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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9  
10 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
11

12 CENTER FOR VOTING AND  
13 DEMOCRACY; CONGRESS OF  
14 CALIFORNIA SENIORS; SAN  
15 FRANCISCO LABOR COUNCIL, CLF,  
16 AFL-CIO; CALIFORNIA PUBLIC  
17 INTEREST RESEARCH GROUP;  
18 CHINESE PROGRESSIVE  
19 ASSOCIATION; ENRIQUE ASIS;  
20 GWENN CRAIG; ARTHUR CHANG;  
21 TRACY BAXTER,

22 Plaintiffs and Petitioners,

23 v.

24 JOHN ARNTZ, Director of Elections, City  
25 and County of San Francisco; ALIX  
26 ROSENTHAL, President of the San  
27 Francisco Elections Commission;  
28 MICHAEL MENDELSON, ROBERT  
KENEALY, THOMAS SCHULTZ,  
RICHARD SHADOIAN, BRENDA  
STOWERS, ARNOLD TOWNSEND, San  
Francisco Elections Commissioners; SAN  
FRANCISCO DEPARTMENT OF  
ELECTIONS; SAN FRANCISCO  
ELECTIONS COMMISSION,

Defendants and Respondents.

CASE NO.

EX PARTE APPLICATION FOR  
TEMPORARY RESTRAINING ORDER  
AND ORDER TO SHOW CAUSE RE:  
PRELIMINARY INJUNCTION/WRIT OF  
MANDATE; MEMORANDUM OF  
POINTS AND AUTHORITIES

DEPARTMENT:

JUDGE:

DATE: August 11, 2003  
TIME: 11:00 a.m.

EX PARTE APPL. FOR TRO/OSC

1  
2  
3 Plaintiffs and Petitioners request immediate issuance of a temporary restraining order,  
4 directing Defendants, pending a full hearing, (1) to proceed immediately with the development of  
5 the necessary materials and procedures to conduct the 2003 municipal general election using a  
6 hand count of paper ballots on which voters mark their ranked choices; (2) to proceed  
7 immediately with full implementation of the Department of Elections' existing plan for an instant  
8 runoff voting educational campaign, as mandated by section 13.102(g) of the City Charter,  
9 including completion of all print and audio-visual materials, mailing of materials to voters,  
10 immediate distribution of the grants to community organizations that are provided for in the plan,  
11 and re-application to the Finance Committee of the Board of Supervisors for release of \$250,000  
12 held in reserve for use in the educational campaign; (3) not to order, print, or distribute any non-  
13 IRV ballots, sample ballots, voter information pamphlets, or voter education materials, and not to  
14 conduct staff or volunteer training in non-IRV procedures for the 2003 municipal general election;  
15 and (4) not to submit to the Secretary of State for certification the paper ballot, hand count voting  
16 materials and procedures they develop.

17 Plaintiffs and Petitioners also request issuance of an order to show cause re: preliminary  
18 injunction and peremptory writ of mandate, and that the Court set a schedule for briefing and  
19 argument at the earliest dates compatible with the Court's calendar.  
20

## 21 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 22 **INTRODUCTION**

23 Plaintiffs and Petitioners (hereafter "Plaintiffs") seek a temporary restraining order to  
24 prevent San Francisco's elections officials from "pulling the plug" on instant runoff voting for the  
25 2003 San Francisco general municipal election. Instant runoff voting can be put in place this year,  
26 as required by the City Charter, but only if Defendants are ordered now not to give up on its  
27 implementation.  
28

1 Use of instant runoff voting in this election is expressly mandated by section 13.102 of the  
2 San Francisco City Charter. The mandate came directly from the voters through their 55%-45%  
3 approval of Proposition A in the March 2002 election—nearly a year and a half ago. Proposition A  
4 instituted instant runoff voting for local offices only; no elections for state or federal office are  
5 affected. Rather than follow Proposition A’s plain mandate, Defendants are preparing to conduct  
6 the upcoming municipal election under a separate runoff scheme that as a matter of law no longer  
7 exists.

8 Proposition A repealed former Charter section 13.102, which authorized a separate runoff  
9 election in December when no candidate received more than 50% of the vote in the November  
10 general election. Literally in its place, Proposition A substituted the requirement for instant runoff  
11 voting.

12 Instant runoff (or “ranked choice”) voting allows voters to rank their candidate  
13 preferences and determines a majority winner in a single election. If no candidate receives a  
14 majority of the first rankings, a majority winner is determined in an instant runoff. With the  
15 instant runoff, voters select their favorite candidate, and at the same time can have the option to  
16 indicate their runoff choices by ranking their choices as 1, 2 and 3.<sup>1</sup> If a candidate receives a  
17 majority of first rankings, the election is over. If not, the candidate with the fewest votes is  
18 eliminated, and a runoff round of counting occurs. In this runoff round, each voter’s ballot counts  
19 for that voter’s top-ranked candidate still in the race. Runoff rounds continue until there is a  
20 majority winner.

21 Instant runoff voting saves the voters a second trip to the polls; it saves the city the effort  
22 and the 3.5 to 5 million dollar expense of conducting a second election; and it spares the  
23 candidates and the public from an additional month of campaign advertising.

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26  
27 <sup>1</sup>Additional rankings can be included if the systems in use can accommodate them. In this case,  
28 use of paper ballots and hand counting, as discussed later in the text of this memorandum, would  
permit each voter to assign as many ranks as there are candidates for a given office.

1 Contrary to Defendants' claims, IRV is not a practical impossibility for this year. An IRV  
2 voting system submitted by ES&S, the Department's election equipment and software vendor, is  
3 pending before the Secretary of State, who may yet certify it in time for the election. But  
4 Defendants need not wait for the Secretary of State's decision to begin preparing for an IRV  
5 election. The Director of Elections has before him the alternative proposal of a respected voting  
6 services company but has failed to pursue it seriously. Under this proposal, voters would number  
7 their ranked choices on simple paper ballots and Department of Elections staff, trained and aided  
8 by experts from the company, would count those ballots by hand, producing a final result in two  
9 days.

10 Hand counting paper ballots is inexpensive, costing one-tenth as much as an alternative  
11 partial hand count system proposed by the Director of Elections and rejected by the Secretary of  
12 State. In addition, voting on paper ballots that are counted by hand is a method that requires no  
13 State certification. Since nothing needs to be plugged in, no one can pull the plug. This old-  
14 fashioned method is low-tech, but it is tried and true. The problem is that the Director of  
15 Elections has refused to try it.

16 When the voters adopted instant runoff voting, they gave the Department of Elections one  
17 free pass. Proposition A permitted use of the old, separate runoff system for one final time in the  
18 November 2002 election, but only if the Director of Elections certified that the Department could  
19 not implement IRV by then. Thereafter, Proposition A unmistakably mandates that "the City  
20 shall begin using ranked-choice, or 'instant runoff,' balloting at the November 2003 general  
21 municipal election." After a year and a half, there were to be no exceptions, no more grace  
22 periods.

23 Mr. Arntz used his one free pass last November, vowing at the time that IRV would be  
24 ready for the 2003 election. Now, however, he is refusing to take the necessary steps to  
25 accomplish that objective while there is still time. Instead, he has announced that IRV is "dead"  
26 for this year. Mr. Arntz has stated that he will conduct the upcoming election under the separate  
27 runoff system that Proposition A expressly repealed.

1 The time for excuses is over. The Director of Elections has had his marching orders for  
2 nearly a year and a half. Instant runoff voting is the law now. It should be implemented now, not  
3 next year, or the year after. It is not too late. Approximately five weeks remain in which instant  
4 runoff voting can be made a reality this year.

### 5 **STATEMENT OF FACTS**

6 A general municipal election is scheduled for November 4, 2003 to elect the Mayor,  
7 District Attorney, and Sheriff for the City and County of San Francisco. Section 13.102 of the  
8 City Charter requires the use of instant runoff or ranked choice voting in the general municipal  
9 election. The voters adopted section 13.102 as part of Proposition A, which passed by a 55% to  
10 45% margin at the March 5, 2002 election. (Verified Complaint, ¶ 14.)

11 Defendant John Arntz, as Director of Elections, is charged with the responsibility for  
12 implementing instant runoff voting pursuant to the City Charter and for conducting the 2003  
13 general municipal election. In a letter dated May 31, 2002, Mr. Arntz informed San Francisco  
14 Mayor Willie L. Brown, Jr. that the Department of Elections would be unable to implement  
15 instant runoff voting for the November 2002 election. (Verified Complaint, ¶ 16 & Exh. C.) The  
16 letter acknowledged that the City Charter required use of IRV starting with the November 2003  
17 election. Mr. Arntz stated that the Department and its vendor ES&S would “develop the  
18 necessary systems and procedures to implement IRV for November 2003” and that “the  
19 Department will not delay its responsibility to plan for IRV.” (*Ibid.*)

20 On March 14, 2003, the San Francisco Department of Elections submitted to the  
21 Secretary of State an application for certification of a partial hand count voting system to  
22 implement ranked choice voting. (Verified Complaint, ¶ 18.)

23 On June 2, 2003, the city’s election vendor ES&S submitted to the California Secretary of  
24 State an application for certification of a fully mechanized and computerized instant runoff voting  
25 system. (Verified Complaint, ¶ 19.) The proposed system involves an upgrade to the city’s Eagle  
26 optical scan voting machines and vote-counting software. (*Ibid.*) No decision has been made on  
27 certification of the proposed voting system. (*Ibid.*)

1 At a meeting of the San Francisco Elections Commission on June 18, 2003, a  
2 representative of ES&S told the Commission that a four-person team would require only two  
3 weeks to upgrade the city's 682 Eagle voting machines for use as part of the proposed ES&S  
4 instant runoff voting system. (Verified Complaint, ¶ 20 & Exh. D.)

5 On July 7, 2003, Electoral Reform Services, a British company with decades of experience  
6 administering instant runoff elections, sent Plaintiff Center for Voting and Democracy a proposal  
7 to conduct a hand count for a San Francisco instant runoff election in November 2003. The  
8 proposal gave a fee estimate of \$29,000 plus expenses and stated that the hand count could be  
9 completed in two days. (Verified Complaint, ¶ 21 & Exh. E.) The Center promptly relayed the  
10 proposal to Defendant Arntz, the Director of Elections. In a letter dated July 15, 2003,  
11 Defendant Arntz requested additional details from Electoral Reform Services concerning its  
12 proposal. (Verified Complaint, ¶ 22 & Exh. F.) On July 31, 2003, Electoral Reform Services  
13 sent Mr. Arntz a proposal that included detailed procedures for conducting the hand count, as  
14 well as information on a number of large instant runoff elections it had conducted. (Verified  
15 Complaint, ¶ 23 & Exh. G.) Defendants have not communicated further with Electoral Reform  
16 Services and have taken no action either to reject or to pursue the proposal. (Verified Complaint,  
17 ¶ 23.)

18 On July 23, 2003, the Department of Elections requested the release of \$250,000 in  
19 reserve funds by the Board of Supervisors Finance Committee for the Department's Public  
20 Education Plan for Ranked Choice Voting. (Verified Complaint, ¶ 24 & Exh. H.)

21 On July 28, 2003, the Voting Systems and Procedures Panel recommended denial of  
22 certification for the Department of Elections partial hand count voting system proposal that had  
23 been submitted on March 14, 2003. The Secretary of State subsequently adopted the Panel's  
24 recommendation. (Verified Complaint, ¶ 25.)

25 At the August 6, 2003 meeting of the Board of Supervisors Finance Committee,  
26 Defendant Arntz withdrew the July 23, 2003 request by the Department of Elections for release of  
27 \$250,000 in reserve funds for the Department's Public Education Plan for Ranked Choice Voting.  
28

1 Mr. Arntz told the committee that the Department of Elections would not implement instant  
2 runoff voting for the November 2003 election. (Verified Complaint, ¶ 26.) That same day at a  
3 hearing of the San Francisco Board of Elections, Mr. Arntz again stated that the Department of  
4 Elections would not implement instant runoff voting for the November 2003 election. (*Id.*, at ¶  
5 27.)

## 6 **ARGUMENT**

### 7 **I. THE CITY CHARTER MANDATES INSTANT RUNOFF VOTING THIS YEAR**

8 The mandate for use of instant runoff voting in elections to city office appears in section  
9 13.102(b) of the San Francisco City Charter, which provides in relevant part that “The Mayor,  
10 Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and  
11 members of the Board of Supervisors shall be elected using a ranked-choice, or ‘instant runoff,’  
12 ballot.” Section 13.102 was added to the City Charter by Proposition A, approved by a 55%-  
13 45% margin at the March 2002 election. The timetable to implement instant runoff voting is  
14 clearly set forth in section 13.102(i), which provides in relevant part as follows:

15 (i) Ranked choice, or "instant runoff," balloting shall be used for the  
16 general municipal election in November 2002 and all subsequent  
17 elections. If the Director of Elections certifies to the Board of  
18 Supervisors and the Mayor no later than July 1, 2002 that the  
19 Department will not be ready to implement ranked-choice balloting  
in November 2002, then the City shall begin using ranked-choice,  
or "instant runoff," balloting at the November 2003 general  
municipal election.

20 An un-codified section of Proposition A repealed the former section 13.102, which had  
21 authorized separate December runoff elections. (See Verified Complaint Exhibit B, §2.)<sup>2</sup>  
22 Proposition A authorized one last separate December runoff election if instant runoff voting was  
23 not ready for the November 2002 general municipal election. The final, un-numbered paragraph  
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25 <sup>2</sup>Former Charter section 13.102 provided in relevant part that “if no candidate . . . receives a  
26 majority of the votes cast . . . , the two candidates receiving the most votes shall qualify to have  
27 their names placed on the ballot for a municipal runoff election. . . . A runoff election for the  
28 office of Mayor, Sheriff, District Attorney, City Attorney and Treasurer, or a district runoff for  
Supervisor, shall be held on the second Tuesday of the next ensuing December.” (Repealed by  
Proposition A, Section 2; see Verified Complaint Exh. B.)

1 of Charter section 13.102(i), states:

2 If ranked-choice, or "instant runoff," balloting is not used in  
3 November of 2002, and no candidate for any elective office of the  
4 City and County, except the Board of Education and the Governing  
5 Board of the Community College District, receives a majority of the  
6 votes cast at an election for such office, the two candidates  
7 receiving the most votes shall qualify to have their names placed on  
8 the ballot for a runoff election held on the second Tuesday in  
9 December of 2002.

10 In sum, subject to the exception for 2002 which has now expired, Proposition A clearly  
11 requires use of ranked-choice balloting for "all subsequent elections," and specifically for the  
12 November 2003 general municipal election.<sup>3</sup> Conversely, Proposition A prohibits use of a  
13 separate runoff election this year through its repeal of the provision of the City Charter that  
14 formerly authorized separate runoffs.

15 **II. THE CITY CHARTER REQUIRES DEFENDANTS TO CONDUCT A VOTER**  
16 **EDUCATION CAMPAIGN ON INSTANT RUNOFF VOTING BEFORE THE**  
17 **UPCOMING CITY ELECTION**

18 City Charter section 13.102(g) provides as follows:

19 (g) The Department of Elections shall conduct a voter education  
20 campaign to familiarize voters with the ranked-choice or, "instant  
21 runoff," method of voting.

22 Obviously, a voter education campaign on instant runoff voting would be useless if not  
23 conducted before the first election at which instant runoff voting will be used. Thus, this  
24 provision, read in conjunction with section 13.102(I), quoted above, requires a voter education  
25 campaign before this year's election.

26 In recognition of this fact, the Department of Elections prepared a detailed plan for a voter  
27 education campaign this year,<sup>4</sup> and received an appropriation of over \$750,000 from the Board of  
28

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29 <sup>3</sup>The remaining provisions of Charter section 13.102 define terms, establish the specific  
30 procedures for counting ranked choice ballots, and require that any voting equipment acquired by  
31 the city have the capacity for rank-choice voting. The full text of Charter section 13.102 is  
32 attached hereto as Exhibit A.

33 <sup>4</sup>The latest version of the instant runoff voting educational campaign plan is attached to the  
34 Verified Complaint as Exhibit H.



Supervisors for that purpose.<sup>5</sup> The plan includes grants to community organizations for voter outreach targeted at limited English speaking, racial minority, low voter turnout, senior, disabled, and youth communities. The plan also calls for mailings to all registered voters. The plan's timetable called for the Department of Elections to begin extensive preparation and outreach efforts months ago.

To date, however, with the exception of a handful of presentations to community organizations, Defendants have distributed no IRV voter education materials, and have now abandoned the campaign completely. Defendant Arntz told the Finance Committee on August 6, 2003 that instant runoff voting is "dead" for this year and that the Department has stopped all work on it for the upcoming general municipal election. (Hill Decl., ¶ 7.)

### **III. INSTANT RUNOFF VOTING CAN BE IMPLEMENTED IN THIS YEAR'S MUNICIPAL ELECTION, AS REQUIRED BY LAW**

The Director of Elections claims that instant runoff voting is "dead" for 2003 for two reasons. First, the Secretary of State denied certification of the Elections Department proposal for a mixed machine and hand count instant runoff voting system. (See Verified Complaint, ¶ 25.) Second, the Secretary of State has not acted on the proposal of ES&S, San Francisco's elections equipment and software vendor, for a fully mechanized and computerized instant runoff voting system, and Mr. Arntz has stated that he believes any certification would come too late for the Elections Department to use the system this year. (Hill Decl, ¶ 7.)<sup>6</sup>

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<sup>5</sup>\$250,000 of the budget was held in the Finance Committee for later release to the Department. Release of the \$250,000 was on the agenda for the August 5, 2003 Finance Committee meeting. (See Declaration of Steven Hill in Support of Application for Temporary Restraining Order and Order to Show Cause ("Hill Decl."), ¶ 5.) Defendant Arntz announced at the meeting that the Department of Elections would not request release of the funds because instant runoff voting was "dead" for this year. (*Ibid.*)

<sup>6</sup>Recently, Mr. Arntz has raised an additional concern: the apparent lack of sufficient time to reset and test voting equipment for instant runoff voting after the October 7, 2003 gubernatorial recall election and before November 4, 2003, the date set for the municipal general election. Mr. Arntz's assessment may be unduly pessimistic. An ES&S representative told the Elections Commission in June 2003 that the city's 682 Eagle voting machines could be upgraded for ranked

(continued...)

1 In fact, Defendants' abandonment of the fully automated and computerized voting system  
2 option is premature. Certification of the system could easily occur in time for the system to be  
3 used this year. Recent litigation involving the October 7, 2003 California gubernatorial recall  
4 election strongly indicates that the form of ballots and manner in which ballots are counted can be  
5 finalized as late as six weeks before an election.

6 *Partnoy v. Shelley* \_\_ F.Supp.2d \_\_, 2003 WL 21749418 (S.D.Cal.) (copy attached) was  
7 a successful challenge to the constitutionality of requiring a voter to vote on the gubernatorial  
8 recall question in order to have his or her vote counted on a substitute candidate should the recall  
9 succeed. At the outset of the litigation, the Secretary of State, the Registrar of Voters for San  
10 Diego County, and the Registrar of Voters for Los Angeles County voluntarily agreed not to  
11 print, mail or distribute any ballots or instructions on the recall voting procedures until August 20,  
12 2003 at the earliest, a date approximately seven weeks before the October 7, 2003 recall election.  
13 For the November 4, 2003 election at issue in this case, the comparable date would be September  
14 17<sup>th</sup>, well over a month from now.

15  
16  
17  
18  
19 <sup>6</sup>(...continued)  
20 choice voting by a four-person team in two weeks. Even if Mr. Arntz is correct, a certified IRV  
21 voting system could still be used for the city election. This Court has the equitable power to  
22 postpone the date of the municipal general election to December 9, 2003 if this is the only way  
instant runoff voting can be implemented pursuant to the City Charter.

23 Defendants may be expected to object that there is no provision in the City Charter or in state law  
24 for moving the election date. It should be noted, however, that December 9<sup>th</sup> is the same date  
25 Defendants intend to conduct a separate runoff election, notwithstanding a similar lack of Charter  
26 or state statutory authority. (See Proposition A, §2 [repealing December runoff provision]; Elec.  
27 Code §§1000, 1002, 1003(b).) And unlike Defendants' plan, postponement of the general  
28 municipal election to December on a one-time basis to permit instant runoff voting would fulfill  
the voter mandate in Proposition A. It would also relieve Defendants of the extraordinary burden,  
due to the recall, of conducting citywide elections in three consecutive months. The Court need  
not decide this issue now to rule on the propriety of temporary injunctive relief.

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1 In any event, delay in certification of the electronic IRV voting system would not justify  
2 abandoning instant runoff voting for this election. An alternative means of implementing instant  
3 runoff voting this year is available; Defendants have simply failed to give it serious consideration.  
4 The alternative is an instant runoff election using paper ballots and hand counting of votes.

5 **A. San Francisco Can Implement Instant Runoff Voting This Year Using Paper**  
6 **Ballots and Hand Counting**

7 Elections have long been conducted using paper ballots that are counted by hand. Instant  
8 runoff elections have been successfully conducted using this method in countless elections over  
9 many decades. (Hill Decl., ¶ 2.) For a charter city like San Francisco, a paper ballot, hand count  
10 election has the particular advantage of needing no certification by the Secretary of State.

11 **1. Defendants Have Not Seriously Considered the Paper Ballot, Hand**  
**Count Method**

12 Plaintiff Center for Voting and Democracy called the paper ballot, hand count method to  
13 the attention of Director of Elections John Arntz on March 16, 2003. (Hill Decl., ¶ 4.) CVD  
14 Senior Analyst Steven Hill reminded Mr. Arntz of this option several times over the course of the  
15 next two months. (*Ibid.*) In early July, 2003, at the suggestion of CVD, Electoral Reform  
16 Services prepared a brief proposal for assisting the Department of Elections in conducting a hand  
17 counted, paper ballot instant runoff election this November. (Verified Complaint, ¶ 21 & Exh. E.)  
18 Electoral Reform Services is a respected British firm that has successfully conducted hundreds of  
19 ranked-choice, instant runoff elections. (*Ibid.*; see [www.erbs.co.uk](http://www.erbs.co.uk).) The total cost of hand  
20 counting under the proposal, including the company's fee, would be approximately \$250,000,  
21 one-tenth the projected cost of the Elections Department's mixed mechanical-hand count method  
22 and a fraction of the cost of a second citywide election for the runoff in December. (See Hill  
23 Decl, §§ 5, 6 & Exh. A.) Use of paper ballots would also permit a voter to list as many rankings  
24 as there are candidates for a given office; the voting systems favored by Defendants would restrict  
25 each voter to three rankings per office.

26 On July 31, 2003, Electoral Reform Services submitted a more detailed proposal, spelling  
27 out specific procedures for conducting the election. (Verified Complaint, ¶ 23 & Exh. G.)

1 Plaintiffs are informed and believe that Electoral Reform Services has received no response to its  
2 proposal from Defendants.

3 **2. The Paper Ballot, Hand Count Method Requires No Certification By**  
4 **The Secretary Of State**

5 A hand counting of paper ballots that does not utilize any voting equipment does not  
6 require certification by the Secretary of State. On the contrary, the Secretary of State has no  
7 statutory authority to require certification of this method, particularly in the case of a charter city.

8 The Legislature has given the Secretary of State the authority to require certification of  
9 any “voting system” before its use. (Elec. Code, §19201.) However, the Legislature has defined  
10 “voting system” as “any mechanical, electromechanical, or electronic system and its software, or  
11 any combination of these, used to cast or tabulate votes, or both.” (Elec. Code, §362.) Hand  
12 counting of votes cast on paper ballots does not come within the definition. (For other statutory  
13 provisions reinforcing the distinction between a “voting system” and hand counting of votes on  
14 paper ballots, see Elec. Code, §§15270 and 15290 [fully detailed statutory procedures for hand  
15 counts], 15627, 19202-19205, and 19210 [explicitly distinguishing between voting systems and  
16 paper ballots].)

17 The City Attorney has previously acknowledged that “on its face the state’s statutory  
18 definition of voting systems does not appear to cover a non-mechanized, non computerized  
19 method for casting and counting ballots.” (Verified Complaint, ¶ 28 and Exh. I, at p. 8.)  
20 Nonetheless, he concludes that the Secretary of State is likely to assert his general authority under  
21 Government Code section 12172.5, to “see that elections are efficiently conducted and that state  
22 election laws are enforced,” to require certification if San Francisco tries to use paper ballots and  
23 hand counting. The City Attorney also speculates that a court will defer to the Secretary of State.  
24 (*Id.*, at pp. 8-9.)

25 The City Attorney’s analysis is erroneous for at least two reasons. First, it fails to  
26 recognize that the Legislature, by giving the Secretary of State very specific certification authority  
27 with respect to a precisely defined class of “voting systems,” apparently chose not to extend that  
28 authority to non-mechanical, non-computerized voting methods. Second, it fails to take into

1 account the plenary authority of California charter cities to control via their charters “the manner  
2 in which, the method by which, the time at which, and the terms for which the several municipal  
3 officers . . . shall be elected or appointed . . .” (Cal.Const., art. II, §5(b).) Article XI, section  
4 5(a) of the Constitution also provides as follows:

5       It shall be competent in any city charter to provide that the city governed  
6       thereunder may make and enforce all ordinances and regulations in respect to  
7       municipal affairs, subject only to restrictions and limitations provided in their  
8       several charters and in respect to other matters they shall be subject to general  
9       laws. City charters adopted pursuant to this Constitution shall supersede any  
10      existing charter, *and with respect to municipal affairs shall supersede all laws*  
11      *inconsistent therewith.*

12               (Cal. Const., art. XI, § 5(a), emphasis added.)

13       Combined, the supremacy of charter cities in municipal affairs under subdivision (a)  
14      generally and their plenary authority over municipal elections under subdivision (b) specifically  
15      mean that charter cities are given wide berth by our appellate courts in matters of municipal  
16      elections. (See, e.g., *Johnson v. Bradley* (1992) 4 Cal.4th 389, 409-411 [Los Angeles city charter  
17      provision establishing partial public funding of municipal elections is a municipal affair,  
18      superseding a conflicting Political Reform Act provision, enacted by the state’s voters, that  
19      prohibited all public funding of campaigns]; *Cawdrey v. City of Redondo Beach* (1993) 15  
20      Cal.App.4th 1212, 1228 [city charter provisions imposing term limits on elected municipal  
21      officeholders concern a municipal affair and supersede a conflicting state statute]; *Rees v. Layton*  
22      (1970) 6 Cal.App.3d 815, 820-822.) Accordingly, even if the Legislature had attempted to  
23      extend the certification authority of the Secretary of State to manual balloting and counting  
24      methods, which it did not, one might expect the City Attorney to argue vigorously against the  
25      applicability of such state legislation to a charter city’s purely municipal election, particularly in  
26      light of the city’s obligation to defend and enforce charter provisions enacted by the voters. As  
27      our Supreme Court has observed,

28               “[T]he fact, standing alone, that the Legislature has attempted to  
29      deal with a particular subject on a statewide basis is not

determinative of the issue as between state and municipal affairs ... ; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.”

*(Johnson v. Bradley, supra, 4 Cal.4th at p. 405, citation omitted.)*

In light of these authorities, the appropriateness of temporary injunctive relief in this case should not turn on speculation about the position of the Secretary of State. The Court should issue the temporary restraining order and order to show cause to stop Defendants from abandoning instant runoff voting before reasonable alternatives are pursued.

**IV. Both Mandatory and Prohibitory Relief Are Available In A Mandamus Proceeding To Enforce Election Laws**

“Mandamus is clearly the proper remedy for compelling an officer to conduct an election according to law.” (*Knoll v. Davidson* (1974) 12 Cal.3d 335, 341, quoting *Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570, fn. 2.) Mandate will lie to compel performance of a clear and present duty. (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 972.) As an equitable remedy, injunctive relief is also available in a mandamus proceeding and “is appropriate to restrain action which, if carried out, would be unlawful.” (*Id.*, at p. 973.)

Plaintiffs and Petitioners respectfully request immediate issuance of a temporary restraining order having the following elements. First, we ask the Court to order Defendants to proceed immediately with the development of the necessary materials and procedures to conduct the 2003 municipal general election using a hand count of paper ballots on which voters mark their ranked choices. The Electoral Reform Services company remains available to offer its expertise and assistance.

Second, we ask the Court to order Defendants to proceed immediately with full implementation of its existing plan for an instant runoff voting educational campaign, as mandated by section 13.102(g) of the City Charter. This must include completion of all print and audio-visual materials, mailing of materials to voters, immediate distribution of the grants to community organizations that are provided for in the plan, and re-application to the Finance Committee of the Board of Supervisors for release of the \$250,000 held for use in the educational campaign.

1 Third, we ask that, pending a full hearing, Defendants be ordered not to order, print, or  
2 distribute any non-IRV ballots, sample ballots, voter information pamphlets, or voter education  
3 materials, and that they be prohibited from conducting staff or volunteer training in non-IRV  
4 procedures for the 2003 municipal general election.

5 Finally, we ask that the Court order Defendants not to submit to the Secretary of State for  
6 certification the paper ballot, hand count voting materials and procedures they develop, in light of  
7 the Secretary of State's lack of authority in the matter.

### 8 CONCLUSION

9 It is said that where there is a will, there is a way. The people's will to have instant runoff  
10 voting now is manifest, and there is a way by which Defendants can successfully accomplish it.  
11 At this point, however, it is clear they will do so only if ordered by this Court. For all the  
12 foregoing reasons, the Court should issue a temporary restraining order and order to show cause  
13 re: preliminary injunction and peremptory writ of mandate as prayed.

14 Dated: August 11, 2003

Respectfully submitted,

16 \_\_\_\_\_  
17 Lowell Finley

18 Attorney for Plaintiffs and Petitioners  
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1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, certify and declare that I am a citizen of the United States, over the age  
3 of 18 years, employed in Alameda County, California, and not a party to this action. My business  
4 address is 1604 Solano Avenue, Berkeley, California 94707. On August 11, 2003, I served true  
5 copies of the attached VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF and VERIFIED  
6 PETITION FOR WRIT OF MANDATE; EX PARTE APPLICATION FOR TEMPORARY  
7 RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY  
8 INJUNCTION/WRIT OF MANDATE and MEMORANDUM OF POINTS AND  
9 AUTHORITIES; DECLARATION OF STEVEN HILL IN SUPPORT OF APPLICATION FOR  
10 TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE; DECLARATION  
11 OF LOWELL FINLEY IN SUPPORT OF APPLICATION FOR TEMPORARY  
12 RESTRAINING ORDER AND ORDER TO SHOW CAUSE; and [PROPOSED] ORDER TO  
13 SHOW CAUSE AND TEMPORARY RESTRAINING ORDER on the Defendants in the action  
14 by delivering them by hand to their counsel, Julia Moll and Wayne Snodgrass, Deputy City  
15 Attorneys.

16 I declare under penalty of perjury and the laws of the State of California that the foregoing  
17 is true and correct and that this declaration was executed on August 11, 2003 in Berkeley,  
18 California.

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21 Lowell Finley  
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EX PARTE APPL. FOR TRO/OSC 15