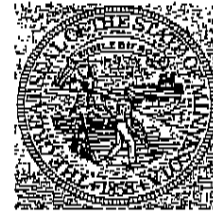


State of Minnesota
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Fourth Judicial District / Hennepin County District Court

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STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Minnesota Voters Alliance, et. al.,

Court File No. 27-CV-08-35

Plaintiffs,

vs.

The City of Minneapolis, et. al.,

Defendants,

and

FairVote Minnesota, Inc.,

Intervenor-Defendant.

MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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I. Appearances

Erick Gregg Kaardal, Esq. appeared on behalf of Plaintiffs. Minneapolis City Attorney Susan L. Segal and Assistant Minneapolis Attorney Lisa M. Needham, Esq. appeared on behalf of Defendants. James E. Dorsey, Esq. and Nicole M. Moen, Esq. appeared on behalf of Defendant/Intervenor.

II. Introduction

The above-captioned matter came on for hearing on December 11, 2008, on Plaintiffs' Motion for Summary and Declaratory Judgment, Defendants' Motion for Summary Judgment, and Intervenor-Defendant's Motion for Summary Judgment.

III. Procedural Background

The Complaint and Amended Complaint in this case were filed on December 20, 2007, and August 28, 2008, respectively. The Amended Complaint seeks:

- 1) a declaratory judgment against the City of Minneapolis for violating the Minnesota and United States constitutions;
- 2) a finding that the City of Minneapolis Charter, Chapter 2, Section 5A and 5B violates the Minnesota and United States constitutions;
- 3) a finding that the City of Minneapolis ordinances enacted as procedures for IRV violate the Minnesota and United States constitutions;
- 4) a finding that the City of Minneapolis violated Plaintiffs' civil rights under 42 U.S.C. §1983;
- 5) attorney fees under 42 USC §1983 and other fees and costs
- 6) a declaratory judgment against the City of Minneapolis that the City violated the rule of law under Minnesota Statutes §205.02 and §209;
- 7) litigation costs, costs, expenses, and expert witness fees allowed by law;
- 8) other relief as the Court deems just and equitable.

FairVote Minnesota ("FairVote") intervened as a party Defendant by Stipulation and Order filed on August 28, 2008.

On September 10, 2008, Plaintiffs, Defendant, and FairVote each filed a Motion for Summary Judgment. Briefing was simultaneous. In the opening submissions, no party

--including Plaintiffs--relied on or referred to mathematical theory. On September 29, 2008, Plaintiffs filed their Memorandum of Law and Affidavits in Opposition to the summary judgment submissions of the City of Minneapolis and FairVote. There, Plaintiffs for the first time referred to the mathematical concept of monotonicity¹. Specifically, Plaintiff argued:

Since the Minneapolis Single Transferable Voting² election scheme—also referred to as Instant Runoff Voting—is non-monotonic, it threatens the fundamental rights to vote and to associate requiring this Court to apply a rigorous if not a strict scrutiny standard of review under the Minnesota and the United States Constitutions.³

Plaintiffs' Memorandum of Law in Opposition to City of Minneapolis and FairVote Minnesota Memoranda for Summary Judgment ("Plaintiffs' Opposition"), p. 8.

Plaintiff submitted the following affidavits:

1. Affidavit of Steven J. Brams, Professor of Politics at New York University. The Affidavit asserts that IRV fails to satisfy the mathematical principle of monotonicity.
2. Affidavit of John Linback, Director of Elections Division in the Oregon Secretary of State's Office. The Affidavit asserts that IRV fails to treat all voters equally.
3. Affidavit of John Kysylyczyn, former mayor of Roseville, Minnesota. The Affidavit asserts that, during his term of office he successfully led a campaign to convert the election system from an odd-year to an even-year cycle.
4. Affidavit of Kathy Dopp, M.S. in Mathematics and Executive Director of the National Election Data Archive. The Affidavit asserts that: a) Single Transferable Voting ("STV") does not promote the election of officials with popular mandates; b) does not eliminate the role of spoiler candidates; c) does not simplify the election process and save money; and d) has key mathematical weaknesses.

In their Reply Memorandum filed October 3, 2008, Defendants objected to Plaintiffs' belated introduction of mathematical theory and undisclosed expert testimony.

¹ Plaintiff claims that it raised monotonicity for the first time in its Amended Complaint, in ¶¶42, 80, 81, 93, and 94. None of those paragraphs contain the word "monotonicity" or "monotonic".

² The parties use Single Transferable Voting ("STV") and Instant Runoff Voting ("IRV") interchangeably in the memoranda.

³ Plaintiffs define monotonicity as follows: "[r]anking a candidate higher, without changing the ordering of other candidates, can never cause the candidate to lose, nor [sic] ranking a candidate lower can never cause that candidate to win." Plaintiffs' Opposition, p. 8; Affidavit of Steven J. Brams, ¶2.

On October 7, 2008, the Court held a telephone conference call with counsel to discuss the propriety of the submissions in controversy. The Court informed the parties that the October 8, 2008 hearing would not be on the merits of the summary judgment motion. Rather, the Court instructed counsel to use the October 8, 2008 hearing to address whether:

- 1) the Court should strike (on procedural grounds) the expert testimony and argument of mathematical theory that was submitted with Plaintiff's responsive papers;
- 2) there were any Frye-Mack and/or foundational issues with respect to the opinion evidence submitted by Plaintiffs;
- 3) the City/FairVote ought to be provided an opportunity to respond to the expert testimony and/or mathematical theory submitted in Plaintiff's responsive papers.

The parties argued these issues at the October 8, 2008 hearing. On October 8, 2008, the Court issued an Order giving Defendants and Intervenor time to file a supplemental Reply Memorandum and affidavits on their own summary judgment motions -- to respond to Plaintiffs' introduction of mathematical theory. Defendants and Intervenor submitted the following affidavits:

- 1) The Affidavit of Jack H. Nagel in Support of FairVote Minnesota, Inc.'s Motion for Summary Judgment.
- 2) The Affidavit of David Austen-Smith (in support of Defendants' Motion for Summary Judgment).

On December 11, 2008, the Court heard argument on the merits of the cross motions for summary judgment.

IV. Undisputed Facts

A. The Adoption of Instant Runoff Voting in Minneapolis

The City of Minneapolis is a home rule charter city of the first class.

In the general election on November 6, 2006, the following language appeared on the 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?

Voters approved the ballot measure, and the Minneapolis City Charter was amended to require Instant Runoff Voting (“IRV”).

The Minneapolis Amended Charter, Section 5B now reads:

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

Minneapolis’ elections for Mayor and City Council are single-seat elections. The Park Board has three Commissioners “at-large” elected by voters city-wide. These terms are staggered with two at-large seats open for election every four years and only one seat open for election at the municipal election held two years later. The Park Board also has Commissioners elected in single-seat elections representing each of the six individual park districts. The Board of Estimate includes two members who are elected city-wide every four years in a multiple-seat election.

B. How Instant Runoff Voting Works

Instant Runoff Voting eliminates the need for primary elections by allowing voters to rank, in order of preference, multiple candidates on a single ballot. A threshold number of votes is needed for a candidate to be elected. “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. Threshold (=) (Total Votes Cast)/ (Seats to be elected + 1) + 1.”

1. Single-Seat Election

In a single-seat election, such as for mayor, the threshold number is a majority of the voters. A candidate who receives votes from a majority of voters on the first round is declared the winner, without the need for further election rounds.

If no candidate receives a majority of votes on the first round, the candidate who received the lowest number of votes is eliminated. Those who voted for the eliminated candidate have their second-choice votes counted in the second round. For those voters whose candidate is continuing, their first-choice votes are still counted in the second round. In the second round, then, the election officials count the first-choice ballots cast for the continuing candidates, along with the second-choice ballots of the voters who voted for the eliminated candidate as their first choice. The candidate with a majority of the votes cast wins the election. 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.

2. Multiple-Seat Election

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 vote counting process is more complicated but the voter still ranks the candidates by preference. The same definition of “threshold” applies.

Consider an election in which four candidates are running for two seats on a board, with 10,000 voters casting ballots. In this example, the threshold to be elected is 3,334 votes $[(10,000 \text{ votes} / (2 \text{ seats} + 1)) = 3,333 + 1 = 3,334]$. Assume the following distribution of votes in the first round:

Candidate A: 4,000

Candidate B: 3,000

Candidate C: 2,000

Candidate D: 1,000

If none of the candidates had reached the threshold of 3334 votes, candidate D would have been eliminated because she had the fewest votes, and her votes would have been redistributed in accordance with the IRV method described above. But here, candidate A did reach the threshold and therefore wins one of the two seats. Candidate A's surplus of 666 votes are reallocated among the remaining candidates, based upon the percentage of second choice votes on all 4,000 of candidate A's first choice ballots. If, for example, Candidate B received 2400 second choice votes on those 4000 ballots (i.e., 60%), candidate C received 1,200 second place votes (30%), and Candidate D received 400 second choice votes (10%), the 666 surplus votes would be reallocated as follows: Candidate B, 399.6 votes (60%); Candidate C, 199.8 votes (30%); and Candidate D, 66.6 votes. After reallocation, Candidate B has 3,399.6 votes ($3000 + 399.6 = 3,399.6$); 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.

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 method described above for a single-seat election.

C. The Challenge

Plaintiffs have asked for a declaratory judgment that the City of Minneapolis' adoption of IRV violates the federal and Minnesota state constitutions and Minnesota statutory law. Plaintiffs claim that IRV fails to allow voters to direct their intent towards one candidate to the exclusion of others; allows the transfer of one vote to another; and fractionalizes votes.

D. Monotonicity

IRV is non-monotonic; that is, it is theoretically possible for a voter to hurt his or her first-choice candidate by voting for that candidate.

V. Legal Analysis of Summary Judgment

Summary 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. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment should be granted if "there is no genuine issue as to any material fact" such that the moving party is "entitled to judgment as a matter of law". Minn. R. Civ. P. 56.03; *Celotex Corp.*, 477 U.S. at 322.

The party opposing the motion has the burden of showing that a genuine fact issue exists. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). A fact is material only if its resolution will affect the outcome of the case. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial. *Nicollet Restoration, Inc. v. St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). The non-moving party cannot rely upon mere general statements of fact, but must come forward, at the time of the motion, with evidence of specific facts that establish a genuine issue for trial. *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 530-31 (Minn.App. 1993). The non-moving party must also adduce legally

N.W.2d 524, 530-31 (Minn.App. 1993). The non-moving party must also adduce legally admissible and competent evidence, not hearsay or evidence lacking foundation. Minn. R. Civ. P. 56.05; *Nicollet Restoration*, 533 N.W.2d at 848. Evidence lacking proper foundation or conclusory statements by a purported expert are not sufficient to raise a material question of fact. *Potter v. Pohlad*, 560 N.W.2d 389, 395 (Minn.App. 1997), rev. denied (Minn. June 11, 1997).

A "genuine issue" for trial must be established by "substantial evidence". *DLH Inc.*, 566 N.W.2d at 70 (citing *Murphy v. Country House, Inc.* 240 N.W.2d 507, 512 (1976); *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80, 84 (Minn.App. 2002).

VI. Discussion

A. Monotonicity as a Disputed Issue of Material Fact

When the parties submitted their motions for summary judgment, all parties agreed that the facts were undisputed. In their opposition papers, however, Plaintiffs submitted expert affidavits on the issue of monotonicity. At the initial hearing on October 8, 2008, the Court asked the parties whether the affidavits created a disputed issue of material fact. Plaintiffs stated that a fact issue would arise only if Defendant and/or FairVote disputed that IRV was non-monotonic.

Neither Defendant disputes that IRV is non-monotonic; nor does FairVote.

All parties have provided the affidavits of experts. All experts agree that IRV is non-monotonic; in other words, that IRV could lead to a situation in which a voter's vote for a particular candidate harms, rather than helps, that candidate. (All such scenarios were hypothetical). The experts disagree on whether a non-monotonic voting system violates equal protection and is otherwise permissible. This disagreement relates to legal conclusions, not facts. The expert opinions do not create a disputed issue of material fact.

Since there are no disputed issues of material fact, the matter is ripe for summary judgment.

B. Standard of Review

1. Facial Challenge

When a challenger brings a facial attack on a statute, seeking to invalidate the statute in all its applications, the challenger bears a heavy burden of persuasion. *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1621 (2008). As the Supreme Court of the United States explained in another recent case:

Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of “premature interpretation of statutes on the basis of factually barebones records.”...Facial challenges also 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.’ “...Finally, 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. We must keep in mind that “ ‘[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.’ “

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1191 (2008).

Plaintiffs do not bring an as-applied challenge to IRV. Nor could they, since no election under IRV has yet been held. Plaintiffs bring a facial challenge, attacking IRV in all its applications.

2. Strict Scrutiny

Plaintiffs argue that the Court should subject IRV to “a rigorous, if not a strict scrutiny standard of review”. Plaintiff’s Opposition, p. 8. However, the degree of court inquiry into a state election law depends on the extent to which the challenged regulation burdens First and Fourteenth Amendment rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When rights are

severely restricted, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). When a law imposes restrictions that are reasonable and nondiscriminatory, “the State’s important regulatory interests are generally sufficient to justify” the restriction. *Burdick*, 504 U.S. at 434, citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (U.S.1983).

In order to determine whether to subject IRV to strict scrutiny, therefore, the Court must consider whether IRV severely burdens voting rights, and what interest the City of Minneapolis has in IRV.

3. City Interests

The City of Minneapolis has an important interest in respecting the democratic process, and the citizens of Minneapolis democratically voted for IRV by referendum. The vote was almost two to one in favor of IRV.

In addition, the City has presented evidence 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.⁴

The City has important interests in IRV.

4. Burden on Voting Rights

Crawford v. Marion County Election Board examined a burden on voting rights. There, the United States Supreme Court considered the constitutionality of an Indiana election law requiring citizens to present photo identification when voting. *Id.* at 1613. The court acknowledged that a photo identification requirement imposed some burdens (*id.* at 1620), but concluded that the burdens were insufficient to support a facial attack on the validity of the statute. *Id.* at 1615. As the court held: “In sum, on the basis of the record that has been made in

⁴ Affidavit of Jack H. Nagel, ¶15.

this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.” *Id.* at 1623.

Similarly, in *Washington State Grange*, the United States Supreme Court evaluated the constitutionality of Initiative 872, which provided: “candidates for office shall be identified on the ballot by their self-designated ‘party preference’; that voters may vote for any candidate; and that the top two vote getters for each office, regardless of party preference, advance to the general election.” *Washington State Grange*, 128 S. Ct. at 1187. The Supreme Court reversed the Court of Appeals’ decision that the initiative was unconstitutional “[b]ecause I-872 does not on its face impose a severe burden on political parties’ associational rights, and because respondents’ arguments to the contrary rest on factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge...” *Id.* The Court stated:

In determining whether a law is facially invalid, we must be careful not to go beyond the statute’s facial requirements and speculate about “hypothetical” or “imaginary” cases...Exercising judicial restraint in a facial challenge ‘frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretation of statutes in areas where their constitutional application might be cloudy.’

Id. at 1190-91. Accordingly, not every law that imposes a burden on the right to vote is subject to strict scrutiny. As the United States Supreme Court said in *Burdick v. Takushi*, 504 U.S. 428 (1992):

Election laws will invariably impose some burden upon individual voters...Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

Id. at 433.

C. Constitutionality

Plaintiffs have not identified any specific burden that IRV places on voting rights. Rather, they assert that IRV burdens voting rights because it violates the constitutional rights to vote and to associate, as well as the right to equal protection.

1. The United States Constitution

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Ninth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides in part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Minnesota Constitution

The Minnesota Constitution directly addresses the right to vote in Article VII, which provides in pertinent part:

Section 1. Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.

In *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005), the Minnesota Supreme Court provided some guidelines for the interplay between the Minnesota Constitution and the United States Constitution:

We have indicated that we will not construe our state constitution as providing more protection for individual rights than does the federal constitution unless there is a principled basis to do so... We adhere to the general principle of favoring uniformity with the federal constitution. We will not reject a Supreme Court interpretation of a provision of the U.S. Constitution merely because we want to bring about a different result.

Id. at 824.

Our precedent indicates that we are most inclined to look to the Minnesota Constitution when we determine that our state constitution's language is different from the language used in the U.S. Constitution or that state constitutional language guarantees a fundamental right that is not enumerated in the U.S. Constitution... We take a more restrained approach when both constitutions use identical or substantially similar language.

Id. at 828.

The *Kahn* court held that the mere fact that the Minnesota Constitution explicitly enumerates the right to vote is not enough to support a holding that the right to vote deserves greater protection under the state constitution than the federal constitution. *Id.* at 831. As the court said, “[w]hen constitutional language is unambiguous, it is effective as written and we do not apply any other rules of construction.” *Id.* at 826.

Plaintiffs argue that “Minneapolis’s ordinances create an artificial ‘majority’ of votes and intent to political [sic] associate. Artificial in the sense that co-mingling and counting first, second, and third ranked-choices creates a ‘preferential majority’ not contemplated under Minnesota’s Constitution.” Plaintiffs’ Memorandum of Law in Support of Their Motion for Summary and Declaratory Judgment (“Plaintiffs’ Memorandum”), p. 18. However, Plaintiffs

cite no part of the Minnesota Constitution and no case law to support their proposition that this system is “not contemplated under Minnesota’s Constitution”.

Plaintiffs also argue that “[a] voting method cannot be constitutional if votes are weighted or diluted resulting in unintentional consequences of the elector’s intent of his or her vote.” Plaintiffs’ Reply Memorandum to City of Minneapolis’ and FairVote Minnesota’s Response Memoranda, p. 13.

3. Plaintiffs’ Amended Complaint

a. Violation of the United States Constitution

The Amended Complaint alleges in part:

89. The First Amendment protects an individual citizen’s right to vote and assurance that the vote be counted as cast without impairment to or loss of a voter’s first choice of electing the candidate of his or her choice.

93. The Fourteenth Amendment of the United States Constitution protects the First Amendment protections of the right to vote and assurance of the vote be counted [sic] as cast without impairment to or loss of a voter’s first choice of electing the candidate of his or her choice from state infringement.

94. An act that threatens to interfere with or dilute the act of voting for a candidate of an individual’s choice violates the First, Fourteenth, and Ninth Amendments of the United States Constitution.

b. Violation of the Minnesota Constitution

The Amended Complaint alleges in part:

58. Each voter is entitled to have his or her vote counted as a numeric “one” as applied to the candidate of his or her choice.⁵

59. The Minneapolis ordinance detailing the procedures for Instant Runoff Voting also included the definition for “*transferable vote*” as meaning “a vote or a fraction of a vote for a candidate who has been either elected or defeated.”

60. A fraction of a vote is not a “whole” vote and cannot be counted numerically as “one”.

61. Under Instant Runoff Voting, fractions of a whole vote can be distributed to two or more candidates defined as a “*transferable vote*”.

⁵ The Court is unable to locate any language in the United States or Minnesota Constitutions entitling each voter to have his or her vote counted as a “numeric one”.

62. Fractions of a whole vote attributed to more than one candidate is unequal treatment of all other voters whose votes counted numerically as "one".
63. Fractions of a whole vote attributed to more than one candidate interfere with the intent of a voter to associate with one particular candidate.⁶
64. Fractions of a vote distributed to more than one candidate interferes with the voter's right of association to give a candidate a "whole" value of the numeric value of "one" vote as to be counted for that candidate of choice.
65. A voter's intent to vote for one candidate cannot be equally divided as a fraction among other candidates as the expression of the voter's right of association with the candidate of his or her choice.
66. The right to vote and the assurance of the vote is counted as cast without impairment to or loss of a voter's first choice of electing the candidate of his or her choice is a fundamental right under the Minnesota Constitution.

81. The voting methodology of the City of Minneapolis will dilute or threaten to interfere with the act of an individual citizen's right to vote and assured of the vote be counted as cast without impairment to or loss of a voter's first choice of electing the candidate of his or her choice.
(emphasis as in original).

4. The Right to Associate

Although "freedom of association" is not mentioned in the text of either the federal or the state constitution, the Supreme Court of the United States, in certain circumstances, has recognized it as derivative of federal first amendment guarantees of free speech, press, petition, and assembly and protected by the due process clause.

Metropolitan Rehabilitation Services, Inc. v. Westberg, 386 N.W.2d 698, 700 (Minn. 1986).

Plaintiffs allege that IRV burdens their right to associate in multi-seat elections because some ballots become exhausted in that the second-choice votes of some voters are not counted. They argue that a voter whose first choice is successful has his or her one entire vote allocated to that first choice, whereas a voter whose first choice is unsuccessful has his or her vote allocated to the second-choice candidate. 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.

⁶ This assertion assumes that voter association must always be in a one-to-one relationship, which is not always the case. For example, voters vote for Presidential and Vice-Presidential candidates on the same ticket.

Further, Plaintiffs have provided no authority to suggest that the right to associate operates somewhat like a marriage—a right to associate with one, and only one, other person. A voter can reasonably choose to associate with his or her first choice. In the event that his or her first choice is eliminated, the voter can make an alternative choice to associate with another candidate, whom the voter chooses to rank #2. If the voter wishes to express association with only one candidate and no other, that voter is free to decline to rank a second choice. The voter's choice to so decline does not indicate that the City unconstitutionally denied him or her the right to vote for, and associate with, that second choice. Rather, the voter has voluntarily decided not to exercise the right to vote for the second choice.

Plaintiffs argue that “an elector’s intent to politically associate with a candidate cannot be realized if his one vote is divided between two candidates with opposing political beliefs.” Plaintiffs’ Memorandum, p. 19. However, voters are not required to associate with any candidate. If voters wish not to associate with a particular candidate, they can rank that candidate last or not at all.

Plaintiffs have not demonstrated that IRV burdens the right of association.

5. The Right to Equal Protection

Plaintiffs claim that IRV violates equal protection in multi-seat elections.⁷ Plaintiffs quote *Gray v. Sanders*, 372 U.S. 368, 380 (U.S. 1963):

The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

a. Equal Protection and *Brown v. Smallwood*

⁷ Plaintiffs have not made an equal protection claim with respect to single-seat elections.

In 1915, the Minnesota Supreme Court in *Brown v. Smallwood* determined that the voting system in that case violated the right to equal protection:

In the case at bar it may be noted that the number of persons who voted were 12,313, and the number of cross marks considered on the plurality election were 18,860. It was not a voting of man against man.

Brown v. Smallwood, 153 N.W. 953, 957 (Minn. 1915).

Plaintiffs are unable to present any numbers analogous to those in the *Brown* case to demonstrate that some votes might be counted more than once. Nor do Plaintiffs predict or speculate that the number of voters and votes counted will be anything other than equal.

Confronted with this difficulty, and wishing to claim violation of equal protection, Plaintiffs belatedly introduced expert affidavits about the mathematical concept of monotonicity. According to the doctrine of monotonicity, IRV fails—not because some votes are counted more or less than once—but because of a hypothetical possibility that a vote cast by a particular voter could in fact harm the candidate the voter wished to help.

b. *Bush v. Gore*

Plaintiffs cite *Bush v. Gore*, 531 U.S. 98 (2000) for the proposition that a person cannot be enfranchised unequally. Plaintiffs' Memorandum, p. 21. First, the holding in *Bush v. Gore* is limited to that case alone: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."

Bush v. Gore, 531 U.S. at 109.

Further, Plaintiffs' have presented no evidence that IRV causes certain ballots to be treated unequally. Each voter has an equal opportunity to rank candidates and have his or her rankings counted. Each voter also has an equal opportunity to skip rankings. In multi-seat elections, the transfer fractions and surplus votes are determined by the results of the election.

No vote is given any greater weight than any other, and Plaintiffs have presented no evidence that ballots are treated unevenly.

This situation is distinct from *Bush v. Gore*, where the court was concerned that ballots were being counted in different ways:

The want of those rules here has led to unequal evaluation of ballots in various respects...As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

Bush v. Gore, 531 U.S. 98, 106 (U.S.Fla., 2000).

c. Fractionalized and Surplus Votes

Plaintiffs' right to equal protection is not violated by fractionalized or surplus votes. Plaintiffs are unable to point to any provision of the United States or Minnesota Constitutions any or case law requiring each vote to be counted as one numeric and indivisible whole.

Nor are Plaintiffs' equal protection rights violated because some voters fail to indicate a second choice candidate. Voters can decline to vote altogether; decline to vote for a second choice, and so on. Each voter has an equal opportunity to take advantage of some portion, or all, of the voting process, or to decline to do so.

d. Exhausted Ballots

Plaintiffs claim that inequality results when a voter chooses not to rank all candidates. That voter's ballot then could become exhausted once the voter stops listing preferences. However, each voter has an equal opportunity to select whether or not to rank candidates and how many candidates to rank.

e. Monotonicity

Nothing in the affidavits submitted by Plaintiffs indicates that, under IRV, voters will be treated unequally. If all the claims of Plaintiffs' experts are accurate, then there is at most some

risk that a vote for a particular candidate might work against that candidate. To the extent that risk exists, it applies to all voters equally. There is no evidence before the Court that any voter is more likely to incur this risk than any other voter, or that the risk has unequal application. *See Bush v. Gore*, 531 U.S.98, 105-106 (2000) (“The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for *nonarbitrary* treatment of voters necessary to secure the fundamental right...The problem inheres in the absence of specific standards to ensure its *equal application*.”) (emphasis added). *See also Kahn*, 701 N.W.2d at 832 (“[T]he question invites us to determine whether the failure of the City of Minneapolis to hold city council elections immediately after ward redistricting infringes upon *all* Minneapolis residents’ right to vote—regardless of whether the voters affected by that failure are members of a suspect class.”)(emphasis as in original).

Every reasonable voting rule suffers from this problem 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.

Plaintiffs 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. Plaintiffs’ claim that non-monotonicity equals unconstitutionality has no support in the law.

Brown does not stand for the proposition that voting systems in Minnesota must be mathematically flawless. As the Minnesota Supreme Court stated in *Kahn*:

Requiring rigid mathematical equality at all times would result in a sacrifice of stability and experience due to shorter terms, increase the costs of elections for taxpayers, make it more difficult for citizens of limited means to participate in local elective politics, and undermine the settled expectations that both voters and

elected officials hold.

Kahn, 701 N.W.2d at 833.

IRV does not violate the voters' right to equal protection.

f. The No-Show Paradox

Plaintiffs assert that it is possible that a voter could help his or her candidate more by not coming to the polls than by coming to the polls. This argument is very similar to Plaintiffs' monotonicity argument; essentially, that the voter suffers a risk that his or her voting choices will have unintended effects. Plaintiffs have not cited, and the Court cannot find, any case law indicating that the right to vote means that every voter must be assured that there is no risk his or her vote can have an unintended effect.

g. Vote Dilution

Plaintiffs claim that IRV leads to vote dilution. Plaintiffs do not explain how they believe vote dilution occurs, except to say that a voter who chooses not to rank a second-choice candidate has his or her vote diluted. The Court is not persuaded. A voter who chooses not to rank a second-choice candidate has no different opportunity to vote than anyone else. That voter has simply decided not to take full advantage of the opportunity available.

D. *Brown v. Smallwood*

Plaintiffs rely heavily on the decision of the Minnesota Supreme Court in *Brown* as support for their position that IRV is unconstitutional. In *Brown*, the Minnesota Supreme Court found the general municipal election system in Duluth to be unconstitutional. *Id.* at 956-57.

1. The “Preferential System”

The *Brown* court referred to the election system as the “preferential system”, described in the opinion as follows:

The general scheme of the *preferential system* is this:

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 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.

Id. at 955 (emphasis added). Unlike the preferential system identified in *Brown*, the IRV system at issue here does not allow the addition of first and second choice votes to the additional choice votes.⁸ Rather, the system involves a series of rounds. On the first round, the candidate with the fewest first-choice votes is eliminated from consideration. The voters who voted for that candidate have their second-choice votes counted instead of their now-eliminated first-choice vote. In this manner, each voter still has only one entire vote.

When the *Brown* court stated that “[t]he preferential system directly diminishes the right of an elector to give an effective vote for the candidate of his choice” (*Id.* at 956), it was referring to the specific “preferential system” described with particularity earlier in the opinion. The *Brown* Court was not referring to any and all preferential voting systems:⁹

⁸ The system overturned in *Brown* led to a scenario where there were more votes cast than there were voters.

⁹ If the Court were to so interpret the language of *Brown*, the Court would be in the precarious position of attempting to draw a line between a voting system that could be called “preferential” and one that could not be called “preferential”. All voting systems involve a voter expressing a preference for some candidate over some other candidate. In this respect, all voting systems are “preferential”, and a broad reading of the language in *Brown* would require the courts to overturn all voting systems.

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.

Id. at 957.

2. One Person, One Vote

The language of *Brown* relied on by Plaintiff does not apply to IRV because each vote is counted only once, and a voter's second choice is counted only after his or her first choice candidate has been either eliminated or elected with surplus votes. Because each round is separately counted, it is impossible to cast multiple votes "for" or "against" any particular candidate. The following language of the *Brown* court is thus not applicable here:

When the Constitution was framed, and as used in it, the word 'vote' meant a choice for a candidate by one constitutionally qualified to exercise a choice. Since then it has meant nothing else. It was never meant that the ballot of one elector, cast for one candidate, could be of greater or lesser effect than the ballot of another elector cast for another candidate. It was to be of the same effect.

Id. at 956.

Similarly, *Brown* held:

[W]hen a voter votes for the candidate of his choice, his vote must be counted one, and it cannot be defeated or its effect lessened, except by the vote of another elector voting for one. A qualified voter has the constitutional right to record one vote for the candidate of his choice, and have it counted one. This right is not infringed by giving the same right to another qualified voter opposed to him. It is infringed if such other voter is permitted to vote for three opposing candidates.

Id. at 957. The reasoning of the *Brown* court depended heavily upon the fact that a voter could cast multiple votes against one particular candidate. The IRV system does not, however, give a voter the opportunity to cast multiple votes against a candidate; or thus to vote for "three opposing candidates". *On Petition for Reargument*, the *Brown* court highlighted the centrality of this concern to its opinion:

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

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

Brown, On Petition for Reargument, at 508 (emphasis added). Under IRV, the voter does not vote for multiple candidates *against the first choice* of another voter. The voter votes for one candidate in each round.

The *Brown* court also stated:

It was never thought that with four candidates one elector could vote for the candidate of his choice, and another elector could vote for three candidates against him.

Id. Here, although a voter under IRV ranks candidates, only one ranking is counted per round.

The voter therefore has only the opportunity to vote for (or against) *one candidate per round*.

Plaintiffs have failed to demonstrate how, under IRV, a voter could cast multiple votes *against* a disfavored candidate.

3. Mathematics

In support of their belated introduction of mathematical evidence to support their novel legal theory, Plaintiffs point to the following language of *Brown*: “The mathematical possibilities of the application of the system to different situations are infinite.” *Id.* at 956. Plaintiffs seem to imply that the *Brown* court held the preferential system unconstitutional in part because it had infinite mathematical possibilities. However, the court made this statement in connection with its immediately preceding statement that “[a]nother elector may vote for three candidates opposed to him”. As discussed above, IRV does not allow a voter to vote for three candidates opposed to one, and thus the premise upon which the *Brown* court made its “mathematical possibilities” statement is not true in this case. Moreover, the only “mathematical” analysis that was done by the *Brown* court was the court’s observation that “the number of persons who voted

was 12,313, and the number of cross marks considered on the plurality election were 18,860.”

Id. The *Brown* court did not conduct any sort of statistical or mathematical analysis similar to that Plaintiffs presented in their expert affidavits.

4. The “Mandate” of a Plurality Vote

Plaintiffs allege that the Minnesota Supreme Court in the *Brown* case mandated plurality voting. The *Brown* case contains no such plurality vote mandate; nor does *Brown* address plurality or majority voting requirements. Plaintiffs also cite *Phelps v. Rockefeller*, 435 F.2d 976, 979-80 (2d Cir. 1970), but the court in *Phelps* merely stated that a majority was not required—it did not mandate plurality voting. Moreover, the Minnesota State Constitution does not contain a mandate of either plurality or majority voting.

E. Minnesota Election Statutes

Plaintiffs argue that Minneapolis election law runs afoul of Minnesota Statute §205.02 (dealing with municipal elections); and Minnesota Statute §209.02 (dealing with election contests).

1. Minnesota Statute §205.02

Minnesota Statute §205.02 (2008) provides:

Subdivision 1. Minnesota Election Law. Except as provided in this chapter the provisions of the Minnesota Election Law apply to municipal elections, *so far as practicable*.

Subd. 2. City elections. In all statutory and home rule charter cities, the primary, general and special elections held for choosing city officials and deciding public questions relating to the city shall be held as provided in this chapter, except that sections 205.064, subdivisions 4 to 7; 205.07, subdivision 3; 205.10; 205.121; and 205.17, subdivisions 2 and 3, do not apply to a city whose charter provides the manner of holding its primary, general or special elections.

(emphasis added).

Minnesota Statute §410.21 (2008) provides:

The provisions of any charter of any such city adopted pursuant to this chapter shall be valid and shall control as to nominations, primary elections, and elections for municipal offices, notwithstanding that such charter provisions may be inconsistent with any general law relating thereto, and such general laws shall apply only in so far as consistent with such charter.

Plaintiffs argue that Minn. Stat. §205.02 prohibits home-rule charter cities from controlling municipal general elections.

However, Minnesota Statute §645.16 provides that “[t]he object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.” Minnesota Statute §645.26 provides that “[w]hen a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both.”

Minn. Stat. §205.02 states that the provisions of Minnesota Election Law shall apply to municipal elections *so far as practicable*. This language indicates that the legislature anticipated that the application of Minnesota Election Law to municipal elections would not be absolute and in disregard of all other considerations and all other statutes.

Similarly, the legislature anticipated that Minn. Stat. 410.21 might conflict with other statutes and unequivocally indicated its intent that Minn. Stat. 410.21 should apply “notwithstanding that such charter provisions may be inconsistent with any general law relating thereto, and such general laws shall apply only in so far as consistent with such charter.”

When the legislature has intended to limit a city’s authority over elections, it has done so expressly, such as it did in Minnesota Statute §204B.14, subd. 7 (2008), which provides:

Notwithstanding the provisions of section 410.21, or any other law, ordinance or charter to the contrary, the provisions of subdivisions 1, 3 and 6 apply to all municipalities.

Similarly, Minnesota Statute 211A.12 (2008) states in part that “[n]otwithstanding sections 211A.02, subdivision 3, and 410.21, this section supersedes any home rule charter.”

Plaintiffs cite *State ex rel. Town of Lowell v. City of Crookston*, 528, 91 N.W.2d 81, 83 (Minn. 1958), for the proposition that the City cannot adopt any charter provision which is unconstitutional or contrary to public policy. As already demonstrated, Plaintiffs have failed to demonstrate that IRV is either unconstitutional or contrary to public policy.

Indeed, *City of Crookston* describes the broad discretion possessed by home rule cities:

The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld. The adoption of any charter provision contrary to the public policy of the state, as disclosed by general laws or its penal code, is also forbidden. The power conferred upon cities to frame and adopt home rule charters is limited by the provision that ‘such charter shall always be in harmony with and subject to the constitution and laws of the state.’ Minn.Const. art. 4, s 36, M.S.A. But these limitations do not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ from those of existing general laws.

2. Minnesota Statute §209.02

Minnesota Statute §209.02 (1992) provides:

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

Plaintiffs contend that:

112. Minnesota Statute §209.02 does not provide for an election contest procedure for Instant Runoff Voting. It only covers elections that concern “who received the largest number of votes.”

Amended Complaint, ¶112. The Amended Complaint uses the word “only”, suggesting that the statute restricts election contests to issues of which candidate received the largest number of votes. However, the statute provides that “a contest *may* be brought over...”, not that “a contest *may only* be brought over...” The logical interpretation of this language is that the statute will offer a list of permissible contests, not an *exhaustive* list of the *sole* permissible contests.

In addition, Minnesota Statute §209.02 is procedural—intended to provide a mechanism by which a person can contest an election over any number of issues, including the number of votes. It does not conflict with IRV.

Even if the Court were to read the statute as Plaintiffs claim, the statute does not define how “the largest number of votes” is to be determined. The statute could well be read to allow a contest regarding who received the largest number of votes in a particular round of IRV.

The Court is not persuaded that Minnesota Statute §209.02 precludes IRV.

F. Violation of 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C.A. § 1983.

For all the reasons outlined in the previous section, the Court finds that there is insufficient evidence to conclude that IRV causes any citizen to be deprived of any rights, privileges, or immunities secured by the Constitution and laws.

G. Other Jurisdictions

Courts in other jurisdictions have upheld the constitutionality of IRV. In *Stephenson v. Ann Arbor Board of Canvassers*, No. 7010166 AW (Mich. Cir. Ct., 1975), the court upheld Ann Arbor's Majority Preferential Voting System:

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.

The court in *State ex rel. Sherrill v. Brown*, 99 N.E.2d 779 (Ohio, 1951) upheld a similar preferential voting system:

An indication by a preference number is clearly a formal expression of a preference and thus is an indication of a vote. Certainly, an indication by a separate preference number for each candidate is an indication of a vote for such candidate separately from an indication by a different preference number of a vote for any other candidate.

Id. at 781.

The court in *McSweeney v. City of Cambridge*, 665 N.E.3d 11, 13 (Mass. 1996), confronted an election system similar to IRV:

[T]he voters designate candidates in order of preference on their ballots, and the ballots cast for candidates who have more than enough votes to be elected or for candidates who have too few votes to be elected are transferred to the candidate next designated in the voter's order of preference.

Id. at 13. With respect to the issue of exhausted ballots, the court said:

They too are read and counted; they just do not count toward the election of any of the nine successful candidates. Therefore it is no more accurate to say that the ballots designating a losing candidate in a two-person winner-take-all race are not counted.

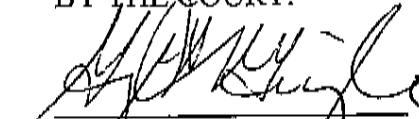
Id. at 14.

ORDER

1. Plaintiffs' Motion for Summary Judgment and for Declaratory Judgment is DENIED.
2. Defendants' Motion for Summary Judgment is GRANTED.
3. Intervenor-Defendant's Motion for Summary Judgment is GRANTED.
4. Plaintiff's Actions for Declaratory Judgment are DISMISSED.
5. Defendants City of Minneapolis and R.T. Rybak is entitled to judgment dismissing the Amended Complaint in its entirety, with prejudice, and to their costs and disbursements herein.
6. Intervenor-Defendant FairVote Minnesota, Inc., is entitled to judgment dismissing the Complaint in its entirety, with prejudice, and to its costs and disbursements herein.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED IMMEDIATELY.

BY THE COURT:



George F. McGunnigle
Judge of District Court

Dated: January 13, 2009