

Appellate Case No. A09-182

STATE OF MINNESOTA
IN SUPREME COURT

Minnesota Voters Alliance, John Malone, Ronald D. Moey, Laura L. Morales,
Craig Bartless, 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,

and

FairVote Minnesota, Inc.

Intervenor-Respondent.

BRIEF OF INTERVENOR-RESPONDENT

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Statement of the Case

In 2007, Appellants commenced this action seeking a declaration that Minneapolis' new system of voting is unconstitutional. In 2008, FairVote Minnesota, Inc. ("FairVote"), a non-partisan, non-profit organization that advocates for progressive voting systems that lead to greater competitiveness, better representation, and more participation was permitted to intervene as a defendant (now respondent) pursuant to stipulation.

Statement of Facts

On Election Day in November 2006, the voters of the City of Minneapolis approved, by a 65%-35% vote, a charter amendment adopting the Instant Runoff Voting system ("IRV") for Minneapolis elections starting in 2009.

I. Instant Runoff Voting works by allowing voters to rank, in order of preference, multiple candidates on a single ballot.

Under Minneapolis IRV, each voter casts a ballot by ranking the candidates for a particular office in the order of the voter's preference (1, 2, 3, etc.). A candidate needs a "threshold" number of votes to win. "Threshold" is defined in City Ordinance 167.20:

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. Threshold (=) (Total Votes Cast) / (Seats to be elected + 1) + 1.

See also Mem. and Order on Mots. for Summ. J. (“District Court Order”), 4; App.

17. As set out below, the method of counting the votes under the Minneapolis IRV system differs somewhat depending on whether it is a single-seat election or a multiple-seat election, although the definition of “threshold” applies to both.

A. Minneapolis IRV in a single-seat election.

In a single-seat election (e.g., for the mayor), the threshold number of votes is a majority. City Ordinance 167.20; District Court Order, 5; App. 18. If a candidate receives a majority of the first-choice preferences, that candidate is elected. *Id.* If, however, no candidate receives a majority, then one or more rounds of “instant runoffs” occur. District Court Order, 5; App. 18.

In the first instant runoff (the second “round” of voting), the candidate who received the fewest first-place preferences is eliminated. *Id.* The voters who listed the eliminated candidate as their first-place preference have their second-place preferences counted in the second round. *Id.* The voters who listed one of the remaining candidates as their first-place preference have those preferences counted in the second round. *Id.* Thus, in the second round, election officials count the first-choice preferences for the remaining candidates, along with the second-choice preferences of the voters who listed the eliminated candidate as their first-choice preference. *Id.* If a candidate reaches the threshold number – i.e., a majority – then that candidate wins the election. *Id.* If no candidate reaches

the threshold number on the second round of voting, then a third round is initiated, with subsequent rounds initiated until a candidate reaches the threshold.

The following charts illustrate an example of how IRV works in a single-seat election with four candidates and a nine-voter electorate. The first chart shows how each voter ranked each of the four candidates.

**Instant Runoff Voting in a single-seat election
Voter's Candidate Rankings**

| | Candidate Smith | Candidate Jones | Candidate Baker | Candidate Carson |
|----------------|-----------------|-----------------|-----------------|------------------|
| Voter 1 | 3 | 2 | 4 | 1 |
| Voter 2 | 1 | 4 | 2 | 3 |
| Voter 3 | 4 | 3 | 2 | 1 |
| Voter 4 | 3 | 4 | 1 | 2 |
| Voter 5 | 4 | 3 | 1 | 2 |
| Voter 6 | 2 | 1 | 3 | 4 |
| Voter 7 | 1 | 2 | 3 | 4 |
| Voter 8 | 3 | 2 | 1 | 4 |
| Voter 9 | 4 | 3 | 1 | 2 |

With 9 voters, a majority would equal 5 votes. Since no candidate got a majority of first-place preferences in the initial round, the instant runoff process would take place as follows:

Instant Runoffs
(5 first-choice preferences needed to have a majority)

| | Round 1 | Round 2 | Round 3 |
|---------------|------------------------------|---|---|
| | No candidate has a majority. | Jones eliminated. Voter 6's 2 nd -choice preference goes to Smith. Still no majority winner. | Carson eliminated. Voter 3's 2 nd -choice preference goes to Baker. Voter 1's 3 rd -choice preference goes to Smith (because Jones was already eliminated). Baker wins a majority. |
| Smith | 2 | 3 | 4 |
| Jones | 1 | X | X |
| Baker | 4 | 4 | 5 |
| Carson | 2 | 2 | X |

After three rounds (two runoffs), Baker reaches the majority and is the winner.

B. Minneapolis IRV in a multiple-seat election.

For an election in which multiple candidates win (the Minneapolis Park Board and the Board of Estimate and Taxation), the vote counting process is a little more complicated; however, the voter again ranks the candidates by preference. *Id.* The same definition of "threshold" applies. *Id.* To explain how the Minneapolis IRV process works in a multiple seat election, let us take an example of four candidates (Smith, Jones, Baker, and Carson) who are running for two seats on a board with 10,000 voters casting ballots.

First, the threshold figure for victory is established. Under City Ordinance 167.20, the threshold is equal to: (Total Votes Cast) / (Seats to be elected + 1) + 1.

In the example of an election for two seats with 10,000 voters voting, the threshold to get elected is 3,334 votes ($10,000 \text{ votes} / (2 \text{ seats} + 1) = 3,333 + 1$). The ballots show the following distribution of first-choice preferences:

**Instant Runoff Voting in a multiple-seat election
2 seats, 4 candidates, 10,000 votes cast**

Voter's Candidate Rankings

| | Candidate Smith | Candidate Jones | Candidate Baker | Candidate Carson |
|--|--------------------|--------------------|--------------------|---------------------|
| 1st-choice preferences | 4,000 | 3,000 | 2,000 | 1,000 |

If no candidate had reached the 3,334-vote threshold, the candidate with the fewest first-choice preferences would have been eliminated, and the voters who listed that candidate as their first-choice preference would have their second-place preferences counted in accordance with the method used in a single-seat election. District Court Order 6, App. 19.

If, however, as shown in the above chart, Candidate Smith had a surplus of 666 first-choice preferences above the threshold, then Smith is a winner of one seat, and his 666 surplus first-choice preferences are reallocated among the remaining candidates. That reallocation is based on the percentage of second-choice preferences on all 4,000 of Smith's first-choice preferences. For instance, if Jones got 2,400 second-choice preferences on those 4,000 ballots (or 60%), Baker received 1,200 second-choice preferences (30%), and Carson received 400 second-choice preferences (10%), then the 666 surplus first-choice preferences would be

reallocated as follows: 399.6 preferences (60%) to Jones, 199.8 preferences (30%) to Baker, and 66.6 preferences (10%) to Carson.¹

Reallocation of Surplus First-Choice Preferences

| | Candidate Smith | Candidate Jones | Candidate Baker | Candidate Carson |
|--|-----------------|-------------------------|-------------------------|------------------------|
| 1st round results | 4,000 | 3,000 | 2,000 | 1,000 |
| 2nd round after reallocation | 3,334 | 3,000 + 399.6 = 3,399.6 | 2,000 + 199.8 = 2,199.8 | 1,000 + 66.6 = 1,066.6 |

In this example, after the allocation of Smith’s surplus votes, Jones surpasses the threshold and wins the second seat.

What would happen if, after the reallocation, Jones still had not reached the threshold? Say, for example, that Jones had been named as a second choice on only 1,200 of Smith’s first choice ballots. Then he would have been allocated only 199.8 votes, for a total of 3,199.8, less than the threshold. In that case, the candidate with the fewest first-choice and reallocated second-choice preferences would be dropped, and all of the preferences for that candidate would be reallocated using the same instant runoff method as used in a single-seat election.

¹ In effect, a percentage of each first-choice preference for Smith is reallocated to the remaining candidates. The percentage is determined by the formula: surplus/total votes cast for elected candidate, or, in this case, 666 surplus votes/4000 votes for Smith = 16.65%.

II. Legitimate policy reasons support Instant Runoff Voting.

A. IRV promotes the election of public officials with popular mandates.

Under the system that is used in most elections in Minnesota and the rest of the United States, elections are frequently won by a person who receives only a plurality, not a majority, of votes. See *Aff. of Nicole M. Moen in Supp. of FairVote Minnesota, Inc.’s Mot. for Summ. J. (“Moen Aff.”), Ex. B (Minneapolis should try voting by number, STAR TRIBUNE, October 9, 2006), FVM App. 9.* For instance, in Minnesota, Jesse Ventura won the governorship in 1998 with 37% of the vote, and Tim Pawlenty won with 44.2% in 2002 and 46.7% in 2006. Office holders elected under such circumstances are perceived as lacking a mandate from the electorate. By greatly increasing the probability that an election winner has the approval of a majority of the voters, the IRV method promotes the election of public officials who have received a clear mandate to lead. *Id.* at Ex. B, *FVM App. 9, Ex. C (Don Fraser, Citizens, ‘instant runoff’ is a better way to vote, STAR TRIBUNE, Sept. 23, 2006), FVM App. 11-12.*

B. IRV eliminates the role of “spoiler” candidates.

Under a plurality system, certain candidates will act as spoilers. While they have little chance of winning even a plurality on their own, their presence on the ballot sometimes leads to the election of candidates who are most opposed to their positions. For instance, Ralph Nader, by getting some 96,000 votes in

Florida in the 2000 Presidential election, arguably spoiled the election for Al Gore, who ended up losing that pivotal state by only 500 votes. Similarly, in 1992, Ross Perot may have spoiled the re-election of George H. W. Bush by getting 19% of the vote, while President Bush and Bill Clinton received 37% and 43% respectively. Regardless of who wins Minnesota's November 2008 United States Senate election, Dean Barkley will have played a spoiler role in that race. Indeed, sometimes candidates are encouraged to run in order to serve as spoilers. For instance, during John F. Kennedy's first congressional campaign, his campaign persuaded a man with the same name as one of his main opponents to run, so as to reduce the number of votes that opponent would receive.

In any plurality-wins election with more than two candidates, a voter who is inclined to vote for a third-party candidate runs a risk that, by voting for that third-party candidate, the voter is actually supporting the voter's least favorite candidate. The IRV method takes away that risk. *Id.* at Ex. B, FVM App. 9, Ex. F (*Better Ballot Campaign bring Instant Runoff Voting to Mpls Voters*, KINGFIELD NEWS, Fall 2006, at 2), FVM App. 17. If the voter's preferred candidate loses in an IRV election, then, unless another candidate wins a majority based solely on first choice votes, his or her vote will be reallocated to his or her second choice candidate. The IRV method thus ends the spoiler dynamic. The good-faith third

party candidates will not be spoilers (nor will they feel constrained from running lest they become spoilers), and the intentional spoiler candidates will not even bother to run.

C. IRV simplifies the election process, saves money, and increases voter turn-out.

The Minneapolis IRV method consolidates two elections – a nonpartisan primary and a general election – into a single general election. This reduces costs of elections both for the candidates and for the taxpayers. District Court Order, 10, App. 23; Moen Aff., Ex. B, FVM App. 9, Ex. D (Nancy Sartor, *Learn about Instant Runoff Voting, it'll be on November ballot*, NORTHEASTER, Aug. 23, 2006, at 5), FVM App. 13. Further, by consolidating these two elections, all candidates will be on the ballot for the general election when voter turnout is highest, which in turn will maximize voter participation in the selection of the winner. See Moen Aff., Ex. B, FVM App. 9, Ex. F, FVM App. 17. Indeed, the District Court found that, because IRV is less expensive than having both a primary and a general election and because IRV may lead to higher voter turnout, the “City has important interests in IRV.” District Court Order, 10, App. 23.

D. IRV helps ensure more diverse representation.

IRV promotes minority representation in multiple-seat elections. See Moen Aff., Ex. B, FVM App. 9, Ex. C, FVM App. 11-12, Ex. E (*IRV Voting would empower underrepresented communities*, LA PRENSA DE MINNESOTA, Oct. 14, 2006), FVM App.

14-16, Ex. F, FVM App. 17. If the election were for five seats on a board and 12,000 people voted, then the threshold for winning a seat would be 2,001 votes. Any minority voting block of more than 16.7% would be able to win a seat. Under the old system whereby all 12,000 voters were to vote for 5 candidates and the top 5 vote-getters would win, then a majority voting block of only 51% could win all five seats, while a minority voting block of as much as 49% could win none.

The role of surplus votes in multiple-seat IRV elections merits a quick explanation. In a multiple-seat non-IRV election where each voter may vote for as many candidates as there are open seats, the surplus vote system is not necessary. But then the minority representation advantage of an IRV election is lost. When voters have just one first place vote, a remarkably popular and talented candidate will get the lion's share of the first place votes. Without reallocating that candidate's surplus votes, there might not be enough other first place votes to get any of the other candidates to the winning threshold (and, if the threshold were not to apply, the resulting plurality winners might be candidates with very little support from the electorate).

E. IRV promotes civil election campaigns.

The IRV system discourages negative campaigning and promotes issue-based debates by providing an incentive for candidates to appeal to voters for second choice votes. *See id.* at Ex. B, FVM App. 10, Ex. C, FVM App. 11-12.

Argument

Appellants bring a facial constitutional challenge to Minneapolis IRV, contending that Minneapolis IRV impermissibly weighs or counts certain votes more than others and/or allows voters to cast multiple votes, and that IRV is subject to a hypothetical condition of “non-monotonicity.”

Appellants bear a “heavy burden of persuasion” on their facial challenge to the constitutionality of the Minneapolis IRV system. As set forth below, Appellants cannot meet that burden. Appellants’ repeated assertion that IRV allows voters to cast multiple and/or unequal votes is simply false. Under Minneapolis IRV, every person has one vote, every person has the same opportunity to list multiple ranked candidate preferences on a ballot, and every ballot is counted according to the same rules. Although IRV is potentially non-monotonic, the City of Minneapolis’s previous primary-general election system had the same potential for non-monotonicity. Non-monotonicity does not alter the fact that, under IRV, every person has one equal vote. Further, non-

monotonicity has never been shown to have any impact in a real-world IRV election.

Far from violating constitutional guarantees, IRV not only satisfies but also enhances the rights and freedoms protected by the United States Constitution and the Minnesota Constitution. Because Appellants have failed to meet their heavy burden of persuasion on a facial challenge to the constitutionality of Minneapolis IRV, the Court should deny the appeal and affirm the decision of the District Court.

I. Appellants bear a “heavy burden of persuasion” because they brought a facial challenge to the constitutionality of IRV.

Notwithstanding the considerable latitude that the Constitution grants to states for running their own state and municipal elections, Appellants brought a facial constitutional challenge to Minneapolis IRV.

As the District Court noted, facial challenges are disfavored for several reasons. District Court Order, 9, App. 22. A facial challenge that is based on events that have not yet happened – which is the situation here, as no IRV election has yet occurred in Minneapolis – raises the risk of “premature interpretation of statutes on the basis of factually barebones records.”

Washington State Grange v. Washington State Republican Party, 552 U.S. ___, 128 S. Ct. 1184, 1191 (2008) (citing *Sabri v. United States*, 541 U.S. 600, 609 (2004)). In addition, facial challenges “run contrary to the fundamental principle of judicial

restraint that courts should neither ‘anticipate a question of constitutional law in advance of the necessity of deciding it’ nor ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’ ” *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Finally, as the United States Supreme Court in *Washington State Grange* noted, 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.”

The United States Supreme Court in *Washington State Grange* cautioned that in deciding a facial constitutional challenge, courts “must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” *Id.* (internal quotations omitted) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)). That concern is especially relevant here because Minneapolis IRV was approved by the voters of Minneapolis in a referendum by a vote of 65%-35%.

Given these concerns, the United States Supreme Court has held that a “facial challenge must fail where the statute has a ‘plainly legitimate sweep.’” *Crawford v. Marion County Election Bd.*, 553 U.S. ___, 128 S. Ct. 1610, 1622 (2008) (quoting *Washington State Grange*, 128 S. Ct. at 1190 and *Washington v. Glucksberg*, 521 U.S. 702, 739-740, and n.7 (1997)). A party bringing a facial constitutional

accordingly bears a “heavy burden of persuasion.” *Crawford*, 128 S. Ct. at 1621 (2008) (denying facial attack on voter ID law) (citing *Washington State Grange*, 128 S. Ct. at 1191 (same)).

As explained below, Minneapolis IRV has a “plainly legitimate sweep,” and Appellants have failed to meet their “heavy burden of persuasion.” Accordingly, the Court should deny the appeal and affirm the District Court.

II. The Court should not apply strict scrutiny to IRV.

Appellants argue that the District Court should have applied strict scrutiny to IRV. Under *Anderson* and *Burdick*, strict scrutiny does not apply to all laws imposing a burden on the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). Voting regulations that impose only nonsevere, nondiscriminatory restrictions are reviewed under the “flexible standard” in *Anderson*. *Crawford*, 128 S. Ct. at 1616 n.8. Strict scrutiny is reserved for voting regulations that “severely restrict the right to vote.” *Id.* at 1624 (Scalia, J., concurring); *see also Burdick*, 504 U.S. 428, 433-34 (1992).

III. The District Court correctly determined that IRV weighs and counts all votes equally in accordance with the United States and Minnesota Constitutions.

Appellants’ facial constitutional challenge is based on their fundamentally erroneous claim that “voters cast multiple votes” under IRV. As the District Court correctly determined, under IRV, each voter has one vote, all voters have

equal opportunity to indicate ranked preferences for candidates on a single ballot, and all votes are counted according to the same set of rules. Accordingly, the Court should reject Appellants' facial challenge, deny the appeal, and affirm the District Court.

A. Courts uphold voting regulations when the regulation is supported by legitimate interests, imposes a limited burden on the right to vote, and applies to all voters.

When evaluating a constitutional challenge to an election regulation, a court weighs the asserted injury to the right to vote against the "precise interests put forward by the State as justifications for the burden imposed by its rule." *Crawford*, 128 S. Ct. at 1616 (2008) (internal quotations omitted) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Restrictions on the right to vote are unconstitutional if they "invidiously discriminate" among voters. *Id.* Even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down Virginia's poll tax); *see also Anderson*, 460 U.S. at 788 n.9.

In *Crawford*, the United States Supreme Court applied the standard from *Anderson* to a facial constitutional challenge to an Indiana statute that would require all voters to have photo identification. The United States Supreme Court noted that the statute was supported by several state interests, including

detering and detecting voter fraud, election modernization, and safeguarding voter confidence. *Crawford*, 128 S. Ct. at 1616.

The United States Supreme Court then analyzed the burdens resulting from Indiana's statute. *Id.* at 1620. It noted that, in contrast to the poll tax in *Harper*, the photo identification cards issued by Indiana were free. The United States Supreme Court in *Crawford* court concluded that, for most voters, the burdens imposed by Indiana's statute – the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph – would not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting. *Id.*

Finally, the United States Supreme Court in *Crawford* noted that the party bringing a facial challenge to a statute bears a very heavy burden of persuasion, and that, if a statute has a "plainly legitimate" sweep, the facial challenge must fail. Because the Indiana voter photo ID statute was supported by legitimate state interests, would not impose a substantial burden on the right to vote, and applied broadly to all voters, the facial challenge failed.

In *Burdick*, the United States Supreme Court also applied the same balancing test in upholding a Hawaii statute that banned write-in voting. *Burdick*, 504 U.S. at 441. In that case, the United States Supreme Court weighed the burden imposed by the statute on the right to vote against the State's asserted

interests as justification for the burden imposed by the statute. The United States Supreme Court noted that, if a statute imposes only “reasonable, nondiscriminatory restrictions” on the right to vote, the State’s important regulatory interests are generally sufficient to justify the restrictions. *Id.* at 434. Examining Hawaii’s statute, the United States Supreme Court in *Burdick* determined that the prohibition on write-in voting imposed only a very limited burden on the right to vote and that this burden was outweighed by Hawaii’s legitimate interests in avoiding the possibility of “unrestrained factionalism” at the general election and in guarding against “party raiding” during the primaries. *Id.* at 439.

B. Minneapolis IRV is constitutional because it is supported by legitimate interests, imposes no burden on the right to vote, and applies to all voters.

1. Minneapolis IRV is supported by legitimate interests.

Under *Anderson*, *Crawford* and *Burdick*, the Court should examine the City of Minneapolis’s interests in the IRV system. As the District Court noted, the voters of Minneapolis overwhelmingly supported IRV in a referendum, and the City of Minneapolis has an interest in supporting democracy. District Court Order, 10, App. 23; *see also Washington State Grange*, 128 S. Ct. at 1191 (rejecting facial challenge against voting law that had been approved by the voters, noting reluctance to “short circuit the democratic process”); *Johnson v. City of New York*, 9

N.E. 2d 30, 38 (N.Y. 1937) (affirming a proportional voting system that had been adopted by the voters, holding that courts “should be very slow in determining that the act is unconstitutional, until we can put our finger upon the very provisions of the Constitution which prohibits it.”).

IRV is also supported by many other legitimate policy interests. As set forth above, IRV promotes the election of public officials with popular mandates and is thus more consistent with the basic democratic principle of majority rule than the traditional plurality method of voting. See *Williams v. Rhodes Socialist Labor Party v. Rhodes*, 393 U.S. 23, 47 n.8 (1968) (Harlan, J., concurring) (“many constitutional electoral structures could be designed which would accommodate this valid state interest [majority] . . . the voter could be given the right, at the general election, to indicate both his first and his second choice for the Presidency – if no candidate received a majority of first-choice votes, the second-choice votes could then be considered.”). IRV also increases voter turn-out by combining the primary and general elections into one election. In addition, the IRV system will eliminate “spoiler” candidates, help ensure more diverse representation, and encourage civil election campaigns. These interests, similar to the state interests identified in *Crawford* and *Burdick*, are legitimate, non-discriminatory interests.

2. Minneapolis IRV imposes no burden on the right to vote.

The next step under *Anderson, Crawford and Burdick* is to examine the burdens imposed by the IRV method. Unlike the statutes at issue in those cases, however, the Minneapolis IRV method imposes *no* burden on the right to vote. It does not require voters to obtain an identification card. It does not prohibit write-in voting. It does not impose any costs or fees on voters. In fact, the IRV system eases current burdens on the right to vote by streamlining the primary-general voting process and giving full weight to every voter's preferences by eliminating the "spoiler" effect.

Appellants have failed to allege, and the record does not disclose, *any* burdensome requirements on voters, let alone any "excessively burdensome" requirements.

3. Minneapolis IRV applies equally to all voters.

The Minneapolis IRV system applies equally to all voters. As set forth above, each voter gets a single vote that has exactly the same weight as the vote of every other voter. Under IRV, every voter has an equal opportunity to list ranked candidate preferences on a single ballot. All IRV ballots, and the preferences indicated on the ballots, are counted according to the same rules. Additional ranked preferences on an IRV ballot do not constitute additional "votes," but rather serve as instructions on how the single vote should be

counted, depending on how the rounds of voting progress. By indicating multiple ranked preferences, the voter has essentially given her ballot “instructions” to maximize its effectiveness: “Support Candidate A, unless A has no chance of winning; then switch to Candidate B, as long as B still has a chance, etc.” No individual’s vote is weighted or diluted, although it may be divided into pieces or moved according to the voter’s instructions to maximize its effectiveness.

4. Many courts have found that Instant Runoff Voting systems meet constitutional requirements.

Courts in many states have upheld IRV methods and found that such systems pass constitutional scrutiny. *See, e.g., Stephenson v. Ann Arbor Board of Canvassers*, No. 75-10166 AW (Mich. Cir. Ct. 1975) (available at <http://www.fairvote.org/library/statutes/legal/irv.htm>), FVM App. 21-29; *Reutener v. City of Cleveland*, 144 N.E. 27, 33 (Ohio 1923); *State ex rel. Sherrill v. Brown*, 99 N.E. 2d 779 (Ohio 1951); *Moore v. Election Comm’rs of Cambridge*, 35 N.E. 2d 222 (Mass. 1941); *Campbell v. Bd. of Educ.*, 310 F. Supp 94 (E.D.N.Y. 1970); *McSweeney v. City of Cambridge*, 665 N.E. 2d 11, 15 (Mass. 1996); *Johnson v. City of New York*, 9 N.E. 2d 30, 38 (N.Y. 1937).

In *Stephenson*, the plaintiff challenged Ann Arbor’s preferential voting system as unconstitutional for violating the Equal Protection provisions of the United States and Michigan Constitutions. *Stephenson*, No. 75-10166 AW. The

Michigan Circuit Court held that Ann Arbor's system did not violate the Equal Protection Clause because there was "no classification or suspect classification" of voters. *Id.* at 7. In addition, the court rejected the claim that voters were treated unequally because some voters' second choices were counted while others were not, noting that "[s]uch a voter does not have his vote counted twice – it counts only once, and if that first preference no longer remains and is eliminated from consideration, his or her second preference is the 'counted' vote." *Id.* at 5. Finally, the court determined that Ann Arbor's IRV method did not infringe on any voter's fundamental rights:

All voters possess the same right to vote, to list numerical preferences and are subject to the same possibility of having their first preference eliminated and second or third, etc., preference then counted in order to achieve the election of their Mayor by a majority of the total countable votes cast in the election.

Id. at 7.

Similarly, in *Reutener*, the Ohio Supreme Court upheld an IRV system for multiple seat elections. *Reutener*, 144 N.E. 27. The plaintiff claimed that, because he could not vote for as many candidates under the IRV system in a multiple election race as there were seats to be filled, he was denied his right under the Ohio Constitution to "vote at all elections." *Id.* at 29, 32. The court disagreed, holding that the voter was "entitled to vote at every municipal election, even though his vote may be effective in the election of fewer than the full number of

candidates, and he has exactly the same voting power and right as every other elector.” *Id.* at 33.

C. Appellants’ arguments in support of their constitutional challenge lack merit.

Appellants argue that Minneapolis IRV violates the constitutional right to equal protection, the right to vote, the right to political association, and one person, one vote jurisprudence. Appellants’ arguments are based on incorrect factual assertions and misapplication of law. Their arguments lack merit and, accordingly, the Court should deny their appeal.

1. Minneapolis IRV does not violate equal protection.

Citing *Bush v. Gore*, 531 U.S. 109 (2000) and *Reynolds v. Sims*, 377 U.S. 533 (1964), Appellants argue that the Minneapolis IRV system violates equal protection. Appellants contend that Minneapolis IRV treats voters differently because some voters have only their first-choice preference counted, while other voters have their “second or third ranked choices counted again.” Appellants’ Br., 48. Appellants also assert that Minneapolis IRV in multiple-seat elections violates equal protection because fractionalized surplus votes are “counted twice.” Appellants’ Br., 50.

Appellants’ assertions that certain voters have their “second or third ranked choices counted again” or that “all winning candidate voters have their votes counted again” are false and have no support in the record. To the

contrary, in IRV, every voter has only one vote. No voter ever has any candidate preference counted more than once. As set forth above, in a single-seat election, a voter's second-choice preference is counted only if there is a second round of voting and that voter's first-choice candidate preference was eliminated after the first round. The voter's first-choice preference and second-choice preference are never both counted or added together.

In a multiple-seat election, each voter still has only one whole vote that is counted one time. If an election proceeds in multiple rounds with surplus votes, then the surplus votes are not "counted twice," rather, they are cut into fractions and reallocated proportionally. Quite the opposite of counting votes again, fractionalizing surplus votes in a multiple-seat election simply ensures that all votes are fully counted once.

Bush and *Reynolds* do not support Appellants' arguments. As the District Court noted, the holding in *Bush* is limited to that case alone. District Court Order 17, App. 30 (citing *Bush*, 531 at 109). Moreover, even if *Bush* were not limited to that case, it would not apply here, because the concern in *Bush* was that ballots were not being counted under the same set of rules. Here, in contrast, all votes would be counted according to the same set of rules.

In *Reynolds*, the United States Supreme Court struck down plans for apportionment of seats in the Alabama Legislature under the Equal Protection

Clause because the apportionment was not on a population basis and was “completely lacking in rationality.” *Reynolds*, 377 U.S. at 568. *Reynolds* did not address an election system such as IRV and, moreover, there is no evidence that IRV is “completely lacking in rationality.” Minneapolis IRV was adopted by the voters in a referendum and is supported by many legitimate policy reasons.

2. Minneapolis IRV does not contravene the “one person, one vote” jurisprudence.

Appellants contend that, under the Supreme Court’s “one person, one vote” jurisprudence, the IRV system is unconstitutional. This argument fails. As an initial matter, under IRV, each voter has one and only vote. Because all voters have one vote, IRV does not contravene the principle of “one person, one vote.”

In addition, the “one person, one vote” jurisprudence does not impose a limit on the number of votes that may be allocated in an election system, but simply requires that each person has equal voting power. As long as each person has equal voting power, the formal number of votes cast irrelevant. See Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 282 (1995) (“[A]s long as each person has equal voting power, the formal number of votes cast is irrelevant to the equal-protection concerns embodied in the one person, one vote doctrine.”). No court has ever held that all elections must be conducted by voters casting only one vote for one candidate for one office.

3. Minneapolis IRV does not infringe the right to associate because voters retain the freedom to associate with the candidate(s) of their choice.

Appellants assert that the Minneapolis IRV system would violate voters' right to freedom of association by forcing them to list preferences for more than one candidate on a ballot. Appellants' Br., 45.

These assertions are based on an incorrect factual premise. The Minneapolis IRV system does *not* compel voters to list any more candidate preferences on a ballot than they wish. Rather, the Minneapolis IRV system allows voters to affiliate themselves with as many or as few candidates as they wish. Indeed, the voter is free to list no preference at all and leave some or the entire ballot blank.

Because IRV does not require a voter to list any more preferences on the ballot than the voter wants to list, IRV does not infringe the right to association.

4. *Brown* does not compel a different result.

Appellants claim that Minneapolis IRV is unconstitutional under *Brown v. Smallwood*, 153 N.W. 953 (Minn. 1915). The Court in *Brown*, however, addressed the constitutionality not of IRV, but rather of an election system that allowed certain voters to manipulate the outcome. Because every voter under Minneapolis IRV has one vote and because all ballots are counted according to the same set of rules, *Brown* is not applicable to this case.

In *Brown*, the Court examined a preferential voting system that the City of Duluth had adopted and used for a municipal judge election. Under Duluth's voting system in that case, the ballot had three columns to the right of the candidates' names. The first column was labeled "First Choice," and the voter, who was instructed on the ballot to "vote for only one first choice," was to "mark a (x)" in that column next to the candidate who was the voter's first choice. The second column was labeled "Second Choice," and the voter, who was also instructed on the ballot to "vote for only one second choice," could write a mark in that column next to the candidate who was the voter's second choice. The third column was labeled "Additional Choices" and could be checked next to the candidate who was the voter's third or subsequent choice. *Id.* at 955. No voter could vote more than one vote for any one candidate; and the voter was not required to vote a second choice or additional choice. *Id.* at 955.

Under Duluth's system, if the result of the first choice were a majority for one candidate, that candidate would be elected. *Id.* In the absence of a first-choice majority, all of the second choice votes were added to the first choice votes and counted with equal weight. If a candidate then had a majority of the first and second choice votes, that candidate would be elected. If that did not produce a majority, then all of the "additional choice" votes would be added to the first and second choice votes and weighted equally. The winner would then

be the candidate with the resulting plurality (regardless of whether the plurality was also the majority).

In the 1915 Duluth municipal election, four candidates, Windom, Smallwood, Louisell, and Norton, ran for municipal judge. *Id.* Using the ballots described above, 12,313 voters made first choice votes; 5,684 of them made second choice votes; and only 863 made any additional votes. *Id.* When the first choice votes were tallied, Windom led with nearly 36% of the votes cast, Smallwood was second with 29%, Norton was third with 28%, and Louisell had just under 8%. *Id.* Adding the second choice votes and, eventually, the additional choice votes, failed to produce a majority winner. But with the additional votes, Smallwood had the plurality of votes (35%) when compared to Norton and Windom (each with just under 28%), and to Louisell (just over 11%). *Id.* Having attained a plurality with all ballots counted, Smallwood was declared the winner. As the *Brown* Court noted, 12,313 people voted in the election, but 18,860 votes were counted in the final tally. *Id.* at 956.

A Duluth voter named Brown contested the election; on appeal, the Court held that the system violated the Minnesota Constitution. Notably, the Court did not hold that all preferential voting systems were unconstitutional. *Id.* at 957 (the court “had no quarrel” with preferential voting systems generally). Rather, the Court found that the Duluth system was unconstitutional because it allowed

certain voters to “manipulate” the election process. *Id.* at 956, 959. A voter who indicated first, second, and additional choices would have more votes counted in the election than a voter who indicated only a first choice. *Id.* This also meant that a voter’s second and subsequent choices would necessarily be used to weaken the standing of the voter’s own first choice candidate. *Id.* at 956 (noting that “with four candidates one elector could vote for the candidate of his choice, and another elector could vote for three candidates against him”).

Brown is distinguishable from this case. The voting method in *Brown* is different from the Minneapolis IRV method. Under Duluth’s system, some voters cast multiple votes. Thus, when no majority winner appeared after the first round in *Brown*, the second-choice votes were added to the count with the same weight as first-choice votes. Any voter who had not included a second choice on the ballot had his voting strength diluted by 50% compared to the voters who selected both first and second choice choices. This also led to the anomalous result that although some 12,000 people voted in the election, over 18,000 votes were counted.

In contrast to the voting method in *Brown*, the Minneapolis IRV method does not allow some voters to manipulate the election by casting more votes than others. Under the Minneapolis IRV method, each voter’s vote is counted once – and only once – in an election. A voter’s second (or subsequent) choice is

counted only when a voter's first choice candidate has become unviable. Thus, no person's vote is ever diminished relative to another person's vote. Further, in any election using the Minneapolis IRV method, the total number of votes cast will never be more than the number of persons voting. Because the Minneapolis IRV system ensures that no voter can manipulate the election and that each person who casts a vote has one vote counted, the Minneapolis IRV system complies with constitutional requirements.

Since *Brown* was decided in 1915, the Minnesota constitutional provision at issue has changed, instant runoff voting became technologically feasible, and courts have had over ninety years to develop voting rights jurisprudence. Moreover, the Court has made clear that the purpose of an election in Minnesota is to "ascertain the will of the electorate." *Wichelmann v. City of Glencoe*, 273 N.W. 638, 639 (Minn. 1937). In addition, the Court has held that election laws are to be "construed as to ensure rather than defeat, full exercise [of the election franchise] when and wherever possible." *Flakne v. Erickson*, 6 N.W.2d 40, 42 (Minn. 1942).

The principles in *Wichelmann* and *Flakne* support Minneapolis IRV. As set forth above, IRV does a better job of "ascertain[ing] the will of the electorate" by eliminating spoiler candidates and promoting the election of candidates with popular mandates than the City of Minneapolis's previous primary-general election system. IRV also promotes the "full exercise" of the franchise by

increasing voter turn-out and by giving all voters the opportunity to list multiple ranked preferences on a single ballot.

Notwithstanding Appellants' repeated assertions that, under Minneapolis IRV, certain votes would be weighed or counted differently or that certain voters would cast multiple votes, those assertions are simply wrong. In the Minneapolis IRV system, every voter has one vote. Every voter has the same opportunity to list multiple ranked candidate preferences on a single ballot. Those preferences are counted according to the same rules. Appellants offer no evidence to contradict those facts.

Appellants brought a facial constitutional challenge to Minneapolis IRV and, as such, the "heavy burden of persuasion" rests on them. The United States Supreme Court has held that election laws that have a "plainly legitimate sweep" must be sustained against a facial challenge. Minneapolis IRV has a plainly legitimate sweep, and Appellants have failed to meet their burden. Accordingly, the Court should deny their appeal and affirm the District Court.

IV. The District Court correctly determined that the potential non-monotonicity of Minneapolis IRV does not render IRV unconstitutional.

Appellants argue that IRV is unconstitutional because it is potentially non-monotonic. As the District Court correctly determined, however, the City of Minneapolis's previous primary-general election system was also potentially

non-monotonic. The fact that Minneapolis IRV is potentially non-monotonic does not mean that votes are weighed or counted unequally. Similarly, to the extent Minneapolis IRV is non-monotonic, that condition applies equally to all voters. IRV has never been shown to have any impact on a real-world IRV election (in contrast, people regularly try to take advantage of the non-monotonic aspects of non-IRV two-stage elections). Non-monotonicity does not render Minneapolis IRV unconstitutional on a facial challenge, and accordingly, the Court should deny the appeal and affirm the District Court.

A. All voting systems have logical defects.

In a famous book that led to his winning the Nobel Prize in Economics, Kenneth Arrow proved that every voting system fails to satisfy, under certain circumstances, at least one out of a small set of specified logical conditions, each one of which by itself would seem to most people to be a standard that would be desirable for any democracy to satisfy. *Aff. of Jack H. Nagel in Supp. of FairVote Minnesota, Inc.’s Mot. for Summ. J. (“Nagel Aff.”), ¶ 2, App. 394.* This proof, known as “Arrow’s Theorem,” shows that there is no “perfect” voting system. *Id.*

“Monotonicity” is one condition from Arrow’s list. *Id.* at ¶ 3, App. 394. A system is “monotonic” if a candidate can never be hurt by receiving more votes.

Id. at ¶ 4, App. 394. In a non-monotonic system, it is theoretically possible for a candidate to do better by receiving fewer votes. *Id.*

Another condition from Arrow's list is "independence of irrelevant alternatives." *Id.* at ¶ 3, App. 394. A system is "independent of irrelevant alternatives" if the order of finish between two candidates, A and B, can never be changed by the presence (or entry) of a third candidate, C. *Id.* at ¶ 5, App. 394. A voting system that does not satisfy the independence condition can be affected by "spoilers." *Id.* For example, it is widely accepted that Al Gore would have defeated George W. Bush for President in 2000 if Ralph Nader had not been on the ballot in Florida. *Id.*

Voting systems actually used in governmental elections around the world commonly violate the conditions of monotonicity or independence of irrelevant alternatives or both. *Id.* at ¶ 3, App. 394.

B. All voting systems are vulnerable to manipulation.

The main practical importance of an electoral system's failure to meet any one of Arrow's conditions is that this makes it possible to "manipulate" outcomes. *Id.* at ¶ 6, App. 395. One form of manipulation is influencing the choices presented to the voters – e.g., by encouraging or discouraging the entry of additional candidates who might serve as spoilers. *Id.* at ¶ 7, App. 395. Another type of manipulation is voting strategically, which means that some

electors vote contrary to their true preferences. For example, a strategic voter might vote for the “lesser evil” rather than “wasting” a vote on a third-party candidate. *Id.* at ¶ 8, App. 395.

When there are three or more candidates and a single winner is to be chosen, every voting system is vulnerable under some circumstances to manipulation through strategic voting (“the Gibbard-Satterthwaite Theorem”). *Id.* at ¶ 9, App. 395.

C. Because no voting system is perfect, decisions about a voting system should be made by comparing its advantages and disadvantages to those of realistic alternatives.

As proved by the Arrow and Gibbard-Satterthwaite Theorems, no voting system is perfect. *Id.* at ¶¶ 2, 9, App. 394, 395. All voting systems violate at least one of Arrow’s conditions, and all voting systems are potentially vulnerable to manipulation. *Id.* Therefore, the mere fact that a voting system fails to meet one of Arrow’s conditions or could be vulnerable to manipulation cannot serve as a reason for rejecting that voting system. *Id.* at ¶ 10, App. 396. Rather, any policy decisions regarding the kind of voting system to use should be based on comparisons between realistic alternative voting systems. *Id.* at ¶ 11, App. 396.

D. Both the City of Minneapolis’s previous voting system and IRV are potentially non-monotonic.

Appellants argue that the Minneapolis IRV system is unconstitutional because it is non-monotonic. Appellants attempt to distinguish Minneapolis IRV

from the previous primary-general election by noting that each election, by itself, would be non-monotonic. Appellants do not dispute, however, that the condition of non-monotonicity applies equally to Minneapolis's previous primary-general election system as a whole. As the District Court correctly determined, both the challenged IRV system and the City's previous system were non-monotonic:

Every reasonable voting rule suffers from this problem [non-monotonicity] when there are at least three different candidates for office. Moreover, the same non-monotonicity was true of the previous primary election system of Minneapolis. Under that system, the primary election was, in effect, the first round of IRV.

District Court Order, 19, App. 32. All multi-stage voting systems that involve elimination of candidates before the final stage – including both IRV and the City's two-round primary-general election system – are potentially non-monotonic. Nagel Aff., ¶ 12, App. 396.

Election systems that combine both a primary and a general election are potentially non-monotonic because candidates are eliminated at the primary stage. Nagel Aff., ¶ 14, App. 396. This possibility arises if the shift of some early-stage votes from candidate A to a weak opponent C would enable C to get into the final round ahead of a stronger candidate B, who would otherwise defeat A at the final stage. *Id.* at ¶ 12, App. 396.

Non-monotonicity in two-round systems makes those systems vulnerable to manipulation. *Id.* at ¶ 18, App. 397. For instance, the potential for manipulation was revealed in the 2008 presidential primaries, when some commentators urged Republicans to cross over to the Democratic primary (thus reducing the votes cast for their favorite Republicans) in order to vote for the Democratic candidate they thought would be easier to beat in the general election. *Id.* IRV, however, is less prone to non-monotonic dynamics than traditional two-election runoffs, because tactical voters cannot change their votes between rounds.

Because both systems are non-monotonic, the possibility of non-monotonicity under IRV cannot be a reason to favor Minneapolis's previous two-round voting system over the IRV system chosen by the voters.

E. In real-world IRV elections, non-monotonicity is a non-issue.

Although the potential non-monotonicity of IRV sets up the possibility of manipulation by strategic voting, such manipulation does not occur in actual IRV elections. Successful manipulation would require the ability to satisfy several difficult requirements. *Id.* at ¶ 21, App. 398. For example, assume an IRV election with only three candidates: A, B, and C. If the manipulation is to divert first-preference votes from A to C, so that C rather than the tougher B will be A's opponent in the final round, then the manipulators must divert enough votes to

put C ahead of B without also diverting so many that A will fall behind both opponents. *Id.* They must find a way to organize A's supporters into two groups—those who will vote strategically and those who will not. *Id.* They must also count on most of B's supporters to give their second preferences to A, even if word leaks out about the attempted manipulation. *Id.*

The difficulty of satisfying these and other requirements means that such manipulation will rarely, if ever, succeed in a large-scale IRV election. *Id.* That difficulty explains why, even though IRV voting has occurred in the United States and overseas for one hundred years, Appellants have failed to cite a single instance in which such manipulation has even been attempted, much less been successful. It simply does not happen.

As the District Court concluded, “[Appellants] have not cited, and the Court has not found, a single case in any jurisdiction in which a voting system of any kind was ever challenged – let alone invalidated – because the system was non-monotonic.” District Court Order, 19, App. 32. The concern about non-monotonicity is strictly academic. *See id.* In real-world IRV elections, non-monotonicity is a non-issue.

Minneapolis IRV – like the City of Minneapolis's previous election system – is potentially non-monotonic. Non-monotonicity, however does not change the facts that under IRV, every voter has one vote, every voter has the equal

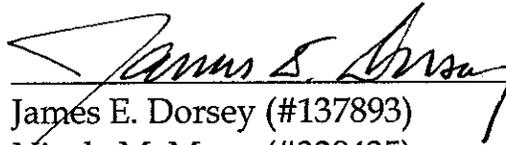
opportunity to indicate ranked candidate preferences on a ballot, and all votes are counted according to the same rules. The condition of non-monotonicity has never been shown to have any impact on a real-world instant runoff voting election. Further, both the City of Minneapolis's previous primary-general election system and IRV have the same potential for non-monotonicity. Thus, the non-monotonicity of Minneapolis IRV does not violate the United States Constitution or the Minnesota Constitution. Appellants have failed to meet their "heavy burden of persuasion" on a facial challenge to Minneapolis IRV. Accordingly, the Court should deny the appeal and affirm the District Court.

Conclusion

In voting to approve an IRV system, the voters of Minneapolis sought to adopt a system that is fair, saves money, increases voter turnout, promotes minority representation, and more accurately captures and reflects the will of the people. IRV may not be a perfect system, but it is a significant improvement over the previous system, and it satisfies and enhances all rights and freedoms protected by the United States Constitution and the Minnesota Constitution.

Appellants have failed to meet their heavy burden of persuasion in a facial challenge to the constitutionality of Minneapolis IRV. Accordingly, this Court should deny the appeal and affirm the District Court.

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