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February 9, 2021

The Honorable Mark Brnovich
Attorney General of Arizona
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2005 North Central Avenue
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Re: Complaint Pursuant to Ariz. Rev. Stat. § 41-194.01

Dear Attorney General Brnovich:

We write to call your attention to a resolution adopted by the Pima County Board of Supervisors on February 2, 2021 purportedly "codifying, extending, and/or expanding a moratorium on evictions in Pima County" (hereafter, the "Moratorium"). For the reasons discussed below, not only do county governments lack any constitutional or statutory authority to interdict lawful judicial processes or to abrogate valid lease contracts, but even if they did, the Moratorium is in conflict with, and hence preempted by, controlling provisions of state law. Because Pima County stands in continuing violation of the directives of the Arizona Legislature and the Arizona Constitution, we request that your office undertake an investigation and, if necessary, order the withholding of Pima County's allocation of state shared monies or initiate special action proceedings in the Arizona Supreme Court, pursuant to Ariz. Rev. Stat. § 41-194.01.

FACTUAL BACKGROUND

In March 2020, the United States Congress approved, and the President signed, the federal Coronavirus Aid, Relief, and Economic Security ("CARES") Act. Among other things, the CARES Act prohibited property owners with federally-backed mortgage loans from initiating any eviction proceedings against delinquent tenants during the 120-day period following the Act's enactment on March 27, 2020. *See* Public Law No. 116-136, § 4024. The Centers for Disease Control subsequently issued an order broadly restricting residential evictions nationwide through December 31, 2020. *See* Agency Order, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55292 (Sept. 4, 2020). Congress has since extended the duration of the CDC order by an additional thirty days. *See* Public Law 116-260, § 502. In addition, executive orders issued by Governor Ducey largely suspended from March 24 through October 31, 2020 the enforcement of writs of restitution obtained against tenants for nonpayment of rent. *See* Executive Orders 2020-14, 2020-49. All of those enactments have permitted the eviction of tenants on grounds unrelated to delinquent rent (*e.g.*, criminal activity or the creation of nuisances on the leased premises).

On February 2, 2021 the Pima County Board of Supervisors voted to adopt a resolution purportedly "codifying, extending, and/or expanding a moratorium on evictions in Pima County." Pima County Board of Supervisors, *Meeting Summary Report*, item #9 (Feb. 2, 2021), *available at* https://pima.legistar.com/View.ashx?M=M&ID=811136&GUID=A457DE0D-E5C4-4D92-A62B-1243E187D158. The precise scope and import of this exiguous resolution—which is not yet memorialized in any ordinance or other operative writing—remains unclear. According to information received from a source in the county government, however, the Board of Supervisors' action will be recorded as follows:

> Motion to adopt as a public-health regulation, through March 31, 2021, applicable throughout Pima County, a moratorium on all evictions in Pima County except those for material falsification or for material and irreparable breaches as provided in A.R.S. 33-1368(A), and to direct the Pima County Health Department to develop a form / declaration eligible tenants can sign to show their eligibility for the protections of this moratorium, consistent with the terms of this moratorium and otherwise with the Centers for Disease Control's eviction moratorium; and to make such form easily accessible to the public.

The Moratorium's sponsor has publicly stated that it is intended to prohibit evictions that otherwise would be permissible under state and federal law—*i.e.*, evictions premised on a tenant's breach of lease covenants other than the obligation to pay rent. *See* Luzdelia Caballero, *Pima County Stops Landlords From Using Eviction Moratorium Loophole*, KGUN-TV, Feb. 2, 2021, *available at* https://www.kgun9.com/news/local-news/pima-county-stops-landlords-from-using-eviction-moratorium-loophole.

DISCUSSION

Upon a request by a member of the Legislature, the Attorney General must "investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town that the member alleges violates state law or the Constitution of Arizona." Ariz. Rev. Stat. § 41-194.01. If the Attorney General finds a violation, he must order the Treasurer to withhold and redistribute the offending locality's allocation of state shared revenues. If he concludes that a violation may exist, he must commence a special action seeking an adjudication of the question by the Arizona Supreme Court. *Id.*

I. Pima County Has No Authority to Impose an Eviction Moratorium of Any Kind

"The boards of supervisors of the various counties of the state have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature." *Associated Dairy Products Co. v. Page*, 68 Ariz. 393, 395–96 (1949); *see also* Ariz. Const. art. XII, § 4 ("The duties, powers, and qualifications of [county] officers shall be as prescribed by law."). Thus, every act of the Pima County Board of Supervisors must derive from some specific antecedent statutory authorization. Importantly, the necessary grant of authority must be clear and explicit; it cannot be inferred from legislative silence or extruded from amorphous statutory language. *See Marsoner v. Pima County*, 166 Ariz. 486, 488 (1991) ("Our courts have consistently required counties and county boards of supervisors to show an express grant of power whenever they assert that such statutory authority [to act] exists. They have only those powers that are expressly or by necessary implication delegated to them by the legislature."); *Home Builders Ass'n of Cent. Arizona v. City of Maricopa*, 215 Ariz. 146, 150, ¶ 11 (App. 2007) (noting that "the burden is on the county to point out the constitutional or statutory power that permits the conduct." (internal citation omitted)).

A prerogative to dictate the permissible parameters of eviction proceedings or nullify the terms of private lease agreements is nowhere found among the functions assigned to county governments in Title 11. Nor can the statutory regime of "emergency powers" sustain the Board of Supervisors' overreach. Whatever powers that may redound to counties in a state of emergency are subordinate to the directives of the Governor and state government. *See* Ariz. Rev. Stat. § 26-307(A). To this end, the regnant state policy governing the response to the COVID-19 pandemic instructs in no uncertain terms that "no county, city or town may make or issue any order, rule or regulation that conflicts with ***or is in addition to*** the policy, directives or intent of this Executive Order, including . . . any other order, rule or regulation that was not in place as of March 11, 2020." Executive Order 2020-36, ¶ 7 [emphasis added]. This plenary preemption displaces any and all supplemental enactments of county or municipal bodies—to include the Moratorium—that purportedly are premised on the subdivision's emergency powers. The exceptions to Executive Order 2020-36's preemption clause have been express, limited and discrete, and do not even indirectly encompass the Moratorium. *See, e.g.*, Executive Order 2020-40, ¶ 4 (authorizing exemption from Executive Order 2020-36's preemption clause with respect to mask mandates).

Executive Order 2020-36 notwithstanding, Pima County's "emergency powers" do not license the Moratorium. At most, the relevant statutes authorize counties to adopt measures urgently necessary to contain the physical spread of disease, secure health and medical services for afflicted individuals, supply necessary medical equipment, and otherwise ameliorate immediate threats to human life. *See* Ariz. Rev. Stat. §§ 26-307, -301(5), -311. Nothing in those provisions contemplates that a political subdivision may unilaterally conscript private property for an indefinite period without compensation, or effectively extinguish judicial enforcement of remedies guaranteed by state law.

In short, even if the Moratorium did not conflict with any state statute or constitutional provision (and, as discussed below, it does), it is an *ultra vires* act of the Board of Supervisors and thus a legal nullity.

II. The Moratorium is Irreconcilable with State Law

Even when the Board of Supervisors acts pursuant to some cognizable grant of statutory authority, its enactments must yield to conflicting or superseding provisions of state law.

A. State Statutes

The Legislature may displace county measures when "the [county] creates a law in conflict with the state law" or "the state legislature intended to appropriate the field through a clear preemption policy." *City of Scottsdale v. State*, 237 Ariz. 467, 470, ¶ 10 (App. 2015) (quoting *State v. Coles*, 234 Ariz. 573, 574, ¶ 6 (App. 2014)); *see also Jett v. City of Tucson*, 180 Ariz. 115, 121 (1994).[1] State law is clear and explicit: lessors are contractually and statutorily entitled to repossess their property upon a tenant's default or material breach of any provision of the lease agreement. *See* Ariz. Rev. Stat. §§ 33-361(A), 33-1368, 33-1377. Indeed, the Legislature has directed in unqualified terms that "[a]ny right or obligation declared by this chapter [governing landlord-tenant relations] is enforceable by action unless the provision declaring it specifies a different and limited effect," *id.* § 33-1305(B), and that a writ of restitution issued in favor of a property owner "shall be enforced as promptly and expeditiously as possible," *id.* § 12-1178(C). In attempting to prohibit proceedings expressly authorized by state law and abrogating contractual rights and remedies secured by statute, the Moratorium collides palpably and inescapably with the pronouncements of the sovereign Legislature. *See generally State v. Payne*, 223 Ariz. 555, 566, ¶ 39 & n.7 (App. 2009) (finding that county ordinance imposing "prosecution fee" on convicted defendants conflicted with state law that permitted courts to require defendants to pay the costs of prosecution); *City of Casa Grande*, 199 Ariz. 547, 551-52, ¶¶ 12-13 (App. 2001) (ordinance authorizing city to acquire utility without voter approval was preempted by statute requiring voter approval as prerequisite to municipal acquisition of utility). It hence is invalid and preempted.

Further, even if there were not a direct conflict between the Moratorium and the commands of state law, the former is still preempted because it an impinges on a field that is exclusively the domain of the State. When the Legislature has spoken with clarity and precision on a given subject, it has occupied the regulatory field to the exclusion of municipal or county enactments. *See Clayton v. State*, 38 Ariz. 135, 139 (1931) (finding that although a provision in the highway code expressly delegated responsibility for "local parking and other special regulations" to municipal governments, a Phoenix ordinance that prohibited operating a vehicle under the influence of alcohol was preempted because "the Highway Code manifests a purpose to cover the whole subject of highways and to regulate their use by the public in cities and towns as well as in the country"); *Mayor & Common Council of City of Prescott v. Randall*, 67 Ariz. 369, 377 (1948) (finding field preemption of liquor license regulation notwithstanding statutory language permitting some municipal legislation on the subject, reasoning that "[t]o authorize cities and towns to regulate the liquor traffic would emasculate the entire state liquor code").

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[1] It should be noted that an implicit confusion pervades the case law with respect to whether preemption must entail both a conflicting state statute and the Legislature's occupation of the field. While the current formulation of the doctrinal test is structured in the conjunctive, other cases have indicated that the presence of either a conflict or field occupation is independently sufficient to establish a preemptive effect. *See, e.g., Union Transportes de Nogales v. City of Nogales*, 195 Ariz. 166, 171, ¶ 20 (1999) ("Preemption becomes an issue when the charter city legislates in contradiction to state law **or** over a subject that is in a 'field' already fully occupied by state law." (emphasis added)); *State ex rel. Baumert v. Municipal Court of the City of Phoenix*, 124 Ariz. 159, 161 (1979) (declining to reach question of field preemption "since we have resolved the issue on the narrower ground of conflict between the ordinance and the statute"). Still other cases omit the conflict element altogether from their recitation of the standard. *See, e.g., Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 559 (1978). In any event, a framework that conditions preemption on either a conflicting statute **or** field appropriation is not only more conceptually sound and descriptively accurate—no case has ever sustained a municipal or county ordinance against a conflicting statute—but also comports with the federal case law, which likewise recognizes conflict and field preemption as two distinct and independent variants of preemption doctrine. *See generally Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013) ("There are 'three classes of preemption': express preemption, field preemption and conflict preemption.").

The Legislature has constructed in the Arizona Residential Landlord and Tenant Act, Ariz. Rev. Stat. tit. 33, ch. 10, an exhaustive and self-contained statutory infrastructure delineating in detail the respective rights of property owners and tenants, and the procedural channels through which those rights may be vindicated. In aspiring "[t]o simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant," Ariz. Rev. Stat. § 33-1302(1), and by explicitly enumerating the narrow circumstances in which it does not apply, *see id.* § 33-1308, the Act evinces the Legislature's intent to occupy the regulatory field of landlord-tenant relations, unencumbered by competing county or municipal edicts.[2]

B. Arizona Constitution

In addition to defying the preemptive force of controlling state statutes, the Moratorium also transgresses at least three provisions of the Arizona Constitution. *See generally* Ariz. Op. Atty. Gen. No. I20-006 (Mar. 31, 2020) (emphasizing "the careful balance that must be struck in protecting the public health while respecting individual rights").

1. Takings Clause

The Moratorium effectuates a regulatory taking of private property without just compensation, in violation of Article II, Section 17 of the Arizona Constitution, which provides that "no private property shall be taken or damaged for public or private use without just compensation having first been made." Although takings usually take the form of eminent domain (*i.e.*, government's seizure of private property), both federal and Arizona courts have recognized the concept of a "regulatory taking," which results "from government regulations that deprive an owner of the economic benefit of the property." *Dos Picos Land Ltd. P'ship v. Pima County*, 225 Ariz. 458, 461 (App. 2010).

In essence, the moratorium converts private property into public housing, with lessors shouldering the substantial costs of sheltering defaulted tenants for as long as the Board of Supervisors dictates that they do so. That tenants remain liable on paper for accrued rent is an illusory means of redress for this conscription of private property; eviction is generally a lessor's only effective remedy when a tenant—who most often is judgment proof in any event—breaches his or her contractual obligations. And even if it were feasible for lessors to later collect delinquent rent payments, Pima County's "temporary" impressment of private property remains a compensable taking; at the very least, affected lessors burdened with defaulted tenants are prevented from selling their parcels or otherwise putting their property to more profitable uses for as long as the Moratorium remains in effect. *See Corrigan v. City of Scottsdale*, 149 Ariz. 538 (1986) (affirming that even temporary takings require compensation).

2. Contracts Clause

In unilaterally annulling, for a potentially indefinite duration, lessors' contractual right to reclaim their property from tenants in material breach, the Moratorium also violates Article II, Section 5 of the Arizona Constitution, which provides that "no . . . law impairing the obligation of a contract shall ever be enacted." By its terms, the Moratorium operates directly on extant lease contracts, which are squarely within the ambit of the Contracts Clause. *See Herndon v. Hammons*, 33 Ariz. 88, 93 (1927).

While a legislative body may modify remedial procedures governing existing contracts in the event of a breach, it "may not withdraw all remedies, and thus in effect destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass enforcement of rights under the contract, according to the usual course of justice as established when the contract was made." *Nat'l Sur. Co. v. Architectural Decorating Co.*, 226 U.S. 276, 283 (1912) (internal citations omitted).[3] In other words, the government may not retroactively "so affect[] [an existing] remedy as substantially to impair and lessen the value of the contract." *Edwards v. Kearzey*, 96 U.S. 595, 607 (1877). Here, the Moratorium does not merely prescribe a new procedure for property owners to enforce eviction judgments, or even substitute one remedy for another of equivalent efficacy. *Contrast*

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[2] Even if the relevant "field" were instead conceptualized as "emergency powers" (rather than owner-tenant relations), the Moratorium is still preempted by Executive Order 2020-36, as discussed above.

[3] Assuming that Arizona's Contracts Clause was modeled on its counterpart in the federal Constitution, the common understanding of the latter in 1912, when the Arizona Constitution was ratified, is a critical interpretive touchstone. *See Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994) ("When interpreting the scope and meaning of a constitutional provision . . . [o]ur primary purpose is to effectuate the intent of those who framed the provision.").

Schwetner v. Provident Mut. Bldg. Loan Ass'n, 17 Ariz. 93, 95 (1915) (statute requiring foreclosure actions to be brought in a judicial proceeding did not impair any existing contractual obligation in mortgage agreements). Rather, it directly obstructs lessors from obtaining their primary (if not sole) means of contractual redress—*i.e.*, the eviction of a delinquent tenant and reclamation of their property. That the resolution perhaps may be only "temporary" does not make it any less an impairment. *See Edwards*, 96 U.S. at 602 ("If a State may stay the remedy for one fixed period, however short, it may for another, however long."); *Barnitz v. Beverly*, 163 U.S. 118, 129 (1896) ("[W]e hold that a statute which . . . extends the period of redemption [of a foreclosed property] beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage."); *cf. Foltz v. Noon*, 16 Ariz. 410, 416-17 (1915) (rejecting argument that statute allowing workers to impose a lien for uncompensated services was "merely remedial").

3. Jurisdiction Stripping

That the Moratorium substantially curtails the statutory and constitutional rights of property owners is clear; the precise manner in which it will do so is less so. To the extent the Moratorium purports to abridge the jurisdiction of the Superior Court or the Justice Court to hear and adjudicate special detainer proceedings, it contravenes Sections 14 and 32 of Article VI of the Arizona Constitution. Both tribunals are organs of the state government, and their jurisdictional purviews are prescribed by the Constitution and/or state law. *See* Ariz. Const. art. VI, §§ 14(1) (securing the Superior Court's jurisdiction over all "[c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court"), 32 (jurisdiction of the Justice Court is as "provided by law"). To this end, the Legislature has vested in these courts original jurisdiction over eviction proceedings. *See* Ariz. Rev. Stat. §§ 33-1377, 12-1175(A), 22-201. Nothing in the Constitution countenances an inferior political subdivision's diktat stripping a state court of jurisdiction entrusted to it by state law. Thus, to the extent the Moratorium obstructs litigants' access to judicial fora or derogates the jurisdiction of the Superior Court or the Justice Court, it is constitutionally infirm for that reason as well.

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For the foregoing reasons, we respectfully request that your office immediately initiate an investigation and undertake all remedial actions authorized by Ariz. Rev. Stat. § 41-194.01 to vindicate the supremacy of state law against the Pima County Board of Supervisors' unlawful eviction moratorium.

Thank you for your attention to this important matter.

Respectfully,

Vince Leach, Senator for District 11

Bret Roberts, Representative for District 11