SUPREME COURT OF ARIZONA

STATE OF ARIZONA, ex rel. MARK BRNOVICH, Attorney General, Petitioner, v. CITY OF TUCSON, Arizona, Respondent.	Supreme Court No. CV–20–0244-SA

RESPONSE TO PETITION FOR SPECIAL ACTION

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Introduction

Our state is among a very few in which the powers of charter cities stem not from acts of the Legislature, but instead from the same Constitution that created the Legislature itself. Because of that independent authority, this Court has long confirmed that charter cities like the City of Tucson ("City") enjoy "independen[ce from] the State legislature" on "all subjects of strictly local municipal concern." *City of Tucson v. State ("Tucson II")*, 229 Ariz. 172, 174 ¶ 10 (2012) (quoting *City of Tucson v. Tucson Sunshine Climate Club*, 64 Ariz. 1, 8–9 (1945)).

In particular, and as the Attorney General concedes, "charter city governments enjoy autonomy with respect to structuring their own governments." *Id.* at 176 ¶ 21. This autonomy includes "the 'method and manner of conducting elections in the city,'" *State ex rel. Brnovich v. City of Tucson ("Tucson IV")*, 242 Ariz. 588, 602 ¶ 56 (2017) (quoting *Strode v. Sullivan*, 72 Ariz. 360, 368 (1951)), and the decision on "who shall be its governing officers and how they shall be selected," *Strode*, 72 Ariz. at 368. In short, and as this Court has expressly confirmed, "[m]unicipal elections" are among the "matters of local interest" protected from the Legislature's interference. *Triano v. Massion*, 109 Ariz. 506, 508 (1973).

Yet in this original action, the Attorney General claims that two recently enacted Arizona statutes about when and how a city should hold its purely local, municipal elections—A.R.S. §§ 16-204.01 and 16-204.02 (collectively, the "Legislation")—should trump the repeated choice of City

voters to have their elections on a schedule of their choosing. Specifically, these statutes command the City to move forward by one year, to even-numbered years, its elections for certain elected officials and to extend the terms of office for these municipal officials.

The Arizona Constitution, however, bars the State from encroaching on the City's autonomy over the structure of its elections and the tenures of its officials, for at least four reasons.

First, by commanding the City to move its municipal elections to even-numbered years consistent with the State's elections ("on-cycle elections"), the Legislature impermissibly seeks to substitute its policy choices for those of the City as to the "method and manner of conducting [its] elections," *Tucson IV*, 242 Ariz. at 602 ¶ 56 (quoting *Strode*, 72 Ariz. at 368), including "how [the cities' governing officials] shall be selected," *Strode*, 72 Ariz. at 368.

Second, by extending the tenures of the City's elected officials, the Legislation encroaches on the City's autonomy to "structur[e its] own government[]," *Tucson II*, 229 Ariz. at 176 ¶ 21.

Third, the purported interests that the Attorney General claims the Legislature had in enacting the Legislation—generalized interests like voter turnout—do not establish that the State has a *statewide* interest in the City's elections on City matters for City voters at the City's expense. Because there is no statewide interest in the Legislation, it cannot displace the City's laws on its own affairs.

Lastly, the State's renewed attempt to encroach on the City's elections also violates the Arizona Constitution's prohibition against certain "local or special laws." ARIZ. CONST. art. IV, pt. 2 § 19. This prohibition prevents legislative targeting, including through laws creating classifications that are not "elastic," meaning they do not "allow[] 'other individuals or entities to come within' and move out of the class." *Gallardo v. State*, 236 Ariz. 84, 88 ¶ 11 (2014). The Legislation fails this long-established test because once a city falls within the class of political subdivisions required to hold on-cycle elections, they can never exit. Based on the turnout of a single set of elections, the Legislation would forever require the City to conduct on-cycle elections. As a result, A.R.S. § 16-204.01 is an unconstitutional special law.

In the end, the Legislation seeks to regulate a subject that the Constitution put beyond the Legislature's reach in a manner that the Constitution forbids. The City thus respectfully asks this to Court "resolve the issue" in this Special Action by determining that the City's Charter and implementing Ordinance do not "violate any provision of state law." A.R.S. § 41-194.01(B)(2).

Statement of Facts

The City Sets Its Candidate Elections for Odd-Numbered Years

The City is a charter city under Article 13, Section 2 of the Arizona Constitution. As set forth in the Tucson City Charter ("Charter"), the "[C]ity shall have power . . . [t]o provide for the manner in which and the

times at which any municipal election shall be held . . . ." Charter, Chapter IV, § 1(20).

As amended in 1960, the Charter sets primary and general elections for the Mayor and Council Members for every four years, in odd-numbered years ("off-cycle elections"). Charter, Chapter XVI, §§ 3, 4. These terms are staggered, so that a portion of the governing body is elected every two years. *Id.* § 4. The City's general elections are generally held "on the first Tuesday after the first Monday in November" in election years. *Id.* § 3. Primary elections are also held in odd-numbered years. *Id.* § 2. The next local elections, for example, are scheduled for 2021.

As reflected in the Charter, and as City voters recently reaffirmed in a referendum, the City's decision to conduct its elections off-cycle—separately from other county, state, and federal elections—is a local policy choice that the electorate has confirmed.

The Legislature Mandates Municipal Candidate Election Dates

Nonetheless, and for nearly a decade now, the Legislature has attempted to force the City to hold certain municipal elections in even-numbered years, or concurrently with the State's elections.

Initially, in 2012, the legislature amended A.R.S. § 16-204 to provide that, "[n]otwithstanding any other law or any charter or ordinance to the contrary, a candidate election held for or on behalf of any political subdivision of this state other than a special election to fill a vacancy or a recall election may only be held on" certain enumerated

dates "and only in even-numbered years." A.R.S. § 16-204(E).

The City sued, arguing that the legislature did not have the authority to preempt the provisions in their charters that mandate candidate elections be held in odd-numbered years. *City of Tucson v. State* ("*Tucson III*"), 235 Ariz. 434 (App. 2014). The Court of Appeals agreed, holding "that state-mandated election alignment, when it conflicts with a city's charter, improperly intrudes on the constitutional authority of charter cities," provided under Article 13, Section 2. *Id.* at 435 ¶ 3. In doing so, the Court of Appeals recognized that the timing of municipal elections implicated policy decisions, which are best "entrust[ed] . . . to the voters of charter cities." *Id.* at 439 ¶ 16 (quoting *Tucson II*, 229 Ariz. at 180 ¶ 46).

This Court declined review and the City continued to hold elections for its Mayor and Council Members in odd-numbered years, including in 2019, as mandated by its Charter.

Undaunted by *Tucson III*, the Legislature again attempted, in 2018, to force the City to move its local elections, by enacting A.R.S. §§ 16-204.01 and 16-204.02. *See* A.R.S. § 16-204.01(A); *see also* 2018 Ariz. Legis. Serv. Ch. 247 (H.B. 2604).

Under § 16-204.01 the Legislature mandated that if, "[b]eginning with elections in 2018," there is a "significant decrease in voter turnout" in a political subdivision's elections—including in charter cities like Tucson—then that political subdivision must hold its subsequent

elections, "other than special elections or recall elections, . . . on the statewide election dates." A.R.S. § 16-204.01(C). Statewide elections fall within even-numbered years and coincide with county and federal elections. *See* A.R.S. §§ 16-211, -201.

Under A.R.S. § 16-204.02, the Legislature also imposed additional requirements for a political subdivision consolidating its local elections with the statewide elections. When moving to the statewide elections, for example, A.R.S. § 16-204.02(A) "lengthen[s]" "the terms of office for elected officials of the political subdivision."

The City Electorate Reaffirms Its Choice of Off-Cycle Elections

Recognizing that A.R.S. §§ 16-204.01 and 16-204.02 would, among other things, require City candidate elections be held in even-numbered years in conflict with the Charter, the City put the question of the method and manner of local candidate elections in the hands of the local electorate, entrusting its voters to determine whether they want their municipal elections shaped by State, county, or federal issues, or conducted off-cycle from those other elections. Specifically, the City asked its voters either to reaffirm their choice for off-cycle elections or to amend the Charter to move to consolidated on-cycle elections and extend the terms of their incumbent officers.

A proposed Charter amendment was presented to the voters as Proposition 408 at the November 2018 election. Under it, the Mayor and those Council Members whose terms were set to expire in 2019 would

have continued in office until 2020, at which time there would have been primary and general elections for those offices. [Appendix to Response to Petition for Special Action ("APP-") 005–007] And those Council Members whose terms expire in 2021 would have continued in office until 2022, at which time there would have been primary and general elections for those offices. *Id.*

Voters rejected the measure decisively. 57.84% of voters voted "NO," and 42.16% of voters voted "YES." [APP-031] As a result, the Charter continues to require that elections for Mayor and Council Members be held in odd-numbered years. Charter, Chapter XVI, §§ 3, 4.

The Ordinance Sets the City's 2021 Elections

Following the voters' directive, on February 19, 2020, the Mayor and Council enacted Ordinance No. 11731 (the "Ordinance"). [APP-068–070] The Ordinance outlined the City's elections in 2021, with two aspects that are most relevant here. First, the Ordinance "call[ed] a City primary election" to be held on August 3, 2021, "at which candidates for the offices of Council Members from Wards Three, Five, and Six shall be nominated." [*Id.* at Sec. 1] Second, it "call[ed] a City general election" for November 2, 2021," at which candidates for the same offices will be elected. [*Id.* at Sec. 2][1]

[1] The Ordinance did not call for any "special elections."

This Action

Several months after the Ordinance, on June 16, 2020, an Arizona legislator filed with the Attorney General a Request for Investigation (the "Request"), pursuant to A.R.S. § 41-194.01, asking whether "Tucson ordinance 11731 (Feb[.] 19, 2020)" conflicts with "A.R.S. 16-204, A.R.S. 16-204.01, & A.R.S. 16-204.02." [APP-071]

Responding to the Request, the City acknowledged, as it does here, that the Legislation has been triggered based on the City's 2019 election and the turnout from that election. *See* A.R.S. § 16-204.01(B), (C). The City also agreed that the Legislation now conflicts with the City's laws. Whereas the City's Charter and Ordinance require its elections for Mayor and Council Members in odd-numbered years (like 2021), the Legislation now requires these elections in even-numbered years (like 2022). And whereas the City's laws grant the current Mayor and Council Members four-year tenures, the Legislation extends these tenures to five years.

But relying on this Court's precedent and those of the Court of Appeals, the City explained that A.R.S. § 16-204.01 does not displace the City's Charter provisions and Ordinance to the contrary, because of the "home rule charter" provision in the Arizona Constitution. [APP-074–082] Nonetheless, the Attorney General concluded that "the Ordinance may violate" the Arizona Constitution. [APP-085 (emphasis omitted)]

Statement of the Issues

1. Considering that the "home rule charter" provision of the

Arizona Constitution gives charter cities autonomy over matters of purely municipal concern, are the City's choices to hold its own elections for its own officials on dates of its own choosing and to set the terms of office for its Mayor and Council Members, both matters of purely local concern, such that A.R.S. §§ 16-204.01 and 16-204.02 may not displace the conflicting provisions of the City's Charter and Ordinance?[2]

2. Considering that Arizona's Constitution prohibits "local and special laws" that create election classifications from which there is no exit, and considering that A.R.S. § 16-204.01 creates a classification from which there is no exit, is A.R.S. § 16-204.01 unconstitutional?

Argument

As in the past, the Legislature's renewed attempt to encroach on the City's purely municipal elections fails, for reasons old and new.

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[2] The Petition (at 5) adopts verbatim the text of the legislator's Request as the "Statement of the Issue" before this Court. The Request asks whether the Ordinance violates A.R.S. § 16-204.01 "by calling for elections for" "city ballot measures" (as well as elections for City Council Members). [APP-073] But the Petition does not address any conflict between A.R.S. § 16-204.01 and the City's ability to set elections for ballot measures. This makes sense. The Ordinance does not call for any "special election," including one related to ballot measures. [*See* APP-068–070] Further, as a legal matter, the plain language of A.R.S. § 16-204.01(C) exempts "special elections." To the extent this Court views the City's ability to hold special elections related to ballot measures as being at issue in this case, the City requests that the Court order supplemental briefing on the issue.

I. A.R.S. §§ 16-204.01 and 16-204.02 Violate Article 13, Section 2 of the Arizona Constitution.

As much as the Legislature might want to govern even the purely local concerns of charter cities, the Constitution denies it that power. Where, as here, a statute conflicts with a city's charter, the issue of "whether [these] state laws displace [the] charter provisions depends on whether the subject matter is characterized as of statewide or purely local interest." *Tucson IV*, 242 Ariz. at 601 ¶ 52 (emphasis omitted) (quoting *Tucson II*, 229 Ariz. at 176 ¶ 20). For the reasons below, the City's laws on its own elections and its governing officials' terms of office are issues of purely local concern.

A. The Arizona Constitution Guarantees Charter Cities Autonomy in Matters of Purely Local Concern.

The Attorney General admits, as he must, that the City has autonomy in legislating certain local concerns. Indeed, "[s]ince statehood, Arizona's Constitution has included a 'home rule' provision authorizing eligible cities to adopt charters." *Tucson II*, 229 Ariz. at 173 ¶ 1.

Specifically, under Article 13, Section 2 an eligible city "may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the State," that will "become the organic law of such city and supersede any" existing charter or inconsistent ordinances. ARIZ. CONST. art. XIII, § 2. "Once adopted and approved, a city's charter is, 'effectively, a local constitution.'" *Tucson IV*, 242 Ariz. at 598 ¶ 39 (quoting *Tucson II*, 229 Ariz. at 174 ¶ 10). "[T]he very purpose

of the home-rule provision is to render cities independent of the legislature with respect to matters strictly of local concern[.]" JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 333 (2d ed. 2013) (hereinafter, "LESHY, CONSTITUTION").

Arizona's framers "valu[ed] local autonomy" and, thus, empowered charter cities to govern their own local affairs. *Tucson II*, 229 Ariz. at 174 ¶ 8; *see also* TONI MCCLORY, UNDERSTANDING THE ARIZONA CONSTITUTION 174 (2d ed. 2010). Consistent with this, the framers also "rejected th[e] view" that "generally viewed cities and towns as entirely subordinate to and dependent on the state's legislature for any governmental authority." *Tucson II*, 229 Ariz. at 173 ¶ 7, 174 ¶ 8.

Tellingly, the importance of home rule for cities was a key issue at the constitutional convention. "[H]ome rule for counties and cities" "provoked much debate" and "was a major issue in the selection of delegates to the convention." LESHY, CONSTITUTION at 12; *see also* John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 47 (1988) ("Home rule was an issue common to all state constitutions, mirroring the federalism debates of the national Constitution."). So, at the convention, the founders "put constitutional limits on the legislature's ability to interfere with cities and towns." MCCLORY, *supra*, at 178. Specifically, they empowered "charter cities [to] enjoy their own, individualized forms of government," analogous to the 50 states' laboratories of democracy. *Id.* (emphasis omitted).

Notably, as Arizona drafted its constitution, "Western[] and progressive constitutions commanded the most attention" as exemplars. Leshy, *supra*, at 98–99. In particular, Arizona largely relied on the Constitution of Oklahoma—including its "identical" home-rule provision, *Strode*, 72 Ariz. at 364—despite then-President William Howard Taft "pointedly warn[ing] against patterning Arizona's constitution after Oklahoma's" because it was "a 'zoological garden of cranks.'" LESHY, CONSTITUTION at 9 (citation omitted). Notwithstanding this warning, Arizona's framers adopted much of Oklahoma's Constitution and granted charter cities autonomy to rule their own local affairs without encroachment by the Legislature. *See* ARIZ. CONST. art. XIII, § 2.[3]

Against this background, "this court has uniformly held that . . . the provisions of [a] charter supersede all laws of the state in conflict with such charter provisions insofar as such laws relate to purely municipal affairs." *Strode*, 72 Ariz. at 365; *see also Tucson IV*, 242 Ariz. at 598 ¶ 40

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[3] The Attorney General (at 15) cites Missouri's Constitution and a 19th Century case concluding that Missouri had "not intended to abdicate state sovereignty over [charter cities]." *State ex rel. Crow v. Lindell Ry. Co.*, 52 S.W. 248, 253 (Mo. 1899). But Missouri's home-rule provision and precedent are inapposite here. The Attorney General overlooks that Missouri's home-rule provision, in granting charter cities *some* home-rule power, prohibited them from superseding conflicting Missouri law. *See* MO. CONST. art. XXIII, § 9 (1875) ("[T]he [Missouri] general assembly shall have the same power over the[se charter cities] that it has over other cities and counties."). Arizona's framers explicitly refused to incorporate this half-baked home-rule power into Arizona's home-rule provision. *See* ARIZ. CONST. art. XIII, § 2.

("[W]here [a State] legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter."); *City of Tucson v. Walker*, 60 Ariz. 232, 238–39 (1943) (similar). This Court reaffirmed this deeply rooted precedent in 2012—and again in 2017—holding that "whether general state laws displace [conflicting] charter provisions depends on whether the subject matter is characterized as of statewide or purely local interest." *Tucson IV*, 242 Ariz. at 601 ¶ 52 (emphasis omitted) (quoting *Tucson II*, 229 Ariz. at 176 ¶ 20).[4]

As the above history and precedent make clear, state legislation, including the Legislation at issue in this case, cannot "displace" a conflicting charter provision on a matter of "purely local" concern. *Id.* (quoting *Tucson II*, 229 Ariz. at 176 ¶ 20).

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[4] The Attorney General does not advocate overturning this foundation of Arizona constitutional law—applied in numerous Supreme Court opinions from, among others, *Walker* in 1943 to *Strode* in 1951 to *Tucson II* in 2012 and to *Tucson IV* in 2017. And for good reason: this foundational principle not only has repeatedly received this Court's stamp of approval, but also arises from the text, purpose, and original meaning of Article 13, Section 2. *See Tucson II*, 229 Ariz. at 176 ¶ 19, 180 ¶ 47; *Strode*, 72 Ariz. at 364 (analyzing the Oklahoma Supreme Court's opinion in *Lackey v. State*, 116 P. 913 (Okla. 1911)—interpreting Oklahoma's "identical" home-rule provision only one year after Arizona adopted its home-rule provision—and agreeing with *Lackey* that "the intention [of the provision] was not to require the charter to conform to every statutory provision, but only to those that were not confined to purely municipal affairs").

B. Charter Cities Have "Absolute Autonomy" in "Structuring Their Own Governments," Including in the "Method and Manner of Conducting Elections."

The Attorney General admits (at 17) that "a charter city has the power to supersede state law on matters regarding the city's 'governmental structure[.]'" Indeed, this Court has held—time and again—"that charter city governments enjoy autonomy with respect to structuring their own governments." *Tucson II*, 229 Ariz. at 176 ¶ 21 (citing *Strode*, 72 Ariz. at 368); *see also id.* at 178 ¶ 34.

Accordingly, this Court "ha[s] held that the 'method and manner of conducting elections in the city . . . is peculiarly the subject of local interest and is not a matter of statewide concern.'" *Tucson IV*, 242 Ariz. at 602 ¶ 56 (second alteration in original) (quoting *Strode*, 72 Ariz. at 368). This makes sense. "If the 'home rule' provisions of Article 13, Section 2 are to have effect, they must *at the least* afford charter cities autonomy in choosing how to elect their governing officers." *Tucson II*, 229 Ariz. at 177 ¶ 31 (emphasis added).

In applying these standards, in fact, this Court has consistently concluded that election matters relating to a charter city's autonomy implicate purely local concerns. In *Strode*, for example, this Court held that a charter city's decision to conduct non-partisan elections implicated "the method and manner of conducting elections" and, thus, is of purely local concern. 72 Ariz. at 368. In *Tucson II*, this Court similarly held that "a city may choose to use partisan elections" (rather than *non*-partisan

elections, like in *Strode*). 229 Ariz. at 177 ¶ 30. Finally, this Court in *Tucson II* also "h[e]ld that electors in charter cities may determine under their charters whether to constitute their councils on an at-large or district basis." *Id.* at 180 ¶ 47.

As these examples elucidate and as this Court has confirmed: "Municipal elections are matters of local interest and not matters of statewide concern." *Triano*, 109 Ariz. at 508.[5]

Fighting not only the language of this Court's precedents but also the text and history of the Constitution itself, the Attorney General disparages (at 18 n.9) this Court's recent precedent—holding "that the 'method and manner of conducting elections in the city . . . is peculiarly the subject of local interest and is not a matter of statewide concern,'" *Tucson IV*, 242 Ariz. at 602 ¶ 56 (alteration in original) (quoting *Strode*, 72 Ariz. at 368)—as "clearly a gloss on the actual holdings of *Tucson II* and *Strode*." Not so.

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[5] These cases also align with the dictum in *Tucson II*, stating that the Court "d[id] not question that some aspects of the conduct of local elections," including "administrative aspects" like "election dates," "may be of statewide concern." 229 Ariz. at 178 ¶ 35. This dictum referred to a mere seven-day shift in an election date. *Id.* (citing *City of Tucson v. State ("Tucson I")*, 191 Ariz. 436, 439 (App. 1997). And as explained more below, although the *seven-day* shift in *Tucson I* presented a closer constitutional call, the *one-year* delay in the election date here is not an administrative aspect of an election and instead implicates the City's autonomy over the method and manner of its elections—including the tenures of its officials. *See infra* Part I.E.

First, this Court in *Tucson II* explicitly "consider[ed] whether there is reason to reconsider or qualify *Strode*'s holding that 'the method and manner of conducting elections' for a charter city 'is peculiarly the subject of local interest.'" 229 Ariz. at 177 ¶ 32 (quoting *Strode*, 72 Ariz. at 368). "For several reasons," though, the Court declined "to reassess *Strode*." *Id.* at 178 ¶ 34. Just three years ago, this Court again reaffirmed the relevance of the method and manner of elections to this Court's home-rule precedent. *See Tucson IV*, 242 Ariz. at 602 ¶ 56 (discussing the method and manner of conducting elections).

Second, this Court has repeatedly safeguarded a charter city's powers over "the 'method and manner of conducting [its] elections.'" *Id.* (quoting *Strode*, 72 Ariz. at 368); *accord Tucson II*, 229 Ariz. at 177 ¶¶ 30–31. As the examples above show, that standard both was used in and synthesizes this Court's holdings in *Tucson II*, *Strode*, and other opinions concluding that certain election matters were of purely local concern. *See Tucson II*, 229 Ariz. at 176 ¶ 22, 180 ¶ 47 (partisan, at-large, and district-wide elections); *Strode*, 72 Ariz. at 368 (non-partisan elections); *see also Triano*, 109 Ariz. at 508 (qualifications for office).

And third—until now, it appears—"[t]he [Attorney General] acknowledge[d] that the Legislature cannot regulate the 'method and manner' of conducting municipal elections." *Tucson III*, 235 Ariz. at 438 ¶ 12. Having flipped positions, the Attorney General fails to provide a reason to reassess—let alone overturn—this precedent.

In summary, Arizona's Constitution grants charter cities independence from the Legislature over matters of purely local concern. This independence includes the "autonomy with respect to structuring their own governments." *Tucson II*, 229 Ariz. at 176 ¶ 21 (citing *Strode*, 72 Ariz. at 368). And attendant to that autonomy is charter cities' necessary power over "the 'method and manner of conducting elections in the city.'" *Tucson IV*, 242 Ariz. at 602 ¶ 56 (quoting *Strode*, 72 Ariz. at 368). Here, the City's exercise of its powers falls well within the protections of the Constitution and the precedents interpreting it.

C. Both Off-Cycle Elections and Terms of Legislators Are of Local Concern.

The subject matters at issue here involve matters of "purely local interest" or concern. *Id.* at 601 ¶ 52 (quoting *Tucson II*, 229 Ariz. at 176 ¶ 20). Contrary to the Attorney General's protestation (at 19) that "such a holding" would require this Court to "depart from its prior precedent," the matters here—concerning how the City elects its governing officials and for how long—fall squarely within this Court's precedent, including its recognition that "[m]unicipal elections are matters of local interest and not matters of statewide concern." *Triano*, 109 Ariz. at 508; *see also Socialist Party v. Uhl*, 103 P. 181, 186 (Cal. 1909) ("That the election of municipal officers is strictly a municipal affair goes without question.").

1. The City's Off-Cycle Elections Are Matters of Purely Local Concern.

As noted above, "[i]f the 'home rule' provisions of Article 13, Section 2 are to have effect, they must at the least afford charter cities autonomy in choosing how to elect their governing officers." *Tucson II*, 229 Ariz. at 177 ¶ 31; *see also Strode*, 72 Ariz. at 368 ("The framers of the Constitution, in authorizing a qualified city to frame a charter for its own government, certainly contemplated the need for officers and the necessity of a procedure for their selection."). Consistent with this autonomy, this Court has held that "the 'method and manner of conducting elections in the city . . . is peculiarly the subject of local interest and is not a matter of statewide concern.'" *Tucson IV*, 242 Ariz. at 602 ¶ 56 (alteration in original) (quoting *Strode*, 72 Ariz. at 368).

In separating the City's municipal elections—instead of having them subsumed within numerous county, state, and federal elections that fall on the State's election date—the City and its electorate made policy choices about how and when to conduct its elections. For decades now, the City and its electorate have chosen to conduct their municipal elections in odd-numbered years bookended by the years when the State (and county and federal governments) conduct their elections. The City effectively has given its elections one year of breathing room both before and after these other elections.

That the City has the power to make these choices, notwithstanding

the obsession of the Legislature with thwarting them, is confirmed by this Court's precedents. These choices over how, and when, to conduct these municipal elections constitute "the 'method and manner of conducting elections in the city.'" *Id.* at 602 ¶ 56 (quoting *Strode*, 72 Ariz. at 368). These choices also reflect the City's exercise of its complementary "power to determine 'who shall be [the City's] governing officers and how they shall be selected.'" *Tucson II*, 229 Ariz. at 173 ¶ 1 (quoting *Strode*, 72 Ariz. at 368).

Under this precedent, the City's decision on how to elect its governing officers—*i.e.*, through off-cycle elections—is a matter of purely local concern that the Legislature cannot displace. *See, e.g.*, *id.* at 177 ¶ 31 (holding that it was a matter of purely local concern for the City to elect its Council Members through "ward-based primaries and at-large general council elections"); *id.* at 177 ¶ 28 (holding that it was a matter of purely local concern for the City to elect its Council Members through "partisan elections"); *Strode*, 72 Ariz. at 363 (holding that it was a matter of purely local concern for a charter city to elect candidates through nonpartisan elections).

Furthermore, the policy reasons behind the City's decision to conduct off-cycle elections also confirm that this decision is a matter of purely local concern. Political entities, including charter cities and others, chose to use off-cycle elections for numerous reasons. For many of these same reasons, in fact, at least five states conduct their statewide

elections in odd-numbered years to keep them separate from federal elections—and some have done so for over 200 years.[6]

Arizona benefits from off-cycle elections as well. It offsets its elections for Arizona's executive officers from the elections for U.S. president and vice president. *Compare* ARIZ. CONST. art. V, § 1(A) (setting elections for Arizona's executive officers every "four years," with the next election in 2022), *with* 3 U.S.C. § 1 (setting presidential elections for "every fourth year," with the next election in 2024). In doing so, Arizona places its executive-branch elections outside the shadow of the potentially more contentious, partisan presidential elections.

Most notably among these reasons for offsetting elections—and as the City has long recognized—off-cycle elections "preserv[e] the local nature of the City elections." [APP-103] "So long as citizens have a limited stock of political attention in any given time period, spreading elections across time periods may result in an increase in per-issue or per-election citizen attention, even if aggregate turnout is lower." Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U. CHI. L. REV. 37, 60 (2010). Removing all other county, state, and federal elections from the ballot thus "allows [the City] to obtain the full focus of the electorate and to insulate its electoral process from the influence of partisan issues

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[6] These states are Kentucky, Louisiana, Mississippi, New Jersey, and Virginia. Paul Braun et al., *Why These 5 States Hold Odd-Year Elections, Bucking the Trend*, NPR (Nov. 4, 2019 5:00 AM), https://perma.cc/A3DL-P8XT.

that are inevitably interwoven with federal, state, and county elections." *Tucson III*, 235 Ariz. at 438 ¶ 14. With this full focus, the local community and electorate are more informed on the local matters coming up for a vote at the City's election. *See* Berry & Gersen, *supra*, at 60.

Separating the City's municipal elections from the Pima County, Arizona, and federal primary and general elections also avoids the downsides of these often more contentious, higher-profile elections. In casting a shadow over everything on the ballot, these other elections often steal the spotlight from municipal elections. Though some cities have accepted this tradeoff, the City has not. *See* Jessica Boehm, *Phoenix Likely Will Change How Elections Are Conducted. What Are the Options?*, azcentral.com (Mar. 8, 2018, 3:37 PM), https://perma.cc/3YN3-8AH5 (reporting on the City of Phoenix's switch from off-cycle to on-cycle elections and outlining policy "[a]rguments for" and "[a]rguments against" proposal, including that with on-cycle elections "fewer people will pay attention to city elections because they'll be distracted by statewide and national elections").

Other policy reasons also support the City's decision to move its municipal elections off cycle. As compared to off-cycle elections, on-cycle elections are more expensive for a local candidate or campaign. *See Tucson III*, 235 Ariz. at 438 ¶ 14 ("[On-cycle elections] may be more difficult or expensive to use those resources for election advertising during general elections."). They result in lower campaign contributions

and fundraising amounts for local candidates and campaigns. *See id.* They favor incumbents and disadvantage candidates who are new to politics or who come from disadvantaged backgrounds.

And consolidating municipal elections with county, state, and federal elections also can lead to "ballot roll-off"—*i.e.*, "the phenomenon where fewer votes are cast as the ballot extends in length." *Id.* at 438–39 ¶ 15 n.5. This phenomenon would particularly affect the City because combining ballots with other elections would, quite literally, push down the City's ballot questions to the end or even back of the ballot. By giving its municipal matters an election all their own, the City and its electorate made a policy decision that the Constitution protects and that the Legislature cannot supplant.

This Court has already, and correctly, recognized that "[d]etermining the method for electing city council members necessarily involves a weighing of competing policy concerns." *Tucson II*, 229 Ariz. at 180 ¶ 46. And "Arizona's Constitution entrusts those issues to the voters of charter cities [rather than] the state legislature." *Id.*

In short, "the home rule charter provisions of article XIII, § 2 entrusts charter city voters to determine whether they want their municipal elections shaped by state, county, or federal partisan issues." *Tucson III*, 235 Ariz. at 439 ¶ 16. The City's decision to conduct its municipal elections separate from county, state, and federal elections therefore is a matter of purely local concern.

2. The Tenures for the City's Mayor and Council Members Are Matters of Purely Local Concern.

The State similarly cannot force a charter city to extend (or shorten) the tenures of its elected officials. Again, as the Attorney General agrees (at 18), "charter city governments enjoy autonomy with respect to structuring their own governments." *Tucson II*, 229 Ariz. at 176 ¶ 21 (citing *Strode*, 72 Ariz. at 368); Pet. at 18 (noting that "both *Strode* and *Tucson II* addressed provisions in city charters concerning the structure of a city's government—a recognized purely local interest").

Nonetheless, the State still tries to encroach on the City's autonomy to structure its government by mandating that the City change its current officials' tenures. Most clearly, A.R.S. § 16-204.02 "lengthen[s]" "the terms of office for elected officials of the [City] . . . to align with the consolidated election dates." A.R.S. § 16-204.02(A). Effectively, § 16-204.02(A) lengthens the term of office for the City's current Mayor and Council Members from four years to five.

Further, by mandating that municipal elections occur on statewide election dates in even years, A.R.S. § 16-204.01(C), the Legislature has foreclosed affected municipalities from setting term limits in anything other than two-year increments. The City effectively could not, for instance, change officials' terms to one or three years because it could not hold elections when these terms expired in odd-numbered years.

By expressly lengthening these tenures, and preventing the City

from ever choosing certain tenures for its officials, the State encroaches on the City's autonomy over how to "structur[e] [its] own government[]." *Tucson II*, 229 Ariz. at 176 ¶ 21; *see Tucson III*, 235 Ariz. at 438 ¶ 13 ("Section 16-204(E)," which would have moved all off-cycle elections one year ahead, "would require major changes to city charters and election procedures, including altering the terms of office for some officials."); *State ex rel. Hackley v. Edmonds*, 80 N.E.2d 769, 774 (Ohio 1948) ("It seems to us that there could not be a more forthright statement to the effect that the selection of municipal officers is a matter of purely local concern, and that the method of their selection and *the tenure of their office* may legally be limited or circumscribed by the provisions of a municipal charter adopted in pursuance of [Ohio's home-rule provision]." (emphasis added)).

Put otherwise, an elected official's term of office falls squarely within the category of "*[s]tructural authority*[, which] is the power to design one's type of government, including issues such as the number of city councilors, whether elections are by district or at-large, [and] *the length of terms*." Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, J. ACS ISSUE BRIEFS 3, 5 (2017) (second emphasis added). That structural authority is precisely at issue here, and the State cannot dictate to the City the tenures for the City's governing officials.

In short, *how long* an official is elected—like *how* an official is

elected, *see, e.g.*, *Tucson II*, 229 Ariz. at 177 ¶ 30—implicates "a charter city's authority to structure its own government," *id.* at 175 ¶ 18, and, thus, is a matter of local concern. That is particularly true here, where the City's electorate decided to elect these City officials for four years, not five as the Legislature now would have it.

Tellingly, the Attorney General almost entirely ignores that A.R.S. § 16-204.02 would run contrary to the City's Charter and implementing Ordinance by lengthening the tenures for the current Mayor and Council Members. In passing, the Attorney General merely quotes this statute (at 10–11) without discussion. And later—in trying to distinguish reasoning in *Tucson III* that an identical extension to charter city officials' tenures "would require major changes to city charters and election procedures, including altering the terms of office for some officials," *Tucson III*, 235 Ariz. at 438 ¶ 13—the Attorney General oddly contends (at 31 n.14) that "[t]his type of concern is not present here[.]" But wishing doesn't make it so. As explained above, A.R.S. § 16-204.02(A) would *require* the City to extend its Mayor's and Council Members' terms of office.

Both the statute at issue in *Tucson III* (A.R.S. § 16-204) and that at issue here (A.R.S. § 16-204.02) strike at the structure of the City's government by purporting to extend the tenures of certain local officials. And as the Attorney General concedes (at 18), "the structure of a city's government" is "a recognized purely local interest." That controls the

outcome here.[7]

D. The Court of Appeals Was Correct to Hold that the City's Decision to Hold Off-Cycle Elections Is of Purely Local Concern.

Contrary to the Attorney General's suggestion otherwise (at 30–34), the reasoning of Court of Appeals in a similar case confirms that the City's off-cycle elections are matters of purely local concern. *See Tucson III*, 235 Ariz. at 439 ¶ 16. After the Legislature in 2012 enacted the similar statute A.R.S. § 16-204, the Court of Appeals in 2014 in *Tucson III* considered an issue legally indistinguishable from this case and held that the City could conduct off-cycle elections notwithstanding a conflicting Arizona statute.

At issue there, A.R.S. § 16-204 required charter cities to conduct "most municipal candidate elections . . . simultaneously with state and national candidate elections." *Id.* at 435 ¶ 1. This statute, in effect, sought to displace any charter that allowed for off-cycle elections. Based on the City's Charter provision allowing for off-cycle elections then (as it does now), the Court of Appeals considered "[w]hether § 16-204(E) improperly preempt[ed] the constitutional authority of a charter city to direct its own affairs" and, more specifically, whether "an off-cycle

[7] That § 16-204.02 would extend the tenures of only the current Mayor and six Council Members, is no answer to the statute's constitutional failings. A constitutional violation is not lawful merely because it is short-lived.

election affects the method and manner of selecting [the City's] governing officers." *Id.* at 436 ¶ 6, 437 ¶ 9.

Relying on this Court's opinions in *Strode*, *Tucson II*, and other cases, the Court of Appeals held that "the home rule charter provision of article XIII, § 2 entrusts charter city voters to determine whether they want their municipal elections shaped by state, county, or federal partisan issues" or whether they want to conduct off-cycle elections. *Id.* at 439 ¶ 16. The Court therefore "conclude[d] that state-mandated election alignment, when it conflicts with a city's charter, improperly intrudes on the constitutional authority of charter cities." *Id.* at 435 ¶ 3 ("We therefore affirm the trial court's judgment that § 16-204 does not preempt city charters that require odd-numbered year election dates."). The Attorney General ignores this holding.

The Court of Appeals acknowledged that an off-cycle election provides many of the benefits discussed above. *See supra* Part I.C.1. Specifically, an off-cycle election: (1) "allows a city to obtain the full focus of the electorate," (2) "insulate[s] its electoral process from the influence of partisan issues that are inevitably interwoven with federal, state, and county elections," (3) prevents municipal campaigns from needing to "compet[e] with state and national candidates for resources," and (4) avoids making it "more difficult or expensive to use those resources for election advertising." *Tucson III*, 235 Ariz. at 438 ¶ 14. The court also considered the effect of off-cycle elections on voter turnout for these

municipal elections, as well as how the City could come to different conclusions on whether "the ultimate impact is positive or negative." *Id.* ¶ 15.

"These differing conclusions," the court correctly reasoned, "illustrate valid policy disagreements and, potentially, qualitatively different results in election outcomes." *Id.* at 438–39 ¶ 15. And because "there are 'competing policy concerns' in the manner of the election, 'Arizona's Constitution entrusts those issues to the voters of charter cities [if the statute conflicts with the charter.]'" *Id.* at 439 ¶ 16 (alteration in original) (quoting *Tucson II*, 229 Ariz. at 180 ¶ 46).

Finally, in analyzing "whether the state identifie[d] actual statewide interests," the Court of Appeals noted that the State failed to posit how any interests outside of the municipality were affected. *Id.* at 439 ¶ 17. Because the State could not, and cannot, show any benefit (nor any detriment, for that matter) for persons outside of the affected charter cities, the court rightly "conclude[d that] the state ha[d] not shown § 16-204(E) implicates an existing, statewide interest that is not independent of the interests of the charter cities." *Id.* at 440 ¶ 19.

The Attorney General further misconstrues the opinion by claiming (at 31) that it was premised on "the State . . . failing to advance" any legislative finding about a statewide interest over the City's municipal elections. Not so. Although the Court of Appeals noted that "the state advance[d] no facts or legislative findings," the court held that such

findings were irrelevant because "'whether state law prevails over conflicting charter provisions under Article 13, Section 2 is a question of constitutional interpretation,' within the exclusive province of the courts." *Id.* at 439 ¶ 17 & n.7 (quoting *Tucson II*, 229 Ariz. at 178 ¶ 34).

In the end, and as the Court of Appeals held, "article XIII, § 2 entrusts charter city voters to determine whether they want their municipal elections shaped by state, county, or federal partisan issues" or conducted off-cycle from these other elections. *Id.* ¶ 16.

E. That the Legislation Implicates "Election Dates" Does Not Dictate a Different Result.

As established above, the Legislation cannot displace the City's Charter and Ordinance because off-cycle elections and tenures for the City's Mayor and Council Members are of purely local concern. *See supra* Part I.C. The Attorney General (at 30) nevertheless tries to relegate these municipal matters to the category of mere administrative changes just because they relate to "election dates." This is incorrect.

Most notably, neither moving the City's municipal-only elections to an entirely different year nor extending from four years to five the tenures for the City's officials are mere administrative matters. These matters fall within the heart of this Court's precedent about a charter city retaining local autonomy over its government, especially over "the 'method and manner of conducting elections in the city.'" *Tucson IV*, 242 Ariz. at 602 ¶ 56 (quoting *Strode*, 72 Ariz. at 368).

As this Court explained in *Tucson II*, "Tucson's manner of electing its city council members supersedes the conflicting provisions of [Arizona law]." 229 Ariz. at 177 ¶ 30. The Attorney General nevertheless attempts to make much of certain dictum in that opinion about election dates that were unrelated to the case.

Specifically, the Attorney General fixates on this Court's unremarkable observation "that some aspects of the conduct of local elections may be of statewide concern." *Id.* at 178 ¶ 35 (citing *Tucson I*, 191 Ariz. at 439). Certain "administrative aspects of elections" like "election dates," it was suggested, "involve matters qualitatively different from determining how a city will constitute its governing council." *Id.* The Attorney General latches onto this language as dispositive in this case and controlling of the outcome, but it cannot bear the weight he gives it.

Far from proving the Attorney General's point, this dictum is entirely consistent with this Court's prior precedent establishing that the method and manner of conducting elections is a matter of purely local concern when, as here, doing so implicates the charter city's "autonomy with respect to structuring their own governments." *Id.* at 176 ¶ 21 (citing *Strode*, 72 Ariz. at 368). That principle guided this Court's holdings in *Tucson II*, *Strode*, *Triano*, and elsewhere, where the issue implicated not only an election, but also the charter city's autonomy in structuring its government *through that election*.

At most, this dictum in *Tucson II* simply stands for the proposition

that the State can legislate over matters that do not implicate the charter city's autonomy over the structure of its government and that are, instead, mere "administrative aspects of elections." *Id.* at 178 ¶ 35.

To be sure, the State could potentially legislate over certain administrative aspects of elections (*e.g.*, issues related to campaign finance laws). Some might arguably implicate "the 'method and manner of conducting elections in the city.'" *Tucson IV*, 242 Ariz. at 602 ¶ 56 (quoting *Strode*, 72 Ariz. at 368)). But they would *not* necessarily implicate, as they do here, the threshold principle "that charter city governments enjoy autonomy with respect to structuring their own governments." *Tucson II*, 229 Ariz. at 176 ¶ 21.

Tucson II's dictum, in fact, both understood and recognized that certain election-date matters might be administrative because they did not implicate a charter city's autonomy. In doing so the Court noted the Court of Appeals's holding in *Tucson I*. *Id.* at 178 ¶ 35 (citing *Tucson I*, 191 Ariz. at 439).[8]

To the extent that the Attorney General now cites *Tucson I* to support his position, that case is distinct from the present one. The Court of Appeals in *Tucson I* considered a mere seven-day shift in an election date, 191 Ariz. at 439—unlike the one-year changes to the election dates

[8] The Court also cited a list of examples in A.R.S. § 9-821.01(A). *Tucson II*, 229 Ariz. at 178 ¶ 35. This list includes "voter registration laws to prevent abuse and fraud and campaign finance laws." A.R.S. § 9-821.01(A).

and terms of office here. Further, there was no suggestion in *Tucson I* that the seven-day shift would have altered any terms of office for the City's officials or that the shift would relegate municipal matters to the bottom of a ballot crowded with other county, state, or federal choices.[9]

Here, of course, the Legislature seeks to move the City's elections an entire year forward. Although the seven-day shift in *Tucson I* may have presented a closer constitutional call, the one-year shift in the election date here is not an administrative aspect of an election. It instead fundamentally implicates the City's autonomy in conducting elections. As established above, both off-cycle elections and terms of office are matters of purely local concern. *See infra* Part I.C.

The Court of Appeals in *Tucson III*, in fact, recognized this very distinction, noting that "[t]he practical impact" in *Tucson I* of the "one-week change in the date of its primary election" "was minor" and that a one-year change, by comparison, "would require major changes to city charters and election procedures, including altering the terms of office for some officials." 235 Ariz. at 438 ¶ 13.

The Attorney General half-quotes *Tucson III*, stating that "the Court of Appeals agreed with the State that *Tucson II* 'arguably places election dates outside of local autonomy and interest.'" [Pet. at 30 (quoting *Tucson III*, 235 Ariz. at 438 ¶ 12)] But the *second* half of this

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[9] Further, *Tucson I* applied "a balancing test," 191 Ariz. at 439, that this Court later "reject[ed]," *Tucson IV*, 242 Ariz. at 604 ¶ 63.

quote—that the Attorney General omits—reveals that which he seeks to hide: "We agree with the state that dicta from *Tucson II* arguably places election dates outside of local autonomy and interest, but the case from which the dicta is derived, *Tucson I*, cannot be stretched so far." *Tucson III*, 235 Ariz. at 438 ¶ 12. Although the Attorney General would prefer to avoid that language entirely, *Tucson III* expressly recognized what this Court in *Tucson II* understood: the method and manner of local elections are of purely local concern when they implicate the charter city's autonomy over how to form and select its government.

As *Tucson I* and *Tucson II* establish, a charter city's decision over whether to hold off-cycle or on-cycle elections is distinguishable from "administrative aspects" of elections. *Tucson II* and *Strode* simply do not, as the Attorney General contends (at 30), "compel the conclusion that state law supersedes the City's Ordinance" and control the Court's analysis here.

F. In All Events, the Legislation Does Not Implicate Matters of Statewide Concern and Thus Cannot Displace the City Charter and Ordinance.

To be sure, "general state laws displace charter provisions" when "the *subject matter* is characterized as of statewide," rather than purely municipal, concern. *Tucson IV*, 242 Ariz. at 601 ¶ 52 (quoting *Tucson II*, 229 Ariz. at 176 ¶ 20). This is not such a case.

1. The Court, Not the Legislature, Decides What Is a Matter of Statewide Concern.

Section 16-204.01(A) includes a statement that the Legislature believes the issue of consolidated elections is "a matter of statewide concern." The Attorney General argues (at 26) that this statement by the legislature is "significant in considering the statewide interests at stake."

But this Court has confirmed that "whether state law prevails over conflicting charter provisions under Article 13, Section 2 is a question of constitutional interpretation." *Tucson IV*, 242 Ariz. at 598 ¶ 37 (quoting *Tucson II*, 229 Ariz. at 178 ¶ 34). And matters of constitutional interpretation are the prerogative of the judiciary—not the legislature. *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485 ¶ 8 (2006); *see Marbury v. Madison*, 1 Cranch 137, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

And so, because this case concerns a legal issue, the Legislature's statement, while "respect[ed]" by this Court, does not define its analysis. *Tucson II*, 229 Ariz. at 178 ¶ 34; *accord State v. Osborne*, 14 Ariz. 185, 188 (1912) ("The constitutionality of an act of the Legislature, although it may determine the legality of holding an election and thereby have a political effect, is strictly a judicial question."). In the end, it cannot be that the Legislature is able to transform an issue into one of statewide concern by simply declaring it so. This would not only usurp the role of

this Court but also would render meaningless the Constitution's guarantee that charter cities be "as nearly independent of state legislation as [i]s possible." *Walker*, 60 Ariz. at 239.

2. None of the Interests that the Attorney General Claims Are of Statewide Concern.

The Attorney General nonetheless claims (at 25–30) that the years in which a charter city elects its governing officials is a matter of statewide concern, based on three interests: (1) "protecting the fundamental right to vote," (2) "preserving election integrity," and (3) "increasing voter participation." None withstand scrutiny.

First, any generalized interest the State has in "protecting the fundamental right to vote" does not render the years in which charter city elections are held matters of statewide concern, as the Attorney General claims without explanation (at 26). This Court has correctly rejected arguments that similar generalized interests related to voting rights establish a particular issue is of statewide concern. *See Tucson II*, 229 Ariz. at 179 ¶ 43 (noting that the Court was "not persuaded by the out-of-state cases cited by the [Attorney General]," including one "noting that 'the primary concern of the legislature was to insure the fundamental right to vote,'" because Tucson's "at-large elections do not necessarily deny voting rights protected by Arizona's Constitution or federal law"). Conducting municipal elections separately from State and federal elections also does not impair the fundamental right to vote—nor

has the Attorney General offered any authority or evidence for that argument.

Next, the Attorney General is incorrect in his similarly unexplained assertion (at 27) that "promoting election integrity" creates a statewide interest in barring off-cycle elections. The City guarantees voters the same the right to vote in a fair election, regardless of when the election is held. *See id.* at 179 ¶ 41 (rejecting the Attorney General's argument that an Arizona statute prohibiting partisan elections and hybrid district-and-city elections "involve[d] matters of statewide concern because it promotes 'equality in the democratic process'"). In the end, the Attorney General presents no argument, let alone evidence, that off-cycle elections somehow undermine "election integrity."

The Attorney General also is incorrect that "voter turnout" creates a statewide interest in municipal-only off-cycle elections. The Attorney General identifies no specific, tangible effect that voter turnout at the City's municipal elections would have on the State. He does not assert, for example, that the State must run and pay for the City's elections, nor that any State funds are tied to this voter turnout. *See Tucson III*, 235 Ariz. at 439 ¶ 18 (reasoning that the Attorney General had not shown "how the state's own interests would be affected").

Rather, the State claims a generalized interest in voter turnout that is not specific—or even tangible—to the State. *See id.* at 440 ¶ 19 ("We conclude the state has not shown . . . an existing, statewide interest that

is not independent of the interests of the charter cities."); *cf. United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981) ("Congress may regulate 'pure' federal elections, but not 'pure' state or local elections."). And even to the extent the State has a general interest in increasing voter turnout, the State simply lacks an interest in the turnout for elections in charter cities themselves. Such elections necessarily implicate issues related to their local government. *See State ex rel. Carroll v. King County*, 474 P.2d 877, 880 (Wash. 1970) (finding "no sound reason why the state should have an interest in the dates of elections which concern only the residents of a county").

Indeed, municipal elections are inapposite with the subject matters that this Court has held to be of statewide concern. Matters of statewide concern, this Court has held, include "state budget law[s]," *American-La France & Foamite Corp. v. City of Phoenix*, 47 Ariz. 133, 144 (1936), the "destruction or disposal of firearms," *Tucson IV*, 242 Ariz. at 603 ¶ 58, and the "use of the streets and highways of [a] city by a person under the influence of intoxicating liquor," *Clayton v. State*, 38 Ariz. 135, 145 (1931).

Finally, accepting the Attorney General's argument—that "voter turnout" in municipal-only elections is a matter of statewide concern—would eviscerate any protection that Article 13, Section 2 provides. Under the guise of increasing voter turnout at municipal elections, the State could encroach on charter cities' autonomy over purely municipal

affairs like whether to conduct partisan or non-partisan elections, whether to conduct primary elections on an at-large or district-wide basis, and countless other purely local affairs. But, as this Court has recognized, Arizona's Constitution empowers charter cities, alone, to make those decisions. *See, e.g.*, *Strode*, 72 Ariz. at 368 (non-partisan elections); *Tucson II*, 229 Ariz. at 177 ¶ 30 (partisan elections); *id.* at 180 ¶ 47 (at-large or district-wide elections).

The Attorney General advances no purported statewide interest in extending the terms of office for certain city officials. "[B]y fail[ing] to argue [the issue] in [his Petition]," "the [Attorney General] has waived consideration . . . of this issue." *State v. Rodriguez*, 160 Ariz. 381, 384 (App. 1989). Nor does any such interest exist, because the length of a charter-city official's term of office is a matter of purely local concern, as established above. *See infra* Part I.C.2.

In the end, none of the interests that the Attorney General advances qualify as a *statewide* interest that justifies the State encroaching on the City's autonomy to structure its elections and the tenures of its officials.

II. A.R.S. § 16-204.01 Is an Unconstitutional Special Law.

In addition to impermissibly encroaching on the City's powers as protected by the Arizona Constitution's home-rule protections, A.R.S. § 16-204.01 violates the Constitution's prohibition against "special laws," and is thus invalid. "Special laws favor one person or group and disfavor

others." *Gallardo*, 236 Ariz. at 88 ¶ 10. To restrain this legislative favoritism, the Constitution provides that "[n]o local or special laws shall be enacted" regarding "[t]he conduct of elections" or "[w]hen a general law can be made applicable." ARIZ. CONST. art. IV, pt. 2 §§ 19(11), (20).

To determine whether a law imposes a classification that is an unconstitutional special law, Arizona's courts apply a three-prong test. *Republic Inv. Fund I v. Town of Surprise ("Republic")*, 166 Ariz. 143, 149 (1990). Each prong stands alone and must be satisfied for a law to be "general" and thus constitutional. *Id.* And "[d]etermining constitutionality," including under this special-laws provision, "is a question of law, which [this Court] review[s] de novo." *Gallardo*, 236 Ariz. at 87 ¶ 8.[10]

A. The Constitution Prohibits Laws that Classify Members Forever.

The third prong of the special-laws analysis concerns the "elasticity" of a law and whether that law legislatively favors—or disfavors—a classification the law imposes. "To be general, [a]

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[10] Although some cases have "accord[ed] [a] traditional presumption of constitutionality" to claims of "special" legislation, *Gallardo*, 236 Ariz. at 88 ¶ 9, that presumption does not control here. First, the presumption is of no effect because A.R.S. § 16-204.01 plainly creates an unconstitutional special law, as detailed below. Second, as some of this Court recently recognized, "[t]he role of judicial review articulated by *Marbury* leaves no room for the presumption that the legislature acts constitutionally." *State v. Arevalo*, 249 Ariz. 370, -- ¶ 38 (2020) (Bolick, J., concurring).

classification must be elastic, or open, not only to admit entry of additional persons, places, or things attaining the requisite characteristics, but also to enable others to exit the statute's coverage when they no longer have those characteristics." *Republic*, 166 Ariz. at 150. Thus, under this prong, courts consider whether "the classification [is] elastic, allowing 'other individuals or entities to come within' and move out of the class." *Gallardo*, 236 Ariz. at 88 ¶ 11 (quoting *Republic*, 166 Ariz. at 149).

This exit feature, this Court has reaffirmed, is foundational to elasticity. *See id.* at 93 ¶ 35 ("We reaffirm our holding . . . that the elasticity requirement is met when the statute looks to broader application in the future, no matter how imminent the application might be, and allows 'persons, places, or things attaining the requisite characteristics' to enter and those that 'no longer have those characteristics' to leave the class." (quoting *Republic*, 166 Ariz. at 150)). And this foundational feature dooms the Legislature's latest gambit to encroach on the City's elections and to legislatively disfavor the class drawn for the City—with no possibility of exiting.

B. By Preventing Class Members from Exiting the Class, A.R.S. § 16-204.01 is an Unconstitutional Special Law.

It is beyond dispute that the statute does not "allow[] 'others to exit the statute's coverage when they no longer have those characteristics,'" as the statute must. *Id.* at 91 ¶ 27 (quoting *Republic*, 166 Ariz. at 150).

Though "political subdivision[s]" may enter the class—based on "a significant decrease in voter turnout" as defined in the statute, A.R.S. § 16-204.01(B)—none may ever exit. Once turnout of a single municipal election triggers this law, no mechanism allows the municipality to ever again hold municipal elections at the time of its choosing. *See* A.R.S. § 16-204.01 (forever requiring a qualifying municipality to hold on-cycle elections); *cf. Gallardo*, 236 Ariz. at 93 (ruling the elasticity requirement met where counties could join the class by satisfying a certain population threshold and could leave the class by dropping below this threshold). That perpetuity creates an impermissible special law.

This case, in fact, considers a law analogous to one that this Court long ago rejected. In *Bravin v. Mayor of Tombstone*, the Court considered a law, intended to "reduce expenses" in municipal elections, that would apply "in all cities . . . in which the total vote cast at the general election [held in a certain year] was less than [a certain level of voter turnout]." 4 Ariz. 83, 88 (1893). "A classification of cities may be made . . . upon the number of votes cast from time to time," the Court explained, "[b]ut the statute must be elastic so that other cities may, as they attain the requisite conditions, come within the classification and within the operation of the state." *Id.* at 89. Because "[this law] applie[d] only to cities that" had certain voter turnout, the law qualified as

unconstitutional "special legislation." *Id.* at 89, 90.[11]

This case, by comparison, presents the opposite side of the same coin. By preventing class members like the City from exiting the class, A.R.S. § 16-204.01 violates this "elasticity" requirement. Accordingly, § 16-204.01 is inelastic and thus an unconstitutional special law that the City need not follow.

Conclusion

The City respectfully asks this Court to "resolve the issue," A.R.S. § 41-194.01(B)(2), by determining that the Arizona statutes at issue, A.R.S. §§ 16-204.01 and 16-204.02, cannot displace the City's powers, as a charter city, to decide when to elect its officials and for how long. The City also asks this Court to conclude that A.R.S. § 16-204.01 is an unconstitutional special law that the City need not follow.

Attorneys' Fees

Pursuant to A.R.S. § 12-348.01, the City requests its taxable costs and reasonable attorneys' fees from this action, including fees relating to the Attorney General's S.B. 1487 investigation—where the Attorney

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[11] *Bravin* applied the Harrison Act, a federal statute passed in 1886 that "prohibited territorial legislatures from enacting local or special laws, and applied to the Arizona territory before statehood." *State v. Levy's*, 119 Ariz. 191, 192 (1978). Because the Harrison Act was "[t]he progenitor of the Arizona constitutional provision prohibiting local or special laws," and "very similar to the present [Arizona] constitutional provision," this Court has looked to this precedent when interpreting Arizona's provision. *Id.*

General, a "governmental officer acting in the officer's official capacity," filed a lawsuit against the "city." A.R.S. § 12-348.01; *see also State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, -- ¶ 38 (2020).

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