STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

INVESTIGATIVE REPORT By MARK BRNOVICH ATTORNEY GENERAL April 10, 2019	No. 19-001 Re: City of Tempe Ordinance O2017.51 (Campaign Finance Disclosures)

To: The Honorable Doug Ducey, Governor of Arizona
The Honorable Karen Fann, President of the Arizona Senate
The Honorable Russell Bowers, Speaker of the Arizona House of Representatives
The Honorable Vince Leach, Requesting Member of the Arizona Legislature
The Honorable Katie Hobbs, Secretary of State of Arizona

I. Summary

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-194.01, the Attorney General's Office ("Office") has investigated City of Tempe ("City") Ordinance O2017.51 ("Ordinance"), which requires any person or entity that spends more than $1,000 to influence the outcome of a city election to disclose the identity of certain contributors. Based on a review of relevant authorities and materials during the limited 30-day period prescribed in § 41-194.01(B), the Attorney General has determined that the Ordinance **does not violate** state law because its provisions should be read in harmony with the controlling state law on nonprofit disclosures.

II. Background

A. The Office's Investigation

On March 11, 2019, the Office received a request for legal review of the Ordinance pursuant to A.R.S. § 41-194.01 from Senator Vince Leach ("Request"). The Office asked the City to provide a voluntary response. The City fully and openly cooperated with the Office's review, including by providing a voluntary response, along with supporting materials. In performing the required investigation during the limited 30-day period, the Office reviewed relevant materials and authorities. 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 A.R.S. § 41-194.01.

B. Relevant State and City Laws

On November 9, 2017, the Tempe City Council adopted a resolution to place on the ballot at a special City election the question of whether to amend the City's charter to require the City Council to adopt a system of disclosure requirements regarding major expenditures made to influence City elections ("Amendment"). The full text of the Amendment that went before the City's voters was as follows: "There shall be a requirement for disclosure of original and intermediary sources of major contributions used to influence city elections, in order to foster transparency and maintain the public trust in city elections. The City Council shall adopt by ordinance all regulations for the establishment of and compliance with the disclosure requirements. This requirement shall be separate from existing campaign finance reporting requirements." Tempe Charter, Article VII, Section 7.01(h).

Before the vote, on November 30, 2017, the Council approved the Ordinance, also known as the "Keep Dark Money Out of Local Tempe Elections Ordinance." The Ordinance was conditioned on the City's voters approving the Amendment and was not itself on the ballot. On March 13, 2018, a majority of voting citizens approved the Amendment. On May 16, 2018, Governor Ducey approved the Amendment pursuant to Article 13, Section 2 of the Arizona Constitution. Accordingly, the Amendment and the Ordinance went into effect on that date. *See* Ordinance, Section 3.

The Ordinance establishes certain contribution disclosure requirements on any person or entity that spends money to influence a City election. Specifically, the disclosure requirement applies when the following three elements are present: 1) a person or entity spends more than $1,000 during an election cycle to influence the outcome of that election and 2) a single source has contributed more than $1,000 to the spending person or entity during the election cycle that 3) is attributable to the expenditure. *Id.*, Section 1 at § 13-128(a).[1] The Ordinance requires disclosure of the name, address, and employer of each "original source," *id.* at § 13-128(b), which in relevant part is defined as "a person, association of persons, or entity, other than a registered candidate committee, regardless of legal form, who makes a major contribution from his, her or its own resources," and any intermediary source, defined as a non-original source "who receives and transfers funds from one or more original sources or from other intermediaries that are attributed to an expenditure, and the amounts and dates of each contribution." *Id.* at §13-126.

[1] Contributions are attributable to an expenditure either when "earmarked and used for [the] expenditure" or can be "credibly traced" to the expenditure using generally accepted accounting principles.

The Ordinance applies broadly; it specifically excludes only registered candidate committees (which are regulated by state law). *Id.* at § 13-128(a).[2] When the disclosure requirement applies, persons and entities must exercise "best efforts" to identify the sources of all relevant contributions. *Id.* at § 13-128(b)(4). A person or entity will not be deemed to have exercised "best efforts" unless it has made at least one written request to ascertain the identity of the source of the contribution. *Id.*

Pursuant to the Ordinance, disclosures must be made to the City Clerk in electronic form within 48 hours of a qualifying expenditure. *Id.* at § 13-128(c)(1), (2). Supplemental disclosures are required within 48 hours for each additional $1,000 spent. *Id.* at (c)(2). The City Clerk must post the disclosures online within two working days of receipt. *Id.* at § 13-128(c)(4). The City Manager must investigate alleged violations of the Ordinance and provide notice to potential violators if a violation may have occurred. *Id.* at § 13-128(c)(5)(c). Violators can be fined up to three times the amount spent in violation. *Id.*

On April 5, 2018, Governor Ducey signed into law H.B. 2153, which the Legislature enacted to amend A.R.S. § 16-905 by adding what is now paragraph (E) ("the State Law").[3] In full, the State Law provides:

> Except as prescribed in subsections B and C of this section and section 16-938, a filing officer, enforcement officer or other officer of a city, town, county or other political subdivision of this state may not require an entity that claims tax exempt status under section 501(a) of the internal revenue code and that remains in good standing with the internal revenue service to do any of the following:

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[2] An organization is not required to disclose the identities of persons contributing less than $1,000 in an election cycle or members that pay membership dues and fees according to a schedule published by the organization at least two years prior. *Id.* at § 13-128(b)(3).

[3] State laws are not effective until 90 days after the end of the session in which the law was passed. Ariz. Const. art. IV, Pt. 1 § 1(3). Thus, the State Law became effective on August 3, 2018, while the charter Amendment and Ordinance became effective on May 16, 2018 after the Governor's approval.

1. Register or file as a political action committee.

2. Report or otherwise disclose personally identifying information relating to individuals who have made contributions to that entity.

3. Disclose its schedule B, form 990.

4. Submit to an audit or subpoena or produce evidence regarding a potential campaign finance violation.

A. R. S. § 16-905(E). By its plain language, the State Law prohibits a municipality from requiring entities claiming federal tax-exempt status ("Non-Profits") to report or otherwise disclose the personally identifying information of contributors.

The Request asserts that the Ordinance violates the State Law as well as the speech rights recognized under both the United States and Arizona constitutions.

III. Analysis

As an initial matter, the City challenges the Office's jurisdiction over this request, arguing that A.R.S. § 41-194.01 is not implicated because the Ordinance stems from a voter-approved charter amendment. The Legislature mandated through A.R.S. § 41-194.01(A) that upon a request from a member of the Legislature, the Office "shall investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town" alleged to violate state law or the Arizona Constitution. Here, the Office need not analyze how voter-approved charter amendments may affect the scope of that statutory language because the Request triggered only the requirement for the Office to review the Ordinance, which plainly was an ordinance adopted by the City's governing body.

The Ordinance implicates a number of legal issues arguably related to the Office's analysis of the underlying question. Those issues include whether and how the Ordinance implicates a matter of purely local concern, the relationship between exercises of municipal and

state police powers, and the many constitutional considerations relevant to questions about political contribution disclosures—including the U.S. and Arizona constitutions' speech protections, the petition and assembly clause (Article 2, Section 5), the privacy clause (Article 2, Section 8), the method of voting clause (Article 7, Section 1), the registration clause (Article 7, Section 12), and the campaign expenditures clause (Article 7, Section 16).

While those questions may be highly pertinent to a potential future enforcement action or a specific as-applied challenge, they need not be considered here—even assuming, *arguendo*, that each would be resolved against the City, the Ordinance does not violate the State Law under A.R.S. § 41-194.01 because it does not facially conflict with the State Law. Instead, the two provisions can be harmonized through principles well-established in Arizona law. *See*, *e.g.*, *UNUM Life Ins. Co of America v. Craig*, 200 Ariz. 327, 329 ¶11 (2001) ("When two statutes appear to conflict, we will attempt to harmonize their language to give effect to each."); *State v. Jones*, 235 Ariz. 501, 502 ¶6 (2014) (same while emphasizing courts will adopt a harmonizing construction "whenever possible"). In enacting the State Law, the Legislature exercised its power to carve out exceptions to any generally applicable disclosure requirements that the state or a political subdivision may decide to impose. And no evidence demonstrates that the Ordinance was intended to conflict with state law—indeed, it was adopted and took effect before the State Law at issue here became effective. Both the State and charter cities may legislate in the same field. *See 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; but where 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."). In addition, the Ordinance is a general and older provision while the State Law is specific and more recent. Given these factors, it is appropriate to conclude that the more recent law controls as it relates to its specific requirements. *See Lemons v. Superior Court of Gila Cty.*, 141 Ariz. 502, 505 (1984) ("As a general proposition, it is true that the more recent, specific statute governs over the older, more general statute."). Here, that is the State Law, in which the Legislature set specific rules concerning Non-Profits.

Despite the Ordinance's broad language, concluding that the State Law and Ordinance may be harmonized is appropriate for at least four reasons. First, the State Law did not exist when the Ordinance was adopted. Second, the Ordinance's language makes no attempt to assert that it controls despite any laws that may be to the contrary. Third, the Ordinance does not mention Non-Profits specifically. Finally, and perhaps most importantly, the City's voters did not consider whether to include Non-Profits in the Ordinance; rather, they considered whether the City Council should create a system to provide for major contribution disclosures regarding City elections. Thus, the City Council was afforded wide discretion to implement such a system, and any future conflicts that may arise between what the City Council adopts and state law will be due to the City Council's official action, not because the City charter mandates a conflict with state law.

IV. Conclusion

The Office concludes under A.R.S. § 41-194.01(B) that the Ordinance on its face, as currently written, **does not violate** state law. The Ordinance and the State Law do not conflict because they can be harmonized through principles well-established in Arizona law, with the Legislature's later-in-time and more specific rules in the State Law controlling as to Non-Profits

and the Ordinance controlling otherwise. Should the City disregard the harmonization set forth herein and seek to enforce the Ordinance against Non-Profits, doing so would create an as-applied conflict, which is beyond this Report's scope and the resolution of which would necessitate evaluating the substantial questions previously noted (*e.g.* purely-local-concern and freedom-of-speech considerations).

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