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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;
and MARGARET BURKHOLDER, an
individual voter and a candidate for Tucson
City Council in Ward 4,

Plaintiffs/Contestants,

v.

CITY OF TUCSON, a chartered city of the State
of Arizona; JONATHAN ROTHSCILD, 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,

and

PAUL CUNNINGHAM, in his capacity as
purported Councilor-Elect for Tucson City

No.

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

Council in Ward 2; and SHIRLEY SCOTT, in
her capacity as purported Councilor-Elect for
Tucson City Council in Ward 4,

Defendants/Real Parties In
Interest/Contestees.

Plaintiffs/Contestants hereby allege as follows:

SUMMARY OF THE CASE

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

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

3. Defendants/Real Parties in Interest Paul Cunningham and Shirley Scott have been certified as elected to the Ward 2 and Ward 4 City Council seats, respectively, on the basis of illegal votes cast by electors residing outside the relevant ward. Accordingly, the certifications should be annulled and declared as lacking any legal force or effect, and 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.

PARTIES

4. Plaintiff Kelly Lawton is a citizen and resident of the United States of America, the State of Arizona, Pima County, and Ward 2 of the City of Tucson, and is a duly registered elector in Ward 2 of the City of Tucson. Plaintiff voted, and was the

1 nominee of the Republican Party for the Tucson City Council seat for Ward 2, in the
2 general election held on November 3, 2015.

3 5. Plaintiff Margaret Burkholder is a citizen and resident of the United States
4 of America, the State of Arizona, Pima County, and Ward 4 of the City of Tucson, and is
5 a duly registered elector in Ward 4 of the City of Tucson. Plaintiff voted, and was the
6 nominee of the Republican Party for the Tucson City Council seat for Ward 4, in the
7 general election held on November 3, 2015.

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

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

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

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

26 10. Defendant Robin Brigode is the Clerk of the Pima County Board of
27 Supervisors, and is named in this action in her official capacity only. The Clerk is a
28 public officer responsible for carrying out the determinations and policies of the Pima

1 County Board of Supervisors with respect to the conduct of elections, to include
2 delivering certificates of elections to candidates declared elected by the Pima County
3 Board of Supervisors. *See* A.R.S. § 16-647.

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

11 12. Defendant/Real Party in Interest Paul Cunningham was certified by the
12 Pima County Board of Supervisors on November 10, 2015 as elected to the Tucson City
13 Council seat for Ward 2. An Official Canvass and Declaration of Results, which would
14 certify Paul Cunningham as elected to the Tucson City Council seat for Ward 2, was
15 placed on the agenda for the Tucson City Council meeting scheduled for November 9,
16 2015, but its consideration was continued until the Tucson City Council meeting
17 scheduled for November 17, 2015.

18 13. Defendant/Real Party in Interest Shirley Scott was certified by the Pima
19 County Board of Supervisors on November 10, 2015 as elected to the Tucson City
20 Council seat for Ward 4. An Official Canvass and Declaration of Results, which would
21 certify Shirley Scott as elected to the Tucson City Council seat for Ward 4, was placed on
22 the agenda for the Tucson City Council meeting scheduled for November 9, 2015, but its
23 consideration was continued until the Tucson City Council meeting scheduled for
24 November 17, 2015.

25 **JURISDICTION AND VENUE**

26 14. This Court has jurisdiction over this action pursuant to Article 6, § 14 of the
27 Arizona Constitution, and A.R.S. §§ 12-123, 16-672, and 16-674(B).
28

1 15. Venue for this action lies in Pima County pursuant to A.R.S. § 16-674(B)
2 because Plaintiffs reside in Pima County.

3 **GENERAL ALLEGATIONS**

4 **The 2015 City Council Elections**

5 16. The City of Tucson is divided into six wards composed of substantially
6 equal populations. *See* Tucson City Charter ch. XVI, § 8.

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

10 18. The four year terms of the City Council members are staggered, and
11 elections are held on a biennial basis in odd-numbered years. *See* Tucson City Charter ch.
12 XVI, §§ 3, 4. Elections for the seats allotted to Ward 1, Ward 2 and Ward 4 were held in
13 2015.

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

19 20. Plaintiff Kelly Lawton voted in the primary election in Ward 2, but was not
20 permitted to participate in the primary elections in either of Ward 1 or Ward 4.

21 21. Plaintiff Margaret Burkholder voted in the primary election in Ward 4, but
22 was not permitted to participate in the primary elections in either of Ward 1 or Ward 2.

23 22. Defendant/Real Party in Interest Paul Cunningham was certified as the
24 winner of the August 25, 2015 Democratic Party primary in Ward 2.

25 23. Kelly Lawton was certified as the winner of the August 25, 2015
26 Republican Party primary in Ward 2.

27 24. Defendant/Real Party in Interest Shirley Scott was certified as the winner of
28 the August 25, 2015 Democratic Party primary in Ward 4.

25. Margaret Burkholder was certified as the winner of the August 25, 2015 Democratic Party primary in Ward 4.

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

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

28. Upon information and belief based on the Official Canvass of the November 3, 2015 election results certified by the Pima County Board of Supervisors, Defendant/Real Party in Interest Paul Cunningham received 10,179 votes in Ward 2 and 45,296 votes citywide.

29. Upon information and belief based on the Official Canvass of the November 3, 2015 election results certified by the Pima County Board of Supervisors, Kelly Lawton received 11,513 votes in Ward 2 and 33,231 votes citywide.

30. Upon information and belief based on the Official Canvass of the November 3, 2015 election results certified by the Pima County Board of Supervisors, Defendant/Real Party in Interest Shirley Scott received 6,533 votes in Ward 4 and 43,824 votes citywide.

31. According to the Official Canvass of the November 3, 2015 election results certified by the Pima County Board of Supervisors, Margaret Burkholder received 9,143 votes in Ward 4 and 34,611 votes citywide.

Constitutional Challenge to Tucson's Hybrid Election System

32. On April 6, 2015, the Public Integrity Alliance, Inc., an Arizona nonprofit corporation, and five qualified electors of the City of Tucson filed a complaint in the United States District Court for the District of Arizona seeking relief pursuant to 42 U.S.C. 1983 and arguing that the City of Tucson's combination of ward-only primary

elections coupled with citywide at-large general elections (the “Hybrid System”) results in the denial or dilution of Tucson electors’ right to vote in violation of the Fourteenth Amendment of the United States Constitution.

33. On November 10, 2015, the United States Court of Appeals for the Ninth Circuit held that the Hybrid System violated the Fourteenth Amendment of the United States Constitution. *See Public Integrity Alliance v. City of Tucson*, -- F.3d --, 2015 WL 6875310 (9th Cir. Nov. 10, 2015).

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

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

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

Ground for Contest No. 1: Illegal Votes

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

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

39. Because participation in the Ward 2 partisan primary election was limited to qualified electors residing in Ward 2, only residents of that geographical unit (*i.e.*, Ward

2) could, consistent with the Fourteenth Amendment, cast legal votes in the general election for the Ward 2 City Council seat.

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

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

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

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

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

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

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

Ground for Contest No. 2: Improperly Declared Winner

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

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

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

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

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

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

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

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

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

DEMAND FOR RELIEF

WHEREFORE, the Plaintiffs demand relief in the following forms:

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

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

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(a)(4), 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 13th 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

Verification

State of Arizona)
County of Pima) ss.

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

I have read the foregoing 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 13th day of November, 2015.

Notary Public