Case No. 15-16142

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUBLIC INTEGRITY ALLIANCE, INC.,
an Arizona nonprofit membership corporation, *et al*.,

Plaintiffs/Appellants,

vs.

CITY OF TUCSON,
a chartered city of the State of Arizona, *et al*.,

Defendants/Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
D.C. No. 4:15-cv-00138-CKJ

APPELLEES' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

MICHAEL G. RANKIN
City Attorney
DENNIS P. McLAUGHLIN,
Arizona State Bar No. 00197
Principal Assistant City Attorney
P.O. Box 27210
Tucson, Arizona 85726-7210
Telephone: (520) 791-4221
Fax: (520) 623-9803
Attorneys for Defendants/Appellees

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Defendants/Appellees (collectively, "the City") petition for panel and en banc rehearing of this matter under FED. R. APP. P. 35 and 40 and NINTH CIR. R. 35-1.

INITIAL STATEMENT

On November 10, 2015, a three-judge panel of this Court ruled 2-1 that the City violates the Equal Protection Clause of the Fourteenth Amendment by having its Council Members nominated by the voters of the ward in which the Council Member resides but elected by the voters of the City at large. *Public Integrity Alliance v. City of Tucson*, 805 F.3d 876 (9th Cir. 2015) ("*PIA*") (Attachment 1).

The two circuit judges on the panel (Judges Kozinski and Tallman) came to opposite conclusions on the issue, with Senior District Judge Piersol[1] joining Judge Kozinski in the majority and Judge Tallman strongly dissenting.

The Court should grant panel or en banc rehearing for the following reasons:

1. The panel's Opinion conflicts with the following decisions of the Supreme Court and this Court, and consideration by the full Court is therefore necessary:

- *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) and *Burdick v. Takushi*, 504 U.S. 428 (1992) (standards for evaluating laws respecting geographical limits on the right to vote).
- *American Party of Texas v. White*, 415 U.S. 767 (1974); *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *Newberry v. United States*, 256 U.S. 232 (1921); *Alaskan Independence Party v. Alaska*, 545

[1] For the U.S. District Court for the District of South Dakota, sitting by designation.

F.3d 1173 (9th Cir. 2008); *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992) (nature of primaries; separateness of primaries and general elections; state control over nomination process).

- *Gray v. Sanders*, 372 U.S. 368 (1963) (majority's misapplication of its one person, one vote holding).
- *Holt* and *Town of Lockport v. Citizens for Community Action at the Local Level*, 430 U.S. 259 (1977) (state's power to draw electoral boundaries and recognize differing voter interests).
- *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971), *aff'd* 409 U.S. 807 (1972) (rejecting same challenge to judicial election).

2. The proceeding involves a question of exceptional importance to both equal protection doctrine and state and local control of elections: Does the Equal Protection Clause permit the City to nominate its Council Members by ward and elect them at large? [2] Put another way, may the City use different electoral boundaries for its primary and general elections, or must the boundaries be the same in both elections?

The question raised in this case is particularly appropriate for en banc reconsideration under this Court's precedent. This Court has historically granted en banc rehearings and utilized them to overrule incorrect panel rulings in three categories of cases specifically relevant here:

[2] The process makes Council Members answer to both voters Citywide who elect them and voters in their ward who nominate them; guarantees that nominees have ward support; and assures each ward representation on a unitary governing body aware of each ward's issues, problems, and views.

1. **Equal protection challenges to state action:** *Lipscomb ex rel. DeFehr v. Simmons*, 962 F.2d 1374 (9th Cir. 1992) (reversing panel, finding no equal protection violation in Oregon statutes regulating foster care benefits);
2. **Challenges to state and local election procedures:** *Padilla v. Lever*, 463 F.3d 1046 (9th Cir. 2006) (reversing panel, holding school district recall petitions were not subject to Voting Rights Act provision regarding translation of election materials); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (reversing panel, holding Washington's felon disenfranchisement law did not violate Voting Rights Act); *see also Geary v. Renne*, 2 F.3d 989 (9th Cir. 1993) (in challenge to facial constitutionality of California Elections Code, ordering panel opinion withdrawn and superseded by en banc opinion); and
3. **Equal protection challenges to state election procedures:** *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (reversing panel, rejecting equal protection challenge to California's term limits for state officeholders); *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (reversing panel in equal protection challenge to use of "punch-card" balloting machines in California initiative and gubernatorial recall elections).

This Court should act likewise here. The question raised here is an important one; the panel majority opinion is wrong; and Judge Tallman's dissent is right. By incorrectly holding that the City's primary and general elections must be treated as a "single" election for purposes of drawing electoral boundaries, the *PIA* Opinion contradicts a long line of Supreme Court decisions upholding state and local control

over elections,[3] and stretches the one person, one vote principle beyond its traditional application. The panel's Opinion creates a brand new equal protection right not previously recognized by the Supreme Court or this Court, and unsupported by the decisions of either. If upheld, it will spur other challenges, directed not only at other state and local election systems, including nonpartisan ones, but also at distinctions routinely made by election officials between primary and general elections and the voters who vote in them.

It is already clear that the panel's Opinion will not only affect the City's partisan election system, but could also affect similar partisan and nonpartisan state or local election systems in at least two other states within the Ninth Circuit. Two Nevada cities, Reno and Sparks, both conduct *nonpartisan* primary and general elections in the same manner as the City under their charters.[4] Nonpartisan[5] and partisan ward primaries and at-large general elections are conducted by various cities[6] and general law counties[7] in the State of Washington, as well as by certain of its school districts,[8] port commissions,[9] and special districts.[10]

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[3] For a fuller discussion of the holdings confirming state and local control over their elections, and the limited nature of the one person, one vote doctrine, *see* Appellee's Answering Br. §§ I(A)-(H).

[4] *See* Reno City Charter, Art. V, §§ 5.010, 5.020 (Attachment 2); Sparks City Charter, Art. V, §§ 5.010, 5.020 (Attachment 3).

[5] Revised Code of Washington (RCW) 29A.52.231 (nonpartisan offices specified).

[6] RCW 35.18.020, 35A.12.180, 35.23.080, 35.23.051.

[7] RCW 36.32.404, 36.32.050, 36.32.0556.

[8] RCW 28A.343.660.

[9] RCW 53.12.010.

[10] RCW 54.12.010, 52.14.013, and 57.12.039.

The question raised in this case is too important, and the panel majority's Opinion too poorly reasoned and inconsistent with current Supreme Court and Ninth Circuit precedent, to have that Opinion stand as the law on this issue.

Finally, if the panel majority's creation of a brand new equal protection right is to be Ninth Circuit law, then it should be declared by this Court after full and careful en banc consideration and decision, not through a 2-1 panel opinion where the two circuit judges involved in the decision strongly disagreed.

ARGUMENT

The majority's Opinion failed to apply the appropriate standard for evaluating laws respecting the right to vote. It also rests on three flawed and incorrect conclusions, each of which Judge Tallman effectively and correctly contradicts in his dissent, and all of which should be revisited and rejected by this Court:

1. Primary and general elections "are complementary components of a *single* election." *PIA*, 805 F.3d at 879 (emphasis supplied).
2. *Gray v. Sanders* requires the City to use the same election districts for its primary and general elections. *Id.* at 880.
3. The City cannot constitutionally impose a ward residency requirement to exclude voters in its primary elections. *Id.* at 882.

I. THE MAJORITY FAILED TO APPLY THE APPROPRIATE STANDARD.

As Judge Tallman noted, "[c]onspicuously absent from the majority's opinion is any mention of the appropriate standard of review" for "evaluating laws respecting the right to vote." *Id.* at 883. This case could and should be decided on the basis of the

rational basis standard specifically applicable to residency qualifications under *Holt*. Even Judge Tallman's "lesser burden" analysis under *Burdick* leads to the same correct result. In any event, it was error for the majority to fail to apply, or to misapply, either of these standards to this case.

II. FOR PURPOSES OF EQUAL PROTECTION, THE CITY'S PRIMARY AND GENERAL ELECTIONS ARE TWO SEPARATE ELECTIONS, NOT A "SINGLE" ELECTION.

According to the majority, the City's primary and general elections are "two parts of a single election cycle, which must be considered in tandem when determining their constitutionality." *Id.* at 879. Elsewhere, the majority states even more categorically that the two elections "are complementary components of a single election," and "entirely co-dependent." *Id.* The majority itself considers the concept of a single election to be its key conclusion, stating "[i]f the two elections [are] separate, PIA's constitutional objections would largely evaporate and this would become a simple case." *Id.* Because the two elections actually *are* separate, PIA's constitutional objections *do* evaporate, and this *is* a simple case, with a panel Opinion that must be reversed.

For purposes of equal protection, the majority's attempted merging of the City's two elections into one "single" election is simply untenable. They are two separate elections, for which the City may set two different electoral boundaries. Here are the reasons why:

1. The City's partisan primary election is offset in time from its general election by two months.

2. The two elections perform different functions. As Judge Tallman notes, "[p]rimary elections in Tucson are … nothing more than the means political groups use to choose the standard bearers who will face off in the general election." *Id.* at 885. The Supreme Court long ago came to the same conclusion. "[Primaries] are in no sense elections for an office but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors." *Newberry*, 256 U.S. at 250.

3. The electorates at the two elections, by federal constitutional mandate, can never be the same. The City could never replicate its general election electorate at its partisan primary elections, because it cannot force a party qualified for the ballot to include voters from another qualified party as eligible voters in its primary. *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

4. Finally, it is settled federal constitutional law that the City is free to choose whether primaries occur at all. It can mandate them. *Jones*, 530 U.S. at 572. It can also choose not to have them, or to allow primaries for some parties and not for others. *American Party of Texas*, 415 U.S. at 781-82 (state may require larger parties to use primaries and smaller parties to use conventions to select nominees to appear on the general-election ballot). Or it could have the primary merely be a preliminary to a convention. *Lopez Torres*, 552 U.S. at 206 (primary selected delegates to convention, which then selected nominee). When the state gives a party the right to have its candidates appear with party endorsement on the general-election ballot, "the State acquires a legitimate governmental interest in ensuring the fairness of the party's

nominating process, enabling it to prescribe what that process must be." *Lopez Torres*, 552 U.S. at 203.

In deciding freedom of association challenges to primaries required by the state, this Court too has decided that "a state categorically has the power to determine the method by which a party nominates a candidate." *Lightfoot*, 964 F.2d at 872; *accord Alaskan Independence Party*, 545 F.3d at 1177-78.

The wholly optional nature of primaries as potential preliminaries to general elections, and the various ways they may permissibly be structured and used in the nomination process, emphasize their separateness from general elections and contradict the majority's position.

Because of these obvious differences, Judge Tallman correctly stated that "primary and general elections are not on the same constitutional footing" and therefore "individuals do not have an absolute right to vote in a primary election. States may, for example, host a "closed" or "semiclosed" primary, in which only people who are registered members of a major political party may vote." *PIA*, 805 F.3d at 885 (citing *Clingman v. Beaver*, 544 U.S. 581, 584 (2005)). Thus, "the Constitution permits states to prohibit qualified individuals who are registered Independents (or who chose not to register as a party member) from voting in a primary election." *Id.* Consistent with this principle, this Court upheld Arizona's then-operative "closed primary" system in the face of a Fourteenth Amendment challenge in *Ziskis v. Symington*, 47 F.3d 1004 (9th Cir. 1995).

The majority ignores this precedent, and instead relies on cases that, as Judge Tallman notes, "do not establish that primary and general elections must always be considered together." *PIA*, 805 F.3d at 886.

For example, the majority cites *United States v. Classic*, 313 U.S. 299 (1941), an election fraud case where the government prosecuted certain state election commissioners for allegedly falsifying ballots in a Democratic primary. The majority quotes *Classic* out of context as purported authority for a generalized assertion that "[b]ecause a candidate must win a primary in order to compete in the general election, the 'right to choose a representative is in fact controlled by the primary.'"[11] *PIA*, 805 F.3d at 879 (quoting *Classic*, 313 U.S. at 319). In fact, read in context, the quoted language was based on the allegations of the indictment in *Classic*, and thus specific to *Classic*'s facts. Control of the general election through the primary ("whites only" Democratic primaries) was certainly true for Louisiana in 1941. But the Supreme Court's statement was never intended as a universally applicable statement of equal protection law in all cases at all times. Yet the majority makes exactly that error.

The Supreme Court itself, just three years later, stated that the only real holding in *Classic* was as follows:

> We there held that Section 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, '*where the primary is by law made an integral part of the election machinery.*'

[11] The majority's first quoted clause is incorrect. City candidates can also get on the general election ballot through a process of nomination. *See* A.R.S. § 16-341.

Smith v. Allwright, 321 U.S. 649, 659-60 (1944) (emphasis supplied) (internal citations omitted). That description of *Classic*'s holding emphasizes the distinctness of the two elections and contradicts the idea that they can be considered a "single" election.

Moreover, as Judge Tallman stated, *Classic* itself states that it only protects "qualified" primary voters, leaving to the City to decide who is "qualified":

> *Classic* teaches us that Tucson cannot deprive a "qualified" voter from voting in a ward primary. However, Tucson retains broad discretion to decide who is "qualified" to vote in its primaries. Thus, *Classic* does not preclude Tucson from setting up ward-based primaries whose "qualified" voters are limited to the residents of that particular ward.

PIA, 805 F.3d at 886.

Unlike the majority's reading of *Classic*, Judge Tallman's is fully consistent with the Supreme Court's other precedent emphasizing state and local control over their elections. "[T]he Constitution of the United States does not confer the right to vote in state elections." *Harris v. McRae*, 448 U.S. 297, 322 n. 25 (1980). "The right to vote intended to be protected [by the 14th Amendment] refers to the right to vote as established by the laws and constitution of the state." *Lassiter v. Northampton County. Bd. of Elections*, 360 U.S. 45, 51, (1959); *McPherson v. Blacker*, 146 U.S. 1, 39 (1892). "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised," *Carrington v. Rash*, 380 U.S. 89, 91 (1965), and may "impose voter qualifications and regulate access to the franchise in other ways." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The majority similarly misapplies *Smith v. Allwright*, which, as Judge Tallman points out, actually held only "that a political party may not create a 'whites only' primary." *PIA*, 805 F.3d at 886. As with *Classic*, the majority quotes *Smith* in

asserting that the primary and general elections are a "single instrumentality for choice of officers." *Id.* at 879 (citing *Smith*, 321 U.S. at 660). Likewise, the majority quotes *Smith*'s use of the word "unitary" in claiming that "[b]ecause the primary and general elections are two parts of a 'unitary' process, … a citizen's right to vote in the general election may be meaningless unless he is also permitted to vote in the primary." *Id.*

The majority is simply incorrect. Nowhere does either *Classic* or *Smith* say any such thing. Indeed, in the quote above, the majority itself refers to the primary and general elections as "two parts" of a "unitary process." This reference is consistent with the Supreme Court's own statements that the primary is simply the first of two "steps," *Classic*, 313 U.S. at 316-17, or the "initial stage in a two-stage process." *Storer v. Brown*, 415 U.S. 724, 735 (1974). There are two separate elections here, not one.

Though cited by the majority, both *Classic* and *Smith* contradict the majority's position and support the City's. Both cases protected qualified voter rights in primary elections that were understood to be, *and created difficulties precisely because they had to be analyzed as*, elections separate and distinct from their general elections. Neither case ever treated the two types of elections as one. Neither contradicts the City's position throughout this litigation—that primary and general elections are both made part of the overall election "machinery," "process," or "instrumentality," either by state statute or, as here by the City's Charter, does not make them a "single" election for equal protection purposes.

The majority compounds its errors by trying to use the City's current political demographics as a basis to justify its incorrect view of the City's primary and general

elections as one election. *PIA*, 805 F.3d at 880 ("Tucson generally votes Democratic," and "the City's current mayor and all six councilmembers are Democrats … in most cases … the Democratic ward primary is the only election that matters; the general election is a mere formality"). That one party currently has a registration advantage, and which political party is being elected at a particular point in time, have nothing to do with the constitutional question before this Court, and cannot justify the majority's incorrect decision.[12]

III. *GRAY V. SANDERS* HAS NO APPLICATION HERE.

The majority concludes that Tucson's election system for electing its city council violates the "one person, one vote" principle announced in *Gray v. Sanders*, 372 U.S. at 380. According to the majority, Tucson's system violates equal protection principles by designating different geographical units for its primary and general elections. *PIA*, 805 F.3d at 880.

Judge Tallman rightly disputed this, stating that "the Supreme Court has never before held that the same geographical unit must apply to both the primary and general elections." *Id.* at 886. In the 52 years since *Gray*, no federal court has used *Gray* as a purported basis to say that geographical eligibility to vote in one election creates a constitutional right to be geographically eligible to vote in another election.

Until now.

The majority makes three egregious mistakes here. First, it misinterprets the wording and context of *Gray* itself. *Gray* involved a statewide primary election for

[12] The majority also posits two hypotheticals, dissimilar to our facts, which are addressed in Judge Tallman's dissent and need no further discussion.

offices that would eventually also be elected statewide. The "geographical unit" for both the primary and general election happened to be the same in *Gray*, but the only "representative … to be chosen" in that primary election was the party nominee for the general election. For City voters, meanwhile, both the "geographical unit for which a representative is to be chosen" and the "representative … to be chosen" are different in the City's primary and general elections, by Charter definition. At the City's primary, no one is elected to office. The "geographical unit" is the ward, and the only representative to be chosen is the party nominee for that ward. At the general election, the "geographical unit" is the City as a whole, and the representatives to be chosen are the council members. This is constitutionally permissible. As Judge Tallman correctly stated, "*Gray* does not deprive states of their broad authority to set the geographical unit from which a representative is to be elected." *PIA*, 805 F.3d at 887 (citing *Holt*, 439 U.S. at 68-69, holding that city need not extend the franchise to the citizens living in unincorporated area outside city limits, even though those citizens are subject to city's police powers).

Second, the majority ignores the Supreme Court's own subsequent statements about *Gray*, which show that it created no such requirement or new constitutional right as the majority claims. "The *Gray* case … did no more than to require the State to eliminate the county-unit machinery from its election system." *Fortson v. Morris*, 385 U.S. 231, 235 (1966).

Third, the majority's judicial invention of a "static" electoral constituency, projected backwards from the general election, that then forces a "static" electoral unit in both the primary and general elections is wholly inconsistent with the Supreme

Court's decisions granting states and localities broad powers over elections, electoral districts, and primaries, as well as with the correspondingly narrow focus of the "one person, one vote" cases.[13] Specifically, it improperly reads "one person, one vote" doctrine to extend to more than one election, and to grant a right to vote where none has been authorized by the state. Neither of these things are supportable under the "one person, one vote" doctrine, as the Supreme Court has made clear in multiple cases after *Gray*. Creating such a requirement makes little sense in the case of partisan primary and general elections. A partisan primary by its nature has a different time frame, function, electorate, and candidates than a general election; stands on a lesser constitutional footing than the latter; and occurs at the sole discretion of the state.

IV. THE CITY HAS BROAD AUTHORITY TO ESTABLISH THE RELEVANT GEOGRAPHICAL UNITS FOR ITS ELECTIONS.

The majority rejected the City's right to have different residency qualifications for its primary and general elections based on its erroneous conclusion that "the out-of-ward Tucsonans who are excluded from the ward primaries have precisely the same interests in those primaries as do the ward residents who are permitted to participate." *PIA*, 805 F.3d at 882. But as made clear by Judge Tallman, and contrary to the majority's assertion, the City has demonstrated that, as to its primary, there is a "genuine difference in the relevant interests of the groups that the state electoral classification has created," as required by the case cited by the majority, *Town of Lockport*, 430 U.S. at 268. The City's in-ward and out-of-ward voters do not in fact have "identical" interests in the ward primaries. Given that, the City's system is

[13] *See* Appellees Answering Br. §§ I(A)-(H).

constitutional if "the [City] might legitimately view their interests as sufficiently different to justify a distinction between [the two groups of] voters." *Id.* at 270 n. 17; in other words, if there is a rational basis for the City's classification.

As to the residency requirement itself, in drawing electoral boundaries, the City has "*unquestioned* power to impose reasonable residence restrictions of the availability of the ballot." *Carrington*, 380 U.S. at 91 (emphasis supplied). Residency qualifications are not subject to strict scrutiny. *Hill v. Stone*, 421 U.S. 289, 297 (1975). Rather, they are again analyzed under a rational basis standard. *Holt*, 439 U.S. at 70-71.[14]

V. THE MAJORITY DID NOT CONSIDER *HOLSHOUSER* AND *STOKES V. FORTSON*.

In a footnote, the majority rejected the City's reliance on *Holshouser*, summarily affirmed by the Supreme Court, and *Stokes v. Fortson*, 234 F.Supp. 575 (N.D. Ga. 1964). *PIA*, 805 F.3d at 880, n. 2. Both cases were contemporaneous to *Gray* and presented exactly the issue presented here, albeit involving judicial elections. *Holshouser* was binding on this Court under *Mandel v. Bradley*, 432 U.S. 173 (1977):

> Summary affirmances … without doubt reject the specific challenges presented in the statement of jurisdiction and … prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

Id. at 176. The majority ignored *Mandel*, relying instead on *Dillenburg v. Kramer*, 469 F.2d 1222 (9th Cir. 1972), which predates *Mandel*, and asserted that the summary disposition in *Holshouser* "was likely intended to affirm the proposition that one

[14] *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975), also cited by the majority, is inapposite. There, only some persons governed by the elected officials were permitted to vote in the *general* election. Here, no such limit exists.

person, one vote does not apply to judicial elections ….” But that assertion ignores *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973), the summary affirmance case actually cited on that point in *Chisom v. Roemer*, 501 U.S. 380 (1991), and continues to be cited to this day. *See, e.g., Hall v. Louisiana*, 12 F.Supp. 3d 878, 887 (M.D. La. 2014). The majority improperly ignored *Holshouser* as potentially binding precedent under *Mandel*.

CONCLUSION

For all the reasons presented above, this Court should grant a panel rehearing or rehearing en banc and reverse the erroneous panel Opinion.

RESPECTFULLY SUBMITTED this 11th day of December, 2015.

MICHAEL G. RANKIN
City Attorney

By: s/*Dennis P. McLaughlin*
Dennis P. McLaughlin
Principal Assistant City Attorney
Attorneys for Defendants/Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for Appellees state that they are unaware of any related cases pending in this Court.

DATED this 11th day of December, 2015.

MICHAEL G. RANKIN
City Attorney

By: s/*Dennis P. McLaughlin*
Dennis P. McLaughlin
Principal Assistant City Attorney
Attorneys for Defendants/Appellees

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing and rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 4,193 words.

DATED this 11th day of December, 2015.

MICHAEL G. RANKIN
City Attorney

By: s/*Dennis P. McLaughlin*
Dennis P. McLaughlin
Principal Assistant City Attorney
Attorneys for Defendants/Appellees

CERTIFICATE OF MAILING

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/EFC system on December 11, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 11th day of December, 2015.

MICHAEL G. RANKIN
City Attorney

By: s/*Dennis P. McLaughlin*
Dennis P. McLaughlin
Principal Assistant City Attorney
Attorneys for Defendants/Appellees

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Hon. Cindy K. Jorgenson
Case No. 4:15-cv-00138-CKJ

APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND FOR REHEARING EN BANC

STATECRAFT
LAW · GOVERNMENT · CRISIS MANAGEMENT

Kory A. Langhofer – Arizona Bar No. 024722
Thomas J. Basile – Arizona Bar No. 031150
Roy Herrera Jr. – New York Bar No. 4772430
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
Telephone: 602.382.4078
Attorneys for Plaintiffs-Appellants

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I. Introduction

The panel opinion embodies a straightforward application of two foundational precepts of modern voting rights jurisprudence. First, animated by a recognition that deprivation or dilution of the the franchise on the basis of geography is intrinsically irreconcilable with the "one person, one vote" rule, the United States Supreme Court long ago held that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote…wherever their home may be in that geographical unit." *Gray v. Sanders*, 372 U.S. 368, 379 (1963). Second, because the primary and general elections are, in both practice and in doctrine, "fus[ed]…into a single instrumentality of choice," "the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election." *Smith v. Allright*, 321 U.S. 649, 660, 664 (1944); *see also United States v. Classic*, 313 U.S. 299 (1941). The import of *Gray* and *Smith/Classic* is unmistakable: Denying a Tucson elector the opportunity to participate on equal terms in either the primary or the general election for a citywide representative, solely on the basis of his geographic location within the City, contravenes the constitutional mandate of Equal Protection.

The City's hybrid election system categorically bans voters from participating in the primary elections for five-sixths of their representatives on the Tucson City Council. To sustain it, the City attempts to resituate an anachronistic conception of

the primary election long ago repudiated by the Supreme Court, while concomitantly advocating that this Court disregard a pillar of the "one person, one vote" rule – *i.e.*, that geographic discrimination in the extension or exercise of the franchise triggers strict scrutiny. To advance this argument, the City relies heavily on a fundamentally erroneous conflation of the Equal Protection analysis attaching to geographic discrimination with the wholly distinct (and entirely irrelevant) doctrinal tests governing First Amendment claims in the primary election context.

The theories espoused by the City would license states and municipalities a nearly unfettered ability to deny the right to vote in the primary election to large swaths of a representative's constituency solely because of their geographic location. This profoundly retrogressive understanding of Equal Protection doctrine would severely undermine *Gray*, *Classic* and the long lineage of case law they begot, inject deep uncertainty into the constitutional status of the primary election franchise, and engender conflicts with decisions in other Circuits that adhere to the modern jurisprudential framework. Accordingly, the Petition should be denied.

II. Abandoned Arguments

As an initial matter, the City appears to have abandoned its earlier assertions that (a) notwithstanding U.S. Supreme Court cases applying the "one person, one vote" principle to state and local elections, municipalities hold "plenary" power in local elections, *see* Answering Brief at 1, 9, 28; and (b) the Fourteenth Amendment

claims in this case are inconsistent with pre-Civil War decisions of the U.S. Supreme Court, *see id.* at 50 (citing *Luther v. Borden*, 48 U.S. 1 (1849) (Taney, C.J.)). The Appellants therefore will not rebut those arguments anew in this filing, and will instead rely on the rebuttals set forth in their opening and reply briefs.

III. Standard of Review

A. The Court Need Not Apply a Standard of Review Because the Hybrid System Is Categorically Unconstitutional

The dissenting opinion faults the majority for not expressly explicating the standard of review. *See Public Integrity Alliance, Inc. v. City of Tucson*, 805 F.3d 876, 883 (9th Cir. 2015) (Tallman, J., dissenting). The panel's analysis, however, aligns with that of *Gray*, in which the Supreme Court directly disposed of Georgia's county-weighted primary election system as *per se* unconstitutional without parsing the variants of Equal Protection review. The *Gray* Court seems to have eschewed intentionally those standards of review because, when *Gray* was decided, the basic contours of the standards of review had been apparent in Supreme Court case law for nearly twenty years and were obviously well known by the Court. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944).

B. The Lower Tier of *Burdick* Scrutiny Does Not Apply to Direct Denials of the Franchise

As noted in the dissenting opinion, the Supreme Court has devised a two-tiered approach for evaluating encumbrances on the franchise. When a regulatory burden on voting rights is "severe," "it must be 'narrowly drawn to advance a state

interest of compelling importance.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal citation omitted). By contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (internal citation omitted); *see also Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003).

The dissenting opinion contended that the City's hybrid electoral system be afforded the more lenient facet of *Burdick*'s sliding scale analysis, which countenances restrictions "that are generally applicable, even-handed, politically neutral, and protect the reliability and integrity of the election process." 805 F.3d at 884 (9th Cir. 2015) (internal quotation omitted).

The approach urged in the dissenting opinion fundamentally subverts the *Burdick* framework. *Burdick*'s lesser tier of scrutiny attaches only to voting practices and procedures that erect procedural barriers to voting or ballot access – not legislative enactments that by their express terms *per se* deny the franchise. For example, *Burdick* itself featured restrictions on write-in voting, which did not withhold the franchise from any voter but rather merely required candidates and their supporters to "act in a timely fashion" if they wished to secure a position on the printed ballot. *See* 504 U.S. at 438. Two of the other cases cited by the dissenting opinion – *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959) and

Crawford v. Marion Cnty., 553 U.S. 181 (2008) – likewise evaluated the constitutionality of literacy tests and voter identification requirements, respectively; both legislative devices withstood Supreme Court review in large part because while they may have hindered some electors' exercise of their voting rights, they did not entirely dispossess any citizen of the franchise.[1]

In this case, the hybrid system presents far more than a mere procedural hurdle; it categorically bars every Tucson voter from casting a nomination ballot for five-sixths of her own representatives. The *Burdick* test is therefore inapposite.

C. Under *Burdick*, Vote Denial or Dilution on the Basis of Geography Triggers Strict Scrutiny

This Court has instructed that "severe" restrictions are denoted by measures that deny an eligible voter "an opportunity to cast a ballot at the same time and with the same degree of choice among candidates available to other voters." *Dudum v. Arntz*, 640 F.3d 1098, 1109 (9th Cir. 2011); *see also Kramer v. Union Free Sch.*

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[1] The dissenting opinion also cites *Richardson v. Ramirez*, 418 U.S. 24 (1974), as an instance in which "the Supreme Court has applied a lesser burden" to alleged infringements of the right to vote. 805 F.3d at 884. *Richardson*, which was decided nearly two decades before the Court formulated the *Burdick* standard, affirmed the constitutionality of felon disenfranchisement laws on the basis of directly applicable language of the Fourteenth Amendment. Recognizing that its decision was a *sui generis* byproduct of the constitutional text and its attendant historical understanding, the Court expressly distinguished contemporary voting rights cases, explaining that "the exclusion of felons from the vote has an affirmative sanction in [section 2] of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely." *Richardson*, 418 U.S. at 54.

Dist. No. 15, 395 U.S. 621, 626 n.6 (1969) (distinguishing cases "involv[ing] an absolute denial of the franchise" from laws "which made casting a ballot easier for some" voters rather than others). And even more specifically, this Court has held that laws denying the vote to some residents of a geographic unit from voting within unit-wide elections are *per se* strictly scrutinized. *See Green v. City of Tucson*, 340 F.3d 891, 899-900 (9th Cir. 2003); *accord Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d Cir. 2005) ("Infringements of voting rights that have risen to the level of constitutional violation include…purposeful or systematic discrimination against voters of a certain…geographic area…."); *Mixon v. State of Ohio*, 193 F.3d 389, 402 (6th Cir. 1999) ("[When legislation] grants the right to vote to some residents while denying the vote to others, then [courts] must subject the legislation to strict scrutiny and determine whether the exclusions are necessary to promote a compelling state interest.").

And in a closely analogous line of cases, this Court pronounced that "strict scrutiny applies to state laws treating nomination signatures unequally on the basis of geography," *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 (9th Cir. 2003); *Am. Civil Liberties Union of Nev. v. Lomax*, 471 F.3d 1010 (9th Cir. 2006), a conclusion that extends with equal force to voters themselves.[2] *Cf. Hussey*

[2] The case upon which *Cenarrusa* relied likewise invalidated under heightened scrutiny an Illinois statute that imposed a county-based geographic distribution requirement for nomination petition signatures, reasoning that "[a]ll procedures used

v. City of Portland, 64 F.3d 1260, 1263 (9th Cir. 1995) (consents to annexation signed by electors were the "constitutional equivalent" of votes).

More broadly, the panel opinion also comports with the Supreme Court's settled edict that geographic homesite is within the canonical catalogue of classifications that warrant strict scrutiny when employed to deny or dilute the right to vote. As distilled succinctly by the *Gray* Court:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote —whatever their **race**, whatever their **sex**, whatever their **occupation**, whatever their **income**, and wherever their **home[site]** may be in that geographical unit.

372 U.S. at 379 (emphasis added). Consistent with this formulation, federal courts consistently have extended heightened scrutiny to any abrogation of the franchise premised on any of the criteria articulated in *Gray*. *See, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (invalidating poll tax, explaining that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored"); *Carrington v. Rash*, 380 U.S. 89 (1965) (statute denying vote to military personnel deemed unconstitutional). By contrast, measures that condition voting eligibility on age, *see Gaunt v. Brown*, 341 F. Supp. 1187 (S.D. Ohio 1972),

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by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969).

or party affiliation (in the case of primary elections), *see Balsam v. Sec'y of State of N.J.*, 607 F. App'x 177 (3d Cir. 2015), or compliance with various procedural prerequisites governing ballot access or the manner of voting, *see Crawford*, 553 U.S. 181, generally receive more deferential review.

If the majority opinion had explicated a standard of review, it would have applied strict scrutiny—and because the City has never suggested or argued that its hybrid system is the least restrictive means of advancing a compelling governmental interest, the disposition of the case would have not have changed.

IV. The Primary and General Elections Are Coequal Components of a Unitary Election

As the panel's ruling correctly noted, the fulcrum of this constitutional dispute is whether the primary and general election contests are properly conceived as two independent and discrete elections, or rather as two deeply entwined and constitutionally coequal facets of a single electoral system. Central to the dissenting opinion's and the City's defense of the hybrid system is the notion that "primary and general elections are not on the same constitutional footing." 805 F.3d at 885; Petition at 14.

The constitutional parity of the primary and general elections, however, was confirmed by the Supreme Court in *United States v. Classic*, 313 U.S. 299 (1941), and remains a cornerstone of modern voting rights jurisprudence. As the *Classic* Court explained:

> [T]he…primary is made by law an integral part of the procedure of choice, [and] the right to choose a representative is in fact controlled by the primary . . . . [W]e cannot close our eyes to the fact already mentioned that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made in the primary and may thus operate to deprive the voter of his constitutional right of choice.

Id. at 318-19. The Court reaffirmed this precept three years later, commenting in *Smith v. Allwright* that *Classic* had "fus[ed]…the primary and general elections into a single instrumentality of choice for officers" and recognized "the unitary character of the electoral process." 321 U.S. at 660. While the City suggests that *Smith* merely established the illegality of racial discrimination in the conduct of primary elections (*see* Petition at 10), this constricted reading is belied by the reasoning of *Classic* and *Smith*, which impart a broader recognition of the intrinsic interconnections that inevitably meld the primary and general elections into a unitary mechanism for exercising democratic choice – a proposition heeded by subsequent cases. *See Bullock v. Carter*, 405 U.S. 134, 146 (1972) (invalidating filing fee requirement that applied only to primary election candidates, noting that "the primary election may be more crucial than the general election"); *Morse v. Republican Party of Va.*, 517 U.S. 186, 205, 207 (1996) (deeming challenge to party convention fee actionable under Voting Rights Act, reasoning that plaintiffs' exclusion from the nominating process "weakens the 'effectiveness' of their votes cast in the general election itself" and "does not merely curtail their voting power, but abridges their right to vote

itself"); *cf. Moore*, 394 U.S. at 818 ("All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.").

Notably, the *Classic* paradigm undergirded a recent decision of the Seventh Circuit invalidating an Indiana county's so-called "partisan balance" statute for local judicial elections, whereby major parties were permitted to nominate candidates for only half of the open seats in the general election. *See Common Cause Ind. v. Indiv. Members of the Ind. Election Comm'n*, 800 F.3d 913 (7th Cir. 2015). Reasoning that the restriction "burdens the right of voters to have an effective voice in the general election," the court grounded its analysis in the maxim that "[t]he direct party primary…is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." *Id.* at 917-18 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)).

In this vein, while the dissenting opinion is correct that the City retains discretion to define who is a "qualified" voter in the primary election, this prerogative is constrained by the anterior obligations of Equal Protection. Specifically, because the City has chosen to conduct the general election on a citywide basis and thereby provide that "Tucson city council members…represent the entire city," *City of Tucson v. State*, 273 P.3d 624, 631 (Ariz. 2012), every voter

in that geographical unit (*i.e.*, the City) is constitutionally "qualified" to participate on equal terms in the primary election. Any abridgement of this constitutional entitlement on the basis of the geographic location of an elector's residence *within* the City must satisfy the dictates of strict scrutiny. *See Gray*, 372 U.S. at 379.

While the City insists that *Gray* has no application to this dispute, a careful review of the Court's opinion ineluctably reveals that *Gray* is irreconcilable with the theory of primary elections advanced by the City and the dissenting opinion. At issue in *Gray* was the constitutionality of Georgia's "county unit" primary election system for statewide offices, which accorded votes cast in sparsely populated rural counties proportionately greater weight. If, as the City maintains, a state or municipality can constitutionally untether the primary election from the general and denote a separate "geographical unit" for the former, Georgia could have simply conceptualized a single rural county as the geographical unit for the primary and entirely denied (rather than merely diluted) the franchise to electors residing in other, heavily populated counties. The impermissibility of the county unit system, however, necessarily derived from the Court's recognition that every elector permitted to vote in the statewide general election likewise was vested with a right to an equal voice in the nominating process, irrespective of the location of his residence within the state.

Similarly, the City has never proffered any limiting principle that would

prevent a state from, for example, permitting only a single congressional district or political subdivision (perhaps on a rotating basis) to participate in the primary election for a statewide officer. While the dissenting opinion dismisses such hypotheticals as unlikely to "pass constitutional muster," 805 F.3d at 886, they easily could find refuge in the same rationale that the dissenting opinion employed to sustain the City's hybrid system, *i.e.*, ensuring candidates have support in, and are adequately attuned to the needs of, particular subsets of the larger geographical unit. *See id.* at 887-88. Further, if the City can designate a single ward as the "geographical unit" for the primary election, there is no apparent constitutional compulsion that the wards bear equal populations. Under the City's reasoning, so long as each voter within a ward is treated equally, the primary election franchise can be denied to voters residing in other wards; if deprivation of suffrage is permissible, however, then so too must be its dilution.

To be sure, long abandoned case law once would have buttressed attempts to disassociate the nomination process from the general election and relegate the former to a lesser constitutional plane. Indeed, the City doggedly appeals to the Supreme Court's plurality opinion in *Newberry v. United States*, 256 U.S. 232 (1921), in support of its depiction of the primary election's inferior constitutional standing. As the Appellants have pointed out repeatedly, however, "*Classic* overruled the *Newberry* plurality" with respect to the constitutional significance of

primary elections. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 191 (D.D.C. 2003), *rev'd in part on other grounds*, 540 U.S. 93 (2003). The City's inexplicable reliance on a long defunct holding provides a scant basis for revisiting the panel's entirely correct application of the modern conception of the primary and general elections' unitary status.

V. First Amendment Cases Are Inapposite

The City and the dissenting opinion contend that the primary election is more accurately envisaged as "nothing more than the means political groups use to choose the standard bearers who will face off in the general election," 805 F.3d at 885, rather than a true election clothed with the panoply of constitutional protections that attach to the general election contest. This argument, however, posits a false dichotomy; the primary election is both a constitutionally coequal component of a unitary electoral instrumentality as well as a device for political associations to select their nominees.

While the partisan character of primary elections does not detract from their constitutional dignity under the Equal Protection Clause, it does imbue them with unique First Amendment properties. The City has confounded this distinction to contrive a purported conflict between the panel decision and various precedents of this Court and the Supreme Court, including *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008); *Alaskan Indep. Party v. Alaska*, 545 F.3d 1173 (9th

Cir. 2008); and *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992). *See* Petition at 1-2.

Remarkably, however, **not a single one of those cases adjudicated an Equal Protection claim**. To the contrary, all of them pivoted on the First Amendment freedom of association, and embodied judicial attempts to temper political parties' associational rights with legitimate governmental aspirations of preserving the integrity of the electoral system and promoting democratic methods of candidate selection. Notably, *Lightfoot* and *Alaskan Independence Party* both subordinated the party's restrictions on voter participation to "the State's interest in enhancing the democratic character of the election process," *Eu*, 964 F.2d at 873; they certainly are incongruous authorities for a legislative abrogation of the franchise solely on the basis of geography. *Cf. Lopez Torres*, 552 U.S. at 204 (when a state has provided for a primary, courts have "acknowledged an individual's associational right to vote in a party primary without undue state-imposed impediment").

The City attempts to extract from the First Amendment cases a general dispensation for state and local governments to fashion or even forego primary elections in accordance with their own predilections. These repeated invocations of local autonomy in the operation of primary elections, however, misapprehend the locus of the dispute. The City certainly enjoys wide latitude to devise its electoral arrangements – to include entirely ward-based or entirely at-large methods of election – and indeed is not constitutionally required to render the City Council open

to popular election at all. Rather, the Appellants seek only enforcement of the directive that "if a State adopts an electoral system, the Equal Protection Clause of the Fourteenth Amendment confers upon a qualified voter a substantive right to participate in the electoral process equally with other qualified voters." *Harris v. McRae*, 448 U.S. 297, 322 (1980).

By permitting all qualified voters in the City to participate in the general election for all City Council members, the City incurred a constitutional obligation to ensure that all electors in that geographical unit (*i.e.*, the City as a whole) likewise could partake equally in the primary election for their Citywide representatives. The panel's decision appropriately recognizes and applies this axiom of Equal Protection.

VI. Conclusion

For the foregoing reasons, the Appellees' Petition for Rehearing and for Rehearing En Banc should be denied.

Dated: January 5, 2016

STATECRAFT PLLC

By: *s/ Thomas J. Basile*

Kory A. Langhofer
Thomas J. Basile
Roy Herrera Jr.
649 North Fourth Avenue
First Floor
Phoenix, AZ 85003
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE APPELLATE PROCEDURES 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief contains 3,647 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of the word-processing system used to prepare this brief in preparing this certificate.

The undersigned also certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman font.

Dated: January 5, 2016

STATECRAFT PLLC

By: *s/ Thomas J. Basile*

Kory A. Langhofer
Thomas J. Basile
Roy Herrera Jr.
649 North Fourth Avenue
First Floor
Phoenix, AZ 85003
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court of Appeals for the Ninth Circuit using the appellate CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following registrants:

Richard M. Rollman – rollman@bossefunklaw.com

Michael G. Rankin – mike.rankin@tucsonaz.gov

Dennis McLaughlin – dennis.mclaughlin@tucsonaz.gov

Tim Donaldson – tdonaldson@wallawallawa.gov

Rebecca Glasgow – RebeccaG@atg.wa.gov

Pamela Beth Loginsky – pamloginsky@waprosecutors.org

By: *s/ Thomas J. Basile*