal law); *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 735 (Minn. 2003) (where it is only cited in Justice Page's concurring opinion).

Moreover, there are no violations of the equal protection clause in this case, even under a *Bush v. Gore* review. As the District Court correctly concluded, under IRV “[e]ach voter has an equal opportunity to rank candidates and have his or her rankings counted. No vote is given any greater weight than any other, and ...[Appellants] have presented no evidence that ballots are treated unevenly.” Order at 17-18 (Appellants’ Appendix at 30-31). The Supreme Court based its decision in *Bush v. Gore* on the fact that identical votes were counted in different ways with “standardless” determinations regarding voter intent. 531 U.S. 98, 106, 109 (2000). Here, the methodology provides one uniform set of procedures for counting votes and there cannot be any such challenge raised. See M.C.O. 167.50-167.80 (Respondents’ Appendix 74-77). While citing *Bush v. Gore* in election-related cases has become quite popular for litigants despite the United States Supreme Court’s admonition to the contrary, *Bush v. Gore* is not at all applicable to the case at hand.

Nor do Appellants’ arguments succeed when viewed through the lens of the more traditional “one person, one vote” principles set forth in cases such as *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), *Gray v. Sanders*, 372 U.S. 368 (1963) and *Reynolds v. Sims*, 377 U.S. 533 (1964). These landmark voting rights cases dealt specifically - and *only* - with redistricting and apportionment schemes that impermissibly favored white, rural voters over black urban voters. The Supreme Court found that such actions impermissibly diluted the voting strength of a minority group by drawing district lines that reduced the number of minority voters in the district. By their terms, those

(Professor, University of Pennsylvania) at ¶¶ 1, 15, 22 (Appellants' Appendix at 396, 398); *see also* Order at 10 (Appellants' Appendix at 23) ("The City has presented important interests in IRV, including that "IRV: 1) is less expensive because it requires voters to come to the polls only once; and 2) may lead to higher voter turnout." (citing Nagel Affidavit at ¶15)).

Appellants argue that the City has no legitimate interests in IRV because it does not have a developed record of reasons for adopting IRV. IRV was initiated by a petition and passed through a referendum, not a Council legislative process. A political subdivision would not have as developed a record from a referendum. This does not alter the result in this case, however. IRV is a reasonable action, aligned with legitimate public interests. Appellants have failed to overcome the presumption of constitutionality of the City's IRV charter provision.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE MATHEMATICAL THEORY OF "NON-MONOTONICITY" IS NOT A LEGAL CONCEPT AND HAS NO RELEVANCE TO ASSESSING THE CONSTITUTIONALITY OF IRV.

The second issue asserted by Appellants arises out of mathematical theory. The theoretical principle of "monotonicity" is not a legal concept and, while no doubt interesting to academicians, has no relevance to determining the constitutionality of IRV.

The principle of "monotonicity" is but one part of a theorem developed in the 1950s by mathematician Kenneth Arrow, known as "Arrow's Theorem." Arrow's Theorem involves a set of five norms or rules that Arrow postulated should be satisfied by a perfect voting system, but the Theorem concludes that **no** voting system can satisfy

all five of the norms or rules. All democratic voting systems in use around the world commonly violate one of these norms or rules, including “monotonicity.” See Austen-Smith Affidavit (Professor at Kellogg School of Management, Northwestern University) at ¶¶ 1, 9 (Appellants’ Appendix at 371); Nagel Affidavit at ¶¶ 2, 3 (Appellants’ Appendix at 394).

Arrow argued that there are five properties that are necessary for a sound democratic voting rule:

- 1) The rule should be applicable to all logically possible distributions of individual ballots.
- 2) The rule should respect any unanimous preference among the voters, for instance, if every individual ranks candidate x as strictly preferred to candidate y, then the rule itself should likewise declare x ranked strictly higher than y.
- 3) For any distribution of ballots and any three candidates, say x, y, and z, and if the rule determines that x is ranked higher than y, and that y is ranked higher than z, then it must also be consistent and declare x ranked higher than z – the “independence” rule – i.e., the outcome of an election should not change because there is a third candidate in the race.
- 4) The rule should not identify a given individual and invariably deliver as the outcome that particular individual’s reported preferences, irrespective of any other ballots or preferences – the non-dictator rule – i.e., elections should not be decided by the will of a single person or dictator.
- 5) When determining the relative ranking of any two candidates, the rule should use only the individual voters’ relative rankings of those two candidates; for instance, in determining whether x beats y in a contest involving candidates x, y and z, the rule should consider only the distribution of individual ballots over x and y – the “monotonicity” rule.

See Austen-Smith Affidavit at ¶ 11 (Appellants’ Appendix at 371). Arrow’s Theorem concludes that *no* voting system that involves three or more choosers and three or more alternatives can be both fair and logical. “This is true of virtually any group selection

procedure that one might devise.” Oona A. Hathaway, *Path Dependence in the Law: The Court and Pattern of Legal Change in a Common Law System*: 86 Iowa L. Rev. 601, 617 (citing Kenneth Arrow, *Social Choice*, at 22-32; 46-60).

Democratic voting systems will typically satisfy properties (1) and (2), above. See Austen-Smith Affidavit at ¶ 14 (Appellants’ Appendix at 373). By definition, all democratic voting systems satisfy property (4), also referred to as “nondictatorship” – that the preferences of one person won’t dictate the election outcome regardless of how votes are cast. *Id.* See also Grant M. Hayden, *The Limits of Social Choice Theory: A Defense of the Voting Rights Act*, 74 Tul. L. Rev. 87, 101. If democratic voting systems regularly satisfy three of Arrow’s properties – (1), (2), and (4), and no voting system can satisfy all five properties, then Arrow’s Impossibility Theorem dictates that democratic voting systems must violate either property (3), “independence,” or property (5), “monotonicity.” See Austen-Smith Affidavit at ¶ 14 (Appellants’ Appendix at 373); Nagel Affidavit at ¶ 3 (Appellants’ Appendix at 394). Indeed, any possible voting procedure where there are three or more candidates on the ballot – which includes traditional plurality elections and the City’s IRV methodology – will result in a violation of Arrow’s Impossibility Theorem. *Id.* at ¶ 13 (Appellants’ Appendix at 373); Hayden at 102. The only voting system that will satisfy properties (1), (2), (3), and (5) is a dictatorship whereby a single voter is given absolute power to determine election outcomes, regardless of how votes were cast in the election. See Austen-Smith Affidavit at ¶ 13 (Appellants’ Appendix at 373).

Appellants fail to note in their brief that all primary elections used to narrow the number of candidates on the final ballot, including the pre-IRV Minneapolis primary, fail the monotonicity test. *See Austen-Smith Affidavit at ¶¶ 4-5 (Appellants' Appendix at 367-368); Nagel Affidavit at ¶ 12 (Appellants' Appendix at 396).* Thus, if this Court is to credit Appellant's argument that the risk of a non-monotonic result violates the Constitution, the Court would have to find that decades of previous City elections were unconstitutional as well as any number of other primary systems. *See Nagel Affidavit at ¶14 (Appellants' Appendix at 396).*

Plurality general elections, like those currently conducted in Minnesota for statewide elections, fail the third norm of Arrow's Theorem – the “independence” norm, that the order of finish between two candidates can never be changed by the presence of a third candidate, thereby avoiding the risk of potential “spoiler” candidates. *See Nagel Affidavit at ¶¶ 5, 19 (Appellants' Appendix at 394, 397).* Appellants have provided no evidence why the hypothetical risk of failing the 5th norm of Arrow's Theorem, “monotonicity,” is any more significant to the constitutionality of IRV than failing the 3rd norm – “independence.” *See Jeffrey C. O'Neill, Everything that can be Counted does not Necessarily Count: The Right to Vote and the Choice of a Voting System, 2006 Mich. St. L. Rev. 327, 339.*

The risk posed by “non-monotonicity” is that voters can try to manipulate the outcome of an election, “gaming the system,” by casting votes for another candidate in an effort to help their favorite candidate. This risk is theoretical, however. Despite the

“non-monotonicity” of our current primary election systems, Appellants have presented no evidence of any actual problems being caused in elections by the risk of “non-monotonicity.” They have provided no examples of any challenges to the legitimacy of election results based on this theory. Moreover, there is nothing illegal about voters seeking to cast their ballot however they choose to try to help their favored candidate, excluding, of course, situations involving bribery and the like. To establish constitutional standards that prohibit votes for a “spoiler” candidate or anyone but the voter’s true favored candidate would violate the fundamental principles of a democratic election system and create unprecedented and wholly unacceptable government intrusion into voter privacy.

The hypotheticals set out in the affidavits and briefs are just that – hypotheticals developed by theoreticians. Anyone can construct a controlled hypothetical whereby numbers can be manipulated to show the possibility of a “non-monotonic” result in any election system that involves three or more candidates. *See, e.g., Austen-Smith Affidavit at ¶ 6 (Appellants’ Appendix at 369).* To create these “non-monotonic” results, however, the creator of the hypothetical needs perfect information on exactly how many voters will rank which candidates in which order. In a real election, with tens of thousands of voters, the same results cannot be reconstructed. No voter is going to have knowledge ahead of time about exactly how many voters are going to cast which ranked choices for which candidate. Only perfect information, constructed as a hypothetical, can result in the manipulated results that are included in Appellants’ brief. The risk of conscious

manipulation of the outcome under the “non-monotonicity” hypothetical has to be a virtual zero in a secret ballot election involving more than a few voters.¹⁴ All democratic voting systems bear some risk that one’s vote may cause a mathematical quirk that results in unintended consequences. The very risks that are of concern to Appellants are the identical risks that exist in traditional primary election systems. IRV does not pose any different or greater threat. *See* Nagel Affidavit at ¶14 (Appellants’ Appendix at 396).

Arrow’s Theorem is neither a legal concept nor a constitutional standard. There are no published court cases that mention monotonicity or Arrow’s Theorem. The District Court correctly concluded that “non-monotonicity” is for purposes of constitutional analysis a “nonissue.”

III. MULTIPLE-SEAT IRV ELECTIONS, IN WHICH SURPLUS FRACTIONS OF VOTES ARE TRANSFERRED TO ENSURE THAT EACH VOTER HAS AN EQUALLY EFFECTIVE VOTE, DO NOT VIOLATE ANY PROVISION OF THE UNITED STATES OR MINNESOTA CONSTITUTIONS.

Appellants’ final issue on appeal is that the City’s proposed mechanism for the multiple seat elections for the Park Board and the Board of Estimate and Taxation violates the constitution because voters who have helped select the first identified winner in a multiple seat race may have their second (or subsequent) choices counted, albeit proportionally, in subsequent rounds. Appellants allege that this gives the voters for the

¹⁴ It should also be noted that Professor Nagel opined in his Affidavit below that IRV is in fact superior to conventional plurality elections in being able to reduce the risk of “spoiler” candidates being able to influence election outcomes. Nagel Affidavit at ¶ 20 (Appellants’ Appendix at 398).

rankings for other remaining candidates are only counted at a fractional value, based on the percentage of surplus choices counted for the winner in excess of the threshold number needed to win.

At the same time Appellants argue that the votes of those who chose the first identified winner are given too much weight, they claim that they should be transferred at full value, not at a proportional or fractional value. As the District Court noted, however, “voters whose first choice won, having selected a winning candidate and having had their vote counted towards that candidate can hardly complain of a burden upon their right to associate.” Order at 15 (Appellants’ Appendix at 28). Transfers of fractional surplus “votes” serve a necessary purpose in the context of multiple seat elections. They ensure that the subsequent choice votes are evenly and fairly counted, without giving undue weight to the voters who cast their first choice ballots for the first identified winner, while also ensuring that the remaining seat is not chosen just by a minority of voters.

The multiple seat methodology does not violate freedom of association, equal protection or any other constitutional protection.

IV. CASES FROM OTHER JURISDICTIONS UPHOLDING THE CONSTITUTIONALITY OF ALTERNATIVE VOTING SYSTEMS ARE INSTRUCTIVE.

It is notable that instant runoff voting systems, similar to the Minneapolis IRV system, have been upheld by appellate courts in other states. *See, e.g., Stephenson v. Ann Arbor Board of Canvassers*, No. 7010166 AW (Mich. Cir. Ct. 1975) (holding that all voters possess the same right to vote in a preferential voting system; *State ex. rel. Sherrill*

v. Brown, 99 N.E.2d 779 (Ohio 1951) (stating that indicating votes by preference numbers is certainly permissible); *McSweeney v. City of Cambridge*, 665 N.E.3d 11, 13 (Mass. 1996) (confirming ongoing constitutionality of the city's preferential voting system, similar to IRV, and explaining benefits of the system). Appellants' claim that the District Court erred by making reference to these cases from other states in its Memorandum Opinion is wholly without merit.

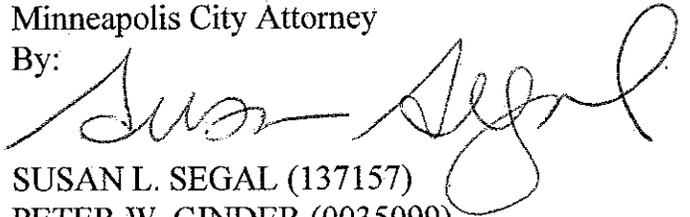
CONCLUSION

Respondents City of Minneapolis and Mayor R.T. Rybak respectfully request that this Court affirm the District Court's decision below, granting summary judgment in favor of Respondents and entering judgment against Appellants in this declaratory judgment action.

Dated: April 6, 2009

SUSAN L. SEGAL
Minneapolis City Attorney

By:



SUSAN L. SEGAL (137157)
PETER W. GINDER (0035099)
LISA M. NEEDHAM (0326999)
Assistant City Attorney
333 South 7th Street, Suite 300
Minneapolis, MN 55402-2453
(612) 673-2429

Attorneys for Respondents City of
Minneapolis and Mayor R.T. Rybak