No. _____

In the Supreme Court of the United States

PUBLIC INTEGRITY ALLIANCE, INC., an Arizona nonprofit membership corporation; BRUCE ASH, an individual; FERNANDO GONZALES, an individual; ANN HOLDEN, an individual; KEN SMALLEY, an individual,

Petitioners,

v.

CITY OF TUCSON, *et al*.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

KORY A. LANGHOFER
Counsel of Record
STATECRAFT PLLC
649 North Fourth Avenue
First Floor
Phoenix, Arizona 85003
(602) 382-4078
kory@statecraftlaw.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Each of the six members of the Tucson, Arizona City Council is elected in a citywide, at-large general election. The candidates in the general election are nominated through six partisan primary elections that are held separately in each of the City's six wards; only voters residing in the ward may participate in that ward's primary election. Thus, each City Councilmember is the elected representative of every City voter—but each City Councilmember is nominated through a primary election process that necessarily excludes more than eighty percent of his or her constituents.

The question presented is: Does the Equal Protection Clause of the Fourteenth Amendment permit the City of Tucson to exclude certain registered voters from the primary election for a citywide representative based solely on the geographic location of such voters' residence within the City?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The Petitioners, who were the Plaintiffs-Appellants in the court below, are: Public Integrity Alliance, Inc. (the "Alliance"), Bruce Ash, Fernando Gonzalez, Ann Holden, and Ken Smalley. The Alliance is a nonprofit membership corporation organized under the laws of the State of Arizona. The Alliance is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in the Alliance.

The Respondents, who were the Defendants-Appellees in the court below, are: the City of Tucson, Arizona; Jonathan Rothschild, Mayor of the City of Tucson; Regina Romero, Tucson City Councilor; Paul Cunningham, Tucson City Councilor; Karin Uhlich, Tucson City Councilor; Shirley Scott, Tucson City Councilor; Richard Fimbres, Tucson City Councilor; Steve Kozachik, Tucson City Councilor; and Roger Randolph, Clerk of the City of Tucson.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OPINIONS BELOW

The opinion of the *en banc* panel of the United States Court of Appeals for the Ninth Circuit is reported at 836 F.3d 1019, and is reproduced in the appendix at App. 1-19. The opinion of the three-judge panel of the United States Court of Appeals for the Ninth Circuit is reported at 805 F.3d 876, and is reproduced in the appendix at App. 20-45. The order and opinion of the United States District Court for the District of Arizona is not reported in the Federal Supplement but is available at 2015 WL 10791892 and is reproduced in the appendix at App. 46–64.

JURISDICTION

A three-judge panel of the Unites States Court of Appeals for the Ninth Circuit entered its judgment on November 10, 2015. App. 21. The Ninth Circuit granted the Respondents' petition for rehearing *en banc* on April 27, 2016 and the *en banc* panel of the Ninth Circuit entered its judgment on September 2, 2016. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Chapter XVI, Section 9 of the Tucson City Charter states that "the councilmen shall be nominated each from, and by the respective voters of, the ward in which

he resides, and shall be elected by the voters of the city at large."

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioners Public Integrity Alliance, Inc., Bruce Ash, Fernando Gonzalez, Ann Holden, and Ken Smalley respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

This case challenges the constitutionality of the City of Tucson's method for electing its City Council, which couples partisan, ward-only primary elections held separately in each of the City's six wards with a subsequent at-large general election in which all qualified Tucson electors citywide may participate (the "Hybrid System").

The constitutional question is controlled by a single, simple maxim of equal protection: "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 . . . wherever their home may be in that geographical unit." *Gray v. Sanders*, 372 U.S. 368, 379 (1963). It is undisputed that "Tucson council members, although nominated by ward, represent the entire city, just as do council members elected at large in other cities." *City of Tucson v. State*, 273 P.3d 624, 631 (Ariz. 2012); App. 6. Because the relevant "geographical unit" of representation thus is the city as a whole, the City unconstitutionally denies the right to vote when, through operation of the Hybrid System, it excludes otherwise eligible Tucson electors from voting in primary elections for citywide

representatives based solely on the location of "their home . . . in that geographical unit." *Gray*, 372 U.S. at 379.

II. FACTUAL BACKGROUND

Pursuant to Chapter XVI, Section 8 of its Charter, the City of Tucson is divided into six wards composed of substantially equal populations; one seat on the six-member City Council is allotted to each ward, and a candidate for the City Council must reside in the ward from which he or she seeks to be nominated. *See* Tucson City Charter ch. III, § 1; ch. XVI, §§ 5, 9; App. 5–6. The four-year terms of the City Council members are staggered, and elections are held on a biennial basis in odd-numbered years. *See* Tucson City Charter ch. XVI, §§ 3–4; App. 5. Candidates for the seats allotted to Ward 1, Ward 2 and Ward 4 were last elected in 2015, while elections for the seats designated to Ward 3, Ward 5 and Ward 6 will next be held in 2017. App. 5.

The candidates nominated in the ward-based primaries then compete in an at-large general election in which all registered voters in the City of Tucson may participate. App. 6. Every voter may select one candidate for each of the three City Council seats appearing on the general election ballot. *Id.* A ward's nominees compete in the general election only against other candidates nominated in the same ward. *Id.*

Each of the individual Petitioners is a resident and qualified elector of the City of Tucson. App. 4. The Alliance is a non-profit membership corporation organized under the laws of the State of Arizona. *Id.* The Respondents are responsible for administering

Tucson elections. *See generally* Tucson City Charter ch. IV, VII; Tucson City Code § 12-1.

III. COURSE OF PROCEEDINGS

On April 6, 2015, Petitioners filed a Complaint in the United States District Court for the District of Arizona seeking relief pursuant to 42 U.S.C. § 1983 and alleging violations of the Fourteenth Amendment of the United States Constitution, and Article II, §§ 13 (Equal Privileges and Immunities Clause) and 21 (Free and Equal Elections Clause) of the Arizona Constitution. The district court was vested with subject matter jurisdiction over the Petitioners' claims pursuant to 28 U.S.C. §§ 1331 and 1367(a). On the same date, the Petitioners moved for a preliminary injunction prohibiting the Respondents from utilizing the Hybrid System in connection with the 2015 Tucson City Council elections and any future election for that office, and to conduct elections on a wholly ward-based or wholly at-large basis pending an amendment to the City Charter.

On May 20, 2015 the district court entered a final judgment and order concluding that the Hybrid System placed only "reasonable, nondiscriminatory restrictions" on the individual Petitioners' right to vote that were justified by the City's "important regulatory interests." App. 61. It accordingly denied the Petitioners' requests for injunctive relief. *Id.* 63.

A divided three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court on November 10, 2015 in an opinion authored by Judge Kozinski. Relying principally on this Court's holdings in *United States v.*

Classic, 313 U.S. 299 (1941) and *Smith v. Allwright*, 321 U.S. 649 (1944), Judge Kozinski reasoned that the primary and general elections "are complementary components of a single election" and that "a citizen's right to vote in the general election may be meaningless unless he is also permitted to vote in the primary." App. 27. Heeding the command of *Gray*, Judge Kozinski commented that "[i]f the city were permitted to change the geographical unit between the primary and general elections, it could decouple the representative to be elected from his constituency." App. 29. Accordingly, the panel held that "every otherwise eligible voter who will be a constituent of the winner of the general election must have an equal opportunity to participate in each election cycle through which that candidate is selected." App. 31.

In dissent, Judge Tallman argued that "primary and general elections are not on the same constitutional footing" and that the City "retains broad discretion to decide who is 'qualified' to vote in its primaries." App. 40. Concluding that the City could permissibly designate different geographic units for the primary and general elections, Judge Tallman found that the Hybrid System did not impose a "severe" burden on the right to vote and could be sustained by Tucson's "legitimate interest in ensuring geographical diversity on the City Council." App. 43-44.

The Ninth Circuit granted the Respondents' petition for rehearing *en banc* on April 27, 2016. Upon rehearing, the *en banc* panel affirmed the judgment of the district court and found that the Hybrid System did not exact an unconstitutional denial of the franchise. Writing for the *en banc* court, Judge Berzon asserted

that "*Gray* . . . did not hold that the same geographical unit must apply to both primary and general elections." App. 14. Countering the theory that the primary and general elections necessarily are a unitary electoral mechanism, the *en banc* court invoked cases in which federal courts have upheld on First Amendment grounds the exclusion of non-party members from partisan primaries. Judge Berzon extracted from these cases a general maxim that "primaries serve a different function than the general election," and thus states and municipalities possess discretion to designate different electorates for the two contests. *See id*. 15-16. The court also suggested that any constitutional injury was ameliorated by the fact that "[a]lthough half of Tucson's residents are unable to vote in a primary in a given election year, that burden quickly evens out over time, as the other half of Tucson's residents will not be able to vote in a primary in the next election year." *Id.* 16-17.

The *en banc* court thus concluded that any "minimal" burden on voting rights was counterbalanced by the City's "important" interests of "promot[ing] local knowledge and legitimacy, geographic diversity, and city-wide representation on the city council." *Id.* 17-18.

REASONS FOR GRANTING THE PETITION

For much of the past century, two foundational principles have undergirded this Court's voting rights jurisprudence. First, because deprivation or dilution of the franchise is irreconcilable with the "one person, one vote" rule, "there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters" of the geographical unit for which a representative is chosen. *Gray*, 372 U.S. at 380. 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*, 321 U.S. at 660; *see also Classic*, 313 U.S. at 318-19.

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 mandate of equal protection.

In this vein, three critical errors pervade the Ninth Circuit's ratification of the Hybrid System.

First, in holding that states and localities may invoke "important regulatory interests" to withhold certain residents' right to vote on the basis of geography, the Ninth Circuit departed from longstanding precedents of this Court and lower federal courts holding that the deprivation or dilution of the franchise because of a voter's homesite is a "severe"

burden on constitutional rights requiring strict scrutiny.

Second, the Ninth Circuit's attempt to sever the primary and general elections and relegate the former to a lower constitutional plane upends the modern jurisprudential framework constructed in *Classic* and *Smith*. In so doing, the Ninth Circuit erroneously conflated the equal protection analysis attaching to geographic discrimination with the wholly distinct (and entirely irrelevant) doctrinal tests governing First Amendment claims concerning the exclusion of non-members of a political party in the primary election context.

Third, the Ninth Circuit's effort to salvage the Hybrid System relied at least in part on the notion that any burden on a given Tucson elector's right to vote is "even[ed] out over time" by corresponding injuries on other Tucson voters. *See* App. 17. This theory that equal protection violations can be cured by inflicting offsetting harms to other voters over the course of several years is foreign to this Court's voting rights doctrine, which has long conceived of the franchise as an individual right imbued with intrinsic constitutional value.

At bottom, the Ninth Circuit's reasoning in this case would vest in 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 severely undermines *Gray*, *Classic*, and the long lineage of case law they begot, injects deep uncertainty into the constitutional status of the

primary election franchise, and engenders conflicts with decisions in other Circuits that more faithfully adhere to the modern jurisprudential framework.

I. THE NINTH CIRCUIT'S APPLICATION OF LESSER SCRUTINY TO DISCRIMINATION BASED ON GEOGRAPHIC HOMESITE DISREGARDS THIS COURT'S PRECEDENTS AND CREATES A CIRCUIT SPLIT

The *en banc* panel held that a state or municipality may deny a citizen the right to vote in the primary election for his representative on the basis of geographic homesite, so long as the deprivation is counterbalanced by an "important" government interest. *See* App. 16 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). The Ninth Circuit's eschewal of strict scrutiny in favor of the more lenient *Burdick* test, however, is simply incorrect; it stands at odds not only with the controlling pronouncements of this Court, but also precipitates a direct conflict with the strict scrutiny analysis adopted by the lower federal courts, including the Eighth Circuit, in evaluating geographic discrimination in the exercise of the franchise.

A. This Court Applies Strict Scrutiny to Denials of the Franchise Based on Geographic Homesite

This Court in *Burdick* 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.'" 504 U.S. at 434 (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).

Direct deprivations of the franchise based on geographical location are *per se* "severe" burdens on the franchise that demand strict scrutiny, as even the Ninth Circuit has previously acknowledged. *See Green v. City of Tucson*, 340 F.3d 891, 899-900 (9th Cir. 2003) (holding that "regulations that unreasonably deprive some residents in a geographically defined governmental unit from voting in a unit wide election" are *per se* strictly scrutinized); *Dudum v. Arntz*, 640 F.3d 1098, 1109 (9th Cir. 2011) (noting that "severe" burdens 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").

For more than five decades, this Court has instructed that all residents of the geographic unit from which a representative is elected must be accorded an equal and undiluted right to vote, irrespective of their geographical location within the unit. As succinctly distilled by the Court, the central precept of modern voting rights jurisprudence is that

> 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.

Gray, 372 U.S. at 379 (emphasis added).

Consistent with this formulation, the Court consistently has 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); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 629-30 (1969) ("[I]f the city charter made the office of mayor subject to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review."). As the Court explained in invalidating an Illinois law that imposed a county-based distribution requirement for candidate nomination petition signatures, the denial or dilution of the franchise based on geographical location is "contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Moore v. Ogilvie*, 394 U.S. 814, 818-19 (1969).[1]

---

[1] By contrast, measures that condition voting eligibility on age, *see Gaunt v. Brown*, 341 F. Supp. 1187 (S.D. Ohio 1972), 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

In *Evans v. Cornman*, 398 U.S. 419 (1970), the Court again affirmed that all voters within a geographic unit must stand in electoral parity in selecting their representatives. At issue in *Evans* was a Maryland statute that defined "residents" for voting purposes as excluding denizens of a federal enclave located within the state. As a threshold matter, the Court noted that "before th[e] right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close scrutiny." *Id.* at 422. Rejecting the state's contention that the enclave residents did not possess a "substantial interest" in the state's governance and policy decisions, the Court explained that they were "just as interested in and connected with electoral decisions" as residents of Maryland proper and were constitutionally entitled to equal treatment in the electoral realm. *Id.* at 426.[2]

---

various procedural prerequisites governing ballot access or the manner of voting, *see Crawford v. Marion Cnty.*, 553 U.S. 181 (2008); *Anderson v. Celebrezze*, 460 U.S. 780 (1983), generally receive more deferential review under the lower tier of *Burdick*.

[2] *Evans* and the instant case are easily distinguished from *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), in which the Court held that a city could permissibly exclude from city elections residents of an unincorporated area *outside* the city's geographic boundaries. The *Holt* Court itself cautioned that its holding hinged on the specific facts presented, most notably the limited jurisdictional reach of the city government's powers over the unincorporated area. Importantly, the Court emphasized that a different conclusion may have followed if the city were "exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits." 439 U.S. at 72 n.8.

In the same vein, the City's decision to permit *all* Tucson voters to choose *every* ward's Council member in the general election reflects that all Tucson voters are represented by every City Council member and share a common and undifferentiated interest in electoral outcomes. Although the City attempts to evade strict scrutiny by denominating the Hybrid System's abrogation of the primary election franchise as merely a "residency requirement," this facile characterization obscures the critical fact that City Council members undisputedly are representatives of *all* Tucson residents. *See City of Tucson*, 273 P.3d at 631.

As Judge Kozinski correctly reasoned in the panel opinion, "[w]hen two groups of citizens share identical interests in an election, the city may not use a residency requirement to exclude one group while including the other." App. 31. While the City could permissibly adopt ward-based residency restrictions if City Council members were elected on a purely ward-only basis, that is not the case under the Hybrid System. "The nominees selected in the ward primaries will advance to the general election; if elected there, they will represent the entire city." App. 32. Thus, because "the geographical unit for which a representative is to be chosen" is the City as a whole, *Gray*, 372 U.S. at 379, any discrimination among voters solely because of their geographic location within the City must satisfy strict scrutiny.

B. The *En Banc* Panel's Rejection of Strict Scrutiny Conflicts With Decisions of Other Circuits

The Ninth Circuit's novel proposition that states and municipalities may withhold the franchise from certain residents of the geographic unit subject only to the forgiving lower tier of *Burdick* review is irreconcilable with precedents of other Circuits, which have maintained fidelity to the rule of *Gray* and *Evans*. Most notably, the Eighth Circuit rejected precisely the view espoused by the Ninth Circuit in this case when it invalidated under heightened scrutiny a South Dakota law providing that unorganized counties would be governed by, but not participate in the election of, officials in adjacent organized counties. *See Little Thunder v. State of S.D.*, 518 F.2d 1253 (8th Cir. 1975). Discounting the state's contention that the law was "nothing more than a geographic residency requirement," *id.* at 1255, the court concluded that the state "may not, through residency requirements, disenfranchise citizens who have a substantial interest in the choice of those who will function as their elected officials. Such unequal application of fundamental rights we find repugnant to the basic concept of representative government." *Id.* at 1258.

While not having occasion to extensively engage the question, other courts likewise have alluded to the settled principle that geographic homesite is within the canonical catalogue of classifications that trigger strict scrutiny when employed to deny or dilute the franchise. *See, e.g.*, *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, 405 (6th Cir. 1999) ("If the municipal school boards [which represented both Cleveland and its surrounding suburbs] were elected [rather than appointed] bodies and only the Cleveland residents could vote in the school board election, the relevant geographical entity would be the municipal school district" and strict scrutiny would apply to any exclusion of suburban voters.). Indeed, even the Ninth Circuit previously recognized the constitutional infirmity of measures that disfavor certain geographical elements of the electorate in any stage of the selection process. *See Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 (9th Cir. 2003) (relying on *Moore* in holding that "strict scrutiny applies to state laws treating nomination signatures unequally on the basis of geography").

In sum, the Ninth Circuit's abnegation of the rule of *Gray*, *Evans*, and their progeny in this case has engendered a marked discrepancy between the Circuit courts with respect to the constitutionality of geographic discrimination in the exercise of the franchise. To avoid a deepening schism and further erosion of the "one person, one vote" principle enunciated in *Gray*, the Court should grant certiorari and affirm that when a state or municipality denies the right to vote to segments of an elected representative's constituency solely because of those individuals' geographic location within the electoral unit, such impairments can be sustained only if proved to be the least restrictive means of advancing a compelling government interest.

II. THE GEOGRAPHIC UNIT IS FIXED THROUGHOUT THE PRIMARY AND GENERAL ELECTIONS

The Ninth Circuit's application of the incorrect standard of review derived largely from its erroneous premise that the City may designate different geographic units at different points in the *same* election cycle for the *same* office. Integral to its reasoning was a disregard of the unitary character of the primary and general elections as "a single instrumentality of choice." *Smith*, 321 U.S. at 660. The court's conclusion not only misinterprets *Gray*, but is profoundly at variance with modern voting rights doctrine. The constitutional equivalence of the primary and general elections, and the necessity of ensuring *Gray*'s continued vitality, foreclose the Ninth Circuit's theory of a mutable geographical unit. This Court's intervention is necessary to emend the Ninth Circuit's marked deviation from settled law.

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

The relationship between the primary election and the general election is, ultimately, the fulcrum of this case. As distilled by Judge Kozinski, the operative query is: "Are Tucson's primary and general elections two separate contests, each governed by rules that must be judged independently of one another . . . . Or are they two parts of a single election cycle, which must be considered in tandem when determining their constitutionality?" App. 26.

This Court answered precisely that question in *United States v. Classic*, 313 U.S. 299 (1941). Explaining that the primary and general election contests are two deeply entwined and constitutionally coequal facets of a single electoral system, the Court observed that:

> [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.

313 U.S. at 318-19. The Court reaffirmed this precept three years later, commenting that *Classic* had "fus[ed]. . .the primary and general elections into a single instrumentality of choice for officers" and articulated "the unitary character of the electoral process" as a matter of constitutional law. *See Smith*, 321 U.S. at 660. Indeed, *Smith* and *Classic* impart a broad recognition of the intrinsic interconnections that inevitably meld the primary and general elections into a unitary mechanism for exercising democratic choice – a proposition this Court has heeded in 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."). Noting that "[t]his case illustrates the point" animating *Classic* and *Smith*, Judge Kozinski correctly reasoned that a Tucson resident's "right to vote in the general election may be meaningless unless he is also permitted to vote in the primary." App. 27.

After offering a perfunctory acknowledgement of the *Classic* line of cases, however, the *en banc* panel rejected their application to the Hybrid System, citing "decades of jurisprudence permitting voting restrictions in primary elections that would be unconstitutional in the general election." App. 15. Crucially, however, all the cases invoked by the Ninth Circuit hinged on the right of political parties to admit or exclude voters from nominating contests on the basis of such electors' party allegiances. App. 15-16 (citing *Clingman v. Beaver*, 544 U.S. 581 (2005); *Am. Party of Texas v. White*, 415 U.S. 767 (1974); *Ziskis v. Symington*, 47 F.3d 1004 (9th Cir. 1995)). None sustained efforts to curtail the primary election franchise solely on grounds of geographic homesite.

The Ninth Circuit's assertion that "primaries serve a different function than general elections" and

implicate distinct state interests, App. 16, is factually true, but a *non sequitur*; the distinguishing attributes of primary elections bear no relationship whatsoever to geography. As the cases relied upon by the *en banc* panel illustrate, primaries differ from general election contests in one important, but entirely irrelevant, respect, *i.e.*, they intersect directly with political parties' First Amendment right of association. As this Court has observed,

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

California Democratic Party v. Jones, 530 U.S. 567, 575 (2000).

In this vein, the authorities cited by the Ninth Circuit embodied judicial attempts to secure an equipoise between political parties' associational rights and legitimate governmental aspirations of preserving the integrity of the electoral system and promoting democratic methods of candidate selection. These First Amendment properties unique to the primary election process, however, neither illuminate nor justify the Hybrid System, which offends the doctrine of equal protection by systematically excluding Tucson electors from participating in the primary election for citywide representatives solely because of the geographic ward in which they reside.

This Court has never accepted the paralogism that "because primaries serve a different function than general elections," App. 16, states and municipalities therefore may abrogate the primary election franchise on grounds unrelated to party affiliation. To the contrary, "[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." *Storer v. Brown*, 415 U.S. 724, 735 (1974). Accordingly, "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*, 321 U.S. at 664; *see also Gray*, 372 U.S. at 381-82 (applying equal protection principles to primary election arrangement); *Bullock*, 405 U.S. at 147 (applying heightened scrutiny to candidate filing fee requirement that applied only to primary elections). While courts have acceded to party membership limitations on the primary election franchise in recognition of the singular First Amendment concerns they present, those precedents do not license discriminatory restrictions on primary voting based on the geographical location of electors' residence. It is for precisely this reason that Judge Kozinski correctly concluded that "every otherwise eligible voter who will be a constituent of the winner of the general election must have an equal opportunity to participate in each election cycle through which that candidate is selected." App. 31.

In sum, the *en banc* panel's holding that states and municipalities may wholly exclude large geographic segments of the general election electorate from participating in the primary election for their own

representatives is not an idiosyncratic adaptation—or even isolated misapplication—of settled voting rights precepts. As discussed above, federal courts have countenanced limitations on the primary election franchise *only* on the basis of party affiliation and *only* to accommodate the unique First Amendment elements integral to the nomination process. By fundamentally decoupling the primary and general election contests, the *en banc* opinion marks a significant and consequential derogation of the settled "postulate that the right to vote in . . . a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." *Smith*, 321 U.S. at 661-62.

B. The Notion of a Mutable Geographical Unit Is Inconsistent with *Gray* and Core Voting Rights Principles

Rejecting the *Classic* rule that the primary and general election contests are a unitary electoral mechanism, the Ninth Circuit concluded that the City could properly designate one geographical unit for the primary election (*i.e.*, the specific ward in which a given voter resides) and a different geographical unit for the general election (*i.e.*, the city as a whole) for the same office. *See* App. 16. This assertion, however, reflects not simply an erroneous application of *Gray*, but an implicit repudiation of *Gray*'s constitutional underpinnings.

To discern the gravity of the Ninth Circuit's misunderstanding of the "one person, one vote" rule and the troubling potentialities it portends, it is crucial to first properly distill the teachings of *Gray*. The germane "geographical unit" for denoting a state or

municipality's equal protection obligations is the one "for which a representative is to be chosen." *See Gray*, 372 U.S. at 379. In other words, once a state or municipality designates a particular constituency for a given representative, the corresponding geographic ambit is the applicable "unit" for assessing equal protection challenges. The ability to cast a vote for a candidate is the nexus establishing a "representative" relationship.

The notion that the government can dictate different geographic units in each of the primary and general elections for the same office representing the same constituency—and thereby disenfranchise large swaths of the general electorate in the primary election—is not only irreconcilable with *Gray* but also embodies a troubling circularity. If the government can deny the franchise to constituents of a representative in the primary election by simply decreeing a different "geographical unit" and casting the restriction as a "residency requirement," it is difficult to discern what independent force the Equal Protection Clause can impart against enactments that discriminate on the basis of voters' homesite.

For this reason, the Ninth Circuit's untethering of the geographic unit from the office to be elected is flatly inconsistent with the prevailing understanding of equal protection in the voting rights context. Two hypotheticals supplied by Judge Kozinski underscore vividly the bizarre implications of the Ninth Circuit's holding. Under the City's reasoning, subsequently adopted by the *en banc* panel:

> Tucson could decree that only voters living on Main Street are eligible to vote in primaries,

> thereby forcing the entire city to choose among nominees selected by a tiny minority of residents. Or the State of New York, in an effort to cap its number of city-slicker senators, could limit the primary for its junior senator to Manhattanites and the primary for its senior senator to the rest of the state.

App. 29–30. Such arrangements, as Judge Kozinski observed, would of course be constitutionally untenable.

The *en banc* court attempted to elude the constraints of *Gray* by asserting that it "concerned only the primary election, not a comparison of the geographical units used in the primary and general elections." App. 14. This cursory summation of *Gray*'s factual posture obscures that the case is analytically indistinguishable from this matter. *Gray* involved an equal protection challenge to Georgia's so-called "county unit" system for conducting primary elections for statewide offices. The "county unit" arrangement accorded votes cast in sparsely populated rural areas proportionately greater weight than ballots submitted in dense urban counties. This Court deemed the process constitutionally unacceptable, holding that "there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State." 372 U.S. at 380.

While it is superficially true that *Gray* examined only the primary election process, its reasoning implicitly pivoted on the unitary character of the primary and general elections. Because the positions to be filled in the general election were statewide

offices, "the geographical unit for which [the] representative is to be chosen," *id.* at 379, necessarily was the state as a whole. It followed that all voters in this geographical unit were constitutionally entitled to an equal vote in the primary election; hence, diluting the ballots of electors in some geographic portions of the state was constitutionally impermissible. By contrast, if, as the *en banc* panel maintains, a state or municipality can disjoin the primary election from the general and denote a separate geographical unit for the former, Georgia (and this Court) could have simply conceptualized a single rural county as the geographical unit for the primary. Under the *en banc* court's reasoning, Georgia could have freely diluted (or, as in Tucson, entirely excluded) the votes of electors residing elsewhere in the state because it was under no constitutional compulsion to allow those voters to participate in the primary election at all. Such logic is, of course, anathema to the reasoning of *Gray*.

A hypothetical underscores the point. Suppose Tucson permitted voters residing outside Ward 1 to participate in the Ward 1 primary election, but provided that each non-Ward 1 ballot would be accorded only half the weight of each vote cast inside Ward 1. Such an arrangement would of course be substantively identical to the system invalidated in *Gray*. Rather than diluting non-Ward 1 votes by 50%, however, the City effectively discounts them entirely. It is an ineluctable corollary of the "one person, one vote" axiom, however, that when the dilution of an elector's vote is unconstitutional, its denial necessarily is likewise impermissible. The Ninth Circuit's repudiation of this cornerstone of Fourteenth

Amendment jurisprudence warrants this Court's intervention.

III. THE NINTH CIRCUIT'S HOLDING THAT STATES MAY PERMISSIBLY "EVEN OUT" AND CURE A CONSTITUTIONAL INJURY BY INFLICTING THE SAME INJURY ON OTHER CITIZENS IS UNPRECEDENTED AND INCORRECT

As discussed above, the Ninth Circuit's conclusion that states and municipalities may, subject only to lenient *Burdick* review, deny the primary election franchise to vast segments of the general election electorate solely because of their geographic location within the represented unit implicitly repudiates decades of settled voting rights jurisprudence.

Perhaps the most aberrant aspect of the court's analysis, however, is found in its assertion that the Hybrid System is constitutionally sound because "[a]lthough half of Tucson's residents are unable to vote in a primary in a given year, that burden quickly evens out over time, as the other half of Tucson's residents will not be able to vote in a primary in the next election year." App. 16-17. This notion—*i.e.*, that an infringement of one individual's voting rights can be "evened out" and hence cured by inflicting an offsetting injury on another individual some years later—is an unprecedented contrivance that is deeply dissonant with the animating rationale of the "one person, one vote" rule. As this Court has observed, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555

(1964). The franchise is not merely an instrument for obtaining an electoral outcome; it is an individual right imbued with intrinsic importance and vested equally in each qualified elector. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). It is for this reason that this Court has always conceived of the right to vote as "a substantive right to participate in the electoral process equally with other qualified voters," *Harris v. McRae*, 448 U.S. 297, 322 (1980), *in each election*.

It is obvious that, for example, a malapportioned legislative map cannot be constitutionally redressed by devising a scheme that disfavors other districts during the next round of redistricting. Similarly, Georgia plainly could not have rescued the county unit system invalidated in *Gray* by revising it to dilute rural votes in some election years and urban votes in other election years. Likewise, to borrow Judge Kozinski's hypothetical, a state could not exclude half of its electorate from the primary election for one of its U.S. Senators by promising to enfranchise only the other half of the state in the primary election for its other U.S. Senator. *See* App. 29-30.

Unsurprisingly, other federal courts have adopted a decidedly skeptical view of the notion that a state or municipality can somehow "cancel out" equal protection infractions over the course of multiple elections. Concluding that a New York statute permitting party officials from outside the relevant congressional district

to participate in nomination decisions in special elections violated Article I, Section 2 of the Constitution, the Second Circuit opined:

> We are not impressed by the argument . . . that any injury inflicted on the voters in the 21st C.D. by the participation of persons elected from other districts is compensated by the potential reciprocal ability of persons elected by voters in the 21st C.D. to inflict injury on the voters in other Congressional districts when, as and if special elections should be held there.

Montano v. Lefkowitz, 575 F.2d 378, 387 n.15 (2d Cir. 1978). The First Circuit espoused a broadly similar sentiment when invalidating a city's plan to limit participation in a curative primary election only to those voters who had cast a ballot in the prior invalid election. Rejecting the notion that "the ability to vote in the general election [was] a satisfactory alternative for those voters not allowed to vote in the primary," the court noted that "the candidate of their choice may have been excluded in the preliminary election from which they were barred." *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 731 n.5 (1st Cir. 1994). Thus, the Ninth Circuit's attempt to sustain the Hybrid System on a theory of aggregating and "canceling out" constitutional injuries simply is not plausible.

Further, even if the concept of "offsetting" constitutional injuries were sound as an abstract proposition, the inevitable vicissitudes of demographics and geographic mobility render it unworkable in practice. For one to persuasively argue that, over time, every City voter has equal influence over the composition of City Council, a court would be required

to assume that (a) every City voter participates in an even number of elections cycles, so that every voter is denied the right to vote in primary elections an equal number of times; (b) in between election cycles, no City voter moves from a ward that held a primary election in the most recent election cycle to one that did not, or *vice versa*; and (c) redistricting, which occurs every ten years and necessarily will not track the four year terms of City Councilmen, does not cause voters to shift from a ward that held a primary election in the most recent election cycle to one that did not, or *vice versa*. Not only is there no record evidence substantiating these assumptions in this case, but common sense dictates that the notion of a static electorate is simply implausible as a general matter.

This Court should grant review and affirm the right to cast an equally weighed vote in each primary election for one's representative, irrespective of one's geographic homesite within the constituency.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KORY A. LANGHOFER
Counsel of Record
STATECRAFT PLLC
649 North Fourth Avenue
First Floor
Phoenix, Arizona 85003
(602) 382-4078
kory@statecraftlaw.com

Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-16142
D.C. No. 4:15-cv-00138-CKJ

[Filed September 2, 2016]

PUBLIC INTEGRITY ALLIANCE, INC., an Arizona nonprofit membership corporation; BRUCE ASH, an individual; FERNANDO GONZALES, an individual; ANN HOLDEN, an individual; KEN SMALLEY, an individual,
Plaintiffs-Appellants,

v.

CITY OF TUCSON, a chartered city of the State of Arizona; JONATHAN ROTHSCHILD, in his capacity as the Mayor of the City of Tucson; REGINA ROMERO, in her capacity as a member of the Tucson City Council; PAUL CUNNINGHAM, in his capacity as a member of the Tucson City Council; KARIN UHLICH, in her capacity as a member of the Tucson City Council; SHIRLEY SCOTT, in her capacity as a member of the Tucson City Council; RICHARD FIMBRES, in his capacity as a member of the Tucson City Council; STEVE KOZACHIK, in his capacity as a member of the Tucson City Council; ROGER

RANDOLPH, in his capacity as the Clerk of the City of Tucson,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted En Banc June 21, 2016
San Francisco, California

Filed September 2, 2016

Before: Sidney R. Thomas, Chief Judge, and William A. Fletcher, Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, Richard R. Clifton, Consuelo M. Callahan, Morgan Christen, Jacqueline H. Nguyen, John B. Owens, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Berzon

SUMMARY[*]

Civil Rights

The en banc court affirmed the district court's order awarding judgment in favor of the City of Tucson and its co-defendants in an action challenging the City's system for electing members of its city council.

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Tucson is divided into six wards of approximately equal population, and each ward is allotted one seat on the six-member city council. Council members are elected through a hybrid system involving a ward-level partisan primary election and an at-large partisan general election. The top-vote getter from each party eligible for inclusion on the ward-level primary ballot advances to an at-large general election where she competes against the other candidates nominated from the same ward. In the general election, every Tucson voter may vote for one candidate from each ward that held a primary.

Plaintiffs alleged that the combination of the ward-based primary and the at-large general was constitutionally fatal. Applying *Burdick v. Takushi*, 504 U.S. 428 (1992), the en banc court held that Tucson's hybrid system for electing members of its city council imposed no constitutionally significant burden on the right to vote. The panel further held that Tucson advanced a valid, sufficiently important interest to justify its choice of electoral system. The panel concluded that on the facts alleged, the system did not violate the Equal Protection Clause's one person, one vote commitment.

COUNSEL

Kory A. Lanhofer (argued), Thomas J. Basile, and Roy Herrera Jr., Brownstein Hyatt Farber Schreck, LLP, Phoenix, Arizona, for Plaintiffs-Appellants.

Dennis P. McLaughlin (argued), Principal Assistant City Attorney; Michael G. Rankin, City Attorney; City Attorney's Office, Tucson, Arizona; for Defendants-Appellees.

Rebecca Glasgow and Callie A. Castillo, Deputy Solicitors General; Robert W. Ferguson, Attorney General; Office of the Attorney General, Olympia, Washington; for Amici Curiae Washington Secretary of State, Washington State Association of Counties, Association of Washington Cities, and Washington Association of County Officials.

Jennifer M. Perkins; John R. Lopez, IV, Solicitor General; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Amicus Curiae State of Arizona.

OPINION

BERZON, Circuit Judge:

The structure of municipal governments and methods of selecting municipal officials vary greatly across the country. Such diversity is a manifestation of our federal structure, which ideally, though not always, "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). This case requires us to consider the constitutional validity of one municipality's chosen election system.

Public Integrity Alliance, a nonprofit corporation, and four Tucson voters (collectively referred to as "Public Integrity Alliance") challenge as unconstitutional the City of Tucson's system for electing members of its city council. We hold that

Tucson's system does not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and so affirm the district court's order awarding judgment in favor of the City and its co-defendants.

BACKGROUND

I.

Tucson is one of nineteen charter cities in Arizona. *City of Tucson v. State*, 229 Ariz. 172, 174 (2012) (en banc). Under Arizona's constitution, charter cities are municipalities of more than 3,500 people that have elected to "adopt a charter—effectively, a local constitution—for their own government without action by the state legislature." *Id.* Charter cities enjoy enhanced autonomy with regard to government structure and the selection of their city officials. *See id.*; *Strode v. Sullivan*, 72 Ariz. 360, 368 (1951).

Since adopting its current city charter in 1929, Tucson has used a "hybrid election system" for electing members to its city council. *City of Tucson*, 229 Ariz. at 175; Tucson City Charter, ch. XVI, § 9. Tucson's city council election system operates as follows: Tucson is divided into six wards of approximately equal populations. *Id.* ch. XVI, § 8. Each ward is allotted one seat on the six-member city council. *Id.* ch. III, § 1. Council members serve four-year terms and are elected on a staggered basis, with three council members elected every odd-numbered year. *Id.* ch. XVI, §§ 3, 4. For example, elections for the seats allotted to Wards 1, 2, and 4 were held in 2015, and elections for the seats allotted to Wards 3, 5, and 6 will be held in 2017.

A candidate for city council must reside in the ward from which she seeks to be nominated. *Id.* ch. XVI, § 5.

Council members are elected through a hybrid system involving a ward-level partisan primary election and an at-large partisan general election. First, each ward with a city council seat up for election conducts a partisan primary to select one nominee from each recognized political party. Persons who reside within that ward and are registered with a political party qualified for representation on the ballot may vote in their party's ward-level primary. Ariz. Rev. Stat. § 16-467(B); Tucson City Charter, ch. XVI, § 9. A person registered as an independent, as having no party preference, or as a member of a party not entitled to representation on the ballot may vote in any one party's ward-level primary. Ariz. Rev. Stat. § 16-467(B).

The top vote-getter from each party eligible for inclusion on the ward-level primary ballot then advances to an at-large general election, where she competes against the other candidates nominated from the same ward. Every Tucson voter may vote for one candidate from each ward that held a primary—that is, all voters may vote for one candidate for each of the three council member seats appearing on the general election ballot. Tucson City Charter, ch. XVI, § 9. Thus, when city council seats for Wards 1, 2, and 4 were up for election in 2015, residents of Ward 1 were permitted to vote in the primary only for a candidate from Ward 1, but then were permitted to vote for candidates from Wards 1, 2, and 4 in the general election. Once elected, council members represent the entire city. *See City of Tucson*, 229 Ariz. at 179.

Tucson's voters twice have affirmed their commitment to the system. They rejected a proposal to change from at-large to ward-based general elections in 1991 and disapproved a proposal to change from partisan to non-partisan elections in 1993. *Id.* at 175.

Analogous election systems can be found in at least two other states in our circuit. Washington employs a similar system to elect county commissioners in 32 of its 39 counties and has done so for nearly a century. *See State v. Bd. of Comm'rs of King Cty.*, 146 Wash. 449, 463 (1928), *overruled on other grounds by Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wash. 2d 754 (1978) (en banc); Wash. Rev. Code §§ 36.32.040, 36.32.050, 36.32.0556. Several Washington cities, school districts, and special purpose districts also use similar hybrid election systems. *See* Wash. Rev. Code § 35.18.020 (cities); § 28A.343.660 (school districts); § 53.12.010 (port districts); § 54.12.010 (public utility districts); 52.14.013 (fire protection districts); § 57.12.039 (water-sewer districts). In Nevada, at least two cities, Sparks and Reno, conduct "hybrid," albeit nonpartisan, city council elections, with the primary election by ward and the general election city-wide. *See* Reno City Charter, Art. V, §§ 5.010, 5.020; Sparks City Charter, Art. V, §§ 5.010, 5.020.

II.

Public Integrity Alliance alleges that Tucson's hybrid system runs afoul of the Equal Protection Clause of the Fourteenth Amendment[1] because it

---

[1] Public Integrity Alliance's complaint also alleged that Tucson's system violates the Equal Privileges and Immunities Clause and

violates the "one person, one vote" principle, relying mainly for their analysis on *Gray v. Sanders*, 372 U.S. 368, 380–81 (1963). The core of their argument is that Tucson voters currently are denied the right to participate in primary elections for all but one of their representatives on the city council. Because city council members represent Tucson as a whole, Public Integrity Alliance contends *either* (1) every Tucson voter must be permitted to vote in each ward's primary, or (2) Tucson must switch to a purely ward-based system, in which voters for both the primary and general elections for a given council seat are limited to voting for the representative from their own ward and have no voice in selecting candidates from other wards. In other words, Public Integrity Alliance's position is that an entirely ward-based or entirely at-large system of voting would be permissible, but the combination of the ward-based primary and at-large general is constitutionally fatal.

Public Integrity Alliance filed a complaint in federal district court seeking to enjoin the operation of Tucson's hybrid system and secure a declaration that the scheme is unconstitutional. The district court held Tucson's system constitutional and so denied Public Integrity Alliance's request for relief.

A divided three-judge panel of this court reversed, holding that by denying out-of-ward voters the ability

---

the Free and Equal Elections Clause of the Arizona Constitution. Ariz. Const. art. II, §§ 13, 21. Because these state-law claims were not developed in the appellate briefing, we consider them abandoned. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994).

to vote in the primary elections of other wards, the hybrid system violates the one person, one vote guarantee embedded in the Equal Protection Clause. *Pub. Integrity All., Inc. v. City of Tucson*, 805 F.3d 876, 883 (9th Cir. 2015). We took the case en banc and now affirm the district court. Tucson's hybrid voting system for its city council elections does not violate the Equal Protection Clause.

STANDARD OF REVIEW

"[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). "This power is not absolute," however. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). "[V]oting is of the most fundamental significance under our constitutional structure," *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979), and state and local government election laws that violate the Constitution are impermissible. *See Wash. State Grange*, 552 U.S. at 451; *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969).

The Supreme Court delineated the appropriate standard of review for laws regulating the right to vote in *Burdick v. Takushi*, 504 U.S. 428 (1992). *Burdick* recognized that governments necessarily "must play an active role in structuring elections," and "[e]lection laws will invariably impose some burden upon individual voters." *Id.* at 433. Consequently, not every voting regulation is subject to strict scrutiny. *Id.*

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

Id. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Under *Burdick*'s balancing and means-end fit framework, strict scrutiny is appropriate when First or Fourteenth Amendment rights "are subjected to 'severe' restrictions." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). "But 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.* (quoting *Anderson*, 460 U.S. at 788).

Applying these precepts, "[w]e have repeatedly upheld as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and protect the reliability and integrity of the election process." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th

Cir. 2011) (citation and alterations omitted).[2] Our "respect for governmental choices in running elections has particular force where, as here, the challenge is to an electoral *system*, as opposed to a discrete election *rule*." *Id.* at 1114.

Despite *Burdick*, the City of Tucson asks that we apply traditional rational basis review, rather than a balancing and means-end fit analysis. Public Integrity

---

[2] Restrictions that block access to the ballot or impede individual voters or subgroups of voters in exercising their right to vote receive different treatment from rules establishing an overall, generally applicable electoral system. Controversies concerning laws allegedly designed to impede voting are not a historical artifact. *See, e.g.*, Brennan Center for Justice, *Voting Restrictions in Place for 2016 Presidential Election* (last updated Aug. 10, 2016), http://www.brennancenter.org/sites/default/files/analysis/New_Restrictions_2016.pdf; U.S. Gov't Accountability Office, GAO-14634, *Elections: Issues Related to State Voter Identification Laws* 44–56 (2014), http://www.gao.gov/assets/670/665966.pdf. Under *Burdick*, courts are to assess the "character and magnitude" of the asserted burden, the proven strength of the state's interest, and whether the extent of the burden is "necessary" given the strength of that interest, so as to ferret out and reject unconstitutional restrictions. 504 U.S. at 434. Recently, in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a majority of the Supreme Court agreed that in so doing, courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe. *Id.* at 199–203 (plurality opinion) (recognizing that a voter identification law may have disproportionately burdened certain persons, but holding that petitioners' evidence was insufficient to permit the Court to quantify the burden imposed on the subgroup); *id.* at 212–17 (Souter, J., dissenting) (disagreeing as to the sufficiency of evidence in the record regarding the burden imposed on subgroups of voters).

Alliance agreed at oral argument that if we rejected its position that primary and general elections must involve identical electorates, traditional rational basis was the appropriate standard of review.

Our case law has not always accurately described the *Burdick* test. In *Libertarian Party of Washington v. Munro*, 31 F.3d 759 (9th Cir. 1994), we stated that where plaintiffs can demonstrate only a "slight" or "*de minimis*" impairment of their rights, they bear "the burden of demonstrating that the regulations they attack have no legitimate rational basis." *Id.* at 763. But *Burdick* calls for neither rational basis review nor burden shifting. *See Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 732 n.12 (9th Cir. 2015) (noting the "tension" between *Munro* and *Burdick*); *id.* at 734–36 (McKeown, J., concurring) (same). To the extent *Munro* prescribed a different standard from the one articulated by the Supreme Court in *Burdick*, it is now overruled.

DISCUSSION

I.

Public Integrity Alliance argues that Tucson's hybrid system severely burdens the Fourteenth Amendment by denying Tucson voters the right to vote in the primary elections for five out of six of their representatives on the city council. Central to Public Integrity Alliance's articulation of the alleged burden is their interpretation of *Gray v. Sanders*.

According to Public Integrity Alliance, the case before us "is controlled by a single, simple maxim of equal protection" from *Gray*: "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 . . . wherever their home may be in that geographical unit." *Gray*, 372 U.S. at 379. Public Integrity Alliance interprets this language as a requirement that primary and general elections use identical geographical units. Because members of the city council represent the entire city, Public Integrity Alliance reasons, the relevant "geographical unit" is the city as a whole. So, Public Integrity Alliance maintains, Tucson cannot constitutionally designate individual wards as the geographical units for the primary elections and limit participation in a given ward's primary election to that ward's residents, and then designate the whole city as the geographical unit for the general election.

Gray establishes no such principle. A vote dilution case, *Gray* involved a challenge to Georgia's system of primary elections for statewide officers, a system wholly different from Tucson's hybrid system of primary and general elections. Instead of counting individual votes, Georgia employed a "county unit system." 372 U.S. at 370–71. Candidates who received the most votes in a county were considered to have won the county primary and, with respect to the statewide primary, were awarded "county units" in proportion to the number of representatives the county had in Georgia's lower legislative body. *Id.* at 371. Georgia's primary election system was thus similar to the electoral college used to elect our President, with counties' representation substituted for the state representation in the electoral college. The county units were not proportionate to the county population, giving residents in one county dramatically more influence in

the nomination of candidates than residents in another county. *Id.*

Gray held Georgia's county unit system violative of the one person, one vote principle, because it diluted the voting power of certain voters based only on where they happened to live. *Id.* at 379–80.[3] But *Gray* concerned only the primary election, not a comparison of the geographical units used in the primary and general elections. *Gray* therefore did not hold that the same geographical unit must apply to both primary and general elections; no issue regarding the relationship between the voting basis in the primary and in the general election was before the Court. And *Gray* has never been cited for the proposition Public Integrity Alliance puts forward. Instead, *Gray* has uniformly been construed as an unequal vote weighting case for a single election stage. *See Williams v. Rhodes*, 393 U.S. 23, 52 n.5 (1968) (Stewart J., dissenting) (*Gray* "sustained the right of a voter to cast a ballot whose numerical weight is the equal of that of any other vote cast within the jurisdiction in question."); *Fortson v. Morris*, 385 U.S. 231, 235 (1966) ("The Gray case . . . did no more than to require the State to eliminate the county-unit machinery from its election system."); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 744 (1964) (Stewart, J., dissenting) (noting that *Gray* was irrelevant to a case "hav[ing] nothing to

---

[3] The Supreme Court later clarified that the unit system violated equal protection not only because it diluted votes, but because aggregating county units rather than individual votes meant that votes for losing candidates were effectively discarded, solely because of the voter's county residence. *See Gordon v. Lance*, 403 U.S. 1, 4–5 (1971).

do with the 'weighting' or 'diluting' of votes cast within any electoral unit"). We decline to take a single sentence in a decades-old vote dilution case concerning a single stage of an election, read it without regard to the issue before the Court in that case, and transform it into a new voting rights principle requiring a two-stage election to cover the same geographical base at each stage.

Indisputably, primary elections are state action subject to the same constitutional constraints as general elections. *See Smith v. Allwright*, 321 U.S. 649, 661–62 (1944); *United States v. Classic*, 313 U.S. 299, 318–19 (1941). And primaries and general elections have an obvious and strong interconnection; that relationship is why the Supreme Court has described them as "a single instrumentality for choice of officers." *Allwright*, 321 U.S. at 660. But the recognition that primaries are of great significance to the ultimate choice in a general election and thus directly implicate the right to vote does not mean that primaries and general elections must be identically structured and administered.

In fact, that contention is belied by decades of jurisprudence permitting voting restrictions in primary elections that would be unconstitutional in the general election. *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 584 (2005) (permitting a semiclosed primary, in which only people who are registered as party members or independents may vote in a party's primary); *Am. Party of Tex. v. White*, 415 U.S. 767, 786 (1974) (providing that states may establish waiting periods before voters may be permitted to change their registration and vote in another party's primary); *Ziskis v. Symington*, 47

F.3d 1004, 1004–05 (9th Cir. 1995) (holding that a law requiring participants in primaries be registered with a political party did not violate the challenger's Fourteenth Amendment right to vote). These voting restrictions are constitutionally permissible in primaries because primaries serve a different function than general elections: A primary determines which candidates will compete in the general election, a critical stage and one fully subject in its own right to constitutional scrutiny under *Burdick*, but a stage as to which the legitimate state interests are not identical with those pertinent to the general election, as the partisan primary cases illustrate.

II.

Having concluded that *Gray* does not require that the primary and general elections use identical geographical units, we now apply the *Burdick* balancing approach, assessing first the burden imposed on Tucson voters by its hybrid system.

All voters in Tucson have an equal right to vote, both during the primary election and during the general election. Each voter may vote for the candidate of her choice in her ward's primary election. No one may vote in another ward's primary. And each voter may vote in the general election for one candidate from each ward with a council member position on the ballot.

That the city council elections are staggered is immaterial to the vote denial claim at issue, as Public Integrity Alliance admits in its opening brief. Although half of Tucson's residents are unable to vote in a primary in a given election year, that burden quickly

evens out over time, as the other half of Tucson's residents will not be able to vote in a primary in the next election year. Ultimately, every voter has an equal opportunity to vote in their own ward's primary every four years and in the general election every two years.

As is constitutionally required, then, every voter in Tucson has the same voting power as every other voter in the primary and general city council elections. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973) (noting that the constitution protects the right "to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population"). There is no unequal weighting of votes, no discrimination among voters, and no obstruction or impediment to voting. *See Holshouser v. Scott*, 335 F. Supp. 928, 933 (M.D.N.C. 1971) (rejecting, in the context of judicial elections, a challenge to a state law providing that judges should be nominated from their respective districts and elected by statewide vote in a general election)*; Stokes v. Fortson*, 234 F. Supp. 575, 578 (N.D. Ga. 1964) (per curiam) (same). The burden on Public Integrity Alliance's Fourteenth Amendment rights is far from severe. If a burden exists at all, which we doubt, it is at best very minimal.[4]

As to the governmental interest justifying whatever minimal burden may exist, Tucson has asserted that the hybrid system serves to promote local knowledge

---

[4] We note that no geographically based vote dilution allegation is before us on appeal, nor has minority or other subgroup vote dilution been alleged.

and legitimacy, geographic diversity, and city-wide representation on the city council:

> Having nominations through primary elections in each ward, using separate ballots for each party, allows the party electorates in each of those wards to make their own choice of a nominee, and simultaneously acts as a guarantee for the City electorate as a whole that each ward's nominee actually has support among the party members within that ward. Moreover, since nominees compete in the general election only against other candidates nominated in the same ward, . . . ward nominations also help assure that each ward has a local representative on the council, and, conversely, that the Mayor and Council has members who are aware of each ward's issues, problems, and views.

There is no question that Tucson's interests are important. The Supreme Court has approved requirements that a city council candidate elected at-large reside in the district with which her seat is affiliated. *See Dallas County v. Reese*, 421 U.S. 477, 481 (1975) (per curiam) (upholding an election regime providing for countywide balloting for county commission members but requiring that one member reside in and be elected from each district); *Dusch v. Davis*, 387 U.S. 112, 117 (1967) (same). Candidate-residency requirements promote a similar interest to the one Tucson has articulated: ensuring local representation by and geographic diversity among elected officials. By holding ward-based primaries in addition to maintaining a candidate-residency

requirement, Tucson is working to ensure that the candidates nominated in a given ward actually have the support of a majority of their party's voters in that ward, a conclusion that may not always follow from a candidate-residency requirement alone.

Tucson's hybrid system represents a careful, longstanding choice, twice affirmed by voters, as to how best to achieve a city council with members who represent Tucson as a whole but reflect and understand all of the city's wards. It is, in other words, the product of our democratic federalism, a system that permits states to serve "as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

CONCLUSION

Tucson's hybrid system for electing members of its city council imposes no constitutionally significant burden on voters' rights to vote. And Tucson has advanced a valid, sufficiently important interest to justify its choice of electoral system. On the facts alleged herein, the system does not violate the Equal Protection Clause's one person, one vote commitment.

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-16142
D.C. No. 4:15-cv-00138-CKJ

[Filed November 10, 2015]

PUBLIC INTEGRITY ALLIANCE, INC., an Arizona nonprofit membership corporation; BRUCE ASH, an individual; FERNANDO GONZALES, an individual; ANN HOLDEN, an individual; LORI OIEN, an individual; KEN SMALLEY, an individual,
Plaintiffs-Appellants,

v.

CITY OF TUCSON, a chartered city of the State of Arizona; JONATHAN ROTHSCHILD, in his capacity as the Mayor of the City of Tucson; REGINA ROMERO, in her capacity as a member of the Tucson City Council; PAUL CUNNINGHAM, in his capacity as a member of the Tucson City Council; KARIN UHLICH, in her capacity as a member of the Tucson City Council; SHIRLEY SCOTT, in her capacity as a member of the Tucson City Council; RICHARD FIMBRES, in his capacity as a member of the Tucson City Council; STEVE KOZACHIK, in his capacity as a member of the Tucson City Council; ROGER

RANDOLPH, in his capacity as the Clerk of the City of Tucson,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted
August 11, 2015—San Francisco, California

Filed November 10, 2015

Before: Alex Kozinski and Richard C. Tallman,
Circuit Judges, and Lawrence L. Piersol,[*]
Senior District Judge.

Opinion by Judge Kozinski;
Dissent by Judge Tallman

SUMMARY[**]

Civil Rights

The panel reversed the district court's judgment in favor of the City of Tucson in an action challenging the constitutionality of Tucson's hybrid system for electing members of its city council.

[*] The Honorable Lawrence L. Piersol, Senior District Judge for the U.S. District Court for the District of South Dakota, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Tucson is divided into six wards of approximately equal population, and each ward is allotted one seat on the city council. Under the first step of the hybrid system each ward holds its own primary limited to residents of that ward. The winners of the ward primaries advance to the general election, where they compete against the other candidates nominated from that ward. In the general election, all Tucson residents can vote for one council member from each ward that held a primary during the same election cycle.

The panel first held that in determining the system's constitutionality, the primary and general elections must be considered in tandem as two parts of a single election cycle, rather than two separate contests judged independently of one another.

The panel determined that the practical effect of the Tucson system is to give some of a representative's constituents—those in his home ward—a vote of disproportionate weight. That is the very result the Supreme Court's one person, one vote jurisprudence is meant to foreclose. The panel held that every otherwise eligible voter who will be a constituent of the winner of the general election must have an equal opportunity to participate in each election cycle through which that candidate is selected.

The panel rejected Tucson's argument that the hybrid system is a reasonable "residency restriction" on the right to vote. The panel held that when two groups of citizens share identical interests in an election, the city may not use a residency requirement to exclude one group while including the other. The panel concluded that excluding out-of-ward voters from the primary election discriminates among residents of the

same governmental unit in violation of the Equal Protection Clause of the Fourteenth Amendment.

Dissenting, Judge Tallman stated that the Constitution does not require Tucson to draw its district borders in a particular way for different local elections. He concluded that Tucson's hybrid system is constitutional, and the majority erred in holding otherwise.

COUNSEL

Kory A. Langhofer (argued), Thomas J. Basile and Roy Herrera, Jr., Brownstein Hyatt Farber Schreck, LLP, Phoenix, Arizona, for Plaintiffs-Appellants.

Michael G. Rankin, City Attorney, Dennis McLaughlin (argued), Principal Assistant City Attorney, Office of the Tucson City Attorney, Tucson, Arizona, and Richard Rollman, Gabroy Rollman & Bosse PC, Tucson, Arizona, for Defendants-Appellees.

OPINION

KOZINSKI, Circuit Judge:

We consider the constitutionality of Tucson's unusual system for electing members of its city council.

FACTS

Tucson's elections are ordinary in many ways. The city is divided into six wards of approximately equal population, and each ward is allotted one seat on the city council. A candidate for city council must run for the seat in the ward where he resides. *See* Tucson City Charter ch. III, § 1; ch. XVI, §§ 5, 8, 9. From there, things take an odd turn.

In some American cities, council seats are filled at large, with the entire city voting for each seat in the primary and general elections. In other cities, council members are nominated and elected by the residents of particular districts. Tucson splits the difference: Since 1930, the city has used a "hybrid system" that combines ward-based primaries with at-large general elections.

The first step in the hybrid system is a partisan primary. Each ward holds its own primary limited to residents of that ward. The winners of the ward primaries advance to the general election, where they compete against the other candidates nominated from that ward. In the general election, all Tucson residents can vote for one council member from each ward that held a primary during the same election cycle. *See* Charter ch. XVI, § 9. Thus, a resident of Ward 1 can't vote in the Ward 2 primary, but *can* vote for one of the Ward 2 candidates in the general election. The parties agree that, once elected, council members represent the entire city, not just the ward from which they were nominated. *See City of Tucson* v. *State*, 273 P.3d 624, 631 (Ariz. 2012) ("Tucson council members, although nominated by ward, represent the entire city, just as do council members elected at large in other cities."); *see also Dallas Cty.* v. *Reese*, 421 U.S. 477, 480 (1975) ("[E]lected officials represent all of those who elect them . . . ."); *Fortson* v. *Dorsey*, 379 U.S. 433, 438 (1965) (similar).

Council seats are filled in staggered elections, with three council members elected every other year. Once elected, a council member serves a four-year term. *See* Charter ch. XVI, §§ 3–4. The council members from

Wards 1, 2 and 4 will be elected in 2015, and the council members from Wards 3, 5 and 6 will be elected in 2017. Because only half of the council seats are up for election in any given year, only half of Tucsonans can vote in a primary in each election cycle. And approximately 83 percent of the electorate that votes for any given council seat in the general election has no say in selecting the nominees competing for that seat.

Plaintiffs are five Tucson voters and a non-profit corporation called the Public Integrity Alliance (collectively "PIA"). PIA concedes that the city could use ward-based primaries and ward-based general elections without offending the Constitution. Similarly, the city could use at-large primaries and at-large general elections. But PIA argues that combining these two options into a hybrid system violates the federal and Arizona Constitutions[1] by depriving Tucson voters of their right to vote in primary elections for individuals who will ultimately serve as their at-large representatives. PIA sued the city seeking to enjoin the hybrid system and secure a declaration that the scheme is unconstitutional. The district court ruled in favor of the city. We have jurisdiction under 28 U.S.C. § 1291.

---

[1] PIA alleges that the hybrid system violates the Free and Equal Elections Clause of the Arizona Constitution. Ariz. Const. art II, § 21. We have been cited no authority indicating that the rights guaranteed by that document differ from those guaranteed by the federal Constitution. Because PIA did not develop any state-law arguments in its appellate briefing, we consider the state-law claims abandoned. *See Greenwood* v. *F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994).

DISCUSSION

We start by resolving a dispute between the parties that has a substantial bearing on our analysis and, ultimately, on the result we reach: Are Tucson's primary and general elections two separate contests, each governed by rules that must be judged independently of one another—as the city contends? Or are they two parts of a single election cycle, which must be considered in tandem when determining their constitutionality—as PIA claims? The difference matters a great deal. If the two elections were separate, PIA's constitutional objections would largely evaporate and this would become a simple case. This is so because there would be no mismatch between the voting constituency and the represented constituency in the two elections. It's only if we view the two elections as one that serious constitutional doubts arise.

Unfortunately, the easy solution is not available because it is perfectly clear that the two contests are *not* independent. Instead, they are complementary components of a single election. Although the two contests are separated in time by ten weeks, they are entirely co-dependent. Without the primary, there could be no candidate to compete in the general election; without the general election, the primary winners would sit on their hands. Because 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." *United States* v. *Classic*, 313 U.S. 299, 319 (1941). Thus, the Supreme Court has held that the primary and general elections are a "single instrumentality for choice of officers." *Smith* v. *Allwright*, 321 U.S. 649, 660 (1944); *see Newberry* v.

United States, 256 U.S. 232, 284–86 (1921) (Pitney, J., concurring in part) (noting that the primary and general elections are "essentially but parts of a single process").

Because the primary and general elections are two parts of a "unitary" process, *Allwright*, 321 U.S. at 660–61, a citizen's right to vote in the general election may be meaningless unless he is also permitted to vote in the primary. If a voter's preferred candidate is defeated in a primary from which the voter is excluded, the voter would never have the chance to cast a ballot for his candidate of choice. *Cf. Morse* v. *Republican Party of Va.*, 517 U.S. 186, 205 (1996) (invalidating registration fee for Virginia senatorial nominating convention because the fee limited voters' "influence on the field of candidates whose names [would] appear on the ballot" and thus "weaken[ed] the 'effectiveness' of their votes cast in the general election itself"); *Bullock* v. *Carter*, 405 U.S. 134, 146 (1972) ("[T]he primary election may be more crucial than the general election . . . ."); *Classic*, 313 U.S. at 319 (observing 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"); *Ayers-Schaffner* v. *DiStefano*, 37 F.3d 726, 728 n.5 (1st Cir. 1994) (noting that "the ability to vote in the general election [is not] a satisfactory alternative for those voters not allowed to vote in the primary, as the candidate of their choice may have been excluded in the preliminary election from which they were barred").

This case illustrates the point. Although Arizona as a whole generally votes Republican, Tucson generally votes Democratic. This means that the Democratic

nominee from each ward will likely win the general election regardless of whether the ward from which he was nominated is principally Republican or Democratic. Indeed, the city's current mayor and all six council members are Democrats. *See Tucson City Council Democratic Incumbents Re-Elected*, Arizona Public Media (Nov. 6, 2013), *available at* https://goo.gl/oMkOxi. In most cases, then, the Democratic ward primary is the only election that matters; the general election is a mere formality. Even if electing the Democratic nominee is not automatic, there is no dispute that the Democratic nominee enters the general election with an enormous advantage. Thus the vote in the primary—and particularly the Democratic primary— has a commanding influence on the outcome of the general election. Yet five-sixths of Tucson's voters have not even a theoretical possibility of participating in the primary that will, for all practical purposes, determine who will represent them in the city council.

The Supreme Court has indicated 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" no matter where "their home may be in that geographical unit." *Gray* v. *Sanders*, 372 U.S. 368, 379 (1963). *Gray* defines the "geographical unit" by reference to the constituency of "the representative to be chosen." *Id.* at 379; *see id.* at 382 (Stewart, J., concurring) ("*Within a given constituency*, there can be room for but a single constitutional rule—one voter, one vote." (emphasis added)). All parties before us agree that the constituency of each Tucson council member is the entire city. Thus, the relevant geographical unit is the city at large. Because

the constituency of the representative to be elected remains static throughout the election process, the geographical unit must also remain static throughout that process.[2]

If the city were permitted to change the geographical unit between the primary and general elections, it could decouple the representative to be elected from his constituency. For example, Tucson could decree that only voters living on Main Street are eligible to vote in primaries, thereby forcing the entire city to choose among nominees selected by a tiny minority of residents. Or the State of New York, in an effort to cap its number of city-slicker senators, could

---

[2] We are not persuaded by the city's reliance on two decades-old district court opinions that dealt with hybrid systems for judicial elections. *Holshouser* v. *Scott* and *Stokes* v. *Fortson* involved challenges to state laws providing that judges would be nominated from their districts but elected statewide in the general election. In both cases, three-judge district courts ruled that the principle of one person, one vote is not applicable to judicial elections. Both courts went on to observe that, even if that were not the case, the hybrid schemes would not violate one person, one vote because they didn't involve dilution or an unequal counting of votes. *See Holshouser*, 335 F. Supp. 928, 930, 933 (M.D.N.C. 1971); *Stokes*, 234 F. Supp. 575, 577 (N.D. Ga. 1964). The city argues that the Supreme Court's summary affirmance in *Holshouser*, 409 U.S. 807 (1972), is a ruling on the merits that requires us to uphold Tucson's hybrid system. But a "summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance." *Dillenburg* v. *Kramer*, 469 F.2d 1222, 1225 (9th Cir. 1972). It does not enshrine as Supreme Court precedent every stroke of the pen in the district court's opinion. The summary disposition in *Holshouser* was likely intended to affirm the proposition that one person, one vote does not apply to judicial elections, as the Court eventually held in *Chisom* v. *Roemer*, 501 U.S. 380, 402–03 (1991).

limit the primary for its junior senator to Manhattanites and the primary for its senior senator to the rest of the state. We do not believe that such mismatches between voters at different stages of a single election cycle are constitutionally permissible.

Given the city's concession that each council member represents all of Tucson, it's clear that the representational nexus runs between the city and the council member, not between the ward and the council member. But the hybrid system makes the tenure of each at-large council member largely dependent on the preferences of voters of his home ward; without their support, a council member could not be nominated (or re-nominated) in the first place. Given that reality, each council member will be disproportionately responsive to voters from his home ward, especially those of his own party. The city claims that this is a redeeming benefit of its hybrid system. The exact opposite is true. The practical effect of the Tucson system is to give some of a representative's constituents—those in his home ward—a vote of disproportionate weight. That is the very result the Supreme Court's one person, one vote jurisprudence is meant to foreclose. *See Reynolds* v. *Sims*, 377 U.S. 533, 560–64 (1964). We cannot endorse an election system that encourages at-large representatives to prioritize kissing babies and currying favor in their home wards over the interests of their constituents who happen to live in other parts of the city. As the Supreme Court itself has noted, an at-large representative "must be vigilant to serve the interests of all the people in the [city], and not merely those of people in his home [ward]." *Fortson*, 379 U.S. at 438.

We hold that every otherwise eligible voter who will be a constituent of the winner of the general election must have an equal opportunity to participate in each election cycle through which that candidate is selected. Just as the city could not exclude a resident of Ward 1 from voting in the general election for his council member from Ward 2, so the city may not exclude that resident from a primary election for the same official. *See Allwright*, 321 U.S. at 664 ("[T]he same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election."); *Classic*, 313 U.S. at 318 ("[The] right of participation [in the nominating process] is protected just as is the right to vote at the election. . . .").

The city's final argument is that the hybrid system is a reasonable "residency restriction" on the right to vote. But when two groups of citizens share identical interests in an election, the city may not use a residency requirement to exclude one group while including the other. *See Town of Lockport* v. *Citizens for Comm. Action at the Local Level, Inc.*, 430 U.S. 259, 268 (1977) (residency requirements must be premised on a "genuine difference in the relevant interests of the groups that the state electoral classification has created"); *id.* (excluded group must be permitted to vote if it has "substantially identical interests" as included group); *Evans* v. *Cornman*, 398 U.S. 419, 422–26 (1970) (residents of federal enclave within Maryland couldn't be excluded from the franchise because they had "a stake equal to that of other Maryland residents"); *see also Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 72 n.8 (1978) (suggesting that a city might be required to enfranchise non-residents if it were "exercising

precisely the same governmental powers over [them] as it does over those residing within its corporate limits").[3] In this case, 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. The nominees selected in the ward primaries will advance to the general election; if elected there, they will represent the entire city. Because all Tucsonans have an equal interest in determining who the nominees will be, the city may not exclude out-of-ward voters from the primaries.

Little Thunder v. *South Dakota*, 518 F.2d 1253 (8th Cir. 1975), is instructive. That case involved a challenge to South Dakota's scheme for governing its unorganized counties. The residents of the unorganized counties were governed by elected officials in the nearest organized county, but only the residents of the organized county were allowed to vote for those officials. The state defended this scheme as a reasonable residency requirement. *Id.* at 1255. In its

---

[3] Nothing we say has any bearing on the city's existing *candidate*-residency requirement, which requires each council member to run for the seat from the ward in which he resides. *See* Tucson City Charter ch. XVI, §§ 5, 9. The Supreme Court has twice upheld similar schemes. *Dusch* v. *Davis*, 387 U.S. 112, 114–16 (1967); *Dallas Cty.* v. *Reese*, 421 U.S. 477, 480–81 (1975). In light of *Dusch* and *Reese*, the city argues that we are bound to approve the *voter*-residency requirements imposed by the hybrid system. But, despite the similarity in names, candidate-residency requirements are quite different than voter-residency requirements. Neither *Dusch* nor *Reese* requires that the same constitutional principles governing candidate-residency requirements also apply to voter-residency requirements. *See Dusch*, 387 U.S. at 115–16.

view, the residents of the unorganized counties (who were mainly Native Americans) did not share the same interests in the elections as did the residents of the organized counties. The Eighth Circuit rejected the argument. Citing *Cornman*, that court held that a state may not use a residency requirement to prevent citizens from voting for "those who will function as their elected officials." *Id.* at 1258. The court applied strict scrutiny and invalidated the scheme. *Id.*

The fact that two groups live on opposite sides of a political boundary does not necessarily mean they can be treated differently for voting purposes. This is the teaching of *Little Thunder*. 518 F.2d at 1256; *see English* v. *Bd. of Educ. of Town of Boonton*, 301 F.3d 69, 77, 79 (3d Cir. 2002); *United States* v. *South Dakota*, 636 F.2d 241, 245 (8th Cir. 1980); *see also Holt Civic Club*, 439 U.S. at 81, 86 (Brennan, J., dissenting) (cautioning against "ced[ing] to geography a talismanic significance"). If two groups are represented by the same politician, they are necessarily part of a "single unit of local government." *Little Thunder*, 518 F.2d at 1256. Any boundary that purports to sub-divide that single unit is hopelessly arbitrary, and any "residency restriction" that disenfranchises citizens based on where they live in relation to that arbitrary boundary cannot stand. Excluding out-of-ward voters from the primary election discriminates among residents of the same governmental unit in violation of the Equal Protection Clause of the Fourteenth Amendment.

REVERSED.

TALLMAN, Circuit Judge, dissenting:

There are certain times when a federal court may tell a municipality how to run its local elections. This is not one of them. Tucson's hybrid election system does not invidiously discriminate against voters based on their race, ethnicity, gender, or wealth. Rather, plaintiffs argue—and the majority agrees—that Tucson unconstitutionally denies its citizens the right to vote by setting different geographical units for its councilmanic primary and general elections. Because I conclude that the Constitution does not require Tucson to draw its district borders in a particular way for different local elections, I respectfully dissent.

I

"The Constitution grants States broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). The United States Supreme Court has recognized that government "is the science of experiment" and that states are "afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (citing *Anderson v. Dunn*, 6 Wheat. 204, 226 (1821)). However, a state's power over its electoral procedures is not absolute and "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).

A

Conspicuously absent from the majority's opinion is any mention of the appropriate standard of review. In *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the Supreme Court announced the standard for evaluating laws respecting the right to vote. Although we typically invoke strict scrutiny to evaluate state laws that implicate fundamental rights, *Burdick* requires courts to apply a more deferential level of scrutiny to most state election laws that abridge the fundamental right to vote. *Id.* at 433; *Dudum v. Arntz*, 640 F.3d 1098, 1113 (9th Cir. 2011) (recognizing that *Burdick* creates a sliding scale standard of review). Courts determine the appropriate level of scrutiny to evaluate a state election law by examining the burden the law imposes on voters' rights and then weighing that burden against the state's legitimate interest in maintaining the law. *Burdick*, 504 U.S. at 434 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); Lauren Watts, *Reexamining* Crawford*: Poll Worker Error as a Burden on Voters*, 89 Wash. L. Rev. 175, 180 (2014) (discussing the *Anderson/Burdick* framework).

"Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. Strict scrutiny review is appropriate only if the burdens are severe; otherwise, the state election law is constitutional so long as it is justified by a state's "important regulatory interests." *Id.*

B

The Supreme Court has been reticent to apply strict scrutiny to state election laws: It has done so only to evaluate discriminatory poll taxes, property ownership requirements for voting, and durational residency requirements. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665–70 (1966) (invalidating state poll tax); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 632–33 (1969) (holding that a state law requiring school district voters to own real property was unconstitutional); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972) (states must show a "substantial and compelling reason" for imposing durational residency requirements). But, the Supreme Court has applied a lesser burden when evaluating the constitutionality of literacy tests, felon disenfranchisement laws, and voter identification laws. *See Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959) (upholding state statute that conditioned voting eligibility on ability to read and write any section of the Constitution); *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (upholding the ability of states to disenfranchise felons); *Crawford v. Marion Cty.*, 553 U.S. 181, 202 (2008) (upholding constitutionality of state law requiring voter identification). In other words, the Supreme Court counsels us to approach the constitutionality of state election laws through a deferential lens. *See Burdick*, 504 U.S. at 433 ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.").

Applying *Burdick*'s sliding scale of constitutional scrutiny, we have "repeatedly upheld as 'not severe'

restrictions that are generally applicable, even-handed, politically neutral, and protect the reliability and integrity of the election process." *Dudum*, 640 F.3d at 1106 (citation omitted). Indeed, we have said that "voting regulations are rarely subjected to strict scrutiny," and we are particularly loathe to strike down as unconstitutional an entire election system. *Id.* at 1106, 1114.

II

The majority concludes that Tucson's hybrid election system for electing its city council violates the "one person, one vote" principle announced in *Gray v. Sanders*, 372 U.S. 368, 380 (1963). According to the majority, Tucson's system violates equal protection principles by designating different geographical units for its primary and general elections. The practical effect of the majority's decision today is the total eradication of Tucson's voting system, which has been in place since 1930. Tucson is now forced to choose between an entirely at-large method of election or a ward-only method of election despite the fact that a majority of Tucson citizens have *twice* before voted against adopting these election systems. The Constitution does not require this sort of judicial highjacking of state power. Accordingly, I conclude that Tucson's hybrid election system is constitutional. Several principles inform this conclusion.

A

Constitutional standards must be satisfied in primary as well as in general elections. *Smith v. Allwright*, 321 U.S. 649, 661–62 (1944). However, 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. *See Clingman*, 544 U.S. at 584; *Nader v. Schaffer*, 417 F. Supp. 837, 850 (D. Conn. 1976), *aff'd mem.*, 429 U.S. 989; *see also Am. Party of Texas v. White*, 415 U.S. 767, 786 (1974) (holding that states may establish waiting periods before voters may be permitted to change their registration and participate in another party's primary). In other words, 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.

In fact, we have upheld Arizona's "closed primary" system in the face of a Fourteenth Amendment challenge similar to Plaintiffs' challenge here. In *Ziskis v. Symington*, an independent voter "could not vote in the Arizona state primary election . . . because [Arizona law] denies any voter not affiliated with a political party the opportunity to vote in that party's primary." 47 F.3d 1004, 1004–05 (9th Cir. 1995). Ziskis sued the state in federal district court alleging that the law violated his Fourteenth Amendment right to vote. *Id.* at 1005. On appeal, we ruled in favor of the state. We held that the law did not overly burden Ziskis's right to vote because Ziskis could access the ballot by associating with a political party, and if Ziskis chose not to register, "his right to vote in the *general* election is unaffected." *Id.* at 1006. The Third Circuit recently resolved a similar Fourteenth Amendment challenge to New Jersey's closed primary system. *See Balsam v. Sec'y of N.J.*, No. 14-3882, 2015 WL 1544483, at *3 (3d Cir. Apr. 8, 2015). The court reasoned that voters do

not "have a constitutional right to unqualified participation in primary elections," and the burden the closed primary system placed on plaintiff's rights was minor compared to the state's interests. *Id.* at *4–5.

While *Ziskis* and *Balsam* do not resolve the exact constitutional question presented here, they do counsel that primary and general elections are not on the same constitutional footing. *See* 26 Am. Jur. 2d *Elections* § 223 ("A primary election is one that results in nominations rather than final elections to office. Thus, a primary election serves a different function from a general election, in that it is a competition for the party's nomination, no more, no less, and does not elect a person to office but merely determines the candidate who will run for the office in the general election."). Primary elections in Tucson are, in short, nothing more than the means political groups use to choose the standard bearers who will face off in the general election.

B

The majority finds it to be "perfectly clear" that Tucson's primary and general elections are not independent and "must be considered in tandem when determining their constitutionality." Yet, the cases the majority cites do not establish that primary and general elections must always be considered together. For instance, *United States v. Classic*, was an election fraud case where the federal government prosecuted certain state election commissioners for allegedly falsifying ballots in a Democratic primary. 313 U.S. 299, 307–08 (1941). *Classic* held that the Constitution secures the right to have one's "vote counted in both the general election and in the primary election." *Id.* at

322; *see also Smith*, 321 U.S. at 664–65 (holding that a political party may not create a "whites only" primary). However, *Classic* explained that the right it recognized only applied to voters who were "qualified" to cast votes in the state's Democratic primary. 313 U.S. at 315. Notably, *Classic* did not decide who was "qualified" to vote in the Democratic primary and left that distinction up to the state. *See id.* at 310–11.

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.

The majority cautions that "if the city were permitted to change the geographical unit between the primary and general elections, it could decouple the representative to be elected from his constituency." The majority creates two hypotheticals to illustrate its point: First, Tucson could decree that only voters living on Main Street are eligible to vote in primaries. Second, the State of New York could limit the primary for its junior senator to Manhattanites and the primary for its senior senator to the rest of the state.

But, an application of *Burdick*'s sliding scale of constitutional scrutiny reveals that neither of the majority's fictional state election systems would pass constitutional muster. First, both of these hypotheticals eliminate large swaths of city residents from voting in *any* primary, which would likely be considered a "severe burden" on voting rights and subject to strict scrutiny under *Burdick*. And second, the states would

have an extremely difficult time articulating any sort of legitimate state interest in defense of these election systems. Unlike the majority's hypothetical state election laws, Tucson's hybrid system gives each citizen the right to vote in her respective ward primary, and Tucson has articulated an "important regulatory interest" to support its hybrid system.

C

Gray v. Sanders, 372 U.S. 368 (1963), is not as favorable to the majority's position as it assumes. *Gray* held that states cannot construct election schemes so that one person's vote is weighed more heavily than another person's vote. *Id.* at 380–81. And, let there be no doubt about this—"[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." *Id.* at 379. However, the Supreme Court has never before held that the same geographical unit must apply to both the primary and general elections.

In asserting the contrary, the majority misreads *Gray* and views the case in a vacuum. Since *Gray*, the law on "one person, one vote" has dealt almost exclusively with congressional redistricting and malapportionment, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 557 (1964), principles that are not at issue here. And, the Supreme Court has squarely rejected the notion that an individual has a right to vote in any election that might impact her life and livelihood. *See Holt*, 439 U.S. at 69 ("No decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions.").

Gray does not deprive states of their broad authority to set the geographical unit from which a representative is to be elected. *See Holt*, 439 U.S. at 68–69 (holding that city need not extend the franchise to the citizens of bordering municipalities, even though those citizens are subject to the city's criminal law jurisdiction); *see also Green v. City of Tucson*, 340 F.3d 891, 893 (9th Cir. 2003) (upholding Arizona's annexation law that "draws geographical distinctions" between voters living in unincorporated communities); *City of Herriman v. Bell*, 590 F.3d 1176, 1185 (10th Cir. 2010) ("[T]he state has the right to draw different boundaries for voting purposes—and we generally defer to these delineations—as long as the separate units further reasonable government objectives."). Simply put, *Gray* does not reach as far as the majority might wish.

III

A

From this it follows that Tucson's hybrid primary system does not "severely burden" the Plaintiffs' right to vote. During Tucson's primary election, the law ensures that each eligible voter within the relevant geographical unit—the ward—has an equal right to vote. The same holds true for the general election: Each eligible voter within the relevant geographical unit—the city—has an equal right to vote. Thus, the Plaintiffs are only entitled to vote in the primary election of the ward in which they reside. But, their right to vote in their ward primary is not burdened in any way. *See Holt*, 439 U.S. at 68–69.

The majority finds that "the practical effect of the Tucson system is to give some of a representative's constituents—those in his home ward—a vote of disproportionate weight." Not so. While a City Council member, once elected, is likely to be alert to the particular needs of his home ward, every single vote in Tucson's elections are weighted the same. In fact, the hybrid system's ability to foster attentiveness to local needs is precisely the reason it was created in the first place: the ward-based primary helps to ensure that *each* ward has a nominee for City Council who is aware of that ward's particular needs.

B

When a state election law places no severe burden on voters' rights, "a [s]tate's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Clingman*, 544 U.S. at 593. Tucson has a legitimate interest in ensuring geographic diversity on the City Council, and the hybrid system fairly advances this legitimate interest. Specifically, Defendants persuasively assert:

> Having nominations through primary elections in each ward, using separate ballots for each party, allows the party electorates in each of those wards to make their own choice of a nominee, and simultaneously acts as a guarantee for the City electorate as a whole that each ward's nominee actually has support among the party members within that ward. Moreover, since nominees compete in the general election only against other candidates nominated in the same ward, see Compl. ¶ 24, ward nominations also help assure that each

> ward has a local representative on the council, and conversely, that the full Mayor and Council has members who are aware of each ward's issues, problems, and views . . . . The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give some due consideration to questions presented throughout the entire area.

This important regulatory interest is sufficient to justify any burden the hybrid system places on Plaintiffs' right to vote.

IV

Tucson's hybrid system is constitutional, and the majority errs in holding otherwise. Supreme Court precedent teaches us that a municipality has broad authority to establish the relevant geographical units for its elections. *See Holt*, 439 U.S. at 68–69. Furthermore, the majority points to no case that requires a municipality to use the same geographical unit for both its primary and general elections, *cf. Gray*, 372 U.S. at 381, and the majority's holding to the contrary stretches the "one person, one vote" principle beyond its traditional application. Finally, because primary and general elections are not constitutionally equal, *see Balsam*, 2015 WL 1544483, at *3, state laws may narrow the franchise in a primary election without running afoul of the Fourteenth Amendment, *see Ziskis*, 47 F.3d at 1005–06. *See also N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 206 (2008) (permitting nomination by party convention). In short,

the Constitution permits Tucson to set different geographical units for its primary and general elections.

I respectfully dissent.

APPENDIX C

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 15-138-TUC-CKJ

[Filed May 20, 2015]

PUBLIC INTEGRITY ALLIANCE INCORPORATED, et al. Plaintiffs,	)
vs.	)
CITY OF TUCSON, et al., Defendants.	)

ORDER

Pending before the Court is the Motion for Preliminary Injunction (Doc. 3) filed by Plaintiffs. Oral argument was presented to the Court on May 8, 2015, and the parties agree this matter is presented for final disposition, including a requested permanent injunction. For the reasons discussed herein, Plaintiffs' requested relief is denied.

I. *Factual and Procedural History*

The facts in this case are undisputed. The City of Tucson ("the City" or "Tucson") is divided into six wards composed of substantially equal populations.

One seat on the six-member Tucson City Council ("Council") is allotted to each ward. A candidate for the Council must reside in the ward from which he or she seeks to be nominated. The four-year terms of the Council members are staggered, and elections are held on biennially in odd-numbered years.

A partisan primary is conducted each August of an election year in each ward whose Council seat is up for election. One nominee from each recognized political party is selected. Each ward's primary election is limited only to registered voters who reside within that ward; otherwise qualified electors who reside in other wards of the City may not participate in the ward's primary election.

The candidates nominated in the ward-based primaries then compete in an at-large election held in November of the election year in which all qualified electors in the City may participate. Every qualified elector may select one candidate for each of the Council seats appearing on the ballot. The nominees compete in the general election only against other candidates nominated in the same ward. This election procedure will be referred to as the Hybrid System. "Tucson has used this [hybrid] system since adopting its current city charter in 1929." *City of Tucson v. State*, 229 Ariz. 172, 173 ¶ 2, 273 P.3d 624, 625 (2012); *see also* Tucson City Charter, Chapter XVI, § 9.

On at least eight occasions since 1991, a candidate has won election to the Council in the at-large general election despite failing to carry the ward in which he or she resided and from which he or she had been nominated.

On April 6, 2015, Plaintiffs Public Integrity Alliance, Inc. ("Alliance"), Bruce Ash, an individual who is expected to be an elector in Tucson Ward 2 during the 2015 elections, Fernando Gonzales, an individual who resides in Tucson Ward 1, Ann Holden, an individual who resides in Tucson Ward 3, Lori Oien, an individual who resides in Tucson Ward 2, and Ken Smalley, an individual who resides in Tucson Ward 6 (collectively "Plaintiffs") filed a Complaint against the City and Tucson officials (collectively, "Defendants"). Plaintiffs allege the Hybrid System deprives them of the right to vote (Count I), dilutes them of the right to vote (Count II) pursuant to the U.S. Const. Amend. XIV § 1 (Equal Protection Clause), and denies them of equal privileges or immunities (Count III) pursuant to the Ariz. Const. Art. II, § 13. Plaintiffs also allege the Hybrid System violates the Free and Equal Elections Clause of the Arizona Constitution (Count IV). Ariz. Const. Art II, § 21.[1] Defendants have filed an Answer.

Also, on April 6, 2015, Plaintiffs filed a Motion for Preliminary Injunction (Doc. 3). Defendants have filed a Response and a Supplemental Citation of Authority. Plaintiffs have filed a Reply. Plaintiffs have also filed a Supplemental Authority.

II. *Equal Protection Clause*

"'The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection

---

[1] In their Reply, Plaintiffs assert Defendants have conceded the relevant geographical unit is Tucson as a whole. Therefore, Plaintiffs assert Count I, denial of the right to vote, as opposed to Count II, dilution of the right to vote, is at issue in this case.

of the laws," which is essentially a direction that all persons similarly situated should be treated alike.'" *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1063 (9th Cir. 2014), (*quoting City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); *see also Lawrence v. Texas*, 539 U.S. 558 (2003) (O'Connor, J., concurring in the judgment)). "The equal protection clauses of the 14th Amendment and the [Arizona] constitution have for all practical purposes the same effect." *Vong v. Aune*, 235 Ariz. 116, 123 (App. 2014) (*quoting Valley Nat'l Bank of Phx. v. Glover*, 62 Ariz. 538, 554 (1945)).

III. *Review of Claim that the Hybrid System Deprives Plaintiffs of the Right to Vote*

The Tucson City Charter provisions at issue in this case set forth the election procedures for Council members. 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). However, "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).

A. *Discussion of Applicable Legal Principles*

It is only when the primary and the general election are viewed together does the equal protection argument raised by Plaintiffs become an issue. Defendants assert the primary election only produces a party endorsement rather than an elected official:

> If it be practically true that under present conditions a designated party candidate is necessary for an election—a preliminary thereto—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition does not directly affect the manner of holding the election.

Newberry v. United States, 256 U.S. 232, 257 (1921). Indeed "[primaries] are not an election 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." *Id*. at 250. Defendants assert "[t]he 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). While there is a distinction between primary and general elections, by choosing to nominate candidates through a primary election, *see e.g.*26 Am. Jur. 2d Elections § 223 (Feb. 2015) ("While states may require that political parties select their candidates for general election through a primary, such contests are not mandated by the First Amendment to the Federal Constitution[.]"), the electoral procedure "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) (addressing the use of nomination petitions by independent candidates).

Plaintiffs point out that the right to vote guarantees that "[o]nce a 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); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Plaintiffs assert that, because Tucson council members represent the entire City, *City of Tucson v. State*, 273 P.3d 624, 631 (Ariz. 2012), the City, as the corresponding geographic area, is the applicable unit for assessing equal protection challenges.[2] Additionally, Plaintiffs assert the constitutional infirmity is not corrected by future staggered elections cancelling out equal protection violations: the denial of the right to vote from a resident of a ward because in two years that resident will be able to cast a vote when others residents will not be able to (based on which ward the residents reside in) is unconstitutional. *Montano v. Lefkowitz*, 575 F.2d 378, 387 n.15 (2d Cir. 1978); *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 731 n.5 (1st Cir. 1994). Because the Tucson City Charter grants the right to vote to some residents and denies the franchise to others, Plaintiffs assert a strict scrutiny review is appropriate. *See e.g. Green*, 340 F.3d at 896 (in

---

[2] Plaintiffs also argue that a constitutional violation occurs if the ward is considered the electoral geographic unit. Plaintiffs, in their reply, focus their claim on Count I of the Complaint (denial of the right to vote in primary elections), because Defendants have not disputed that the relevant geographical unit in this case is Tucson as a whole.

discussing equal protection clause challenge to legislation, the court, "where the statute in question substantially burdens fundamental rights, such as the right to vote . . . strict scrutiny applies and the statute will be upheld only if the state can show that the statute is narrowly drawn to serve a compelling state interest").

Defendants assert the restriction in this case is a residency requirement and residency requirements based on those boundaries are subject to a rational basis scrutiny.[3] Defendants point out that "[s]tates have considerable leeway in discriminating against voters residing in different governmental units or electoral districts even when the outcome of a particular election affects them." *City of Herriman v. Bell*, 590 F.3d 1176, 1186 (10th Cir. 2010). Further, Defendants assert that courts generally defer to different boundaries drawn for voting purposes by a governmental entity if the separate units further reasonable government objectives." *Id*. at 1185. Indeed, the "Supreme Court has consistently upheld laws that give different constituencies different voices in elections[.]" *Id*. at 1184. However, the court clarified that statement by recognizing that principle especially applied in those situations "involving the annexation or adjustment of political boundaries." *Id*.

Defendants also cite to *Stokes v. Fortson*, 234 F.Supp. 575 (D.C.Ga. 1964) in support of their assertion that the procedure is constitutional. *Stokes*

---

[3] The geographical units for Tucson's elections are created by designating the geographical boundaries of the election jurisdiction to be used for each election.

involved a similar factual situation regarding a judicial position. That court stated:

> In the first place, we are unable to discern any discrimination among voters or unequal weighting of votes of the sort condemned by the one man-one vote principle. Indeed, plaintiffs concede that there is no discrimination in either the nomination process or the election process considered separately. The vote of each person in the statewide election is equal; the electors of every judicial circuit are permitted to vote for the nominees from every judicial circuit. Also, the vote of each person in the judicial circuit is equal in the nominating process. [Footnote omitted.] Since every man's vote counts the same, the fact that the statewide electorate may override the choice of the circuit in no way offends the principles of *Baker v. Carr* and its progeny. *See Alsup v. Mayhall*, S.D.Ala., 1962, 208 F.Supp. 713.

234 F.Supp. at 577. However, the *Stokes* decision and other similar cases cited by Defendants in their Supplemental Citation of Authority distinguished the fact that the election was for the judiciary rather than a legislative or executive official:

> [E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of

> a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

Id.; *see also Holshouser v. Scott*, 335 F.Supp. 928 (D.C.N.C., 1971). This emphasizes the distinction of the elections of judges with those of representatives of a constituency.

Additionally, Plaintiffs disagree with Defendants' assertion that "[n]othing in the Fourteenth Amendment creates a right to have the same residency requirement or geographic unit" in both primary and general elections for the same office. *See* Response, p. 10. Plaintiffs argue that, under *Gray*, once the "geographical unit" in a voting rights case is fixed, it is the unit "for which a representative is to be chosen." 372 U.S. at 379. Indeed, the Supreme Court has stated that "[t]he concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections . . . and, as previously noted, there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the [geographical unit]. *Id*. at 380 (*citations omitted*). Further, voting rights "must be recognized in any preliminary election that in fact determines the true weight a vote will have." *Id*. Therefore, it appears the geographical unit is tethered to the office to be elected

rather than the timing of the election. *See e.g. Smith v.Allwright*, 321 U.S. 649, 660 (1944) *(United States v. Classic*, 313 U.S. 299 (1941) fused "the primary and general elections into a single instrumentality for choice of officers").

However, in recognizing that the primary and general elections were fused, *Gray* did not specify that corresponding primaries must necessarily be the same geographical unit as a general election. Rather, the Supreme Court's statement that the homesite does not afford a permissible basis for distinguishing between qualified voters within a geographical unit was made in discussing the value of a vote in an individual election – not a combined primary and general election process. Further, *Herriman*, *Stokes*, and similar cases recognize that generally strict scrutiny does not "apply to voting restrictions based on voters' residency outside the relevant electoral district." 590 F.3d at 1186. However, these cases do not address whether a primary and general election must have the same geographical unit when the election is for a representative official. Nonetheless, the Court finds these cases instructive. The *Stokes* court specifically found no discernable discrimination among voters or unequal weighting of votes of the sort condemned by the one man-one vote principle. Only when assuming some disparity in voting power did the court find the distinction between the judiciary elections as opposed to legislative or executive elections significant. Further, in general, laws that give different constituencies different voices in elections are constitutional. *Herriman*, 590 F.3d at 1184.

Plaintiffs acknowledge that the Supreme Court has held that county or city bodies elected on an at-large basis but subject to district-based candidate residency requirements do not implicate "one person, one vote" concerns, *Dallas Cnty. v. F.D. Reese*, 421 U.S. 477 (1975). However, Plaintiffs argue that the Supreme Court has recognized that "different conclusions might follow" if the districts served as "the basis . . . for voting or representation," rather than merely the situs of candidates' residence. *Dusch v. Davis*, 387 U.S. 112, 115-16 (1967). Defendants assert, however, that, in context, the Court was recognizing a hypothetical situation that could arise in which a general election system which is based on districts of unequal population could result in either unequal representation, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 480 (1968), unequal weighting of votes, *Gray v. Sanders*, 372 U.S. 368, 379 (1963), or both.

While the *Dusch* Court was discussing varied populations, it did not discuss the contemporaneously developing principles of strict scrutiny and rational basis analyses. The Supreme Court incorporated the district court's findings in its opinion:

> 'The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area.

> (T)he history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wide cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster.'

387 U.S. at 116-117. The Supreme Court stated that the *Dusch* plan made "no distinction on the basis of race, creed, or economic status or location," 387 U.S. at 115, and determined the process was constitutional.

B. *Rational Basis Review*

Significant to this Court is that no court decision has determined that the same geographical unit must apply to corresponding primary and general elections. Also significant is that, in every case in which courts have addressed the constitutionality of at-large elections (and, where applicable, the primary elections corresponding to those at-large elections) the courts have determined that a rational basis review is appropriate. Moreover, the *Dusch* Court held that an at-large election for a government body with district-based candidate residency requirements did not implicate "one person, one vote" concerns. The City has broad power to establish the procedure and provide conditions for the nomination and election process for city offices. *See e.g. Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008). The procedure established by the Tucson City Charter does not employ a system in which districts of unequal population could result in unequal representation and does not involve unequal weighting of votes. Indeed, "[t]o hold with [Plaintiffs] here and invalidate the election procedure permitted by [the Tucson City Charter], this court would be plowing new ground, and extending the "one man, one vote" principle [] beyond the fields heretofore entered by the Supreme Court. *Holshouser*, 335 F.Supp. at 930-31.

The Court finds the City of Tucson has not placed a severe regulatory burden on Plaintiffs. The Court, therefore, must determine if Tucson's election procedure "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters[.] *Burdick*, 504 U.S. at

434. Plaintiffs argue that, even under the more lenient rational basis standard, Tucson's regulatory interests do not justify the restrictions placed upon the rights of voters. Plaintiffs speculate the regulatory interest is the desire to cultivate accountability mechanisms and incentivize Council members to act for the benefit of the City of Tucson as a whole:

> Specifically, if the ability of a Ward 6 voter to cast a general election ballot for Ward 1's representative is necessary to foster democratic responsiveness and improve the institutional functioning of the Council, there is no apparent rational reason for excluding the same Ward 6 voter from Ward 1's primary election. *See Hosford v. Ray*, 806 F. Supp. 1297, 1307 (S.D. Miss. 1992) (noting the "irrationality" of permitting voters in a city outside the school district to vote for the executive arm of the school board but not the legislative/judicial arm of the district).

Motion, Doc. 3, pp. 12-13. Plaintiffs point out that courts have recognized that overinclusive voting arrangements may traverse equal protection guarantees if such arrangements provide outside voters the numerical strength to decide electoral outcomes. *See, e.g., Burson*, 121 F.3d at 250 (holding that franchise was over-inclusive in part because voters of city outside the school district had voting strength sufficient to control seats on the governing body); *Duncan*, 69 F.3d at 97 ("Where the government allocates the franchise in such a manner that residents of a separate area have little or no chance to control their own [representatives], there may be grave

constitutional concerns, even where out-of-district voters have a substantial interest."); *Sutton v. Escambia Cnty. Bd. of Educ.*, 809 F.2d 770, 773 (11th Cir. 1987) (sustaining overinclusive school district election scheme in part because votes of residents of city served by another district had never been outcome determinative and comprised only a quarter of the total electorate); *Creel v. Freeman*, 531 F.2d 286, 288 (5th Cir. 1976) (upholding overinclusive arrangement in part because the facts "do not show domination by such [outside] residents over county school board elections").

However, Defendants assert:

> Having nominations through primary elections in each ward, using separate ballots for each party, allows the party electorates in each of those wards to make their own choice of a nominee, and simultaneously acts as a guarantee for the City electorate as a whole that each ward's nominee actually has support among the party members within that ward. Moreover, since nominees compete in the general election only against other candidates nominated in the same ward, see Compl. ¶ 24, ward nominations also help assure that each ward has a local representative on the council, and, conversely, that the full Mayor and Council has members who are aware of each ward's issues, problems, and views. According to the Supreme Court, and reading "ward" for "borough" and "local" for "rural," the City has a valid interest in ward residency for the council members on its unitary governing body:

> The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area.

Response, Doc. 14, pp. 4-5, (*quoting Dusch*, 387 U.S. at 116). Defendants also asserts that the procedure gives the ward voters of Tucson a specific voice in its elections. *Id*. at p. 9.

While is not clear what individual ward problems may not cross ward lines, the Court acknowledges that this is an important regulatory interests. The procedure allows for those with knowledge of each ward's problems and views to intelligently express their views, *Dusch*, 387 U.S. at 116, by having a voice in selecting the candidates for office. The process established by the Tucson City Charter is not "an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office." *Id.* Further, the historical outcome complained of by Plaintiffs, that on at least eight occasions since 1991, a candidate has won election to the Tucson Council in the at-large general election despite failing to carry the ward in which he or she resided and from which he or she had been nominated, would not be altered by allowing all Tucson voters to participate in a ward's primary. The City of Tucson's regulatory interests justify the reasonable, nondiscriminatory restrictions placed by Tucson upon the First and

Fourteenth Amendment rights of Tucson voters. *Burdick*, 504 U.S. at 428.

IV. *Count II – Dilution of the Right to Vote*

In their Count II, Plaintiffs allege the Hybrid System dilutes them of the right to vote pursuant to the U.S. Const. Amend. XIV § 1 (Equal Protection Clause).[4] In their Reply, Plaintiffs assert Defendants have conceded the relevant geographical unit is the City as a whole. Therefore, Plaintiffs assert Count I, denial of the right to vote, as opposed to Count II, dilution of the right to vote, is at issue in this case. The Court, therefore, will dismiss this claim.

V. *Count IV – Free and Equal Elections Clause*

Plaintiffs allege the Hybrid System violates the Free and Equal Elections Clause of the Arizona Constitution. Ariz. Const. Art II, § 21. The Court of Appeals of Arizona has determined that "Arizona's constitutional right to a "free and equal" election is implicated when votes are not properly counted." *Chavez v. Brewer*, 222 Ariz. 309, 320, 214 P.3d 397, 408 (App. 2009). While the appellate court discussed other state court decisions that found other viable claims (e.g., claim "in which the voter is [] prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is [not]

---

[4] Plaintiffs also assert a violation of the Ariz. Const. Art. II, § 13. Because "[t]he equal protection clauses of the 14th Amendment and the [Arizona] constitution have for all practical purposes the same effect[,]" *Vong*, 235 Ariz. at 123, the Court will not separately address this claim as to the Arizona Constitution.

given the same weight as every other ballot"), the court did not determine what was all encompassed by the Arizona Constitution.

Moreover, in their response, Defendants asserted this claim was meritless. Plaintiffs did not respond to this assertion in their reply. The Court declines to find that the Free and Equal Elections Clause of the Arizona Constitution affords any greater protections than either the Due Process Clause of the U.S. Constitution or the Privileges and Immunities Clause of the Arizona Constitution. The Court finds, therefore, Plaintiffs are not entitled to relief under this Arizona constitutional provision.

VI. *Conclusion*

Consideration of Plaintiffs' claims of a denial of the right to vote under the Due Process Clause of the U.S. Constitution, the Privileges and Immunities Clause of the Arizona Constitution, and the Free and Equal Elections Clause of the Arizona Constitution is appropriate under a rational basis review. The important regulatory interests of Tucson justify the reasonable, nondiscriminatory restrictions placed by Tucson upon the First and Fourteenth Amendment rights of voters.

Accordingly, IT IS ORDERED:

1. The Motion for Preliminary Injunction (Doc. 3) is DENIED.

2. Plaintiffs' claim of a dilution of the right to vote as stated in Count II is DISMISSED.

3. Judgment is awarded in favor of Defendants and against Plaintiffs as to Plaintiffs' claim of a denial of the right to vote under the Due Process Clause of the U.S. Constitution (Count I), the Privileges and Immunities Clause of the Arizona Constitution (Count III), and the Free and Equal Elections Clause of the Arizona Constitution (Count IV).

4. The Clerk of Court shall enter judgment and close its file in this matter.

DATED this 20th day of May, 2015.

/s/ Cindy K. Jorgenson
Cindy K. Jorgenson
United States District Judge