



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>KRIS MAYES ATTORNEY GENERAL</p> <p>March 25, 2024</p>	<p>No. I24-006 (R24-004)</p> <p>Re: Applicability of A.R.S. § 16-204(F)(4) to Transaction Privilege Tax Elections in Charter Cities</p>
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To: The Honorable Rosanna Gabaldón, Arizona State Senator (LD21)
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Question Presented

State law provides that municipalities may hold elections to approve transaction privilege taxes only at the November general election. A.R.S. § 16-204(F)(4). Does this law preempt City of Tucson Ordinance No. 12071, setting such an election for a different date, notwithstanding Tucson's status as a charter city whose Charter permits such an election date?

Summary Answer

No. Under Arizona law, when action under a city's charter conflicts with state law, the municipal action prevails if it is on a matter of purely municipal concern. The timing of Tucson's special election to amend its Charter is a matter of purely municipal concern, even though the proposed amendment concerns a transaction privilege tax.

Background

From the earliest days of Arizona statehood, state law has paid special solicitude to cities. That solicitude is reflected in the home rule charter provision, found in the Arizona Constitution at article 13, section 2. According to that provision, a city whose population exceeds 3,500 may adopt a charter, which serves as “effectively, a local constitution.” *State ex rel. Brnovich v. City of Tucson (Tucson IV)*, 251 Ariz. 45, 47 ¶ 11 (2021). The Constitution also permits cities to amend their charters, “by amendments proposed and submitted by the legislative authority of the city to the qualified electors thereof . . . at a general or special election.” Ariz. Const. art. XIII, § 2.

The City of Tucson first adopted a home rule charter before statehood, in 1883. As authorized by the Arizona Constitution, the current Tucson Charter provides that it may be amended at a general or special election. *See* City of Tucson Charter ch. XXVI, § 1. It also provides that the City will determine “the times at which any municipal election shall be held.” Charter ch. IV, § 1, ¶ 20. This is accomplished by way of ordinance passed by the Mayor and Council. *Id.* ch. XVI, § 6; *see id.* ch. VII, § 1, ¶ 2.

On February 6, 2024, Tucson’s Mayor and Council adopted Ordinance No. 12071, calling a special election to amend the Charter on August 6, 2024. Section 1 provides:

The Mayor and Council of the City of Tucson, Arizona, call a special election . . . on August 6, 2024, for the purpose of submitting to the City’s qualified electors a proposed ballot measure or measures, to include a measure amending the Tucson Charter to establish a dedicated transaction privilege tax and use tax . . . for the purpose of funding community investments to promote quality of life for the residents and businesses of the City of Tucson.

Tucson Ord. No. 12071, § 1.¹

¹ Tucson has since indicated that the special election date will be moved to July 30, in light of state legislation adjusting the date for statewide primary elections from August 6, 2024 to July 30, 2024. *See* Ariz. H.B. 2785 (S.B. 1733) § 29, Fifty-sixth Leg. (2nd Reg. Sess. 2024) (passed Feb. 9, 2023).

Although the Arizona Constitution and the Charter give Tucson the power to amend the Charter via municipal election, A.R.S. § 16-204(F)(4) provides that elections to approve transaction privilege taxes must be held on the general election date in November. Thus, the question presented is whether Tucson may call a special election to amend its Charter to authorize a transaction privilege tax on a date other than the November general election date.

Analysis

I. Charter city governments possess autonomy regarding matters of purely municipal concern.

Arizona's Constitution recognizes "home rule" rights in municipalities, permitting the adoption of city charters by cities whose population exceeds 3,500. Ariz. Const., art. XIII, § 2. Municipal charters function as "local constitution[s]." *Tucson IV*, 251 Ariz. at 47 ¶ 11. This constitutional provision reflects an effort to make these cities "as nearly independent of state legislation as was possible." *City of Tucson v. Walker (Tucson I)*, 60 Ariz. 232, 239 (1943). Tucson, then, has a grant of independence from state legislation over a wide variety of matters.

The breadth of this independence is controlled both by the Constitution and by A.R.S. § 9-284, a statute that "supplements" the Constitution's effort to secure municipal independence. *State ex rel. Brnovich v. City of Tucson (Tucson III)*, 242 Ariz. 588, 598 ¶ 39 (2017) (quoting *City of Tucson v. Ariz. Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 335 (1948)). Section 9-284 provides that a city charter supersedes any applicable law "in force at the time of the adoption and approval of the charter" while requiring that the charter be "consistent with and subject to the state constitution, and not in conflict with the constitution and laws relating to the exercise of the initiative and referendum and other general laws of the state not relating to cities." This law's "roots . . . trace back to statehood." *Tucson III*, 242 Ariz. at 598 ¶ 39 (identifying statute as successor of a 1913 law) (citing Rev. Stat. of Ariz., Civ. Code, tit. 7, ch. 16, ¶¶ 2033, 2036 (1913)).

And since statehood, it has been interpreted to allow charter cities like Tucson autonomy in areas solely their concern, while ensuring that matters of statewide concern are governed by state law. *See Tucson IV*, 251 Ariz. at 47-48 ¶ 12; *see also, e.g., Yuma Gas, Light & Water Co. v. City of Yuma*, 20 Ariz. 153, 155 (1919) (finding unconstitutional charter provision granting power over matters “not . . . pertaining to the cities’ own government”).

An oft-cited instance is the Arizona Supreme Court’s interpretation of this constitutional provision and supplementary statute in *Strode v. Sullivan*. 72 Ariz. 360, 365 (1951). There, the question was whether a state law requiring elections to be partisan would be effective in a city whose charter provided for non-partisan elections. Surveying its past cases, the Court observed that a charter city acts as a sovereign in “municipal affairs where the power to be exercised has been specifically or by implication granted in its charter.” *Id.* at 363 (cleaned up).

The city is sovereign, then, when the matter is a municipal affair controlled by its charter. Therefore, the charter supersedes state laws to the extent those laws “relate to purely municipal affairs.” *Strode*, 72 Ariz. at 365. This holding effectuated the intent of the Constitution and statute, and harmonized the two provisions of § 9-284(A), which may have otherwise seemed in tension. *See Tucson IV*, 251 Ariz. at 48-49 ¶¶ 12, 14, 17 (discussing *Strode*).

An unbroken chain of cases has continued to apply this dichotomy. *See, e.g., Tucson IV*, 251 Ariz. at 49 ¶ 19; *id.* at 56 ¶ 60 (Bolick, J., dissenting) (acknowledging the consistency with which the Court has applied *Strode*); *Tucson III*, 242 Ariz. at 600 ¶ 46 (referring to the Court’s “longstanding analytical approach”).

In short, Arizona courts resolve conflicts between state and municipal law by looking to what is regulated, and whose concern it is. *Tucson IV*, 251 Ariz. at 47-48 ¶ 12. When a charter provision or action under the charter raises an issue of purely municipal concern, the charter

governs. When, by contrast, the matter is of statewide concern, state law wins out. *Id.*; see *Tucson I*, 60 Ariz. at 239.

II. The timing of local elections is a matter of purely municipal concern.

The issue here is whether the timing of Tucson's election to consider an amendment to the Charter is a matter of purely municipal concern.

The Arizona Supreme Court has repeatedly held that, as a general matter, the means and methods of municipal elections are matters of purely municipal concern. In *Strode*, the Court addressed whether a state law requiring elections to be partisan controlled in a city with a charter providing for non-partisan local elections. 72 Ariz. at 365. Relying on the fundamental right of self-governance given to charter cities and the intent of the framers of Arizona's Constitution the Court rejected the argument that the partisan nature of a local election was a matter of state concern. *Id.* at 367-68. Instead, the Court reaffirmed that whether a municipal election is to be partisan is a matter of purely municipal concern. *Id.*

More recently, the Court reaffirmed in *City of Tucson v. State (Tucson II)*, 229 Ariz. 172 (2012) that the particulars of municipal elections are matters of purely municipal concern. In *Tucson II*, the Court considered two questions pertaining to municipal elections: (1) whether a state law mandating non-partisan elections prohibited a charter city from holding partisan local elections (the inverse of the question presented in *Strode*); and (2) whether an election which used a ward-nomination followed by citywide election model, was permissible as a matter of purely municipal concern. *Id.* at 173 ¶¶ 2-3, 5.

On the question of partisan elections, the Court reasoned that if holding non-partisan elections is a matter of purely municipal concern, so is holding partisan elections. *Id.* at 177 ¶ 30. It thus held a charter city could hold partisan local elections, notwithstanding the state law mandating non-partisan elections. *Tucson II*, 229 Ariz. at 177 ¶ 30.

On the question of Tucson’s chosen election system, the Court concluded that “how a city will constitute its governing council” is of purely municipal concern. *Id.* at 178 ¶ 35. While recognizing that “some aspects of the conduct of local elections may be of statewide concern,” the Court reasoned that the model used by Tucson did not conflict with “equality in the democratic process” because it allowed just as much equality as other election formats permitted under state law. *Id.* at 179 ¶¶ 41, 43.

Most recently, the Court again addressed the state versus municipal concern question in the municipal election context in *State ex rel. Brnovich v. City of Tucson (Tucson IV)*, 251 Ariz. 45 (2021). *Tucson IV* involved a state law requiring municipal elections be held on-cycle, i.e., in even-numbered years, under certain circumstances. *Id.* at 46 ¶ 3; *see* A.R.S. § 16-204.01 (held unconstitutional as applied). Tucson’s charter required that municipal elections be held in odd-numbered years. *Tucson IV*, 251 Ariz. at 46 ¶ 5. The Attorney General argued that the statute, which declared that municipal election timing was an issue of statewide concern because it impacted turnout, controlled over the Charter. *Id.* at 47 ¶¶ 8-9, 50-51 ¶ 24; *see* A.R.S. § 16-204.01(A). The Court disagreed, holding that the timing of a local election was a matter of purely municipal concern and thus the Charter controlled. *Id.* at 53 ¶ 33.

In reaching this conclusion, the Court first surveyed its past cases. From *Strode*, it noted that the need for an election procedure was “essential” to government. *Id.* at 50 ¶ 21. Then it looked to *Tucson II* for the proposition that “election methodology” is generally of municipal concern. *Id.* ¶ 23.

The Court then turned to the Attorney General’s attempt to limit *Tucson II*’s holding to matters of “governmental structure.” *Id.* ¶ 23. That limitation would have excluded election timing from the general rule treating municipal elections as of purely municipal concern because it does

not impact governmental structure. The Court explicitly rejected this reasoning, including timing as among the aspects of elections of that are of purely municipal interest. *Id.* at 51 ¶¶ 24-25. Election timing was part of the city’s “determination on how to structure its government.” *Id.* ¶ 25. And weighing the policy concerns dictating different election dates “implicates a city’s choice for how best to elect its officers.” *Id.* As a result, the power to decide on the timing of the election “affects the City’s autonomy in structuring its government.” *Id.*

Importantly, the state law at issue in *Tucson IV* declared municipal election timing to be of statewide concern because it impacted turnout. *Tucson IV*, 251 Ariz. at 51 ¶ 28. But the Court declined to accept that unsupported assertion, observing that low turnout at the municipal election would result from low interest and not from some government-erected barrier to voting under the Charter. *Id.* at 52 ¶ 32.

The Court further explained that while a choice concerning the method and manner of a municipal elections may become a matter of statewide interest if it implicates the ability to hold “free and equal” elections, or the “purity of elections,” there was no such concern here because concerns about low voter turnout did not implicate the election’s integrity. *Id.* at 53 ¶ 33.

In sum, under Arizona Supreme Court precedent, the manner and method of holding municipal elections are matters of purely local concern, unless the manner or method of the municipal election implicates a fundamental right, such as free exercise of the right to vote or free and equal elections. *See Tucson II*, 229 Ariz. at 179 ¶ 41 (quoting Ariz. Const. art. II, § 21 (free and equal elections, free exercise) and art. VII, § 12 (election purity)). But absent such issues, it is for the city to decide how best to give citizens their voice.

III. The Tucson Ordinance calling a special election to amend the Charter is a matter of purely municipal concern, notwithstanding the substance of the measure to be voted on.

Applying the foregoing authority, we conclude that the timing of Tucson’s election regarding a proposed Charter amendment is a matter of purely local concern.

As in *Tucson IV*, the question here is whether a state law regulating the timing of certain elections controls over a Charter provision providing an alternative election time. As the Court concluded in that case, the timing of a municipal election is a matter of purely local concern, absent some indication that the timing implicates a fundamental right. Here, nothing indicates that the timing of Tucson’s election regarding a proposed Charter amendment implicates a fundamental right that would raise statewide interest under *Tucson IV*. While turnout may suffer when the election is not held at the general November election, low turnout “from disinterest in strictly municipal issues . . . does not deprive [] voters of their constitutional right to vote.” *Id.* at 52 ¶ 30. Nor does lower turnout “cast[] doubt on the fairness and honesty of the electoral process.” *Id.* at 52-53 ¶ 32. The question whether to hold this election on a general or special election date does not implicate any issues that our courts have identified as statewide concerns. So, for the same reasons identified by the Court in *Tucson IV*, this is also not the rare case where municipal election timing is a matter of statewide concern.

For much the same reasons, that conclusion is not disturbed by the Arizona Constitution’s attention to municipal transaction privilege taxes. *See* Ariz. Const. art. IX, § 25. The Constitution prohibits cities from increasing or implementing such taxes on services after a certain date. *Id.* Although this might evidence a statewide interest in transaction privilege taxes, that does not mean there is a statewide interest in the timing of a local election on that subject. The Arizona Supreme Court has long held that the timing of municipal elections is a matter of local concern, and it has never suggested that there is an exception to that rule for ballot measures.

Conclusion

For the reasons discussed above, the timing of Tucson's election to amend the Charter and authorize a transaction privilege tax is a matter of purely municipal concern. As a result, Tucson is not preempted from holding such an election on a different date from that prescribed in A.R.S. § 9-204(F)(4).

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