FairVote Policy
PERSPECTIVE

CALIFORNIA'S PROPOSITION 14: WEAKNESSES AND REMEDIES

Summary of Recommendations

- ***Changes to Top Two Primaries Act recommended for California Legislature***
  - Permit write-in votes
  - Shorten the time between the primary and general elections
  - Permit "Partial Party Ballot Endorsement"
  - Provide fairer means to achieve and maintain recognized party status

- ***Changes to Open Primaries Model Recommended for other Jurisdictions***
  - Adopt Louisiana's "Open General Election" system with a conditional runoff
  - Adopt instant runoff voting /choice voting, maybe in Open General Election
  - Advance three or more candidates to the general election and use IRV

By Patrick Withers and Rob Richie
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Introduction

On June 8, 2010, the voters of California approved Proposition 14, "The Top Two Primaries Act," ("the Act") with 53.7% of the vote. In its own words, the Act's intention is "to protect and preserve the right of every Californian to vote for the candidate of his or her choice."[1] All general elections will be won with a majority of the vote, and voters in the primary are generally free to vote for their true first choice with little fear that doing so will help elect their least favored candidate. Many of its backers argued that by giving independent voters more influence in determining which candidates advance to the general election, the Act would result in more moderate politicians and less gridlock in the legislature.[2]

The Act and associated statutes establish a system in which all registered voters can participate in a primary to be held in June and cast one vote for the candidate of their choosing for each office. Instead of separate primary contests according to party affiliation, the state will hold an "open primary" where all candidates compete against one another. Candidates may choose either to be unaffiliated or to identify with a state-recognized party, and voters can vote for any candidate, regardless of party. In the November general election, voters choose between the two candidates who received the most votes in the primary. No other candidates appear on the ballot, nor are write-in candidacies allowed.

The Act[3] was placed on the ballot in 2009 after receiving support from Governor Arnold Schwarzenegger and state Democratic leaders in return for key Republican support for the state's annual budget.[4] In order to get the measure on the ballot in time, the legislature bypassed the usual hearing process,[5] giving the public no easy way to voice their views on the bill and its particulars before the legislature approved it.

FairVote respects the decision of California voters and applauds the goal of giving voters more choices, more competitive elections and fairer representation than that provided by the system replaced by the Act, but we have concerns about several ramifications of the hastily-drafted language of statutes implementing the Act.[6] Several of the Act's problems are wholly or in part caused by these statutes rather than the language of the Act itself. We recommend that the legislature enact several statutory changes that will not require any

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[1] S.C.A. 4, 2009-10 Reg. Sess. (Cal. 2010).
[2] *E.g.* "Proposition 14: Campaign for open primaries rolls out of the gate" *available at* http://www.santacruzsentinel.com/localnews/ci_14356110.
[3] See Appendix A.
[4] "Proposition 14 Puts Primaries Shakeup on California Ballot" *available at* http://abcnews.go.com/Politics/Media/proposition-14-puts-primaries-shakeup-california-ballot/story?id=10809262.
[5] "CDP Chair Burton says NO on Prop 14" *available at* http://www.camajorityreport.com/index.php?aid=4340&func =display&module=articles&ptid=9.
[6] 2009 Cal. Legis. Serv. Ch. 1 (S.B. 6) (WEST), the act which implemented Proposition 14, amended "Sections 13, 334, 337, 2150, 2151, 2152, 2154, 8025, 8062, 8068, 8081, 8121, 8124, 8142, 8148, 8150, 8300, 8550, 8600, 8605, 8805, 8807, 10705, 10706, 12108, 13102, 13105, 13110, 13206, 13207, 13208, 13230, 13300, 13302, 13305, 15451, 15452, 15670, 15671, 19300, and 19301 of, to amend Part 1 of Division 7 of, to add Sections 300.5, 325, 332.5, 338.5, 359.5, 8002.5, 8005, 8141.5, 8606, 9083.5, 9084.5, 13109.5, and 14105.1 to, to add Chapter 0.5 (commencing with Section 6000) to Part 1 of Division 6 of, to amend and renumber Section 6000 of, to repeal and add Section 8125 of, to repeal Sections 8802 and 8806 of, the Elections Code, and to amend Section 88001 of the Government Code, relating to elections."

further changes to the state constitution. We believe these changes will make the Act more likely to succeed in its intent of providing voters with more choice and better representation. We do not believe they should be controversial. Indeed, several of our recommendations are already part of Washington State's version of the Top Two law.

After explaining our concerns about the Act and associated statutes, we detail our recommended statutory changes to mitigate the impact of these defects. We also explain more substantial changes involving establishing an "Open General Election" that would require amending the Act in California, but should be considered by states or jurisdictions interested in the open primaries model.

I. Weaknesses Remediable by Statute

A. The Top Two Primaries Act does not provide voters with sufficient options in the wake of politically damaging personal revelations or health problems associated with a general election candidate.

According to current California law, the "Top Two Primary" will be held in June with a general election between the top two candidates in November. This means that, for the five months leading up to the general election, there will be at most two candidates with any chance of being elected to each office. This presents a variety of problems. As the old adage goes, a day is a year in politics. American political history is littered with candidates brought down by scandal, failed policy attempts, health concerns or other last-minute political missteps. Short of a candidate's death or formal withdrawal from the race,[7] the Act provides no way to replace a candidate should one of these very real possibilities occur between the primary and general elections. Frustrated voters won't have their vote count if they write in another alternative nor can embarrassed political parties nominate a replacement candidate. In the case of a candidate's de facto, but not official removal from the race by scandal or illness, voters would only have one choice on Election Day – without an ability have their write-in vote counted. Elections in these cases would be more like coronations than races.

If a candidate dies or formally withdraws, then the candidate who finished third in the primary is elevated to the general election ballot. But even in the case of a candidate's death or formal withdrawal, the statute is silent on what happens in the event that only two candidates have run in the primary – as is likely to happen in many races.[8] In most states, such "candidate vacancies" are filled by the party. However, as the party is no longer allowed to control its own nomination process, there is no longer an authority, either logical or statutory, that would have the power to replace the candidate.

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[7] CAL. ELEC. CODE § 8807 (2009).

[8] *Id.* For a discussion of how many races had only one or two candidates in the Washington State's Top Two primary, *see* http://www.newamerica.net/blog/political-reform/2009/study-shows-top-two-could-elect-more-extremists-not-moderates-10559.

Furthermore, even if there were a third candidate in the primary, it might be someone with a very different base of support than the candidate who has died or withdrawn. As one example, this year Jerry Brown was the only Democrat running for governor. In the overall popular vote in the June primary, he finished first, followed by Republican candidates Meg Whitman and Steve Poizner. Under the Act, if Brown withdrew from the race or died, the general election would be between the two Republicans. Given that it is not unusual for an incumbent elected official to avoid a challenger from a candidate of his or her party, there will be many districts where this could occur, including in districts where the voters clearly have a preference for the party of the candidate who has died or withdrawn.

The failure to provide for sensible candidate substitution procedures in such situations is a glaring hole in the statute, but one without a clear statutory solution. One potential remedy requiring a state constitutional amendment would be to allow a recognized party to nominate a replacement for a candidate who had accepted that party's endorsement, as part of the Washington State law[9], although this provision might be seen as conflicting with the Act's general anti-party ethos. Another approach would be to provide a short window of time for candidates to petition onto the ballot as done in nonpartisan races in Nebraska[10] instead of simply going to the candidate who finished in third, but that could lead to non-majority winners in November without use of majority system like instant runoff voting.

B. The Act maintains an unnecessarily long campaign season, with added problems due to the reduction in general election candidacies.

With a June primary, the general election campaign will entail nearly five months with, at most, two candidates for any state or federal office. Although California's previous system also involved June primaries (and even a March primary in 2002), maintaining a June primary date is particularly problematic when only two candidates advance to the general election.

A primary closer to the general election would improve the Act in several ways. The first area of improvement relates to money in politics and negative campaigning. No matter what the date of the primary, a "top two" election will establish clear Incentives for negative attacks in the general election by the candidates and by independent campaign committees. Once the field is reduced to two, a candidate's calculus to win a campaign is simple: win more votes than your opponent. While a candidate can earn positive support through taking positions attractive to the electorate, it is often easier to gain the votes of swing voters through attacking your opponent. Two-choice elections without a third option create strict "zero-sum" dynamics: any vote taken away from your opponent helps you win.

Furthermore, the costs of running for office already have been climbing rapidly, but there likely will be even greater increases in the wake of the Supreme Court ruling in *Citizens United v. Federal Election Commission*[11] that opens the door to greater independent

[9] WASH. REV. CODE ANN. § 29A.28.021 (2010).
[10] NEB. REV. STAT. § 32-625 (2010).
[11] 558 U.S. 50 (2010).

expenditures. With a five-month general election season governed by zero-sum campaign dynamics, we can expect months of attacks that will be most effective for well-financed candidates with well-financed allies. Relating to the role of independent expenditures in these campaigns, the San Francisco Ethics Commission found that, before San Francisco replaced traditional runoff elections with instant runoff voting, independent expenditures had often quadrupled in runoff elections[12] and were largely spent in negative attacks.

A second area of general improvement relates to the value of a more concentrated campaign cycle. A June primary means that candidates must file to run for office barely a year into a legislative term, and incumbents will then need to engage in active campaigning in a competitive race. Many voters are rightly frustrated with the "permanent campaign" phenomenon of American politics that makes many votes and tactics in legislatures just another part of the next campaign. Delaying the primary would not eliminate this problem, but at least would give legislators more time to govern without also directly campaigning for re-election.

The long gap between a June primary and November general election also further isolates all the candidates who will be eliminated in the primary. Campaigns are about debating ideas, not just choosing representatives, and we believe it is better to have a fuller conversation with more choices as close as possible to the general election in November.

C. The Act does not enable voters to write in candidates in the November election.

In the first century of our Republic, many voters signified their vote by writing the names of their preferred candidates on a piece of paper. While elections by the late 19th century turned to "the Australian ballot" printed by the government, our tradition of being able to "write in" a preferred candidate still exists in nearly every state in every election. It is an important symbol of being able to vote for whomever you want, regardless of the opinions of others. Furthermore, under certain circumstances, write-in candidates can win; examples in recent years include wins in primary races by ultimately successful candidates in races for the U.S. House in Washington State and for the mayor of Washington, D.C. The power to write in candidates could be particularly significant in general elections where the field has been reduced to one due to unforeseen developments. Given other weaknesses in the Act relating to how it handles candidate withdrawals and deaths, there is even more reason to allow write-in candidacies that in fact could be viable.

Those who want every general election winner to earn more than 50% of the official vote might oppose write-in candidates. But a majority of the vote only secured through denying voters a chance to write in their true choice is illusory and not reflective of voter preference. In FairVote's opinion, write-in candidacies should be allowed within the "Open Primaries" structure and, ideally, instant runoff voting used in the general election.

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[12] *See* "San Francisco Ethics Commission Resolution" *available at* http://archive.fairvote.org/sfrcv/ethicsresolution.htm.

D. The Act will make it hard for candidates to associate with their party of choice, including those with decades of history in California.

According to the Act, "At the time they file to run for public office, all candidates shall have the choice to declare a party preference."[13] A plain reading of the text would suggest that a candidate in the primary could select whichever party label that the candidate decides is descriptive of his or her affiliation. However, in subsequent statutes passed by the Legislature, the simple "declar[ing] a party preference" became more rigid, limiting the choice only to whether a candidate would like to list on the ballot their party status as reflected by their voter registration.[14] The situation is complicated by the fact that parties are only recognized to "participate" in the primary if one of their candidates receives 2% of the vote in the last gubernatorial election, if they already have 1% of the voting public registered as members of the party, or if they are able to secure an astounding 10% of the voting public's signatures on a petition.[15]

The problem for both new and established minor parties lies in the definition of the first, often used route to maintaining recognition by the state: the requirement that the party's candidate for a statewide office receive 2% of the vote in the last general election for governor. Because minor party candidates for statewide office will almost never finish in the top two in the June primary, they will rarely appear on the November ballot for statewide offices and, as a result, not have a chance to help their party earn ongoing recognition. Without changes, the Act promise to have an impact unforeseen by many voters who supported it: several parties with a long history in the state may not be able to have their endorsed candidates indicate their party preference on the primary ballot and instead will need to state inaccurately "no party preference."

E. The Act may infringe on the Constitutionally-protected right to free association.

The First Amendment protects the right of freedom of association.[16] Freedom of association is the individual right to come together with others and collectively express, promote, defend and pursue common interests. Political parties are a classic example of an association. Contrary to some people's perception, parties are private associations created and maintained by individuals, not the government. Their influence in our politics developed as a natural by-product of how like-minded people come together to achieve their objectives. Before the late 19th century, voters in most American elections cast their votes on ballots that they brought into the polling place because the government did not print a ballot. The government did not determine which parties or candidates could appear on the ballot; rather the voter typically used a ballot provided by a particular political party, which often would only list its endorsed candidates and their party association. Parties were successful solely in proportion to how many voters and candidates were interested in associating with them. The government had nothing to do with it.

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[13] S.C.A. 4, 2009-10 Reg. Sess. (Cal. 2010).
[14] CAL. ELEC. CODE § 8002.5(a) (2009).
[15] CAL. ELEC. CODE § 5100 (2009).
[16] NAACP v. Ala. ex rel. Patterson, 357 U.S. 449 (1958).

First introduced in the United States in Massachusetts in 1888 and gradually adopted in all 50 states, the Australian (or secret) ballot brought the government directly into regulation of ballot. It established the worthy principle that voters should be able to keep their party preference private when casting their votes, but as a result required the government to establish policies determining which candidates would appear on the government-sanctioned, official ballot and what associations they could list. The government grew further enmeshed in regulation of political parties when states in the 20th century began to require parties to nominate candidates in government-administered primaries – to the point that many states today require voters to indicate their party preference when registering to the vote.

Under the Act, parties of course can endorse whichever candidates they like and find private ways to communicate their endorsement, but the party is prevented from indicating its endorsement on the ballot and the concept of "nomination" becomes moot.[17] Given that many voters learn about candidates' party affiliation directly from the ballot, this prohibition significantly weakens the value of a party's endorsement.

Parties' association rights are most directly challenged, however, by the fact that any candidate can choose to appropriate their label. Freedom of association includes the right of a group to exclude individuals whose membership would impair the group's expression of its core views.[18] According to the Act, "a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot…A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary."[19] Because any candidate can choose whichever party affiliation he or she wants, political parties are deprived of their Constitutional right *not* to associate.[20]

This issue of association rights in Open Primaries systems is before a federal judge[21] in a legal challenge to Washington State's version of open primaries. Regardless of its constitutionality, the fact remains that California's approach to parties' rights of association runs contrary to American tradition – and is more limiting than Washington State's model. A person can learn a great deal about an organization's identity based on the individuals with whom it chooses to associate. The ability to control one's identity is central to the American persona and should not be infringed without good cause.

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[17] CAL CONST, art. II, § 5(b) (amended 2010). It is important to note that, according to the Act, the means by which candidates list party designations, and which designations they can claim, is left up to statute. *Id.*
[18] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.").
[19] CAL CONST, art. II, § 5(b) (amended 2010).
[20] Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate.").
[21] The U.S. District Court for the Western District of Washington has scheduled oral arguments for November 2010. *See* http://www.sos.wa.gov/_assets/elections/Democratic%20Partys%20Amended%20Complaint%201-21-10.pdf

II. Weaknesses Remediable only by State Constitutional Amendment

A. Most of the candidates eliminated in election, especially minor party candidates, will lose in primaries with historically low voter turnout.

Under the Act, most candidates will be eliminated during the primary, with only the top two candidates appearing on the general election ballot. In other words, most candidates' only chance to campaign before the voters occurs in the "Top Two" primary. The problem with this timing is that, across the country, primaries have low, typically unrepresentative voter turnout with an electorate that is generally far older, whiter and wealthier than the general election electorate in November. These turnout patterns and disparities show all indications of becoming worse.[22] This means that most candidates, including often all non-major party candidates, will be eliminated from contention by a small sliver of the voting populace in June and may not even be noticed by the far greater number of voters who participate only in general elections.[23]

As mentioned previously, the self-stated purpose of the Act is to "to protect and preserve the right of every Californian to vote for the candidate of his or her choice."[24] However, when a relatively tiny minority of the voting populace eliminates most candidates in June, many Californians may in fact not be able to vote for the candidate of their choice in November. Defenders of the current law might argue that the June election is in fact part of a two-step general election, and that no voter will be denied an opportunity to vote in June. But under that logic, the Act's current schedule could be construed to violate Federal law, which, since 1872, has required all states to hold general elections for Congress on the first Tuesday after the first Monday in November of even-numbered years.

B. The Act leaves open the possibility that one party can dominate the general election ballot in November.

The Act establishes that the two candidates with the highest vote totals in the primary advance to the general election regardless of party affiliation. In theory, doing so may seem like a way to allow voter choice without the need for partisan labels. However, partisan labels are not mere symbols; they serve an important role in signaling to voters what a candidate believes. The very fact that many primary races in Washington State's open primaries elections in 2008 did not have more than one candidate expressing a preference for each of the major parties and that nearly every general election race that year presented a candidate preferring the Republican Party matched against a candidate

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[22] *See, e.g.,* "Low Voter Turnout Raises Questions About Runoffs" *available at* http://www.digtriad.com/news/local_state/article.aspx?storyid=144379; "Voter turnout low for presidential primaries" *available at* http://www.usatoday.com/news/politicselections/nation/president/2004-03-09-voter-turnout_x.htm.

[23] In Washington State's Top Two primary in August 2008, voter turnout was 1,455,756, or 42.60% of registered voters. In November, turnout was nearly double: 3,071,587 voters, or 84.61% of registered voters. http://vote.wa.gov/Elections/WEI/VoterTurnout.aspx?ElectionID=26

[24] S.C.A. 4, 2009-10 Reg. Sess. (Cal. 2010).

preferring the Democratic Party[25] is further demonstration that parties play an important role in determining who chooses to run for office and what voters look for on the ballot. Furthermore, there are substantial policy differences among the Democratic Party, Republican Party, Constitution Party, Green Party, Libertarian Party and Peace and Freedom Party, and being able to list a party's endorsement can be particularly important to less well-financed candidates who are backed by a party with a loyal following. FairVote has always stood for opening up the political process to more voter choice and competition among parties and independent candidates, but it does not favor abolishing parties.

Consider the specter of a race where the two finalists facing off in the general election are both affiliated with the same party, as will happen when no other party's candidates finished in the top two. Such a scenario could easily occur not only in election districts dominated by one party, but also in districts or states that are closely balanced in party preference. It would depend on the number of candidates running in the primary, how voters distributed their votes among those candidates in the primary and the vagaries of relative voter turnout.

The 2008 presidential election provides a concrete example. In January 2008, both major parties had hotly contested presidential primaries in New Hampshire, one of our nation's few presidential swing states in general elections. Because more independents chose to vote for Democrats in the primary and because the Republican field was more fractured than the Democratic field, the top two finishers in the overall vote were Democrats Hillary Clinton and Barack Obama. Republicans John McCain and Mitt Romney trailed in third and fourth. If the Act had governed this election, the presidential election in November would have been restricted to two Democrats: Barack Obama and Hillary Clinton. Such a result surely would create an outcry from Republican voters, just as Democratic voters would complain if their candidates were shut out of the general election for president.

Monopolization of the general election by only party would stifle voter choice and substantive dialogue rather than increase it. It also leaves the system highly vulnerable to a controversial result that could lead to repeal, particularly for a major statewide race such as governor or U.S. Senator. For that reason alone, we believe California proponents of the system should consider changes that allow at least three candidates to advance to the general elections and that other jurisdictions take steps to head off that potential controversial outcome.

III. Statutory remedies for the State of California

A. Permit write-in votes.

Under the Act as currently enforced, the specter of a general election candidate becoming "unelectable" either by scandal or health reasons will always loom over California's elections. However, there are means short of outright repeal that can help alleviate, if not

[25] *See* "Elections" *available at* http://wei.secstate.wa.gov/osos/en/PreviousElections/Pages/default.aspx.

necessarily foreclose, this problem. One improvement would be for the Legislature to permit write-in votes, as allowed in Washington State's similar open primaries system. There is nothing in the text of the Act explicitly prohibiting counting write-in votes, and indeed current California law requires space for write-in candidates to be included on the ballot, even if those write-in votes are not going to be counted.[26] The Act provides that "a political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election,"[27] but that provision merely means that a *political party's favorite candidate* is not guaranteed a place on the general election ballot. According to a strict reading of the text, it does not prohibit *individual voters* from voluntarily writing in a candidate's name.

The Act establishes that "the top two candidates, as determined by the voters in an open primary, shall advance to a general election"[28] –a provision that will be upheld even if write-ins are allowed. In its next phrase, the Act provides that the winning candidate will be the one "receiving the greatest number of votes cast in an open general election."[29] Nowhere does the Act currently limit the possibility of victory to only the two candidates whose names appeared on the general election ballot. By our reading, if a write-in candidate were to receive the highest number of votes in the general election, he or she would be the winner – meaning that the possibility of a write-in candidate is not prohibited by the Act. The Legislature should permit write-in votes by repealing Section 8606 of the California Election Code, the implementation statute that prohibits write-in votes. Write-in votes then could then be handled by the Elections Division in future elections exactly as they are now.[30]

B. Shorten the time between the primary and general elections.

The Act does not specify the date of the primary. A remedy to the problems associated with the five-month general election would be to move the date of the primary closer to the November election and thereby shorten the general election campaign with only two candidates. This change would require the Legislature to amend California Election Code[31]. While the exact date of the rescheduled primary would be up to the Legislature and require a balancing of interests, it is FairVote's opinion that the primary should not be held before the end of the summer holiday season -- that is, it should be held in late August or early September, as is the case in Washington State in its open primaries system.[32] A later

[26] CAL. ELEC. CODE § 13207 (2009).
[27] CAL CONST, art. II, § 5(b) (amended 2010).
[28] S.C.A. 4, 2009-10 Reg. Sess. (Cal. 2010).
[29] *Id.*
[30] CAL. CODE REGS. tit. 2, §§ 20102 – 20105 (2010).
[31] CAL. ELEC. CODE § 1001 (2009) et al.
[32] The date selected for the primary must balance the conflicting interests of a shorter election season with a sufficient gap between the primary and general election to resolve any election disputes and legal challenges related to the primary and to give overseas voter sufficient time to receive and return their general election ballot. A two-month gap should provide this balance, especially if legal challenges are expedited and innovations such as South Carolina's ranked ballots system are used to ensure overseas voters can cast a vote in the general election.

primary date would shorten the overall campaign season, keep more candidates involved in political debate closer to November and decrease the period likely to be dominated by negative campaigns and big campaign spending. At the same time, this schedule should allow sufficient time to resolve disputes arising from the primary election and to ensure overseas voters are given a fair opportunity to cast a general election ballot.

C. Permit "Partial Party Ballot Endorsement" and establish fair means for parties to maintain status as a recognized party.

California Election Code can allow candidates to communicate their partisan preference without denying parties the ability to communicate their candidate preference. We recommend that the California legislature pursue a middle path between the interests of candidates and the interests of parties by enacting a "Partial Party Ballot Endorsement" system. Under our proposal, recognized parties could indicate their endorsed candidates, while candidates could list their preferred party affiliation.

To uphold parties' association rights, the Legislature should pass a statute to provide for more descriptive wording on the ballot. To distinguish between a candidate who has chosen to affiliate with the Constitution party and a candidate who has been officially endorsed by such a recognized party, the endorsed candidate could use the description "Constitution Party endorsed," while the other candidate could use "Constitution Party affiliated." These descriptions would conform to the Act's constitutional provisions[33] and strike a reasonable balance between the competing concerns of party association and individual branding.

Under this proposal, a candidate could list his or her preferred party affiliation as long as that party is a recognized party. To provide a fair means for a party to maintain its status as a recognized party, we propose that the Legislature establish that the primary elections be used to measure whether a party's candidate in a statewide race has earned at least 2% of the vote in the governor's race. Unlike in the general election that limits the field to just two candidates, every voter will have the right to vote for any candidate in the primary, which provides a fair measure of a party's level of support.

The Legislature also could explore additional methodologies to allow candidate to indicate association.[34] It would be entirely permissible under the text of the Act to move to a less

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[33] The Act amends the California Constitution to read that "A political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election." CAL CONST, art. II, § 5(b) (amended 2010). However, this does not forbid a differential labeling system as proposed, as all other matters regarding party designation are left to the statute. *Id.*

[34] Current law gives candidates only two options, with respect to ballot-indicated party affiliation. Candidates can choose to have their party affiliation indicated, or alternatively, they can have no party affiliation indicated. *Id.* However, it would be entirely permissible under the text of the act to move to a less restrictive method of party affiliation labeling, such as in New York, where candidates can run under the "emblem" of their choosing, provided that a requisite number of voter signatures have been certified. N.Y. ELEC. § 6-140 (Consol. 2010). We support the option of a candidate being able to indicate any party that has been recognized as a party in any state.

restrictive method of party affiliation labeling. In Washington State's open primaries law, candidates have wide leeway in indicating their association preference, to the extent that they can use trademark names of entities that do not want their association used for political purposes. New York has a more tested approach where candidates can run under the "emblem" of their choosing, provided that a requisite number of voter signatures have been certified.[35]

We recommend providing a candidate with the option to list an affiliation with any party that has been recognized as a party in any state, although only being able to indicate the endorsement of a party that is recognized by California. That party could earn recognition for this party by securing at least two percent of the vote in a statewide primary election. Such a provision would provide for greater voter choice in self-identification on the ballot. Grounded in American history, FairVote supports the right of new parties to emerge and seek votes, which suggests an inclusive standard for listing party preference and reasonable threshold for maintaining state recognition of parties. Candidates should have the maximum amount of discretion possible in ballot identification. Disagreements over party recognition should not block this effort.

IV. Remedies for other states or by amending California's constitution

The following recommendations are not possible to implement for state and federal elections in California without a new state constitutional amendment. But any state looking at open primaries would be well-advised to consider them seriously as better ways to provide voter choice and empower voters.

A. Adopt Louisiana's "Open General Election" system instead of "Top Two."

Since 1975, Louisiana has used an "Open General Election" system for state elections and for most of its federal elections since 1978. In 2012, after a four-year experiment with a more traditional primary system in federal elections, all ballot-qualified candidates in Louisiana's congressional elections will go to the general election ballot in November, when voters will pick the candidate of their choice. If a candidate receives more than 50% of the vote, he or she wins. If no candidate receives that winning majority, then the top two vote-getters advance to a December runoff election.

Holding an "open general election" results in a much shorter election season and correspondingly longer "governing season" for legislators. It means that elections with the highest voter turnout will be the elections with the most representative array of candidates. All candidates will be able earn votes and help shape public debate. Fewer campaigns will be dominated by zero-sum, two-choice politics where big money has its greatest advantage. Unlike California's Act, the system does not have the potential to run afoul of the 1872 law that requires general elections for Congress to be held on the first Tuesday after the first Monday in November.

[35] N.Y. ELEC. § 6-140 (Consol. 2010).

Because the November vote will not always be decisive, however, December runoffs will regularly be necessary. Candidates will need to campaign and raise money for a second election, and turnout may drop significantly after the November election depending on how important voters see the races going to a runoff. At the same time, Louisiana has shown that this timing should give enough time to resolve challenges to the November election results, and the state has developed a sensible means to provide military voters and other overseas voters with a fair opportunity to cast a vote in runoff despite the short turnaround time: these voters receive a ballot in which they are asked to rank candidates in each race in order of preference. If there is a runoff election, that ranked ballot can be used to award a vote to the top-ranked candidate who had made the runoff. This "instant runoff" ballot for overseas voters also is used in most runoff elections in Arkansas and South Carolina.

B. Adopt or adapt choice voting and/or instant runoff voting

One of the main problems with the California system of elections is the long period of time when the electorate's choices are limited to, at most, two candidates. This limits voter choice and results in unrepresentative general elections. Furthermore, primaries are costly and typically have far lower and less representative voter turnout.[36] While Louisiana's Open General election system mitigates these problems, it still relies on runoffs in the event no candidate earns a majority in the general election. These runoffs typically result in lower turnout, high election administration costs and nearly double the demands on candidates for campaign financing.

The best way to address these problems is to adopt systems that better accommodate voter choice. In elections for a single winner, we recommend instant runoff voting, or "IRV."[37] IRV is a proven system of system that has been adopted to combine two elections into one in such cities as Memphis, Minneapolis, Oakland and San Francisco. IRV allows voters to rank their preferred candidates in order of preference – typically all candidates, but some cities have established a limit of three rankings. At tabulation, first choices are counted as one vote. If a candidate earns a majority of first choices, the election is over. If not, the candidates with the fewest number of votes are eliminated and ballots cast for them are added to the totals of the next-ranked candidates in the next round of counting. This process is repeated until one candidate receives a majority of votes and is declared the winner. Exit poll surveys show that voters tend to respond very positively to IRV. While jurisdictions usually will need to upgrade their voting machines to be able to administer the count and engage in at least some degree of voter education about the new system, an associated costs will be recouped any time IRV allows consolidation of elections.

IRV could be part of an open primary system in three ways. One simple approach would be to follow the Louisiana "open general election" model by eliminating the primary, but replace the potential December runoff with IRV. Minneapolis and San Francisco have shown this approach can work. It ensures that winners earn a majority of votes cast when

[36] *Supra* note 22.

[37] This system is also called "preferential voting" in Australia, "the alternative vote" in the United Kingdom and "ranked choice voting" in certain American cities that have adopted it.

matched against their top opponent, and maximizes voter choices and voter participation."[38] It would preserve the intent of Proposition 14 and eliminate a round of voting likely to be costly and prone to low voter turnout.

A second approach would be to retain the principle of a top-two general election, but use IRV to reduce the field to two of three candidates. Such a method would avoid "spoilers" in the primary election, which can be a real factor in large field races. It also would encourages more positive campaigning in the primary and reduce the chances of a weak outlier candidate displacing a stronger candidate in the general election.

A third approach would be a variation on the second. IRV again could be used to determine the top-finishing candidates, but regardless, more than two candidates would advance. Obviously, if more than two strong candidates appear on the general election ballot in any given race, it would make sense to implement IRV in the general election, again to uphold majority rule, and avoid the majority splitting its vote between two or more candidates in the race. If the advancing number of candidates were three, it would be possible to implement IRV on all current voting machines at no extra cost except whatever was deemed necessary for voter education.

IRV also should be seriously considered by policymakers who support some of the goals of an open primary system, but want to maintain a more traditional system of separate primaries followed by a general election. Adoption of IRV in primaries provides greater assurance that nominees are truly representative of their party; as it is, primaries can results in low-plurality winners who don't need to reach out to a majority of primary voters to win. Adoption of IRV in the general election would accommodate voters having more choices in the general elections, including independent candidates who under current rules are often criticized as "spoilers."

Finally, we urge policymakers to also look beyond winner-take-all elections in elections for more than one person. The goal of more moderate legislators paradoxically is most likely to be achieved by lowering the percentage of the vote necessary to win one seat out of several being elected. For example, for more than a century Illinois elected its House of Representatives with cumulative voting, a non-winner-take-all system. Each voter had three representatives, and it took a little over a quarter of the vote to elect one out of three seats. The result was election of more urban Republicans, more rural Democrats and a great mix of perspectives that included a healthy number of independent-minded centrists. To be sure, the system also meant stronger representation for those to the left and right of the center, but they won seats in general proportion to their actual share of support in the state. To achieve this goal of "shared representation," we recommend choice voting, a single transferable vote system that operates similarly to IRV, but with a lower threshold of support necessary to win one seat. Either within a traditional primary system or within a single Blanket General Election, choice voting holds great promise to give voters fairer and more balanced representation, and greater electoral choice than any winner-take-all system.

[38] S.C.A. 4, 2009-10 Reg. Sess. (Cal. 2010).

Conclusion

In enacting its "Top Two Primary" system, voters and legislators hoped "to protect and preserve the right of every Californian to vote for the candidate of his or her choice."[39] However, as currently established by the Act and associated statutes, the system does not protect this choice as well as it should. Indeed, it serves to limit many voters both from making choices among a representative array of candidates and from exercising their prerogative to support a candidate who is not preferred by a large enough bloc of voters to appear on the general election ballot. To mitigate these defects, FairVote proposes California pass three statutory changes to:

1) allow write-in votes;
2) shorten the post-primary season by moving the primary to later in the year;
3) make it easier for parties to secure and maintain their status as recognized parties;
4) permit "Partial Party Ballot Endorsement.

For policymakers in other states considering alternatives to traditional partisan primaries, FairVote recommends laws to:

1) advance three or more candidates to the general election or the runoff and use IRV;
2) adopt Louisiana's system that replaces a primary with an "open general election" in November with a conditional runoff in December;
3) modify Louisiana's system to a single instant runoff voting election as a proven means of providing voter choice and upholding majority rule .

Appendix

Appendix A: "Top Two Candidates Open Primary Act" (text of California law)

Appendix B: Draft Statutory Language for an Open Primary with a Top Three General Election and Partial Political Party Endorsement

Appendix C: Draft Statutory Language for an Open General Election with an Optional Runoff and Partial Political Party Endorsement

[39] *Id.*

Appendix A: "Top Two Candidates Open Primary Act"[40]

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 2009-10 Regular Session commencing on the first day of December 2008, two-thirds of the membership of each house concurring, hereby proposes to the people of the State of California that the Constitution of the State be amended as follows:

First-- This measure shall be known and maybe cited as the "Top Two Candidates Open Primary Act."

Second-- The People of the State of California hereby find and declare all of the following:

(a) Purpose. The Top Two Candidates Open Primary Act is hereby adopted by the People of California to protect and preserve the right of every Californian to vote for the candidate of his or her choice. This act, along with legislation already enacted by the Legislature to implement this act, are intended to implement an open primary system in California as set forth below.

(b) Top Two Candidate Open Primary. All registered voters otherwise qualified to vote shall be guaranteed the unrestricted right to vote for the candidate of their choice in all state and congressional elections. All candidates for a given state or congressional office shall be listed on a single primary ballot. The top two candidates, as determined by the voters in an open primary, shall advance to a general election in which the winner shall be the candidate receiving the greatest number of votes cast in an open general election.

(c) Open Voter Registration. At the time they register, all voters shall have the freedom to choose whether or not to disclose their party preference. No voter shall be denied the right to vote for the candidate of his or her choice in either a primary or a general election for statewide constitutional office, the State Legislature, or the Congress of the United States based upon his or her disclosure or nondisclosure of party preference. Existing voter registrations, which specify a political party affiliation, shall be deemed to have disclosed that party as the voter's political party preference unless a new affidavit of registration is filed.

(d) Open Candidate Disclosure. At the time they file to run for public office, all candidates shall have the choice to declare a party preference. The preference chosen shall accompany the candidate's name on both the primary and general election ballots. The names of candidates who choose not to declare a party preference shall be accompanied by the designation "No Party Preference" on both the primary and general election ballots. Selection of a party preference by a candidate for state or congressional office shall not constitute or imply endorsement of the candidate by the party designated, and no candidate for that office shall be deemed the official candidate of any party by virtue of his or her selection in the primary.

(e) Freedom of Political Parties. Nothing in this act shall restrict the right of individuals to join or organize into political parties or in any way restrict the right of private association of political parties. Nothing in this measure shall restrict the parties' right to contribute to, endorse, or otherwise support a candidate for state elective or congressional office. Political parties may establish such procedures as they see fit to endorse or support candidates or otherwise participate in all elections, and they may informally "nominate" candidates for election to voter-nominated offices at a party

[40] S.C.A. 4, 2009-10 Reg. Sess. (Cal. 2010).

convention or by whatever lawful mechanism they so choose, other than at state-conducted primary elections. Political parties may also adopt such rules as they see fit for the selection of party officials (including central committee members, presidential electors, and party officers). This may include restricting participation in elections for party officials to those who disclose a party preference for that party at the time of registration.

(f) Presidential Primaries. This act makes no change in current law as it relates to presidential primaries. This act conforms to the ruling of the United States Supreme Court in Washington State Grange v. Washington State Republican Party (2008) 128 S.Ct. 1184. Each political party retains the right either to close its presidential primaries to those voters who disclose their party preference for that party at the time of registration or to open its presidential primary to include those voters who register without disclosing a political party preference.

Third-- That Section 5 of Article II thereof is amended to read:

SEC. 5. (a) A voter-nomination primary election shall be conducted to select the candidates for congressional and state elective offices in California. All voters may vote at a voter-nominated primary election for any candidate for congressional and state elective office without regard to the political party preference disclosed by the candidate or the voter, provided that the voter is otherwise qualified to vote for candidates for the office in question. The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall, regardless of party preference, compete in the ensuing general election.

(b) Except as otherwise provided by Section 6, a candidate for a congressional or state elective office may have his or her political party preference, or lack of political party preference, indicated upon the ballot for the office in the manner provided by statute. A political party or party central committee shall not nominate a candidate for any congressional or state elective office at the voter-nominated primary. This subdivision shall not be interpreted to prohibit a political party or party central committee from endorsing, supporting, or opposing any candidate for a congressional or state elective office. A political party or party central committee shall not have the right to have its preferred candidate participate in the general election for a voter-nominated office other than a candidate who is one of the two highest vote-getters at the primary election, as provided in subdivision (a).

(c) The Legislature shall provide for partisan elections for presidential candidates, and political party and party central committees, including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy.

(d) A political party that participated in a primary election for a partisan office pursuant to subdivision (c) has the right to participate in the general election for that office and shall not be denied the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates.

Fourth-- That Section 6 of Article II thereof is amended to read:

SEC. 6. (a) All judicial, school, county, and city offices, including the Superintendent of Public Instruction, shall be nonpartisan. (b) A political party or party central committee shall not nominate a candidate for nonpartisan office, and the candidate's party preference shall not be included on the ballot for the nonpartisan office.

Fifth-- This measure shall become operative on January 1, 2011.

Appendix B: Draft Statutory Language for an Open Primary with a Top Three General Election and Partial Political Party Endorsement

§1 All elections for federal, state, county and municipal office shall consist of a Primary Election and a General Election.

§1.1 The Primary Election for all federal, state, county and municipal offices shall be the second Tuesday in September.

§1.2 General Elections for members of the United States House of Representatives shall occur once every two years on the first Tuesday after the first Monday of November in an election year.

§1.3 General Elections for members of the United States Senate shall occur once every six years on the first Tuesday after the first Monday of November directly before the expiration of a sitting Senator's term.

§1.4 General Elections for all state, county and municipal offices shall be elected every four years unless specifically exempted by law.

§1.4.1 Unless otherwise provided by law, General Elections for offices falling under §1.3 shall occur at the same time as for the offices under §§1.1 and 1.2.

§2 All persons who have registered to vote in this state prior to the time the registration records are closed as required by law may vote in the Primary and General Elections for any candidate running in a jurisdiction in which they are domiciled according to such records.

§2.1 Regardless of the disclosed party preference of the voter, any qualified voter may vote for any candidate in either the Primary or General Election if the voter is otherwise entitled to vote for candidates for the office to be filled. Any party preference designated by the candidate is shown for the information of the voters only and may in no way limit the options available to voters.

§3 Primary Elections shall present to the voters all candidates eligible by law to run for offices for which the voter is eligible to vote under §2 regardless of party affiliation.

§3.1 The Secretary of State shall design a ballot for use in the Primary Election that both enables voters to clearly and easily mark their vote and provides voters for the opportunity to write-in candidates. Any write-in votes, provided that they are otherwise ballot under law, shall be counted.

§3.2 The Secretary of State shall provide procedures for voters to register for mail-in ballots and vote using these ballots in the Primary Election and any subsequent Runoff Election.

§3.2.1 The Secretary of State shall prepare a special mail-in ballot with proper instructions for use by a qualified voter who is either a member of the United States Service or who resides outside of the United States. Such special ballot shall contain a list of the offices being contested in the Primary Election and shall permit the voter to rank candidates for each office by order of preference. The voter shall not be required to indicate his preference for more than one candidate on the ballot if the voter so chooses.

§3.3 The Secretary of State shall have the authority unless explicitly provided by subsequent statute, to issue rules permitting the use of Instant Runoff Voting in the

Primary Election, provided that this method produces three candidates for the General Election.

§3.3.1 Any rule to this effect must include provisions certifying new voting machines or voting procedures conducive to Instant Runoff Voting and provisions for a reliable auditing procedure.

§4 The candidates with the three highest pluralities of the vote, and only these candidates, shall proceed to the General Election.

§4.1 In case of an exact tie between two or more candidates, all candidates possessing a total of the vote equal to or greater than the third-highest plurality of votes may progress to the General Election.

§4.2 The Secretary of State shall design a ballot for use in the General Election that both enables voters to clearly and easily mark their vote and provides voters for the opportunity to write-in candidates. Any write-in votes, provided that they are otherwise valid under law, shall be counted. Voters shall be able to rank candidates for each office by order of preference in a manner established by the Secretary of State.

§4.3 Votes in the General Election shall be tabulated according to each voter's first preference. If no candidate has received 50% plus one of the votes cast, the candidate with the fewest number of votes shall be removed from contention and that candidate's votes shall be redistributed to the remaining two candidates, based on the voter's second preference. The votes shall then be retabulated and the candidate with the majority of votes shall win.

§5 A candidate for an office under §1 who files for candidacy as provided by law may indicate his or her party preference, or lack of party preference upon his or her declaration of candidacy.

§5.1 This party affiliation designation shall not be limited to the one as disclosed upon the candidate's most recent statement of registration or any other document of registration.

§5.2 No political party, organization, or individual shall have authority to alter a candidate's party preference designation without their consent except as in §§5.3.1 and 5.9.

§5.3 A candidate at his or her discretion may select as his or her party designation any party recognized by the Secretary of State of this state or comparable authority in any other state or territory in the United States.

§5.4 If a candidate indicates his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name as "John Doe, Prefers XXXXX Party."

§5.5 If a candidate does not indicate his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name as "John Doe, No Party Preference."

§5.6 The candidate's designated party preference on the ballot shall not be changed between the Primary and General Elections in the same year.

§5.7 A candidate designating a party preference pursuant to §5.3 shall not be deemed to be the official nominee of the party designated as preferred by the

candidate. A candidate's designation of party preference shall not be construed as an endorsement of that candidate by the party designated.

§5.8 Any candidate receiving a nomination from a political party recognized by the Secretary of State of this state may elect to have this designation noted on the ballot in conjunction with his or her name as "John Doe, Endorsed by XXXXX Party."

§5.8.1 A party is qualified to endorse candidates under §5.8 if at least two percent of the registered voters of the state cast a vote for a candidate bearing the party's label in a statewide race held at the time of the last gubernatorial Primary Election or if at least one-tenth of one percent of the registered voters of the state have affiliated with the party or signed a petition to be filed with the Secretary of State stating their intention to file with the party if it were recognized.

§5.8.2 In the case of death or resignation of any candidate in the General Election or any subsequent Runoff Election endorsed by a recognized political party, the political party shall have the authority to have the designation as detailed above assigned to any other candidate on the ballot. If the party can find no candidate on the ballot which it deems suitable to bear this endorsement, the party shall have the authority to endorse an individual not previously on the ballot but is otherwise eligible for candidacy as defined by law. This candidate shall be placed on the ballot after verification of eligibility by the Secretary of State and shall bear the party endorsement label as described above.

§5.9 No candidate may choose a party preference designation which is identical or substantially similar to the formulation in §5.8 so as to convey important information about a party's institutional support to the voters of the state.

§5.9.1 The Secretary of State shall have authority to determine the standard for "substantial similarity" unless otherwise provided by statute.

§5.10 Nothing in this act shall be construed to influence or alter the internal nomination process of any political party except as already provided by law.

§5.11 The Secretary of State shall be required to make available at all polling places and include with all mail-in ballots an explanation of the different political party designations listed in §§5.4, 5.5 and 5.8 so as to reasonably inform voters about their meaning and significance as different indications of ideology and political party support.

§6 All references to party preference or affiliation shall be omitted from all forms required to be filed by a voter-nominated candidate pursuant to this division in the same manner that such references are omitted from forms required to be filed by nonpartisan candidates, except that any declaration of candidacy required shall include space for the candidate to list the party preference in accordance with §3.

§7 In case of court invalidation of any section or subsection of this act, any section or subsection of this act shall be understood as severable from the rest of the act.

Appendix C: Draft Statutory Language for an Open General Election with an Optional Runoff and Partial Political Party Endorsement

§1 All elections for federal, state, county and municipal office shall consist of a November General Election with the possibility of a December runoff election.

§1.1 General Elections for members of the United States House of Representatives shall occur once every two years on the first Tuesday after the first Monday of November in an election year.

§1.2 General Elections for members of the United States Senate shall occur once every six years on the first Tuesday after the first Monday of November directly before the expiration of a sitting Senator's term.

§1.3 General Elections for all state, county and municipal offices shall be elected every four years unless specifically exempted by law.

§1.3.1 Unless otherwise provided by law, General Elections for offices falling under §1.3 shall occur at the same time as for the offices under §§1.1 and 1.2.

§1.4 If a Runoff Election is necessary under §4 and no rules are issued by the Secretary of State pursuant to §3.3, it shall be held on the first Tuesday after the first Monday of December.

§2 All persons who have registered to vote in this state prior to the time the registration records are closed as required by law may vote in the General Election and any necessary Runoff Election for any candidate running in a jurisdiction in which they are domiciled according to such records.

§2.1 Regardless of the disclosed party preference of the voter, any qualified voter may vote for any candidate in either the General or Runoff Election if the voter is otherwise entitled to vote for candidates for the office to be filled. Any party preference designated by the candidate is shown for the information of the voters only and may in no way limit the options available to voters.

§3 General Elections shall present to the voters all candidates eligible by law to run for offices for which the voter is eligible to vote under §2 regardless of party affiliation. There shall be no primary election held before the General Election.

§3.1 The Secretary of State shall design a ballot for use in the General Election that both enables voters to clearly and easily mark their vote and provides voters for the opportunity to write-in candidates. Any write-in votes, provided that they are otherwise ballot under law, shall be counted.

§3.2 The Secretary of State shall provide procedures for voters to register for mail-in ballots and vote using these ballots in the General Election and any subsequent Runoff Election.

§3.2.1 The Secretary of State shall prepare a special mail-in ballot with proper instructions for use by a qualified voter who is either a member of the United States Service or who resides outside of the United States. Such special ballot shall contain a list of the offices being contested in the General Election and shall permit the voter to rank candidates for each office by order of preference. The voter shall not be required to indicate his preference for more than one candidate on the ballot if the voter so chooses.

§3.3 The Secretary of State shall have the authority unless explicitly provided by subsequent statute, to issue rules permitting the use of Instant Runoff Voting in the General Election, thereby negating any need to hold a Runoff Election.

§3.3.1 Any rule to this effect must include provisions certifying new voting machines or voting procedures conducive to Instant Runoff Voting and provisions for a reliable auditing procedure.

§4 If no candidate wins a total of the vote equal to or greater than 50% plus one of the votes cast in the General Election, a runoff will occur among the three candidates with the highest pluralities of the vote.

§4.1 In case of an exact tie between two or more candidates, all candidates possessing a total of the vote equal to or greater than the third-highest plurality of votes may progress to the Runoff Election.

§4.2 The Secretary of State shall design a ballot for use in the General Election that both enables voters to clearly and easily mark their vote and provides voters for the opportunity to write-in candidates. Any write-in votes, provided that they are otherwise valid under law, shall be counted. Voters shall be able to rank candidates for each office by order of preference in a manner established by the Secretary of State.

§4.3 Votes in the General Election shall be tabulated according to each voter's first preference. If no candidate has received 50% plus one of the votes cast, the candidate with the fewest number of votes shall be removed from contention and that candidate's votes shall be redistributed to the remaining two candidates, based on the voter's second preference. The votes shall then be retabulated and the candidate with the majority of votes shall win.

§5 A candidate for an office under §1 who files for candidacy as provided by law may indicate his or her party preference, or lack of party preference upon his or her declaration of candidacy.

§5.1 This party affiliation designation shall not be limited to the one as disclosed upon the candidate's most recent statement of registration or any other document of registration.

§5.2 No political party, organization, or individual shall have authority to alter a candidate's party preference designation without their consent except as in §§5.3.1 and 5.9.

§5.3 A candidate at his or her discretion may select as his or her party designation any party recognized by the Secretary of State of this state or comparable authority in any other state or territory in the United States.

§5.4 If a candidate indicates his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name as "John Doe, Prefers XXXXX Party."

§5.5 If a candidate does not indicate his or her party preference on his or her declaration of candidacy, it shall appear on the primary and general election ballot in conjunction with his or her name as "John Doe, No Party Preference."

§5.6 The candidate's designated party preference on the ballot shall not be changed between General and Runoff Elections in the same year.

§5.7 A candidate designating a party preference pursuant to §5.3 shall not be deemed to be the official nominee of the party designated as preferred by the candidate. A candidate's designation of party preference shall not be construed as an endorsement of that candidate by the party designated.

§5.8 Any candidate receiving a nomination from a political party recognized by the Secretary of State of this state may elect to have this designation noted on the ballot in conjunction with his or her name as "John Doe, Endorsed by XXXXX Party."

§5.8.1 A party is qualified to endorse candidates under §5.8 if at least two percent of the registered voters of the state cast a vote for a candidate bearing the party's label in a statewide race held at the time of the last gubernatorial Primary Election or if at least one-tenth of one percent of the registered voters of the state have affiliated with the party or signed a petition to be filed with the Secretary of State stating their intention to file with the party if it were recognized.

§5.8.2 In the case of death or resignation of any candidate in the General Election or any subsequent Runoff Election endorsed by a recognized political party, the political party shall have the authority to have the designation as detailed above assigned to any other candidate on the ballot. If the party can find no candidate on the ballot which it deems suitable to bear this endorsement, the party shall have the authority to endorse an individual not previously on the ballot but is otherwise eligible for candidacy as defined by law. This candidate shall be placed on the ballot after verification of eligibility by the Secretary of State and shall bear the party endorsement label as described above.

§5.9 No candidate may choose a party preference designation which is identical or substantially similar to the formulation in §5.8 so as to convey important information about a party's institutional support to the voters of the state.

§5.9.1 The Secretary of State shall have authority to determine the standard for "substantial similarity" unless otherwise provided by statute.

§5.10 Nothing in this act shall be construed to influence or alter the internal nomination process of any political party except as already provided by law.

§5.11 The Secretary of State shall be required to make available at all polling places and include with all mail-in ballots an explanation of the different political party designations listed in §§5.4, 5.5 and 5.8 so as to reasonably inform voters about their meaning and significance as different indications of ideology and political party support.

§6 All references to party preference or affiliation shall be omitted from all forms required to be filed by a voter-nominated candidate pursuant to this division in the same manner that such references are omitted from forms required to be filed by nonpartisan candidates, except that any declaration of candidacy required shall include space for the candidate to list the party preference in accordance with §3.

§7 In case of court invalidation of any section or subsection of this act, any section or subsection of this act shall be understood as severable from the rest of the act.

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