CITY OF
TUCSON
OFFICE OF THE
CITY ATTORNEY

October 27, 2016

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1275 W. Washington
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Re: Your October 13, 2016 Notice of Submission of Legislator Request for Investigation Pursuant to A.R.S. Sec. 41-194.01; Request for Response; and Public Records Request

Dear Mr. Roysden,

This letter is offered as the City of Tucson's (City) response to Representative Mark Finchem's October 12, 2016 *"Legislator Request for Attorney General Investigation of Alleged State-Law Violation by County, City or Town."* Any questions you might have relating to this response can be directed to me.

The City's response to your Arizona Public Records Law request is contained on the thumb drive attached to the hard copy of this letter. The City does not ask for reimbursement for associated costs. To avoid duplication, this response does not include all of the records that were previously provided to Representative Finchem, which he attached to the request he filed with your office. If you have any questions about the records provided, or about how the Tucson Police Department ("TPD") processes firearms that it acquires, let me know and I will connect you with TPD Evidence Superintendent Nancy McKay-Hills.

I. Introduction

Representative Finchem's request for investigation arises from the City's lawful procedures and practices in the disposition of City property; specifically, property that happens to be firearms. The City operates under the authority of the Tucson City Charter, which was adopted and ratified pursuant to Article 13, Sec. 2 of the Arizona Constitution. Pursuant to its Charter and constitutional authority, the City has established procedures and practices for the disposition of property, including firearms, taken into custody and held by TPD. *See, Tucson Code (T.C.) Secs. 2-140 – 2-142; T.C. Secs. 28-66 – 28-70; TPD Property & Evidence Section Policies, Policy 800.7.* Under

these policies and procedures TPD disposes of unclaimed, lost and confiscated firearms either through sale at auction, by keeping them for law enforcement purposes, or destruction.

Representative Finchem's request for investigation is premised upon the application of the provisions of various acts of the Arizona Legislature [A.R.S. Secs. 12-941–12-945; 13-3105(A); and 13-3108(F)] that, on their face, dictate the disposition of firearms lawfully acquired and held by Arizona cities. However, under Arizona law, "[o]ur supreme court has held that 'the sale or disposition of property by charter cities' is a matter of solely local concern in which the state legislature may not interfere." *McMann v. City of Tucson*, 202 Ariz. 468, 472, 47 P. 3d 672, 676 (App. 2002) [quoting *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 336, 195 P.2d 562, 566 (1948)]. To the extent that the Arizona statutes cited by Representative Finchem conflict with the City's codes and policies adopted pursuant to the authority of the Tucson Charter, those statutes have no application to the City. The City's methods of disposition of firearms are not in violation of state law, but instead are lawful under the supreme law of the State of Arizona, namely the Arizona Constitution.

Additionally, Representative Finchem's request for investigation was filed pursuant to A.R.S. Section 41-194.01, a statute adopted by the Fifty-second Legislature of the State of Arizona under Senate Bill (SB) 1487. SB 1487 is a plainly unconstitutional legislative act that violates multiple provisions of the Arizona Constitution, including but not limited to Article 13, Sec. 2 (relating to Charter Cities); Article 3 (Separation of Powers); and Article 9, Sec. 5 (Appropriations). Any actions that may be brought or sanctions that may be imposed under the putative authority of A.R.S. Section 41-194.01 or other provisions of SB 1487 would further violate the Arizona Constitution. The City requests that the Office of the Attorney General reject Representative Finchem's request for investigation submitted pursuant to A.R.S. Section 41-194.01, and refrain from taking any actions described in SB 1487, including the withholding or redistribution of state shared revenues.

II. Factual Background

Through its law enforcement activities, TPD takes into its possession and control more than 1,500 firearms in a given year. By way of example, in 2013, TPD acquired 1,926 firearms. The numbers for 2014 through 2016 are as follows: 1,694 in 2014; 1,587 in 2015; and 1,364 in 2016 (as of 10/13/16).

In your letter, you asked that I address the origin or sources of the described firearms acquired by TPD. The sources of the firearms vary. Pursuant to TPD's General Order series 8200 (copy included in the public records request response), firearms may be seized, collected, turned over or held within the custody of TPD for the purpose of safe keeping, investigation, forfeiture, or identification.

Firearms designated as "safekeeping" are considered non-evidentiary property that is placed into temporary custody of TPD for the purpose of safeguarding for the rightful owner. This designation includes firearms being held in domestic violence situations where the firearm is not evidence of a crime; firearms turned in to TPD during the pendency of an order of protection; firearms that are part of prisoner property where the firearm is not evidence of a crime; and firearms turned in by members of the community who no longer wish to possess the firearm. This designation comprises approximately 10% of the firearm inventory in question.

Firearms taken into custody for investigation purposes are designated as evidence related to a violation of law and may implicate or clear an individual of a crime. Combined with the forfeited firearms category, this designation comprises approximately 85% of the firearm inventory. Forfeited firearms take on this designation following a civil judicial forfeiture proceeding in which a court issues an order awarding possession of the firearm to the City as the proceeds of a crime or as an instrument that was used or intended to be used to facilitate the commission of a crime. Forfeiture may also occur following a criminal conviction as part of the orders issued by the sentencing court.

Firearms taken into custody for identification purposes are designated as "found property" having been determined to be lost or abandoned. These firearms are held temporarily in an effort to determine the legal owners. Also, on certain rare occasions, the department will assist other agencies in returning a firearm recovered in another jurisdiction to a rightful owner within the City. This designation comprises approximately 5% of the firearm inventory.

TPD's procedures for holding and disposing of firearms are codified in the Tucson Police Department Property and Evidence Section Manual (hereafter, "Manual," a copy of which is included in the response to the public records request). Firearms taken into custody by TPD as evidence are held as long as needed for that purpose. No firearm is disposed of unless it no longer has an evidentiary purpose. After TPD determines that a firearm no longer has any evidentiary value, the procedures in the Manual dictate the disposition of that firearm. Disposition can include returning the firearm to its owner; putting the firearm to TPD's use (with transfer of the firearm to the requesting unit); transfer of the firearm to another law enforcement agency for its use; sale of the property to an FFL at auction; or destruction.

To give you a sense of scale of the various disposition methods, I've attached as Exhibit A to this letter a chart describing the number of firearms collected, auctioned, transferred into a unit of the department, and destroyed. In 2013, 1,926 firearms were collected by TPD; 244 were auctioned; 121 were a departmental transfer, and 1,849

were destroyed. Thus far in 2016, 1,364 have been collected; 49 auctioned; 84 departmental transfers, and 1,128 destroyed.[1]

The details of TPD's procedures are embedded in the Manual and won't be repeated here, but certain elements of those procedures warrant explanation in order to assist in your review of this response. With respect to disposition by auction, TPD only makes available sporting weapons – rifles that are not semi-automatic, and shotguns – for sale at auction. No handguns or semi-automatic long guns are put to auction. Of course, no firearms of any type that are prohibited from being sold under federal or state law are put to auction. Instead, illegal firearms are disposed of by destruction. As provided under the Manual as well as the policies and procedures of the City's Procurement Department (which manages the auctions), sales of firearms at auction can only be made to persons who possess a valid FFL. Records of all sales are kept and maintained by the City (and are included in the public records request response).

TPD's procedures for firearm destruction are codified in Sec. 800.7 of the Manual. Per those procedures, TPD creates an electronic destruction report that includes the relevant case number and a description of each firearm, including the serial number. All firearms identified for destruction are first run through NCIC to check whether they might be stolen property. If this check is positive, additional attempts are made to notify a lawful owner. Additionally, prior to any destruction, TPD's Crime Lab, SWAT and Armory units are given the opportunity to evaluate the weapons to determine if any might be used by the Department. Any firearms determined to have a departmental use are transferred to the requesting unit, and appropriate records of this transfer are kept and maintained.

After these procedures are completed, TPD convenes a review board (the "destruction board"), consisting of a Commander or section head, a Sergeant or first-line Supervisor, and a member of the Property and Evidence section. The board reviews the inventory of the property identified for destruction to ensure compliance with procedures prior to destruction. All outgoing firearms are subject to audit upon the direction of the board. The board remains present during the inventory and audit, and during the actual destruction of the property. The date and time of the destruction and the total number of firearms destroyed are documented in a case report that is submitted to TPD's Records section.

III. The City's Response to Representative Finchem's Allegations

As described above, TPD does in fact destroy many unclaimed and forfeited firearms rather than return them into public circulation, where its officers may encounter them in

[1] The total number of dispositions will not match the number of firearms collected in a given year, as dispositions frequently involve firearms collected in prior years.

carrying out their law enforcement responsibilities in the corporate limits of the City. TPD does so pursuant to ordinances adopted by the City's Mayor and Council (T.C. Secs. 2-140 through 2-142), which provide that, with certain limited exceptions, firearms held and controlled by TPD that are not needed as evidence will be disposed of through destruction.

Tucson is one of nineteen (19) Arizona charter cities, and operates under the authority granted to charter cities through Article 13, Section 2 of the Arizona Constitution. Pursuant to the Constitution, the Tucson Charter is the organic law of the City. *Strode v. Sullivan,* 72 Ariz. 360, 368, 236 P.2d 48, 54 (1951). Article 13, Section 2, which has been part of the Arizona Constitution since statehood, was included in the Constitution in order to permit cities the autonomy to govern their local affairs without interference from the Legislature. *City of Tucson v. State,* 235 Ariz. 434, 436, 333 P.3d 761 (App. 2014) ["Tucson III"], citing *City of Tucson v. State*, 229 Ariz. 172, 176, 273 P.3d 624, 628 (Ariz. 2012) ["Tucson II"]. The Tucson Charter supersedes all State laws in conflict with the Charter, in all matters that pertain to municipal affairs of a local nature. *Id.*

The Tucson Charter provides that the City has the power to "purchase, receive, have, take, hold, lease, use and enjoy property of every kind and description, both within and without the limits of said city, and control and dispose of the same for the common benefit." *Tucson Charter, Ch. IV., Sec. 1(4).* The Tucson Charter further provides that the City's Mayor and Council have the power to "prescribe by ordinance the duties of all officers whose duties are not defined by this Charter; and may by ordinance prescribe for any officer's duties in addition to those herein prescribed, when the same are not inconsistent with the provisions of this chapter, and . . .the mayor and council shall exercise all of the powers of the city, and shall pass any and all ordinances or resolutions necessary to carry out the provisions of this Charter." *Tucson Charter, Ch. VII., Sec. 1(35).*

In 2005, Tucson's Mayor and Council adopted Ordinance No. 10146, which established Tucson Code Sections 2-140 through 2-142. T.C. Sec. 2-142 and provides for the methods of disposal of unclaimed and forfeited firearms by the Tucson Police Department, and expressly provides for disposal by destruction. *T.C. 2-142(a).* Ordinance No. 10146, which is the specific ordinance or other official action of the City that is the subject of Representative Finchem's request (as amended), was adopted pursuant to the Mayor and Council's authority pursuant to Chapter IV., Sec. 1(4) and Chapter VII., Sec. 1(35) of the Tucson Charter.[2]

To the extent the provisions of acts of the Arizona Legislature cited by Representative Finchem [A.R.S. Secs. 12-941–12-945; 13-3105(A); and 13-3108(F)] conflict with the

[2] The Mayor and Council agenda materials relating to Ordinance No. 10146 are included in the public records request response.

provisions of the Tucson Code with respect to the City's disposal of firearms, those acts and statutes have no application to the City. Tucson Ordinance No. 10146 provides for the disposition of property (including firearms) acquired by TPD. The Arizona courts have determined that the sale or disposition of property by charter cities – and specifically, by the City under its Tucson Charter – is a matter of solely local concern "in which the state legislature may not interfere." *McMann v. City of Tucson*, 47 P.3d 672, 676 (App. 2002), citing *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 195 P.2d 562, 566 (Ariz. 1948). Therefore, the provisions of Ordinance No. 10146 that provide for the destruction of firearms supersede any conflicting statutory enactments of the Arizona Legislature, including but not limited to the statutes referenced by Representative Finchem. The Office of the Attorney General must reject the request for investigation and determine that the City's enactment of Ordinance No. 10146 does not violate the laws or Constitution of Arizona.

While *McMann* and *Arizona Alpha, supra,* involved the disposal of real property by the City, rather than the disposal of personal property like firearms, this distinction is irrelevant to the question of the City's constitutional authority under its Charter. As noted above, the authority to dispose of City property under the Tucson Charter extends to property "of every kind and description." *Tucson Charter, Ch. IV., Sec. 1(4).* If the question of the sale or disposal of real property is solely a matter of local concern with which the Legislature cannot interfere, then the disposal of personal property is as well. Simply put, if there is no legitimate statewide concern in how a charter city disposes of a piece of land, then there is no legitimate statewide concern in how a charter city disposes of a firearm – or a desk, a computer, a shovel, or any other piece of equipment or other personal property.

The absence of any statewide concern with respect to the City's disposition of its own property, including the City's personal property generally and firearms specifically, is reinforced by the absence of any articulated statewide concern in the statutes referenced by Representative Finchem in his request for investigation. A.R.S. Title 12, Chapter 7, Article 8 (A.R.S. Secs. 12-940 through 12-945) contains no declaration of statewide concern or state preemption of local ordinances. While A.R.S. Sec. 12-943 provides that "[a]ll property that is described in § 12-941 and that is in the possession of a state, county, city or town agency may only be disposed of pursuant to this article," Arizona law is clear that preemption does not arise from negative inference, and instead the policy of preemption must be clearly stated. *City of Tucson v. Rineer*, 193 Ariz. 160, 162, 971 P.2d 207, 209 (App. 1998); *City of Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart*, 197 Ariz. 600, 5 P.3d 934 (App. 2000).

Likewise, A.R.S. Section 13-3105 (relating to court orders issued upon felony convictions), also cited by Representative Finchem, lacks any statement of statewide concern or preemptive effect. And while A.R.S. Section 13-3108 (the only other statute cited in the amended request) does include express statements of preemption, neither of

those statements addresses the acts of the City that are the subject of the request for investigation. Section 13-3108(A) purports to preempt a city's authority to regulate the "transportation, possession, carrying, sale, transfer, purchase, acquisition, gift, devise, storage, licensing, registration, discharge or use of firearms. . ." Even under its own express terms, the preemptive statement does not address the city's act of destroying its own property. In fact, this language, with its placement in Title 13, "strongly suggests that the legislature only intended to preempt municipalities from enacting local criminal ordinances relating to firearms." *McMann*, 47 P.3d at 678. Similarly, Section 13-3108(D) preempts a local ordinance relating to firearms that is "more prohibitive than or that has a penalty greater than any state law penalty." Tucson Ordinance No. 10146 does not prohibit any person's conduct relating to firearms and does not impose any penalty on any person. Instead, it merely establishes how the City disposes of its own property.

Finally, Section 13-3108(F) provides that a city and/or law enforcement agency "shall not facilitate the destruction of a firearm or purchase or otherwise acquire a firearm for the purpose of destroying the firearm except as authorized by § 13-3105 or 17-240." The prohibition against the facilitation of destruction of firearms that was added to this subsection under House Bill 2455 in 2013 was crafted to try to prevent gun "buy-back" events supported or facilitated by cities, an activity that has nothing to do with Ordinance No. 10146, which was enacted in 2005 and relates only to the disposition of property by TPD after it is no longer needed for evidentiary purposes. Moreover, neither the City nor TPD, through the implementation of Ordinance No. 10146 or otherwise, acquires firearms "for the purpose of destroying" them. As described earlier, TPD acquires firearms through its law enforcement activities for the purpose of providing public safety, not for the purpose of destroying guns. Firearms are acquired as evidence of crimes, as found property, and for safekeeping. None of these acts are preempted by the language of the statute.

Accordingly, even if the Legislature had the authority to preempt by statute the constitutional and charter authority of the City to choose how it disposes of its own property – authority that it clearly lacks under Arizona law – the Legislature has failed to do so through the actual language of the statutes referenced by Representative Finchem. Moreover, even if a court were to read the preemptive language of the referenced statutes as evidencing an intent by the Legislature to express a statewide concern, the mere fact that the Legislature expresses that a statute addresses a matter of statewide concern does not make that statement true or determinative. Instead, the determination of whether an act of the Legislature addresses a matter of statewide concern, and therefore might supersede a conflicting provision enacted by a charter city, is a matter for the courts to decide. *City of Tucson v. State, [Tucson II]*, 273 P.3d at 630 (Ariz. 2012).

In this instance, the Legislature has entirely failed to articulate any cognizable statewide interest that is or could be implicated by the City's destruction of its own personal property. The reason for this is simple: no legitimate statewide concern can be articulated. To the contrary, the City's disposition of firearms serves solely local concerns and interests. The destruction of City-acquired firearms that were used in crimes or otherwise acquired by TPD prevents the reintroduction of these weapons into the community, where they might once again be put to that purpose and encountered by TPD officers carrying out their law enforcement responsibilities in the City. Not only is this a purely local concern, it is a legitimate local public health and safety concern over which the City has authority to legislate pursuant to the police powers conferred through its Charter. *See, City of Tucson v. Rineer*, 971 P.2d at 211-213 (finding that a Tucson ordinance prohibiting firearms within City parks relates to a "legitimate and narrow local concern" that is plainly within the City's authority to enact through its police powers as conferred under Chapter VII, Section (1)(32) of the Tucson Charter).[3]

The City's charter authority to enact Ordinance No. 10146 and to carry out the provisions of this law is not limited to its sovereign authority to determine how to dispose of its own property. The Arizona courts also have recognized that charter cities, including specifically the City, have a constitutional right to engage in business activities in the same manner as a private person. *McMann v. City of Tucson*, 47 P.3d 672, 676 (App. 2002). When acting in a proprietary capacity relating to its business activities – which includes commercial activities – pursuant to its charter and constitutional authority, the City is not subject to the will of the Legislature. *Id.* The Legislature's acts referenced by Representative Finchem all relate to statutory provisions that attempt to compel Arizona cities to engage in commercial business activities (the sale of city-acquired firearms) in a particular manner. Pursuant to *McMann*, these acts of the Legislature are superseded by the City's rights under its Charter and the Arizona Constitution, and the City remains free to make its own business decisions and act under the same authority and restrictions as a private person. *Id.* Nothing in the Arizona laws cited by Representative Finchem compel a private person to sell his or her firearms, or prohibit a private person from destroying his or her firearms. Accordingly, nothing in those statutes can prohibit the City from destroying its firearms or compel the City to sell them. Instead, the City is free to choose which of its firearms it destroys, and which firearms it will sell, all without interference from the Legislature.

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[3] To the extent Representative Finchem or anyone else might suggest that there is a statewide interest in dictating how Arizona cities generate local revenues, see *Trigg v. City of Yuma*, 59 Ariz. 480, 484, 130 P.2d 59, 63 (Ariz. 1942), finding that "[i]t is plain that the securing of revenue for a city is peculiarly and emphatically a matter of local concern" [quoting *Home Owners' Loan Corporation v. City of Phoenix*, 51 Ariz. 455, 459, 77 P.2d 818, 822 (Ariz. 1938)]; *also see Barrett v. State*, 44 Ariz. 270, 273, 36 P.2d 260, 263 (Ariz. 1934).

IV. SB 1487 is Unconstitutional and No Action can be Taken Under its Putative Authority

Representative Finchem's request for investigation by your Office was made under A.R.S. Section 41-194.01 and SB 1487. SB 1487 is a plainly unconstitutional legislative act that violates multiple provisions of the Arizona Constitution, and any actions that may be brought or sanctions that may be imposed under the putative authority of A.R.S. Section 41-194.01 or other provisions of SB 1487 would further violate the Arizona Constitution.

While I can identify at least a half dozen possible constitutional defects in SB 1487, for the purposes of this response, I will focus on three that illustrate that the imposition of any sanctions or the initiation of any legal actions against the City under the provisions of this legislation would violate the Arizona Constitution and cause immediate and severe harm to the City and its residents and taxpayers.[4]

1. SB 1487 Violates Article 13, Sec. 2 of the Arizona Constitution.

The overriding purpose of SB 1487 is not a mystery. The legislation represents the Arizona Legislature's desire to strip charter cities of their sovereign powers granted by Article 13, Sec. 2 of the Arizona Constitution, and to punish Arizona charter cities who exercise that constitutional authority by withholding and redistributing revenues generated by the taxpayers of those cities.[5] Article 13, Section 2 is discussed at some length in the earlier sections of this response, so I will not repeat those points here, other than to emphasize what the Arizona Supreme Court has repeatedly stated (and in many instances, in cases involving the Tucson Charter): charter cities are sovereign and autonomous over matters of local interest, and a city's charter supersedes any state law that conflicts with a charter city's ordinances relating to matters of local concern. *Tucson II; Tucson III.* Acts of the Arizona Legislature that attempt to interfere with a charter city's exercise of this sovereign power vested by Article 13, Section 2 cannot be constitutionally applied. SB 1487 is exactly such an act. In fact, interference with the sovereign authority of a "recalcitrant" charter city is its core purpose.

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[4] In the House Rules Committee, House staff attorneys advised the Committee that there were "potential constitutional problems" with SB 1487; however, the bill passed both houses of the Legislature, and was signed into law by the Governor.

[5] Senate President Andy Biggs made this clear in his remarks to the House Commerce Committee on 3/9/16, explaining that the withholding of shared revenue funds was a "stick" to hold "over a recalcitrant municipality," and that he expected that if a city or town "were notified by the Attorney General that you are in violation of the state constitution or state statute. . .that you would see a rapid-fire response by the municipality to come in and cure."

2. SB 1487 Violates Article 3 of the Arizona Constitution, which Requires Separation of Powers.

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, 309 P.2d 779, 787 (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, 751 P.2d 957, 960 (1988).

A.R.S. § 41-194.01 plainly violates this constitutional commitment to the separation of powers in at least two critical respects. First, the law divests the judiciary of its constitutional role to "say what the law is." *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.") Second, it infringes on the Attorney General's inherent constitutional discretion to decide what cases to bring.

a. Usurpation of the Powers of the Judiciary

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, 237 P.3d 1052, 1057-58 (App. 2010) (quotation omitted); *State v. Prentiss*, 163 Ariz. 81, 85, 786 P.2d 932, 936 (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, 972 P.2d 179, 195 (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." *Id.*

A.R.S. § 41-194.01 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, and instead it vests these exclusively judicial powers in the Attorney General, who is an

executive officer.[6] Additionally, through A.R.S. § 41-194.01, the Legislature has engineered an end-run around 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, 972 P.2d at 196.

b. Usurpation of the Executive Powers of the Attorney General

At the same time A.R.S. § 41-194.01 unconstitutionally delegates judicial powers to the Attorney General, it also strips the Attorney General of one of his inherent constitutional powers—the power to decide what cases to bring to court. The Arizona Supreme Court has consistently held that one limitation on the powers of the Legislature in prescribing duties for our State's constitutional officers is that the Legislature cannot impose "duties that would interfere with the maintenance and preservation of the independence of the three branches of government." *Hudson v. Kelly*, 76 Ariz. 255, 262-63, 263 P.2d 362, 367 (1953); *Shute v. Frohmiller*, 53 Ariz. 483, 495, 90 P2d. 998, 1003 (1953) (both construing powers of the Attorney General).

It is hard to imagine a greater case of Legislative interference with the independence of the Attorney General than A.R.S. § 41-194.01's command that the Attorney General: (1) must investigate any local-law preemption issue brought to him by any single legislator; (2) must decide the merits of that issue; (3) depending on his decision, must cause the Treasurer to cut off a municipality's revenue sharing funds; and (4) must bring a special action seeking an advisory opinion if he concludes that an ordinance only "may" violate state law.

Both the inherent constitutional power of the Attorney General and the statutory powers given to him as our State's "chief legal officer" and a "practicing attorney" carry with them a mandate that he represent the State of Arizona in a manner and through means consistent with his obligations as a lawyer, including his obligation to exercise his

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[6] Opinions of the 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.*

discretion, or, put differently, his "independent professional judgment," *Ariz. R. Prof'l Resp. 2.1*, in the execution of the substantial powers of his office. *See State ex rel. Woods v. Block*, 189 Ariz. 269, 271, 942 P.2d 428, 431 (1997) (Attorney General has power to intervene in certain cases but "he clearly retains discretion not to intervene if he concludes it is appropriate to do so."). Nowhere is the Attorney General's independent judgment more necessary, or more protected, than in deciding which cases to try and what charges to bring. *See, e.g., Prentiss*, 163 Ariz. at 85, 786 P.2d at 936 (1989) ("[T]he executive branch has the power to decide what criminal charges to file"); *State v. Rice*, 279 P.3d 849, 859-60 (Wash. 2012) ("The legislature is free to establish statutory duties that do not interfere with core prosecutorial functions, . . . but the legislature cannot interfere with the fundamental and inherent charging discretion of prosecuting attorneys.").

By mandating the circumstances under which the Attorney General must bring court action and the means by which he must do so, A.R.S. § 41-194.01 impermissibly strips the Attorney General (and thus the executive branch) of his inherent discretion and purports to require the Attorney General to act in contravention of his independent professional judgment.

3. SB 1487 Provides for an Unconstitutional Re-Appropriation of Funds

The last sentence of Article 9, § 5 of the Arizona Constitution provides that "[n]o money shall be paid out of the State treasury, except in the manner provided by law." This constitutional provision makes it "axiomatic that public money may not be spent, even for public purposes, unless somebody, authorized by the Constitution and the law to do so, has made an appropriation therefor." *Proctor v. Hunt*, 43 Ariz. 198, 201, (1934). In *Proctor*, the Arizona Supreme Court went on to describe the limited number of constitutionally permissible ways that appropriations can occur under Art. 9, § 5:

> Under our system of government, these appropriations may only be made by the direct authorization of the people, through the Constitution or an initiated act, or *by an act of the Legislature*, which has plenary power over the expenditures of public money, except as restricted by the terms of the Constitution. This legislative power may be exercised directly, as in the various appropriation bills made by the Legislature from time to time, or indirectly, through the establishment of subordinate municipal corporations, such as counties, cities, school districts, and the like, and the authorizing of them to spend certain portions of the public money, *but in the end all appropriations are based upon the affirmative act, either of the people or of the Legislature*.

Proctor, 43 Ariz. at 201-02. (emphasis added).

SB 1487, through A.R.S. Sec. 41-194.01(B)(1)(a), unlawfully delegates the legislative power of appropriation under Art. 9, § 5 to the Attorney General, an executive officer, who is empowered to direct and compel the Treasurer to withhold and redistribute state revenue funds if he reaches an opinion that a city or town ordinance violates state law.

This delegation to executive branch officials clearly violates Article 9, § 5 of the Arizona Constitution:

> It is generally held that the Legislature is supreme in matters relating to appropriations, except so far as there are constitutional restrictions upon it.... But there [is a] limitation[ ], not as a rule expressed in precise language in the various state constitutions, but nevertheless almost universally upheld, as implied therein. The [ ] Legislature may not delegate its power to make laws to any other person or body, except when authorized by the Constitution .... It therefore must itself make any appropriation which authorizes money to be drawn from the state treasury, and it cannot delegate that power to another.

Crane v. Frohmiller, 45 Ariz. at 496-97 (1935).

There is an invalid delegation here under Article 9, § 5 because the Legislature has left matters completely to the discretion and judgment of the executive branch. One of the most important tests as to whether particular laws amount to an invalid delegation of legislative power is found in the completeness of the statute as it appears when it leaves the hands of the Legislature. The generally recognized principle is that a law must be so complete in all its terms and provisions, when it leaves the legislative branch of the government, that nothing is left to the judgment of the electors, or other appointee or delegate of the Legislature. *Tillotson v. Frohmiller*, 34 Ariz. 394, 403-04, (1928).

SB 1487 wholly fails the *Tillotson* test. It unconstitutionally delegates authority relating to the appropriations of state shared revenues to unilateral executive branch judgment and discretion. SB 1487 requires the Treasurer to withhold and redistribute previously appropriated state revenues based not on any legislative action, but rather solely on the Attorney General's opinion whether a municipal ordinance violates state law. This wholesale, unconstitutional delegation of the legislative power over appropriations is a violation of Article 9, § 5. *Crane, supra; Tillotson, supra.*

V. Conclusion

The target of Representative Finchem's request for investigation, City of Tucson Ordinance No. 10146, is a lawful local ordinance enacted pursuant to the City's sovereign powers as a charter city under Article 13, Sec. 2 of the Arizona Constitution. Ordinance No. 10146 provides for the disposition of City property, and this is a matter of solely local concern in which the state legislature may not interfere. To the extent that the Arizona statutes cited by Representative Finchem conflict with Ordinance No. 10146 and the City policies adopted thereunder, those statutes have no application to the City.

Regardless of the opinion that the Office of the Attorney General might develop with respect to the issues presented by Representative Finhem, the Office must refrain from taking any actions that are based upon the putative authority of SB 1487, including but not limited to the withholding or redistribution of state shared revenues. SB 1487 is a plainly unconstitutional act of the Legislature. As noted by Representative Finchem on his Arizona Legislature member page, "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." [quoting *Norton v. Shelby County*, 118 U.S. 425, 442 (May 10, 1886)]. As our State's chief legal officer, the Attorney General has the responsibility to refrain from taking actions under legislation that is clearly violative of the Arizona Constitution.[7] Accordingly, the City of Tucson asks that the Office of the Attorney General reject Representative Finchem's request for investigation and any other request submitted pursuant to A.R.S. Section 41-194.01; and refrain from taking any actions described in SB 1487, including but not limited to the withholding or redistribution of state shared revenues.

Sincerely,

Mike Rankin
City Attorney

MR/dg

Atts.

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[7] Attorney General Brnovitch has previously demonstrated the integrity to make this choice in at least one other context. *See Flagstaff Living Wage Coalition v. State of Arizona*, Maricopa County Superior Court Case No. CV2015-004240.

EXHIBIT A

2013	
Collected	1926
Auctioned	244
Departmental Transfer	121
Destroyed	1849
2014	
Collected	1694
Auctioned	99
Departmental Transfer	82
Destroyed	1305
2015	
Collected	1587
Auctioned	21
Departmental Transfer	59
Destroyed	538
2016 (as of 10/13/16)	
Collected	1364
Auctioned	49
Departmental Transfer	84
Destroyed	1128