



Mike Rankin
City Attorney
City of Tucson, Arizona
255 W. Alameda Street, Tucson, AZ 85701
Mike.Rankin@tucsonaz.gov

January 13, 2023

VIA EMAIL ONLY

Attorney General Kris Mayes
OFFICE OF THE ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, AZ 85004
Kris.Mayes@azag.gov

Re: Attorney General Investigative Report No. 22-002, dated December 21, 2022, Relating to Whether the City of Tucson's Fair Housing Ordinance Regarding "Source of Income" Violates State Law

Dear Attorney General Mayes,

I'm writing on behalf of the City of Tucson Mayor and Council to request that you agree to reconsider the determination made in Investigative Report No. 22-002 (the "Report"). The Report finds that the City of Tucson's ordinance prohibiting housing discrimination based on "Source of Income" violates state law. The Report, issued by Attorney General Brnovich on December 21, 2022, was generated following a complaint submitted by Representative (now, Speaker) Ben Toma on November 16, 2022 (the "Complaint"). The Complaint, the Solicitor General's request for a response, and the City's response are all available for review here:

<https://www.azag.gov/complaints/sb1487-investigations>

I have attached the Report for your review as well.

The Complaint, the subsequent investigation, and the Report are the product of the provisions of A.R.S. § 41-194.01, a statute still commonly referred to as SB 1487. As you know, this law provides that the Attorney General shall investigate any ordinance adopted by a city's governing body if a member of the Arizona Legislature alleges that the ordinance violates state law or the Arizona Constitution. The statute requires the Attorney General to issue a written report within 30 days of the legislator's request, with a finding and conclusion of whether the local action violates, may violate, or does not violate state law or the Arizona Constitution. If the report finds that the local action does not violate Arizona law, no further actions are required. If the report finds that the action "may violate" Arizona law, the statute compels the Attorney General to file a special action in the Arizona Supreme Court to resolve the issue. If the report finds that the local action

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violates Arizona law, the Attorney General shall provide notice to the city, by certified mail,¹ of the violation and shall indicate that the city has 30 days “to resolve the violation.” If the Attorney General thereafter determines that the city has failed “to resolve the violation” within 30 days, the Attorney General shall notify the Arizona Treasurer, who shall withhold and redistribute certain of the city’s state shared monies.

In this particular case, the Report finds that Tucson’s Ordinance 11959, adopted by the City on September 27, 2022, violates state law, finding that “the Ordinance is contrary to the time constraints for certain local governments to enact a fair housing ordinance contained in A.R.S. §§ 9-500.09, 41-1491.06(C), and 41-1491.13(B).” The Report concludes by stating that “Tucson must ‘resolve the violation’” as set forth in A.R.S. § 41-194.01(B)(1) by repealing the Ordinance, or the Attorney General will notify the State Treasurer, who shall withhold state shared monies pursuant to § 41-194.01(B)(1)(a).”² Given the 30-day time frame established in that section, the deadline for Tucson to “resolve the violation” is January 20, 2023.

At its meeting on January 11, 2023, the Tucson Mayor and Council discussed the Report in Executive Session for the purpose of receiving legal advice, and thereafter acted in the open session to provide direction to resolve this matter. The motion that was unanimously approved by the Mayor and Council provided as follows:

“I move that the Mayor and Council direct the City Attorney to proceed as discussed in Executive Session, and to do the following:

- 1) To make a formal request to Attorney General Kris Mayes to reconsider the determination issued by the prior Attorney General at the end of his term regarding the City’s Source of Income Ordinance; and
- 2) To suspend enforcement of the City’s Source of Income ordinance during the time frame that Attorney General Mayes might need to reconsider the determination relating to the Ordinance, and to eliminate the potential conflict with Arizona law as cited in the prior determination; and
- 3) To take any measures necessary to eliminate the threat of the loss of state shared revenues while this issue is resolved; and
- 4) To schedule an agenda item at the next Mayor and Council meeting – or at a special meeting if necessary – to allow the Mayor and Council to take appropriate action to avoid any interruption of state shared revenues.”

Consistent with this direction, I now ask that you consider and agree with the following proposals:

1. The alleged conflict with state law, as determined in the Report, is now “resolved” – at least temporarily – by the Mayor and Council’s action on January 11th.

¹ See A.R.S. § 41-194.01(B)(1). Deputy Solicitor General Michael Catlett did provide the Report to me by email before close of business on December 21, 2022. To my knowledge, the Report was not sent or delivered by certified mail, as provided in the statute.

² In the case of Tucson, the implicated state shared monies represent more than \$150 million per year.

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As noted above, the Report directs that the only path for Tucson “to resolve” the asserted violation per § 41-194.01(B)(1)(a) is “by repealing the Ordinance.” In fact, the statute only requires that the City “resolve the violation,” and does not limit the City’s actions to a repeal. § 41-194.01(B)(1)(b) recognizes that while the conflict can be resolved by repeal of the Ordinance, the asserted violation may be “otherwise resolved.”

Based on the actions taken by the Tucson Mayor and Council on January 11th, any enforcement of Ordinance No. 11959 is now suspended, and will remain so until such time as Tucson can either secure a revised Attorney General report and determination, or until the question of whether the Ordinance violates state law is determined by the Arizona courts.³ While the Ordinance is suspended, Tucson will not accept or investigate complaints alleging violations of the Source of Income provisions. I ask that as the Attorney General, you conclude that Tucson has “resolved the violation” identified in the Report, and that pursuant to § 41-194.01(B)(1)(b) you notify the Governor, President of the Senate, Speaker of the House, and State Treasurer that the violation has been resolved.

2. The Report will be reconsidered prior to any direction or notice to the Treasurer to withhold Tucson’s state shared monies.

On behalf of the Tucson Mayor and Council, I also ask that you reconsider the Report issued by your predecessor at the close of his term. I offer two reasons that justify reconsideration:

- 1) The facts and arguments provided by Tucson in its response to the Complaint provide a compelling basis to determine that the Ordinance does not violate Arizona law.

As part of its investigation of the Complaint, the Attorney General’s Office gave me the opportunity to provide a response on behalf of Tucson.⁴ That response is available for your review here:

<https://www.azag.gov/sites/default/files/docs/complaints/sb1487/22-002/2022-12-09COTResponsetoRequesttoInvestigate.pdf>

I will not repeat the content of that response here, but I encourage you to review it. I’ll only emphasize that the Arizona laws that provide the basis for the Report’s conclusion that the Ordinance is preempted by state law contain no express or plain statement of intent to preempt. If there is anything the Arizona Legislature knows how to do, it is how to plainly and expressly state its intent to preempt local legislative or regulatory authority.⁵ A.R.S. §§ 9-500.09, 41-1491.06(C), and 41-1491.13(B) contain no statement declaring that the issues in question are of statewide

³ Under the Arizona Constitution, the determination of whether the Ordinance violates state law is properly a function of the courts. This issue is addressed further below.

⁴ The statute does not require that the AGO provide this opportunity to respond. I continue to appreciate the fact that the AGO has adopted this practice.

⁵ See, e.g. A.R.S. §§ 13-3108(A)(D); 23-205; 44-1648; many others.

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concern; no statement of intent to occupy the field; and no statement prohibiting regulation by a city, town, or county.

I respectfully submit that the Report's conclusion that the Ordinance is preempted by the cited statutes is incorrect, and that the Ordinance does not violate those state laws. I believe that when examining the question of whether the Ordinance is lawful – or for that matter, when examining any local ordinance that is the subject of a 1487 complaint - the Attorney General must start with a presumption that the legislative act is in fact lawful⁶, and should only come to a different conclusion when applicable legal authority clearly and convincingly compels that conclusion. That certainly is not the case with respect to Tucson's Ordinance. At the very least, the facts, arguments, and authority provided in Tucson's response demonstrate that the question of whether the Ordinance violates state law is strongly debatable, and that the Report should be reconsidered, at a minimum, for a possible "may violate" determination.⁷

- 2) § 41-194.01(B)(1) violates Article 3 of the Arizona Constitution, which requires Separation of Powers.

While I believe that SB 1487/A.R.S. § 41-194.01 violates the Arizona Constitution in a number of ways, I will focus here on the provisions of that law under 41-194.01(B)(1) that establish extraordinary sanctions based upon a legal determination issued by the Attorney General concerning whether a local action violates state law. This of course is the exact situation Tucson now faces based on the Report.

The Arizona Constitution explicitly provides that "powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and . . . such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. III. The Supreme Court of Arizona has reinforced that it "is very essential . . . that one branch of government shall not be permitted to unconstitutionally encroach upon the functions properly belonging to another branch, for only in this manner can we preserve the system of checks and balances which is the genius of our government." *Giss v. Jordan*, 82 Ariz. 152, 164 (1957). The Supreme Court has also underscored that "[n]owhere in the United States is this system of structured liberty [of separation of powers] more explicitly and firmly expressed than in Arizona." *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988).

⁶ When the lawfulness of an ordinance is reviewed by the Arizona courts (which is where this question should be resolved in any event), the party challenging the ordinance must overcome a strong presumption that the ordinance is constitutional; and when a "reasonable, even though debatable, basis supports an ordinance," the courts will uphold the ordinance unless it is "clearly unconstitutional." *City of Tucson v. Grezaffi*, 23 P3d 675, 679 (Ariz. App. 2001). Additionally, when examining whether an ordinance conflicts with an Arizona statute, an ordinance will not be found to be invalid if a reasonable interpretation of it avoids conflict with statute. *Id.*, at 680.

⁷ A determination that the Ordinance "may violate" state law would provide a path to presenting this legal issue to the Arizona Supreme Court, and would avoid the separation of powers violation discussed below.

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A.R.S. § 41-194.01(B)(1) plainly violates this constitutional commitment to the separation of powers in at least one critical respect. The law divests the judiciary of its constitutional role to “say what the law is.”⁸

Under the Arizona Constitution, “[t]he Legislature has the exclusive power to declare what the law shall be.” *State v. Rios*, 225 Ariz. 292, 297-98 (App. 2010) (quotation omitted); *State v. Prentiss*, 163 Ariz. 81, 85 (1989). But, “[t]he power to define existing law, including common law, and to apply it to facts rests exclusively within the judicial branch.” *San Carlos Apache Tribe v. Super. Ct. ex rel. Cty. of Maricopa*, 193 Ariz. 195, 211, ¶ 21 (1999). When evaluating whether a legislative enactment impermissibly intrudes on the power of the judiciary, courts look to see whether the legislative act unreasonably limits or hampers the judicial system in performing its function. *See id.* at ¶ 37.

A.R.S. § 41-194.01(B)(1) does not simply hamper the judicial system from performing its duties to define existing law and apply it to facts. It entirely eliminates the role of the courts both in defining certain existing laws and in applying certain facts to those laws. § 41-194.01(B)(1) unconstitutionally attempts to vest these exclusively judicial powers in the Attorney General, who is an executive officer.⁹ Additionally, through A.R.S. § 41-194.01, the Legislature has engineered an end-run around of the judiciary on an issue—whether a municipal law violates state law—that our Supreme Court has explicitly confirmed is for the courts alone to decide. *See City of Tucson v. State*, [Tucson II], 273 P.3d 624, 630 (2012) (“Although we respect findings by the legislature, whether state law prevails over conflicting charter provisions under Article 13, Section 2 is a question of constitutional interpretation” for which “courts are ultimately responsible.” (quotation omitted)).

A.R.S. § 41-194.01 purports to vest within one executive officer, the Attorney General, the power to investigate and rule on facts, and in turn issue a judgment, and then order draconian sanctions upon cities and their residents. As in *San Carlos Apache Tribe*, “[t]he practical effect of the [Legislature’s] enactment . . . [is] to remove all possibility of meaningful judicial conclusions based on findings of fact. This the Legislature cannot do.” 193 Ariz. at 212, ¶ 40.

Because the Report makes a determination that the Ordinance violates state law, Tucson now faces extraordinary and crippling legal sanctions, all based on the actions of an executive officer and without any consideration or action of the judiciary. This is a plain violation of Article 3 of the Arizona Constitution, which requires Separation of Powers, and is a compelling basis to reconsider the Report.

⁸ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”)

⁹ Opinions of the Attorney General are advisory only; are not binding on courts of law; and are not a legal determination of what the law is at any certain time. Op.Atty.Gen. No. I78-283.

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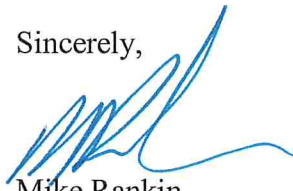
3. The 30-day time frame for Tucson “to resolve” the determined conflict with Arizona law has not yet begun.

As noted above, the Report was issued on December 21, 2022. I acknowledge that the Deputy Solicitor General had the courtesy and professionalism to send the Report to me, by email, on that date. I have had the opportunity to review the Report, and to share it with the Mayor and Council. To my knowledge, however, the Report was never sent or delivered to the City by certified mail. Pursuant to § 41-194.01(B)(1), delivery of the Report to the city by certified mail is a condition of the commencement of the 30-day clock for Tucson to take action to resolve the asserted violation. While I admit that this is a purely technical defect in process, given the staggering sanctions involved under § 41-194.01(B)(1), I request that at a minimum no further actions be taken at this time by the Attorney General’s Office under the statute until required notice has been perfected.

Conclusion

Thank you for the consideration of my requests. I keenly recognize that time is of the essence in these matters, and I will make myself available to you at any time to discuss these issues. To that end, my direct line is 520.668.4888.

Sincerely,



Mike Rankin
City Attorney
City of Tucson, Arizona
Mike.Rankin@tucsonaz.gov

cc (by email):

House Speaker Ben Toma, c/o Linley Wilson, General Counsel, Arizona House of Representatives
Joshua Whitaker, Arizona Attorney General’s Office