Dudum v. Arntz: Upholding Ranked Choice Voting in San Francisco
An Analysis by FairVote, December 2011

On May 20, 2011, the Ninth Circuit Court of Appeals upheld a lower federal court ruling in *Dudum v. Arntz*. The three-judge panel unanimously rejected a constitutional challenge to the City of San Francisco's current form of ranked choice voting (RCV), also known as instant runoff voting (IRV).[1] In emphasizing the constitutionality of RCV, the panel definitively dismissed claims that RCV violates the principles of one-person, one-vote and equal protection under the law even when voters are limited in how many candidates they are able to rank in order of preference.

BACKGROUND

In 2002, the voters of the City and County of San Francisco approved Proposition A, amending the City Charter to establish RCV in elections for most city offices, including mayor and the Board of Supervisors. Among its provisions, Proposition A permitted the Department of Elections (Department) to limit every voter to three choices if the Department's voting equipment could not "feasibly accommodate choices equal to the total number of candidates for each office."[2] Given the fact that California state law requires all types of voting machines to be certified by the California Secretary of State and that no state-certified machine can read RCV ballots with more than three ranked candidates, the Department has limited each voter to ranking three candidates in all RCV elections in San Francisco.

On February 4, 2010, with the financial backing of the California Apartment Association, Ron Dudum (a losing candidate for the Board of Supervisors in 2006[3]) and five other registered San Francisco voters filed suit in federal court seeking injunctive relief against San Francisco, the Department of Elections and its Director of Elections John Arntz, claiming that the city's current form of RCV was unconstitutional. Plaintiffs argued that limiting voters to three rankings, as done in San Francisco, prevented some voters' ballots from counting the same as others. Plaintiffs stated that in a race with more than four candidates, limiting voters to three rankings meant that some ballots might not be counted for one of the continuing candidates in the final round of tabulation, given that a voter might have chosen to to rank three candidates who had been eliminated in previous rounds of counting. Defining this potential "exhaustion" of ballots as disenfranchisement, plaintiffs moved to enjoin the 2010 election and require the City either to remove limits on rankings or return to a traditional two-round runoff.

On April 16, 2010, Judge Richard Seeborg of the U.S. District Court for the Northern District of California denied a motion for a preliminary injunction of the City and County of San Francisco's 2010 elections in *Dudum v. San Francisco*. On September 9, Judge Seeborg granted summary judgment, ruling that San Francisco's form of RCV does not violate federal constitutional guarantees to free association, or to equal protection and due process. He concluded that, "[w]hile a limitation to no more than three preferences in a large field of candidates does exert some

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[1] The terms "ranked choice voting" (RCV) and "instant runoff voting" (IRV) are used synonymously in this memo, although technically instant runoff voting is a form of ranked choice voting. The plaintiffs in this case specifically challenged "restricted IRV." All parties, as well as the court, referred to San Francisco's form of voting as IRV. Thus, in quotations from the opinions in the case, the voting system will be called IRV. However, as San Francisco now generally uses the term RCV to describe the system, our analysis will use that term.
[2] S.F. Charter § 13.102(b).
[3] Dudum would have lost to three different candidates that year if paired against them one-on-one.

burden on voting rights, it is not severe. Defendants, for their part, have adequately identified important government interests that are well-served by the limitation."

On appeal, plaintiffs argued that San Francisco's limited system of RCV caused a dilutive effect because when there are more than four candidates in the race, a voter might involuntarily "exhaust" his or her ballot by ranking three defeated candidate before the final round of counting. A three-judge panel of Ninth Circuit Court of Appeals unanimously upheld the lower court, finding that the plaintiffs' argument lacked merit and that RCV was constitutional. Among key excerpts from the Ninth Circuit's opinion are the following:

> Plaintiffs insist theirs is not a claim for a constitutional right to win elections but is instead about the right to participate equally. San Francisco's implementation of IRV does not infringe that right. [. . .]

> Notably both IRV and restricted IRV tend to result in *fewer* entirely 'wasted' votes than plurality voting, because voters whose first-choice candidate is eliminated may choose the winning candidate as their second- or third-choice pick. [. . .]

> Therefore, *if* the characteristics of the City's system Dudum has identified impose any burdens on the right to vote, they are minimal at best. [. . .]

> Restricted IRV advances the City's legitimate interests in providing voters an opportunity to express nuanced voting preferences and electing candidates with strong plurality support.

DISTRICT COURT ANALYSIS OF DUDUM CLAIM

In his lower court opinion, Judge Seeborg had also found there was no vote dilution in the case of a three-ranking limitation based on the fact that, under restricted RCV, every properly cast ballot is counted equally. He stated that every ballot has the same weight in the election, as every non-exhausted ballot only supports one candidate at a time. The court pointed out that at no point in the tabulation process does one ballot support more than one candidate per office, a situation that would create problems of votes being "weighted" differently. As to "exhausted" ballots, the court found that these votes are not arbitrarily "thrown out" but rather they are counted as showing a preference for an eliminated candidate. The court stated that an "exhausted" ballot merely means that the voter who cast that particular ballot voted for candidates who did not win. The court reiterated that equating an exhausted ballot with vote dilution would be analogous to saying that every voter who casts a vote for a losing candidate in *any* election has been disenfranchised, something that surely is not correct. The court was clear that no deprivation occurs where all properly registered voters are allowed to participate in the single election.

Here are some key excerpts from Judge Seeborg's district court opinion:

> The most meaningful misconception in plaintiffs' argument is that exhausted votes are not counted. [. . .]

> Even if a voter does not rank a single candidate who survives into the final rounds, he or she still participates in and affects the election. So too does this voter participate on equal footing with the rest of the electorate: from the outset, every voter may consider and rank in order of preference any three out of a complete field of candidates. Even where a voter fails to help elect the winner, he or she nonetheless shares an identical opportunity for meaningful participation. No matter how or for

whom a voter casts his or her preferences, every ballot is counted and every ballot affects the election. [. . .]

No matter how many preferences a voter expresses, the Department only 'counts' the preference associated with the candidate who survives the longest. When a ballot is exhausted, it means the vote was effectively cast for the lowest ranking candidate. Even though that candidate ultimately loses as well, it is not true (as plaintiffs suggest) that the limitation operates such that a voter votes not at all or three times. The ability to rank multiple candidates means no more than that all voters get three chances to cast their vote in an effective manner. This is also plainly consistent with the idea that equal access at the outset undermines the disenfranchisement claim.

NINTH CIRCUIT COURT'S ANALYSIS OF CONSTITUTIONALITY OF RANKED CHOICE VOTING

The Ninth Circuit declared that individuals have a right to vote created through the First and Fourteenth Amendments' guarantee that all persons have the right to associate freely for the advancement of their political beliefs, but that states have the ability to burden that right in the interest of regulating their elections. It found that any burden imposed on the right to vote was "minimal at best" and rejected the plaintiffs' claim that exhausted ballots left voters disenfranchised. It stated that the city was justified in any minimal burden caused by limited voters to three rankings in RCV elections due to its interest in saving money by using RCV versus a two-round runoff system, in alleviating administrative burdens of administering two elections, and in allowing voters to express preferences through rankings.

Central to the court's reasoning was that an RCV election is analogous to an election where a voter casts one single vote and that the plaintiffs were wrong in arguing that exhausted ballots are discarded and not counted toward the final tally. The court reasoned that exhausted ballots were counted; they were merely counted as equivalent to a vote for a losing candidate in a plurality voting election. Here are key excerpts from the opinion addressing this point

The contention sidesteps the basic fact that there is only one round of voting in restricted IRV. . .

Like every electoral system, [San Francisco's three-ranking RCV system] offers an amalgam of advantages and disadvantages. The burdens Dudum identifies, however, are largely ephemeral, disappearing upon examination. The redistricted IRV scheme does *not* provide disparate opportunities for any voter to cast additional ballots or votes. The appearance that some votes are not "counted" is just a product of how the algorithm operates for efficiency's sake; the result would be identical were the "exhaustion" feature eliminated, and the "exhausted" ballots recorded and counted through the process for what they are – votes for losing candidates. As the votes from "exhausted" ballots *are* taken into account in the election, as much as "wasted" votes ever are, the practical burden on voters are no different than in other election systems. Finally, Dudum's vote dilution argument fails as well because the ability to rank preferences sequentially does not affect the ultimate weight accorded any vote cast in the election.

NINTH CIRCUIT COURT AND DISTRICT COURT DISMISS OTHER CONCERNS ABOUT RCV

The Ninth Circuit explained that voters are not deprived of their true choice because they might need to vote "strategically" to ensure that at least one of their choices survives to later rounds. It

stated that every voting system creates different structural incentives; the mere existence of these incentives is not enough to make a voting system constitutionally suspect. Furthermore, the court stated that the risk of strategic voting with RCV in fact was less than with plurality voting, because the likelihood that a vote would be wasted was lower than in a plurality or traditional runoff:

> [R]estricted IRV advances the City's legitimate interests in providing voters an opportunity to express nuanced voting preferences and electing candidates with strong plurality support. . . . Unlike a two-round runoff election, redistricted IRV will not always produce a candidate with majority support, But restricted IRV also does not limit voters' choice to only two candidates, and so it allows voters to express a wider range of preferences [than runoffs]. Moreover, in practice, the ability to express more nuanced preferences means that candidates with greater plurality support (although not necessarily majority support) tend to elected, as compared to a traditional plurality system.

The Ninth Circuit also explained why RCV is a one-person, one-vote system:

> At its core, Dudum's argument is that some voters are literally allowed more than one vote (i.e., they may cast votes for their first-, second-, and third-choice candidates), while others are not. Once again, Dudum's contention mischaracterizes the actual operation of San Francisco's restricted IRV system and so cannot prevail. In fact, the option to rank multiple *preferences* is not the same as providing additional *votes,* or more heavily-weighted votes, relative to other votes cast. Each ballot is counted as no more than one vote at each tabulation step, whether representing the voters' first-choice candidate or the voters' second- or third-choice candidate, and each vote attributed to a candidate, whether a first-, second- or third-rank choice, is afforded the same mathematical weight in the election. The ability to rank multiple candidates simply provides a chance to have several preferences recorded and counted *sequentially,* not at once. (emphasis in original)

This explanation echoed Judge Seeborg 's 2010 opinion: "[I]t is not true (as plaintiffs suggest) that the limitation operates such that a voter votes not at all or three times. The ability to rank multiple candidates means no more than that all voters get three chances to cast their vote in an effective manner. This is also plainly consistent with the idea that equal access at the outset undermines the disenfranchisement claim."

CONCLUSION

In *Dudum v. Arntz,* the Ninth Circuit affirmed that even if voters being allowed to rank more than three candidates might have advantages in RCV elections, a limitation of three rankings was at most a minimal burden on the right to vote. Moreover, the court was clear that any such "minimal burden" was justified by the city's sufficient governmental interest in promoting efficient, participatory and representative elections. Most importantly, the court stated that RCV operates as comparable to one election in which voters rank candidates, not as a series of runoffs. This insight is fundamental to understanding that all voters in an RCV election have an equal opportunity to have their votes counted, and that no voter's vote is diluted in the process. *Dudum v. Arntz* is conclusive evidence that San Francisco's version of RCV does not serve to disenfranchise or dilute the vote of some voters, and that limiting rankings in an RCV election is constitutional.