MEMORANDUM

DATE: January 16, 2019

TO: Honorable Mayor and Council

FROM: Mike Rankin
City Attorney
x4221

SUBJECT: Initiative Petition 2018-I001, "Tucson Families Free and Together"

I'm providing this Memorandum to share with you my evaluation of the provisions of the described initiative petition ("Petition"), and the potential legal implications that would result if the Petition makes it onto the ballot in November and is approved by the City's voters.

First, I'm mindful of the provisions of A.R.S. Section 9-500.14, relating to the prohibitions against the use of City resources to influence the outcome of an election. This Memorandum is provided to the Mayor and Council and other City officers as a legal opinion pursuant to Chapter X, Section 4 of the Charter for the purpose of evaluating the impact of the proposed ballot measure on the City, and to provide impartial and factual information for use in response to questions about the Petition and its various provisions. This Memorandum is not offered for the purpose of attempting to persuade any individual elector to support or oppose this measure, or otherwise to influence the outcome of an election.

Also, because this Memorandum does not provide legal advice relating to a proposed or contemplated action by the Mayor and Council or by any City officer, but instead documents my opinions regarding the legal implications to the City connected with legislation proposed by third parties, I am providing those opinions by a Memorandum that can be shared with other persons and with the public and is not subject to the attorney-client privilege.

Throughout this Memorandum, any reference to A.R.S. Section 11-1051/SB 1070 means the provisions of Section 2(B) of that law that have survived legal challenges[1] and that require Arizona law enforcement officers to determine or attempt to determine a person's immigration status in certain circumstances, namely: (1) when the officer lawfully stops or detains a person and develops reasonable suspicion that the person is unlawfully present in the U.S.; and/or (2) when the officer arrests a person and prior to release.

[1] *See Rodriguez v. United States*, 135 S. Ct. 1609 (2015); *Arizona v. United States*, 132 S. Ct. 2492 (2012); and *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012).

I. If approved by voters, the Petition cannot later be amended or repealed except by subsequent election.

The Petition is an initiative measure that would create a new Article X to Chapter 17 of the Tucson Code. As an initiative, if it is approved by the voters at a City election, its provisions could not be later repealed or amended except by a subsequent vote of the City's electors. *See Charter, Ch. XIX, Sec. 9.*[2] This means that the City's governing body, the Mayor and Council, could not amend or revise the Code provisions enacted through the Petition by adopting an ordinance, but instead would need to submit any amendment or repeal to the City's voters at a subsequent general election.

II. Summary of the terms of the Petition

Section 1. Declaration of Policy –

The Petition begins with a Section 1, Declaration of Policy, that states that the policy of the City is to be a "sanctuary" for all persons, and to uphold the "unalienable rights of life, liberty and sanctuary." The term "sanctuary" is not defined within the Petition itself.

Section 2. Amendment to Tucson Code Chapter 17 –

The balance of the Petition would create a new Article X of Chapter 17 of the Tucson Code. In order, those provisions include:

Sec. 17-81. Definitions

This section provides the definitions of terms used in the measure, including "Arrest," "Detention," and more. Of particular note here is that it includes a definition of "Federal Officer" that captures all sworn and certified federal law enforcement officers and federal peace officers employed by an agency of the United States. This would include officers of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Drug Enforcement Administration (DEA), FBI, U.S. Marshals, U.S. Secret Service, and any other federal enforcement agency – not just U.S. Immigration and Customs Enforcement (ICE) or Border Patrol.

Sec. 17-82. Detentions and lawful stops

This section imposes certain prohibitions and certain obligations upon Tucson Police officers in the context of stops and detentions. In addition to provisions that align with existing TPD

[2] ". . . an ordinance proposed by petition, and adopted by a vote of the people, cannot be repealed or amended except by a vote of the people."

General Orders (*see GO 2300, Immigration*), this Section includes prohibitions and obligations that go beyond the GOs and/or existing state law, such as:

c) requires use of an electronic testing device for any stop/detention for a window tint violation;

d) prohibits a TPD officer from participating in *any law enforcement activity*, the purpose of which is to determine a person's immigration status. I believe this is a direct conflict with A.R.S. Sec. 11-1051(b)/SB 1070, which requires that an officer, as part of his/her law enforcement activities, make an attempt to determine immigration status in certain situations;

f) requires a TPD officer to advise a detainee when he or she is no longer subject to detention.

Sec. 17-83. Officers' determination of immigration status.

This section prohibits TPD officers from making certain types of inquiries of people who have been detained for criminal activity. These prohibitions include:

b) an officer cannot inquire how a detainee or arrestee entered the United States, unless necessary to establish probable cause of a state or local crime;

c) an officer cannot, under any circumstances, ask a detainee or arrestee how many times he or she has entered or traveled to the United States;

g) an officer cannot, under any circumstances, seek to determine the immigration status of any person, including arrestees and detainees, in any of the following locations:

1) a school;

2) a hospital, medical clinic, or nursing home;

3) a church or place of worship;

4) a state or local court building.

h) and i) these subsections substantially limit the factors that an officer can consider when developing reasonable suspicion that a person is unlawfully present, and expressly prohibit the consideration of factors currently permitted under the TPD GO and applicable case law. Under these limitations, even in situations where a detainee is unable to provide a permanent or local address, is with other persons who are unlawfully present, cannot speak English, and admits to being unlawfully present in the U.S., the officer would not have sufficient reasonable suspicion to believe the detainee is unlawfully present. I believe these limitations

conflict with the obligations imposed under A.R.S. Sec. 11-1051(b)/SB 1070, and are contrary to the concept of reasonable suspicion under legal precedent;

j) this subsection declares, as a matter of policy, that determining a detainee's immigration status during a traffic stop is "not practicable." The purpose of this provision is to exempt such detentions from the status inquiries that are otherwise required under A.R.S. Sec. 11-1051(b)/SB 1070. This subsection is likely not a defensible restriction on the obligations under the state law, since the question of whether an action is "practicable" is a question of fact that depends on factors like call load, available personnel on scene, the officers' other duties, etc. and is not a matter of policy;

k) this provision attempts to protect detainees of certain crimes from any attempt to determine their immigration status by declaring it to be City policy that any such inquiry may hinder or obstruct the investigation, thus exempting them from the requirements of A.R.S. Sec. 11-1051(b)/SB 1070. The crimes in question include: sexual exploitation of a minor, domestic violence, aggravated domestic violence, sexual abuse, sexual conduct with a minor, sexual assault, child molestation, child sexual abuse, and sexual misconduct by a health professional.

Without commenting on the wisdom of a policy that would give a higher level of protection against immigration inquiries to persons detained for sex crimes against minors, I believe that this provision conflicts with the obligations imposed under A.R.S. Sec. 11-1051(b)/SB 1070 in a manner that cannot reasonably be explained or defended.

Sec. 17-84. Officers' determination of immigration status; procedures

This section establishes prohibitions and obligations, including documentation requirements, of TPD officers relating to the procedures for immigration status determinations. Subsection (e) requires TPD officers to provide a new warning, similar to a *Miranda* warning, advising detainees and arrestees that they have no obligation to speak with an officer about immigration status, and that any statements they make could affect their ability to stay in the United States. This warning, and the associated requirement that the officer secure a written waiver provided in both Spanish and English, is not currently required under any applicable case law.

Sec. 17-85. Collaboration with federal law enforcement.

This section prohibits any city employee or officer from providing training to federal officers that would confer Arizona peace officer certification to that federal officer. Additionally, it prohibits TPD and any of its officers from participating in any joint law enforcement operations "or similar endeavor" with a federal officer or agency unless the relevant federal

agency (which could be FBI, DEA, ATF, US Marshall, etc.) first signs an agreement (a "memorandum of understanding") under which that agency agrees to certain restrictions on its arrest authority within City limits.

As a practical matter, it is extremely unlikely that any of these federal agencies would consent to such an agreement. As a result, the effect of this provision would be that TPD could not collaborate with any of these federal law enforcement agencies in any joint law enforcement operation "or similar endeavor," regardless of the nature of that operation. Currently, TPD (like any other major municipal law enforcement department) routinely works with federal law enforcement agencies in investigations and enforcement activities that promote and protect public health and safety. Examples include joint and collaborative law enforcement relating to illegal drug and firearms trafficking. This section would end those joint operations.

Sec. 17-86. City employees.

This section establishes certain prohibitions that apply to City employees other than police officers.

Sec. 17-87. Certifications for crime victims.

This provision sets out a fixed time frame under which applications for crime victim certification (U-Visa requests) must be processed.

Sec. 17-88. Cause of action.

This section attempts to establish a private, civil cause of action (i.e., the ability of a private person to bring a lawsuit) against a City employee, official or agency in order to enforce the many provisions of this new Article of the Code. As written, the section provides that these lawsuits would be brought and heard in Tucson City Court. It sets out penalties, and authorizes the City Court to award attorney fees and costs to a successful plaintiff. Individual employees or officers would be indemnified by the City, meaning that the City would pay the sanctions, costs and fees.

I believe that this section is legally void in its entirety. The jurisdiction of the various courts in Arizona is established by the Arizona Constitution and statute, and not by local codes.[3] As a limited jurisdiction court, the Tucson City Court has no jurisdiction under either the Constitution or statute to hear and adjudicate private civil causes of action.

[3] See A.R.S. Const. Art. VI; A.R.S. Secs. 22-402, 22-406. Civil actions in municipal court for the recovery of a penalty provided by City ordinance can only be brought by the City.

Because this Section of the Petition includes the only provisions relating to the classification of violations of its various requirements, if it is in fact void, it means that the code created by the Petition would be silent as to what type of penalty would attach to a violation. By operation of existing provisions of the City Charter (Chapter XXV, Section 5) and Tucson Code (Tucson Code Sec. 1-8), where any Code provision declares an act to be prohibited or unlawful but fails to specify a penalty, that offense is treated and punished as a class 1 misdemeanor, with fines up to $2,500, jail time up to six months, and probation up to 36 months.

Sec. 17-89. Severability and Construction –

This provision provides for the severability of any provisions found to be invalid by a court; and states that this Code shall not limit an officer's ability to establish reasonable suspicion or probable cause of a state or local crime or traffic violation.

III. Legal and Operational Implications of the Petition

It is my opinion that several of the provisions included in the Petition are in conflict with Arizona law. Those provisions include:

Sec. 17-82(d), which prohibits a TPD officer from participating in "any law enforcement activity" that has the purpose of determining a person's immigration status. This provision conflicts with the provisions of A.R.S. Sec. 11-1051(b) that mandate an attempt to determine immigration status as part of law enforcement activity under certain conditions;

Sec. 17-83(g), which prohibits any immigration status inquiry in certain locations (e.g. hospital) even where such inquiry might otherwise be required by A.R.S. Sec. 11-1051(b)/SB 1070;

Sec. 17-83(h, i), which together have the effect of limiting a reasonable attempt to determine immigration status by prohibiting the consideration of factors that are otherwise legally permissible;

Sec. 17-83(k), which attempts to provide special protection against immigration status determinations for persons detained for certain specified crimes, such as child molestation or sexual abuse;

Sec. 17-88, which attempts to create a private civil cause of action in a court (Tucson City Court) that has no jurisdiction to adjudicate that action.

The implications of these conflicts, or other possible conflicts with Arizona law, include the specter of an "SB 1487" complaint under A.R.S. Sec. 41-194.01 *et seq*. Under the process established under SB 1487/A.R.S. Sec. 41-194.01, if the Attorney General determines (following a complaint by a single Legislator) that a City ordinance violates Arizona law, the City faces the suspension of state shared revenues if the City refuses to repeal or otherwise resolve the conflict.[4] In this instance, because the measure is an initiative, the Mayor and Council would be powerless to amend or repeal its provisions without submitting a new measure to the electors for approval.

Even in the absence of a SB 1487 complaint, the Petition's provisions that conflict with Arizona law as described in this Memorandum expose the City to actions seeking declaratory judgment. In the alternative, the Petition could generate additional legislation by the Arizona Legislature relating to immigration and local law enforcement.

Additionally, these conflicts, together with other provisions of the Petition that relate to the sharing of information with federal law enforcement [see Sec. 17-84(a), Sec. 17-86(b)], combined with the Petition's declaration of policy stating that the City intends to be a "sanctuary," could jeopardize the City's eligibility for certain federal grants. While the current federal administration's repeated efforts to disqualify "sanctuary" cities from eligibility for federal funding have thus far been held off in litigation that has produced court-ordered nationwide stays, and even decisions finding 8 U.S.C. Sec. 1373 [relating to local governments' obligations to share immigration status information with federal immigration authorities] to be unconstitutional, this litigation remains ongoing.

The implications of the Petition go beyond the legal ramifications described above. As noted earlier, the Petition includes provisions that significantly limit TPD's law enforcement activities. In particular, Sec. 17-85 would prevent collaboration with federal law enforcement agencies in a wide range of joint operations. Other sections (e.g. Sec. 17-83) prohibit officers from making certain inquiries that could be important to criminal investigations such as drug trafficking. And some sections [e.g. Sec. 17-83(k)] prohibit officers from seeking information that might help protect victims of crime.

Finally, it should be noted that the Tucson Police Department already has developed immigration policies that are incorporated within the Chief's General Orders (*see GO 2300, Immigration Policy*]. These policies were carefully developed at the direction of the Mayor

[4] An argument can be made that the provisions of SB 1487 do not apply to ordinances adopted by initiative measure, because they are ordinances approved by general election, and not by the governing body of the City, the Mayor and Council. See A.R.S. Section 41-194.01(A). However, adoption and implementation of the Petition could only occur with certain actions taken by the Mayor and Council, including the approval of an ordinance or resolution calling the election and putting the Petition in front of the electors.

and Council and with the guidance of the City Attorney and Chief of Police. GO 2300 provides guidance and direction for all TPD officers relating to immigration enforcement activities, and establishes rules and procedures that protect the civil rights of all persons while maintaining consistency with federal and state laws. The TPD policies are presently in a very strong legal position. In 2017, the Arizona Attorney General issued an Investigative Report in response to a SB 1487 complaint filed by Senator Kavanagh concerning the Operations Orders of the Phoenix Police Department relating to the requirements of A.R.S. Sec. 11-1051(b)/SB 1070.[5] As noted in the AG Report, the Phoenix Operations Orders in question were based largely upon TPD GO 2300 (*see AG Report, p. 3).* In the Report, the Attorney General concluded that the Operations Order did not violate Arizona law and did not expose the City of Phoenix to the sanctions in SB 1487/A.R.S. Sec. 41-194.01. *Id., p. 7.* In coming to that conclusion, the Attorney General noted that the Order was not created for the purpose of designating Phoenix as a "sanctuary" city. *Id.*, at pp. 4, 7.

IV. Reminder on the Prohibitions under A.R.S. Sec. 9-500.14

Under A.R.S. Sec. 9-500.14, no City resources can be expended or used to "influence the outcome of an election." With respect to initiative measures, this prohibition begins even before an initiative qualifies for the ballot, and commences when the application for a serial number for the ballot initiative is filed. *See Ariz.Op.Atty.Gen. No. I15-002 (2015).*

What this means is that while individual elected officials and other City officials can take a position on an initiative measure in their individual capacity and can express that position, no City resources can be used to advocate for or against the measure. City "resources" is a broad term, and includes facilities, telecommunications, computer equipment, web pages, and more.

If you have any questions about what is and is not permissible under the applicable state laws, please call me.

cc: Michael J. Ortega, City Manager
Chief Chris Magnus, Tucson Police Department
Roger Randolph, City Clerk

[5] Investigative Report No. 17-002, Re: City of Phoenix Police Operations Order 4.48, dated October 16, 2017 (the "AG Report").