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To: Hon. Chair and Members, Pima County Board of Supervisors

From: Andrew L. Flagg, Chief Civil Deputy County Attorney

Date: July 25, 2017

Subject: Proposed Ordinance regarding conversion therapy

On August 1, 2017, the Board is scheduled to consider an Ordinance that would ban the commercial practice of so-called “conversion therapy” or “sexual orientation change efforts” (SOCE) on minors. This type of therapy—which seeks to change the sexual orientation of the recipient—is widely condemned by mainstream medical associations and associations of psychotherapists and counselors, but it is practiced by a small number of practitioners. The proposed Ordinance would ban this type of therapy for recipients who are minors, if a fee is paid for the therapy. It provides that the practice of SOCE on minors for a fee is a civil infraction with a maximum penalty of \$2,500 (which is the statutory maximum for County ordinances). This Ordinance was proposed by Supervisor Elías and drafted by me in consultation with his staff.

While I believe this Ordinance is defensible—indeed, bans have been enacted elsewhere and have thus far withstood legal challenge—there are some legal risks associated with its adoption, which I highlight in this memorandum.

1. While the County likely has authority to adopt this Ordinance, a challenger could contend that only the State may regulate therapists. The County has clear statutory authority to “[a]dopt provisions necessary to preserve the health of the county,” A.R.S. § 11-251(17),¹ and the findings

¹See *Marsoner v. Pima Cty.*, 166 Ariz. 486, 489 (1991) (“It is difficult to imagine a more express direction from the legislature to the county boards of supervisors that they may adopt rules and regulations to protect and preserve the public health . . .”).

recited in the draft Ordinance should be more than sufficient to establish that regulation of SOCE is a public-health issue. But counties may not adopt ordinances that conflict with the State law, A.R.S. § 11-251.05(A)(1), and a challenger could argue that the State's statutes regulating psychologists (A.R.S. Title 32, Chapter 19.1) and behavioral-health professionals (A.R.S. Title 32, Chapter 33) effectively preempt the County's authority to regulate in this area. While this is an open question in Arizona, as I am unaware of any instance in which a county has attempted to regulate the practices of behavioral-health professionals, the County would have a strong argument that there is no conflict because the State does not actually regulate the practice of SOCE one way or another. The County is not prohibited from overlapping the State in its regulation if the regulations can coexist.² Here, I would argue the overlap is permissible.

2. The Ordinance is drafted to have a strong chance of withstanding a religion-based challenge, but none has been challenged under Arizona's strict freedom-of-religion statute. While SOCE bans have withstood religion-based challenges well, Arizona has a strict statute, A.R.S. § 41-1493.01, that applies the highest level of scrutiny to laws that "substantially burden" religious exercise.³ A burden on religious exercise is not "substantial" unless it puts "substantial pressure on an adherent to modify his behavior to violate his beliefs."⁴ The Ordinance is limited to the practice of SOCE on minors *and* for a fee in part to avoid any problem under the Arizona statute. Because the Ordinance would leave open the possibility of practicing SOCE, even on minors, without receiving a fee, it would be difficult to successfully argue that it imposes a substantial burden. If, however, a challenger were to be able to show a substantial burden, the challenger would likely prevail because the law would be subjected to the highest level of scrutiny, which few laws survive.

3. While similar laws have been subjected to speech-based or parental-rights-based challenges, they have withstood those challenges well. Challengers to SOCE bans elsewhere have claimed that SOCE is constitutionally protected speech or that the bans infringe on parental rights. These challenges have fared poorly, and the Ordinance is similarly drafted to stand up to these challenges. First, as to speech, the Ordinance regulates only the practice of SOCE, and specifically allows any other communication that is not itself an effort to change a minor's sexual orientation. It is based on a very similar provision in California that the Ninth Circuit recently upheld.⁵ And, second, as to parental rights, courts have routinely held that children's health can be regulated in ways that may conflict with parental choices (e.g., mandatory vaccination⁶ or provision of other medical treatment⁷). The

²*City of Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart*, 197 Ariz. 600 ¶ 6 (App. 2000).

³Thus, while the Ninth Circuit, for example, upheld California's SOCE ban against a federal constitutional challenge, *Welch v. Brown*, 834 F.3d 1041, 1046 (9th Cir. 2016), the court was applying a more lenient standard than the Arizona statutory standard.

⁴*Shakur v. Shriro*, 514 F.3d 878, 888 (9th Cir. 2008) (internal quotation marks and citations omitted).

⁵*Pickup v. Brown*, 740 F.2d 1208, 1229-32 (9th Cir. 2014).

⁶*Prince v. Massachusetts*, 321 U.S. 158, 166 (1968).

⁷*Jehovah's Witnesses v. King Cty. Hosp.*, 278 F. Supp. 488, 504 (W.D. Wash. 1967)).

Ninth Circuit similarly held that the California ban on SOCE did not infringe on parents' rights.⁸

4. *Any conflict with any Arizona statute or Arizona Constitution could lead to investigation by the Attorney General and a potential loss of state-shared revenues.* Finally, the Board must also be aware of A.R.S. § 41-194.01, the provision enacted in 2016 and providing that the Attorney General must, on complaint by at least one member of the Legislature, investigate whether an ordinance is in conflict with state law.⁹ If the Attorney General finds that it is, the County risks the loss of state shared revenues. The statute, however, allows the County 30 days to remedy any violation found in an investigation.

5. *Conclusion.* A challenger could raise several arguments in opposing the County's authority to regulate SOCE. This Ordinance has been drafted to give it a strong chance of withstanding those challenges. Thus, I believe it is defensible, but there are legal risks associated with its adoption.

cc: C.H. Huckelberry, County Administrator

⁸*Pickup*, 740 F.3d at 1235.

⁹The constitutionality of § 41-194.01 has been challenged in litigation between the State and City of Tucson regarding the City's practice of destroying seized firearms. The Arizona Supreme Court has not yet decided the issue.