

No. 15-135

In the Supreme Court of the United States

MICHAEL RUBIN, *et al.*,
Petitioners,

v.

ALEX PADILLA, CALIFORNIA
SECRETARY OF STATE, *et al.*,
Respondents.

*On Petition for a Writ of Certiorari to the
Court of Appeal of California, First Appellate District*

**BRIEF FOR FAIRVOTE AND THE CENTER
FOR COMPETITIVE DEMOCRACY AS
AMICI CURIAE IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICI CURIAE*

FairVote and The Center for Competitive Democracy urge this Court to grant it leave to appear in this case as amici curiae in support of neither party. This case concerns the rights of voters, candidates and political parties to participate in elections, an issue that is critically important.¹

FairVote is a 501(c)(3) non-profit organization incorporated in the District of Columbia whose mission is to advocate for fairer political representation through election reform. FairVote's mission is to promote the voices and views of every voter, grounded in the evidence that the use of fair election methods will create a government that is more representative and effective. FairVote encourages public officials, judges, and the public to explore fairer and more inclusive election methods, including through litigation when appropriate.

FairVote has previously filed amicus curiae briefs in a variety of cases, including a case concerning primary election methods in the Third Circuit. *See* Brief for FairVote as Amicus Curiae, *Balsam v. Sec'y of New Jersey*, 607 F. App'x 177 (3d Cir. 2015) (No. 14-3882). FairVote has also published scholarly and popular articles critically analyzing various approaches to

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no part of this brief was authored by counsel for either party. No person other than *amici curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties received notice of the intent to file this brief. Petitioner, respondent, and intervenors have each consented to the filing of this brief.

primary election reform. *See, e.g.*, Drew Spencer, *The Top Two System in Action: Washington State, 2008-2012*, FAIRVOTE (July 2013), <http://www.fairvote.org/assets/WashingtonReport.pdf>; Rob Richie & Patrick Withers, *California's Proposition 14: Weaknesses and Remedies*, FAIRVOTE (Aug. 2010), <http://www.fairvote.org/research-reports/california-s-proposition-14-weaknesses-and-remedies/>; Rob Richie, *Instant Runoff Voting: What Mexico (and Others) Could Learn*, 3 ELECTION L.J. 501 (Aug. 2004), <http://online.liebertpub.com/doi/abs/10.1089/1533129041492150>; Rob Richie & Drew Spencer, *Fixing Top Two with Open General Elections: The Colorado Innovation*, FAIRVOTE (May 27, 2014), <http://www.fairvote.org/research-and-analysis/blog/fixing-top-two-with-open-general-elections-the-colorado-innovation>. Because of its familiarity with the benefits and drawbacks of primary election systems and beneficial reforms, FairVote is particularly well-suited to expound on this issue.

The Center for Competitive Democracy (“CCD”) is a 501(c)(3) non-profit organization founded in Washington, D.C. in 2005 to strengthen American democracy by increasing electoral competition. CCD works to identify and eliminate barriers to political participation and to secure free, open and competitive elections by fostering active civic engagement in the political process. CCD has participated in numerous cases challenging barriers to political participation across the country as either amicus curiae or through direct representation. *See, e.g.*, *Constitution Party of Pa. v. Cortes*, No. 5:12-cv-2726 (E.D. Pa. July 23, 2015) (holding unconstitutional Pennsylvania’s ballot access scheme that required minor parties to submit

nomination petitions with a specified number of signatures and bear the expense of validating them); *Libertarian Party v. Danzansky*, No. 1:12-cv-01248 (D.D.C. December 30, 2014) (case dismissed as moot after District of Columbia conceded its restrictions on petition circulators were unconstitutional and rescinded them); *Rogers v. Cortes*, 426 F. Supp.2d 232 (M.D. Pa. 2006), *aff'd*, 468 F.3d 188 (3d Cir. 2006) *cert. denied*, 552 U.S. 826 (2007) (CCD files amicus brief at certiorari stage to notify Supreme Court of severe burdens imposed by Pennsylvania's electoral scheme).

CCD's interest in the instant case arises from the extraordinary restrictions that "top two" primaries impose on voter choice. While the benefits of such a system are debatable, there can be no doubt that it prevents voters from hearing a broad range of diverse ideas and agendas during the general election, when voters' freedom to choose matters most. Experience shows that top two primaries inevitably result in a general election ballot that includes two major party candidates only. Such a system thus imposes a severe limitation on voters' ability to express displeasure with the status quo. Taking account of less restrictive alternatives, which do not impose such burdens on voting rights, is therefore critical to constitutional review of top two primary schemes.

SUMMARY OF ARGUMENT

This brief and our participation rest on the fact that election policy, as applied to primary elections and ballot access, is both critically important and poorly understood. Indeed, some of the arguments of the principal parties and the reasoning of the lower courts appear to be based on subtle, but critical

misunderstandings. Further, the choice of primary election method—whether “top two,” the “semi-open” primary election California used prior to 2012, or any of the alternatives described in this brief—have significant implications for the democratic principles and policies inherent in our constitutional framework.

Primary elections are fundamentally different from general elections, regardless of the format, and no expansion of choices in a primary election adequately compensates for a general election without the sort of open debate among diverse viewpoints that gives voters genuine choices. The goals of top two—to create a primary election that includes all voters irrespective of political party and to elect candidates willing to work across party lines—are defensible goals, but the limitation of the general election to two is not necessary to accomplish them. The system could be altered in relatively minor ways that would accommodate more candidates in the general election without undermining the goals of top two.

Because this case concerns issues at the heart of the right to vote, it deserves to be heard and considered. Proposals to change state election methods occur frequently, including proposals to adopt top two, in many states. See Scott Maxwell, *‘Top-two’ primaries in Florida: The way to go*, ORLANDO SENTINEL, (Aug. 1, 2015), <http://www.orlandosentinel.com/opinion/os-top-two-primary-scott-maxwell-20150801-column.html>; Editorial, *Wanted: Primaries that pull pols toward the center*, PALM BEACH POST (Aug. 2, 2015), <http://opinionzone.blog.palmbeachpost.com/2015/08/02/wanted-primaries-that-pull-pols-toward-the-center/>; Jeremy Duda, *‘Open primary’ advocates hoping for*

better luck in 2016, ARIZ. CAPITOL TIMES (April 20, 2015), <http://azcapitoltimes.com/news/2015/04/20/open-primary-advocates-hoping-for-better-luck-in-2016/>; *Editorial: Top two primary is worth voter support*, CORVALLIS GAZETTE-TIMES (Oct. 14, 2014), http://www.gazettetimes.com/news/opinion/editorial/editorial-top-two-primary-is-worth-voter-support/article_66628b2c-5300-11e4-8ae7-97e47211e181.html. States need guidance on what election methods do and do not conflict with an unfettered right to vote.

ARGUMENT

This case presents an issue of tremendous importance for election policies going forward. Petitioners argue that the top two system unconstitutionally constrains voter choice in the general election. Their argument stems from the propositions that political viewpoints with significant support must be represented in the choices voters have before them in the most significant and decisive election. Although we do not take a position on the underlying legal issues, we do argue that courts should have all relevant information before them when weighing the importance of general election choices against the countervailing interests that top two seeks to advance.

I. THE SUPREME COURT SHOULD PROVIDE STATES GUIDANCE ON THE CONSTITUTIONAL FRAMEWORK UNDERLYING ELECTION METHODS

With general elections increasingly predictable based on the underlying partisan tilt of the electorate, primary elections increasingly are the only elections

where voters can have a real impact on the decision as to who will represent them in office. See FAIRVOTE, MONOPOLY POL. 2014, ch. 1, *available at* <http://www.fairvote.org/assets/Redistricting2014.pdf> (indicating that strongly partisan districts limit competition to primary elections); Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, FIVETHIRTYEIGHT (Dec. 27, 2012, 9:46AM), http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/?_php=true&_type=blogs&_r=0 (indicating that increasing numbers of safe districts limit true electoral competition to the primary elections); *see also* Shigeo Hirano & James M. Snyder Jr., *Primary Elections and the Quality of Elected Officials*, 9 Q.J. OF POL. SCI. 9 473 (2014) (“In safe constituencies, it is the dominant party’s primary that in most cases determines the winner.”); Jamie Carson *et al.*, *Constituency Congruency and Candidate Competition in Primary Elections for the US House*, 12 STATE POL. & POL’Y Q. 127, 129 (2012) (noting that “with a majority of congressional districts dominated by one political party, the only real choice between candidates for voters in many races occurs during the nomination stage of the electoral process.”); Alan I. Abramowitz, Brad Alexander, Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. OF POL. 77 (Feb. 2006). In most states, however, primary elections are nominating contests for political parties, and often they are not open to voters who exercise their right to not affiliate with those parties. This elevation of a private function to such a central place in our democracy has left many feeling like the current primary and general election structure has fallen short of their expectations.

Understandably, this has galvanized many to work to reform how elections are conducted. This Court has already grappled with difficult constitutional issues implicated by attempts at reform through campaign finance regulation and attempts to reign in partisan gerrymandering. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015). However, this Court has not accepted a case concerning ballot access since 1992,² and as states experiment with new approaches to primary elections, with inevitable impacts on ballot access, they lack the guidance necessary to know what boundaries the Constitution places on ballot access policies. The “top two” system, as applied in California, provides a natural policy for deciding these important issues, as it both represents a creative departure from common rules that limit access to primary election ballots and a particularly severe ballot access restriction by universally limiting general election races to exactly two candidates with no opportunity for a write-in.

II. PRIMARY ELECTIONS IN CALIFORNIA

Primary elections are fundamentally different from general elections, and top two as practiced in California and Washington has not changed that fact. Primary elections were instituted to replace conventions as a means of political party nomination. Under top two, they instead serve as a means of winnowing the field of

² In 1992, the Court decided *Burdick v. Takushi*, 504 U.S. 428 (1992), which concerned write-in candidacies, and *Norman v. Reed*, 502 U.S. 279 (1992), which concerned signature requirements for new political parties.

candidates seeking office, from however many participated in the primary to exactly two. Because they serve this secondary function in service of deciding who will ultimately win the office elected, they attract significantly lower numbers of voters, as well as an unrepresentative pool of voters. The California Court of Appeal therefore erred in stating that “the role played by the general election under the former partisan system is fulfilled by the primary election in the top-two system.” *Rubin v. Padilla* (2015), 233 Cal. App. 4th 1128, 1135 [83 Cal. Rptr. 3d 373, 377].

A. California’s Voting System

California has experimented with various approaches to primary elections. Prior to 1996 it used a closed primary system: only voters affiliated with a political party could vote in that party’s primary election. It then transitioned to a “blanket primary,” in which candidates from all parties appeared on the same primary ballot, as they do now, but where one candidate from each political party advanced to the general election, along with any independents who petitioned for access to the general election. However, this Court ruled in 2000 that requiring political parties to take part in the blanket primary violated their rights to freedom of association. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). California then began using a “semi-open” primary: voters affiliated with a political party could only vote in their party’s primary, while unaffiliated voters could choose the primary ballot of any party that had internally decided to allow unaffiliated voters to participate, including the Republican and Democratic parties. *History of Political Parties That Have Adopted Party Rules Regarding No*

Party Preference Voters, CAL. SEC'Y OF STATE, <http://www.sos.ca.gov/elections/political-parties/no-party-preference/history-political-parties-have-adopted-party-rules-regarding-no-party-preference-voters/> (last visited August 14, 2015).³

Then, in 2010, a proposition on the primary election ballot labeled Proposition 14, Top Two Primaries Act, instituted the system currently used in California.

III. THE IMPORTANCE OF GENERAL ELECTIONS

Scholars and those active in politics debate the relative merits of various approaches to conducting primary elections, but it is clear that no form of primary election can take the place of a meaningfully competitive general election. As petitioners describe, turnout in primary elections remains significantly lower than turnout in general elections. Petition for a Writ of Certiorari App. E at 77a, *Rubin v. Padilla*, No. 15__ (U.S. July 23, 2015) (“Pet’rs’ Br”). Primary elections are like qualifying events in sports; they are very important, but they do not attract the kind of attention that the championship game (or general election) ultimately will. After all, if a candidate “wins” in a primary election, they are not elected to office. Rather, they will take part in the general election, which will ultimately decide who will be elected. To

³ Petitioners are therefore in error when they state that “as a result of implementation of California’s ‘top two’ system, independent and decline-to-state voters can now vote in primary elections,” given that such voters could vote in the Republican and Democratic non-presidential primary elections prior to implementation of top two.

have genuinely competitive elections, we must have genuinely competitive general elections.

In the context of elections of Members of Congress, this fact has been codified into federal law. Federal law requires that the election of Members of Congress take place on the first Tuesday following the first Monday in November. 2 U.S.C. §§ 1, 7. As this Court held, part of the reason for adopting that law was to address concerns “with the burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years[.]” *Foster v. Love*, 522 U.S. 67, 73 (1997). It therefore cannot be the case, for federal elections at least, that “the role played by the general election under the former partisan system is fulfilled by the primary election in the top-two system,” as the California Court of Appeal held below. *Rubin v. Padilla* (2015), 233 Cal. App. 4th 1128, 1135 [83 Cal. Rptr. 3d 373, 377].

General elections in California have been notably unresponsive. In the entire 2002-2010 decade, only one congressional seat experienced a change in party. The primary election was the dominant election to determine most outcomes, and the trajectory of both primary and general election voter turnout was downward.

California’s former system was flawed, but the limitation to two in the general election can also have real consequences for democratic policy. Overall voter turnout has continued to decline. California in fact showed the single greatest decline in voter turnout from 2010 to 2014 of all 50 states. Rob Richie, *Reform Traditional Primaries and Top Two Primary with Ranked Choice Voting*, (Apr. 22, 2015),

http://eventmobi.com/api/events/8461/documents/download/c28dcdbc-382b-4db8-a4ef-1b565f85077b.pdf/as/Rob%20Richie_Reform%20Traditional%20and%20Top%20Two%20Primaries%20with%20RCV_Reform%20#1.pdf (prepared for National Democracy Slam) (“Reform Traditional Primaries”). Notably, California was the only state in which it was impossible to vote for anyone other than a Democrat or a Republican in any statewide office in the 2014 general election. As petitioners point out, voters who prefer candidates other than Democrats and Republicans are not seeing their points of view reflected in general elections, when most voters participate. Pet’rs’ Br. at 4.

Furthermore, even as top two increases the significance of the primary election, it has not yet changed the fact that turnout in primary elections remains both very low and highly unrepresentative. Demographically, voters in primary elections tend to be considerably older, whiter and more conservative than the voting population in general. Drew Spencer & Rob Richie, *Fixing Top Two in California: The 2012 Elections and a Prescription for Further Reform* 5, FAIRVOTE POL’Y PERSPECTIVE (June 18, 2013), <http://www.fairvote.org/assets/Uploads/Fixing-Top-Two-in-California5.pdf>. Primary turnout is also low overall, and national trends suggest that it is continuing to decrease. Hunter Schwarz, *Voter turnout in primary elections this year has been abysmal*, WASHINGTON POST (July 23, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/23/voter-turnout-in-primary-elections-this-year-has-been-abysmal/>.

In many cases, the limitation to two actually is at cross-purposes to California's goal of increasing competition and decreasing partisanship. Although anecdotal examples may seem to support these goals, primary voters continue to effectively determine the outcome of the election in nearly every contest. For example, Washington has used a similar form of top two in 56 statewide and congressional elections since 2008, and every such race but two has involved a Democrat facing a Republican. Richie, *supra*, at 2. Given that the overwhelming majority of districts remain safe for one party's candidates, that means that the primary election effectively decided the outcome, with general elections becoming largely ceremonial affairs with little competition. In 2014, only one of California's 53 congressional seats had a competitive race between candidates of the same party, and no incumbents were defeated. Richie, *supra*, at 3. All eight statewide races for partisan offices in California in 2012-2014 ended with a November contest in which a Democrat comfortably defeated a Republican. *Id.*

The limitation to two also creates the possibility that neither of the two candidates will represent the majority viewpoint of the voters depending on the outcome in the primary. For example, in 2012, the majority Democratic and majority-minority congressional district 31 advanced two white Republican candidates from the primary election, not because they were favored by a majority of the district's voters, but because too many Democratic candidates had run in the primary and split their support. Joshua Alvarez, *In CA-31, Democrats Nearly Repeat 2012 Mistake in Primary*, INDEP. VOTER PROJECT (June 9,

2014), <http://ivn.us/2014/06/09/ca-31-democrats-nearly-repeat-2012-mistake-primary/>.

This is not to ignore the fact that top two does treat all voters equally, and it provides open candidate access to the primary ballot. California should be congratulated on its innovations in that respect. However, there are election methods that also accomplish these goals without narrowing the general election field to only two, and so that limitation cannot be justified by the openness of top two's primary election.

IV. ELECTIONS METHODS AVAILABLE

As history has shown, states have many options for candidate selection, and states do experiment with a wide variety of constitutionally acceptable methods for conducting primary and general elections. There are numerous viable alternatives for elections systems which may address the issue raised by Petitioners in this case. This brief examines three such alternatives.

A. The "Top Four" Preliminary Election

California could retain the use of its primary election method while eliminating fewer candidates to ensure a more diverse and competitive general election that would still feature candidates from more than one political party any time such candidates ran serious campaigns.

One option is the "top four" primary, which adds two modifications to the top two primary. First, the top four candidates in the preliminary election, rather than the top two, advance to the general election ballot. Second, the general election would be held using

ranked choice voting, permitting voters to rank the four candidates in order of preference. A top four primary would help to combat the disproportionate advantages of major party candidates and incumbents while promoting competitive general elections and giving voters real choice over their representatives. *See Top Four Elections*, FAIRVOTE, <http://www.fairvote.org/reforms/instant-runoff-voting/top-four-elections/>.

The median percent of the vote received by the second-place candidate in California primaries with at least three candidates in 2012 was 25.1% - a high bar for candidates to meet to be able to have a place in the general election. Drew Spencer & Rob Richie, *supra*, at 8. The median percent of the vote gained by the fourth-place candidate in California primaries with at least five candidates in 2012 was 5.8%, a proportion much closer to what courts have considered a reasonable barrier in ballot access cases. *Id.*; *see also Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (holding a 5% threshold for petition signatures constitutional).

B. Eliminating Nomination Systems: Louisiana Example

Another alternative practice would simply have each candidate petition to get directly onto the general election ballot, which may then include multiple candidates who affiliate with a single political party, with or without party labels.

One such system is already in use in Louisiana, where congressional general elections are open to all candidates seeking office without any primary election.

LA. REV. STAT. § 18:451 (2013).⁴ If a candidate receives more than half of the votes, they win election, while in the event that no candidate receives a majority of votes in the general election, a runoff election between the two top performing candidates is held a month after the general election. LA. REV. STAT. §§ 18:402, 18:481, 18:511 (2013). This addresses the concerns raised in *Foster*, which struck down the prior Louisiana system that more closely resembled top two. 522 U.S. 67 (1997).

An additional element in Louisiana’s system is the incorporation of ranked choice voting (RCV) for overseas voters in state and federal elections. LA. REV. STAT. § 18:1306 (2013). RCV gives voters the ability to rank candidates on a ballot in their order of choice. Overseas voters are given RCV ballots to accommodate them in the event of a December runoff election. Ordinarily, overseas voters would be unable to submit a new ballot in time for a runoff election due to the short period between the general election and the runoff. RCV ballots allow those voters to participate in both elections by counting toward voters’ first-ranked candidate in the general election and toward the highest ranking remaining candidate in any subsequent runoff election.

States could also readily adopt RCV as a stand-alone system with neither preliminary nor runoff

⁴ Although Louisiana law refers to the election in November as the “primary” and the December runoff as the “general” election, the November election takes place on the federally mandated Election Day, and most candidates win office by receiving a majority vote in that election, so it is best understood as a general election, with the December election as a contingent runoff.

elections. RCV serves as a useful alternative to avoid weak winners in vote-for-one plurality elections with larger numbers of candidates. Several large cities have already successfully adopted RCV and conducted single-round general elections. These cities include San Francisco⁵ and Oakland,⁶ California; Minneapolis, Minnesota;⁷ and Portland, Maine.⁸ RCV has been regarded favorably and endorsed by numerous officeholders, political organizations, and advocacy groups. *See, e.g.*, Editorial, *Our View: Open Primaries good, but ranked-choice better*, PORTLAND PRESS HERALD, June 24, 2014, <http://www.pressherald.com/2014/06/24/open-primaries-good-but-ranked-choice-better/>; Richard DeLeon & Arend Lijphart, *In Defense of Ranked Choice Voting*, Jan. 22, 2013, S.F. GATE, <http://www.sfgate.com/opinion/openforum/article/In-defense-of-ranked-choice-voting-4215299.php#photo-4069906>; *Endorsers of Instant Runoff Voting*, FAIRVOTE, <http://www.fairvote.org/reforms/instant-runoff-voting/endorsers-of-instant-runoff-voting/> (listing various people and organizations who have endorsed ranked choice voting).

Under RCV, voters are given the ability to rank all candidates in order of preference on their ballots. After all ballots are cast, all the votes are tallied based on voters' first choices. If one candidate receives a

⁵ S.F., CAL., CITY CHARTER art. 13, § 13.102 (2013).

⁶ OAKLAND, CAL., CITY CHARTER art. 11, § 1105 (2008).

⁷ MINNEAPOLIS, MINN., CITY CHARTER § 5B (2014).

⁸ PORTLAND, ME., CITY CHARTER art. 2, § 3 (2012).

majority, that candidate is elected. If no candidate receives a majority, the weakest candidate is eliminated and that candidate's supporters have their votes tallied for their second choices. This process continues until one candidate receives a majority of the remaining ballots. RCV gives voters the ability to express their preferences to a greater degree than in plurality elections and helps promote candidates with greater overall support within communities.

C. The Optional Blanket Primary or Public Primary

Although this Court has ruled that California may not require political parties to take part in a blanket primary, states may conduct a blanket primary in which political parties may participate if they choose to. California could restore its blanket primary system, but simply allow political parties to opt out of the blanket primary, in which case they could nominate candidates by some other process. Alaska uses this method, and all political parties other than the Republican Party participate in the blanket primary. *Congressional and Presidential Primaries: Open, Closed, Semi-Closed, and Others*, FAIRVOTE, <http://www.fairvote.org/research-and-analysis/presidential-elections/congressional-and-presidential-primaries-open-closed-semi-closed-and-top-two/> (last updated July 2015).

A variation on this model would be to return to partisan nominating contests, but to include an additional blanket primary in which any candidate could participate irrespective of political party, and to advance the one candidate with the most votes from that primary. Doing so would provide voters with an

option to advance a nominee separate from the party nominees and guarantee at least one independent voice in every general election.

CONCLUSION

For the foregoing reasons, this Court should consider the challenge brought by petitioners to California's top two election method in a way fully informed by the history and policy implications of top two and its alternatives. As states consider their options, they should be free to innovate, but to do so they must be aware of to what extent their options include those that limit general election fields.

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