NEWS RELEASE

Arizona House of Representatives
Speaker-Elect Ben Toma (R-27)
1700 West Washington • Phoenix, Arizona • 85007

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FOR IMMEDIATE RELEASE

Speaker-Elect Toma Files 1487 Complaint After City of Tucson Forbids Consideration of Source of Income on Rental Housing Applications

STATE CAPITOL, PHOENIX – House Speaker-elect Ben Toma filed a SB 1487 complaint with the Arizona Attorney General on Wednesday to investigate the City of Tucson's action to forbid the consideration of source of income rental housing applications, and to determine whether it violates Arizona's Constitution and state law. Toma today issued the following statement regarding the matter:

Today I requested that the Arizona Attorney General investigate Tucson's amendment to its local Fair Housing code that establishes a new protected class for some (not all) renters within the city.

The adopted ordinance violates state law and our Constitution. To put it plainly, no matter the reason, Arizona's ninety-one cities and towns are bound by the laws of this state. We hold this expectation for our citizens, and we will do the same for our local governments.

As to the merits of the ordinance, it is nothing but smoke and mirrors that cloud the real issue at hand: years of poor growth management, zoning and land use polices that have limited new housing development, and local decisions that have pushed away job and economic opportunities and kept wages considerably lower than other comparable metropolitan areas.

These decisions, and these decisions alone, are the reasons why citizens in Tucson cannot find safe and affordable housing options. Blaming those who construct new housing or those who provide housing is misguided at best.

Just as concerning, the city is attempting to conscript private property and convert those units into public housing, even if such a burden adds significant costs to the private owner, and even if the city is unable to make timely payments to the owners who themselves have mortgages, taxes, and many other expenses. When discussing this ordinance, one Tucson city council member candidly acknowledged that the City's Section 8 program has been plagued by a "history" of property owners being consigned

to "long waiting times to get payment" and "stuck" with apartments that were "trashed" by irresponsible tenants.

While the city's leadership may not respect private property and private contracts, many of us at the legislature still do.

Regarding Tucson's severe housing shortage, my colleagues in the legislature have taken notice. This year, under the leadership of Representative Steve Kaiser, an eleven-member Housing Supply Study Committee was formed to examine the root causes for our state's (and Tucson's) housing shortage. In the seven hearings held to date, it has become more apparent than ever that local red tape, antiquated zoning laws, and a lack of political will has created this shortage. In a hearing held in Tucson in September, coincidently, the committee heard directly from members of the public, academics, and builders about these onerous barriers.

In short, rather than burdening private citizens (or other levels of government), I would encourage Tucson's leadership to look inward and find ways to remove the barriers that have stymied wages, increased taxes, and created an unprecedented housing shortage in the Tucson-metro area.

A copy of his letter to the Attorney General is attached.

Ben Toma is the Speaker-elect for the Arizona House of Representatives and serves Legislative District 27, which includes Glendale and Peoria. Follow him on Twitter at @RepBenToma.

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The Honorable Mark Brnovich
Attorney General of Arizona
Attn: Appeals & Constitutional Litigation
2005 North Central Avenue
Phoenix, Arizona 85004
GovernmentAccountability@azag.gov

Re: Complaint Pursuant to Ariz. Rev. Stat. § 41-194.01 – Tucson "Fair Housing" Ordinance

Dear Attorney General Brnovich:

I write to call your attention to the City of Tucson's recently enacted amendment to its fair housing code, which purports to prohibit nearly all owners of residential rental properties in the city from "discriminat[ing]" or "otherwise mak[ing] unavailable or deny[ing]" housing on the basis of an actual or prospective tenant's "source of income." *See* Tucson City Code § 17-52, as amended by Ordinance No. 11959 (adopted Sept. 27, 2022) (hereafter, the "Ordinance"). The Arizona Legislature, however, has explicitly prohibited municipalities from wielding their fair housing codes to continually exact more regulatory burdens on rental property owners. *See* Ariz. Rev. Stat. §§ 9-500.09, 41-1491.06(C). The Ordinance hence facially and directly contravenes the Legislature's directive that major cities such as Tucson can enact supplementary fair housing codes if—and only if—they do so prior to January 1, 1995 and the provisions of such ordinances are "substantially equivalent to" parallel federal and state laws.

The Ordinance also suffers from a more fundamental flaw, insofar as it compels certain property owners to enroll in the federal Housing Choice Voucher Program (commonly known as Section 8). The administration and enforcement of a federal program is not—and never could be—a matter of local concern. By purporting to force property owners in a federal program that governing federal law makes voluntary, the Ordinance is *ultra vires* and inconsistent with the Supremacy Clause of the Arizona Constitution, *see* Ariz. Const. art. II, § 3.

Finally, the Ordinance's expansive language will prevent certain property owners from exercising their contractual and statutory right to evict delinquent tenants, in derogation of Ariz. Rev. Stat. §§ 33-1368, 33-1377 and Ariz. Const. art. II, § 17.

Because the City of Tucson stands in continuing violation of the constitution and laws of this state, I request that your office undertake an investigation and, if necessary, order the withholding of the City of Tucson's allocation of state shared monies or initiate special action proceedings in the Arizona Supreme Court, pursuant to Ariz. Rev. Stat. § 41-194.01.

FACTUAL BACKGROUND

On September 27, 2022, the Mayor and City Council adopted the Ordinance, which substantially broadens the City's Fair Housing Ordinance to prohibit "discriminat[ion]" in any form—to include "mak[ing] unavailable" a rental property or "indicat[ing] any preference" in notices or advertisements—based on an actual or prospective tenant's "source of income." *See* Tucson City Code § 17-52.[1] The term "source of

[1] The Fair Housing Code contains partial and narrow exemptions for certain owner-occupied dwellings; certain private individuals who own three or fewer single-family residences, who engage only in limited real

income" encompasses any "form of governmental assistance, benefit or subsidy" and "any requirement of any such program, assistance, benefit, or subsidy." *Id.* § 17-51(f). The direct (and intended) import of the amendment is to compel property owners who offer rents that are equal to or less than federal Section 8 reimbursement rates to lease their premises to voucher recipients, even if other prospective tenants are better qualified lessees or the property owner does not wish to enroll in the Section 8 program and accept its draconian regulatory restrictions. In addition to constituting an intrinsic infringement on core property rights, the Ordinance carries with it risks for property owners' economic interests and the personal safety of their tenants and communities.[2]

Further, the City has applied the Ordinance to all property owners, not only participants in the Section 8 program. Most notably, the Ordinance's plain language indicates that property owners cannot lawfully evict tenants who may be eligible for rental assistance available through City and county initiatives. Reimbursements to property owners through these programs, however, often are delayed by weeks or months. In addition to improperly abridging rights secured to property owners by state statute, this enforcement practice effectuates a physical and/or regulatory taking of landlords' property by forcing them to host delinquent tenants for significant and potentially indefinite periods of time.

DISCUSSION

Upon a request by a member of the Legislature, the Attorney General must "investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town that the member alleges violates state law or the Constitution of Arizona." Ariz. Rev. Stat. § 41-194.01. If the Attorney General finds a violation, he must order the Treasurer to withhold and redistribute the offending locality's allocation of state shared revenues. If he concludes that a violation may exist, he must commence a special action seeking an adjudication of the question by the Arizona Supreme Court. *Id.*

I. The Ordinance Is Preempted by the Arizona Fair Housing Act

Housing policy is innately a matter of statewide concern. As you know, the Arizona Constitution affords to charter cities superordinate policymaking jurisdiction only as to matters of "purely local concern." To date, however, the Arizona Supreme Court has made clear that this concept denotes only the delimited domains of (1) certain city election procedures and (2) the disposal of municipal real estate. *See State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, ¶ 20 (2021). By contrast, housing policy—which bears directly on a central pillar of Arizona's economy and is intertwined with social, normative and legal issues that transcend municipal boundaries—inescapably is of statewide concern. *See, e.g.*, *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 600, ¶ 47 (2017) ("Matters involving the police power generally are of statewide concern."); *City of Scottsdale v. State*, 237 Ariz. 467, 471, ¶ 16 (App. 2015) (finding that regulation of sign walkers was a matter of statewide concern, explaining that "criminalizing conduct . . . based on public activity on publicly owned walkways affects everyone who uses the walkway, regardless whether [*sic*] they are residents of the municipality"); *City*

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estate conveyances and who do not rely on the services of brokers or agents; and housing for older persons. *See* Tucson City Code § 17-51(b)(1).

[2] *See generally* Shankar Vedantam, *Researchers Explore the Effects of Section 8 Grants in Houston*, NPR, Nov. 14, 2017, *available at* https://www.npr.org/2017/11/14/564006483/researchers-explore-the-effects-of-section-8-grants-in-houston (reporting on research showing that certain "[p]eople who receive Section 8 vouchers are more likely to be arrested for violent crimes").

of Phoenix v. Harnish, 214 Ariz. 158, 164, ¶ 25 (App. 2006) ("The exercise of eminent domain is a matter of statewide concern.").

When cities venture into areas of statewide concern, their enactments are "subject always to the rule that the state may preempt the legislative field either directly or by implication." *Union Transportes de Nogales v. City of Nogales*, 195 Ariz. 166, 169, ¶ 9 (1999); *see also Jett v. City of Tucson*, 180 Ariz. 115, 121 (1994). As discussed below, the Ordinance is (1) expressly preempted by Ariz. Rev. Stat. §§ 9-500.09 and 41-1491.06(C); and (2) impliedly displaced by the Legislature's occupation of the field of fair housing regulation.

A. State Law Expressly Preempts Municipal Fair Housing Laws Enacted After 1994

Arizona law has long afforded residential tenants robust safeguards against discrimination on the basis of race, color, religion, sex familial status, or national origin. *See* Ariz. Rev. Stat. § 41-1491.14. Balancing opportunities for modest municipal supplementations of these protections against the imperative of regulatory certainty, the Legislature permitted major Arizona cities (including Tucson) to enact their own fair housing codes—but only if they did so "not later than January 1, 1995" and such measures "are substantially equivalent to the provisions of federal law and [the state Fair Housing Act]." Ariz. Rev. Stat. § 41-1491.06(C); *see also id.* § 9-500.09.[3]

The Ordinance disrespects both limitations. It was adopted more than a quarter century after the January 1, 1995 cutoff, and would impose additional regulatory mandates and prohibitions that far eclipse federal and state fair housing directives. Thus, by its plain terms, the Ordinance is facially inconsistent with the Arizona Fair Housing Act's partial preemption clauses.

B. The Legislature Has Occupied the Regulatory Field of Fair Housing Regulation

Even if there were not a direct conflict between the Ordinance and Ariz. Rev. Stat. § 41-1491.06(C), the former is still preempted because it an impinges on a field that is exclusively the domain of the State. When the Legislature has spoken with clarity and precision on a given subject, it has occupied the regulatory field to the exclusion of municipal or county enactments. *See Jett*, 180 Ariz. at 122 (noting that "an obvious preemptive policy" can be "infer[red]" from a "comprehensive statutory scheme"); *Clayton v. State*, 38 Ariz. 135, 139 (1931) (finding that although a provision in the highway code expressly delegated responsibility for "local parking and other special regulations" to municipal governments, a Phoenix ordinance that prohibited operating a vehicle under the influence of alcohol was preempted because "the Highway Code manifests a purpose to cover the whole subject of highways and to regulate their use by the public in cities and towns as well as in the country"); *Mayor & Common Council of City of Prescott v. Randall*, 67 Ariz. 369, 377 (1948) (finding field preemption of liquor license regulation notwithstanding statutory language permitting some municipal legislation on the subject, reasoning that "[t]o authorize cities and towns to regulate the liquor traffic would emasculate the entire state liquor code").

The Legislature has constructed in the state statutes an exhaustive and self-contained legal infrastructure delineating in detail non-discrimination protections and other regulatory strictures governing residential property rentals, and the procedural channels through which those rights may be vindicated. *See* Ariz. Rev. Stat. §§ 41-1491 through 41-1491.37; *see also id.* § 9-1304 (outlining procedural prerequisites to municipal rental inspection programs). In this vein, as the Legislature itself has declared, state law "applies to, regulates, and

[3] The Title 9 provision does not impose the "substantial equivalency" criterion but does incorporate the January 1, 1995 temporal limit.

determines rights, obligations and remedies under" all rental agreements relating to any and all rental properties "within this state." *Id.* § 33-1307. State law also contains expansive prohibitions on municipal enactments that favor certain classes of residents (*e.g.*, voucher recipients), *see id.* § 9-461.16(A), or that restrict property owners' rights to set and collect rent, *see id.* § 33-1329.

The same preemptive intent likewise is implicit in the Arizona Fair Housing Act's enforcement provisions. While the Attorney General may pursue alleged violations directly, *see* Ariz. Rev. Stat. § 41-1491.34, he also may refer complaints to cities and towns that had, by the 1995 deadline, "adopted ordinances providing fair housing rights and remedies that are substantially equivalent to those granted under federal law and this article," and have not had their "substantial equivalency" certification revoked, *see id.* § 41-1491.13. This enforcement structure necessarily requires for its effective and efficient administration congruity between state and local fair housing laws. A patchwork of variegated local ordinances would be irreconcilable with this referral mechanism and frustrate the Legislature's objective of creating a single regulatory playing field. In short, subject to explicit and narrow exceptions not applicable here, state law is the singular and exclusive source of regulatory authority over fair housing matters in Arizona.

II. The Ordinance Is Invalid to the Extent It Mandates Participation in the Section 8 Program

Even when the Legislature has not invoked its preemptive prerogatives, a charter city's powers are cabined by two intrinsic limitations. First, the city's enactment must relate to a matter of "local concern." *See Luhrs v. City of Phoenix*, 52 Ariz. 438, 442-43 (1938); *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 598 (2017). Second, charter cities' authority always is subordinate to the United States Constitution, which provides that itself and federal laws are the "supreme law of the land." U.S. Const. art. VI; Ariz. Const. art. II, § 3 (recognizing and incorporating the principle of federal supremacy).

The Ordinance transgresses both parameters. As written, it compels property owners who charge rents that are eligible for Section 8 reimbursement to enroll in the program if a voucher recipient wishes to lease the premises. But the question of who can or must participate in a federal government program, and the circumstances under which they may or must do so, is dictated by federal law; it is not a matter of local concern. Further (and relatedly), the federal Section 8 program is entirely ***voluntary***—and for good reason. Property owners who choose to enter into a Section 8 agreement with a local public housing agency must submit to an extensive and invasive regime of inspections and regulatory conditions. *See* 42 U.S.C. § 1437f(o)(7)-(8); 24 C.F.R. § 5.703. Courts accordingly have always recognized that property owners cannot be federally liable for claims of "discrimination" against Section 8 voucher recipients because they are never legally obligated to accept such tenants in the first place. *See Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir. 1998) ("We agree . . . that because the Section 8 program is voluntary and non-participating owners routinely reject Section 8 tenants, the owners' 'non-participation constitutes a legitimate reason for their refusal to accept section 8 tenants.'" (quoting *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272 (7th Cir. 1995)). By purporting to convert an explicitly voluntary federal program into a local mandate, the Ordinance is irreconcilable with controlling federal law and, by extension, with Article II, Section 3 of the Arizona Constitution.

III. In Preventing the Eviction of Tenants Who Are Eligible for Rental Assistance, the Ordinance Violates State Law and the Takings Clause of the Arizona Constitution

As noted above, the Ordinance's prohibition on "discrimination" based on a tenant's "source of income" seemingly bars the eviction for nonpayment of rent of tenants who are eligible for rental assistance funding

through even non-Section 8 government programs. This edict, however, collides with state law, which is clear and explicit: lessors are contractually and statutorily entitled to repossess their property upon a tenant's default or material breach of any provision of the lease agreement. *See* Ariz. Rev. Stat. §§ 33-361(A), 33-1368, 33-1377. While property owners certainly can elect to temporarily forego collecting rent pending the disbursement of rental assistance subsidies, the City cannot compel them to do so.

Similarly, this component of the Ordinance violates Article II, Section 17 of the Arizona Constitution, which provides that "no private property shall be taken or damaged for public or private use without just compensation having first been made." Although takings usually take the form of eminent domain (*i.e.*, government's seizure of private property), both federal and Arizona courts have recognized the concept of a "regulatory taking," which results "from government regulations that deprive an owner of the economic benefit of the property." *Dos Picos Land Ltd. P'ship v. Pima County*, 225 Ariz. 458, 461 (App. 2010). The City's processing and approval of rental assistance applications can consume weeks or months. Indeed, one City Councilor candidly acknowledged that the City's Section 8 program has been plagued by a "history" of property owners being consigned to "long waiting times to get payment" and "stuck" with apartments that were "trashed" by irresponsible tenants.[4] Viewed through this historical prism, the City's enforcement position has the practical effect of conscripting private property into public housing, with property owners coerced (albeit, in theory, temporarily) into foregoing rent and contractual remedies to which they are otherwise entitled. *See generally Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733–35 (8th Cir. 2022) (finding that temporary eviction moratorium could be a physical or regulatory taking under the Fifth Amendment). It accordingly is irreconcilable with controlling state statutes and the Takings Clause of the Arizona Constitution.

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The City of Tucson's housing policy has for decades been a case study in perpetual fecklessness and flagrant mismanagement. As the City itself acknowledged, Tucson's historical "[r]acism in housing practices" still echoes in today's housing demographics. *See* City of Tucson Housing & Community Dev. Dept., *Housing Affordability Strategy for Tucson* (Dec. 21, 2021) at p. 21, *available at* https://www.tucsonaz.gov/files/hcd/HAST_Plan_Document.pdf. An equitable policy posture that expands housing accessibility and affordability for all Tucson residents would facilitate and encourage the growth of housing supply to meet swelling demand. Instead, the City has chosen a retrogressive approach that has resulted—in the City's own words—in "low supply compared to demand" and "increased housing costs." *Id.* at p. 16. Indeed, housing supply in Tucson has not only lagged relative population growth, but has decreased substantially in absolute terms during the past 17 years.[5] Rather than confront and correct this legacy of failure, the City has embraced a trajectory of exponentially exacerbated inequality and unaffordability by foisting punitive and unsustainable regulatory burdens on property owners.

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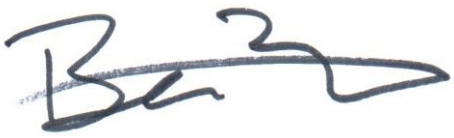
[4] Meeting of the Mayor & City Council of Tucson, Dec. 21, 2021, *available at* https://www.tucsonaz.gov/tv12/mayor-and-council-meeting-december-21-2021 (Statement of Councilor Kozachik, beginning at 1:11:00).

[5] According to data from the University of Arizona, issuance of new building permits in Tucson and Pima County has languished at a rate of approximately 500 per month, compared to a high of more than 1,300 per month in 2005. *See* Making Action Possible for Southern Arizona, "New Home Construction in Tucson and Pima County," *available at* https://mapazdashboard.arizona.edu/new-home-construction.

While the Attorney General of course is not the arbiter of sound public policy, this office is charged with enforcing the Constitution and laws of this state. The Ordinance on its face defies legislative determinations on a matter of statewide concern, conflicts with superseding federal law, and, as applied, threatens the constitutional right of property owners against uncompensated regulatory takings. I accordingly request that your office commence an investigation and employ all appropriate remedial options available under Ariz. Rev. Stat. § 41-194.01.

Respectfully,



Representative Ben Toma, District 22