



40 Worth Street, 10th Floor, New York, NY 10013 | t: 212.430.5982 | info@abetterbalance.org | abetterbalance.org

**Legal Memorandum on *Brnovich v. Tucson*:
The Validity of Arizona’s Law Imposing Financial Penalties on Localities with Preempted
Ordinances Following the Arizona Supreme Court’s *Brnovich* Decision**

I. Background:

In August 2017, the Arizona Supreme Court decided *State ex rel. Brnovich v. Tucson*, a case concerning the validity of a state preemption statute that imposes financial penalties on localities with ordinances that are found by the Arizona Attorney General (AG) to be preempted by state laws. 399 P.3d 663 (2017). Specifically, the law cuts off state shared revenue to localities with ordinances that are determined by the AG to be preempted by state law. The law at issue in the case also requires localities with ordinances that the AG determines *might* be preempted by state law to post a bond equal to six months of their share of state shared revenues before adjudicating the case.

The case arose when, pursuant to the preemption law, a state legislator requested that the AG investigate whether a Tucson gun regulation that required the police department to destroy abandoned and forfeited weapons violated either of two state gun preemption statutes. *Id.* at 667-668. The AG determined that the state laws *may have* preempted Tucson’s ordinance, and commenced this special action at the Arizona Supreme Court to adjudicate whether the ordinance was, in fact, preempted. *Id.* at 668.

Tucson responded by challenging the validity of the preemption statute, arguing in part that the AG’s investigation and determination of whether a local ordinance is preempted violated the state Constitution’s separation of powers provision and that the statute’s financial penalty provisions constituted an “unconstitutional financial blockade to judicial access.” *Id.* at 668, 671. Under the state preemption scheme, Tucson would have had to post a bond of over \$55 million, an amount that exceeded what the city had in reserve at the time. *Id.* at 671.

The decision also addressed whether the Tucson ordinance in question was, in fact, preempted by several Arizona gun preemption statutes in light of the AG’s determination that the Tucson ordinances *may have* violated state law. Tucson argued that its gun regulation was a valid exercise of its home rule authority over local matters, which is immune from state preemption under the Arizona Constitution. *Id.* at 673.

II. Issue:

Specifically, the decision addressed:

1. Whether A.R.S. § 41-194.01, an Arizona state law that imposes financial penalties on localities with ordinances that the AG determines are preempted by state law, violates the state Constitution; and

2. Whether A.R.S. § 13-3108(A)-(F), and A.R.S. § 12-945(B), Arizona state laws that purported to prohibit municipalities from regulating firearms or destroying unclaimed firearms, validly preempted a Tucson ordinance (codified as Tucson Code §§ 2-140 to 2-142) requiring such firearms to be destroyed.

III. Short Answer:

The Court held that:

1. A.R.S. § 41-194.01, an Arizona state law that imposes financial penalties on localities with ordinances that the AG determines are preempted by state law, does not, as applied, violate the state Constitution. Specifically:
 - a. A.R.S. § 41-194.01(A), which requires the AG to investigate allegations from one or more sitting state legislator that a local ordinance is preempted, does not violate the doctrine of separation of powers as between the executive and legislative branch. *Brnovich* at 668-669.
 - b. A.R.S. § 41-194.01(B), which authorizes the AG to make a determination as to whether a local ordinance is preempted, does not violate the doctrine of powers as between the executive and judicial branch. *Brnovich* at 669.
 - c. A.R.S. § 41.194.01(B)(1), which allows the AG to withhold state shared revenues from a municipality with an ordinance that he or she has determined *does* violate state law, was not implicated in this case. As such, the Court did not decide whether it violates the State Constitution. *Brnovich* at 686 n. 2.
 - d. A.R.S. § 41.194.01(B)(2), which, if the AG determines that a municipal ordinance *may* violate state law, requires the AG to bring a special action to the Arizona Supreme Court to determine whether the ordinance does violate state law, and mandates that the Court require the municipality to post a bond equal to six months of its state shared revenue while the case is pending, was not implicated in this case. As such, the Court did not decide whether it violates the State Constitution but expressed strong doubts as to whether it would survive Constitutional muster if the issue were properly raised. *Brnovich* at 671-672.
2. A.R.S. § 13-3108(A), A.R.S. § 13-3108(F), and A.R.S. § 12-945(B), Arizona state laws that prohibit municipalities from regulating firearms or destroying unclaimed firearms, are valid exercises of the state's police powers and the contrary Tucson ordinance (codified as Tucson Code §§ 2-140 to 2-142) requiring such firearms to be destroyed does not fall within the Constitution's home rule immunity to preemption. *Brnovich* at 679.

IV. Detailed Statutory Background

This case deals with the interaction of three state preemption statutes, one providing financial penalties for municipalities with preempted ordinances and two preempting local regulations on firearms, and a local Tucson gun ordinance:

The Arizona Preemption Statute at the Center of the *Brnovich* Case:

Arizona’s preemption statute, which was passed in 2016, provides a framework for the AG to investigate claims that county, city, or town ordinances violate state statutes and, if violations are found, imposes financial penalties on the municipality until the violation is cured. A.R.S. § 41-194.01.

Under this statute, one (or more) state legislator may request that the AG investigate any ordinance that the legislator alleges violates state law or the Arizona Constitution. A.R.S. § 41-194.01(A). The AG then has 30 days to investigate the alleged violation and provide a written report of his or her findings and conclusions. A.R.S. § 41-194.01(B).

If the AG finds conclusively that the ordinance *does violate* a provision of state law or the Arizona Constitution, he or she must provide notice to the municipality, which has 30 days to cure the violation, after which period the AG would order the state treasurer to withhold and redistribute state shared revenue until the ordinance is repealed. A.R.S. § 41.194.01(B)(1).

If, on the other hand, the state AG finds that a municipal ordinance *may* violate state law or the Arizona Constitution, as he did in the case of the Tucson firearm regulation in this case, he or she then files a special action in the Arizona Supreme Court to determine whether the ordinance is or is not preempted. The statute provides that the Supreme Court “shall require” the municipality to post a bond equal to six months of shared state revenue prior to the resolution of the case. A.R.S. § 41.194.01(B)(2).

State Gun Preemption Laws:

The first gun preemption statute at issue, which was passed in 2000, generally prohibits municipalities from regulating or taxing firearms or ammunition. A.R.S. § 13-3108(A), (F).

The second state statute, passed in 2013, expressly prohibits local law enforcement agencies from destroying or facilitating in the destruction of firearms and requires law enforcement agencies that receive firearms through forfeiture or abandonment to sell those firearms to the public. The law also requires firearms possessed by cities to be sold rather than destroyed. A.R.S. § 12-945(B).

Tucson Ordinance:

Both of the above laws were at odds with a Tucson city ordinance and police department policy that directed police officers in receipt of forfeited or abandoned firearms to destroy those firearms. Tucson Code §§ 2-140 to 2-142.

V. Analysis - Arizona Supreme Court Decision

The Court ultimately held that the Arizona preemption statute, *as applied in this case*, did not violate the state Constitution. Specifically, it did not violate the doctrine of separation of powers. Since the fact pattern in this case did not implicate the financial penalty provisions of the preemption statute, the Court declined to determine whether those provisions violate the state Constitution, but did express strong doubt that the bond-posting requirement would pass constitutional muster. Finally, the Court held that the state gun preemption laws did, in fact, preempt the Tucson ordinance.

1. The State Preemption Statute Was Upheld, but the Court Cast Doubt on The Constitutionality of Some of the Financial Penalty Provisions.

a. The Provision Requiring the AG to Commence an Investigation Upon the Request of One or More State Legislators Does Not Violate the Doctrine of Separation of Powers as Between the Legislative and Executive Branches.

Arizona's preemption statute required the AG to investigate whether a local ordinance violates state law upon the request of one or more state legislator. A.R.S. § 41-194.01(A). Tucson argued that this provision impermissibly allowed the legislative branch to control the actions of the executive branch. *Brnovich* at 668.

In determining whether a statute violates the Constitutional separation of powers doctrine, the Court looks at (a) the nature of the power being exercised; (2) the degree to which another branch controls the exercise of that power, (3) the objective of the branch controlling the exercise of that power, and (4) the practical consequences of the action. *Id.* at 668.

The Court ultimately found that the AG's investigation is an essentially executive function, but that the statute does not give any legislator the power to control the exercise of that function. In fact, the legislator who asks the AG to investigate a municipal ordinance has no control over the AG's subsequent investigation. *Id.* at 668. The Court further found that the intent behind the enactment of the preemption statute was not to usurp executive power, nor was that the effect of the statute. *Id.* Thus, the Court held that the preemption statute did not violate separation of powers as between the legislative and executive branch. *Id.* at 669.

b. The Provision Requiring the AG to Make a Determination as to Whether a Local Ordinance Violates State Law Does Not Violate the Doctrine of Separation of Powers as Between the Judicial and Executive Branches.

Tucson also argued that the state statute violated the Constitutional doctrine of separation of powers because it gave the AG the authority perform the essentially judicial function of determining whether a local ordinance violates state law and impose financial penalties on that locality as a result of the determination. *Id.*

The Court held, however, that the AG’s investigation and determination that a ordinance *may* violate state law is merely a legal opinion, the type of which “the Attorney General routinely and permissibly issues in other contexts.” *Id.* The Court held that even a determination that a municipal ordinance *does* violate state law does not violate the separation of powers doctrine because “the offending municipality has a cure period and . . . may file an action challenging the conclusion and any withholding of funds.” *Id.*

c. The Court Declined to Determine the Constitutionality of the Provision That Allows the AG to Withhold State Shared Revenues From a Municipality with an Ordinance That Does Violate State Law, as It Was Not Implicated in This Case.

The Court did not decide the question of whether the provision in the preemption statute that allows the AG to withhold state shared revenues from municipalities violates the Arizona Constitution. Importantly, the Court did hold that withholding such revenues does not violate the separation of powers doctrine because the municipality has the option of challenging the determination in court and may avoid the fine by curing the violation. *Id.* But when faced with the question of its overall constitutionality, the Court demurs, stating in a footnote that because that particular provision “is not at issue here and does not directly impact the questions before us, we express no opinion on the constitutionality of that subsection.” *Id. at 686, n.2.*

d. The Provision That Requires a Locality with an Ordinance that May Violate State Law to Post a Bond Equal to Six Months of That Locality’s State Shared Revenue While the Case Is Being Adjudicated Likely Violates the Constitution, but Was Not Technically Implicated in This Case.

The preemption statute also provides that, once the AG makes a determination that a local ordinance *may* violate state law, he or she must file a special action in the state Supreme Court, which must require the locality to post a bond equal to six months of its state shared revenues. A.R.S. § 41.194.01(B)(2). The Court sidestepped addressing the legality of the state statute’s bond requirement. *Brnovich at 672.*

First, the Court held that, according to the text of the state statute, when the Supreme Court reviews the AG’s determination that a municipal ordinance *may* violate state law, it *must* order the locality in question to post a bond equal to six months of the municipality’s state shared revenue. *Id.* at 671. In this case, Tucson did not post such a bond and the Court did not request it. *Id.* Tucson argued that the bond requirement posed “an unconstitutional financial blockade to judicial access.” *Id.* at 671.

Ultimately the Court held that since Tucson did not post the bond and the Court did not ask it to do so, it would not reach the merits of the enforceability of the provision. *Id.* at 672. The Court did, though, strongly suggest that the provision might be unconstitutional, noting that “we share the City’s concerns regarding the bond’s purpose, basis, practical application, and constitutionality.” *Id.*

at 671. Nevertheless, the provision still stands and could be challenged in a future case where the bond is required.

2. *The Tucson Gun Disposal Ordinance Was Preempted by the State Gun Preemption Statutes.*

The Court ultimately concluded that the Tucson gun ordinance was preempted by the state’s firearms regulation preemption statutes.

In Arizona’s home rule municipalities, a local ordinance is generally preempted by a conflicting state ordinance unless the local ordinance implicates matters of solely local concern, in which case the conflicting state law does not apply to charter cities. In matters of state concern or mixed state and local concern, conflicting local ordinances are preempted. *Id.* at 673.

Tucson argued that its ordinance should be upheld because the disposal of property that it owns, such as firearms that come into their possession, is a matter of purely local concern and thus immune to state preemption. *Id.* at 673. Tucson also argued that the ordinance should be upheld because in disposing of the guns that had come into its possession, it was acting in a proprietary capacity rather than a regulator one. *Id.* at 678.

The Court rejected Tucson’s argument that its ordinance should be upheld because it was acting in a proprietary, rather than regulatory capacity. The Court found that a municipality’s acting in a proprietary matter does not automatically mean that the subject matter at issue is of purely local interest. *Id.* at 678. In fact, the argument merely “skirts the pivotal inquiry in cases like this: ‘whether the subject matter is characterized as of statewide or purely local interest.’” *Id.*

The Court did find that gun regulations clearly implicate a statewide concern, namely “regulating firearms under the state’s police powers; regulating police departments; . . . handling forfeited or unclaimed property; protecting the constitutional right to bear arms; and regulating city budgets and finances.” *Id.* at 675. Importantly, the court noted that municipalities in Arizona do not inherently possess police powers; rather, police powers are properly held by the state. *Id.*

The Court further found that a city’s disposal of its own possessions is a matter of local concern, but only to the extent that such disposal does not implicate state police powers, such as the authority to regulate gun disposal. The Court did note that a previous case *McMann v. Tucson*, 47 P.3d 672, in which the Court had upheld a city ordinance requiring background checks for gun purchasers at gun shows held on city property—indicated that the disposition of municipal property was a matter of purely local concern and thus immune from state preemption. The Court distinguished *McMann* from the current case, noting that “selling and leasing property owned by a municipality do[es] not implicate the police powers of the state,” as destroying firearms does. *Id.* at 677-678. That is, the selling and leasing of *real property*, as in *McMann*, is a matter of purely local concern because the state has no interest in the manner and method and disposal of real property. But the state does have



the work and family legal center

40 Worth Street, 10th Floor, New York, NY 10013 | t: 212.430.5982 | info@abetterbalance.org | abetterbalance.org

an interest in regulating firearms through the application of its police powers, and so the manner and method of disposal of *guns* is a matter of statewide concern. *Id.* at 677. Thus, while in general the disposition of a municipality's real property may be a matter of purely local concern, when the municipality is disposing of firearms, which are regulated as a matter of statewide concern, that disposition becomes a matter of statewide concern and is thus preempted.

VI. Conclusion

Ultimately, this case upheld the state preemption statute while casting serious doubts on the constitutionality of the financial penalties it imposes on municipalities with preempted ordinances. It also reflects a fairly narrow interpretation of Arizona home rule authority under which even a municipality's disposal of its own property can be preempted if such disposal implicates the state's police powers.