

No. 15-39

In the Supreme Court of the United States

MARK BALSAM, *et al.*,

Petitioners,

v.

KIM GUADAGNO, NEW JERSEY SECRETARY OF STATE,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

**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.¹ This case concerns the right to vote as applied to various approaches to conducting primary elections, an area of election law and policy that is as critically important as it is poorly understood and in need of guidance from this Court.

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 where appropriate.

FairVote has previously filed amicus curiae briefs in cases in a variety of cases, including in this case at the Third Circuit. FairVote has published scholarly and popular articles critically analyzing various approaches to primary election reform. *See, e.g.*, Drew Spencer, *The*

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 and respondent have each consented to the filing of this brief.

Top Two System in Action: Washington State, 2008-2012, FAIRVOTE (Jul. 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 (“the Center”) was founded in Washington, D.C. in 2005 to strengthen American democracy by increasing electoral competition. The Center 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. The Center has participated in numerous cases involving electoral barriers across the country as either amicus curiae or through direct representation. *See, e.g., 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) (Center files amicus brief with Supreme Court at certiorari stage). Recently, the Center won a judgment on behalf of several minor political parties and their supporters, which held Pennsylvania’s ballot

access requirements unconstitutional as applied to them. *See Constitution Party of Pa. v. Aichele*, No. 5:12-cv-02726-LS (E.D. Pa. July 23, 2015). Prior to that decision, the Court of Appeals reversed the District Court's decision dismissing the case, and concluded that the challenged requirements created "a chilling effect on protected First Amendment activity." *See Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 363 (3d Cir. 2014).

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, both the district court and the Third Circuit apparently relied on common misunderstandings about the role of primary elections, leading to misstatements regarding petitioners' legal theory.

FairVote and the Center submit this brief to explain the wide variety of relief available to give independent voters the ability to vote at every integral stage of the election, whether or not New Jersey's political parties keep their nominating processes closed. These various election methods satisfy the Petitioners' legal theory in this case and avoid interfering with the right of political parties to choose their own nominees in closed primaries. Thus, we respectfully contend that affording all voters the right to vote at all important stages of the electoral process does not necessarily infringe on the rights of political parties to choose their candidates.

We note that, while publicly funded primary elections² have been a part of U.S. electoral processes for many years, they are, in fact, abnormal both historically and internationally and plainly not constitutionally mandated. Initially the creation of Progressive reformers during the early Twentieth Century, primary elections were intended to increase electoral competition and reduce the power of party bosses and political machines. Political scientists continue to debate the relative impact of different primary elections on the political process.

State governments have often granted candidates access to the general election ballot using procedures that both satisfy the Petitioners' legal theory and do not require private political parties to cede power over their nominations to non-member voters. Consequently, the District Court erred in holding that Petitioners' "entire lawsuit... proceeds from the premise that all registered voters have a fundamental right to vote in the primary elections conducted by political parties they are not members of." *Balsam, et al. v. Guadagno*, No. 14-01388, at 6 (D. N.J. Aug. 14, 2014) [hereinafter *Balsam I*]. The Third Circuit repeated this error in relying substantially on the proposition from *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *aff'd* 429 U.S. 989 (1976), that voters unaffiliated with either party may not gain access to closed primary elections to affirm the District Court's holding. *Balsam et al. v. Guadagno.*, No. 14-3882, at 12

² A "primary" election here refers to elections at which a political party nominates candidates who then compete in the general election. For systems like a "top two" that hold a first-round election without party nominations, we use the term "preliminary."

(3d Cir., Apr. 8, 2015) [hereinafter *Balsam II*]. We urge that this Court recognize that Petitioners' legal theory is *not* foreclosed by cases guaranteeing the rights of political parties to hold closed primary elections. In fact, any number of currently available election methods may entirely remedy Petitioners' claims without compelling private political parties to associate with non-members.

ARGUMENT

Petitioners assert that the right to vote requires states to utilize a process that treats all candidates and voters equally, irrespective of their membership in a major political party, to grant access to the general election ballot. Recognizing that individual voters' rights and political parties' associational rights must be balanced, Petitioners assert that the state may not fund and administer a public election process that fails to protect the voters' right to cast a meaningful vote in the election of their representatives. Petitioners do not attempt to dictate how primary elections should be conducted. Rather they merely challenge whether states can grant special privileges to political parties that infringe the right of independent voters to participate in meaningful elections.

Equally important is what is not before the Court: the question of whether the right to vote in primary elections may be altered when, as a matter of fact, the primary election will be the *only* meaningfully contested election. Decades of settled law stand for the proposition that the right to vote means that state actors cannot hide behind the guise of private association in order to exclude voters from the critical stage of an election—including a primary

election—that is the only meaningful election being held. *See generally Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927); *see also Common Cause Indiana v. Indiana Sec’y of State*, 1:12-CV-01603, 14-15 (D. Ind. Oct. 9, 2014) (finding partisan nomination system for county judges unconstitutional as it effectively bypassed the general election). Consequently, where the state chooses a general election method such that the results of the primary election essentially preordain the results of the general election, states may not constitutionally exclude voters from the only meaningful election. *See Common Cause Indiana v. Indiana Sec’y of State*, 1:12-CV-01603, at 15; *see also* FAIRVOTE, MONOPOLY POLITICS 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). This issue has not been considered in an appellate court since the 1950s; however, it represents a very different issue from that raised by Petitioners, one that this Court need not reach in resolving this appeal.

The Third Circuit and District Court have mischaracterized Petitioners’ claim as an attempt to “abolish the closed primary election scheme altogether,” *Balsam II*, at 6, and “to use the Constitution to pry open a state-sanctioned closed

primary system.” *Balsam I*, at 4. We believe that this is not an accurate reading of the relief sought. Rather, the Petitioner seeks to balance the important associational rights of political parties with the right of voters not affiliated with any party to meaningfully participate in elections.

Indeed, We consider that there are several alternative methods that would address Petitioners’ concerns while protecting political parties’ established associational rights. We submit this brief to highlight the wide variety of methods states may use to decide candidate access to the general election ballot without privileging the nominees of private political parties or requiring them to “pry open” their nominating contests.

I. The Evolution of Candidate Selection in the United States

A. The Origin of the Modern Primary Election System

By framing Petitioners’ challenge as one asserting a right to participate in publicly funded primary elections, the lower courts apparently assumed that such contests are an immutable aspect of public elections. This assumption is divorced from the history of the American electoral experience. Although enjoying widespread use in contemporary American voting systems, the taxpayer-funded direct primary election is actually a relatively recent development, and such a system is by no means constitutionally compelled or inextricably linked to our democracy. The origins of the current primary system date back to the Progressive-era at the turn of the Twentieth Century—most primary systems were not fully adopted

until decades later. Before direct primaries, elections were successfully conducted in the United States and colonial America for more than 100 years in an entirely different manner. Indeed, even the concept of a government-printed general election ballot was unheard of for much of American voting history.

There is no requirement for a government-printed ballot or a government-run primary; in fact, these features are largely late-Nineteenth and early-Twentieth-Century developments. Colonial and post-Revolution elections were typically conducted using voice voting, voting using balls or marbles, or sometimes written ballots prepared by the individual voter. See Malcolm Crook & Tom Crook, *Reforming Voting Practices in a Global Age: The Making and Remaking of the Modern Secret Ballot in Britain, France and the United States*, 212 PAST & PRESENT 199, 203–06 (August 2011). Eventually, as political parties gained power and prominence, they began issuing their own written ballots to party members. Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 BRITISH J. POL. SCI. 1, 11 (Jan. 2000). These ballots typically featured only the party's candidates and provided a means for the party to encourage loyal voting. See Crook at 209. Concerns over the potential for abuse, fraud, and voter manipulation led to the adoption of a state-prepared secret ballot beginning in the late 1880s. Crook at 226. Known originally as the "Australian ballot," these ballots were state-provided ballot, available only at the polling place, not allowed to be removed from the polling place, and filled out by the voter in a private area. Crook at 228; Ware at 8. This ballot was intended to address many perceived

abuses of the party-controlled written ballots and remains the model for the modern ballot.

Once the government chooses to print the names of nominees on an approved ballot, it must develop some means of deciding who the nominees are. Although candidates may gain ballot access through petitions or by paying a fee or participating in a winnowing preliminary election,³ states continued the norm of privileging political parties by printing only their nominees. At first, candidates continued to be hand-picked by party bosses in infamous “smoke-filled rooms.” Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California’s Blanket Primaries and Endanger the Open Primaries of Many States*, 36 TULSA L.J. 59, 61 (Fall 2000). However, to prevent potential abuses, reformers pushed for the selection of candidates through direct primary elections. See Ware at 2; Allison at 61; Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 298 (Apr. 2011). The requirement that political parties nominate by election of their members was coupled with government funding of these elections in most places, both to ease the burden of the mandate on the parties and to protect the process from fraud. Out of these

³ This brief refers to winnowing elections as “preliminary” elections, rather than “primary” elections. Preliminary elections do not involve publicly conducted party nominations. Instead, they serve to reduce the number of candidates who participate in the general election by only allowing some number of candidates who receive the most votes in the preliminary to appear on the general election ballot.

Progressive-era reforms came the general framework for our modern primary election system; in which individual party members or others qualified to vote in the party's primary cast ballots through state-administered primary elections to select the party candidate who will appear as each party's nominee on the general election ballot.

The primary election is thus best viewed as one of many potential candidate-selection methods that was chosen to address specific problems associated with the candidate-selection process at the turn of the last century.

B. New Jersey's Voting System

New Jersey follows the general Progressive-era model for primary elections. As explained in Petitioners' brief, for non-presidential elections, New Jersey uses a state-created Australian ballot and embraces a direct primary election paid for and overseen by the state, at least for the major political parties (currently, only the Republican and Democratic Parties are recognized by the state). New Jersey uses a so-called "closed" primary election in which only declared members of a political party may participate in that party's primary election. N.J.S.A. § 19:23-45. Because only the Republican and Democratic parties are eligible for a state-funded primary election in New Jersey, only voters registered with the Republican or Democratic party may participate in the state's primary process. Independent voters are effectively denied the right to vote in the primary. *See id.*

New Jersey's current system is not, however, the only system capable of identifying nominees with an

Australian ballot. Numerous alternatives exist, several of which are already in use in other jurisdictions. See FairVote, *Congressional and Presidential Primaries: Open, Closed, Semi-Closed, and Others*, FairVote.org, <http://www.fairvote.org/research-and-analysis/presidential-elections/congressional-and-presidential-primaries-open-closed-semi-closed-and-top-two/> (July 2015). Several of these methods both satisfy Petitioners' legal theory and have passed Constitutional scrutiny before this Court.

II. Elections Systems Available

Although publicly funded primary elections have reached a level of ubiquity in the United States, as history has shown, they are not the only option for candidate selection. There are numerous viable alternatives for elections systems which may address the issues raised by Petitioners in this case. This brief examines four such alternatives.

A. Eliminating Nomination Systems : Louisiana Example

States do not have to limit access to the general election ballot to one nominee from each political party. A common 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 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).

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 preference. 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 no preliminary or 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

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.

already successfully adopted RCV and conducted single-round general elections. These cities include San Francisco⁵ and Oakland,⁶ California; Minneapolis, Minnesota⁷; 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 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

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).

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.

In any system that eliminates primary elections, including those in Louisiana or an RCV system, issues arise concerning the ability of candidates and parties to express their political affiliations or endorsements. One potential solution is to give candidates and political parties the ability to indicate party affiliations and endorsements on the ballot for an open primary; this solution was incorporated into a 2014 ballot initiative to adopt the “top two primary,” Measure 90, in Oregon. Press Release, Oregon Secretary of State (Mar. 7, 2014), *available at* <http://oregonvotes.org/irr/2014/055cbt.pdf>. Although there would be no publicly funded primary elections, there would be indications of any current party registration and which political parties have officially endorsed each candidate after the candidates’ names on the ballot. Letter from the Oregon Secretary of State to All Interested Parties (Jan. 28, 2014), Section 9(2), *available at* <http://oregonvotes.org/irr/2014/055text.pdf>. The Oregon initiative effectively balances political parties’ interest in choosing their candidate associations and the candidates’ interest in communicating their political ideology to voters. This solution could be readily incorporated into any single-round election system as well, whether using the Louisiana system or RCV.

B. The “Firehouse Primary” and Ending State Funding of Partisan Primaries

States may also avoid complaints relating to partisan primaries by simply cutting off public funding and returning to the privately-funded primaries, which were exclusively used until the early Twentieth Century. While states have the ability to require that parties nominate candidates through publicly-funded primaries, primaries could just as easily be funded by the private political parties which they benefit. Alternative nomination processes such as party conventions and caucuses are already used in Virginia and North Dakota. Another common option is the “firehouse primary.” See William Safire, *Mulligan Primary*, N.Y. TIMES, Mar. 23, 2008, http://www.nytimes.com/2008/03/23/magazine/23wwln-safire-t.html?_r=3&.

In a firehouse primary, political parties hold private nomination proceedings in quasi-public spaces, such as community centers, firehouses or churches, rather than in official polling places. These types of private primaries have been used by both the Democratic and Republican parties in Virginia as recently as the 2014 congressional election cycle, with hardly any issues reported. See Tarini Parti, *Barbara Comstock Wins Virginia ‘Firehouse’ Primary*, POLITICO (Apr. 27, 2014), <http://www.politico.com/story/2014/04/barbara-comstock-virginia-victory-106055.html>; Graham Moomaw, *Democrats to Hold Firehouse Primary to Fill Marsh’s Seat in Senate*, TIMES DISPATCH, Jul. 25, 2014, http://www.timesdispatch.com/news/latest-news/democrats-to-hold-firehouse-primary-to-fill-marsh-s-seat/article_8cf541d0-1426-11e4-a238-

001a4bcf6878.html. Firehouse primaries are beneficial in that they shift the bill from the state to the parties and alleviate voter concerns over funding private political activity, and modern technology, media scrutiny, and election monitoring would likely prevent the types of abuses of concern during the Progressive era from resurfacing.

However, this would still privilege the party nominees with a place on the ballot, and so the caucuses, conventions and firehouse primaries may then constitute a critical part of the election under Petitioners' legal theory. If so, this option could be accompanied by an equivalent option for independent candidates.

C. The “Top Two” and The “Top Four” Preliminary Election

Another alternative is the elimination of publicly funded nominating contests and their replacement with two-stage election process: a “winnowing” preliminary election that does not elect any political party nominees but only eliminates the weakest candidates, followed by a general election between the strongest performing candidates.

The forms of this method used in Washington and California are referred to as “Top Two” because they eliminate all but two candidates after the preliminary election. Nebraska also uses a “Top Two” two election method for its state legislative elections, but without the use of party labels. However, New Jersey could use this 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/reforums/instant-runoff-voting/top-four-elections/>; *Top Four with Ranked Choice Voting*, FAIRVOTE (Aug. 2014), <http://www.fairvote.org/assets/Policy-Guide/Top-Four-with-RCV-Policy-Brief.pdf>.

D. The All-Independent Primary

Another alternative to the publicly-funded partisan primary is to extend publicly-funded primaries to independent voters through an “all-independent” primary. Currently, voters must choose to either not participate in primary elections, register with a recognized party to participate, or seek to nominate a candidate by petition or other onerous methods. Rather than compelling these voters to resort to affiliating with a party or alternative nomination methods, the state could simply hold an additional primary election. This “all-independent” primary would be open to any voter not registered as a member of either of the two major parties and permit them to vote for independent candidates or for the candidates of either major party.

Voters unaffiliated with a party would thereby have the ability to participate fully in both the primary and general election on equal terms with all major party voters.

III. Each Option Above, and Potentially Many Others, Would Provide an Appropriate Remedy For Petitioners

Although the Petitioner requests only that the current New Jersey primary election system be enjoined—thus allowing the state an opportunity to develop the compliant candidate selection system it deems most appropriate—each option discussed in this brief, and potentially many others, would address Petitioners’ concerns while also preserving the associational rights of political parties. The Louisiana system, for example, provides automatic ballot access to any party provided it has at least 1,000 registered voters and pays a small fee, LA. REV. STAT. § 18:441(B)(1) (2013), addressing Petitioners’ Equal Protection concerns and eliminating the two-party monopoly. The “Firehouse” primary system removes the state from the business of directly funding and administering primaries, providing parties the ability to control their own nomination systems while eliminating the preferential status conferred to voters affiliated with dominant political parties. The “Top Two” primary accords with freedom of association, *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 458 (2008), and the “Top Four” primary would likewise protect voters’ Constitutional rights. Finally, the all-independent primary would provide equal treatment for voters not affiliated with the Republican or Democratic parties, curing the constitutional

infirmity alleged in the Petition, while continuing to allow the major parties to enjoy closed primaries.

CONCLUSION

For the foregoing reasons, this Court should not conclude that Petitioners must lose because they seek to “pry open” New Jersey’s closed primary election process. If this Court accepts the petition for certiorari, it should do so understanding that any of the alternative election systems discussed would provide an adequate remedy that would both satisfy Petitioners’ legal theory while also allowing political parties to retain a closed nomination process.

Respectfully submitted,

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