ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. MICHAEL MILLER CASE NO. C20097207

COURT REPORTER: NONE DATE: March 4, 2010

CITY OF TUCSON, a municipal corporation,

Plaintiff,

vs.

STATE OF ARIZONA,

Defendants.

ORDER and JUDGMENT

RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff City of Tucson moves for a declaratory judgment affirming its practice of conducting partisan primary elections and city-wide general elections for members of the City Council despite the 2009 enactment of Senate Bill 1123 that prohibits such elections. The City argues that SB 1123 is an improper attempt by Defendant State of Arizona to regulate a matter that is of strictly local municipal concern. The City principally relies upon the grant of authority to charter cities under Article XIII, § 2 of the Arizona Constitution, and the case law that establishes the authority of a city to govern local matters. The State argues that the City's interest is trumped where the State legislates in a matter of statewide concern. More specifically, the State argues that the Legislature's express determination in SB 1123 that "the conduct of elections described in this section is a matter of statewide concern" is entitled to deference that cannot be overcome without an affirmative showing by the City.

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Background

Election to the Tucson City Council is a two-step process governed by the Tucson City Charter ("Charter") and, by incorporation, applicable State law. First, there is a partisan primary election by ward in which candidates for each registered political party are selected by the voters of the respective parties in the ward. Tucson City Charter Chapter XVI, § 2.[1] The candidates from each ward are then subject to election by all the voters in the City in the general election. Tucson City Charter Chapter XVI, § 9.[2] The candidates' political affiliations are shown on the ballots for both primary and general elections. The Charter incorporates State election law procedures, although the match is not exact. For instance, although Pima County conducts partisan primary and general elections for the Board of Supervisors, the supervisorial candidates are not subject to a county-wide election analogous to the city-wide election. *See* A.R.S. § 11-213(a).

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[1] The Charter incorporates state election law:

> . . . . The provisions of the general laws of the State of Arizona relating to and governing primary elections and the nomination of elective officers, whether by primary or certificate of nomination (being the whole of title 16, Arizona Revised Statutes, 1956, and each and every provision of said title with all amendments and supplements thereto) applicable to a city of the population and the class of this city, shall apply and govern the holding of primaries and nominations of elective officers. The mayor and council shall have power to make any further and additional provisions relating to primaries and nominations of officers not repugnant or contrary to the provisions of the constitution and the laws of the state or any amendments and supplements thereto.

[2] It provides: "Beginning in the year 1930, and continuing thereafter, the mayor shall be nominated from and elected by the voters of the city at large, and 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."

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SB 1123 (1st Regular Session, 2009), would require a significant change in the conduct of the City's primary and general elections for the Council. It prohibits partisan municipal elections or at-large election of ward candidates.[3] The effective date of SB 1123 was September 30, 2009.

The City filed suit on September 16, 2009. The City had already conducted its 2009 primary election (held September 1, 2009), and had begun preparations for the November 3, 2009 general election. The parties[4] to this action recognized that conducting a city-wide election of the candidates selected in the partisan primary election would violate SB 1123, but agreed that the general election could proceed in the manner that had been used for many decades.

The parties filed cross-motions for judgment on the pleadings pursuant to Rule 12(c) despite conflicting allegations as to whether SB 1123 constituted a matter of local concern or state concern. At oral argument the State conceded that the City's method of electing Council members was a matter

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[3] SB 1123 modified A.R.S. § 9-821.01, which provides in relevant part:

> B. Notwithstanding any other law, a city or town shall not hold any election on candidates for which there is any indication on the ballot of the source of the candidacy or of the support of the candidate.
>
> C. Notwithstanding any other law, for any city or town that provides for election of city or town council members by district, ward, precinct or other geographical designation, only those voters who are qualified electors of the district, ward, precinct or other geographic designation are eligible to vote for that council member candidate in the city or town's primary, general, runoff or other election.

[4] The named defendants included Governor Janice Brewer and Secretary of State Ken Bennett in their official capacities. The City agreed to dismiss them upon the State's assurance that the officials would be bound by a judgment against the State. The City and State stipulated to the participation of the Southern Arizona Leadership Council and former state Senator Jonathan Paton as intervenors based on their expected participation in future city elections. Whereas they have no direct role in the conduct of elections, their participation in the briefs and at oral argument was analogous to invited amicus curiae. The designation of City, State, Intervenors, or parties is made as required by the context of the discussion.

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of local concern, but continued to assert the State's statewide concern. The City continued to argue that this was a matter of local concern only. Both governmental parties agreed, however, that whether the matter was of local and statewide concern could be decided pursuant to Ariz. R. Civ. P., Rule 56. All parties provided supplemental briefs[5] addressing the issue of local versus statewide concern.[6]

Analysis

Is the Parties' Disagreement About the Interpretation of the City Charter Relevant?

The parties dispute whether a conflict exists between the provisions of A.R.S. § 9-821.01 and the Charter as they relate to "partisan" elections. The City contends its Charter "mandates the holding of City 'primary elections' in September of each year in which a City general election is held," and it is required to provide for a partisan primary by placing a candidate's party designation on the ballot. *See* Complaint, ¶ 8. The State argues that the Charter does not require primary or partisan elections. It does not dispute, however, that such elections are permitted. Defendants' Motion for Judgment on the Pleadings at 3. Whether primary and partisan elections are required or permitted is not dispositive[7] on

[5] Intervenors included a Motion to Strike a section of the City's Supplemental Brief that the State joined. The Motion is moot in view of the Court's resolution of the issues.

[6] The City also argued that SB 1123 constituted an impermissible special law because it only affected Tucson at the time of its passage. The argument fails because SB 1123 applies equally to any municipality that attempts to introduce partisan or at-large elections. *Cf., Sherman v. City of Tempe*, 202 Ariz. 339, 344-45, 45 P.2d 336, 341-42 (2002) (charter amendment applies to all future Tempe mayors). Moreover, the multi-factor analysis of a special law challenge under Article IV, pt. 2, § 19.13 of the Arizona Constitution is unnecessary in view of the overlapping analysis relating to statewide concerns. *See infra.*

[7] The City Charter and, by reference, Title 16, specifies the method and manner in which a primary is to be held. *See supra* note 1. Title 16 contemplates and provides for both partisan and nonpartisan primary elections. *Compare*

the pending issues because the City is clear that it intends to continue conducting partisan and city-wide elections unless it is prohibited from doing so by SB 1123. Further, the parties' stipulation that the provisions of A.R.S. § 9-821.01 would not apply to the November 2009 city elections supports the conclusion that there is a justiciable controversy independent of the parties' position on the interpretation of the Charter. The dispositive issues relate to the impact, scope, and validity of SB 1123.

Is SB 1123 a Matter of Local Concern Only?

The Arizona Constitution provides that a city charter "shall not be in conflict with this Constitution or with the laws of the State." Article XIII, § 2. The literal language of this constitutional provision has been interpreted to authorize a chartered city to govern independent of state statutes on matters of strictly municipal concern. *City of Tucson v. Walker*, 60 Ariz. 232, 238, 135 P.2d 223 (1943); *McMann v. City of Tucson*, 202 Ariz. 468, 471, ¶ 8, 47 P.3d 672 (App. 2002).

A.R.S. § 16-311(A) and (B). Although the City asserts that Title 16 requires partisan primary elections, it does not address the statutory provisions for nonpartisan elections. The Court concludes the City could conduct nonpartisan elections under the present Charter/statutory scheme.

The Charter is silent, however, on the choice between partisan and nonpartisan elections. The only City ordinance directly relating to the conduct of elections provides that the city clerk is authorized to promulgate rules, regulations, procedures, and forms necessary to conduct city elections. Tucson City Ordinances, § 12-1.3. A range of circumstances can be envisioned wherein the Mayor, the City Council or the City Clerk could choose to apply the nonpartisan sections of Title 16 rather than the partisan sections. The City's flexibility in whether to choose partisan versus nonpartisan elections arguably supports the conclusion that partisan elections are not a critical consideration in the election of Council members; however, the Court does not consider this factor due to the City's interpretation of its Charter and the absence of a full record on this point.

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The threshold issue is whether partisan municipal elections and city-wide general elections for city council are a matter of local concern only. The City relies upon *Strode v. Sullivan,* 72 Ariz. 360, 236 P.2d 48 (1951) for a bright-line proposition that the method of a local election can only be a matter of local concern. *Strode* also involved a challenge regarding partisan elections. In that case, however, the Democratic Party argued that the City of Phoenix's ban on partisan elections was improper. The Arizona Supreme Court concluded "that the method and manner of conducting elections in the City of Phoenix is peculiarly the subject of local interest and is not a matter of statewide concern." *Id.* at 368.

Despite the commanding dicta, *Strode* does not create an immutable principle that the conduct of municipal elections is always a matter of exclusively local concern. The *Strode* court observed that "[i]f the matter of selecting officers for charter cities can be said to be a subject of state concern, then we think [the charter must give way to the statutory law]." *Id.* at 363. For instance, in *City of Tucson v. State of Arizona,* 191 Ariz. 436, 957 P.2d 341 (App. 1997), the court held that a state statute consolidating election schedules was a matter of statewide concern that took precedence over a contrary city charter provision.

Here, the State relies on the Legislature's statement within the statute itself that the "legislature finds that the conduct of elections described in this section is a matter of statewide concern." A.R.S § 9-821.01(A). The City argues that the inclusion of such language in the statute is nothing more than an attempt to avoid the clear holding of *Strode.* Where the language of a statute and its legislative

history clearly indicates a statewide interest in a matter, the legislative conclusion is entitled to judicial deference. *City of Tucson v. State, supra,* 191 Ariz. at 439. The courts are required, however, to examine the support for such a declaration. *Id.* The legislative history of SB 1123 demonstrates that there was concern about discrimination, including the use of at-large elections to keep some racial groups from electing representatives in their wards. *See* June 25, 2009, House Judiciary Committee Hearing. The Legislature also considered arguments regarding the particular impact of SB 1123 on Tucson compared with other municipalities and supervisorial districts. *Id.*

In view of the Constitution, legislative history, and express declaration in A.R.S. § 9-281.01, the Court finds that the statute pertains to matters of statewide concern and is not limited to local interests.

Does the Finding of a Statewide Interest Trump the City's Interest?

The State and Intervenors strongly argue that once a finding of statewide interest is made, the Court's inquiry is largely finished. More specifically, they argue that the balancing test described in *City of Tucson v. State,* is not supported by Arizona Supreme Court case law, and is based on a misinterpretation of McQuillin, THE LAW OF MUNICIPAL CORPORATIONS, § 4:85 (3d Ed. 1996). The City acknowledges use of a balancing test in *City of Tucson v. State,* but reurges its fundamental argument that *Strode v. Sullivan* eliminates any possible statewide interest. Further, to the extent that a balancing test may be implicated, the City contends under the case law that its interest is paramount.

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The State and Intervenors correctly note that the balancing test has had virtually no application since its appearance in *City of Tucson v. State*. *See, e.g., City of Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart,* 197 Ariz. 600, 5 P.3d 934 (App. 2000) and *City of Casa Grande v. Ariz. Water Co.,* 199 Ariz. 547, 20 P.3d 590 (App. 2001). Moreover, McQuillin does not discuss or describe a balancing test. *See* § 4:85. Whatever may be the merits of a balancing test in this context, however, a superior court is bound to follow an appellate court ruling that has not been explicitly or indirectly overruled. *See Francis v. Ariz. Dept. of Transp.,* 192 Ariz. 269, 271, 963 P.2d 1092, 1094 (App. 1998). This Court is required to compare the relative interests of the City and the State.

Is the State's Interest Paramount?

If a conflict between a city charter and a state statute involves issues of both local and statewide interests, a balancing test evaluates the issues to determine which interest is paramount. *City of Tucson v. State*, *supra,* 191 Ariz. at 439. The State and Intervenors assert three broad arguments: (1) partisan politics at the municipal level is more likely to encourage deleterious patronage effects than substantive policy debate; (2) city-wide general elections not infrequently result in the election of a council member who received fewer votes than another candidate in the ward; and, (3) city-wide elections frequently result in discrimination where there is an uneven distribution of racial groups across the wards. Each argument is addressed separately.

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Public Policy Debate on Nonpartisan Municipal Elections. A strong majority (approximately 75%) of municipalities in the United States use nonpartisan elections.[8] The historical reasons for the transition from partisan elections included lessening the corrosive effects of big city political machines and encouraging citizen participation in municipal government. Removing party affiliation from the ballot has been shown to eliminate voter reliance on the party label, even though political parties are involved in the selection and support of persons to run as nonpartisan candidates.[9] Voters may instead rely upon campaigns, communications, incumbency, name recognition, and gender or ethnic variables.

Policy analysts are not unanimous in their support for nonpartisan municipal elections. The Brennan Center for Justice at New York University argues that nonpartisan elections would have a number of adverse effects on democracy in New York City. *See* "Statement on Nonpartisan Elections in New York City," Democracy Program, Brennan Center for Justice, available 3/3/10 at http://brennan.3cdn.net/e99986f3c21bf6601f_c3m6ii8zz.pdf (2003). The possible negative effects include reduced voter participation, increased importance of candidate name-recognition and personal wealth, and greater strategic advantages for single-issue candidates. *Id.* at 1.

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[8] Brian Schaffner, Matthew Streb, and Gerald Wright, Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections, 54 Political Research Quarterly 7 (2001).

[9] *See* Karen I. Chang, The Party's Over: Establishing Nonpartisan Municipal Elections in New York City, 11 N.Y.U. J. Legis. & Pub. Policy 579 (2003) (providing a comprehensive overview of the structure for nonpartisan elections and the role political parties play in elections).

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Whether it is preferable to inform voters about the candidates based upon party affiliation versus other factors is a policy determination that courts are not-well equipped to address. *See Henning v. Montecini Hospitality, Inc.*, 217 Ariz. 242, 246, ¶ 13, 172 P.3d 430, 434 (App. 2007) (courts exceed their authority where they substitute their own public-policy determinations for those of the legislature). The importance of having consistency among municipal elections across the state is a matter uniquely suited for state legislative consideration. For instance, the State is in the best position to determine whether the method of selecting municipal leaders affects state-municipal issues such as finance[10] and public safety.[11] The finding of a statewide concern is not synonymous with a preference for nonpartisan elections. For example, the Michigan legislature compels partisan primary elections for various county officials despite the opposition of its largest county. *See O'Hara v. Wayne County Clerk*, 238 Mich.App. 611, 625, 607 N.W.2d 380, 387 (1999) (Cavanagh, J., concurring) (acknowledging statewide concern, but inviting legislature to reconsider ban on nonpartisan elections).

The Court concludes that the policy debate regarding partisan versus nonpartisan municipal elections does not clearly favor either party. The finding in favor of nonpartisan municipal elections by the Legislature tips the scales in favor of the State because of the Legislature's unique role in evaluating such policy matters.

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[10] *See, e.g., State v. Jaastad*, 43 Ariz. 458, 465, 32 P.2d 799 (1934) (statute fixing minimum wage is of general public concern).

[11] *See, e.g., Luhrs v. City of Phoenix*, 52 Ariz. 438, 443, 83 P.2d 283 (1938) (matters of police and fire protection are of statewide concern).

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Are Ward Votes Improperly Diluted? The right of citizens to choose their governments is protected in the Arizona Constitution. *See* Article II, § 2. The Intervenors argue that the inability of the City's ward voters to elect their representative to the Council is significantly diluted by counting non-ward votes. Using past electoral data, the Intervenors show that there have been many elections in which a candidate with the most number of votes in a particular ward was not elected because voters from other wards favored a different candidate. *See* Intervenors' brief at 10 and supporting attachments. Although the City correctly points out that city-wide elections make each candidate responsive to concerns beyond their ward, this argument pales against the Arizona Constitution. Moreover, there is no other type of election in Arizona that subordinates the choice of the district's voters to the interest of the larger jurisdiction. Finally, the City points to no evidence suggesting that at-large elections pose an advantage over ward elections. This factor supports the conclusion that a prohibition on city-wide elections is a matter of statewide concern.

Will City-Wide Elections Result in Discrimination or Voting Rights Litigation? The State also argues that it has a very strong interest in preventing discrimination if there are racial or ethnic differences across the wards that could result in disenfranchisement of groups of voters who only reside in one or two wards. The State acknowledges that there is no evidence of such adverse impact in Tucson despite the practice of city-wide elections for almost 80 years. It argues, however, that it must be proactive on such issues because Arizona is a "covered jurisdiction" for purposes of the Voting Rights Act. *See* 28 C.F.R. pt 51, App. (2008). This requires the State and its subdivisions to

submit for preclearance any change in law that affects voting. 28 C.F.R. § 51.1(a). The purpose of this submission to the federal government is to show an absence of discriminatory intent or effect on members of racial or language minority groups. *See* State's Declaration of Counsel, Ex. 2 at 3. The State shows that in the last ten years there have been numerous lawsuits by the Department of Justice challenging at-large voting systems as unlawful under the Voting Rights Act. Such concerns are recognized in federal constitutional jurisprudence. *See, e.g., Rogers v. Lodge,* 458 U.S. 613, 627-28 (1982) (affirming lower court holding that at-large voting in county board elections was unconstitutional); *City of Port Arthur v. U.S.*, 459 U.S. 159, 168 (1982) (at-large voting in city elections violated the Voting Rights Act). Prohibiting city-wide elections removes the threat of litigation that would likely involve the State. It also reflects appropriate caution in light of Arizona's status as a "covered jurisdiction." This factor also supports the State's interest over the City's interest.

Conclusion

In SB 1123 the Legislature determined that the conduct of local elections, whether they are partisan or at-large, is a matter of statewide concern. The Legislature recognized the legal significance of a declaration of statewide concern, and explicitly included that determination in the statute. As part of its concern, the Legislature prohibited partisan and at-large elections for any Arizona municipality. The City's practice of partisan and at-large elections directly conflicts with SB 1123.

The method of conducting city elections is a matter of significant local concern, but the concern is not exclusive to the City of Tucson. The State of Arizona also has an interest in the method

of city elections because of the potential for disparate impact on members of racial or language minority groups, and litigation against it under the Voting Rights Act. Further, the State is in a unique position to determine whether its municipalities should be uniform as it pertains to the source of candidates' support. The State's interest in municipal elections is paramount over the City of Tucson's preference for partisan, city-wide elections. The City must comply with SB 1123.

IT IS HEREBY ORDERED ***granting*** the Motion for Summary Judgment by the State of Arizona and ***denying*** the Cross-Motion for Summary Judgment by the City of Tucson.

IT IS FURTHER ORDERED ***denying*** the request by the City of Tucson for a permanent injunction that would exempt it from complying with the requirements of SB 1123 in the administration of any future city election.

NOW THEREFORE IT IS ADJUDGED AND DECREED that Plaintiff City of Tucson take nothing by its complaint, and that judgment be entered for Defendant State of Arizona.

Dated this _____ day of March, 2010

_____
Judge Michael Miller

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