



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>INVESTIGATIVE REPORT</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>September 7, 2021</p>	<p>No. 21-003</p> <p>Re: Whether the City of Tucson Ordinance 11869 violates A.R.S. §§ 36-114, 36-184, 36-681 (effective 9/29/2021), or 36-787, or the Governor's Executive Order 2021-18.</p>
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To: The Honorable Doug Ducey, Governor of Arizona
The Honorable Karen Fann, President of the Arizona Senate
The Honorable Rusty Bowers, Speaker of the Arizona House of Representatives
The Honorable Kelly Townsend, Requesting Member of the Arizona Legislature
The Honorable Katie Hobbs, Secretary of State of Arizona

I. Summary

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 41-194.01, the Attorney General’s Office (“Office”) has investigated whether Ordinance No. 11869 (the “Ordinance”) adopted by the City of Tucson (“Tucson”) violates A.R.S. §§ 36-114, 36-184, 36-681 (effective 9/29/2021), or 36-787, or the Governor’s Executive Order 2021-18 (“E.O. 2021-18”).

During the 2021 legislative session, in S.B. 1824, the Arizona Legislature statutorily forbid city governments in Arizona from imposing COVID-19 vaccine mandates on their employees. On August 13, 2021, however, Tucson adopted an ordinance requiring employees to provide proof of vaccination for COVID-19 by 4:00 p.m. on August 24, 2021. Tucson adopted an expedited schedule in order to exploit the provision of state law delaying implementation of most new statutes until ninety days after the end of the legislative session. In response, on

August 16, 2021, Governor Ducey issued Executive Order 2021-18, which attempted to close that timing loophole by providing that cities may not implement a COVID-19 vaccine requirement in violation of S.B. 1824. Nonetheless, Tucson has refused to rescind its ordinance, despite that it violates statewide public policy as expressed in S.B. 1824 and E.O. 2021-18. That elected city officials continue to attempt to exploit a perceived timing loophole in order to force irreversible vaccinations on their entire workforce, including police and fire employees who daily risk their lives to protect the public, is highly troubling.

The Attorney General has determined that the Ordinance **does violate** A.R.S. § 36-681 (effective 9/29/2021) for purposes of § 41-194.01(B)(1), and the Ordinance directly conflicts with E.O. 2021-18.¹ Tucson must rescind the ordinance. Moreover, because the Legislature has expressly banned COVID-19 vaccine mandates in § 36-681 and the Governor has issued a similar E.O. in the interim, a Tucson employee could rely in good faith on the expressions of public policy in E.O. 2021-18 and § 36-681 to conclude that Tucson cannot require a city employee to obtain a COVID-19 vaccine.

II. The Office's Investigation

On August 17, 2021, the Office received a request from Senator Kelly Townsend, pursuant to A.R.S. § 41-194.01, for legal review of Tucson Ordinance 11869. The Ordinance was adopted on August 13, 2021, and the Tucson City Manager's Administrative Directive issued the same day required compliance by city employees by 4:00 p.m. on August 24, 2021. The Office promptly asked Tucson to provide a voluntary response to Senator Townsend's request to investigate. Tucson cooperated by providing a voluntary response letter and

¹ The Office acknowledges that informal AG Opinion I21-003 questioned whether the Governor, through an Executive Order grounded in Title 26, properly preempted a local resolution; however, it is undisputed that the Governor issued E.O. 2021-18, it remains in effect, and the Office is unaware of any court of competent jurisdiction enjoining it as to all city employees.

supporting materials on August 30, 2021. In performing the required investigation during the limited 30-day period, the Office reviewed relevant materials and authorities.

The Office's legal conclusions are set forth below. The facts recited in this report serve as a basis for those conclusions, but they are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. § 41-194.01. Nothing in this report is intended to limit any rights of Tucson employees who are subject to the Ordinance.

III. Relevant Background

On June 30, 2021, the Governor signed S.B. 1824, which added article 4.2 to Title 36, chapter 6, Arizona Revised Statutes. *See* 2021 Ariz. Sess. Laws ch. 409, § 13 (1st Reg. Sess.).

That new article contains two statutes, which read as follows:

36-681. COVID-19 vaccine passport; prohibitions

A. NOTWITHSTANDING ANY OTHER LAW, THIS STATE AND ANY CITY, TOWN OR COUNTY OF THIS STATE ARE PROHIBITED FROM ESTABLISHING A COVID-19 VACCINE PASSPORT OR REQUIRING EITHER OF THE FOLLOWING:

1. ANY PERSON TO BE VACCINATED FOR COVID-19.
2. A BUSINESS TO OBTAIN PROOF OF THE COVID-19 VACCINATION STATUS OF ANY PATRON ENTERING THE BUSINESS ESTABLISHMENT.

B. ANY LAW OR ORDINANCE ESTABLISHING A COVID-19 VACCINE PASSPORT IS VOID AND IS NOT ENFORCEABLE AGAINST ANY PERSON OR BUSINESS LOCATED IN THIS STATE.

36-682. Article application; exceptions

THIS ARTICLE DOES NOT DO EITHER OF THE FOLLOWING:

1. LIMIT AN INDIVIDUAL'S ABILITY TO REQUEST THAT THE INDIVIDUAL'S OWN VACCINATION RECORDS BE PROVIDED TO THAT INDIVIDUAL OR TO A THIRD PARTY TO WHOM THE INDIVIDUAL REQUESTS THE RECORDS BE RELEASED.
2. PROHIBIT A HEALTH CARE INSTITUTION LICENSED PURSUANT TO CHAPTER 4 OF THIS TITLE FROM REQUIRING THE INSTITUTION'S EMPLOYEES TO BE VACCINATED.

S.B. 1824 does not contain an emergency clause and did not receive a two-thirds vote by both houses of the legislature, both of which are generally required to make a law that is not “for the support and maintenance of the departments of the state government and state institutions” operative sooner than “ninety days after the close of the session of the legislature enacting such measure.” *See* Ariz. Const. art. IV, pt. 1, § 1(3). Also, while S.B. 1824 contains a retroactivity clause in § 36, that clause by its plain language does not apply to new article 4.2. The general effective date for laws passed in the First Regular Session of the Fifty-fifth Legislature is September 29, 2021. *See* Arizona State Legislature, <https://www.azleg.gov/general-effective-dates/>.

The Tucson City Council passed the Ordinance on August 13, 2021, requiring its employees to obtain proof of vaccination. The Council included an emergency clause in the Ordinance at section 7, making it effective immediately upon its passage and adoption. *See* Tucson Response, Exhibit B.

The same day the Ordinance was passed, the Tucson City Manager issued Administrative Directive No. 2.03-7, which required city employees to provide proof of vaccination by 4:00 p.m. on August 24, 2021—a mere 7 business days after the Ordinance was approved. *See* Tucson Response, Exhibit B. Tucson imposed a five-day suspension without pay on employees who do not provide proof of vaccination, or seek a disability accommodation, medical exemption, or religious accommodation by August 24, 2021.

Two days after Tucson passed the Ordinance, on August 16, 2021, Governor Ducey issued E.O. 2021-18, providing that cities may not implement a COVID-19 vaccine requirement in violation of S.B. 1824 prior to September 29, 2021.

IV. Legal Analysis

The legal issue the Office must resolve is whether Tucson’s Ordinance “violates state law or the Constitution of Arizona” for purposes of § 41-194.01. The legal analysis herein is therefore necessarily limited to that question and is not intended to apply more broadly.

There is no doubt that the Ordinance squarely violates state law, namely A.R.S. § 36-681. We begin with the plain language of a statute, which is the “best indicator of legislative intent.” *See ACLU v. Ariz. Dep’t of Child Safety*, -- Ariz.--, 2021 WL 3746760, at *4 ¶ 20 (Ariz. Aug. 25, 2021). Section A of § 36-681 “prohibit[s]” “any city ... of this state ... from ... requiring ... 1. Any person to be vaccinated for COVID-19.” The plain language uses the words “any city” and “any person,” which evidences the Legislature’s clear intent to prohibit vaccine mandates such as the Ordinance. *See, e.g., Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-19 (2008) (“‘any’ has an expansive meaning, that is, one or some indiscriminately of whatever kind” (quotation omitted)). Moreover, the Ordinance conflicts with the broad language of E.O. 2021-18.

Any argument by Tucson that it is a charter city and thus can ignore this law fails. Health and safety regulations are not matters of “purely local concern,” and Arizona case law makes clear that the Legislature can regulate charter cities in this regard. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 602 ¶¶ 56-57 (2017) (limiting matters of purely local concern to conducting local elections and disposing of the entity’s own real estate).

The Office notes that the City’s obvious effort to circumvent state law raises serious concerns about the equities of requiring city employees to get a vaccine contrary to the clear policy objective set forth by the Arizona Legislature in A.R.S. § 36-681. Moreover, given E.O. 2021-18, which the Governor issued consistent with the Legislature enacting § 36-681, a city

employee could clearly rely in good faith on the Governor’s E.O. 2021-18 and conclude that Tucson cannot require the employee to obtain a vaccine when the Legislature has provided so expressly in § 36-681 and the Governor has issued a similar E.O. in the interim. It is self-evident that any negative side effects of a vaccine will not be undone merely on the general effective date of legislation. And it will be cold comfort to city employees that state law unambiguously protects them *after* they were required to obtain a vaccine that they would not otherwise have obtained in the first place. Any harm at that point would have already occurred.²

The effective date of A.R.S. § 36-681 does not change the “does violate” conclusion of this report for purposes of § 41-194.01(B)(1). Section 41-194.01(B)(1) provides a statutory mechanism for Tucson to “resolve the violation” that extends beyond the September 29, 2021, general effective date for statutes enacted in the First Regular Session of the Fifty-fifth Legislature. Therefore, Tucson must either repeal or amend its Ordinance so that it complies with § 36-681 by the time set forth in § 41-194.01(B)(1), or the Attorney General will notify the State Treasurer, who shall withhold and redistribute state shared monies pursuant to § 41-194.01(B)(1)(a).

V. Conclusion

The Office concludes under A.R.S. § 41-194.01(B) that Tucson Ordinance No. 11869 **does violate** state law. Tucson must therefore “resolve the violation” as set forth in § 41-194.01(B)(1). It must either repeal or amend the Ordinance so that it complies with § 36-681, or the Attorney General will notify the State Treasurer, who shall withhold and redistribute state

² Tucson is a government entity and should also respect the privacy of its employees, particularly when the Arizona Constitution contains an express statement that “[n]o person shall be disturbed in his private affairs.” Ariz. Const. art. 2, § 8.

shared monies pursuant to § 41-194.01(B)(1)(a). Please provide any further information to beau.roysden@azag.gov or 602-542-8958.

MARK BRNOVICH
ATTORNEY GENERAL

By: /s/ Brunn (“Beau”) W. Roysden III _____
Solicitor General
Arizona Attorney General’s Office