



**STATE OF ARIZONA**  
**OFFICE OF THE ATTORNEY GENERAL**

INVESTIGATIVE REPORT  By  MARK BRNOVICH ATTORNEY GENERAL  July 17, 2020	No. 20-002  Re: Whether Tucson City Ordinance 11731 Violates A.R.S. § 16-204.01
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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 J.D. Mesnard, Requesting Member of the Arizona Legislature  
The Honorable Katie Hobbs, Secretary of State of Arizona

**I. Question Presented in Legislator Request**

Following a significant decrease in voter turnout at the 2019 Tucson city election compared to the 2018 statewide election, does Tucson city ordinance 11731 violate A.R.S. § 16-204.01 by calling for elections for city council, as well as for city ballot measures, to continue to be held off cycle in 2021 rather than on the statewide election dates in 2022?

**II. Summary**

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 41-194.01, the Attorney General’s Office (“Office”) has conducted its investigation pursuant to a legislator request relating to City of Tucson (“City”) Ordinance 11731 (“Ordinance”) enacted on February 19, 2020, which calls for elections for city council, as well as for city ballot measures, to continue to be held “off-cycle” in 2021 rather than on the statewide election dates in 2022. *See Exhibit A.*<sup>1</sup>

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<sup>1</sup> An “off-cycle” election refers to “[a]n election held on a date different from state and national elections[.]” *City of Tucson v. State*, 235 Ariz. 434, 435 n.1 (2014) (“*Tucson III*”). The City refers to these elections as “odd-year elections.” Response at 2.

Arizona law establishes that when charter cities “demonstrate low voter turnout in elections that are not held on the consolidated election dates prescribed in § 16–204, the low voter turnout constitutes sufficient factual support for requiring candidate and other elections to be held on certain specific consolidated dates.” A.R.S. § 16–204.01; *see also* A.R.S. § 16–204(E), (F) (establishing consolidated election dates for candidate elections and non-candidate elections, beginning with elections held in 2014 and later). The Ordinance irreconcilably conflicts with A.R.S. § 16–204.01 because—despite the low voter turnout in the City’s 2019 election, which triggers the statute’s requirement that candidate and other elections be held on statutorily-prescribed consolidated dates—the Ordinance calls for an off-cycle election in 2021.

As a charter city, *see* Ariz. Const. art. XIII, § 2, the City may enact ordinances that conflict with state law when those ordinances relate to matters of purely local concern. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 599, ¶42 (2017) (“*Tucson IV*”) (whether a City’s Ordinance or Code controls over a conflicting state law “essentially hinges on whether the subject matter is characterized as of statewide or purely local interest”) (internal quotation marks and citation omitted). Arguing that “the analysis here is straightforward,” the City contends that its Charter, which authorizes the Ordinance, controls and supersedes A.R.S. § 16–204.01. Response at 6. The City argues a “strictly local election ... by its nature is *not* of statewide concern.” *Id.* at 8.

But the subject matter at issue here is when to hold a local election, which is likely not a matter of purely local concern because, as the Legislature found, “increasing voter turnout through the use of consolidated election dates for candidate and other elections as prescribed by this section *is* a matter of statewide concern.” A.R.S. § 16–204.01(A) (emphasis added). And the Arizona Supreme Court has stated that some aspects of local elections are matters of

statewide concern, including specifically “election dates.” *City of Tucson v. State*, 229 Ariz. 172, 178, ¶35 (2012) (“*Tucson II*”) (citing *City of Tucson v. State*, 191 Ariz. 436, 439 (App. 1997) (“*Tucson I*”). The Attorney General of California recently likewise opined that “[e]lections are less ‘complete’ when there is significantly lower voter turnout because fewer eligible voters are participating in the electoral process,” and he concluded that “off-cycle elections may impinge on voting by causing low voter turnout” and “[t]his turnout therefore undermines electoral integrity and thus involves a matter of statewide concern.” Cal. Att’y Gen. Op. 16–603, 100 Ops. Cal. Atty. Gen. 4, \*4 (July 11, 2017).

Nonetheless, “existing law” does not “clearly and unambiguously compel[.]” the Office’s determination that the decision of when to hold local elections is a matter of statewide, not local, concern. *See Tucson IV*, 242 Ariz. at 595, ¶25 (stating that a “does violate” determination under A.R.S. § 41–194.01(B)(1) is for “when existing law clearly and unambiguously compels that conclusion”). This is because the Court of Appeals subsequently distinguished the Supreme Court’s statements in *Tucson II* as dicta and held that charter cities could supersede a different state law regarding election dates. *See City of Tucson v. State*, 235 Ariz. 434, 438, 440, ¶¶12, 21 (App. 2014) (“*Tucson III*”).

For purposes of this Report, the Office therefore concludes that the Ordinance **may violate** state law, and will expeditiously seek relief in the nature of a declaratory action against the City to permit the Arizona Supreme Court “to resolve the issue[.]” *See id.* (quoting A.R.S. § 41–194.01(B)(2)).

### **III. Background**

#### **A. The Office's Investigation**

On June 17, 2020, the Office received from Senator J.D. Mesnard a request for legal review of the Ordinance pursuant to A.R.S. § 41–194.01 (“Request”).<sup>2</sup> The Office asked the City for a response. The City fully cooperated with the Office’s review, including providing a voluntary response (“Response”). In conducting the required investigation during the limited 30-day period prescribed in A.R.S. § 41–194.01, 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 any purpose other than those set forth in A.R.S. § 41–194.01.

#### **B. Relevant State Laws And Arizona Case Law**

The Request asks whether the Ordinance violates A.R.S. § 16–204.01, and also notes that the Ordinance may conflict with two other related statutes, A.R.S. §§ 16–204 and –204.02. The summary below provides context and relevant background information about these statutes and associated Arizona case law.

##### **i. *Strode, Tucson I*, And A.R.S. § 16–204(A)**

The Arizona Constitution states that a city exceeding a minimum population threshold “may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state.” Ariz. Const. art. XIII, § 2. Nearly 70 years ago, the Arizona Supreme Court held that a charter city has the power under this provision to supersede state law on matters regarding the city’s “governmental structure[,]” *i.e.*, “who shall be its governing officers and

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<sup>2</sup> The Request is dated June 16, 2020, but the Office did not receive it until June 17, 2020.

how they shall be selected.” *Strode v. Sullivan*, 72 Ariz. 360, 368 (1951). This is the core holding of *Strode*, which involved whether city council elections would be partisan or nonpartisan. *See id.* at 361.

In 1997, in *Tucson I*, 191 Ariz. 43, the Arizona Court of Appeals considered the City’s challenge to A.R.S. § 16–204, which then stated as follows:

While the legislature recognizes that the method of conducting elections by political subdivisions including charter counties and cities may be a matter of local concern, the legislature finds and determines that for the purposes of increasing voter participation and for decreasing the costs to the taxpayers it is a matter of statewide concern that all elections in this state be conducted on a limited number of days and, therefore, the legislature finds and declares that the holding of all elections on certain specific consolidated days is a matter of statewide concern.

A.R.S. § 16–204(A) (1996).

The City argued that the statute was “invalid as applied to the City because it conflicts with Chapter XVI of the Tucson City Charter[,]” which authorized the City Council “to hold special elections on days other than those specified under the consolidated election schedule.” *Tucson I*, 191 Ariz. at 437. The court of appeals reasoned that “[t]he language of § 16–204 and its legislative history both indicate a strong state interest.” *Id.* at 439. The court of appeals concluded, “we agree [with the Legislature] that the statute pertains to matters of statewide concern and does not ‘relate to purely municipal affairs.’” *Id.* (quoting *Strode*, 72 Ariz. at 365). Accordingly, *Tucson I* held that “[t]he [L]egislature has acted in an area of statewide concern and its legislation takes precedence over the City’s Charter.” *Id.* at 440.<sup>3</sup>

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<sup>3</sup> The Arizona Supreme Court later disapproved of *Tucson I*’s “use of a balancing test in its analysis” to “determin[e] whether local or statewide interests were ‘paramount.’” *Tucson IV*, 242 Ariz. at 604, ¶64 (quoting *Tucson I*, 191 Ariz. at 439). But *Tucson IV* did not otherwise disturb *Tucson I*’s holding.

**ii. 2012 Amendment to A.R.S. § 16–204(A) And *Tucson II***

In 2012, the Legislature modified A.R.S. § 16–204(A) by (1) deleting the first clause of the sentence (therefore removing the Legislature’s previous recognition that “the method of conducting elections” by charter cities “may be a matter of local concern”); and (2) adding a second sentence, which states: “This section preempts all local laws, ordinances and charter provisions to the contrary.” A.R.S. § 16–204(A)(2012); *see* Laws 2012, Ch. 353, § 1.

The same year, in *Tucson II*, 229 Ariz. at 175–76, ¶¶18, 20, the Arizona Supreme Court noted that *Strode* “considered a charter city’s authority to structure its own government ... [and] applied a formalistic analysis: whether general state laws displace charter provisions depends on whether the subject matter is characterized as of statewide or purely local interest.” Similar to the partisan/nonpartisan composition of the city council in *Strode*, the issue in *Tucson II* was whether council members would be elected from districts or citywide (or a hybrid of the two). *Tucson II*, 229 Ariz. at 175, ¶16. The Arizona Supreme Court thus recognized that like *Strode*, the issue was “a charter city’s authority to structure its own government.” *Id.* at ¶18.

*Tucson II* ultimately held that “electors in charter cities may determine under their charters whether to constitute their councils on an at-large or district basis and whether to conduct their elections on a partisan basis” notwithstanding a conflicting state law. 229 Ariz. at 180, ¶47. But the Arizona Supreme Court expressly stated, “[w]e do not question that some aspects of the conduct of local elections may be of statewide concern[,]” noting that “election dates ... involve matters qualitatively different from determining how a city will constitute its governing council.” *Id.* at 178, ¶35 (citing *Tucson I*, 191 Ariz. at 439; A.R.S. § 9–821.01(A)).

In sum, both *Strode* and *Tucson II* addressed provisions in city charters concerning how to structure the city’s own government; these cases did not address the timing of city elections.

**iii. Tucson III And The Legislature’s Enactment of A.R.S. § 16–204.01 & A.R.S. § 16–204.02 In 2018**

Two years later, in *Tucson III*, 235 Ariz. 434, 440, ¶¶19–21, the Arizona Court of Appeals upheld an injunction prohibiting the State from requiring the City of Tucson and the City of Phoenix to comply with A.R.S. § 16–204(E). Section 16–204(E) provides that, for elections held in 2014 and later, “a candidate election held for or on behalf of any political subdivision of this state other than a special election to fill a vacancy or a recall election may only be held on [certain] dates and only in even-numbered years[.]” In *Tucson III*, the court of appeals agreed with the State that the Arizona Supreme Court’s decision in *Tucson II* “arguably places election dates outside of local autonomy and interest.” *Tucson III*, 235 Ariz. at 438, ¶12. Nonetheless, the court of appeals decided that the Arizona Supreme Court’s specific statement in *Tucson II* (referring to “election dates” as a “qualitatively different” matter than the structure of a city’s council) was dicta. *Id.* Citing *Strode*, *Tucson II*, and a decision of the Washington Supreme Court, *Tucson III* held that Tucson and Phoenix could continue to hold off-cycle elections notwithstanding the provisions of A.R.S. § 16–204. *Id.* at 440, ¶20. In its analysis, the court of appeals noted that there were “no legislative findings to support” the conclusion that aligning off-cycle elections with statewide elections “increases voter participation[.]” *Id.* at 439, ¶17.

In specific response to *Tucson III*, the Legislature added A.R.S. § 16–204.01—the primary subject of the Request here—in 2018. *See* Laws 2018, Ch. 247, § 1. Section 16–204.01 provides, in relevant part, as follows:

A. After consideration of the court’s opinion in *City of Tucson v. State*, 235 Ariz. 434 (Ct. App. 2014), the legislature finds and determines that it is a matter of statewide concern to increase voter participation in elections, including elections for cities, including charter cities, towns and other political subdivisions, and the legislature finds and declares that if cities, including charter cities, towns and

other political subdivisions demonstrate low voter turnout in elections that are not held on the consolidated election dates prescribed in § 16-204, the low voter turnout constitutes sufficient factual support for requiring candidate and other elections to be held on certain specific consolidated dates. The legislature further finds and declares that after evidence of low voter turnout in city, including charter city, and town elections and in elections held for other political subdivisions, increasing voter turnout through the use of consolidated election dates for candidate and other elections as prescribed by this section is a matter of statewide concern. This section preempts all local laws, ordinances and charter provisions to the contrary.

B. A political subdivision shall hold its elections on a statewide election date if its previous elections on a nonstatewide election date resulted in a significant decrease in voter turnout in that political subdivision.

C. Beginning with elections in 2018, for each political subdivision's elections, other than special elections or recall elections, if a significant decrease in voter turnout occurs as prescribed in subsection B of this section, the political subdivision shall hold its subsequent elections on the statewide election dates beginning three calendar years after the occurrence of the significant decrease in voter turnout.

D. For the purposes of this section:

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2. "Significant decrease in voter turnout" means the voter turnout for the office that received the highest number of votes in the most recent candidate election for a political subdivision in which candidates are elected at large, or portion of a political subdivision if candidates are not elected at large, is at least twenty-five percent less than the voter turnout in that same political subdivision or portion of a political subdivision for the most recent election in which the office of the governor appeared on the ballot.

3. "Statewide election date" means the date of the regular statewide primary election and the regular statewide general election.

4. "Voter turnout" means the number of ballots cast in a specific candidate race prescribed by this section divided by the total number of active registered voters in that political subdivision or portion of a political subdivision, as applicable, or if no specific candidate race is prescribed by this section, the number of ballots cast in that political subdivision or portion of a political subdivision, as applicable, divided by the total number of active registered voters in that political subdivision or portion of a political subdivision at the election prescribed by this section.



The Legislature also added A.R.S. § 16–204.02 in 2018. *See* Laws 2018, Ch. 247, § 1. Section 16–204.02(A) states that “[n]otwithstanding any other law, in order to comply with the consolidation of election dates if required under § 16–204.01 ... the terms of office for elected officials of the political subdivision shall be lengthened at the time of consolidation to align with the consolidated election dates.”

### **C. The City’s Ordinance**

On February 19, 2020, the City enacted the Ordinance, which calls for: (1) “a City primary election, to be held on Tuesday, August 3, 2021, at which candidates for the offices of Council Members from Wards Three, Five, and Six shall be nominated for each properly and duly qualified political party”; and (2) “a City general election, to be held on Tuesday, November 2, 2021, at which three Council Members representing Wards Three, Five, and Six shall be elected” for a 4-year term spanning from December 6, 2021 until December 1, 2025. *See* Exhibit A. The City enacted the Ordinance pursuant to Chapter XVI, § 6 and Chapter IV, § 1, ¶20 of the Tucson Charter, which authorize the “mayor and council” “by ordinance” to “provide for the holding of all municipal elections” and “provide for the manner in which and the times at which any municipal election shall be held[,]” respectively.

### **IV. Analysis**

Although case law interpreting whether municipal election dates are matters of purely local concern does not “clearly and unambiguously” compel the conclusion that they are not, the best reading of the cases is that 1) *Strode* and *Tucson II* stand for the proposition that the matter of purely local concern at issue is a charter city’s “governmental structure[,]” *i.e.*, “who shall be its governing officers and how they shall be selected,” and 2) the Legislature requiring

consolidated election dates, particularly when it is triggered by an actual decrease in voter turnout, does not fall within that narrow category.<sup>4</sup>

As noted above, “significant decrease in voter turnout” is statutorily defined under A.R.S. § 16–204.01(D)(2). The City states that “[u]sing A.R.S. § 16-204.01’s statutory definition, the ‘voter turnout’ in the 2018 Statewide election, as measured within the City limits, was just over 67%.” Response at 5.<sup>5</sup> Voter turnout in the City’s 2019 election was a mere 39.26%. See City of Tucson Official Canvas for the 2019 general and special election, *available at* [https://www.tucsonaz.gov/files/clerks/COT\\_2019\\_OfficialResults\\_General\\_11122019.pdf](https://www.tucsonaz.gov/files/clerks/COT_2019_OfficialResults_General_11122019.pdf) (last visited July 15, 2020).

In February 2020, the City enacted the Ordinance calling for more off-cycle elections, even though voter turnout in the City’s 2019 election (39.26%) was “at least twenty-five percent less than the voter turnout in [the City] ... for the most recent election in which the office of the governor appeared on the ballot” (67%) under A.R.S. § 16–204.01(D)(2). See Response at 6.

The City concedes that the fall-off of voter turnout in the City’s 2019 election meets the statutory definition under either of two possible methods of calculating “significant decrease in

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<sup>4</sup> There is only one other category of purely local concern, which is “the manner and method of disposal of real estate of a city.” *Tucson IV*, 242 Ariz. at 602, ¶57 (quoting *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 336 (1948)). That is clearly not implicated here.

<sup>5</sup> The Office notes that the overall voter turnout statewide in the 2018 general election was 64.85%. See Arizona Secretary of State, Voter Registration & Historical Election Data, *available at* <http://azsos.gov/elections/voter-registration-historical-election-data> (last visited July 15, 2020). The Office further notes that in Pima County, where the City is located, voter turnout in the 2018 general election was 70.55%. See Pima County Election Results, 2018 General Election, *available at* [https://webcms.pima.gov/UserFiles/Servers/Server\\_6/File/Government/elections/Election%20Results%20and%20Information/Results%20g-2018.pdf](https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/elections/Election%20Results%20and%20Information/Results%20g-2018.pdf) (last visited July 15, 2020). The Office also found in its investigation that the number of registered voters in the City currently comprises approximately 46.55% of the registered voters in Pima County. Given this publicly-available information, the Office agrees with the City that its 2019 election produced a “significant decrease in voter turnout” as defined by A.R.S. § 16-204.01.

voter turnout.” *See id.* at 5–6 & n.2. It is therefore undisputed that the City’s 2019 election produced a “significant decrease in voter turnout” as defined in A.R.S. § 16–204.01. *See id.*

**A. The Ordinance Conflicts With State Law**

The City correctly admits that a “conflict now exists between the City’s Charter and new A.R.S. §§ 16–204.01 and 16–204.02.” Response at 5. The Ordinance establishes that the City’s primary and general elections will be held in 2021, an off-cycle year, despite the significant decrease in voter turnout between the 2018 and 2019 elections. *See Exhibit A.* There is a conflict between the Charter-authorized Ordinance and A.R.S. § 16–204.01 because when a significant decrease in voter turnout occurs in any city, including a charter city, the statute requires the city hold its elections on statewide consolidated election dates, *i.e.*, in even-numbered years. *See* A.R.S. §§ 16–204(E), 16–204.01(A), (C); *see also Tucson I*, 191 Ariz. at 437–38 (observing that the requirement “under the statute’s consolidated election schedule that special elections be held on certain days interferes with Chapter XVI, § 6, which allows the City to schedule special elections on other days” and therefore, “the City Charter conflicts with the statute”).

Further, state law requires such elections to be held “three calendar years after the occurrence of the significant decrease in voter turnout” with “the terms of office for elected officials of the political subdivision ... lengthened ... to align with the consolidated election dates.” A.R.S. §§ 16–204.01(C), 16–204.02(A). Thus, the Ordinance’s requirement that the election be held two years after the occurrence of the significant decrease in voter turnout and failure to lengthen the term of office for the current office holders also conflicts with state law. Simply put, the City cannot comply with the Ordinance while also complying with A.R.S. §§ 16–204, 16–204.01, and 16–204.02.

The only question remaining is whether the state law or the Ordinance controls, *i.e.*, whether the subject matter is of statewide or purely local concern. *See City of Tucson IV*, 242 Ariz. at 599, ¶42. As discussed below, the decision of when to hold a local election likely involves a matter of statewide concern, irrespective of whether a City’s elections produce evidence of low voter turnout. And when the statute is expressly triggered by low voter turnout in a city’s election, the state’s interests become even more compelling and clear.

**B. Election Dates Are Not A Matter Of Purely Local Concern Because They Implicate The Statewide Interest In Increasing Voter Turnout, Among Other Interests**

The City argues that “[g]iven the prior history and existing precedent regarding the issue, the analysis here is straightforward, and the City’s Charter controls.” Response at 6. The City is likely mistaken because existing precedent weighs against the City’s arguments.

The Legislature first declared in 1996, when A.R.S. § 16–204 was enacted, that “for the purposes of increasing voter participation ... it is a matter of statewide concern that all elections in this state be conducted on a limited number of days” and “that the holding of all elections on certain specific consolidated days is a matter of statewide concern.” A.R.S. § 16–204(A) (1996). Indeed, the decision of when to hold local elections implicates the statewide interest of increasing voter turnout, which relates to at least two other statewide interests: (1) the constitutional right to vote; and (2) the integrity of the electoral process. *See Cal. Att’y Gen. Op. 16–603, supra 3*, at \*4 (noting that a charter city’s authority over municipal affairs “is not absolute,” reasoning that “[e]lections are less ‘complete’ when there is significantly lower voter turnout because fewer eligible voters are participating in the electoral process,” and concluding that “off-cycle elections may impinge on voting by causing low voter turnout” and “[t]his turnout

therefore undermines electoral integrity and thus involves a matter of statewide concern”).<sup>6</sup> These statewide interests are so fundamental that Arizona’s Constitution safeguards these rights by providing that “[a]ll political power is inherent in the people,” Ariz. Const. art. II, § 2, “[a]ll elections shall be free and equal,” Ariz. Const. art. II, § 21, and that “[t]he rights of citizens of the United States to vote and hold office shall not be denied or abridged... on the account of sex,” Ariz. Const. art. VII, § 2. And the Constitution empowers the Legislature to enact laws to “secure the purity of elections and guard against abuses of the elective franchise,” Ariz. Const. art. VII, § 12.

First, the State has an interest in protecting the right to vote of its citizens by ensuring that cities encourage voter turnout through the alignment of election dates. *See, e.g.*, A.R.S. § 16–940(A) (“The people of Arizona declare our intent to create a clean elections system that ... will encourage citizen participation in the political process”). While voter turnout is impacted by a myriad of factors, according to one study, “timing is clearly the most important factor affecting turnout[.]” Public Policy Institute of California, Zoltan L. Hajnal, Paul G. Lewis, Hugh Louch, *Municipal Elections in California: Turnout, Timing, and Competition*, at 64 (2002), available at [https://www.ppic.org/content/pubs/report/R\\_302ZHR.pdf](https://www.ppic.org/content/pubs/report/R_302ZHR.pdf) (last accessed July 9, 2020). Another study pointed out that “[e]lections held at odd times force potential voters to bear additional costs to participate in the political process.” Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U.Chi.L.Rev. 37, 39 (2010). Off-cycle elections, therefore, implicate the

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<sup>6</sup> The California Attorney General made this conclusion even when the California Constitution expressly “gives charter cities the power to legislate ‘in respect to municipal affairs’ over inconsistent state law.” *Id.* (quoting Cal. Const., art. XI, § 5(a)); *see* Joseph R. Grodin *et al.*, *The California State Constitution* 280–81 (2d ed. 2016) (discussing 1896, 1914, and 1970 amendments that changed prior version, which “allowed a city to adopt ‘a charter for its own government,’ but those charters remained ‘subject to and controlled by general laws.’”). The Arizona Constitution lacks any such textual commitment to charter cities. *See Tucson IV*, 242 Ariz. at 606, ¶¶73–78 (Bolick, J., concurring) (discussing Arizona case law).

fundamental right to vote. The State has a significant interest in protecting the right of citizens to vote by requiring city election dates to coincide with statewide consolidated election dates under A.R.S. § 16–204.

Second, the Arizona Constitution and case law confirm that the State has a substantial interest in safeguarding the integrity of elections. *See* Ariz. Const. art. VII, § 12; *Miller v. Picacho Elementary School Dist. No. 33*, 179 Ariz. 178, 179 (1994) (“the integrity of the electoral process is an issue of statewide importance”); *Kromko v. State*, 132 Ariz. 161, 163 (1982) (“The preservation of the integrity of the electoral process is a legitimate state goal.”). According to one study, due to the increased costs in participation for off-cycle elections, the result is “selective participation” in which “single-issue interest groups are especially influential.” Berry & Gersen, *supra* 13, at 37. Off-cycle elections contribute to the undesired result of experiencing “fewer eligible voters [who] are participating in the electoral process[.]” which in turn “undermines electoral integrity.” Cal. Att’y Gen. Op. 16–603, *supra* 3, at \*4. Accordingly, the State has a substantial interest in encouraging voter turnout to safeguard the integrity of elections.

In light of the State’s interests in protecting the fundamental right to vote, safeguarding the integrity of elections, and increasing voter participation, it is not clearly established that the decision of when to hold local elections is a matter of purely local concern as the City contends.

**i. Under The Arizona Supreme Court’s Decisions In *Strode* And *Tucson II* Election Dates Are Not A Matter Of Purely Local Concern**

The timing of an election does not implicate “the method and manner of conducting elections” and therefore is not of purely local concern. The City disagrees and asserts that “*Tucson II* and *Strode* both recognize that there is no more inherently local interest than the method and manner of conducting elections for a charter city.” Response at 8. To the contrary,

these cases support the Office’s determination that the decision of when to hold local elections is a matter of statewide concern. In fact, in *Tucson II*, the last opinion from the Arizona Supreme Court discussing statewide regulation of charter city elections, the Court clearly stated that election dates are not a matter of purely local concern. 229 Ariz. at 178, ¶35 (citing *Tucson I*, 191 Ariz. at 439).

*Strode* addressed a city’s power to determine the city’s “governmental structure[,]” *i.e.*, “who shall be its governing officers and how they shall be selected.” 72 Ariz. at 368. Nothing in *Strode* suggests that mere election dates are encompassed within a city’s local concern of structuring its own government. And in *Tucson II*, the Arizona Supreme Court readily acknowledged that “[w]e do not question that some aspects of the conduct of local elections may be of statewide concern” and that “election dates ... involve matters qualitatively different from determining how a city will constitute its governing council.” 229 Ariz. at 178, ¶35. Thus, contrary to the City’s position, the Arizona Supreme Court has never suggested, let alone held, that all aspects of local elections are “inherently” matters of purely local concern. Instead, the supreme court’s decisions demonstrate that matters involving the structure of local government (as in *Strode*) are matters of local concern, in contrast to mere election dates, which are “qualitatively different” from decisions relating to the composition of a city’s council. *See id.*

**ii. The Arizona Court Of Appeals’ Decision In *Tucson III* Does Not Alter The Result**

To support its position that the Ordinance here prevails over state law, the City also relies on the Arizona Court of Appeals’ decision in *Tucson III*, 235 Ariz. at 440, ¶20, which held that Tucson’s Charter superseded A.R.S. § 16–204(E). *See* Response at 8 (arguing that *Tucson III* addressed “the precise issue now being raised again, even-year versus odd-year elections, and found that the City’s charter controls this issue”). Notably, however, the City does not mention

the Arizona Court of Appeals' 1997 holding in *Tucson I* that A.R.S. § 16–204(A) “pertains to matters of statewide concern and does not ‘relate to purely municipal affairs’” and therefore “takes precedence over the City’s Charter.” 191 Ariz. at 439–40 (quoting *Strode*, 72 Ariz. at 365). At a minimum, the holdings of *Tucson I* and *Tucson III* are not entirely consistent.

To be sure, *Tucson III* attempted, briefly, to distinguish *Tucson I* on the basis that the “practical impact on the City” as a result of the 1996 law in *Tucson I* was “a one-week change in the date of its primary election[,]” whereas A.R.S. § 16–204(E) “would require major changes to city charters and election procedures, including altering the terms of office for some officials.” *Tucson III*, 235 Ariz. at 438, ¶13. *Tucson III* then “address[ed] whether an off-cycle election is an integral component of the method and manner of conducting elections” and faulted the State for failing to advance “facts or legislative findings to support” the Legislature’s express declaration in A.R.S. § 16–204(A) of a statewide interest in increasing voter participation. *Id.* at 438–39, ¶¶13–17.

*Tucson III* neither reconciled its holding with, nor disapproved of, *Tucson I*. Again, in *Tucson II*, the Arizona Supreme Court unequivocally explained that election dates are not matters of purely local concern, and it did not indicate that the analysis turns on whether statewide legislation impacts the timing of local elections by one week or one year. *See* 229 Ariz. at 178, ¶35. The court in *Tucson III* acknowledged that “*Tucson II* arguably places election dates outside of local autonomy and interest,” but attempted to write off as dicta *Tucson II*’s statements about timing. 235 Ariz. at 438, ¶12. *Tucson II*’s statements should not be so lightly disregarded. The statements were an important component of the Court’s analysis about the Legislature’s authority over charter city elections. In light of the Arizona Supreme Court’s decision in *Tucson II*—which is consistent with *Tucson I*’s holding—the Legislature’s decision to align



charter city election dates with those for statewide and federal elections does not violate the Arizona Constitution.

**C. The State Law At Issue Presents An Even Easier Question To Resolve Because It Is Only Triggered By An Actual Decrease In Voter Turnout**

Setting aside *Strode*, *Tucson I*, and *Tucson II*, A.R.S. § 16–204.01 is only implicated when off-cycle city elections actually result in a significant decrease in voter turnout. While not dispositive of the issue, *see Tucson II*, 229 Ariz. at 178, ¶¶33–34, the text of the 2018 law expressly states that “it is a matter of statewide concern to increase voter participation in elections, including elections for ... charter cities” and that “after evidence of low voter turnout” in charter city elections, “increasing voter turnout through the use of consolidated election dates for candidate and other elections as prescribed by this section is a matter of statewide concern.” A.R.S. § 16–204.01(A).

The City maintains that A.R.S. § 16–204.01 “does not apply” to Tucson as a charter city because the “method and manner of conducting elections” is a “purely local concern.” Response at 2, 6. But regulation of the timing of city elections with the intent to increase voter turnout—after low voter turnout has indisputably occurred in city elections—is *not* a purely local concern. For the same reasons discussed above, voter turnout implicates at least two other statewide interests: (1) the constitutional right to vote; and (2) the integrity of the electoral process. *See supra*, Section IV(B). These interests become even more pronounced, and are even more compelling to override local interests, when there is evidence that fewer Arizonans are exercising their right to vote in local elections.

Putting aside the correctness of the Arizona Court of Appeals’ holding in *Tucson III* (*see supra*, Section IV(B)(ii)), *Tucson III* was predicated on the State’s failure to proffer factual findings to support the 2012 amendments to A.R.S. § 16–204 (which banned off-cycle elections)

and to affirm the Legislature’s prior declaration in A.R.S. § 16–204(A) that voter participation was a statewide concern. *See Tucson III*, 235 Ariz. at 439–40, ¶¶17–19. But the Legislature specifically responded to *Tucson III*’s holding through the enactment of A.R.S. § 16–204.01. *See* A.R.S. § 16–204.01(A).<sup>7</sup> Although the statute does not help the City here, A.R.S. § 16–204.01 does *not* require cities and other political subdivisions to align their local election dates with statewide election dates when such local elections do not produce a “significant decrease in voter turnout.” *Id.* The Legislature therefore allowed political subdivisions to continue to schedule elections off-cycle, as long as the statewide interest in voter participation is not infringed.

And the Legislature not only reaffirmed what it declared in A.R.S. § 16–204(A)—that it is “a matter of statewide concern to increase voter participation in elections,” *see* A.R.S. § 16–204.01(A)—but also created a facially even-handed, uniform, and quantitative mechanism to identify and define evidence of a “significant decrease in voter turnout.” A.R.S. §16–204.01(A), (D).<sup>8</sup> In other words, the Legislature provided charter cities with an opportunity to safeguard the

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<sup>7</sup> As the text of the statute itself indicates, the Legislature enacted A.R.S. § 16–204.01 “[a]fter consideration of the court’s opinion in [*Tucson III*.]” A.R.S. § 16–204.01(A). The statute likely would never have come into existence if the Arizona Court of Appeals’ holding in *Tucson III* had been consistent with its earlier holding in *Tucson I*.

<sup>8</sup> The City claims there are deficiencies in the Legislature’s chosen statutory mechanism for identifying a drop-off in voter turnout, but such deficiencies are not evident in the instant application. The 2019 election was held pre-pandemic with both a contested mayoral election and a high-profile ballot initiative that garnered national attention. *See, e.g.* Jonathon J. Cooper, *Sanctuary City Initiative Divides Liberal Tucson, Arizona*, ABC NEWS, Nov. 3, 2019, <https://abcnews.go.com/US/wireStory/sanctuary-city-initiative-divides-liberal-tucson-arizona-66724138>. Yet voter turnout was only 39.26%. *See* City of Tucson Official Canvas for the 2019 general and special election, *available at* [https://www.tucsonaz.gov/files/clerks/COT\\_2019\\_OfficialResults\\_General\\_11122019.pdf](https://www.tucsonaz.gov/files/clerks/COT_2019_OfficialResults_General_11122019.pdf) (last visited July 15, 2020).

right to vote and encourage participation in the political process. When triggered, however, this mechanism provides the evidentiary basis that *Tucson III* found to be lacking to support the State’s regulation of the timing of local elections. For this reason, and contrary to the City’s assertion, *Tucson III* does not dictate the outcome here. The Legislature’s enactment of A.R.S. § 16–204.01 renders *Tucson III* materially distinguishable because the statute is now triggered by quantifiable evidence of low voter turnout, which bolsters the Legislature’s declaration of statewide interest in A.R.S. § 16–204.01(A).

\* \* \*

As a general matter, the decision of when to hold local elections involves “a matter of statewide concern to increase voter participation in elections,” *see* A.R.S. §§ 16–204(A) and – 204.01(A). When local off-cycle elections produce evidence of low voter turnout (as the City’s 2019 election unquestionably did), the decision of when to hold local elections is even clearly a matter of statewide, not purely local, concern. Election dates of local elections also involve statewide interests in the right to vote and election integrity. In light of these State interests, the Ordinance likely does not prevail over the statute.

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Further, in reviewing the election result data from the City’s website, the voter turnout for the City’s 2019 election was the *highest* reported of all general elections in the past decade, belying any supposition that voter turnout may have suffered from an unusual downturn. Specifically, the general election voter turnout results were listed on each report as follows: 39.26% in 2019, 35.8% in 2017, 36.61% in 2015, 30.38% in 2013, and 31.07% in 2011. *See* City of Tucson General Election Results, *available at* <https://www.tucsonaz.gov/clerks/elections> (last visited July 15, 2020).

For purposes of this Report, the Office declines to further analyze the City’s arguments that A.R.S. § 16–204.01 is flawed or lacks a rational basis, and reserves the opportunity to contest the City’s statutory arguments in a court proceeding.

## V. Conclusion

*Strode*, *Tucson I*, *Tucson II*, and related principles support the Office’s analysis. Although the Office maintains that *Tucson III* is distinguishable, it is not unreasonable for the City to argue, relying on *Tucson III*, that the Ordinance governs a matter of purely local concern and therefore supersedes A.R.S. § 16–204.01. Under these circumstances, “existing law [does not] clearly and unambiguously compel[.]” the Office’s conclusion. See *Tucson IV*, 242 Ariz. at 595, ¶25. The Office therefore concludes under A.R.S. § 41–194.01(B) that the Ordinance **may violate** state law, and will expeditiously seek relief in the nature of declaratory judgment against the City in the Arizona Supreme Court.



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