STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

INVESTIGATIVE REPORT By MARK BRNOVICH ATTORNEY GENERAL December 21, 2022	No. 22-002 Re: Whether The City Of Tucson's Fair Housing Ordinance Regarding "Source of Income" Violates State Law

To: The Honorable Doug Ducey, Governor of Arizona
The Honorable Karen Fann, President of the Arizona State Senate
The Honorable Rusty Bowers, Speaker of the Arizona House of Representatives
The Honorable Ben Toma, Requesting Member of the Arizona House of Representatives
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. 11959 (the "Ordinance") adopted by the City of Tucson ("Tucson") violates A.R.S. §§ 9-500.09, 41-1491.06(C), 33-1368, 33-1377 or Arizona Constitution art. II, §§ 3, 17. The Office has determined that the Ordinance is contrary to state law.

The Arizona Legislature has taken steps to provide equal opportunity in housing, including by adopting a detailed statutory scheme relating to fair housing. *See* A.R.S. §§ 41-1491 *et seq.* Among other fair housing provisions, state law for decades has provided that "[a] person may not refuse to sell or rent after a bona fide offer has been made or refuse to negotiate for the sale or

rental of or otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status or national origin." A.R.S. § 41-1491.14(A). Similarly, "[a] person may not discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in providing services or facilities in connection with the sale or rental, because of race, color, religion, sex, familial status or national origin." A.R.S. § 41-194.14(B).

In 1991, the Legislature amended the state fair housing laws in an attempt to encourage additional local involvement in providing equal opportunity in housing. But in 1992 the Legislature withdrew much of that authority. The Legislature amended state law to make clear that only certain large cities or towns had circumscribed authority to enact fair housing ordinances by a date certain. *See* A.R.S. § 9-500.09. In fact, the Legislature placed three conditions on local authority to enact fair housing ordinances. First, the city or town adopting a fair housing ordinance was required to have had "a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census." *Id.*; *see also* A.R.S. § 41-1491.06(C). Second, the city or town was required to "adopt a fair housing ordinance not later than January 1, 1995. *Id.* Third, an ordinance must have been "substantially equivalent to the provisions of federal law" and Arizona's fair housing laws. A.R.S. § 41-1491.06(C).

In September 2022, Tucson enacted the Ordinance, which amended existing provisions of Tucson's fair housing code to prohibit discrimination in the provision of housing based on a person's "source of income." The Tucson City Code ("Code" or "T.C.") now defines "source of income" as "any lawful source of income or support that provides funds to or on behalf of a renter or buyer of housing and is verifiable as to amount, regularity, receipt, and length of time received or to be received[.]" T.C. § 17-50(f). As examples of a "source of income," the Code includes "wages, salaries, child support, spousal support, foster care subsidies, rental assistance, security

deposit or downpayment assistance, income derived from social security or disability insurance, veterans' benefits, or any other form of governmental assistance, benefit, or subsidy." *Id.* The Code also added "source of income" as one of the protected characteristics for purposes of housing discrimination. Specifically, the Code now makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . source of income." T.C. § 17-52(a). And the Code makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . source of income." T.C. § 17-52(b).

The Office concludes that the Ordinance is inconsistent with the requirements for local fair housing ordinances set forth in A.R.S. §§ 9-500.09 and 41-194.06(C). Tucson clearly meets the first requirement of those statutes—Tucson had "a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census[.]" A.R.S. § 9-500.09; *see also* A.R.S. § 41-1491.06(C). The Ordinance does not, however, meet the second requirement for local fair housing ordinances because the Ordinance was enacted later than January 1, 1995.[1] *See id.* The Ordinance is, therefore, contrary to state law.

The Office also concludes that providing equal opportunity and avoiding discrimination in housing is both a matter of statewide interest and local concern. Because of the overlap in statewide and local interests, contrary state law takes precedence over the Ordinance. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 599 ¶42 (2017) ("Under this state's well-established

[1] Because the Office concludes that the Ordinance is contrary to the state law deadline for enacting fair housing ordinances, the Office need not address whether the Ordinance is substantially equivalent to the provisions of federal law and Arizona's fair housing laws. *See* A.R.S. § 41-1491.06(C).

jurisprudence, whether the City's Code controls over the conflicting state laws essentially hinges 'on whether the subject matter is characterized as of statewide or purely local interest."). Through A.R.S. §§ 9-500.09 and other statutes, the Legislature has expressly restricted local fair housing ordinances to those enacted no later than January 1, 1995. The Office does not find Tucson's arguments to the contrary persuasive. Thus, unless the Legislature amends state law to provide local governments with autonomy to enact new fair housing ordinances, Tucson cannot create new classifications of housing discrimination, including based on "source of income."

II. The Office's Investigation

On November 21, 2022, the Office received a request from Speaker-Elect Ben Toma, pursuant to A.R.S. § 41-194.01, for legal review of Tucson's Ordinance ("Request"). The Office asked Tucson for a voluntary response to Speaker-Elect Toma's request to investigate. Tucson fully cooperated by providing a voluntary response letter and supporting materials on December 9, 2022 ("Tucson's Response"). 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 are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. § 41-194.01.

III. Background

A. Relevant Federal Law

Federal law prohibits housing discrimination in several chapters of the United States Code. The Civil Rights Act of 1866 provides that "[a]ll persons within the jurisdiction of the United States" shall have "equal benefit of all laws and proceedings for the security of persons and property[.]" 42 U.S.C. § 1981(a). The 1866 Act further provides that "[a]ll citizens of the United

States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

One week after the assassination of Dr. Martin Luther King Jr. in 1968, Congress enacted the Civil Rights Act of 1968, more commonly known as the Fair Housing Act. Through the Fair Housing Act, Congress declared that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. In relevant part, the Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The Fair Housing Act also make it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). Similarly, 42 U.S.C. § 3605(a) provides that "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." The Fair Housing Act does not include any right to be free from discrimination in the provision of housing based on "source of income."

The Fair Housing Act makes clear that its prohibitions do not displace state or local laws protecting the same rights as those the Fair Housing Act protects: "Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter[.]" 42 U.S.C. § 3615. The Fair Housing Act

permits the Secretary of Housing and Urban Development ("HUD"), the United States Attorney General, and private persons to enforce of the prohibitions contained therein. *See* 42 U.S.C. §§ 3612–3614.

B. Relevant State Law

In 1988, the Arizona Legislature passed Senate Bill ("S.B.") 1286, which amended title 41, chapter 9 of the Arizona Revised Statutes to add article 7. *See* 1988 Ariz. Legis. Serv. 339 (2d Reg. Sess.). In large part, article 7 "prescribe[ed] prohibitions, exemptions, procedures and administration regarding fair housing[.]" *See id.* Like the current version of Arizona's fair housing statutes, the 1988 law made it unlawful, among other things, "to refuse to sell or rent after the making of a bona fide offer or to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex or national origin." *See id.* § 2. (creating A.R.S. § 41-1491.02(A)(1)).

In S.B. 1286, the Legislature "determine[d] that the development and adoption of standards prohibiting discrimination in voting rights, public accommodations, housing and employment and methods for enforcing these civil rights are of statewide concern and require uniformity." *Id.* (creating A.R.S. § 41-1491.12). Thus, with some exceptions, "the power to enact or adopt these discrimination prohibitions and enforcement procedures is preempted by this state to be exercised by law, executive order or rule and may not be exercised by counties, cities or towns." *Id.* As an exception to preemption of local ordinances, S.B. 1286 allowed a charter city to adopt, implement, and enforce a fair housing ordinance if, among other requirements, the charter city "receives certification of substantial equivalency status from [HUD]" and "obtains an intergovernmental agreement from the Attorney General." *Id.*

Three years later, the Legislature decided to involve local governments more in providing equal opportunity in housing and enforcing housing discrimination prohibitions. In S.B. 1292, the

Legislature explained that "[i]t is the intent of the legislature that the state undertake vigorous steps to provide equal opportunity in housing [and] resolve housing discrimination disputes at the local level in a timely, cost efficient and effective manner[.]" 1991 Ariz. Legis. Serv. Ch. 181 (1st Reg. Sess.). S.B. 1292 repealed in full the provisions of the article enacted through S.B. 1286 and replaced them with new fair housing provisions. *Id.* § 3. The anti-discrimination provisions previously found in A.R.S. § 41-1491.02 were moved to A.R.S. § 1491.14, but otherwise remained the same. Those provisions, which have not been revised since, provide that "[a] person may not refuse to sell or rent after a bona fide offer has been made or refuse to negotiate for the sale or rental of or otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status or national origin." A.R.S. § 41-1491.14(A). Similarly, "[a] person may not discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in providing services or facilities in connection with the sale or rental, because of race, color, religion, sex, familial status or national origin." A.R.S. § 41-194.14(B). S.B. 1292 also simplified pre-existing restrictions providing that a person may not discriminate in making, or the terms of, a loan to purchase residential real estate because of race, color, religion, sex, handicap, familial status or national origin. *See* 1991 Ariz. Legis. Serv. Ch. 181 § 4 (creating A.R.S. § 41-1491.20). Arizona law does not include any right to be free from discrimination in the provision of housing based on "source of income."

S.B. 1292 stated that "[t]he attorney general shall administer this article." 1991 Ariz. Legis. Serv. Ch. 181 § 4 (creating A.R.S. § 41-1491.07). But the attorney general had the authority to defer proceedings and refer a complaint to a city or town "that has been recognized by [HUD] as having adopted ordinances providing fair housing rights and remedies that are substantially

equivalent to those granted under federal law and that has entered into an intergovernmental agreement with the attorney general." *Id.* (creating A.R.S. § 41-1491.13).

Regarding local preemption, S.B. 1292 eliminated entirely the local preemption provision (former A.R.S. § 41-1491.12) created in S.B. 1286. Other than making clear that S.B. 1292 did not displace local or state occupancy restrictions, S.B. 1292 was nearly silent on the effect its provisions had, if any, on local fair housing ordinances. *See id.* (creating A.R.S. § 41-1491.06(A)). S.B. 1292 made clear only that "[t]his article does not affect a requirement of nondiscrimination in any other state or federal law." *Id.* (creating A.R.S. § 41-1491.06(B)). Thus, after passage of S.B. 1292 in 1991, local governments had authority to pass local fair housing ordinances.

That local authority was short-lived—what the Legislature gave in terms of local authority in 1991, the Legislature took away (at least in material part) in 1992. That year the Legislature enacted House Bill ("H.B.") 2546, which imposed several conditions on local governmental authority to enact fair housing ordinances. *See* 1992 Ariz. Legis. Serv. Ch. 207 (2d Reg. Sess.). H.B. 2546 amended A.R.S. § 41-1491.11 to make clear that "[n]othing in this article shall be interpreted as prohibiting . . . cities or towns with a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census from adopting a fair housing ordinance." *Id.* § 2. But H.B. 2546 created A.R.S. § 9-500.08 (which is now A.R.S. § 9-500.09) making clear that only large (at least at the time) cities or towns had the power to adopt a fair housing ordinance, but that they had to do so by a date certain—January 1, 1995. Specifically, A.R.S. § 9-500.09 provides that "[t]he governing body of a city or town with a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census may adopt a fair housing ordinance not later than January 1, 1995."

HB 2546 also amended A.R.S. § 41-1491.13 to add subsection B to make clear that the Attorney General cannot refer a fair housing complaint to a city or town unless the city or town had "a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census" and had "adopt[ed] a fair housing ordinance by January 1, 1995." 1992 Ariz. Legis. Serv. Ch. 207, § 2. HB 2546 further added A.R.S. § 41-1491.37(A), stating that "[t]he superior court has jurisdiction to enforce a local fair housing ordinance with provisions substantially equivalent to the provisions of federal law and this article." *Id.*

Finally, H.B. 2546 amended A.R.S. § 41-1491.06, entitled "[e]ffect on other law," to make clear that nothing in article 7 prohibits cities or towns from enacting fair housing ordinances. See 1992 Ariz. Legis. Serv. Ch. 207, § 4. But the Legislature placed three conditions on the authority for cities or towns to do so in conjunction with the provisions of article 7. First, consistent with A.R.S. § 9-500.09, the city or town adopting a fair housing ordinance is required to have had "a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census." A.R.S. § 41-1491.06(C). Second, also consistent with A.R.S. § 9-500.09, the city or town was required to "adopt a fair housing ordinance not later than January 1, 1995." *Id.* Third, an ordinance must have been "substantially equivalent to the provisions of federal law" and Arizona's fair housing laws. A.R.S. § 41-1491.06(C).

C. The Ordinance

Tucson adopted the Ordinance on September 22, 2022. The Ordinance amended several portions of Tucson's Code to prohibit property owners from refusing a person access to housing because of any person's "source of income." Tucson Response at 3. Tucson admits that the Ordinance "amended existing provisions of the City's fair housing code[.]" *Id.* The ordinance defines "source of income" as follows:

> [A]ny lawful source of income or support that provides funds to or on behalf of a renter or buyer of housing and is verifiable as to amount, regularity, receipt and length of time received or to be received, including, but not limited to, wages, salaries, child support, spousal support, foster care subsidies, rental assistance, security deposit or downpayment assistance, income derived from social security or disability insurance, veterans' benefits, or any other form of governmental assistance, benefit, or subsidy. Source of income includes any requirement of any such program, assistance, benefit, or subsidy.

T.C. § 17-51(f). The Ordinance then states, in relevant part, that the following are unlawful acts under the fair housing provisions of the Code:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status, or source of income.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status, or source of income.
> . . .
>
> (f) For any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial or residential real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against such person in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status, or source of income of such person or of any person associated with such person in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the housing in relation to which such loan or other financial assistance is to be made or given. . . .

T.C. §§ 17-52(a), (b), (f).

Tucson admits that the Ordinance is a "first-of-its-kind-in-Arizona." Tucson Response at 3. Tucson also argues that "the code amendment furthers state and federal objectives on fair and

affordable housing." *Id.* Finally, Tucson claims that the purpose of the Ordinance "is important, now more than ever, given the scarcity of affordable housing in our state," that the Ordinance "reinforces protections for those who could experience source of income discrimination as a proxy for their protected class," and that legislators, like Speaker-Elect Toma, with constituents outside of Tucson should "see the value of these protections." *Id.* at 4.

IV. Legal Analysis

The legal issue the Office must resolve here is whether Tucson's Ordinance violates the identified provisions of state law for purposes of A.R.S. § 41-194.01. The legal analysis herein is therefore necessarily limited to that question and is not intended to apply more broadly.[2]

The Office's analysis contains two parts. The Office must first consider whether the Ordinance is consistent with state law. The Office concludes that the Ordinance is contrary to state law. The Office must, therefore, determine whether state law preempts the Ordinance. The Office concludes that state law displaces the Ordinance.

A. The Ordinance Is Contrary To State Law.

Tucson's Ordinance is inconsistent with the text, structure, and history of Arizona law. Starting with the text of Arizona law, A.R.S. § 9-500.09 is contained in chapter 4 of title 9, which sets forth the "general powers" of cities and towns. That section provides that cities or towns with a population of at least 350,000 persons according to the 1990 United States decennial census may adopt a fair housing ordinance "not later than January 1, 1995." Tucson admits that the Ordinance "amend[s] existing provisions of the City's fair housing code," and thus it is clear that the

[2] Both the Request and Tucson's Response contain policy arguments about the history of housing regulation in Tucson and the most effective way to solve current issues regarding the affordability and availability of housing. Nothing in this Report turns on any of those arguments, which should be directed to state or local policymakers, and not the Attorney General in the context of A.R.S. § 41-194.01.

Ordinance is a "fair housing ordinance" subject to any strictures in § 9-500.09. Tucson Response at 3. It is also beyond dispute that Tucson was a city with a population of at least 350,000 persons according to the 1990 census.[3]

Arizona law does not permit cities or towns to adopt fair housing ordinances whenever they please. Instead, the Legislature put a deadline on the enactment of fair housing ordinances. Specifically, A.R.S. § 9-500.09 provides that those cities may adopt a fair housing ordinance "not later than January 1, 1995." In determining the impact of that phrase, the terms contained therein should be given their ordinary meaning. *See State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 244 ¶21 (2020) ("[W]e give the words their ordinary meaning, unless the context suggests a different one."). Through use of the phrase "not later than" the Legislature set an outer limit on the time when a fair housing ordinance could be passed. The phrase "not later than" is an idiom that is defined as "at, in, on, or before (a specified time)." "No/not later than." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary /no%2Fnot%20later %20than, (last visited Dec. 20, 2022); *see also Vangilder v. Ariz. Dep't of Revenue*, 252 Ariz. 481, 489 ¶29 (2022) (looking to dictionary definitions to determine the ordinary meaning of statutory terms). Thus, in using the phrase "not later than January 1, 1995" in § 9-500.09, the Legislature granted cities and towns with the minimum required population power to enact fair housing ordinances but only on or before January 1, 1995, and not after.

The text of several other provisions further supports that cities or towns could not enact fair housing ordinances after January 1, 1995. The state preemption provision, entitled "[e]ffect on other law," makes clear that the state fair housing statutes do not prohibit cities or towns from

[3] In 1990, Tucson had a population of 405,390. *See* Bureau of the Census, 1990 Census of Population: General Population Characteristics Arizona, at 292, available at https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-4.pdf.

enacting ordinances, but only if they do so "not later than January 1, 1995." A.R.S. § 41-1491.06(C). And under A.R.S. § 41-1491.13(B), "to be eligible to implement the provisions of this article [8] [a city or town] shall adopt a fair housing ordinance by January 1, 1995."

The legislative history of Arizona's fair housing ordinances also supports that local fair housing ordinances were only valid if adopted by a date certain. In S.B. 1286, enacted in 1988, the Legislature broadly preempted cities and towns from adopting fair housing ordinances. *See* 1988 Ariz. Leg. Serv. 339 § 2 (creating A.R.S. § 41-1491.12). Next, in S.B. 1292, enacted in 1991, the Legislature took the opposite tact, remaining silent on whether cities and towns could adopt fair housing ordinances. Finally, in H.B. 2546, enacted in 1992, the Legislature staked out a middle ground—allowing certain cities with sufficient populations to adopt fair housing ordinances but requiring them to do so no later than January 1, 1995.

Applying the foregoing analysis, the Ordinance is clearly inconsistent with state law. Arizona law states and contemplates that cities or towns were required to pass fair housing ordinances no later than January 1, 1995. The Ordinance was indisputably adopted over twenty-five years after January 1, 1995, and therefore it is inconsistent with the deadline contained in A.R.S. § 9-500.09 and confirmed in other statutory provisions.

Tucson's arguments as to why the Ordinance is not contrary to state law are not persuasive. Tucson first argues that Arizona law expressly "permit[s] local jurisdictions to adopt fair housing codes." Tucson Response at 6. That is only partially true. What Arizona law expressly permitted was for cities or towns with a population in excess of 350,000 to adopt fair housing ordinances "no later than January 1, 1995." Tucson completely ignores the temporal requirement.

Tucson then makes several variations of the same argument—that nothing in Arizona prohibits cities or towns from enacting fair housing "enactments" prior to January 1, 1995 or

amendments thereto after January 1, 1995. Tucson argues that the Request "improperly conflates enactment of a code structure with amendment of an enacted code provision." Tucson Response at 6.

The Office *does not* conclude that Arizona law prohibited adoption of fair housing ordinances prior to January 1, 1995. The Office, however, disagrees that Arizona law allows amendments to prior fair housing enactments while forbidding only "enactment of a code structure." The Legislature did not use the term "code structure" or "fair housing enactment" in § 9-500.09. The Legislature instead used the term "fair housing ordinance" when describing what cities and towns were required to enact no later than January 1, 1995. Had the Legislature intended to allow some fair housing ordinances—for example, those amending code structures—the Legislature was perfectly capable of drafting H.B. 2546 accordingly. Having chosen the term it did—"fair housing ordinance"—the Office will not assume that the Legislature meant to use some other term instead. *Chavez v. Ariz. Sch. Risk Retention Tr., Inc.*, 227 Ariz. 327, 330 ¶9 (App. 2011) ("We presume the legislature says what it means[.]"). As indicated, Tucson admits that the Ordinance "amend[s] existing provisions of the City's fair housing code," and the Office concludes that the Ordinance is therefore a "fair housing ordinance" subject to the time limitation in A.R.S. § 9-500.09 and the other provisions of article 8.

Statutory text is not the only roadblock to Tucson's argument that amendments to existing "code structures" are permitted. Adopting Tucson's view would render the deadline for enacting fair housing ordinances completely toothless. Under Tucson's view, it could simply re-write its entire fair housing code with the explanation that doing so merely constitutes an amendment to the existing code structure. The Legislature would not have gone to such pain to include a deadline in § 9-500.09 for enacting local fair housing ordinances, and then repeat that deadline throughout

H.B. 2546, if the cities who met the population requirement could then just alter those ordinances *ad infinitum* through "amendments." *See TDB Tucson Group, L.L.C. v. City of Tucson*, 228 Ariz. 120, 123 ¶9 (App. 2011) ("[W]e will not interpret a statute in such a way as to produce 'absurd results,' or 'render [any word, phrase, clause, or sentence] superfluous, void, insignificant, redundant or contradictory.'").

The Ordinance is itself a prime example of the problems with Tucson's proffered interpretation. While at first blush adding "source of income" to the list of protected classifications in a fair housing ordinance may seem to some like a minor step. But, as both the Request and Tucson's Response emphasize in various ways, the Ordinance could have a profound impact on tenants, landlords, those seeking to buy and sell property, and even financial institutions extending credit for residential real estate. The Request believes the Ordinance is a step in the wrong direction and Tucson believes it is a needed step in the right direction. The Office takes no position on which side is correct. But what is clear is that the Legislature would not have reserved the immense power Tucson claims in a bill that repeatedly requires the enactment of fair housing ordinances no later than twenty-seven years ago. "That is a great deal of freight to load upon such a tiny statutory vessel." *Roberts v. State*, 512 P.3d 1007, 1014 ¶19 (2022); *cf. id.* at 1017 ¶37 ("It is highly unlikely that the legislature would choose to bestow sweeping regulatory authority upon an agency in such an oblique and indirect fashion.").

Tucson also argues that it was permitted to enact the Ordinance under A.R.S. §§ 9-240(b)(28) and 9-499.01. Tucson Response at 6. Neither of those statutes displaces the express deadline in A.R.S. §§ 9-500.09 and 41-1491.06(C). Starting with A.R.S. § 9-240(b)(28), that provision merely provides that town councils have the general power "[t]o make, amend or repeal all ordinances necessary or proper for the carrying into effect of the powers vested in the

corporation, or any department or officer thereof." A.R.S. § 9-240(b)(28)(a). The other statute Tucson cites, A.R.S. § 9-499.01, then merely provides that charter cities "shall be vested with all the powers of incorporated towns." Contrary to Tucson's view, the general power to amend ordinances in § 9-240(b)(28)(a) can be easily squared with the time restriction in § 9-500.09 by acknowledging that the latter statutory restriction is simply an exception to the former general grant of power. *See City of Mesa v. Salt River Project Agric. Improvement & Power Dist.*, 92 Ariz. 91, 98 (1962) ("The accepted principle is that courts will not render an interpretation of statutes which makes them contradictory to each other[.]"). Charter cities, therefore, ordinarily have the power to amend or repeal ordinances, and they were even free to amend or repeal fair housing ordinances, but the Legislature put an expiration date on that authority when it comes to fair housing ordinances, requiring those ordinances to be enacted "not later than January 1, 1995." *See* A.R.S. § 9-500.09.

Tucson also attempts to make hay of the fact that it enacted an amendment to its fair housing code in 1999 and that "Representative Toma has cited no instances in which anyone challenged passage of the 1999 amendment." Tucson Response at 6. Notably, Tucson does not provide the actual text of the 1999 amendment or explain how the amendment changed Tucson's fair housing code. In any event, the Office does not find the existence of a prior unchallenged amendment to Tucson's fair housing code to be probative of whether the Ordinance, which is being challenged, runs afoul of state law.

Finally, Tucson argues that "the federal regulations both on fair housing and on HCV's permit local jurisdictions to protect additional characteristics, just as the City is doing here." Tucson Response at 7. The Office does not take issue with Tucson's reading of the federal regulations. But that reading is beside the point—the issue the Office must resolve is not whether

Tucson is permitted under federal law to add "source of income" as a protected characteristic, but whether Tucson is permitted under state law to enact new fair housing ordinances. Tucson does not argue, let alone establish, that federal law prohibits state law from restricting the timeframe during which local governments may enact fair housing ordinances. In fact, the federal Fair Housing Act states that it does not displace any state law "that grants, guarantees, or protects the same rights as are granted by this subchapter[.]" 42 U.S.C. § 3615. Arizona law protects the same rights as those protected in the Fair Housing Act. *See* A.R.S. §§ 41-1491.14 *et seq.* The Office, therefore, concludes that the Ordinance is contrary to Arizona law requiring that fair housing ordinances be enacted "no later than January 1, 1995." A.R.S. §§ 9-500.09, 41-1491.06(C), 41-1491.13(B).

B. Fair Housing Is A Matter Of Statewide And Local Interest And Thus The Ordinance Falls To Contrary State Law.

Tucson's status as a charter city adds another wrinkle to the analysis. If the subject matter of the state law that is contrary to a charter city ordinance covers only matters of "purely local concern," then the state law does not apply to the city charter (think reverse preemption). The Office concludes, however, that the regulation of housing, including to ensure equal opportunity in housing, is not a matter of "purely local concern," and thus the Ordinance falls.

The Arizona Constitution contains a home-rule charter provision pursuant to which "eligible cities may adopt a charter—effectively, a local constitution—for their own government without action by the state legislature." *City of Tucson v. State*, 229 Ariz. 172, 174 (2012); *see* Ariz. Const. art. 13, § 2. Since 1929, Tucson has been a charter city. *See City of Tucson v. Walker*, 60 Ariz. 232, 234 (1943). Tucson may, therefore, "exercise all powers granted by its charter, provided that such exercise is not inconsistent with either the constitution or general laws of the state." *Jett v. City of Tucson*, 180 Ariz. 115, 118 (1994); *see also* A.R.S. § 9-284(B). In other

words, Tucson "is granted autonomy over matters of local interest." *City of Tucson v. State*, 235 Ariz. 434, 436 (App. 2014). On the other hand, "[w]here the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter." *City of Tucson*, 242 Ariz. at 598 ¶40. The relevant inquiry "hinges on whether the subject matter is characterized as of statewide or purely local interest." *Id.* at 599 ¶42 (internal quotation marks omitted).

The statutes at issue in this matter concern providing equal opportunity and access to housing and eliminating discrimination based on certain protected characteristics. This subject matter clearly implicates state interests. Courts have repeatedly concluded that states have a compelling interest in eliminating discrimination. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent[.]"); *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (concluding that a state statute was constitutional because it "serves the State's compelling interest in eliminating discrimination against women"). Similarly, courts have held that states have an interest in ensuring equal opportunity and access to housing. *See, e.g.*, *Steinbergh v. Rent Control Bd. of Cambridge*, 571 N.E.2d 15, 18 (Mass. 1991) ("[T]he declared purpose of the Act is, among other things, to maintain decent and affordable rental housing. That is a legitimate State interest."); *McAdoo v. Diaz*, 884 P.2d 1385, 1389 (Alaska 1994) ("The state has a significant interest in assuring that its citizens have fair access to housing."); *Shafer v. State Bd. of Equalization*, 174 Cal.App.3d 423, 431 (1985) ("[T]he state has a legitimate interest to provide affordable housing.").

For years, Arizona has actually exercised its authority to regulate equal opportunity and access to housing. For example, the Arizona Legislature expressly declared more than thirty years

ago that "the development and adoption of standards prohibiting discrimination in voting rights, public accommodations, housing and employment and methods for enforcing these civil rights are of statewide concern and require uniformity." 1988 Ariz. Legis. Serv. Ch. 339 § 2 (2d Reg. Sess.) (creating A.R.S. § 41-1491.12). In the intervening years, the Legislature has attempted to strike the appropriate balance between state control and local enforcement of fair housing ordinances. *Compare* 1988 Ariz. Legis. Serv. Ch. 339 § 2 *with* 1991 Ariz. Legis. Serv. Ch. 181 § 4 *with* 1992 Ariz. Legis. Serv. Ch. 207 § 2. The Legislature in 1992 landed on a detailed set of provisions prohibiting various forms of discrimination throughout the housing process with limited involvement by certain local governments in creating and enforcing their own fair housing laws. *See* A.R.S. §§ 41-1491.01 *et seq.* The state clearly has an interest in ensuring that balance remains intact.

The Arizona Supreme Court has also held that "[m]atters involving the police power generally are of statewide concern." *City of Tucson*, 242 Ariz. at 600 ¶47. Courts have repeatedly recognized that issues with housing implicate the police power. *Humphrey v. City of Phoenix*, 55 Ariz. 374, 384 (1940) (explaining that a statement in the municipal housing law "was made by the legislature under the state's police power to protect the health, morals, and safety of the people by providing housing and surroundings for that portion of the population unable by reason of low income to provide for themselves."); *Pennell v. City of San Jose*, 485 U.S. 1, 12 (1988) ("[T]he Ordinance's asserted purpose of preventing excessive and unreasonable rent increases caused by the growing shortage of and increasing demand for housing in the City of San Jose is a legitimate exercise of appellees' police powers." (cleaned up)); *Levald v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993) (holding that the goal of "alleviat[ing] hardship created by rapidly escalating rents" is "legitimate"). Because issue of equal opportunity and access to housing and the avoidance

of discrimination in the provision of housing are matters "that the entire state is interested in," those matters "are proper subjects for general laws." *Luhrs v. City of Phoenix*, 52 Ariz. 438, 448 (1938).

If there were any doubt left, the Arizona Supreme Court "has narrowly limited the concept of 'purely municipal affairs,'" recognizing only two matters of purely local concern: the conduct of municipal elections and the disposition of municipal real estate. *City of Tucson*, 242 Ariz. at 602 ¶¶56–57; *see also State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 49–50 ¶20 (2021) ("Thus far, we have upheld charter-authorized municipal ordinances that conflict with state laws in two subject areas."). The issues here do not remotely implicate either of those two matters of purely local concern.

For its part, Tucson tacitly acknowledges that the subject matter here involves both statewide and local interests. As explained above, Tucson argues that "the code amendment furthers *state and federal objectives* on fair and affordable housing." Tucson Response at 3 (emphasis added). And Tucson claims that the purpose of the Ordinance "is important, now more than ever, given the scarcity of affordable housing *in our state*" and that legislators, like Speaker-Elect Toma, with constituents outside of Tucson should "see the value of these protections." *Id.* at 4. Accordingly, "although the state laws in question undoubtedly affect municipal affairs, they are also of state concern and therefore take precedence over the City's conflicting Ordinance." *City of Tucson*, 242 Ariz. at 601 ¶51 (cleaned up).

V. Conclusion

The Office has determined that **the Ordinance violates state law**. Specifically, 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).[4]

Because the Ordinance violates state law, Tucson must "resolve the violation" as set forth in § 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).

MARK BRNOVICH
ATTORNEY GENERAL

By: /s/ *Michael S. Catlett*
Deputy Solicitor General
Arizona Attorney General's Office

[4] Because the Office has determined that the Ordinance violates 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 Office does not address the Request's assertion that the Ordinance also violates A.R.S. §§ 33-1368, 33-1377 and Arizona Constitution art. II, §§ 3, 17.