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April 29, 2013

Attorney General Tom Horne
Office of the Attorney General
1275 West Washington Street
Phoenix, AZ 85007-2926

Re: City of Bisbee Family Relationships Ordinance

Dear Attorney General Horne:

I write on behalf of Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) which, has been consulting with elected leadership of the City of Bisbee, Arizona and Bisbee City Attorney John MacKinnon, concerning the City’s plans to provide new legal protections to adult couples who formalize their family relationships pursuant to municipal law. This letter is intended to address concerns presented in your letter of April 17, 2013 to members of the Arizona City Attorneys Association, including your stated view that Bisbee is attempting “to change seven separate state statutes.” As stated explicitly in the text of Bisbee’s ordinance, the City in fact has no such intention.

This letter also addresses matters discussed in the April 1, 2013 letter of Josh Kredit of the Center for Arizona Policy to City Attorney MacKinnon. Among Mr. Kredit’s stated concerns was that “Bisbee ... will create marriage-like relationships, and also provide the partners in those relationships the same benefits and responsibilities that are extended to marital partners under Arizona law.” This also is a misperception that is puzzling in light of the plain text of the Bisbee ordinance itself.

Due to the confusion about Bisbee’s intentions reflected in these two letters and in some media accounts suggesting the possibility of litigation against Bisbee, Lambda Legal undertook to prepare a legal analysis explaining why Bisbee is acting well within its municipal authority as it takes steps to offer certain legal protections and basic respect to unmarried couples and their families. Lambda Legal did so as the oldest and largest nonprofit legal organization working nationally through impact litigation, policy advocacy, and public education to achieve full civil rights for lesbian, gay, bisexual, and transgender (“LGBT”) people and those living with HIV. We addressed related issues in Arizona years ago, in 1997-1998, when representing Pima County employees in *Lawall v. Pima County*, Pima County Superior Court Case No. No. 320550, which confirmed municipal authority under Arizona law to offer health insurance coverage for the domestic partners of local government employees. We currently represent Arizona state

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employees with a same-sex life partner in *Diaz v. Brewer*, which seeks to retain health insurance coverage for domestic partners as part of equal compensation. In *Diaz*, the Ninth Circuit has upheld the district court's preliminary injunction ordering the State to maintain this insurance during the litigation. 656 F.3d 1008 (9th Cir. 2011). As you likely know, the case now is back in the district court and it is expected that proceedings will resume later this summer after the U.S. Supreme Court rules in the two pending cases concerning marriage and same-sex couples.

In this context of litigation and broad national discussion about the needs of same-sex couples, Members of the City Council of Bisbee, like many Arizonans, have become concerned about the effects of Arizona law, which currently discriminates against same-sex couples by denying them the freedom to marry. This discrimination leaves many LGBT residents, including LGBT residents of the City of Bisbee, less able to protect their family members than other residents of the State who have that opportunity.

Accordingly, in March of this year, the City Council of Bisbee determined to offer innovative legal protections to these and other non-marital families. Their ordinance will allow adult couples to register their family partnerships with the City and thereby receive public recognition and certain legal rights that are within City authority to provide. In taking this step, Bisbee joins the scores of cities nationwide—including Phoenix and Tucson—that have established a method to recognize and protect the committed family relationships of adult couples, regardless of their gender and sexual orientation.¹ In the weeks that followed, other Arizona cities have voiced their support for new protections for family relationships under municipal law.²

Since the Bisbee City Council initially took action, outside voices have suggested, based on strained and unsupportable interpretations of the ordinance, that Bisbee lacks the power to act. Lambda Legal has been working with Bisbee leadership to eliminate any confusion regarding the ordinance, and to put to rest suggestions that the city is acting beyond its scope.³ The Bisbee City Council will soon be considering some amendments that should eliminate any ambiguity about its intent.

¹ In its 2012 “Municipal Equality Index,” the Human Rights Campaign evaluated the laws and policies of 137 cities nationwide, and found that 86 of them had municipal laws addressing these relationships. See Human Rights Campaign, *Municipal Equality Index* (“MEI”) at 19–21, available at <http://www.hrc.mei>.

² See, e.g., “Tempe council to hear legal advice on civil unions,” KVOA News, Apr. 4, 2013, available at http://www.kvoa.com/news/tempe-council-to-hear-legal-advice-on-civil-unions/#_.

³ Some of this confusion may have stemmed from the use of the term “civil union,” which has been associated with provisions establishing recognition or protections at the state level. We understand that revisions of the Bisbee ordinance are under consideration that, among other things, would use a new term to avoid this potential confusion.

Bisbee clearly has the power to recognize the relationships entered into by its own residents in the ways provided in its ordinance. The Arizona Constitution contains a home rule charter provision allowing any city with a population of greater than 3,500 to “frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state.”⁴ Just last year, the Arizona Supreme Court affirmed that “under Arizona’s Constitution, eligible cities may adopt a charter—effectively, a local constitution—for their own government without action by the state legislature.”⁵

When Bisbee passed its ordinance, it expressly recognized the current state constitutional restrictions on marriage. Due to an amendment passed by Arizona voters in 2008, Article 30 of the Arizona Constitution currently provides that only the union of one man and one woman will be “valid and recognized as a marriage” in Arizona.⁶ Two years before passing the ballot proposition that approved Amendment 30, Arizonans rejected a proposition that would have gone further, prohibiting “the state or its political subdivisions” from creating or recognizing other legal arrangements for unmarried persons.⁷

Bisbee is plainly *not* prohibited from recognizing arrangements to respect unmarried couples and to protect them in various respects, just as many other cities in states that do not permit same-sex couples to marry nonetheless have passed municipal ordinances for these purposes.⁸ Bisbee’s ordinance grants rights that the city is fully capable of granting and provides adults with a process for creating contracts and other documents to protect each other as permitted by state law.

The specific rights that will be protected by Bisbee’s ordinance are all within a city’s power to recognize. Under its power as an employer, Bisbee will grant employees who have registered a family partnership the opportunity to designate their partner as a beneficiary for all benefits the city provides.⁹ In the ordinance, Bisbee also properly

⁴ Ariz. Const. Art. 13 § 2.

⁵ *City of Tucson v. State*, 229 Ariz. 172, 174, 273 P.3d 624, 626 (2012).

⁶ Ariz. Const. Art. XXX sec. 1

⁷ See 2006 Ballot Proposition Guide, Arizona Secretary of State, available at http://www.azsos.gov/election/2006/Info/PubPamphlet/Sun_Sounds/english/prop107.htm; *Arizona Together v. Brewer*, 214 Ariz. 118, 149 P.3d 742 (2007) (addressing the failure of Proposition 107 to pass).

⁸ See, e.g., MEI at 19–21 (identifying cities in Florida, Georgia, Missouri, and Texas with similar provisions).

⁹ In *Standhardt v. Superior Court ex rel. County of Maricopa*, in which the Court of Appeals held that the right to marry the person of one’s choice is not a fundamental due process right, the court noted that “[m]any state and city governments have commenced the process of examining and ameliorating perceived inequities imposed on same-sex couples and their families,” noting in

exercises its power to establish and regulate City services and facilities to treat members of family partnerships as family members for purposes of those services and facilities. Nothing in federal or state law prohibits Bisbee from regulating its own municipal services and facilities in this way.

Since 2010, federal law has required that any hospital receiving federal funds must allow visitors designated by the patient, regardless of sexual orientation.¹⁰ Bisbee's ordinance will enable family partners to document that they wish to grant such visitation rights to each other before an emergency arises. Moreover, Bisbee will provide broader coverage to its residents than the federal regulation by ensuring visitation rights with respect to all health care facilities, not merely hospitals. Bisbee has the power to regulate visitation in these sorts of public accommodations, just as the City of Phoenix did when its domestic partnership registry became effective in 2009.¹¹

In addition to exercising its power as an employer and its power as a provider of city services, Bisbee will provide a simple and straightforward way for unmarried couples to create and register the existence of enforceable contracts regarding their property and any mutually agreed financial commitments to each other. Nothing in Arizona law prevents it from assisting its residents in this way. Arizona has long held that unmarried couples may contractually agree to share their property and to provide each other financial support, and that such agreements are enforceable in court.¹² State law will continue to govern the creation and enforcement of these contracts and Bisbee's ordinance does not purport to regulate or interfere with them in any way.

State law also explicitly grants adults the right to execute a health care power of attorney in favor of another adult, and to give another adult the authority to make funeral and burial arrangements.¹³ An adult in Arizona may nominate who is to be her guardian should she become incapacitated, and Bisbee family partners will have the power to so

particular that "the cities of Phoenix and Tucson, among others, offer [domestic partnership] benefits to their employees." 206 Ariz. 276, 288, 77 P.3d 451, 463 n. 17 (App. 2003). The federal courts to date have rejected Arizona's attempt to strip state employees of such benefits. *See Diaz v. Brewer*, 656 F.3d at 1008.

¹⁰ *See* 42 C.F.R. § 482.13(h)(2–4).

¹¹ *See* Phoenix City Code, art. IX, § 18-405(A) ("All health care facilities operating with the City shall allow the Domestic Partner of a patient to visit such patient.").

¹² *See Cook v. Cook*, 142 Ariz. 573, 576, 691 P.2d 664, 667 (1984) ("This evidence of Rose and Donald's express agreement, intention and subsequent course of conduct strongly supports a finding that they did contract to pool their earnings and share equally in certain assets.").

¹³ *See* A.R.S. § 36-3221(A). Arizona's statutes contain a form for creating a health care power of attorney, without reference to that person's gender or sexual orientation. *See* A.R.S. § 36-3224.

designate each other.¹⁴ Bisbee's ordinance will provide a clear and inexpensive way for committed couples to exercise these and other rights through the registration process. Arizona law expressly provides that these rights may be exercised in the manner facilitated by the Bisbee ordinance.¹⁵

The nationwide movement towards family equality continues to grow in force, and the Bisbee City Council has shown itself to be leader in that movement. Arguments that Bisbee's ordinance will subvert state law are not merely incorrect, they are counterproductive.¹⁶ Bisbee's ordinance—and other city ordinances likely to follow—will provide same-sex and different-sex couples a simple process to grant each other a number of rights and responsibilities. In doing so, this ordinance also inspires discussion about the continuing legal vulnerability and emotional harms to many Arizona families due to the discrimination against them in State law. These discussions will help more people understand the price paid by loving, law-abiding families for that discrimination and the need for state-level change. By passing its ordinance, Bisbee is reiterating its commitment to equal rights and family diversity in concrete form—by employing its powers as a charter city to offer both practical support and official respect. Lambda Legal applauds Bisbee city leadership for taking this step.

We hope that the matters discussed in this letter will encourage you to reconsider your assessment of the legally sound and eminently reasonable approach being taken by Bisbee and, perhaps soon, additional Arizona municipalities. Should you have any questions about our analysis, please do not hesitate to contact me.

Very truly yours,

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¹⁴ See A.R.S. § 14-5311(B)(2).

¹⁵ See A.R.S. § 36-3224 (“Any writing that meets the requirements of A.R.S. § 36-3221 may be used to create a healthcare power of attorney.”). See also A.R.S. § 14-5311 (a healthcare power of attorney may be used to nominate a guardian).

¹⁶ Those hostile to basic rights for unmarried partners have challenged similar municipal ordinances elsewhere, and generally have failed. See, e.g., *Tyma v. Montgomery County*, 369 Md. 497, 801 A.2d 148 (2002); *Heinsma v. City of Vancouver*, 144 Wash.2d 556, 6 29 P.3d 709 (2001); *City of Atlanta v. Morgan*, 268 Ga. 586, 492 S.E.2d 193 (1997).