

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. GUS ARAGON

CASE NO. C20155222

DATE: December 07, 2015

KELLY LAWTON and  
MARGARET BURKHOLDER  
Plaintiffs

VS.

CITY OF TUCSON and  
PIMA COUNTY  
Defendants

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**RULING**

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IN CHAMBERS RULING:

Before the Court for Ruling is the First Amended Election Contest Complaint of the Plaintiffs. The Court has received and considered the pleadings, the written and oral arguments of counsel, the exhibits admitted into evidence, and the stipulated facts. The parties have stipulated to certain facts set forth below as items 1 – 10.

1. Per the City of Tucson Charter, the 2015 elections for wards 2 and 4 were conducted with ward-only primaries and an at large (*i.e.*, city-wide) general election.
2. All votes in the primaries were cast on or before 8/25/15; all votes in the general election were cast on or before 11/3/15. Pima County canvassed the general election returns on 11/10/15. The City canvassed on 11/17/15.
3. Per the City's canvass, Paul Cunningham and Shirley Scott received the most votes in the at large general elections for Wards 2 and 4, respectively; although Kelly Lawton received more votes than Cunningham among the voters who voted in Ward 2; and Margaret Burkholder received more votes than Scott among voters who voted in Ward 4. Based on those canvassed results, Cunningham and Scott were certified by the City Clerk as the council electees from Ward 2 and Ward 4.
4. On April 6, 2015, plaintiffs Public Integrity Alliance, Inc. ["PIA"]; Bruce Ash, Fernando Gonzales; Ann Holden; Lori Oien; and Ken Smalley filed a Complaint and a Motion for Preliminary Injunction in the United States District Court, asking the Court to prohibit the City from conducting the 2015 elections or any

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future elections using the "hybrid" system established under the Charter, and to order the City, pending an amendment to the Charter, to conduct its primary and general elections for City Council as either entirely ward-only or entirely at-large. The Complaint also sought a declaration that the "hybrid" system is unconstitutional under the Equal Protection Clause of the 14th Amendment.

5. On May 20, 2015, the District Court issued its Order in the PIA case, denying plaintiffs' therein motion for preliminary injunction, dismissing their dilution of right to vote claim, awarding judgment in favor of Defendants (the City, *et al.*) and dismissing all of plaintiffs' constitutional claims relating to the City's "hybrid" election structure.
6. On November 10, 2015, after all votes had been cast in the 2015 election, the 9<sup>th</sup> Circuit Court of Appeals issued its Opinion in the PIA case, with the majority opinion reversing the District Court and finding that the City's "hybrid" system violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.
7. The Ninth Circuit has not issued the Mandate in connection with the Opinion; the City has until 12/11/15 to file a Petition for Panel Rehearing and/or for Rehearing En Banc; and the Mayor and Council have directed the City Attorney to file a Petition for Rehearing En Banc on or before that date. Filing of the Petition will automatically stay the issuance of a Mandate.
8. On November 13, contestants filed this election contest; and on November 16, the First Amended Complaint was filed, adding 2 additional contestants.
9. When certifying the results of the general election on November 17, 2015, the Tucson City Council was aware of the November 10, 2015 ruling from the Ninth Circuit.
10. Exhibits 3 and 4 to the Trial Memorandum of Plaintiffs/Contestants, as filed on November 27, 2015, are true and accurate copies of the official canvasses for Wards 2 and 4 in the 2011 general election.

Plaintiffs have challenged the hybrid election system used by the City of Tucson for more than 80 years. In that system City Council candidates are required to run in a ward only primary. Successful candidates then run in a city wide general election. Plaintiffs challenge this system as unconstitutional. Plaintiffs have asked for alternative remedies. First they ask that the election of Defendants Cunningham and Scott be nullified and that Plaintiff Lawton be declared winner over Cunningham and Plaintiff Burkholder be declared winner over Scott. In the alternative Plaintiffs have asked this Court to nullify the election of Defendants Cunningham and Scott and order the City of Tucson to hold a special election for Ward 2 and 4 Council seats.

The parties have all agreed that, barring a stay in this matter, this Court must enter its Dispositional Ruling by December 7, 2015. The Court finds no good cause to stay these proceedings.

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In order to find for the Plaintiffs the Court would have to find unconstitutional the system in place at the time of the challenged election. Plaintiffs bear the burden of proof. Plaintiffs argue that this current system is unlawful because it allows voters from outside a particular ward to vote for the candidate for that ward in the general election. Plaintiffs argue that this violates the 14<sup>th</sup> Amendment. Plaintiffs' also argue that illegal votes were counted. Defendants respond that the current system is valid and votes were validly counted under federal, state and municipal law, and that laches preclude Plaintiffs' claims. In considering this issue the Court will not attach any precedential value to PIA. No mandate has issued in PIA; and the City of Tucson has until December 11, 2015 to file a Petition for Rehearing in PIA.

Based upon the facts presented, the Court finds that Plaintiffs' claims are precluded by laches. Plaintiffs waited until after the election to file this action. This action challenges the election process. It should have been pursued before the election, not after. *Mathieu vs. Mahoney*, 174 ARIZ. 456,459 (1993). Defendants Cunningham and Scott have submitted declarations which are un rebutted. They assert that they campaigned the way they did in this election based upon the hybrid system in place when the election took place. They would have campaigned differently had a different system been in place. They ran their campaigns in reliance on the operation of the election system as it existed at the time of the election.

It has been argued and is unrefuted that Plaintiffs Lawton and Burkholder campaigned and accepted public funds for their respective campaigns under the hybrid system, and they did not file suit until after losing in the general election. Plaintiffs use of public funds and delay is considered in the context of fairness and equity in evaluation the issue of laches.

Both Plaintiffs and Defendants have relied upon and cited many cases. Both sides agree that *McComb vs. Superior Court*, 189 ARIZ 518 (1997) is instructive. The Court has reviewed *McComb*, in which the Court acknowledged that laches may apply to an election contest under appropriate circumstances. This Court finds that those circumstances exist here. Defendants Cunningham and Scott have shown the necessary elements for the application of laches. They have shown reliance upon the hybrid system under which they campaigned. The Court finds as well that the City of Tucson relied upon existing law at time of the challenged election. The voting public presumably similarly relied on the fact that they were voting under the hybrid system. The Court further finds that Plaintiffs' delay in filing this action after the general election was unreasonable. This delay in light of Plaintiffs' knowledge of the existing system is unfair and prejudicial to Defendants Cunningham, Scott and the City of Tucson.

IT IS THEREFORE ORDERED dismissing Plaintiffs' claims in their entirety on the basis of laches. No further matters remain pending and judgment is entered pursuant to Rule 54(c).

  
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Clerk of Court - Under Advisement Clerk

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