



MEMORANDUM

Date: November 17, 2015

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to be "CHH", is written over the printed name "C.H. Huckelberry".

Re: **Election-related Litigation Filed against the City of Tucson, Pima County and the Board of Supervisors**

The attached lawsuit relates to the City of Tucson election of Councilmembers. The City will take the primary role in defending the lawsuit.

The County Attorney will defend the County, Board of Supervisors, and the Clerk of the Board.

If you have any questions regarding this matter, please contact Chief Civil Deputy County Attorney Thomas Weaver.

CHH/anc

Attachment

c: Thomas Weaver, Chief Civil Deputy County Attorney



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Attorneys for Plaintiffs

**IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA**

KELLY LAWTON, an individual voter and a candidate for Tucson City Council in Ward 2; MARGARET BURKHOLDER, an individual voter and a candidate for Tucson City Council in Ward 4; LANCE MARTIN, and individual voter for Tucson City Council in Ward 2; and MATTHEW PRIDANS, an individual voter for Tucson City Council in Ward 4,

Plaintiffs/Contestants,

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, PAUL CUNNINGHAM, KARIN UHLICH, SHIRLEY SCOTT, RICHARD FIMBRES, and STEVE KOZACHIK, each in his or her capacity as a member of the Tucson City Council; ROGER RANDOLPH, in his capacity as the Clerk of the City of Tucson; PIMA COUNTY, a political subdivision of the State of Arizona; ROBIN BRIGODE, in her capacity as the Clerk of the Pima County Board of Supervisors; and ALLY MILLER, RAMON VALADEZ, SHARON BRONSON, RAY CARROLL, AND RICHARD ELIAS, each in his or her capacity as a member of the Pima County Board of Supervisors,

Defendants/Contestees,

No.

**FIRST AMENDED VERIFIED
ELECTION CONTEST COMPLAINT
PURSUANT TO ARIZ. REV. STAT.
§§ 16-672, -673, -674**

1 and

2 PAUL CUNNINGHAM, in his capacity as
3 purported Councilor-Elect for Tucson City
4 Council in Ward 2; and SHIRLEY SCOTT, in
5 her capacity as purported Councilor-Elect for
6 Tucson City Council in Ward 4,

7
8 Defendants/Real Parties In
9 Interest/Contestees.

10 Plaintiffs/Contestants hereby allege as follows:

11 **SUMMARY OF THE CASE**

12 1. Plaintiffs challenge the certification of Defendants/Real Parties in Interest
13 Paul Cunningham and Shirley Scott by the Pima County Board of Supervisors and by the
14 Tucson City Council as the winners of the November 3, 2015 general election for the
15 Tucson City Council seats designated to Ward 2 and Ward 4, respectively.

16 2. Because participation in the August 25, 2015 primary elections for the Ward
17 2 and Ward 4 City Council seats was limited to qualified electors residing in the
18 respective ward, it follows that participation in the November 3, 2015 general election
19 likewise was required to have been limited to qualified electors residing in the respective
20 ward. *See Public Integrity Alliance v. City of Tucson*, -- F.3d --, 2015 WL 6875310 (9th
21 Cir. Nov. 10, 2015).

22 3. Defendants/Real Parties in Interest Paul Cunningham and Shirley Scott have
23 been certified as elected to the Ward 2 and Ward 4 City Council seats, respectively, on the
24 basis of illegal votes cast by electors residing outside the relevant ward. Accordingly, the
25 certifications should be annulled and declared as lacking any legal force or effect, and
26 Kelly Lawton and Margaret Burkholder should be certified as having the highest number
27 of legal votes for the Tucson City Council seats in Ward 2 and Ward 4, respectively.

28 **PARTIES**

1 Plaintiffs/Contestants Kelly Lawton and Margaret Burkholder are citizens,
2 residents, and qualified electors of the United States of America, the State of Arizona,

1 Pima County, and Wards 2 and 4 (respectively) in the City of Tucson. Lawton and
2 Burkholder voted, and were the nominees of the Republican Party for Tucson City
3 Council for Wards 2 and 4, respectively, in the general election held on November 3,
4 2015.

5 5. Plaintiffs/Contestants Lance Martin and Matthew Pridans are citizens,
6 residents, and qualified electors of the United States of American, the State of Arizona,
7 Pima County, the City of Tucson, and Tucson City Council in Wards 2 and 4,
8 respectively.

9 6. Defendant City of Tucson is a chartered city of the State of Arizona.

10 7. Defendant Jonathan Rothschild is the Mayor of the City of Tucson, and is
11 named in this action in his official capacity only. The Mayor is the chief executive officer
12 responsible for enforcing the laws of the City of Tucson, and “shall be recognized as the
13 official head of the city by the courts for the purpose of service of civil process upon the
14 city and...appearing in any manner before the courts on behalf of the city.” *See* Tucson
15 City Charter ch. VI, §§ 1, 4.

16 8. Defendants Regina Romero, Paul Cunningham, Karin Ulrich, Shirley Scott,
17 Richard Fimbres, and Steve Kozachik are members of the Tucson City Council, and are
18 named in this action in their official capacities only. The Tucson City Council is the
19 governing legislative body in the City of Tucson, Arizona, and is required to adopt an
20 official canvass and declarations of the results of city elections. *See* Tucson City Charter
21 ch. IV, VII; Tucson City Code § 12-31.

22 9. Defendant Roger Randolph is the Clerk of the City of Tucson, and is named
23 in this action in his official capacity only. The City Clerk is a public officer responsible
24 for promulgating “rules, regulations, procedures, and forms necessary to conduct city
25 elections” and for “carry[ing] out the provisions” of the Tucson City Code and the Tucson
26 City Charter pertaining to the conduct of city elections. *See* Tucson City Code § 12-1.3.

27 10. Defendant Robin Brigode is the Clerk of the Pima County Board of
28 Supervisors, and is named in this action in her official capacity only. The Clerk is a

1 public officer responsible for carrying out the determinations and policies of the Pima
2 County Board of Supervisors with respect to the conduct of elections, to include
3 delivering certificates of elections to candidates declared elected by the Pima County
4 Board of Supervisors. *See* A.R.S. § 16-647.

5 11. Defendants Ally Miller, Ramon Valadez, Sharon Bronson, Ray Carroll, and
6 Richard Elias are members of the Pima County Board of Supervisors and are named in
7 this action in their official capacities only. The Pima County Board of Supervisors is the
8 governing body of Pima County, and is charged by law with conducting elections within
9 its jurisdictional boundaries, and with “declar[ing] elected the person receiving the highest
10 number of votes cast for each office to be filled by the electors of the county or a
11 subdivision thereof.” *See* A.R.S. §§ 11-251(3), 16-647.

12 12. Defendants/Real Parties in Interest Paul Cunningham and Shirley Scott were
13 certified by the Pima County Board of Supervisors on November 10, 2015 as elected to
14 the Tucson City Council for Wards 2 and 4, respectively. An Official Canvass and
15 Declaration of Results, which would certify Paul Cunningham and Shirley Scott as elected
16 to the Tucson City Council for Wards 2 and 4, respectively, was placed on the agenda for
17 the Tucson City Council meeting scheduled for November 9, 2015, but its consideration
18 was continued until the Tucson City Council meeting scheduled for November 17, 2015.

19 JURISDICTION AND VENUE

20 13. This Court has jurisdiction over this action pursuant to Article 6, § 14 of the
21 Arizona Constitution, and A.R.S. §§ 12-123, 16-672, and 16-674(B).

22 14. Venue for this action lies in Pima County pursuant to A.R.S. § 16-674(B)
23 because all Plaintiffs reside in Pima County.

24 GENERAL ALLEGATIONS

25 **The 2015 City Council Elections**

26 15. The City of Tucson is divided into six wards composed of substantially
27 equal populations. *See* Tucson City Charter ch. XVI, § 8.

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1 16. One seat on the six-member City Council is allotted to each ward. *See*
2 Tucson City Charter ch. III, § 1. A candidate for the City Council must reside in the ward
3 from which he or she seeks to be nominated. *See* Tucson City Charter ch. XVI, §§ 5, 9.

4 17. The four year terms of the City Council members are staggered, and
5 elections are held on a biennial basis in odd-numbered years. *See* Tucson City Charter ch.
6 XVI, §§ 3, 4. Elections for the seats allotted to Ward 1, Ward 2 and Ward 4 were held in
7 2015.

8 18. In August 2015, the City held in each of Ward 1, Ward 2 and Ward 4 a
9 partisan primary to select one nominee from each recognized political party. Each ward's
10 primary election was limited only to registered voters who resided within that ward;
11 otherwise qualified electors who resided in other wards of the City were not permitted
12 participate in the ward's primary election. *See* Tucson City Charter ch. XVI, § 9.

13 19. Plaintiffs/Contestants Kelly Lawton, Margaret Burkholder, Lance Martin,
14 and Matthew Pridans voted in the primary elections in their own wards, but were not
15 permitted to participate in the primary elections in other wards.

16 20. Plaintiffs/Contestants Kelly Lawton and Margaret Burkholder were certified
17 as the winners of the August 25, 2015 Republican Party primaries in Wards 2 and 4,
18 respectively.

19 21. Defendants/Real Parties in Interest Paul Cunningham and Shirley Scott were
20 certified as the winners of the August 25, 2015 Democratic Party primaries in Wards 2
21 and 4, respectively.

22 22. The nominees selected in the August 25, 2015 primary elections then
23 competed against other candidates nominated in the same ward in an at-large election held
24 on November 3, 2015.

25 23. All qualified electors in the City of Tucson were permitted to participate in
26 the general election for each of the Ward 1, Ward 2, and Ward 4 seats, regardless of the
27 elector's ward of residence. In other words, every voter in the City could select up to one
28 candidate for each of the three City Council seats appearing on the ballot.

1 24. According to the Official Canvass of the November 3, 2015 election results
2 certified by the Pima County Board of Supervisors, the results the for Ward 2 contest were
3 as follows:

- 4 a. 10,179 votes in Ward 2 and 45,296 votes citywide for Cunningham; and
5 b. 11,513 votes in Ward 2 and 33,231 votes citywide for Lawton.
6 c.

7 25. According to the Official Canvass of the November 3, 2015 election results
8 certified by the Pima County Board of Supervisors, the results for the Ward 4 contest were
9 as follows:

- 10 a. 6,533 votes in Ward 4 and 43,824 votes citywide for Scott; and
11 b. 9,143 votes in Ward 4 and 34,611 votes citywide for Burkholder.

12 **Constitutional Challenge to Tucson's Hybrid Election System**

13 26. On April 6, 2015, the Public Integrity Alliance, Inc., an Arizona nonprofit
14 corporation, and five qualified electors of the City of Tucson filed a complaint in the
15 United States District Court for the District of Arizona seeking relief pursuant to 42
16 U.S.C. 1983 and arguing that the City of Tucson's combination of ward-only primary
17 elections coupled with citywide at-large general elections (the "Hybrid System") results in
18 the denial or dilution of Tucson electors' right to vote in violation of the Fourteenth
19 Amendment of the United States Constitution.

20 27. On November 10, 2015, the United States Court of Appeals for the Ninth
21 Circuit published an opinion holding that the Hybrid System violated the Fourteenth
22 Amendment of the United States Constitution. *See Public Integrity Alliance v. City of*
23 *Tucson*, -- F.3d --, 2015 WL 6875310 (9th Cir. Nov. 10, 2015).

24 28. The court held that although the City permissibly could conduct City
25 Council elections on either a ward-only or an at-large basis, the chosen geographical unit
26 must remain constant in both the primary and general elections, explaining that "[b]ecause
27 the constituency of the representative to be elected remains static throughout the election
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1 process, the geographical unit must also remain static throughout that process.” (slip op.
2 at 10).

3 29. Because participation was limited only to qualified electors residing in the
4 ward, the geographical unit for the Ward 2 partisan primary held on August 25, 2015 was
5 Ward 2.

6 30. Because participation was limited only to qualified electors residing in the
7 ward, the geographical unit for the Ward 4 partisan primary held on August 25, 2015 was
8 Ward 4.

9 **Ground for Contest No. 1: Illegal Votes**

10 31. Any elector of the City may contest the election of any person declared
11 elected to a City office on the grounds that the person was elected on account of illegal
12 votes. *See* A.R.S. §§ 16-672(A)(4), -674(A).

13 32. Votes cast by persons who were constitutionally or statutorily ineligible to
14 participate in the contested election are illegal votes. *See generally Moore v. City of Page,*
15 148 Ariz. 151, 713 P.2d 813 (App. 1986).

16 33. Because participation in the Ward 2 partisan primary election was limited to
17 qualified electors residing in Ward 2, only residents of that geographical unit (*i.e.*, Ward
18 2) could, consistent with the Fourteenth Amendment, cast legal votes in the general
19 election for the Ward 2 City Council seat.

20 34. Votes cast in the general election for the Ward 2 City Council seat by
21 individuals residing outside Ward 2 were illegal.

22 35. Upon information and belief, Defendant/Real Party in Interest Paul
23 Cunningham received 10,179 legal votes in the general election for the Ward 2 City
24 Council seat. Kelly Lawton received 11,153 legal votes in the general election for the
25 Ward 2 City Council seat.

26 36. Accordingly, Defendant/Real Party in Interest Paul Cunningham was
27 certified as elected to the Ward 2 City Council seat by reason of illegal votes cast by
28 individuals residing outside the geographical unit.

1 37. Because participation in the Ward 4 partisan primary election was limited to
2 qualified electors residing in Ward 4, only residents of that geographical unit (*i.e.*, Ward
3 4) could, consistent with the Fourteenth Amendment, cast legal votes in the general
4 election for the Ward 4 City Council seat.

5 38. Votes cast in the general election for the Ward 4 City Council by individuals
6 residing outside Ward 4 were illegal.

7 39. Upon information and belief, Defendant/Real Party in Interest Shirley Scott
8 received 6,533 legal votes in the general election for the Ward 4 City Council seat.
9 Margaret Burkholder received 9,143 legal votes in the general election for the Ward 4
10 City Council seat.

11 40. Accordingly, Defendant/Real Party in Interest Shirley Scott was certified as
12 elected to the Ward 4 City Council seat by reason of illegal votes cast by individuals
13 residing outside the geographical unit.

14 **Ground for Contest No. 2: Improperly Declared Winner**

15 41. Any elector of the City may contest the election of any person declared
16 elected to a City office on the grounds that the person did not in fact receive the highest
17 number of votes for the office. *See* A.R.S. §§ 16-672(A)(5), -674(A).

18 42. Because participation in the Ward 2 partisan primary election was limited to
19 qualified electors residing in Ward 2, only votes cast in the general election by residents
20 of that geographical unit (*i.e.*, Ward 2) could, consistent with the Fourteenth Amendment,
21 be counted in determining the winner of the general election for the Ward 2 City Council
22 seat.

23 43. Votes cast in the general election for the Ward 2 City Council by individuals
24 residing outside Ward 2 could not permissibly be counted in determining the winner of the
25 general election for the Ward 2 City Council seat.

26 44. Upon information and belief, Defendant/Real Party in Interest Paul
27 Cunningham received 10,179 votes from qualified electors residing in Ward 2 in the
28 general election for the Ward 2 City Council seat. Kelly Lawton received 11,153 votes

1 from qualified electors residing in Ward 2 in the general election for the Ward 2 City
2 Council seat.

3 45. Accordingly, Defendant/Real Party in Interest Paul Cunningham did not in
4 fact receive the highest number of votes for the Ward 2 City Council seat in the November
5 3, 2015 general election.

6 46. Because participation in the Ward 4 partisan primary election was limited to
7 qualified electors residing in Ward 4, only votes cast in the general election by residents
8 of that geographical unit (*i.e.*, Ward 4) could, consistent with the Fourteenth Amendment,
9 be counted in determining the winner of the general election for the Ward 4 City Council
10 seat.

11 47. Votes cast in the general election for the Ward 4 City Council by individuals
12 residing outside Ward 4 could not permissibly be counted in determining the winner of the
13 general election for the Ward 4 City Council seat.

14 48. Upon information and belief, Defendant/Real Party in Interest Shirley Scott
15 received 6,533 votes from qualified electors residing in Ward 4 in the general election for
16 the Ward 4 City Council seat. Margaret Burkholder received 9,143 votes from qualified
17 electors residing in Ward 4 in the general election for the Ward 4 City Council seat.

18 49. Accordingly, Defendant/Real Party in Interest Shirley Scott did not in fact
19 receive the highest number of votes for the Ward 4 City Council seat in the November 3,
20 2015 general election.

21 **DEMAND FOR RELIEF**

22 WHEREFORE, the Plaintiffs demand relief in the following forms:

23 A. A declaration pursuant to A.R.S. § 12-1831 that participation in the
24 November 3, 2015 general election for the Ward 2 and Ward 4 City Council seats was
25 required to have been limited to qualified electors residing in each respective ward.

26 B. A judgment pursuant to A.R.S. § 16-676(B) annulling or setting aside
27 any and all certifications of election of Defendants/Real Parties in Interest Paul
28 Cunningham and Shirley Scott in Ward 2 and Ward 4, respectively.

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C. A declaration pursuant to A.R.S. § 16-676(C) that Kelly Lawton and Margaret Burkholder should be certified as having the highest number of legal votes for the City Council seats in Ward 2 and Ward 4, respectively.

D. A declaration pursuant to A.R.S. § 16-676(C) that any and all certifications of election of Defendants/Real Parties in Interest Paul Cunningham and Shirley Scott in Ward 2 and Ward 4, respectively, are of no further legal force or effect.

E. **In the alternative**, a judgment pursuant to A.R.S. § 16-676(B) ordering a special election for the Ward 2 and Ward 4 City Council seats.

F. An award of reasonable attorney’s fees and costs pursuant to A.R.S. § 12-348, the private attorney general doctrine, and other applicable law; and

G. Such other relief as the Court deems necessary, equitable, proper, and just.

DATED this 16th day of November, 2015.

STATECRAFT PLLC

By: _____
Kory A. Langhofer
Thomas J. Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
Attorneys for Plaintiffs

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Verification

State of Arizona)
) ss.
County of Pima

_____, being first duly sworn upon his oath, deposes and says:

I have read the foregoing First Amended Verified Election Contest Complaint and know the contents thereof by personal knowledge. I believe the matters and things therein contained are true.

Subscribed and sworn to before me this 16th day of November, 2015.

Notary Public