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## LEGAL MEMORANDUM

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**To:** Alan Durning, Sightline Institute  
**From:** Dmitri Iglitzin and Jacob Harksen  
**Subject:** Potential Legal Challenges to Ranked-Choice Voting and Approval Voting in Washington  
**Date:** September 15, 2022  
**File No:** 6644-001

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### Executive Summary

This November, Seattle voters will vote on whether to adopt one of two proposed changes to the current primary election process. Currently, Seattle’s primaries are “plurality,” or single-choice elections—voters can vote for only one candidate, and the top two candidates move on to the general election. The first proposed reform, “approval voting,” reached the November ballot by way of a successful petition (Initiative 134). Approval voting allows voters to vote for, or “approve of,” as many candidates as they choose, with the two candidates who receive the most total votes moving on to the general election. The second proposed reform, to adopt “ranked-choice voting” (RCV), was placed on the ballot as an alternative by the City Council.<sup>1</sup> RCV allows voters to rank candidates in order of preference, but each voter still only has one vote, which is reassigned to lower-ranked candidates as the voter’s higher-ranked candidates are eliminated.

RCV has repeatedly withstood challenges brought against it based on state and federal law. Relative to approval voting, it is a known quantity, the legality of which is not seriously in doubt. Approval voting, in contrast, has been adopted by only two U.S. cities, and has not been subject to legal challenge in either. This means there are no cases evaluating approval voting’s legality. For that reason, detailed examination of the lawfulness of approval voting is necessary in order to come up with an opinion as to whether the ordinance on the Seattle ballot could lawfully be implemented, if passed by the voters, or could be successfully challenged at some point subsequent to implementation.

If approval voting is adopted by Seattle voters, a legal challenge seeking to prevent it from going into effect based on the claim that it violates either the federal Voting Rights Act or the Washington Voting Rights Act is not likely to be successful in the short-term, because such a challenge would likely have to wait until evidence can be presented to show how approval voting

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<sup>1</sup> Sarah Grace Taylor, *Competing Voting Reform Measures Will Be On Ballot*, SEATTLE TIMES (July 15, 2022), <https://www.seattletimes.com/seattle-news/politics/competing-voting-reform-measures-make-seattles-november-ballot-after-city-council-oks-alternative/>.

actually affects minority voters. That is not to say, however, that approval voting is, ultimately, likely to survive legal challenge.

As explained in more detail below, approval voting (as applied to Seattle’s primaries) would share the most problematic characteristic of “at-large” elections,<sup>2</sup> which allow a majority voting bloc to elect all of its preferred candidates, leaving non-majority voters no meaningful opportunity to elect their candidates of choice. Currently, a majority voting bloc can only advance one of its top two candidates in each primary to the general election, because voters only have one vote each. Under approval voting, the same majority bloc could choose *both* of the top two candidates in each race, if the majority was organized sufficiently, because each voter can vote for as many candidates as they choose. (This would *not* be the case under RCV, because each voter would still only have one vote, and the majority would be limited to advancing one candidate.)

The Supreme Court has recognized that this is a serious problem with at-large elections, noting that they “tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district.” *Rogers v. Lodge*, 458 U.S. 613, 616 (1982). A minority group (whether racial, ethnic, economic, or political), meanwhile, “may be unable to elect any representatives in an at-large election.” *Id.* This same flaw with approval voting makes it vulnerable to a “vote dilution” challenge, *i.e.*, the claim that the preferences of non-majority voters are basically being written out of the electoral process.

The likelihood that such a legal challenge will ultimately prevail, however, is impossible to determine without having first conducted data-based research into past Seattle elections, which is beyond the scope of this memo. Such research would need to assess, among other things, whether there is a history of voting that is polarized along racial lines, whether there is evidence of past intent on the part of voters or elected officials to discriminate against a protected class, and the presence or absence of other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the past use of overt or subtle racial appeals in political campaigns. *See* RCW 29A.92.030. Also highly relevant to assessing the likely merits of a post-enactment challenge to approval voting would be the actual experience of protected classes in Seattle elections once it goes into effect, which by definition cannot be learned in advance of it becoming law.

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<sup>2</sup> Several variations of “at-large” elections exist. One, currently used in some Washington jurisdictions, including Seattle for certain City Council seats, is known as a “numbered post” election—candidates run for specific “numbered” positions in the legislative body, and all voters may vote for a candidate in each race. Another variation of “at-large” elections, “block voting,” involves voting for as many candidates as there are positions in the legislative body, with the top vote-getters being elected. “At-large” is generally used by courts in federal Voting Rights Act cases and in statutes like the Washington Voting Rights Act as a pragmatic catch-all to refer to these types of elections, in which candidates are elected by the entire electorate (rather than by only those voters who live in a specific district). A common feature of “at-large” elections is that they generally enable a majority of voters to elect all of their preferred candidates, to the exclusion of minority groups. This memo also uses “at-large” to refer collectively to these types of election systems.

That said, a different provision of Washington law may pose a more immediate threat to approval voting: a single sentence in the state’s law on primary elections prohibits voters from casting “more than one vote for candidates for a given office.” RCW 29A.52.161. Approval voting would seem to violate this law, but the law has never been interpreted by a court. And, as opposed to other legal challenges which may not be able to proceed until after approval voting is in use (due to the evidence required), a challenge under this law may be more likely to lead to a court enjoining approval voting from being implemented in the first place. For that reason, this law poses at least a potential risk to approval voting, but not RCV.

## Analysis

### I. Comparative Legality of Ranked-Choice and Approval Voting

RCV has been adopted by a number of cities and counties, several states, and even some foreign countries, providing a substantial body of experience to draw from in evaluating its use.<sup>3</sup> RCV’s relatively long history means that it has also been the subject of a number of legal challenges. In general, RCV has fared well in these cases, and courts have upheld its constitutionality under state and federal law.<sup>4</sup>

Approval voting, in contrast, has been adopted by only two U.S. cities: Fargo, North Dakota (adopted in 2018, first used in 2020),<sup>5</sup> and St. Louis, Missouri (adopted in 2020 and first used in 2021).<sup>6</sup> Approval voting was not challenged in court by voters in either Fargo or St. Louis (though an effort to repeal approval voting is already underway in St. Louis). This means there are no cases evaluating approval voting’s legality.

### II. Possible Legal Challenges to Approval Voting

Because the legality of RCV is not seriously in doubt, this memo will not review exhaustively the cases that have upheld it against various state and federal law challenges. But, several important considerations from cases upholding RCV shed light on how approval voting might fare under the same or similar standards. Cases considering RCV are the best source for hypothesizing about approval voting’s potential legal weaknesses. There are also other cases in which voting systems that share significant commonalities with approval voting were struck

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<sup>3</sup> *Where Is Ranked Choice Voting Used?*, FAIRVOTE, [https://www.fairvote.org/rcv#where\\_is\\_ranked\\_choice\\_voting\\_used](https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used) (last visited Sept. 8, 2022).

<sup>4</sup> *Is RCV Constitutional?*, FAIRVOTE, <https://www.fairvote.org/rcv#constitutionality> (last visited Sept. 8, 2022); *What Have the Courts Said About RCV?*, FAIRVOTE, [https://www.fairvote.org/rcv#court\\_decisions](https://www.fairvote.org/rcv#court_decisions) (last visited Sept. 8, 2022).

<sup>5</sup> Dan Gunderson, *Vote for Everyone You Like—Fargo Tests Approval Voting*, MPR News (June 6, 2022, 5:00 AM), <https://www.mprnews.org/story/2022/06/06/vote-for-everyone-you-like-fargo-tests-approval-voting>.

<sup>6</sup> Mark Schlinkmann, *Effort Underway to Repeal ‘Approval Voting’ in St. Louis, Replace it with New System*, St. Louis Post-Dispatch (Jan. 14, 2022), [https://www.stltoday.com/news/local/govt-and-politics/effort-underway-to-repeal-approval-voting-in-st-louis-replace-it-with-new-system/article\\_2c3bad65-1e46-58b6-8b9f-1d7f49d0aaeb.html](https://www.stltoday.com/news/local/govt-and-politics/effort-underway-to-repeal-approval-voting-in-st-louis-replace-it-with-new-system/article_2c3bad65-1e46-58b6-8b9f-1d7f49d0aaeb.html) (describing effort to repeal approval voting after only one use).

down by courts for various reasons, and those cases may suggest additional legal problems with approval voting.<sup>7</sup>

**A. Approval voting is less likely to survive a constitutional challenge than RCV, but still may survive that challenge.**

RCV has survived a variety of constitutional challenges brought by individual voters, nonprofit voting rights groups, candidates for office, and political parties. Plaintiffs generally have alleged that RCV violates their rights under the First and Fourteenth Amendments to associate for political purposes, to free expression (insofar as RCV allegedly forces them to vote for candidates they do not support), and to due process, equal protection, and the right to vote. *See, e.g., Dudum v. Arntz*, 640 F.3d 1098, 1102–03 (9th Cir. 2011) (individual voter alleged RCV violated First Amendment and Fourteenth Amendment’s Equal Protection and Due Process clauses); *Hagopian v. Dunlap*, 480 F. Supp. 3d 288, 294 (D. Me. 2020) (individual voters claimed RCV violated due process and equal protection, burdened their right to vote effectively, compelled them to vote for candidates they did not support, and abridged Twenty-Sixth Amendment rights to vote based on age); *Baber v. Dunlap*, 376 F. Supp. 3d 125, 134, 138 (D. Me. 2018) (individual voters and candidate for office alleged RCV violated Article I, section 2 of U.S. Constitution, and brought First Amendment and equal protection and due process claims); *Maine Republican Party v. Dunlap*, 324 F. Supp. 3d 202, 204 (D. Me. 2018) (political party claimed RCV infringed its First Amendment right of association to select its candidates by plurality vote in primary elections); *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 689 (Minn. 2009) (voters and nonprofit group claimed RCV violated right to vote, to political association, and to equal protection). None of these challenges were successful.

The most useful claims to consider in these cases are those brought under the Fourteenth Amendment’s Equal Protection Clause—that RCV violates the principle of “one person, one vote.” RCV does *not* violate the equal protection principle of “one person, one vote.” Cases holding as much might be cited to support the proposition that approval voting similarly does not violate this principle. There are two basic reasons why this is so: the standard courts apply to constitutional challenges of voting restrictions, and the fact that “one person, one vote,” is not a literal requirement.

Under Article I, section 4 of the U.S. Constitution, “States retain the power to regulate their own elections.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And every election law, “whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.” *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Voting restrictions thus “can burden equal protection rights as well as ‘interwoven strands of liberty’ protected by the First and Fourteenth Amendments—namely, ‘the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their

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<sup>7</sup> *See, e.g., Brown v. Smallwood*, 153 N.W. 953, 955–57 (Minn. 1915) (holding multi-round, cumulative voting system violated state constitution), *discussed in Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 691–93 (Minn. 2009) (upholding constitutionality of RCV).

votes effectively.” *Dudum*, 640 F.3d at 1105–06 (internal quotation marks omitted) (quoting *Anderson*, 460 U.S. at 787).

Recognizing States’ and municipalities’ need “to assure that elections are operated equitably and efficiently,” courts apply a “flexible standard” when considering constitutional challenges to election laws:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

*Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). “When the burdens on voting imposed by the government are ‘severe,’ strict scrutiny applies, and the ‘regulation must be narrowly drawn to advance a state interest of compelling importance.’” *Dudum*, 640 F.3d at 1106 (internal quotation marks omitted) (quoting *Burdick*, 504 U.S. at 434). “But voting regulations are rarely subjected to strict scrutiny.” *Id.* The Ninth Circuit has “repeatedly upheld as ‘not severe’ restrictions that are generally applicable, even-handed, politically neutral, and . . . [which] protect the reliability and integrity of the election process.” *Id.* (internal quotation marks and quotation omitted). When burdens on voting are not “severe,” a court’s review will be correspondingly “less exacting.” *Id.* (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Accordingly, “when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interest are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

RCV was not subjected to strict scrutiny in the cases in which it was upheld. In fact, courts struggled to identify *any* burden RCV imposed on voters when considering equal protection claims. *See, e.g., Dudum*, 640 F.3d at 1113 (“Therefore, *if* the characteristics” of RCV the plaintiff challenged “impose any burdens on the right to vote, they are minimal at best.”); *Baber*, 376 F. Supp. 3d at 142 (“Through RCV, . . . majority rights have been advanced, and no minority rights have been burdened unduly, if at all.”). This is largely because RCV does not treat voters unequally—each voter has the same opportunity to rank the voter’s preferred candidates, or to *not* rank candidates, and all votes are counted and given the same weight. *Dudum*, 640 F.3d at 1109, 1112, 1113; *Minn. Voters All.*, 766 N.W.2d at 693. Assuming, nonetheless, that RCV imposes some burden on voters, courts have concluded that any number of legitimate government interests justify its use, including enabling voters to express more nuanced voting preferences, electing candidates with majority or at least greater plurality support, avoiding the expenses of separate run-off elections, respecting the democratic process (where RCV is enacted by referendum/initiative), increasing voter turnout, and encouraging less divisive campaigns. *Dudum*, 640 F.3d at 1116; *Baber*, 376 F. Supp. 3d at 142; *Minn. Voters All.*, 766 N.W.2d at 697.

Approval voting is likely to survive a federal constitutional challenge for the same reasons that RCV has—the burdens it places on voters are low, and the same legitimate government interests arguably would support its use. The principal difficulty with attacking approval voting from this direction is that, on the front end, and like RCV, approval voting treats all voters equally. Each voter has the same opportunity to cast multiple votes for different candidates, even if they don’t choose to, whether deliberately or not. It’s easy to imagine making similar arguments against approval voting that opponents of RCV have made, and equally easy to imagine those arguments being rejected for the same reasons. *See, e.g., Baber*, 376 F. Supp. 3d at 140–41, 144–45 (rejecting arguments that plaintiffs’ ballots received less weight because their preferred candidate failed to achieve a majority, and that RCV is too confusing or difficult for voters to understand how to vote effectively).

But what about the equal protection principle of “one person, one vote”? The principle of “one person, one vote,” is more of a convenient shorthand than a rule to be read literally. “One person, one vote,” in Supreme Court precedent, concerns the “unequal weighting of votes,” and comes from cases concerning “the malapportionment of legislatures.” *Minn. Voters All.*, 766 N.W.2d at 698 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). “That is, the number of voters in some districts electing one legislator was several multiples higher than in other districts, meaning that a vote in the smaller population district had more impact in terms of electing a legislator than a vote in the more populous district.” *Id.*

Opponents argued that RCV violated “one person, one vote,” because “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.” *Dudum*, 640 F.3d at 1112. The Ninth Circuit recognized that this was an inaccurate statement of how RCV works, because at each step of the RCV process, each ballot was counted as no more than one vote. *Id.* But more importantly, the argument failed because, under RCV, “the option to rank multiple *preferences* is not the same as providing additional *votes*, or more heavily-weighted votes, relative to other votes cast.” *Id.*; accord *Minn. Voters All.*, 766 N.W.2d at 698. “The point is that ‘one person, one vote’ does not stand in opposition to ranked balloting, so long as all electors are treated equally at the ballot.” *Baber*, 376 F. Supp. 3d at 140 (citing *Hadley v. Jr. Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 56 (1970) (“[T]he Equal Protection Clause . . . requires that each qualified voter must be given an equal opportunity to participate in that election[.]”)).

Approval voting, on the other hand, unquestionably *does* allow voters to cast more than one vote, and so in that respect it may be on shakier constitutional ground than RCV. But the more difficult problem for opponents of approval voting is that it may nonetheless be consistent with equal protection and the “one person, one vote” principle, because it affords each voter an equal opportunity to cast the same number of votes. And from a technical, constitutional perspective, approval voting does not weigh some votes more heavily than others. If anything, approval voting seems naturally to *devalue* additional votes (hence the use of “bullet voting” as a strategy for electing a candidate of choice in at-large elections.)<sup>8</sup>

Comparing approval voting to other election systems that permit voters to cast multiple votes helps illustrate why it likely would be found constitutional. First, approval voting functions

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<sup>8</sup> *See, e.g.*, [https://en.wikipedia.org/wiki/Bullet\\_voting](https://en.wikipedia.org/wiki/Bullet_voting).

like “block voting” at-large elections in which voters may cast one vote for as many candidates as there are open positions, with the candidates who receive the highest number of votes being elected. It also resembles “numbered post” at-large elections in its tendency to allow a majority voting bloc to totally control the composition of a multimember legislative body. Both versions of at-large elections may violate the federal Voting Rights Act (VRA), as explained below.<sup>9</sup> But the Supreme Court has held that at-large elections do not violate the Constitution unless they are implemented or maintained for a discriminatory purpose, with the *intent* of “minimizing, cancelling out or diluting the voting strength of racial elements in the voting population.” *Rogers*, 458 U.S. at 617 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)). Insofar as approval voting looks and works like various forms of at-large elections, it probably would not be unconstitutional unless adopted or maintained for a discriminatory purpose.

Approval voting also resembles cumulative voting, a rarer election system in which voters may cast as many votes as there are seats up for election, and may assign more than one vote to a single candidate.<sup>10</sup> Cumulative voting’s constitutionality does not appear to be in question, despite the average voter’s intuitive feeling that it might violate “one person, one vote.”<sup>11</sup> A federal district court has explained: “Cumulative voting satisfies the basic ‘one person, one vote’ rule in that every individual voter is allocated an equal number of votes.” *Cane v. Worcester Cty.*, 847 F. Supp. 369, 374 (D. Md.) (ordering implementation of cumulative voting to remedy VRA violation), *aff’d in part and rev’d in part on other grounds*, 35 F.3d 921 (4th Cir. 1994). Cumulative voting has been accepted as a remedy in VRA cases, which supports the view that it is constitutional. *See id.*; *Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas, J., concurring) (“[N]othing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes.”). Whether or not approval voting comports with the VRA, it may be constitutional for the same general reason as cumulative voting—it gives each voter an equal number of votes.

This is not to say that there is *no* authority that would tend to cast some doubt on approval voting’s constitutionality. In 1915, the Minnesota Supreme Court held that a different variation of cumulative voting violated the state’s constitution. *Brown v. Smallwood*, 153 N.W. 953, 957 (Minn. 1915). Under that system, voters were allowed to vote for a first-, second-, and as many additional-choice candidates as they desired, up to the total number of candidates. *Id.* at 955. If the result of counting the first-choice votes was a majority, that candidate won. *Id.* If there was no majority, the second-choice votes were *added* to the first-choice votes (not reassigned from eliminated candidates, as in RCV), and so on, until either a candidate received a

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<sup>9</sup> *See infra*, section II.B; *United States v. Eastpointe*, 378 F. Supp. 3d 589, 595 (E.D. Mich. 2019) (block voting at-large election); *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 231 (D. Mass. 2017) (numbered post at-large election); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1385–86 (E.D. Wash. 2014) (numbered post at-large election).

<sup>10</sup> *Cumulative Voting*, BALLOTPEdia, [https://ballotpedia.org/Cumulative\\_voting](https://ballotpedia.org/Cumulative_voting) (last visited Sept. 9, 2022). Under cumulative voting, if there are five legislators to be elected, each voter will have five votes to cast, and may spread them among their preferred candidates, or assign all five votes to one candidate.

<sup>11</sup> *See* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 1, 263–64, 282–84 (1995), available at <https://chicagounbound.uchicago.edu/uclf/vol1995/iss1/10> (describing use of cumulative voting in Chilton County, Alabama, as a result of settlement in VRA suit over use of at-large elections, and public reaction).

majority or all votes were added and the candidate with a plurality won. *Id.* Unlike regular cumulative voting, no voter could vote more than once for any individual candidate. *Id.* The Minnesota Supreme Court’s criticism of this system under Minnesota’s constitution could well describe the flaws in approval voting, too:

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. The preferential system directly diminishes the right of an elector to give an effective vote for the candidate of his choice. If he votes for him once, his power to help him is exhausted. If he votes for other candidates he may harm his choice, but cannot help him. Another elector may vote for three candidates opposed to him.

*Id.* at 956. Approval voting exhibits the same basic flaw: votes for additional candidates cannot help a voter’s first-choice candidate, but may in fact hurt that candidate’s chances. The Minnesota Supreme Court believed, in 1915 at least, that this flaw rose to the level of violating the state’s constitution. According to the *Brown* court:

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 problem with the Minnesota Supreme Court’s reasoning is that the voting system at issue did not give voters unequal rights to cast more than one vote. All voters had the same right to vote for first-, second-, and additional-choice candidates, as the dissent in that case pointed out. *Id.* at 959 (Hallam, J., dissenting in part) (“Whatever the Duluth charter does do, it does not infringe on the right to vote. Every citizen has the same right as every other citizen.”). Almost a century later, the Minnesota Supreme Court was careful to say that its holding in *Brown* was limited to the facts before it at the time. *Minn. Voters All.*, 766 N.W.2d at 693 (“[T]he principles of *Brown* arise from and are defined by the cumulative voting system at issue in that case.”).<sup>12</sup>

The Washington Supreme Court, only a few years earlier, rejected a similar argument that the state’s primary law, which required voters to vote for a first- and second-choice candidate in order to prevent candidates from winning a primary with less than 40 percent of the vote, violated Washington’s Constitution. *State v. Nichols*, 50 Wash. 508, 527–28, 97 P. 728 (1908). The Washington Supreme Court held that it was within the state legislature’s power to enact the law, because:

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<sup>12</sup> The Minnesota Supreme Court rejected the plaintiffs’ argument in *Minnesota Voters Alliance* that RCV violated “the principles” articulated in *Brown*, because under RCV, “a voter’s subsequent choices cannot count against his first-choice candidate,” nor does RCV “unequally weight votes.” 766 N.W.2d at 693. With RCV: “Every voter has the same opportunity to rank candidates when she casts her ballot, and in each round every voter’s vote carries the same value.” *Id.* The preferential, cumulative voting system at issue in *Brown* might have violated the second part of this statement—that in each subsequent round each voter’s vote should carry “the same value”—but because approval voting has no subsequent rounds, it is unlikely to violate the same requirement.

So long as voting is by ballot, an official ballot is a convenience, if not a necessity, and some authority vested somewhere in government must determine the names which shall appear on that ballot, and those names must necessarily be few in number; and, we repeat, any reasonable method prescribed by the lawmaking power which accomplishes this result must be sustained by the judicial department of government. The courts have no concern with its wisdom or policy.

*Id.* at 528.

A case like *Brown*, then, certainly supports the argument that adopting approval voting would be unwise, but it may have only limited utility as an argument against approval voting’s constitutionality in Washington. *Brown* was decided in 1915, under another state’s constitution, and on the basis of logic that is imprecise at best, fundamentally flawed at worst. The decision in *Brown* may also conflict with the Washington Supreme Court’s decision in *Nichols*, from the same period, and appears inconsistent with more modern cases decided under the U.S. Constitution, which generally hold that a voting system does not violate an eligible citizen’s right to vote, so long as it treats all voters equally.

**B. Approval voting might violate the federal Voting Rights Act, but such claims are difficult to prove and require significant statistical evidence.**

Approval voting’s potential to worsen representation for communities of color leaves open the possibility that approval voting may violate the federal Voting Rights Act (VRA).<sup>13</sup> Under Section 2 of the VRA, plaintiffs can sue to prevent “any State or political subdivision” from imposing any voting practice that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,” or membership in a language minority group. 52 U.S.C. § 10301(a). An intent to discriminate need not be proven; a violation of Section 2 “is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* § 10301(b).

Most Section 2 cases involve challenges to “at-large” election schemes.<sup>14</sup> “Under an at-large voting system, all voters in the jurisdiction can cast ballots for as many seats as there are up for election. The candidates who receive the most votes will represent the entire political subdivision.” *United States v. Eastpointe*, 378 F. Supp. 3d 589, 595 (E.D. Mich. 2019). The problem with at-large elections and multimember districts, as the Supreme Court has recognized, is that they “tend to minimize the voting strength of minority groups by permitting the political

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<sup>13</sup> Jazmine Smith et al., *The Case Against Approval Voting—And For Real Democracy Reform in Seattle*, THE URBANIST (March 15, 2022), <https://www.theurbanist.org/2022/03/15/the-case-against-approval-voting/> (discussing possible negative impacts on communities of color of adopting approval voting).

<sup>14</sup> *Section 2 of the Voting Rights Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/section-2-voting-rights-act> (last visited Sept. 9, 2022).

majority to elect *all* representatives of the district.” *Rogers v. Lodge*, 458 U.S. 613, 616 (1982). A minority group (whether racial, ethnic, economic, or political), meanwhile, “may be unable to elect any representatives in an at-large election.” *Id.* Interestingly, RCV has been adopted or approved as a remedy in Section 2 cases challenging at-large election systems. See Consent Judgment and Decree, *United States v. Eastpointe*, No. 4:17-CV-10079, 2019 WL 2647355, at \*2 (E.D. Mich. June 26, 2019); Consent Decree at 10, *Huot v. City of Lowell*, No. 1:17-cv-10895-DLC (D. Mass. Oct. 9, 2019).<sup>15</sup>

If adopted in Seattle, approval voting may affect minority representation in ways similar to “at-large” elections. Currently, a majority voting bloc in Seattle can only advance one of its top two preferred candidates in each primary to the general election, because voters only have one vote each. Under approval voting, the same majority bloc could choose *both* of the top two candidates, if the majority was organized sufficiently, because each voter can vote for as many candidates as they choose. This would *not* be the case under RCV, because each voter would still only have one vote, and the majority would be limited to advancing one candidate.

The fact that approval voting would only be used for Seattle’s primary elections does not insulate approval voting from challenge under the VRA—Section 2 explicitly applies to “political processes *leading to nomination* or election.” 52 U.S.C. § 10301(b) (emphasis added). By allowing a majority to determine which candidates will advance to the general election, approval voting may deny minority groups the opportunity to participate meaningfully in the primary and general election. That, in itself, is a problem under the VRA, even if the ultimate outcome of the general election is that the majority inevitably elects its preferred candidate.<sup>16</sup> If the use of approval voting in the primary would tend to give minority groups “less *opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice,” regardless of general election outcomes, then approval voting may well violate Section 2 of the VRA. 52 U.S.C. § 10301(b) (emphasis added).

However viable a VRA Section 2 challenge to approval voting might be in the future, though, such “vote dilution” cases are by no means easy to put on or win. When evaluating Section 2 claims, the Supreme Court has “emphasized the importance of understanding the historical and social context in which the challenge is being raised,” and requires courts to “conduct a ‘searching practical evaluation of the past and present reality of the electoral system’s operation.’” *Eastpointe*, 378 F. Supp. 3d at 593 (internal quotation marks omitted) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986)). “Because vote-dilution cases require a holistic rather than formalistic inquiry,” courts must undertake “‘an intensely local appraisal of the design and impact’ of the challenged electoral structure.” *Id.* (quoting *Gingles*, 478 U.S. at 79). Such a fact-intensive inquiry would require a significant amount of research and study, and likely would not be possible until *after* approval voting is used in at least one and possibly several election cycles.

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<sup>15</sup> See also *Ranked Choice Voting and Representation*, FAIRVOTE, [https://www.fairvote.org/data\\_on\\_rcv#research\\_rcvrepresentation](https://www.fairvote.org/data_on_rcv#research_rcvrepresentation) (last visited Sept. 9, 2022) (discussing RCV and impacts on minority representation).

<sup>16</sup> See *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) (“Section 2 guarantees a fair *process*, not an equal *result*.”); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1387 (E.D. Wash. 2014) (“Section 2 does not confer a right to proportional representation, but rather a right to participate equally in the political process.”).

Even more challenging, however, is the fact that under *Thornbug v. Gingles*, 478 U.S. 30 (1986), plaintiffs in vote-dilution cases must establish three pre-conditions to show a violation of Section 2: (1) “that the minority group purportedly disadvantaged by the system is sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) “that the minority group is politically cohesive” (*i.e.* tends to vote together); and (3) “that the majority group votes sufficiently as a bloc to enable it, in the absence of special circumstances, ‘usually to defeat the minority’s preferred candidate.’” *Eastpointe*, 378 F. Supp. 3d at 600 (quoting *Gingles*, 478 U.S. at 49–51). Establishing these preconditions may require detailed statistical evidence, some of which it may not be possible to gather until after approval voting is in use. While a vote-dilution claim challenging approval voting under Section 2 of the VRA may ultimately have merit (it remains to be seen), it is at most only a long-term potential defect in approval voting as it is being proposed in Seattle.

### C. Approval voting is more likely to violate Washington’s Voting Rights Act.

Washington is one of only a handful of states to have enacted its own, state-level version of the VRA, the Washington Voting Rights Act (WVRA).<sup>17</sup> RCW Ch. 29A.92. The WVRA is largely untested,<sup>18</sup> but it may provide a more immediate and, perhaps, more effective route for opponents of approval voting to challenge it. The substance of a potential WVRA challenge would likely be the same as under the VRA—that by allowing a majority to choose all of the winning candidates in a primary, to the total exclusion of candidates preferred by minority groups, approval voting denies minority groups an equal opportunity to participate.

The WVRA notes the legislature’s intent to enable local governments to “voluntarily adopt changes on their own, in collaboration with affected community members, to remedy potential electoral issues so that minority groups have an equal opportunity to elect candidates of their choice *or influence the outcome of an election.*” RCW 29A.92.005 (emphasis added). The law states that “no method of electing the governing body of a political subdivision may be imposed or applied in a manner that impairs the ability of members of a protected class . . . to have an equal opportunity to elect candidates of their choice,” whether by vote dilution or abridgment of voting rights. RCW 29A.92.020. The WVRA specifically does not require plaintiffs to establish all of the *Gingles* preconditions. *See* RCW 29A.92.030. Additionally, “[m]embers of different protected classes may file an action jointly” under the WVRA “if they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate,” RCW 29A.92.090, meaning that multiple minority groups may

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<sup>17</sup> *See* Aseem Mulji & Valencia Richardson, *New York Joins Other States in Enacting State-Level Voting Rights Act*, CAMPAIGN LEGAL CTR. (June 21, 2022), <https://campaignlegal.org/update/new-york-joins-other-states-enacting-state-level-voting-rights-act> (noting adoption of state-level VRA in Washington, as well as New York, Virginia, Oregon, and California).

<sup>18</sup> *See CLC Wins State Voting Rights Act Case in Historic Settlement*, CAMPAIGN LEGAL CTR. (Aug. 31, 2021), <https://campaignlegal.org/update/clc-wins-state-voting-rights-act-case-historic-settlement> (describing first successful challenge under WVRA); *Historic Washington Voting Rights Settlement in Favor of Latino Voters in Franklin County, Washington*, UCLA VOTING RIGHTS PROJECT (May 12, 2022), <https://latino.ucla.edu/wp-content/uploads/2022/06/5.11.22-Settlement-Press-Release-FINAL-converted.pdf>.

join together to challenge voting rules that dilute their ability to elect representatives of their choosing.<sup>19</sup>

Most interestingly, the WVRA requires local governments to “work in good faith” with individuals that give notice of their intent to sue the municipality for violations of the WVRA, to “implement a remedy that provides the protected class or classes identified in the notice an equal opportunity to elect candidates of their choice.” RCW 29A.92.070(1). This creates a kind of administrative exhaustion requirement that theoretically—and perhaps already in practice<sup>20</sup>—may lead to quicker settlements and revisions to local election rules, without the need for extensive litigation. RCW 29A.92.070–.090.

A challenge to approval voting under the WVRA on the ground that it denies minority groups “an equal opportunity to elect candidates of their choice or influence the outcome of an election” would still require some significant statistical analysis and evidence. *See* RCW 29A.92.030 (describing factors to consider in finding a violation). But the overall barriers to pursuing a claim under the WVRA appear to be significantly lower than under Section 2 of the federal VRA. A claim under the WVRA, because of its administrative exhaustion and “good faith” requirements, may also be more likely to lead to a voluntary change of election rules. Challenging approval voting under the WVRA may still require waiting until approval voting is in effect, but the likelihood of success is probably higher than challenging approval voting under the federal VRA, and it could be accomplished in a shorter period of time.

**D. Approval voting may violate Washington’s prohibition on casting “more than one vote,” but the meaning of the statute is unclear.**

Outside of the WVRA, Washington’s election laws include a separate prohibition on casting multiple votes. RCW 29A.52.161 states: “Nothing in this chapter may be construed to mean that a voter may cast more than one vote for candidates for a given office.” On its face, approval voting seems to violate this rule, insofar as it allows voters to “approve of” (*i.e.* vote for) more than one candidate for the same office. This distinguishes approval voting from the “numbered post” form of “at-large” elections used by some Washington jurisdictions, in which voting in general elections is conducted on a seat-by-seat basis, with all voters casting a vote for one candidate in each race. *See, e.g., Montes*, 40 F. Supp. 3d at 1408–09. “Numbered post” elections allow voters to cast multiple votes, but do not violate the “one vote” law because no voter is able to cast more than one vote for candidates “for a given office.”<sup>21</sup>

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<sup>19</sup> This could be an important benefit of bringing a claim under the WVRA, rather than the federal VRA. It is unknown whether approval voting would prevent minority groups from electing their candidates of choice in *all* of Seattle’s districts, only some, or only for the limited number of at-large City Council positions. By allowing different groups to file an action jointly, the WVRA may provide a way around this potential problem.

<sup>20</sup> *See supra* *CLC Wins State Voting Rights Act Case*, note 18.

<sup>21</sup> “Numbered post” elections are “at-large” elections and can lead to vote dilution and VRA and WVRA claims. *See, e.g., Montes*, 40 F. Supp. 3d at 1411; *see* RCW 29A.92.010(1) (defining “at large election”) and 29A.92.030(6) (including “the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at large elections” as a factor in finding a violation of the WVRA); *CLC Wins State Voting Rights Act Case* and *Historic Washington Voting Rights Settlement*, *supra* note 18; *see also* *See Voting Rights FAQ*, ACLU WASH., <https://www.aclu-wa.org/pages/voting-rights-faq> (last visited Sept. 9, 2022) (noting that “the problem the WVRA seeks to address” is that “[n]early all local elections in Washington use at-large voting systems”).

Similarly, RCV does not violate the “one vote” law, because it does not actually permit voters to cast more than one vote. Rather, each voter casts one vote for a candidate for a given office, and that one vote is transferred to the voter’s highest-ranked candidate who has not been eliminated in successive rounds of tabulation. As the Ninth Circuit has explained: “the option to rank multiple *preferences* is not the same as providing additional *votes*.” *Dudum*, 640 F.3d at 1112. “Each ballot is counted as no more than one vote at each tabulation step[.] . . . The ability to rank multiple candidates simply provides a chance to have several preferences recorded and counted *sequentially*, not at once.” *Id.*; *accord Minn. Voters All.*, 766 N.W.2d at 692. Approval voting differs fundamentally from RCV in that each additional “approval” *is*, in fact, an additional *vote*.

It is tempting to view approval voting as an obvious violation of RCW 29A.52.161 (the “one vote” law), but some caution is warranted. The “one vote” law has apparently never been cited by a court in any case. Accordingly, we cannot say with any certainty how a court would interpret the law. We do know, however, that courts are reluctant to invalidate election systems once they are in place, and thus may be unlikely to take the argument that approval voting violates the “one vote” law at face value.

In *Dudum v. Arntz*, for example, the Ninth Circuit expressed its concern for the separation of powers in rejecting a constitutional challenge to RCV, explaining that “respect for governmental choices in running elections has particular force where, as here, the challenge is to an electoral *system*, as opposed to a discrete election *rule* (e.g., voter ID laws, candidacy filing deadlines, or restrictions on what information can be included on ballots).” 640 F.3d at 1114. The Ninth Circuit noted that while it could more easily “assess the likely effects of entirely eliminating” a discrete election rule, invalidating an entire electoral system is another matter—“given the need to adopt some overall election system, we cannot as a practical matter assess the likely effects of eliminating one election system without considering what system would replace it, and what new burdens that replacement choice would likely impose.” *Id.* at 1114–15. The choice between electoral systems, however, is properly left to the legislature. *Id.* at 1115.

This suggests that if another plausible interpretation of the “one vote” law is available that would not result in invalidating approval voting, a court may be inclined to accept it in order to avoid possible separation-of-powers concerns. For example, one might argue that the “one vote” law’s prohibition against casting “more than one vote for candidates for a given office,” means only that voters may not cast more than one vote *for each candidate*. Such an interpretation would prohibit the adoption of an election system like cumulative voting,<sup>22</sup> but not approval voting (or RCV), and would have no effect on “numbered post” elections. Of course, either interpretation of the “one vote” law—that it prohibits casting multiple votes for one candidate, or that it prohibits voting for more than one candidate for the same office, or perhaps both—requires drawing an inference about what the legislature intended when it adopted the law. That is beyond the scope of this memo, but may be a useful avenue for further research.

It’s worth noting that the timing of a challenge to approval voting could also matter—if approval voting is challenged under the “one vote” law *before* it is implemented, then perhaps a court’s concerns about invalidating an election system would be reduced or eliminated (because

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<sup>22</sup> See *supra* note 10 and accompanying text.

the current plurality system would remain in place). In other words, a court may be more likely to enjoin approval voting from ever taking effect under the “one vote” law than it would be to invalidate it after the fact. But, this is purely hypothetical—without any case law on point, we cannot predict with certainty how a court would rule on a challenge to approval voting under the “one vote” law.