STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

INVESTIGATIVE REPORT By KRISTIN K. MAYES ATTORNEY GENERAL March 8, 2023	No. 22-002-A Re: Whether The City Of Tucson's Fair Housing Ordinance Regarding "Source of Income" Violates State Law

To: The Honorable Katie Hobbs, Governor of Arizona
The Honorable Warren Peterson, President of the Arizona State Senate
The Honorable Ben Toma, Speaker and Requesting Member of the Arizona House of Representatives
The Honorable Adrian Fontes, Secretary of State of Arizona

I. Summary

Pursuant to Arizona Revised Statute ("A.R.S.") § 41-194.01, and at the request of House of Representatives' Speaker Ben Toma, the Attorney General's Office ("Office") investigated whether City of Tucson Ordinance No. 11959 ("Ordinance") violates either Arizona Constitution art. II, §§ 3, 17, or A.R.S. §§ 9-500.09, 41-1491.06(C), 33-1368, and 33-1377.

On December 21, 2022, the Office issued Investigative Report No. 22-002. In that report, the Office asserted that "the Legislature [had] placed three conditions on local authority to enact fair housing ordinances," two of which originated from § 9-500.09 (time and population conditions) and a third from § 41-1491.06(C). The Office concluded: (1) the Ordinance was subject to § 9-500.09; (2) while the City of Tucson ("Tucson") satisfied § 9-500.09's population condition, it had untimely adopted the Ordinance, thereby failing to satisfy § 9-500.09's time condition and rendering

the Ordinance contrary to state law; (3) considering that violation, it was unnecessary to address whether the Ordinance satisfied the third condition prescribed in § 41-1491.06(C); and (4) state law preempted the Ordinance because fair housing is not a matter of purely local concern.

Given the finding that the Ordinance violated state law, the 30-day clock for Tucson to resolve the violation began ("cure period"). *See* A.R.S. § 41-194.01(B)(1). Before the cure period expired, Tucson (1) requested that the Office reconsider Investigative Report No. 22-002, and (2) suspended enforcement of the Ordinance pending reconsideration. The Office granted the reconsideration request.

The Office now withdraws Investigative Report No. 22-002, which was based on two legal errors. First, § 9-500.09 applies to the enactment or adoption of a city or town's fair housing ordinance as a whole; it does not apply to subsequent amendments to a city or town's duly enacted fair housing ordinance. Second, § 41-1491.06(C) does not impose a third condition on a city or town when enacting or adopting amendments to fair housing ordinances; rather, § 41-1491.06(C) operates as an express savings clause for preemption purposes and is unrelated to a city or town's authority under § 9-500.09. Among other things, these legal errors would discourage cities and towns from amending their fair housing ordinances to reflect changes in state and federal fair housing laws, and would undermine all post-1995 amendments made to those ordinances even if the amendments brought the local ordinances into compliance with federal and state law. These legal errors and their concerning consequences necessitated reconsideration of Investigative Report No. 22-002.

The Office issues this investigative report to correct its previous interpretations of §§ 9-500.09 and 41-1491.06(C) and make any necessary changes in its findings and conclusions to reflect those corrections.[1] Pertinently, in light of those corrections: **(1)** the Ordinance does not violate

[1] The Office does not lightly take this corrective action and does so under only the unusual

§§ 9-500.09, 41-1491.06(C), 33-1368, and 33-1377, or Arizona Constitution art. II, §§ 3 and 17; and **(2)** state law does not preempt the Ordinance. 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 purposes other than those set forth in § 41-194.01.

II. Relevant Background

A. Material Developments in the Arizona Fair Housing Act.

The Legislature passed the Arizona Fair Housing Act ("AFHA") in 1988. *See* "Fair Housing—Regulation and Enforcement," 1988 Ariz. Legis. Serv. Ch. 339 (2d Reg. Sess.). As enacted, the AFHA expressly preempted counties, cities, and towns from "enact[ing] or adopt[ing] [housing] discrimination prohibitions and enforcement procedures," with two exceptions. *Id.*, § 2 (adding § 41-1491.12). Under the first exception, a county, city, or town could "adopt and implement a policy, operation, contract or contract provision" required to comply with federal law, provided that policy, etc., did not infringe on the Attorney General's powers under the AFHA. *Id.* Under the second exception, a charter city could adopt a fair housing ordinance if that ordinance obtained "substantial equivalency status" from the U.S. Department of Housing and Urban Development ("HUD"). *Id.*

The AFHA was effective beginning January 1, 1989, but it was subject to automatic repeal if Arizona did not obtain substantial equivalency status from HUD by January 1, 1991.[2] *See id.*, §§ 3, 7.

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circumstances set forth herein, which include the fact that Tucson requested reconsideration within the initial cure period. The Office need not, and thus does not, reach the question of whether an opinion issued pursuant to § 41-194.01 may be reconsidered after the cure period has expired.

[2] In 1988, Congress amended the federal Fair Housing Act ("FHA") to provide more enforcement mechanisms for HUD, and to add families with children and persons with disabilities as protected classes. *See* "H.R. 1158–Fair Housing Amendments Act of 1988, Summary,"

In 1991, the Legislature repealed and replaced the AFHA in its entirety. *See* "Civil Rights–Fair Housing," 1991 Ariz. Legis. Serv. Ch. 181 (1st Reg. Sess.), §§ 3-4. In doing so, the Legislature expressed in part that it intended that "the state undertake vigorous steps to provide equal opportunity in housing; resolve housing discrimination disputes at the local level …; and obtain substantial equivalency with the federal government's housing discrimination enforcement efforts." *Id.*, § 1. Notably, the Legislature did not include an express preemption clause in the newly revised AFHA. *See id.*

In 1992, the Legislature amended the AFHA again. *See* 1992 Ariz. Legis. Serv. Ch. 207 (2d Reg. Sess.). It added the two provisions at issue in this report:

- § 9-500.08 (now numbered 9-500.09), granting express authority for a "city or town with a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census [to] adopt a fair housing ordinance not later than January 1, 1995." *Id.*, § 2.

- § 41-1491.06(C), providing: "Nothing in this article prohibits cities or towns with a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census from enacting ordinances, not later than January 1, 1995, that are substantially equivalent to the provisions of federal law and this article." *Id.*, § 3.

It also added or amended the following provisions:

- § 41-1491.11, amended in part to read: "Nothing in this article shall be interpreted as prohibiting … cities or towns with a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census from adopting a fair housing ordinance." *Id.*, § 4.

- § 41-1491.13, amended to allow the Office to refer a discrimination complaint to a city or town "with a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census," provided (in relevant part) that that city or town has "adopt[ed] a fair housing ordinance by January 1, 1995" that has been recognized by HUD as being "substantially equivalent" to the FHA and the AFHA. *Id.*, § 5.

- § 41-1491.37, added to grant the superior court "jurisdiction to enforce a local fair housing ordinance with provisions substantially equivalent to the provisions of federal law and [the AFHA]." *Id.*, § 6.

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https://www.congress.gov/bill/100th-congress/house-bill/1158. For those state agencies already certified by HUD, Congress gave them 40 months (until 1992) to revise their housing ordinances to reflect the 1988 amendments. *See id.*

With the 1992 amendments, the Legislature expressed its intent that "the state *and* any city or town with a population of three hundred fifty thousand or more persons," and "having an ordinance substantially equivalent to the provisions of [the AFHA], undertake vigorous steps" to, among other things, "provide equal opportunity in housing, resolve housing discrimination disputes at the local level," and "obtain substantial equivalency with the federal government's housing discrimination enforcement efforts." *Id.*, § 1 (emphasis added).

B. Tucson's Enactment of Its Fair Housing Laws and the Ordinance's Adoption.

Pursuant to its authority under its city charter, Tucson adopted its own fair housing laws in May 1988, adding them as "Article VII" to Chapter 17 of the Tucson City Code (T.C.). *See* Tucson Ord. No. 6947. Article VII is entitled "Fair Housing" and, as enacted, was intended to "conform" to the FHA and "provide fair housing opportunities for all of its citizens." *Id.* This original ordinance prohibited property owners from discriminating against buyers or renters of housing based on certain protected characteristics, such as race, religion, and age. *Id.*, § 1 (creating T.C. § 17-52).

On September 27, 2022, Tucson adopted the Ordinance at issue here, which added "source of income" as a protected characteristic, thereby prohibiting housing discrimination based on a buyer or renter's source of income. *See* T.C. § 17-52(a), (b), (f), as amended. "Source of income" is defined as "any lawful source of income or support that provides funds to or on behalf of a renter or buyer of housing and is verifiable as to amount, regularity, receipt, and length of time received or to be received[.]" T.C. § 17-50(f), as amended. Examples of "source of income" include "wages, salaries, child support, spousal support, foster care subsidies, rental assistance, security deposit or down payment assistance, income derived from social security or disability insurance, veterans' benefits, or any other form of governmental assistance, benefit, or subsidy." *Id.*

C. The Office's Investigation and Reconsideration.

On November 21, 2022, the Office received a request from Speaker Ben Toma to

investigate the Ordinance under A.R.S. § 41-194.01 ("Request"). According to the Request: the Ordinance allegedly violates the Arizona Constitution, art. II, §§ 3 and 17, and A.R.S. §§ 9-500.09, 33-1368, 33-1377, and 41-1491.06(C); §§ 9-500.09 and 41-1491.06(C) expressly preempt the Ordinance; and, alternatively, the AFHA impliedly preempts it. Tucson fully cooperated with the Office's investigation, providing a voluntary response letter and supporting materials on December 9, 2022 ("Response").

The Office reviewed those materials, and other relevant materials and authorities, within the 30-day investigation period and issued Investigative Report No. 22-002 on December 21, 2022. Among its findings and conclusions were the following:

- The Legislature placed three conditions on a city or town's authority to enact its own fair housing ordinances; those conditions are found in §§ 9-500.9 (imposing two requirements based on the city/town's population and the laws' enactment date) and 41-1491.06(C) (imposing a third condition that the laws be "substantially equivalent" to the AFHA and FHA).

- The Ordinance was contrary to state law because, while Tucson met § 9-500.09's population condition, its adoption of the Ordinance did not meet § 9-500.09's second condition that a local fair housing ordinance be enacted no later than January 1, 1995.

- Because the Legislature expressly restricted the enactment of local fair housing ordinances to those enacted by January 1, 1995, Tucson lacked the authority to create new classifications of housing discrimination, including one based on source of income.

- Because the Ordinance was contrary to state law, *i.e.*, untimely under § 9-500.09, state law preempted it.

Because the Office concluded that the Ordinance violated state law, Tucson had until January 21, 2023 to resolve the violation or have its state shared money withheld. *See* A.R.S. §§ 41-194.01(B)(1), 43-206(F). Tucson voluntarily suspended enforcement of the Ordinance on January 11, 2023. On January 13, 2023, Tucson requested that the Office reconsider Investigative Report No. 22-002, and submitted additional materials to support reconsideration. In response, on January 17, 2023, Speaker Toma submitted a letter to the Office, arguing: the Office lacked legislative authority under § 41-194.01 to modify its investigative findings and conclusions or

extend the 30-day investigation period to perform such a function, and a municipality like Tucson lacked a statutory mechanism by which it could appeal from or move for reconsideration of the Office's investigative findings and conclusions. Reply, at 1-2.

On January 19, 2023, the Office informed Tucson via letter that, for the time being, Tucson's suspended enforcement of the Ordinance, along with Tucson's written promise that it would not retroactively enforce the Ordinance, was adequate to resolve the state-law violation for purposes of § 41-194.01(B). The Office also informed Tucson that the Office would promptly review the determination contained in Investigative Report No. 22-002. Tucson subsequently submitted a Supplemental Response ("Supp. Response"), to which Speaker Toma submitted a supplemental reply. As part of its reconsideration, the Office has considered Speaker Toma and Tucson's supplemental materials.

III. Legal Analysis

A. The Office has implicit authority to withdraw or amend its A.R.S. § 41-194.01 investigative findings and conclusions during the initial cure period to correct improper interpretations of state law.

The Office has authority to withdraw or amend the legal opinions it has issued under § 41-194.01. That authority, while not explicitly granted, is implicit in the Office's statutory authority to issue legal opinions; otherwise, the Office's effectiveness as "the legal advisor of the departments of this state," A.R.S. § 41-192(A)(1), would be severely impaired.

The Office must "support the Constitution of the United States and the Constitution and laws of the State of Arizona," A.R.S. § 38-231(E), and so its legal opinions should be grounded on reasonable and sound interpretations of the law. If the Office identifies an incorrect interpretation or application of the law in one of its opinions, prohibiting it from correcting that opinion would render the opinion useless, as well as legally unsound, and may subject state departments and officers to litigation if relied upon. It thus makes sense that the Office has implicit authority to withdraw or amend its opinions, particularly when the Office is required to issue legal opinions

under §§ 41-194.01 and 41-193(A)(7). Significantly, both the courts and this Office have previously held that the Office may withdraw its opinions. *See Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 466, ¶ 19 (App. 2007) ("[T]he Attorney General may choose to withdraw an opinion[.]"); Ariz. Att'y Gen. Op. I88-052 (June 15, 1988) (withdrawing a previous Attorney General Opinion because it had "erroneously relied upon two earlier Attorney General opinions which had incorrectly interpreted art. VII, § 15 of the Arizona Constitution") (internal citations omitted); Ariz. Att'y Gen. Op. I77-158-A (Aug. 16, 1977) ("I am withdrawing my letter opinion 77-158 dated August 15, 1977 and substituting this one in place of it. This action is being taken because the paraphrasing of the statute in that letter could have resulted in its misconstruction."); *see also State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 594, ¶ 19 (2017) (holding that Attorney General determinations pursuant to § 41-194.01 are "legal opinions, which the Attorney General routinely and permissibly issues in other contexts") (citing A.R.S. § 41-193(A)(7)).

Furthermore, because the Office only opines about the law when giving its legal opinions, as opposed to deciding the law as the courts would, its legal opinions are not subject to a formal review process as are the courts' decisions, meaning the responsibility to withdraw or amend a legally incorrect opinion falls on no one but the Office. *See Yes on Prop 200*, 215 Ariz. at 465, ¶ 14 (explaining that it is the Office's responsibility "to advise state government concerning the law when requested to do so" and that its opinions are not subject to an abuse-of-discretion type of standard as seen in the courts because, unlike courts that *decide* the law, the Office only "opine[s] about the law").

Since Investigative Report No. 22-002 was based on misinterpretations and misapplications of §§ 9-500.09 and 41-1491.06(C), as explained below, the Office has authority to withdraw it and amend its findings and conclusions regarding the Ordinance.

B. Applying correct interpretations of law, the Ordinance does not violate A.R.S. § 9-500.09 or § 41-1491.06(C).

The Request alleges that the Ordinance "facially and directly contravenes the Legislature's directive that major cities such as Tucson can enact supplementary fair housing codes … only if [ ] they do so prior to January 1, 1995," as § 9-500.09 requires, and only if "the provisions of such ordinances are 'substantially equivalent to' parallel federal and state laws," as § 41-1491.06(C) allegedly requires. Request, at 4. After conducting its investigation and upon reconsideration of the interpretations of §§ 9-500.09 and 41-1491.06(C), the Office concludes that the Ordinance does not violate either statute.

1. The Ordinance does not violate § 9-500.09.

The Ordinance does not violate § 9-500.09 because, in short, that law does not apply to the Ordinance. Section 9-500.09 imposes conditions on a city/town seeking to enact its own "fair housing ordinance," which refers to a *body* of laws governing fair housing, not to amendments subsequently made thereto. The Ordinance seeks only to *amend* Tucson's preexisting fair housing ordinance, which is embodied in Article VII of Chapter 17 of the city code.

Section 9-500.09 provides that "[t]he governing body of a city or town with a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census may adopt a fair housing ordinance not later than January 1, 1995." The Request and the Office, in its December 2022 report, read this provision as if it contains additional words: that a city or town "may adopt a fair housing ordinance *and any amendments thereto* not later than January 1, 1995." (Additional words in italics). But § 9-500.09 does not contain these additional words, and the Office has no authority to add them.

Indeed, it would be unreasonable to believe that the Legislature would have expressly authorized sizable cities to enact fair housing ordinances but impliedly prohibited them from amending those ordinances. Over time, governments often seek to revise their laws to address new problems. If the Legislature had intended to prohibit such adaptation, it would have clearly stated its

intent.

The contrary interpretation contravenes the intent behind § 9-500.09. The Legislature's express intent for adopting § 9-500.09, among others laws, was that sizeable cities and towns would "undertake vigorous steps" to provide fair housing, as well as help enforce anti-discriminatory housing practices by obtaining substantial equivalency status with HUD. 1992 Ariz. Legis. Serv. Ch. 207, § 1. Interpreting § 9-500.09 to prohibit amendments to fair housing ordinances after January 1, 1995 would frustrate that intent. For example, if Congress expanded protection under the FHA *after* January 1, 1995 to include other classifications (such as veteran status), and assuming § 9-500.09 applied to amendments, then a city/town would be prohibited from amending its fair housing ordinance to reflect that change. Such a result would mean the city/town is *not* providing fair housing according to the FHA, and that a city/town cannot obtain substantial equivalency status from HUD for enforcement purposes. *See* 24 C.F.R. § 115.204(h) (requiring local law to "not diminish coverage" of the FHA in order to be found substantially equivalent by HUD).

Insofar as the Request alleges that the Ordinance violates § 9-500.09 because § 9-500.09 does not grant express authority for a city/town to amend its fair housing ordinances after January 1, 1995, the Office rejects that argument because such express authority is not needed. A city/town's authority to amend its fair housing ordinance is implicit in its statutory authority to enact one. *Cf. Dep't of Transp., Motor Vehicle Admin. v. Armacost*, 474 A.2d 191, 206 (Md. 1984) ("[A]n agency with expressly granted rulemaking power has implied authority to alter, amend and repeal the regulations it has adopted. Manifestly, to deny an agency the authority to amend its regulations, absent express statutory inhibition, would severely impair its effectiveness, and the legislature could not have intended such an absurd result.") (internal citations omitted). Moreover, a charter city has the same powers as an incorporated town, A.R.S. § 9-499.01, and an incorporated town has express power to "make, amend or repeal all ordinances necessary or proper for the carrying into effect of the powers

vested in" it, A.R.S. § 9-240(B)(28)(a).

Accordingly, § 9-500.09 does not apply to the Ordinance; in turn, the Ordinance could not have violated § 9-500.09.

2. The Ordinance does not violate § 41-1491.06(C).

The Ordinance does not violate § 41-1491.06(C) because that statute does not impose any requirements on Tucson that Tucson could have violated when it adopted the Ordinance. Section 41-1491.06(C) states: "Nothing in [Article 7 of Title 41, Chapter 9 (the AFHA)] prohibits cities or towns with a population of three hundred fifty thousand or more persons according to the 1990 United States decennial census from enacting ordinances, not later than January 1, 1995, that are substantially equivalent to the provisions of federal law and this article."

Based on its plain language, § 41-1491.06(C) does not purport to prohibit *anything*, let alone limit a city/town's authority to enact a fair housing ordinance. Section 41-1491.06(C) thus cannot be read as imposing a third condition on cities and towns to enact a fair housing ordinance, as the Request asserts, *see* Request, at 6. Instead, because § 41-1491.06(C) states that "nothing" in certain other portions of the AFHA preempts ordinances with certain characteristics, § 41-1491.06(C) operates as a savings clause, meaning it expressly *saves* a local fair housing ordinance from being preempted by the AFHA if the ordinance meets those characteristics.

That interpretation is consistent with how courts have applied 42 U.S.C. § 3615—the federal counterpart to A.R.S. § 41-1491.06(C). Section 3615 states:

> Nothing in [the FHA] shall be construed to invalidate or limit any [state] law … that grants, guarantees, or protects the same rights as are granted by [the FHA]; but any [state] law … that purports to require or permit any action that would be a discriminatory housing practice under [the FHA] shall to that extent be invalid.

Federal courts have looked to the first clause of 42 U.S.C. § 3615 as a savings clause, as opposed to a condition on state authority to adopt fair housing laws. *Cf. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 588 (2015) (Alito, J., dissenting) (citing 42 U.S.C.

§ 3615 for "recognizing local authority" and explaining "nothing prevents States and local government from enacting their own fair housing laws"); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500, n.15 (10th Cir. 1995) (explaining 42 U.S.C. § 3615 "does not completely preempt all state and local regulation of housing"); *Toledo Fair Hous. Ctr. v. Farmers Ins. Grp. of Companies*, 61 F. Supp. 2d 681, 683 (N.D. Ohio 1999) ("[F]ederal law does not preempt Ohio law regarding housing discrimination except to the extent an Ohio law is itself a discriminatory housing practice.") (referring to the second clause of 42 U.S.C. § 3615; internal quotation marks omitted).

The Office's savings-clause interpretation is also consistent with how the Ninth Circuit has interpreted 15 U.S.C. § 1708, which contains language similar to 42 U.S.C. § 3615 and A.R.S. § 41-1491.06(C). Section 1708 first states that the Bureau of Consumer Financial Protection must certify a state's disclosure laws if they are "at least substantially equivalent" to those provided in the Interstate Land Sales Act ("ILSA"). 15 U.S.C. § 1708(a)(1)(A). It later provides: "Nothing in this chapter may be construed to prevent or limit the authority of any State or local government to enact and enforce with regard to the sale of land any law, ordinance, or code not in conflict with this chapter." 15 U.S.C. § 1708(e). In discussing the overall effect of those provisions, the Ninth Circuit referred to § 1708(e) as a "savings clause" and explained that the ILSA does not preempt substantially equivalent state disclosure laws and, instead, "allow[s] for states to supplement the ILSA's provisions with their own requirements." *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1179–80 (9th Cir. 2016).

As 15 U.S.C. § 1708 and 42 U.S.C. § 3615 illustrate, § 41-1491.06(C)'s "nothing in this article prohibits" clause signals that subsection (C) is a savings clause while the ensuing language—the "substantially equivalent" clause—defines what is "saved" from preemption. For that reason, the Request and Investigative Report No. 22-002 were incorrect in construing § 41-1491.06(C), particularly the "substantially equivalent" clause, as imposing a third condition on a city/town to enact a fair housing ordinance.

Nor does construing § 41-1491.06(C)'s "substantially equivalent" clause as a third condition make sense, for several reasons.

First, such an interpretation ignores the first clause entirely ("Nothing in this article prohibits …"), which gives context to the "substantially equivalent" clause and thus informs its meaning. Were the Office to construe the "substantially equivalent" clause as a third condition, it would render the first clause superfluous, which the Office will not do. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019) ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous."); *TDB Tucson Group, L.L.C. v. City of Tucson*, 228 Ariz. 120, 123, ¶ 9 (App. 2011) ("[W]e will not interpret a statute in such a way as to produce 'absurd results,' or 'render [any word, phrase, clause, or sentence] superfluous, void, insignificant, redundant or contradictory.'").

Second, § 9-500.09—not § 41-1491.06—governs a city/town's authorization to enact a fair housing ordinance and, based on that statute's plain language, there is no "substantially equivalent" requirement or even a citation to § 41-1491.06(C) that might suggest a different interpretation. *See* A.R.S. § 9-500.09 (placing only *two* conditions on a city/town's authority to enact a fair housing ordinance: a population threshold and time deadline); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 483 (1997) ("Where the language of a statute is clear and unambiguous, courts are not warranted in reading into the law words the legislature did not choose to include.").

Third, the Legislature simultaneously—in the same bill, in back-to-back sections—added §§ 9-500.09 and 41-1491.06(C) to the A.R.S., and included the "substantially equivalent" clause in only § 41-1491.06(C). Because that legislative history demonstrates that the Legislature was aware of § 9-500.09's two conditions and § 41-1491.06(C)'s "substantially equivalent" clause, it evinces the Legislature's intent *not* to condition a city/town's § 9-500.09 authority to enact a fair-housing ordinance on the ordinance's substantial equivalence to the AFHA and FHA. Had the Legislature

intended to do so, then it would have explicitly included the "substantially equivalent" clause in § 9-500.09 instead of, or in addition to, including it in § 41-1491.06(C)—the fact that the Legislature did no such thing when it simultaneously contemplated both laws is compelling evidence that § 41-1491.06(C) is a savings provision. *See City of Tucson v. Rineer*, 193 Ariz. 160, 163, ¶ 5 (App. 1998) ("[W]hen the legislature has intended to preclude local legislation, it has done so expressly."); *cf. AAA Cab Serv., Inc. v. Indus. Comm'n of Arizona*, 213 Ariz. 342, 344, ¶ 6 (App. 2006) ("[I]n light of the legislative history …, we conclude that, if the legislature had intended a final award to constitute an election of workers' compensation, it would have included express language to that effect. This court cannot write a term into the statute that the legislature did not include.").

In summary, because § 41-1491.06(C) is a savings clause with the exclusive purpose of expressly saving local laws from preemption, it is not a law that the Ordinance could have violated. Accordingly, there was no violation of § 41-1491.06(C).

C. The AFHA does not preempt the Ordinance.

The Request alleges that the Ordinance is "expressly preempted by §§ 9-500.09 and 41-1491.06(C)" and "impliedly displaced by the Legislature's occupation of the field of fair housing regulation." Request, at 6. For the reasons discussed above, §§ 9-500.09 and 41-1491.06(C) have no express preemptive effect. As for the implied-preemption theory, the Office disagrees.

> When an issue affects both state and local interests, a municipality may address the issue by enacting and enforcing relevant laws unless specifically preempted by state law. A municipal ordinance is preempted by state law when: (1) the municipality creates a law in conflict with the state law, (2) the state law is of statewide concern, *and* (3) the state legislature intended to appropriate the field through a clear preemption policy.

City of Scottsdale v. State, 237 Ariz. 467, 469–70, ¶ 10 (App. 2015) (internal quotation marks and citation omitted; emphasis added); *see also Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 559 (1978) ("[W]here the subject is of statewide concern, and the legislature has appropriated the field by enacting a statute pertaining thereto, that statute governs throughout the state, and local

ordinances contrary thereto are invalid."); *accord Jett v. City of Tucson*, 180 Ariz. 115, 121 (1994). Dispositive here are the first and third criteria enumerated above, both of which the Office finds are not present under these facts so as to impliedly preempt the Ordinance.

1. The Ordinance does not conflict with the AFHA.

The Ordinance's source-of-income protection does not conflict with the AFHA. "To conflict under a preemption analysis, a municipal ordinance must be incapable of 'peaceful coexistence' with state legislation. In other words, a conflict exists only where a statute and ordinance are mutually exclusive, so that compliance with both is impossible." *Wonders v. Pima Cnty.*, 207 Ariz. 576, 579, ¶ 13 (App. 2004) (internal citations omitted); *see also Winkle v. City of Tucson*, 190 Ariz. 413, 416 (1997) ("To be preempted, a municipal ordinance must actually conflict with governing state law.").

The source-of-income protection does not conflict with the AFHA because mutual compliance is possible. Most convincing is the fact that there is no source-of-income protection in the AFHA with which the source-of-income protection could conflict, *see*, *e.g.*, A.R.S. § 41-1491.14; nor is there anything in the AFHA that expressly permits source-of-income discrimination, *see generally* A.R.S. §§ 41-1941–41-1491.37. Furthermore, "source of income" is defined without regard to race, color, religion, sex, disability, national origin, or familial status. *See* T.C. § 17-50(f). So, enforcement of anti-discriminatory housing practices based on source of income could be enforced without affecting state enforcement of anti-discriminatory housing practices based on race, color, religion, sex, disability, national origin, or familial status. *See* A.R.S. §§ 41-1491.01 & 41-1491.14–41-1491.21 (prohibiting housing discrimination based on race, color, religion, sex, disability, national origin, and familial status).

If anything, the source-of-income protection complements or may even reinforce the AFHA's protections based on disability and familial status and, in that regard, is in harmony with—not in

conflict with—the AFHA. *See* A.R.S. §§ 41-1491(5) & 41-1491.19 (prohibiting discrimination based on disability, as "defined and construed by the Americans with disabilities act of 1990 (P.L. 101-336) and the ADA amendments act of 2008"); A.R.S. § 41-1491.01 (prohibiting discrimination based on familial status, which includes when a person either lives with a minor and is the minor's parent, legal custodian, or guardian, or is in the "process of obtaining legal custody" of a minor); T.C. § 17-50(f) (defining "source of income" to include "child support, spousal support, foster care subsidies," and income derived from disability insurance).

And as a general matter, the source-of-income protection furthers the federal objective of providing affordable housing. *See Austin Apartment Ass'n v. City of Austin*, 89 F. Supp. 3d 886, 895–96 (W.D. Tex. 2015) (concluding city ordinance prohibiting housing discrimination based on source of income served the purposes and objectives of the Section 8 program "by increasing the number of houses and apartments available to voucher holders"); *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88 (D.D.C. 2008) ("[A] non-discrimination requirement would not stand as an obstacle to the Housing Choice Voucher Program's central objective—that is, to aid low-income families in obtaining a decent place to live. Indeed, prohibiting discrimination in this manner will advance rather than denigrate that objective. Thus, the [agency's] non-discrimination provision can hardly be described as altering, amending, or conflicting with federal law in any material sense.") (cleaned up; citations omitted); *Franklin Tower One, L.L.C. v. N.M.*, 725 A.2d 1104, 1113 (N.J. 1999) (rejecting the notion that federal law prohibits states from proscribing discrimination based on the source of rental payments, and adding: "We are confident that application of the statute's anti-discrimination provision to protect tenants who are eligible to receive Section 8 vouchers will neither conflict with nor frustrate the objectives of Congress in enacting the Section 8 program"); *Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 246 (Conn. 1999) ("[R]equiring landlords to extend rental opportunities to otherwise eligible section 8 recipients, in accordance with

the terms of section 8 leases, is not an obstacle to the congressional agenda but serves instead to advance its remedial purpose.").[3]

While the absence of source-of-income protection in the AFHA means Tucson's fair housing ordinance is more expansive in its protections than the AFHA, and thus more restrictive on property owners, that does not mean Tucson's source-of-income protection conflicts with the AFHA. As a matter of fact, Tucson has provided greater housing protection than the state—protecting against discrimination based on ancestry, age, and "sexual or affectional preference"[4] since 1988, and gender identity and marital status since 1999—without challenge in the courts since adoption. *See* Tucson Ord. No. 6947 (1988); Tucson Ord. No. 9199 (1999). And besides, "Arizona courts have long held that, where the state has not appropriated the field"—as here—"local ordinances do not conflict with state law simply because they are more restrictive." *Wonders*, 207 Ariz. at 579, ¶ 13; *see also Mayor & Common Council of City of Prescott v. Randall*, 67 Ariz. 369, 372 (1948) ("[T]he municipal legislation cannot contradict the state law, but it may parallel it, or even go beyond it, so long as the two are not in conflict.") (citation omitted); *cf. Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1205 (10th Cir. 2002) (finding county ordinance's greater restriction—requiring a company "to obtain local as well as state approval for its activities"—did not conflict with state law so as to be preempted); *Bourbeau*, 549 F. Supp. 2d at 88 ("A state law that imposes additional requirements over and above those imposed by a federal law does not, however, necessarily 'conflict' with federal law in either manner."); *City of Tucson v. Consumers For Retail Choice Sponsored by Wal-Mart*, 197 Ariz. 600, 603, ¶ 10 (App. 2000) (finding no conflict with state law even though "Tucson's additional referendum requirements are more restrictive than those of the state, adding more content

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

[4] It appears this class was changed to "sexual orientation" sometime between 1988 and 1999.

to the petition and additional requirements for circulators"); *Babe's Cabaret v. City of Scottsdale*, 197 Ariz. 98, 104, ¶ 19 (App. 1999) (finding city ordinance dictating the physical layout of an erotic establishment's premises not in conflict with the state law at issue because the latter did not "bar licensees from altering the physical layout of their premises; it simply require[d] them to obtain [state] approval before undertaking alteration"); *Prendergast v. City of Tempe*, 143 Ariz. 14, 17 (App. 1984) (finding no conflict between a municipal ordinance defining "work" and applicable state law because the latter did not provide a statutory definition).

In short, it is possible for officials to enforce, and affected parties to mutually comply with, local and state fair housing laws within Tucson's jurisdiction.[5] Accordingly, the Office finds no conflict with the AFHA for preemption purposes.

2. The Legislature did not intend to appropriate the field.

Regarding the third criteria, the Office concludes that the Legislature did not intend to appropriate the field of fair housing, as evidenced by the absence of a clear preemption policy in the AFHA. *See generally* A.R.S. §§ 41-1941–41-1491.37. A "clear preemption policy" refers to a policy that clearly or expressly defines what local laws the statute preempts. *See Wonders*, 207 Ariz. at 579, ¶ 9 (explaining that the "existence of a preemptive policy must be clear" and "clear[ly] manifest[]" the legislature's "intent to preclude local control"). With that understanding, § 41-1491.06(C) does not constitute or contain a clear preemption policy because its purpose is to save, or exempt, from preemption local fair housing ordinances—rather than preempt them—and so does not manifest an intent to preclude local control. *See supra*, Section III(B)(2); *cf. City of Tucson*, 197 Ariz. at 603, ¶ 7 ("The legislative intent to preempt must be clear; a negative inference is insufficient.") (citations omitted); *Rineer*, 193 Ariz. at 163, ¶ 5 ("[W]hen the legislature has intended

[5] Because the AFHA's provisions are "virtually identical" to those of the FHA, *Canady v. Prescott Canyon Ests. Homeowners Ass'n*, 204 Ariz. 91, 93, n.3 (App. 2002) (citation omitted), the source-of-income protection also would not conflict with the FHA.

to preclude local legislation, it has done so expressly.").

Moreover, §§ 9-500.09 and 41-1491.11 reveal a legislative intent to include, not preclude, local control. Section 9-500.09 grants express authority to sizeable cities and towns to enact their own fair housing ordinances, while § 41-1491.11 clearly states that "[n]othing in [the AFHA] shall be interpreted as prohibiting … cities and towns [with the requisite population] from adopting a fair housing ordinance." *See Wonders*, 207 Ariz. at 579, ¶ 10 (concluding state law did not manifest clear intent to preclude local control when the state law at issue did "the opposite" by providing express authority for a municipal governing body "to adopt and enforce ordinances not in conflict with [the state] law," because, "[w]hen a statute recognizes that there may be local legislation on the same subject matter, no inference of preemption is warranted") (internal quotation marks, citation omitted); *Rineer*, 193 Ariz. at 163, ¶ 8 (rejecting the argument of implied preemption partly because it "ignores the plain language" of statutes that "evince the legislature's intent not to exclusively occupy the field, but rather to permit local ordinances"); *Phoenix Respirator & Ambulance Serv., Inc. v. McWilliams*, 12 Ariz. App. 186, 188 (1970) ("Our Supreme Court has said that both a city and state may legislate on the same subject when that subject is of local concern or when, though the subject is not of local concern, the charter or particular state legislation confers on the city express power to legislate thereon[.]") (citations omitted); *cf. Vega v. Morris*, 184 Ariz. 461, 463 (1996) ("[G]enerally the legislature does not include in statutes provisions which are … contradictory.").

The legislative intent and history behind the AFHA provide even more support for the Office's conclusion that the state has not appropriated the field. When the Legislature first adopted the AFHA in 1988, it included an express preemption provision but then repealed that provision in 1991 and has since chosen not to include it. *See supra*, Section II(A). The Legislature instead chose to include § 41–1491.06, titled "Effect on other law," and provided three provisions, including § 41–

1491.06(C), each of which saved local and other law from preemption by the AFHA. *See supra*, Section III(B)(2). In addition, the Legislature made inclusive amendments to §§ 41-1491.11 and 41-1491.13 to accommodate cities and towns that enacted fair housing ordinances pursuant to § 9-500.09. *See* 1992 Ariz. Legis. Serv. Ch. 207, §§ 4-5. That history and intent evince the Legislature's intent to *include* certain cities and towns in the field of fair housing regulation, as opposed to preclude them.

Indeed, the Legislature expressly stated that its intent for amending the AFHA in 1992—at which time it added § 9-500.09—was that the "state *and* any city or town" with § 9-500.09 authority would provide fair housing, "resolve housing discrimination disputes at the *local* level," and obtain HUD substantially-equivalent certification for enforcement purposes. *Id.*, § 1 (emphasis added). Even when discussing the 1992 changes prior to adopting them, one legislator acknowledged that cities like Tucson and Phoenix had their own fair housing ordinances, and explained that the 1992 changes "grant" those cities "*permission* to continue doing the fine job they have been doing" in administering their laws. Supp. Response, at 10 (Commerce Committee Meeting Minutes, Ariz. House of Rep., Feb. 24, 1992) (emphasis added). That same legislator further commented that Tucson and Phoenix's administration and enforcement of their own laws would mean no duplication of services within the state. *Id.* And the Office's Chief Counsel for Human Resources at the time added that the Office could then focus its own fair-housing enforcement efforts in places other than Tucson and Phoenix. *See id.* at 11. Those comments demonstrate that the AFHA's 1992 amendments favored a joint system of enforcement between the state and certain sizeable cities like Tucson, further evidencing the legislature's inclusive intent.

For these reasons, the Office concludes that the AFHA has not impliedly preempted the source-of-income protection at issue in the Ordinance.

The Office does not find the Request's arguments to the contrary persuasive. The Request

first suggests that the Legislature has occupied the field because it constructed the state statutes to be 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." Request, at 6. While that might be true, it does not mean the Legislature has appropriated the field to the exclusion of certain sizeable cities for the reasons already discussed above, namely the absence of a clear preemption policy and the presence of a legislative history and express legislative intent that speak to inclusivity in the fair housing field. *See Jett*, 180 Ariz. at 121–22 (acknowledging that a "comprehensive statutory scheme" could "infer an obvious preemptive policy," but also instructing that, to find "state legislation has completely occupied the field in a particular area, [t]he existence of a preempting policy must be clear," "the assertedly competing provisions in question must be actually conflicting," and "[m]ere commonality of some aspect of subject matter [between state and local law] is insufficient"). Those same reasons compel us to reject the Request's implied-preemption argument.[6] *See* Request, at 7.

The Request next cites §§ 9-461.16(A) and 33-1329 to suggest that the Legislature has expressly preempted the Ordinance. *Id.* Section 9-461.16(A) states in relevant part that a "city or town shall not adopt a land use regulation or general or specific plan or impose as a condition for approving a building or use permit, a requirement that … requires a residential housing unit or residential dwelling lot or parcel to be designated for sale or lease *to any particular class or group of residents*" (emphasis added). However, the Ordinance is aimed at preventing discrimination

[6] The Request's reliance on *Jett* is unavailing for the same reasons. *See* Request, at 6. Moreover, the Request's reliance on *Clayton v. State* and *Mayor & Common Counsel of City of Prescott v. Randall* are unavailing because those cases are factually distinguishable, and questions of preemption must be decided on a "case-by-case basis," *Coconino Cnty. v. Antco*, 214 Ariz. 82, 90, ¶ 25 (App. 2006). *See Clayton*, 38 Ariz. 135 (1931) (discussing whether the state's "Highway Code" preempted a city ordinance that also regulated drunk driving); *Randall*, 67 Ariz. 269 (1948) (discussing whether state law that regulated liquor preempted a city ordinance affecting liquor licensing).

based on source of income; it does not create a preference for persons based on source of income. *See* Tucson Ord. No. 11959, §§ 2-3. Thus, the Ordinance cannot be construed as creating a requirement that a residential housing unit or dwelling lot be sold or leased to only a particular class or group of residents.

The Request's reliance on § 33-1329 is equally unpersuasive. That section provides in part that "the power to control rents on private residential property is preempted by the state" and "[c]ities, including charter cities, or towns shall not have the power to control rents." A.R.S. § 33-1329(A). The Ordinance does not purport to regulate rent in any manner. *See* Tucson Ord. No. 11959, §§ 2-3. And significantly, Tucson does not interpret the Ordinance in a manner that would compel landlords to lower their rents, or even to change their rental screening criteria, to accommodate applicants or tenants who receive rental income from the Housing Choice Voucher ("HCV") program. *See* "Source of Income Ordinance: FAQ," https://sourceofincome-cotgis.hub.arcgis.com/pages/faq. Section 33-1329, therefore, does not preempt the Ordinance.

Finally, the Request cites § 33-1307 as supposed proof that the Legislature intended to occupy the field of fair housing in the state. *See* Request, at 6-7. Section 33-1307, titled "Territorial Application," states: "This chapter [titled Arizona Residential Landlord and Tenant Act ("ARLTA")] applies to, regulates, and determines rights, obligations and remedies under a rental agreement, wherever made, for a dwelling unit located within this state." But that language only defines the territory, *i.e.*, within the state, in which the ARLTA applies. It does not present a clear preemption policy in the field of *fair housing*, particularly when the ARLTA itself appears to not impose any obligation on a landlord not to discriminate on the basis of race, color, religion, sex, disability (handicap), national origin, or familial status, when selecting a tenant or when showing property to non-tenants (or to others who have not agreed to rent the property). *See* A.R.S. §§ 33-1321–13-1331; *see also* A.R.S. § 33-1317 (generally prohibiting discrimination based on children);

§ 33-1310(13) & (17) (defining "tenant" and "rental agreement").

In summary, the Office concludes that the AFHA does not expressly or impliedly preempt the Ordinance.

D. The Ordinance does not violate Article II, § 3 of the Arizona Constitution.

Article II, § 3(A) of the Arizona Constitution acknowledges that the United States Constitution is "the supreme law of the land." The Request alleges that the Ordinance violates that supremacy clause because it would "compel[] property owners who charge rents that are eligible for Section 8 reimbursement to enroll in the [federal] program if a [housing choice] voucher recipient wishes to lease the premises," even though the federal program is "entirely voluntary" according to 42 U.S.C. § 1437f. Request, at 7. The Request is referring to the HCV program (formerly known as the Section 8 program), which is governed in part by 42 U.S.C. § 1437f.

As the Connecticut Supreme Court has observed: "[T]here is no express language in 42 U.S.C. § 1437f to the effect that landlord participation in section 8 programs is voluntary. The courts that have found it to be voluntary have done so mainly because 42 U.S.C. § 1437f(d)(1)(A), along with the applicable regulations, gives landlords the authority to select tenants." *Sullivan Assocs.*, 739 A.2d at 245, n.22 (citations omitted). And an argument to the contrary (like the one now at issue) has "been rejected by every court [that] has confronted it." *Austin Apartment Ass'n*, 89 F. Supp. 3d at 895 (collecting cases); *see also Bourbeau*, 549 F. Supp. 2d at 87–88 (rejecting the argument that a local non-discrimination requirement was preempted by the HCV program's "voluntary nature," and refusing to presume that Congress intended to "circumscribe local authority" in such a manner); *Franklin Tower One*, 725 A.2d at 1113 (explaining that the "inference that the [Section 8] program is voluntary derives only from one section of the statute that permits landlords to screen potential tenants," and that "[n]othing in the statute … mandates that landlord participation in the Section 8 program be voluntary, nor is there any provision that prohibits states from mandating participation").

Indeed, federal regulations governing the HCV program explicitly provide: "Nothing in part 982 [titled "Section 8 Tenant-Based Assistance: Housing Choice Voucher Program"] is intended to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder," provided such laws do "not change or affect any requirement of this part, or any other HUD requirements for administration or operation of the program." 24 C.F.R. § 982.53(e); *see also Sullivan Assocs.*, 739 A.2d at 245-46 ("[N]othing in the federal [Section 8] program prevents a state from mandating participation."); *accord Franklin Tower One*, 725 A.2d at 1113. On that basis alone, the Office finds the Request's allegation to be legally unsupported.

Relatedly, the Request also argues that the Ordinance violates the supremacy clause in part because Tucson is a charter city and had authority under its charter to regulate only matters of purely local concern. *See* Request, at 7. The Office rejects that argument for three reasons. First, it oversimplifies the law. A charter city's authority is not explicitly limited to regulating only matters of local concern; rather, a charter city may regulate local matters that implicate statewide interests, provided its laws do not conflict with state law. *See* A.R.S. § 9-284(B) ("The charter shall be … not in conflict with the constitution and laws relating to the exercise of the … general laws of the state not relating to cities."); *Jett*, 180 Ariz. at 118 ("The City of Tucson … may exercise all powers granted by its charter, provided that such exercise is not inconsistent with either the constitution or general laws of the state.") (footnote, internal citations omitted); *cf. Varela v. FCA US LLC*, 252 Ariz. 451, 457, ¶ 1 (2022) ("Under the Supremacy Clause of the Federal Constitution, when a state law *conflicts* with a properly enacted federal law, the state law is preempted.") (emphasis added); *Antco*, 214 Ariz. at 90, ¶ 24 ("[T]he doctrine of preemption is derived from the supremacy clause …. Generally, when an issue affects both local and statewide interests, empowered local government entities, such as cities and counties, may enact and enforce relevant laws unless they have been

preempted from doing so by state law.") (citing in part the federal and state constitutions). Second, the Ordinance neither conflicts with the AFHA nor is preempted by it, as discussed earlier in Section III(C). *Cf. Shorey v. Arizona Corp. Comm'n*, 238 Ariz. 253, 260, ¶ 25 (App. 2015) ("Under the Supremacy Clause, federal law may preempt state law through express preemption, field preemption, or conflict preemption.") (internal citation omitted). Third, its charter authority aside, Tucson has authority under § 9-500.09 to adopt the Ordinance for the reasons previously discussed in Section III(B)(1).

In conclusion, the Office finds that the Ordinance does not violate Article II, § 3 of the Arizona Constitution.

E. The Ordinance does not violate A.R.S. § 33-1368 or § 33-1377.

The Request alleges that the Ordinance violates §§ 33-1368 and 33-1377 because it would prohibit, as a discriminatory housing practice, an otherwise valid eviction of a tenant who receives income falling within the "source of income" definition. Request, at 7-8. Section 33-1368 governs a landlord's right to evict a tenant when a "material noncompliance" incident occurs, including nonpayment of rent within a specified time period, and § 33-1377 details how the landlord must proceed to evict such a tenant.

The Office finds no merit in this allegation. The Ordinance does not dictate the terms of eviction or otherwise require a landlord to ignore tenant acts that constitute material noncompliance. With respect to HCV tenants in particular, Tucson correctly notes that landlords retain their eviction right under its amended fair housing ordinance. *See* Response, at 4 (citing in part 24 C.F.R. § 982.310). Part 982 of the Code of Federal Regulations, which governs the HCV program, explicitly provides three grounds under which a landlord might evict an HCV tenant, including nonpayment of rent or other noncompliance with the lease, as similarly provided under state law. *See* 24 C.F.R. § 982.310(a) (allowing eviction for (1) a "[s]erious violation (including but not

limited to failure to pay rent or other amounts due under the lease) or repeated violation of the terms and conditions of the lease"; (2) violations of law applicable to the tenant; and (3) "good cause"). In addition, the federal "good cause" ground for evicting HCV tenants does not displace a landlord's right to evict under A.R.S. § 33-1368. *Cf. Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1210 (9th Cir. 2009) ("HUD did not specifically intend to preempt local eviction laws with its 'good cause' regulation. … [W]hile HUD may have listed examples of 'good cause' in order to provide explicit regulatory assurance to prospective section 8 owners that legitimate owner concerns will be recognized as grounds for termination of tenancy, the fact remains that the same regulation specified that good cause is determined in local landlord tenant courts …. Congress only rejected the application of substantive state and local law to section 8 lease terminations when asked to eliminate federal controls over such terminations *altogether*.") (internal quotation marks, citations omitted; emphasis added).

Although 24 C.F.R. § 982.310(b) prohibits the "termination of tenancy" based on nonpayment of rent *by the public housing authority* ("PHA"), which pays a portion of rent on a HCV tenant's behalf, that restriction is imposed by federal law, not the Ordinance. *See also* 24 C.F.R. § 982.310(b)(2) ("The PHA failure to pay the housing assistance payment to the owner is not a violation of the lease between the tenant and the owner."). Furthermore, Tucson agrees that the Ordinance does not require landlords to continue leasing their premises to delinquent tenants merely because those tenants are HCV recipients. *See* "Source of Income Ordinance: FAQ," https://sourceofincome-cotgis.hub.arcgis.com/pages/faq ("Will I be able to evict a tenant with a Housing Choice Voucher? Yes. The Housing Choice Voucher Program always has provided the landlord the ability to enforce the lease up to and including eviction. City staff are ready and able to assist landlords by addressing issues with the tenant should there be nonpayment or other lease violations").

Accordingly, because the Ordinance does not impinge on a landlord's right to evict under state law, it does not violate §§ 33-1368 and § 33-1377.

F. The Ordinance does not violate Article II, § 17 of the Arizona Constitution.

The Request alleges that the Ordinance violates Article II, § 17 of the Arizona Constitution because, in situations where landlords have to wait extended periods of time for rental payment through the HCV program, the landlord has lost the property's economic benefit, thus resulting in a regulatory taking. Request, at 8. Article II, § 17 of the Arizona Constitution prohibits the taking of private property except under certain circumstances and requires "just compensation" when it does occur. When determining whether a regulatory taking has occurred, courts look at several factors: the "economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citation omitted).

Here, the Office finds that the Ordinance does not violate § 17. As an initial matter, the Office does not foresee many scenarios occurring wherein a landlord would be required to wait extended periods of time for rent. A PHA must pay its share of an HCV recipient's rent to the landlord "promptly when [it is] due" under the PHA's contract with the landlord, and the PHA is responsible for paying any late payment penalties provided for in that contract. 24 C.F.R. § 982.451(b)(5)(i)-(ii).

More importantly, in the event such a scenario does occur, the Office does not see how that scenario is tantamount to a physical invasion by the government without just compensation. Barring

some breach of contract by the landlord that led to a withholding of rent, the landlord will be paid the rent owed according to its contract and for the time during which the HCV recipient remains a tenant, thereby making the landlord whole and compensating it for the HCV recipient's occupancy of its property. Additionally, any inconvenience the landlord might incur as a result would be due to a "public program adjusting the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124—a compelling factor weighing against the finding of a regulatory taking on these facts. *Cf. id.* at 125 ("[I]n instances in which a state tribunal reasonably concluded that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. ... '[T]aking' challenges have also been held to be without merit … when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm.") (internal quotation marks, citation omitted).

For these reasons, the Office finds no violation of Article II, § 17 of the Arizona Constitution.

IV. Conclusion

The Office has determined that **the Ordinance does not violate state law**. Specifically, the Ordinance is not contrary to A.R.S. §§ 9-500.09, 41-1491.06(C), 33-1368, 33-1377, or Article II, §§ 3 and 17 of the Arizona Constitution. Nor does the AFHA preempt the Ordinance.

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