

State ex rel Brnovich v. City of Tucson/Dewitt

Citation: 399 P.3d 663 (Ariz. 2017).

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Author: Vice Chief Justice Pelander

Joined By: Chief Justice Bales, Justices Brutinel and Timmer.

Concurrence: Justice Bolick, concurring in part and in the result.

Concurrence: Justice Gould, joined by Justices Bolick and Lopez, concurring in part and in the result.

Facts: In 2005, the City of Tucson (the “City”) passed an ordinance that enacted Tucson Code § 2-142,¹ (the “Ordinance”). The Ordinance provides that the police “shall dispose” of unclaimed and forfeited firearms “by destroying” them. In 2013, the Arizona state legislature amended two statutes governing the destruction of firearms: Ariz. Rev. Stat. § 13-3108(F),² which prohibited any subdivision of the state from facilitating “the destruction of a firearm . . .” and § 12-945(B),³ which contained an article that governed the disposal of unclaimed firearms which states the agency “shall sell the firearm to any business that is authorized to receive and dispose of the firearm . . . and shall sell that firearm.”

In March 2016, the legislature passed Ariz. Rev. Stat. § 41-194.01⁴ which requires the Attorney General (“AG”), at the request of one more members of the legislature, to investigate any ordinance by any political subdivision that the member alleges violates state law or the Arizona Constitution.⁵ The AG then has thirty days to investigate, and if the AG concludes the ordinance violates state law, the AG must provide notice to the subdivision and give the subdivision thirty days to resolve the violation.⁶ If the violation is not resolved within the time frame, the AG is required to file a special action in the Arizona Supreme Court to resolve the issue and the court must give the action precedence over all other cases.⁷ The statute also requires the violating subdivision to post a bond “equal to the amount of state shared revenue paid” to the subdivision from the preceding six months.⁸

In October 2016, Representative Mark Finchem asked the AG’s office to investigate whether the Ordinance violated Arizona law. The AG concluded that the Ordinance conflicted with § 13-3108(F) which prohibits any “political subdivision” from “facilitat[ing] the destruction of a firearm.” The City refused to repeal the Ordinance but did “suspend

¹ TUCSON, ARIZ., CODE §§ 1-140-142 (2005).

² 2013 Ariz. Sess. Laws, ch. 145, § 6 (1st Reg. Sess.) (codified as amended at ARIZ. REV. STAT. ANN. § 13-3108(F)).

³ 2013 Ariz. Sess. Laws, ch. 145, § 5 (1st Reg. Sess.) (codified as amended at ARIZ. REV. STAT. ANN. § 12-945(B)).

⁴ 2016 Ariz. Sess. Laws, ch. 35, § 1 (2d Reg. Sess.) (codified as amended at ARIZ. REV. STAT. ANN. § 41-194.01).

⁵ § 41-194.01(A).

⁶ § 41-194.01(B)(1).

⁷ § 41-194.01(B)(2).

⁸ *Id.*

implementation of gun destruction required by the Ordinance until the issue [could be] adjudicated.”⁹

Procedural history: The AG filed a special action in the supreme court pursuant to § 41-194.01(B)(2). Tucson then filed a complaint in Pima County Superior Court, seeking an injunction against implementation of § 41-194.01 and a declaration of the statute’s unconstitutionality. The City moved to dismiss the special action. The supreme court had the parties brief discrete issues raised in the special action and held oral argument while allowing the parties to continue litigating the superior court action.

Issues:

1. Separation of powers refers to a division of government responsibilities into distinct branches, executive, legislative, and judicial, in order to limit any one branch from exercising the core functions of another. Does § 41-194.01 violate the separation of powers doctrine by authorizing the Attorney General to investigate if city ordinances violate state law and to file special actions in the Arizona Supreme Court?
2. Mandatory jurisdiction is the notion that a court must exercise authority over cases that come within the terms of the jurisdictional grant of power. Discretionary jurisdiction, on the other hand, allows a court to accept or deny an appeal submitted by a party involved in a lower court’s decision. Is the Arizona Supreme Court’s special action jurisdiction under § 41-194.01(B)(2), which requires the Arizona Supreme Court to give the special action precedence over all other cases, mandatory jurisdiction?
3. The preemption doctrine is the idea that a higher authority of law will supersede the law of a lower authority when the two authorities conflict. Under the preemption doctrine and the home rule charter provision of article 13, section 2 of the Arizona Constitution, does the City’s Ordinance conflict with state law?

Holdings:

1. No, § 41-194.01 does not violate the separation of powers doctrine.
2. Yes, the supreme court’s special action jurisdiction under § 41-194.01 is mandatory.
3. Yes, the Ordinance is in direct conflict with Arizona law.

Disposition: In accordance with article 13, section 2 of the Arizona Constitution, Ariz. Rev. Stat. §§ 12-945(B) and 13-3108(F) supersede Tucson Code § 2-142.

Rule: Under the home rule charter provision of article 13, section 2 of the Arizona Constitution, if the subject matter of a local ordinance is of statewide concern rather than purely local interest, any conflicting state law supersedes it.

⁹ State ex rel v. Brnovich, 399 P.3d 663, 667 (Ariz. 2017).

Reasoning:

- **Separation of Powers:**

1. **Balancing Test.** For the first issue, the court used a factor-based test to determine whether § 41-194.01 violated the separation of powers doctrine. The test, from *State ex rel. Woods v. Block*,¹⁰ examines: (1) the essential nature of the power being exercised; (2) the legislature’s degree of control in the exercise of that power; (3) the legislature’s objective; and (4) the practical consequences of the action. The court found that the power, such as implementing the law and disbursing appropriations, was executive in nature.¹¹ The court also found the legislature has no role beyond initiating the AG review and thus has a limited degree of control.¹² Lastly, the court found that the law had the objective and consequence of “require[ing] and incentiviz[ing] political subdivisions to comply with state law” rather than coercing or interfering with executive powers.¹³ Therefore, the court determined that § 41-194.01 did not violate the separation of powers doctrine.
2. **Judicial Review.** The court also found that the law does not unconstitutionally infringe on judicial power because the AG is merely investigating and making determinations on whether they believe an ordinance violates state law or the Arizona Constitution, not making binding determinations.¹⁴ Furthermore, judicial review is available, so the Court must decide, or retains the discretion to decide, the issue.¹⁵

- **Special Action Jurisdiction:**

1. **Legislature’s Constitutional Authority.** On this second issue, the court first looked to the Arizona Constitution’s catch-all provision regarding the supreme court’s subject matter jurisdiction, which vests the court with “such other jurisdiction as may be provided by law.”¹⁶ The court found that under the authority of the Arizona Constitution, the legislature has the authority to expand the court’s original jurisdiction “as long as doing so does not otherwise violate the constitution” and that the legislature did precisely that by enacting § 41-194.01.¹⁷
2. **Judicial Review.** The court also found that the law did not unconstitutionally infringe on judicial power because the AG would merely be investigating and making determinations on whether the AG believes an ordinance violates state

¹⁰ 942 P.2d 428, 435 (Ariz. 1997).

¹¹ *Brnovich*, 399 P.3d at 668.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 669.

¹⁵ *Id.*

¹⁶ ARIZ. CONST. art. 6, § 5(6).

¹⁷ *Brnovich*, 399 P.3d at 670.

law or the Arizona Constitution, not making binding determinations.¹⁸ Furthermore, judicial review is available, so the Court must decide, or retains the discretion to decide, the issue.¹⁹

3. **Arizona Supreme Court Rule Making Authority.** Lastly, the court found that § 41-194(B)(2) does not violate the supreme court's rule making authority concerning procedural matters because since the Arizona Constitution authorizes the legislature to expand the court's original jurisdiction, "it arguably does not matter whether . . . [the] grant of such jurisdiction is 'procedural' or 'substantive.'"

- **Validity of Tucson Code § 2-142:**

1. **Text of the Ordinance and the state law.** The court first looked to the text of the Ordinance and the conflicting Arizona law, A.R.S. § 13-3108(F), and concluded that the "Tucson Code unquestionably conflicts with Arizona law on this subject."²⁰

2. **Home Rule Charter Provision.** The Court next looked to the "home rule charter" provision in the Arizona Constitution²¹ which allows cities with populations of more than 3,500 to frame a charter consistent with the Constitution and laws of the state. The court also looked to the charter provision statute which allows a charter to prevail over any conflicting law related to charter cities that was in force when the charter was adopted, but, the charter "shall . . . not conflict with . . . general laws of the state not relating to cities."²² The court articulated that consistent with the home charter provision and the "state's well-established jurisprudence, whether the City's Code controls over the conflicting state laws essentially hinges 'on whether the subject matter is characterized as of statewide or purely local interest.'"²³ The court analyzed under the *Strode* rule that based on the state's broad police powers, the state's statutes regarding firearms and forfeited property, and the state's interests in regulating the handling of such property, that the subject matter in question was of statewide interest and concern.²⁴ Therefore, the Ordinance could not coexist with the conflicting state statutes.

3. **Balancing Test.** The court concluded by rejecting a balancing test proposed by Tucson that would allow courts to balance the state and municipal interests to determine if the state interest "is sufficiently concrete and identifiable to

¹⁸ *Id.* at 669.

¹⁹ *Id.*

²⁰ *Id.*

²¹ ARIZ. CONST. art. 13, § 2.

²² ARIZ. REV. STAT. § 9-284(B).

²³ *Brnovich*, 399 P.3d at 674 (citing *Strode v. Sullivan*, 273 P.2d 48, 52 (Ariz. 1951)).

²⁴ *Id.* at 676.

outweigh the local interest . . . ”²⁵ The court found that such a balancing test would not aid the courts in determining if an interest is a purely state or local concern.²⁶

Concurrence (Bolick): Justice Bolick took a different position on the home rule charter provision. Justice Bolick concluded that this issue could be resolved by considering the text of article 13, section 2 of the Arizona Constitution. This section states, in relevant part, that an eligible city “may frame a charter for its own government consistent with, and subject to, the Constitution and laws of the state” and that the charter shall “supersede any charter then existing . . . and all ordinances inconsistent with said new charter.” Justice Bolick argues that the clear language of the Constitution resolves the issue and thus it is not necessary to address the home rule charter statute.

Justice Bolick further urged overruling the *Strode* rule because it rewrote the constitutional provision at issue when it had no power to do so.²⁷

Concurrence (Gould): Justice Gould disagreed with the majority’s decision not to issue a ruling on the bond requirement in § 41-194.01(B)(2), instead concluding that “the bond provision is unenforceable because it is incomplete and unintelligible.”²⁸

²⁵ *Id.* at 678.

²⁶ *Id.* at 679.

²⁷ *Id.* at 681.

²⁸ *Id.* at 683.