



ARIZONA

I. Summary of Home Rule in Arizona

- Arizona has four main kinds of municipalities: counties, towns, general law cities, and charter (or home rule) cities. Counties and general law cities are Dillon’s Rule jurisdictions. Charter cities enjoy a constitutional grant of home rule authority.
- Charter cities enjoy immunity from preemption in matters of purely local concern, but courts have interpreted the scope of “matters of local concern” narrowly.
- Arizona courts recognize three kinds of preemption: express, conflict, and field.
- Arizona’s SB 1487 imposes significant limits on local authority by opening cities up to litigation and loss of revenue if they enact an ordinance that may be preempted by state law.

II. Types of Municipalities in Arizona and Their Power

Arizona recognizes three kinds of municipalities: counties, general law cities, and charter (or home rule) cities. In order to incorporate as a city or town, a community must have a population of 1,500 residents.¹ Incorporated municipalities with a population of under 3,000 are towns; those with a population of 3,000 or more are cities.² Incorporated cities with a population of at least 3,500 can elect to adopt a charter, in which case they become charter cities.³

Counties

The Arizona Constitution allows counties with a population of over 500,000 to adopt a home rule charter,⁴ but this memo has identified no county that has elected to do so.

Arizona counties without a charter are Dillon’s Rule entities, meaning that they “have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature.”⁵

Towns and General Law Cities

There is little difference in the nature and scope of powers granted to towns and general law cities.⁶ They are both Dillon’s Rule entities, which means “may exercise only those powers expressly granted them by the legislature, together with those powers that arise by necessary

¹ A.R.S. § 9-101(A).

² A.R.S. § 9-271(A).

³ Ariz. Const. art. XIII, § 2.

⁴ Ariz. Const. art. XII, § 5.

⁵ *Ass’d Dairy Prods. Co. v. Page*, 206 P.2d 1041, 1043 (Ariz. 1949).

⁶ See A.R.S. § 9-401 et seq.

implication out of those that are expressly granted.”⁷ Only cities, however, may opt to adopt their own charters to gain home rule powers.

Charter Cities

Ariz. Const. art. XIII, § 2 allows any city with a population greater than 3,500 to “frame a charter for its own government . . . [The Charter] shall become the organic law of such city.” This provision delegates to cities the power to regulate subjects of municipal concern if the charter grants them that authority.⁸ A charter city does not need a legislative grant of power to issue particular regulations; rather, it “may exercise all powers authorized by its charter, except where such an exercise is inconsistent with [the] state constitution or the general laws of this state.”⁹

III. Preemption

Immunity from Preemption for Matters of Local Concern

The Arizona Supreme Court has consistently stated that in matters of solely local concern, a charter city’s ordinance supersedes a conflicting state statute.¹⁰ After the Arizona Supreme Court’s decision in *State ex rel. Brnovich v. Tucson*, the only clear area of local concern is around local elections.¹¹

Before The Arizona Supreme Court decided *Brnovich*, the question of how to separate areas “subject to local versus state control often involve[d] specific line- drawing.”¹² In *McMann v. City of Tucson*, the Arizona Supreme Court held that, as part of their home rule power, municipalities have sole control over “the sale or disposition of property.”¹³ In that case, Tucson was able to require instant background checks during gun shows held in its convention center despite a state law explicitly preventing a municipality from enacting “any ordinance, rule or tax relating to the transportation, possession, carrying, sale or use of firearms,” since the ordinance only regulated conduct at a convention center owned by the city.¹⁴

In *Brnovich*, however, the Arizona Supreme Court disclaimed the reasoning in *McMann*, calling the “proprietary/government” distinction—that is, distinguishing between legislation concerning

⁷ *Home Builders Ass’n of Cent. Ariz. v. City of Apache Junction*, 11 P.3d 1032, 1037 (Ariz. Ct. App. 2000).

⁸ See, e.g., *City of Tucson v. Walker*, 135 P.2d 223 (Ariz. 1943); *Gardenshire v. State*, 221 P. 228, 231 (Ariz. 1923); *Union Transportes de Nogales v. City of Nogales*, 985 P.2d 1025 (Ariz. 1999).

⁹ *Prendergast v. City of Tempe*, 691 P.2d 726, 729 (Ariz. Ct. App. 1984).

¹⁰ *Price v. State*, 3 P.2d 1114 (Ariz. 1931); *Clayton v. State*, 297 P. 1037 (Ariz. 1931); *Strode v. Sullivan*, 236 P.2d 48, 51 (Ariz. 1951); *City of Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart*, 5 P.3d 934 (Ariz. Ct. App. 2000).

¹¹ *State ex rel. Brnovich v. Tucson*, 399 P.3d 663, 677 (Ariz. 2017).

¹² *City of Tucson v. State*, 273 P.3d 624 (Ariz. 2012) (en banc) (upholding Tucson’s unique district-based primary system despite contrary state law).

¹³ *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 195 P.2d 562 (Ariz. 1948).

¹⁴ *McMann v. City of Tucson*, 47 P.3d 672 (Ariz. Ct. App. 2002) (internal quotation omitted); but see *City of Scottsdale v. State*, 352 P.3d 936 (Ariz. Ct. App. 2015) (striking down a local ordinance banning “sign walkers” on public sidewalks because the legislature expressly modified cities’ police power to regulate sign walkers).

the municipality’s own property and legislation that regulates the conduct or property of others— “murky and unhelpful.”¹⁵ In that case, the Court struck down a Tucson ordinance ordering the destruction of guns forfeited to the city, holding that while the disposal of a city’s property is a matter of local concern, the regulation of *firearms* is a matter of state concern, so state law could preempt a local ordinance on the matter.¹⁶

Arizona courts, however, have been most clear that structural areas — particularly those involving local elections — enjoy heightened protection from preemption.¹⁷

Conflict Preemption

In matters that implicate both local and statewide concerns, a charter city’s ordinance is preempted if it *conflicts* with a valid state statute.¹⁸ “Mere commonality of some aspect of subject matter is insufficient” to constitute a conflict, and a local ordinance should be upheld against a conflict preemption claim if the ordinance and state statute are “capable of peaceful coexistence.”¹⁹

Field Preemption

Arizona courts have recognized field preemption in areas where a statewide concern is implicated and “state legislation has so completely occupied the field that it becomes the sole and exclusive law on the subject.”²⁰

IV. Local Legislative Immunity

Forty-three state constitutions have some sort of “speech or debate” clause, which essentially provides *absolute immunity* to state legislators for their legislative acts. Federal legislators enjoy the same immunity. These constitutional provisions ensure that legislators cannot be held liable for their actual speech or debate on the legislative floor, nor for other legislative acts such as voting and participating in committee meetings.

Unfortunately, this legislative immunity generally does not explicitly extend to local legislators. As a result, states can punish local legislators for the exact kinds of actions for which state officials themselves are immune from liability.

¹⁵ *Brnovich*, supra n. 11, at 678.

¹⁶ *Id.* at 677.

¹⁷ *City of Tucson v. State*, 273 P.3d at 628. (“[it] is absolutely clear that charter city governments enjoy autonomy with respect to structuring their own governments”).

¹⁸ *City of Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart*, 5 P.3d 934 (Ariz. Ct. App. 2000); *City of Casa Grande v. Ariz. Water Co.*, 20 P.3d 590 (Ariz. Ct. App. 2001).

¹⁹ *City of Prescott v. Town of Chino Valley*, 790 P.2d 263, 271 (Ariz. Ct. App. 1989) (vacated on other grounds).

²⁰ *Jett v. City of Tucson*, 882 P.2d 426, 432-33 (Ariz. 1994) (en banc) (quoting *State v. Mercurio*, 736 P.2d 819, 823 (Ariz. Ct. App. 1987)).

Arizona’s constitution provides that “No member of the Legislature shall be liable in any civil or criminal prosecution for words spoken in debate.”²¹ In extending this privilege to an appointed state level redistricting commission, an Arizona appellate court endorsed a “‘functional’ approach to determine who may assert the legislative privilege,” holding that “a public official who acts in a legislative capacity may assert the legislative privilege regardless of his or her particular location within government.”²² The Arizona Supreme Court has extended the state constitution’s absolute immunity for legislators to city council members.²³

V. Other Relevant Considerations

S.B. 1487

In 2016, the Arizona legislature enacted Senate Bill 1487, which allows the state legislature to cut off state funding to cities acting beyond their authority.²⁴

Under this law, one (or more) state legislators may request that the Attorney General investigate any ordinance that the legislator alleges violates state law or the Arizona Constitution. If the Attorney General finds conclusively that the ordinance does violate state law, the city has 30 days to cure the violation, after which time the Attorney General will order the state treasurer to withhold state shared revenue from the city until the ordinance is repealed. If the Attorney General finds that a municipal ordinance *may* violate state law, he or she must file a special action in the Arizona Supreme Court to determine whether or not the ordinance is preempted; during this action, the Supreme Court must require the city to pose a bond equal to six months of its state shared revenue. The Supreme Court has not imposed this bond requirement and has suggested it will not be enforced.

The draconian fiscal punishment this law imposes has severely chilled local legislation in areas that are not clearly within the authority of those local governments.

Voter Protection Act

In 1998, Arizona voters approved Proposition 105, or the Voter Protection Act (VPA), which prevents the legislature from tampering with successful ballot initiatives.²⁵ The VPA prohibits the governor from vetoing an initiative or referendum; prohibits the state legislature from repealing an initiative or referendum; requires any amendment of an initiative or referendum to occur by a three-fourths majority of votes and only if the amendment “furthers the purposes of such measure;” and prohibits the legislature from appropriating or diverting funds allocated to a particular purpose by an initiative or referendum.²⁶ But the legislature has passed laws that make it quite difficult to gather sufficient signatures to get on the ballot, and the Supreme Court has kicked other progressive ballot initiatives off the ballot for allegedly confusing descriptions.

²¹ Ariz. Const. art. IV, Pt. 2, § 7.

²² *Ariz. Ind. Redistricting Comm’n v. Fields*, 75 P.3d 1088 (Ariz. Ct. App. 2003).

²³ *Sanchez v. Coxon*, 854 P.2d 126, 130 (Ariz. 1993) (en banc).

²⁴ A.R.S. § 41-194.01 (2016).

²⁵ Ariz. Const. art. IV, Pt. 1, § 1(6).

²⁶ *Id.*

Provision Against “Local or Special” Laws

The Arizona Constitution bars the state legislature from passing any “local or special laws” in 20 enumerated situations, including when the special law:

- deals with tax assessment and collection;
- deals with the conduct of elections;
- deals with the privileges, immunities, or franchises of corporations, associations, or individuals;
- deals with the incorporation of cities, town, or villages, or the amendment of their charters; or
- when a general law could be made applicable.²⁷

Arizona courts have adopted a three-part test to determine whether a law is an unconstitutional special law. A law is considered general, and not special, if (1) the classification is rationally related to a legitimate government objective, (2) the classification encompasses all members of the relevant population, and (3) the class is elastic, allowing members to move in and out of it.²⁸ A law can satisfy the federal Equal Protection Clause and still run afoul of Arizona’s prohibition against local or special laws because “[e]qual protection is denied when the state unreasonably discriminates against a person or class” while “[p]rohibited special legislation, on the other hand, unreasonably and arbitrarily discriminates in favor of a person or class by granting them a special or exclusive immunity, privilege, or franchise.”²⁹

Private Law Exception

An additional consideration in assessing whether a local government has the authority to adopt a particular policy is whether state law recognizes a “private law exception.” Private law can generally be defined as law that “establishes legal rights and duties between and among private entities.”³⁰ Some states, either by constitutional provision, statute, or case law, prohibit municipalities from regulating private law. This can take the form of a “subject-based” exception prohibiting any regulation of “private law” or a narrower exception prohibiting private rights of action.³¹

Arizona law does not appear to prohibit home rule municipalities from enacting “private law.” A review of Arizona case law did not identify court opinions adhering to a private law exception.

²⁷ Ariz. Cons. art. IV, Pt. 2, § 19.

²⁸ See *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 149 (1990) (en banc) (finding a law allowing for the deannexation of certain territories from certain cities to be an unconstitutional special law because the class was inelastic and similarly situated cities were arbitrarily exempted from the class); see also *In re Marxus*, 199 Ariz. 11, 13 (App. Div. 2001) (finding, for purposes of the constitutional prohibition against special laws, that a classification is unconstitutional if it is “palpably arbitrary”).

²⁹ *Arizona Downs v. Arizona Horsemen’s Foundation*, 130 Ariz. 550, 557 (Ariz. 1981) (en banc).

³⁰ Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. Rev. 671, 688 (1973).

³¹ See Paul A. Diller, *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109, 1167 (2012).

Arizona law does not clearly prohibit a local government from creating a private right of action, and there is some indication that localities have the authority to create them.³²

Single Subject & Clear Title Rule

Arizona's constitution prohibits the Legislature from enacting a law that encompasses more than one subject and requires the subject to be stated in the statute's title.³³ The single subject and title provision is interpreted liberally by courts and a statute is to be upheld if there is any legal basis for its validity.³⁴ If possible, an unrelated, unconstitutional portion of an Act may be severed and declared invalid to preserve the validity of the remainder of the law.³⁵

Prohibition on Unfunded Mandates

There do not appear to be limitations under Arizona law with respect to the State Legislature's ability to impose unfunded mandates on localities.

Emergency Powers

During a state of emergency, counties, cities, and towns "may make, amend and rescind orders, rules and regulations necessary for emergency functions," so long as those regulations are not inconsistent with those issued by the Governor.³⁶ In a state of war emergency, they may also "waive procedures and formalities otherwise required" as they pertain to certain enumerated topics, including entering into contracts, incurring obligations, and expending public funds.³⁷ They may undertake these actions even if the state emergency plans and programs do not give them specific authority to do so.³⁸

In the case of a local emergency due to "fire, conflagration, flood, earthquake, explosion, war, bombing, acts of the enemy, or any other natural or man-made calamity or disaster or . . . riots, routs, affrays, or other acts of civil disobedience which endanger life or property within the city," a mayor or chairman of the board of supervisors may declare a state of local emergency and have "authority to impose all necessary regulations to preserve the peace and order of the city, town, or unincorporated areas of the county."³⁹

³² *Id.* at 1167.

³³ Ariz. Const. art. IV, Pt. 2, § 13.

³⁴ *See Save Our Vote, Opposing C-03-2012 v. Bennett*, 291 P.3d 342 (Ariz. 2013); *State v. Sutton*, 565 P.2d 1278 (Ariz. 1977) (en banc).

³⁵ *See State v. Coursey*, 71 Ariz. 227 (Ariz. 1951).

³⁶ Ariz. Stat. Ann. § 26-307(A).

³⁷ Ariz. Stat. Ann. § 26-307(C).

³⁸ Ariz. Stat. Ann. § 26-307(D).

³⁹ Ariz. Stat. Ann. § 26-311.