No. 16-730

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE

Given the plenary power over elections possessed by states and localities, does the City of Tucson violate equal protection by having a primary election in which the qualified party electors from each ward nominate that party's council member candidate from that ward, and then having an at large general election where the entire City electorate chooses council members from the parties' nominees from each ward?

RELEVANT COURT RULE

Rule 10 of the Rules of the Supreme Court of the United States provides in pertinent part as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . .
> >
> > * * *
> >
> > (c) a United States court of appeals has decided an important question of federal law that has not been, but

should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUMMARY AND INTRODUCTION

The Petition should not be granted. Petitioners ask this Court to create a new constitutional right that would contradict this Court's longstanding decisions allowing states and localities to control their governmental structure, political processes, and elections. The Ninth Circuit's unanimous *en banc* Opinion ("Opinion") does not conflict with relevant decisions of this Court, but rather tracks them closely and applies them correctly. There is also no conflict between the circuits regarding the issue decided by the Ninth Circuit and now presented to this Court.

REASONS TO DENY THE WRIT

I. THE NINTH CIRCUIT'S OPINION TRACKS THIS COURT'S DECISIONS.

The Ninth Circuit's *en banc* Opinion ("Opinion") in this case was correct, making review by this Court unnecessary. Far from "conflict[ing] with relevant decisions of this Court," the Ninth Circuit's Opinion is consistent with this Court's jurisprudence regarding both equal protection and state and local control over elections and voting. The Opinion speaks for itself and

does not require repetition or replication here. Instead, the City will briefly supplement and buttress the Opinion by showing that it also tracks this Court's broader precedent supporting state and local sovereignty and discretion regarding elections.

A. States and localities possess sovereignty and "vast leeway" in governing themselves.

This Court recognizes "a State's constitutional responsibility for the establishment and operation of its own government." *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). "Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." *Sailors v. Board of Education of Kent County*, 387 U.S. 105, 109 (1967). "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." *Sailors*, 387 U.S. at 110-11. "Absent some clear constitutional limitation, [states and localities are] free to structure [their] political system[s] to meet [their] 'special concerns and political circumstances[.]'" *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 13-14 (1982) (original text referring to Puerto Rico).

B. Specifically, states and localities are free to set the terms and conditions for primary and general elections for their officers.

The "vast leeway," "great flexibility," and room for "experimentation" possessed by states and localities to meet their "special concerns and political circumstances" specifically extends to control over voting, elections, and how they select the officials who sit on their governing bodies. The sovereignty of state and local governments specifically includes "the power to regulate elections," and even more specifically "the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices *and the nature of their own machinery for filling local public offices*." *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (footnote omitted and emphasis added) (Black, J.); *see also id*. at 201-02 (Harlan, J.), 293-94 (Stewart, J.). "Each state has the power to prescribe the qualifications of its officers, *and the manner in which they shall be chosen*." *Boyd v. State of Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) (emphasis added). "[W]e have previously rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives." *Rodriguez*, 457 U.S. at 9. Rather, "[t]he methods by which the people of [a state or locality] and their representatives have chosen to structure the [state's or locality's] electoral system are entitled to substantial deference." *Rodriguez*, 457 U.S. at 8.

State and local governments can exercise all of these powers in the context of primary as well as general elections for their officers. "[T]he mechanism of [primary] elections is the creature of state legislative choice." *Bullock v. Carter*, 405 U.S. 134, 140-41 (1972). When the state gives a party the right to have its candidates appear with party endorsement on the general-election ballot, "the State acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008).

C. The Ninth Circuit correctly recognized and applied this Court's decisions holding that the "right to vote" is the right to participate in elections authorized by the state or locality on an equal basis with other qualified voters.

Petitioners assert that the Ninth Circuit's decision "implicitly repudiates decades of settled voting rights jurisprudence" and that the Ninth Circuit is effectively allowing an "infringement of one individual's voting rights [to] be 'evened out' and hence cured by inflicting an offsetting injury on an individual some years later. . . ." Petition, p. 25. This Court's decisions directly contradict these incorrect assertions.

In recognizing state and local control over election systems, this Court has simultaneously rejected the idea that any particular voter or group of voters can

claim at will a freestanding "right to vote" in state or local elections under the Constitution. In *Rodriguez*, this Court stated:

> . . . [T]his Court has often noted that the Constitution "does not confer the right of suffrage upon any one," *Minor v. Happersett*, 21 Wall. 162, 178, 22 L.Ed. 627 (1875), and that "the right to vote, per se, is not a constitutionally protected right," *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35, n.78 (1973).

Rodriguez, 457 U.S. at 9.

And this Court has also specifically stated that "the Constitution of the United States does not confer the right to vote in state elections." *Harris v. McRae*, 448 U.S. 297, 322 n.25 (1980).

As the Ninth Circuit recognized, the constitutionally "protected right" is instead 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." *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1027 (9th Cir. 2016) ("*PIA*"), *citing San Antonio Indep. School Dist.*, 411 U.S. at 35 n.78. *Accord Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

Thus, states and localities can decide whether a primary, general, or special election for their officers will be held, and under what specific conditions. "The right to vote intended to be protected [by the 14th Amendment] refers to the right to vote as established by the laws and constitution of the state." *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959); *McPherson v. Blacker*, 146 U.S. 1, 39 (1892). "In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution." *Pope v. Williams*, 193 U.S. 621, 632 (1904). "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised," *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *Lassiter*, 360 U.S. at 50, and may "impose voter qualifications and regulate access to the franchise in other ways." *Dunn*, 405 U.S. at 336. Thus, "a State may, in certain cases, limit the right to vote to a particular group or class of people." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 58-59 (1970).

The "right to vote" defined by this Court also has a key corollary that is particularly significant here: the fact that a state or locality provides for participation of electors during one phase of the election process, or as part of one path to a particular elective office, does not mean that the state must authorize, or allow those same electors to participate in, another election that

occurs at a different phase of the process or provides a different path to the office.

Thus, in *Fortson v. Morris*, 385 U.S. 231 (1966), this Court held that where no candidate for governor had received a majority of votes at the general election, Georgia did not violate the Equal Protection Clause by applying the relevant article of its constitution providing that its legislature would elect the governor from the two persons having the highest number of votes, rather than attempting to craft and utilize a statewide runoff election process demanded by the plaintiff but having no basis in Georgia law. *Fortson*, 385 U.S. at 236.

Likewise, in *Sailors*, *supra*, this Court held that Michigan did not violate equal protection by providing that while its local school boards would be directly elected, its county school boards would not be directly elected (as demanded by the plaintiffs), but rather appointed at a meeting of delegates from those elected local school boards, with each local board having one vote irrespective of population. *Sailors*, 387 U.S. at 106-07, 111.

Finally, in *Rodriguez*, *supra*, this Court found no federal constitutional obstacle to Puerto Rico's filling a vacancy in its Legislature through appointment by the deceased incumbent's party, as provided by Puerto Rico's election statutes, rather than through a special election as demanded by plaintiffs, even though the legislative office at issue was one that was normally filled (and indeed had just been filled) through a general election. *Rodriguez*, 457 U.S. at 14.

These decisions show that a state or locality can authorize a vote within a defined voting district during one phase of an election process without having to authorize it during another.

D. In holding any particular election, states and localities are free to designate the election district and limit the vote to voters within that district.

One of the most fundamental ways that states and localities are empowered to control the conditions under which elections occur is through voter residency qualifications, which come into existence when the state or locality designates the geographical boundaries of the election jurisdiction to be used for that particular election. States and localities have "unquestioned power to impose reasonable residence restrictions of the availability of the ballot." *Carrington*, 380 U.S. at 91. "All who participate in the election are to have an equal vote," but only "[o]nce the geographical unit for which a representative is to be chosen is designated" so that "the class of voters is chosen and their qualifications specified." *Gray v. Sanders*, 372 U.S. 368, 379-80, 381 (1963); *Hadley*, 397 U.S. at 59.

Thus, a state or locality may define the geographical limits of the electoral districts to be used for any particular election and limit the vote to qualified electors residing within that district. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). *Holt* involved an

equal protection challenge to state statutes that subjected an unincorporated area to the police powers of Tuscaloosa, the neighboring municipality, without granting residents of the unincorporated area the right to vote in Tuscaloosa elections. *Id.* at 61-62. The plaintiffs claimed that the statutes infringed their fundamental right to vote and argued for strict scrutiny. The Supreme Court rejected both the claim and the argument for strict scrutiny. As the Supreme Court stated, the "line heretofore marked by [our] voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue." *Id.* at 70. "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." *Id.* at 68.

According to this Court, residency qualifications are not subject to strict scrutiny. *Hill v. Stone*, 421 U.S. 289, 297 (1975); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625 (1969). *See also Carlson v. Wiggins*, 675 F.3d 1134, 1139 (8th Cir. 2012); *City of Herriman v. Bell*, 590 F.3d 1176, 1190-92 (10th Cir. 2010).[1]

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[1] Once the state or locality has specified the particular electoral district that it will use for a particular election, the Fourteenth Amendment's Equal Protection Clause then creates "one person, one vote" requirements that attach and apply only to that particular district and election. First, all eligible voters residing within the electoral district must be permitted an equal right to vote in that election. *See*, *e.g.*, *Kramer*, 395 U.S. at 626-27 (striking down New York statute that limited franchise in certain school districts to owners or lessees of taxable realty (or their spouses)

In the City's general election, the "representative to be chosen" is the council member and the election district is the City as a whole. In the City's ward primary elections, the "representative to be chosen" in any particular party's election is that party's nominee from that ward. The City is free to set different residency qualifications in these two separate elections.

E. States and localities may also structure their elections to give different electoral constituencies a voice.

Finally, this Court's decisions allow states and localities to structure their elections so as to give different electoral constituencies each a specific voice in the election process. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907) (election result determined by counting total votes cast by combined electorates of two different electoral districts, meaning that one electorate could effectively outvote the other as a body); *Town of Lockport,*

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and parents or guardians of children in public schools); *Carrington*, 380 U.S. at 91-93 (striking down Texas statute that prohibited military service members from ever acquiring a voting residence in Texas so long as they remained in service); *Evans v. Cornman*, 398 U.S. 419, 421 (1970) (striking down Maryland statute that disqualified residents of a federal enclave from voting in Maryland elections even though they were residents of the state and within state boundaries); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 208-13 (1970) (franchise in city general-obligation bond elections could not be limited to property-holding taxpayers); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (franchise in city revenue bond election could not be limited to property owners). Second, all votes cast within the electoral district must count equally. *Gray*, *supra*.

New York v. Citizens for Community Action at the Local Level, Inc., 430 U.S. 259 (1977) (approval of ballot measure required separate, simultaneous approval of two electorates in two different electoral districts, whether or not total combined vote was in favor of measure).

Moreover, if the City's voters choose to utilize a primary under their Charter, the rationality of the electoral boundaries they set for that primary can rest on benefiting themselves as well as the political parties. *See Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (state's actions in structuring primaries benefited both public and parties).

Here, consistent with this Court's decisions, the Ninth Circuit correctly recognized that the City's election system allows both ward and citywide electorates a voice, and also provides benefits to both. *PIA*, 836 F.3d at 1027-28.

F. *Gray v. Sanders* does not require that the City's primary and general elections use identical election districts.

In attempting to escape this Court's various precedents supporting the Ninth Circuit's *en banc* Opinion, as presented in Section I(A)-(E) above, Petitioners simply repeat two incorrect arguments. First, they claim that *Gray v. Sanders* specifically requires that the City's primary and general elections use identical electoral districts. The Ninth Circuit correctly rejected this argument, citing this Court's own subsequent

precedents explaining the narrow holding of *Gray*. *PIA*, 836 F.3d at 1025-27. There is no need to repeat the Ninth Circuit's analysis in detail here. The City merely notes two additional actions by this Court, not mentioned by the Ninth Circuit, that provide additional support for the Ninth Circuit's rejection of *Gray* as precedent here.

First, just last year this Court made additional statements that reaffirm *Gray*'s lack of applicability. In *Evenwel v. Abbott*, ___ U.S. ___, 136 S.Ct. 1120 (2016), both Justice Ginsburg's opinion of the Court and Justice Thomas's concurring opinion discuss *Gray*. Justice Ginsburg mentions no such requirement as claimed by Petitioners, while reaffirming that the sole issue in *Gray* was Georgia's "scheme of assigning a certain number of 'units' to the winner of each county in statewide [primary] elections." *Evenwel*, 136 S.Ct. at 1130. Moreover, Justice Thomas notes that *Gray* "emphasized equal treatment of *eligible* voters," *Evenwel*, 136 S.Ct. at 1135 (emphasis supplied), and that in holding that Georgia's system violated the one-person, one-vote principle, "the Court emphasized that the right at issue belongs to 'all *qualified* voters' and is the right to have one's vote 'counted once' and protected against dilution." *Id.* (emphasis supplied). Justice Thomas's statements support the Ninth Circuit's conclusion that the City has broad discretion to decide who is "qualified" to vote in its primaries and can set up ward-based primaries limiting "qualified" voters to those residing in that particular ward.

Second, while the Opinion cited *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972), it did not include in its citation, or otherwise mention, this Court's subsequent affirmance of that case. *See PIA*, 836 F.3d at 1027. In *Holshouser*, the unsuccessful plaintiffs raised precisely the same issue that Petitioners raise here, but in the context of district primary and statewide general elections for state judges. If *Gray* had actually said what Petitioners claim it says, there is no way that *Holshouser* could or should have been decided as it was, or that that decision should have been affirmed by this Court. Nor could the district court have reached the decision it did in *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964), also cited by the Ninth Circuit, *PIA*, 836 F.3d at 1027, which likewise raised the identical issue here in the context of judicial elections.

If *Gray* actually said what Petitioners claim, then rather than simply analyzing the equality of the vote in each election, and finding no violation, the two district courts, and this Court in reviewing *Holshouser*, would instead have had to discuss and apply the "fact" (as it would exist in our hypothetical scenario) that *Gray* not only required equal voting rights in any single election, but also required the same election districts in all phases of an election cycle. That these cases did not do so shows that Petitioners' *Gray* argument is simply incorrect and untenable.

One reaches the same conclusion by analyzing this Court's own decision in *Lopez Torres*, which involved a First Amendment freedom of association challenge to

New York's method for selecting nominees for supreme court justice. Under the New York system at issue in *Lopez Torres*, party voters in legislative districts elect delegates at a primary. Those delegates go to a convention and nominate candidates, who then run in the general election held within a much larger judicial district encompassing a number of those legislative districts, where all judicial district voters can vote. In other words, as here, the election jurisdictions differ in size in the two elections, smaller in the primary, larger in the general, but with the difference of an intervening delegate convention to do the actual nominations.

This Court upheld the constitutionality of the New York system, rejecting the plaintiffs' claim that the system violated their rights to freedom of association and should be replaced by a direct primary to be held within the same judicial district used for the general election.

If Petitioners' *Gray* argument were correct, then a claim that equal protection required that the same election district be used for the primary and general elections should have been an obvious one for the plaintiffs to bring in *Lopez Torres*, and for this Court to recognize and enforce. In fact, no such claim was made by the plaintiffs, and no such requirement even mentioned by this Court. To the contrary, this Court was not bothered in the least by New York's nominating system. *Gray* has no relevance or application here.

G. Primary and general elections are two separate elections.

The Ninth Circuit rightly concluded that "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." *PIA*, 836 F.3d at 1026. Seeking to evade this conclusion, Petitioners make their second incorrect argument, which is that the City's primary and general election must be treated as one "unitary" election for purposes of the Equal Protection Clause. Petition, pp. 16-21. This Court's decisions also contradict this argument.

"[Primaries] are in no sense elections for an office but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors." *Newberry v. United States*, 256 U.S. 232, 250 (1921). "The nomination by a political party, whether by caucus, convention, or primary, is nothing more than an indorsement and recommendation of the nominee to the suffrage of the electors at large." *United States v. O'Toole*, 236 F. 993, 995 (S.D. W.Va. 1916), *aff'd sub nom. United States v. Gradwell*, 243 U.S. 476 (1917).

Decisions by this Court subsequent to *Gradwell* and *Newberry* make clear that a primary is certainly an "election" for purposes of Article I, § 4 of the Constitution, *United States v. Classic*, 313 U.S. 299, 316-21 (1941), prevention of racial discrimination, *Smith v.*

Allwright, 321 U.S. 649 (1944), and guaranteeing equally weighted voting to the qualified voters within the primary election district. *Gray*, *supra*. And where the state or locality chooses to utilize a primary, it is an "integral part of the entire election process," *Storer v. Brown*, 415 U.S. 724, 735 (1974).

But even when used, the primary is simply the first of two "steps," *Classic*, 313 U.S. at 316-17, or the "initial stage in a two-stage process." *Storer*, 415 U.S. at 735. As this Court said almost a century ago in *Newberry*, the selection of a designated party candidate, by primary or otherwise, is a separate event, not part of the general election:

> 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, 256 U.S. at 257.

Thus, a primary is an election separate and distinct from the general election, producing only a party endorsement rather than an elected official, and therefore subject to conditions separate and distinct from those for the general election. As the district court

stated in the *O'Toole/Gradwell* case affirmed by this Court:

> In passing statutes regulating primary elections, a state recognizes the important fact that candidates go into the general elections with indorsements of political parties, and *it merely provides the conditions upon which that indorsement is to be received*.

O'Toole, 236 F. at 995 (emphasis added).

Later decisions by this Court also demonstrate the separate nature of the primary election. First, the extent to which the overall election process even includes a primary election is wholly within state or local control. States or localities need not allow primaries at all. *American Party of Texas v. White*, 415 U.S. 767, 781-82 (1974) (state may prescribe party use of either primaries or conventions to select nominees who appear on the general-election ballot). Or they can mandate them. *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) ("State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion."). Or they can allow certain voters to vote by primary, and prohibit others from doing so, even within the same election cycle. *American Party*, 415 U.S. at 781 ("Neither can we take seriously the suggestion made here that the State has invidiously discriminated against the smaller parties by insisting that their nominations be by convention, rather than by primary election."). The optional nature of primaries as preliminaries to general elections, and the

ability of states and localities to allow or not allow them, emphasizes their separateness from general elections.

Moreover, the City's primary is not only offset in time from its general election by two months, but involves wholly different electorates. Under this Court's decisions, it is constitutionally impossible for the City to try to replicate its general election electorate at its partisan primary elections. Even if it wanted to, the City could not force a party that has qualified for the ballot to include voters from another qualified party as eligible voters in its primary. *See* ARIZ. CONST. Art. 7, § 10; *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Nader v. Schaffer*, 417 F. Supp. 837 (D.Conn.), *aff'd*, 429 U.S. 989 (1976). At the same time, this Court has upheld precisely the type of enforced separation of the voters of qualified parties in primary elections that Arizona and the City actually practice. *Clingman v. Beaver*, 544 U.S. 581 (2005) (upholding, against freedom of association challenge, Oklahoma's semi-closed primary system, under which only party's members and independents could vote in its primary).

Finally, from an administrative perspective, this Court has also not required primary elections to necessarily have all the same voting components as general elections, such as absentee balloting. *Fidell v. Board of Elections*, 343 F. Supp. 913 (E.D.N.Y.), *aff'd*, 409 U.S. 972 (1972) (New York did not have to provide absentee balloting in primary elections).

This Court's decisions confirm that primary and general elections are separate elections, for which the City may designate different election districts.

II. THERE IS NO CONFLICT BETWEEN CIRCUITS HERE.

Petitioners also claim that the Opinion "conflicts with decisions of other circuits" regarding when strict scrutiny should apply. Petition, pp. 14-15. But Petitioners cite no cases to this Court that show any such conflict regarding the specific issue here: whether the Equal Protection Clause requires the City to use identical election districts for both its primary and general elections. Instead, Petitioners only cite cases involving wholly different issues.

Two of Petitioners' cited cases only discuss geographic distinctions regarding who can participate *in the same election*. In *Little Thunder v. State of South Dakota*, 518 F.2d 1253 (8th Cir. 1975), the Eighth Circuit found that South Dakota violated equal protection by not allowing residents of unorganized counties to vote for elected county officials of the organized counties to which the unorganized counties were attached for purposes of government and administration.[2] In *Mixon v. State of Ohio*, 193 F.3d 389 (6th Cir. 1999), the Sixth Circuit, upholding Ohio's use of an appointed school board for the Cleveland School District, simply pointed out that if the board were an elected body,

[2] It is also not clear that the outcome in *Little Thunder* would have been the same after *Holt*.

strict scrutiny would apply to distinctions in voting eligibility for that election between district voters residing in Cleveland proper and in its suburbs. *Id.* at 405.

Petitioners' two other cited cases do not even involve voter participation in elections, but rather deal with, respectively, voting machine malfunction, *Shannon v. Jacobowitz*, 394 F.3d 90 (2d Cir. 2005), and geographical requirements for signatures on initiative petitions. *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073 (9th Cir. 2003).

None of these cases create a circuit split regarding the issue here.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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