IN THE SUPREME COURT
STATE OF ARIZONA

DAVID DEVINE and DAVID BOSTON, **Plaintiffs/Appellants,** **ROGER W. RANDOLPH, Clerk of the City of Tucson,** **Defendant/Appellee,** **CAMPUS ACQUISITIONS HOLDINGS, LLC, a Delaware company; DRI/CA TUCSON, LLC, A Delaware limited liability company; CAMPUS INVESTORS TUCSON, LLC, a Delaware limited liability company; CAMPUS ACQUISITIONS INVESTMENT MANAGEMENT, LLC, a Delaware limited liability company; and CA MANAGER, LLC, a Delaware limited liability company,** **Defendant-Intervenors/Appellees.**	**No.** **Court of Appeals** **Division Two** **Now. 2 CA-CV 2012-0069** **Pima County Superior Court** **No. C20122175** **(Special Election Matter – Referendum)**

PETITION FOR REVIEW

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Pursuant to Rule 8.1(i) and Rule 23, Arizona Rules of Civil Appellate Procedure, Petitioners/Appellants, David Devine and David Boston ("Petitioners"), petition for review of the Court of Appeals decision ("Opinion") dated May 31, 2012, in this special referendum petition case.

A. ISSUES PRESENTED FOR REVIEW

1. Whether the provisions of A.R.S. §19-101(A) relating to the form of referendum petitions overrides the City of Tucson Charter and Code provisions regarding a referendum on an issue of municipal concern?

B. ISSUES NOT DECIDED BY THE COURT OF APPEALS

1. Whether a "strict construction" standard must be applied to City of Tucson's referenda contrary to its City Charter and Code?

C. STATEMENT OF MATERIAL FACTS

The trial court judge made findings of fact that, with limited exception, (e.g., number 22) are not disputed (Appendix 1). On February 28, 2012, the City of Tucson's Mayor and Council approved Ordinance 10968, which created an "urban overlay district" and established special zoning for an area known as the "Main Gate District." (App. 1, #1). The ordinance itself is over 25 pages in length. Three citizens, pursuant to Tucson Charter, Chapter XIX, §2, including Val Little, took out referendum petitions and began collecting signatures.

Ms. Little and the group made considerable efforts to ensure that the signatures would legally comply with the referendum process. (App. 1, #16). Some 90 to 95 percent of the signatures were collected by approximately 100 volunteers who were trained by the group. (App. 1, #s 15, 17). On March 30, 2012, the circulators turned in sufficient signatures for a referendum. The City Clerk, however, rejected 460 signature pages potentially containing 6,900 signatures because those pages did not have the notice and voter statement provisions required in A.R.S. §19-101(A). (App. 1, #19)

The failure to strictly comply with that state statute was the sole reason stated for the rejection by the City Clerk. The rejected petitions complied with the Tucson City Charter and Code related to referenda. (TP 27:15-25; 28:1-8)

The trial court agreed with plaintiffs that "to the extent that state law conflicts with city charters on this particular topic, the city charter will prevail so long as the matter is of local concern," citing *City of Tucson v. State*, WL 1138217 (Ariz. 2012). The trial court held, however, that the city clerk's mere attachment of a sample petition to an appendix of its own Rules and Regulations booklet that contained verbiage similar to A.R.S. §19-101(A) meant that the City had adopted that statute. (App. 1)

The Court of Appeals Opinion held, however, that the state statute, A.R.S. §19-101(A) controlled even on a matter of local concern, because the statute stated it applied to all towns and cities.

The City of Tucson has historically argued that its "referendum ordinances concern solely local matters, over which the state has no control." *Tucson v. Consumers for Retail Choice*, 197 Ariz. 600, 602, 5 P.2d 934, 936 (App.2 2000).

The Tucson City Charter was approved by its voters in 1929. Its sections related to referenda generally conformed to Sec. 3323 of Title XXII, Laws 1913, relating to referenda. That section set out simple requirements of form that needed to be "substantially" followed in referenda. The Tucson Charter and Ordinances have interlocking provisions regarding the form of the petitions for referendum, initiative and recall. Chapter XIX relates to the initiative, Chapter XX, the referendum and Chapter XXI, recall. (See Appendix 2)

Sec. 1 of the Chapter XX, The Referendum, provides that the form of recall petitions as provided in Chapter XXI shall be used for referenda "with such modifications as the nature of the case may require... ." Chapter XXI in turn provides that "a general statement of, not to exceed two hundred (200) words" be contained in the petition but that "any defect in said form shall not invalidate the petition." (Sec. 2 of Chapter XXI.)

Article V, Referendum, Sec. 12-76 of the Tucson Code specifically provides that the petition form rules of initiative applies to referendum petitions. (See Appendix 2). Sec. 2 of Chapter XIX relating to the form of initiatives provides that initiative petitions shall be "substantially in the following form."

Article V, Section 12-53 provides that initiative petitions shall be printed in a form prescribed by the city clerk.

> **Sec. 12-53. Form of petition.**
>
> Any initiative petition desired to be submitted to the mayor and council shall be presented upon a petition which has been printed and numbered in the form prescribed by the city clerk.

Sec. 2 of Chapter XIX, the Initiative, provides that any proposed ordinance shall be presented in a petition substantially in the form printed in that charter section. In direct compliance with the City Code Section 12-76, that provides that the form referendum petitions shall follow the form of initiative petitions, the City Clerk in its Initiative and Referendum Rules and Regulations booklet provides a sample in its appendix 3(b) that complies with the requirements of the Tucson Charter and not the state form in A.R.S. §19-101(A).

D. REASONS THIS PETITION SHOULD BE GRANTED

1. This case concerns important and fundamental issues of constitutional interpretation relating to both charter cities and citizen exercise of their reserved legislative power.

Both the trial court and the Court of Appeals recognized the importance of the referendum process and noted their understanding "that the petitioners attempted to comply with the complex requirements for a referendum petition." (e.g., Footnote 1 of the Opinion)

This dual recognition of the importance of the right and the citizen efforts to utilize their important rights emphasizes the importance of reviewing the Opinion that is contrary to fundamental law and settled authority.

2. The Court of Appeals ignored or misinterpreted settled law.

The key issue in both the trial court and on appeal is whether the state statute, A.R.S. §19-101(A) or the city's own charter and code controlled the form of the referendum petition that concerned a city "overlay" zoning ordinance. The Court of Appeals claimed this court has ruled that, in the referendum context, state statutes control and cities may regulate only to the extent their rules do not conflict with the state constitution and laws, citing *Fleischman v. Protect Our City*, 214 Ariz. 406, 153, P.3d 1035 (2007) and *Jones v. Paniagua*, 221 Ariz. 441, 444, 212 P.3d 133, 136 (2009). Those cases are inapposite, however.

Ariz. Const. Art. 4, pt. 1, §1(I) specifically provides that cities and towns could prescribe how the percentages of required signatures could be computed but on that specific issue they could do so only "until provided by general law." Thus,

the court in *Jones v. Paniagua*, 221 Ariz. 441, 444, 212 P.3d 133, 136 (2009) ruled that the Phoenix charter provision related to computation of percentages conflicted with the state statute on that subject and, pursuant to the specific direction in the constitution, it was, hence, invalid. The holding of that case is limited to the application of the specific constitutional provision and does not provide authority that state statutes must always prevail in referenda matters.

In *Fleischman v. Protect Our City*, 214 Ariz. 406, 153 P.3d 1035 (2007), this court correctly decided that the state statute, A.R.S. §19-121(B) had directed as a matter of general law that, once petitions' petition signature sheets are filed, no additional petition sheets may be accepted for filing. The Phoenix charter conflicted with that statute, and the court held that the state statute, as a general law, prevailed.

The key issue in assessing those cases, and the error of the Court of Appeals, lies in its failure to correctly interpret the concept of "general laws" as used in Ariz. Const. Art. 4 pt. 1 §1(8) which reserved the power of referendum to cities. That constitutional section had one limitation on this reserved power: "Such incorporated cities, towns, and counties may prescribe the manner of exercising said powers within the restrictions of general laws."

This same limitation is contained in Ariz. Const. art. 13 §2 that permits

population qualified cities to frame charters that then become the organic laws of those cities. The city charters are required to be "consistent with, and subject to, the Constitution and the laws of the state." This court in *Strode v. Sullivan*, 72 Ariz. 360, 365, 236 P.2d 48, 53 (1951) held that the phrase "laws of the state" referred to laws addressing matters of "statewide interest" rather than "local concern."

This court confirmed that principle on April 6 of this year in Tucson v. State*, 2012 WL 1138217 (Ariz. Apr. 6, 2012), citing* Strode*, supra*, *City of Tucson v. Walker*, 60 Ariz. 232, 239, 135 P.2d 233, 226 (1943), and quoting from *City of Wewoka v. Rodman*, 46 P.2d 334, 335 (Okla. 1935). As this Court noted, the analysis to be used to determine whether general state laws displace charter provisions depends on whether the subject matter is characterized as of statewide or purely local interest. *Strode, supra*, at 365, and *City of Tucson, supra,* at paragraph 20.

The referendum in the instant case concerns a local issue related to an overlay zone that permits intensive high rise development in a small area of Tucson. The interest of Tucson citizens is paramount for this type of ordinance and, therefore, the city charter and code should prevail.

This conclusion is in accord with the argument previously advanced by the

City of Tucson in *Tucson v. Consumers for Retail Choice*, 197 Ariz. 600, 602, 5 P.2d 934, 936 (App. 2000) wherein it argued that "its referendum ordinances concern solely local matters, over which the state has no control."

3. The Court of Appeals finding of "no conflict" between the state statute and the Charter and City Code ignores the two distinct form requirements and processes of the City Charter and A.R.S. §19-101(A).

The Court of Appeals is clearly wrong in its conclusion that "the provisions of §19-101(A)" "do not conflict with the charter or code." (Opinion, para. 11, p. 8). There are, in fact, numerous areas of conflict. §19-101(A) requires a referendum description of "no more than one hundred words of the principal provisions of the measure sought to be referred." The City of Tucson sample petition form provided in appendix 3(B) instructs petitioners to "insert the grounds for referendum in 200 words or less." Using 200 words certainly conflicts with a limit of no more than 100 words. That requirement of the city is based on Sec. 2 of Chapter XXI and Sec. 1 of Chapter XX of the Tucson City Charter.

The requirement of §19-101(A) that a referendum description of "no more than 100 words of the principal provisions" of the ordinance to be referred does not have any equivalent in the City Charter or Code. The Code does not specify the content of its 200 words. The requirement that "the principal provisions" of a

25 page ordinance be described in less than 100 words is an open invitation of litigation for all referenda. In virtually all lengthy ordinances challengers could find some provision they could argue was as one of its principal provisions. The general invitation for nit-picking is illustrated in this case where the intervenors challenged minor word differences in the description. Since the Tucson Charter and Code do not require that the "principal provisions" be described it thus conflicts with the state statute.

As examples of the intervenors nit-picking, they challenged the statement that "the UOD carves away 20 percent of the West University Historic District." Val Little, on cross examination, explained that the overlay district applies to 20 percent of the blocks that are in the West University Historic District as a whole. (RT, 4/20/12 p.m. session, 23:3-15).

The intervenors challenged the statement that the UOD "allows seventeen high-rises up to 14 stories." Val Little explained that the City's own graphics (Exhibits 14 and 15 in evidence) 24 buildings could be six stories or higher, which qualifies as a "high-rise in her profession and that four buildings could be 14 stories." (RT, 4/20/12 a.m., 109:9-24).

The City Charter does not permit such challenges to minutia that are inherent in "principal provision" requirements. The Constitution requires that

"each sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people ..." Ariz. Const. Art. 4 pt. 1, §1(9). Petitioners complied with the Constitution.

4. Applying both A.R.S. §19-101(A) form requirements and the Tucson Charter and Code form requirements unreasonably restricts local referenda.

Ariz. Const. Art. 4 pt. 1 §1(16) provides that the section of the constitution relating to the reserved power of initiative and referendum "shall be, in all respects, self-executing." The self-executing aspect of the detailed constitutional requirements for referenda limit the legislature to laws on the same subject that do not unreasonably hinder or restrict the referenda rights retained by the people by the Arizona Constitution. See *Direct Sellers Association v. McBrayer*, 109 Ariz. 3, 503 P.2d 951 (1972) and *Turley v. Bolin*, 27 Ariz.App. 345, 554 P.2d 1288 (1976).

The ability of the legislature to make referenda more difficult or complex is limited by the nature of the reserved power of referenda. Ariz. Const. Art. 4 pt. 1 §1 relating to "the legislative authority of the state" that is "vested in the legislature" is very specifically not a complete grant of that power. The people reserved to themselves "the power to propose laws ... and to enact or reject such

laws and amendments at the polls, independently of the legislature, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."

Because of the nature of the reserved power the legislature does not have the authority to complicate to the point of defeating the referendum rights of the people. The court, in *Fidelity National Title v. Town of Marana*, 220 Ariz. 247, 251, 204 P.3d 1096, 1100 (App. 2009) commented that they were well aware that "seemingly straightforward statutory requirements for pursuing a referendum are at times mystifying to all but the most sophisticated legal specialists." Another division of our Court of Appeals in *Grosvenor Hollings L.C. v. City of Peoria*, 195 Ariz. 137, 141, 985 P.2d 622, 626 (App. 1 1999) commented on the "heads we win, tails you lose advantage enjoyed by referendum opponents."

Mixing the citizen favorable Tucson Charter and Code provisions with the incompatible provisions of A.R.S. §19-101(A) greatly reduces the ability of plaintiffs to utilize their reserved power of referendum. This problem is magnified in the case of referenda where by definition citizens are challenging an ordinance passed by the mayor and Council who select the City Clerk.

The case of *Whitman v. Moore*, 59 Ariz. 211, 218, 125 P.2d 445, 452 (1942) classicly described the historical importance of referenda in our Constitution.

> The Act providing for the admission of Arizona into the Union was adopted June 20, 1910. By its terms it was the duty of the qualified electors of the territory to select a constitutional convention for the purpose of forming a Constitution for the proposed State of Arizona. Shortly before this time the general principle of that method of popular government known as the initiative and referendum had been adopted by several states, and the question of whether Arizona should follow their example or retain the old method of legislation exclusively by the legislature was a burning issue in this state. It is a notorious fact that the choice of delegates to the constitutional convention was fought out primarily upon this issue. The result favored the advocates of this method of popular government, and the records of the constitutional convention, together with the language of the new Constitution, show clearly that it was the opinion of the delegates who adopted and signed it that its provisions setting forth these principles were among the most important to be found therein. When the instrument was submitted to the voters for ratification, that issue was again the principal one before them and the Constitution was ratified by a very large percentage of the votes cast. Whether the attitude of the convention and the voters was wise is not for this court to say, but we are bound to take that attitude into consideration in determining the construction to be given to these provisions.

The Arizona Constitution in its Declaration of Rights, Art. 2, §1, states that "a frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." It is a notorious fact of our present era that our society and democracy is under stress. The reserved power of referendum, as chosen by our constitutional framers, is an important tool to resolve contentious issues and to promote democracy. Our constitution and Tucson's Charter and Code need the intervention of this court in reversing the

Opinion of the Court of Appeals.

CONCLUSION

The Opinion contains clear errors of law relating to fundamental issues of importance to not only Tucson but statewide. Review should be granted by this Court and the Opinion reversed. Attorney's fees are requested under A.R.S. §12-2030 (mandamus) and in accordance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

DATED this 10th day of June, 2012.

RISNER & GRAHAM

/s/ William J. Risner
William J. Risner
Attorney for Plaintiffs/Appellants
Devine and Boston

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP Rule 23(c), I certify that the attached Petitioner's Petition for Review uses proportionately spaced type of 14 points or more, is double-spaced using a roman font (Times New Roman) and contains 2,903 words.

Dated this 10th day of June, 2012.

/s/ William J. Risner
William J. Risner
Attorney for Plaintiffs/Appellants

Original and 7 copies of the foregoing petition for review and certificate of compliance mailed by priority mail the 11th day of June, 2012 to:

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CERTIFICATE OF SERVICE

Two (2) Copies mailed by first class mail this 11th day of June, 2012 to:

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