IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

STATE OF ARIZONA, APPELLEE, v. DAVID LEE GREEN, APPELLANT.	Case No. 2 CA-CR 2017-0208 Pima County Superior Court No. CR 2016-3874-001

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF APPELLANT

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INTRODUCTION

Section 2(B) of SB 1070 (codified at A.R.S. § 11-1051(B)),[1] often referred to as the "show-me-your-papers" provision, requires Arizona law enforcement officers to determine (or attempt to determine) a person's immigration status in two limited circumstances: (1) when the officer arrests a person for a state-law crime, or (2) when the officer detains a person on suspicion of a state-law crime and the officer, during the course of the stop, develops reasonable suspicion that the detainee "is an alien . . . unlawfully present in the United States." A.R.S. § 11-1051(B); Advisory Model Policy for Law Enforcement Applying SB 1070, Ariz. Att'y Gen. Op. No. I16-010 (Sept. 20, 2016), *available at* https://www.azag.gov/opinions/i16-010. Attempting to comply with these provisions, the officer in this case prolonged Mr. Green's stop solely to conduct an immigration check. Section 2(B) notwithstanding, prolonging a stop to investigate noncriminal matters unrelated to the original purpose of the stop violates the Fourth Amendment.

Not only did the officer in this case unconstitutionally prolong the stop, he also initiated an immigration inquiry even though SB 1070 did not require it in this

[1] Although codified at A.R.S. § 11-1051, this brief refers to SB 1070 or more specifically to Section 2(B), which is the specific provision that triggered the arresting officer's immigration check of Mr. Green in this case, because SB 1070 has become the "legislative shorthand" for this provision. Nigel Duara, *Arizona's Once Feared Immigration Law, SB 1070, Loses Most of Its Power in Settlement*, LA TIMES (Sept. 15, 2016), http://www.latimes.com/nation/la-na-arizona-law-20160915-snap-story.html.

circumstance. Reflecting a broader misunderstanding about SB 1070's requirements, the officer erroneously believed he had to conduct an immigration check even though Mr. Green was neither arrested at that moment nor suspected of being in the country unlawfully. While Section 2(B) requires that all arrestees have their "immigration status determined," the officer decided to arrest and book Mr. Green only *after* the SB 1070 check had concluded, and after the officer consequently violated Mr. Green's constitutional rights by prolonging the stop.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Arizona ("ACLU of Arizona") is a statewide nonpartisan, nonprofit organization of over 22,000 members throughout Arizona dedicated to protecting the constitutional rights of all, including the rights of all persons during routine interactions with local law enforcement. The ACLU of Arizona frequently files amicus curiae briefs in Arizona courts on a wide range of civil liberties and civil rights issues.

Since the 2010 introduction and passage of Senate Bill 1070, Arizona's flagrant anti-immigrant measure typically referred to as SB 1070, the ACLU of Arizona has actively challenged the constitutionality of this law and worked to ensure that any implementation of its provisions is fully consistent with the state and federal constitutions. The ACLU of Arizona first challenged the constitutionality of SB 1070 just three weeks after its enactment in 2010. When this case, *Friendly*

House v. Whiting (later renamed *Valle del Sol v. Whiting*), No. CV-10-01061-PHX-SRB (D. Ariz.), was resolved in 2016, the Arizona Attorney General issued an opinion providing guidance to agencies regarding how to implement SB 1070 in a manner that protects the constitutional rights of the public. Ariz. Att'y Gen. Op. No. I16-010. Additionally, the ACLU of Arizona has collaborated with at least ten Arizona police agencies—including four of the state's largest—urging them to develop clear immigration-related enforcement policies that both protect the civil rights of community members and comply with the statutory obligations of law enforcement.

The ACLU of Arizona nevertheless remains deeply concerned with the current implementation of SB 1070. Of particular concern is Section 2(B)—the notorious "show-me-your-papers" provision implicated in this case—that routinely causes officers to unlawfully prolong traffic stops. In 2014, the ACLU of Arizona filed suit against Pinal County based on one such prolonged stop. *Cortes-Camacho v. Lakosky*, No. CV-14-02132-PHX-JJT (D. Ariz.). Subsequently, the ACLU of Arizona reported in 2016 that the Tucson Police Department unlawfully prolonged traffic stops in 75% of stops involving suspected undocumented immigrants.[2] Based on its extensive policy and advocacy work on issues related to SB 1070, the ACLU

[2] *ACLU Investigation Reveals Rights Violations in SB 1070 Enforcement, ACLU OF ARIZONA* (May 2, 2016), https://www.acluaz.org/en/press-releases/aclu-investigation-reveals-rights-violations-sb-1070-enforcement.

of Arizona believes that such constitutional violations may often result from incorrect interpretations of and uncertainty concerning law enforcement obligations under Section 2(B). For example, in a case in the District of Arizona, *Tenorio-Serrano v. Driscoll*, No. CV 18-08075-PCT-DGC (BSB), policymakers within the same Arizona county have publicly acknowledged their disagreement regarding the meaning of SB 1070.[3]

The ACLU of Arizona therefore has a strong interest in ensuring that Arizona courts interpret the requirements of SB 1070 consistent with the civil rights and civil liberties of all. This case puts such issues squarely before this Court.

ARGUMENT

I. Prolonging Detentions to Determine Immigration Status Violates the Fourth Amendment.

A. A Seizure's Tolerable Duration Is Determined by Its Mission and Cannot Be Extended.

Section 2(B) of SB 1070 imposes an affirmative duty on officers in some circumstances to make a "reasonable attempt" to determine the immigration status of those they stop but do not arrest, A.R.S. § 11-1051(B), but it never requires an officer to pursue an immigration inquiry that "prolongs—*i.e.*, adds time to—the stop." *Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015) (citation and internal

[3] *Jail District Board of Directors Desire Federal Judicial Decision*, COCONINO COUNTY, ARIZONA, BOARD OF SUPERVISORS (April 10, 2018), http://coconino.az.gov/CivicAlerts.aspx?AID=1767.

quotation marks omitted). Because "suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is 'afoot,'" *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012), an Arizona peace officer may not prolong a stop to pursue such "unrelated investigations." *United States v. Gorman*, 859 F.3d 706, 715 (9th Cir. 2017). Yet this is precisely what the arresting officers did in this case, under the mistaken belief that state law required it.[4] Nevertheless, state law does not—and could not—require an officer to detain someone for additional time to investigate noncriminal activity.

The Supreme Court recently concluded that an otherwise lawful traffic stop that was prolonged by "seven or eight minutes" to await a dog sniff that "was not independently supported by individualized suspicion" violated the Fourth Amendment. *Rodriguez*, 135 S. Ct. at 1616. *Rodriguez* clarified that officers may pursue "unrelated checks during an otherwise lawful traffic stop," but "may not do so in a way that prolongs the stop." *Id*. at 1615.

The immigration check that SB 1070 requires in certain circumstances is just another type of computer check that other post-*Rodriguez* courts have found to

[4] The Tucson Police Department policy at the time was to prolong detentions in some circumstances while officers awaited the results of an immigration check. *See Valle del Sol v. Whiting*, No. CV-10-01061-PHX- SRB (D. Ariz.), Doc. 723-5 (Declaration of Chief Roberto Villaseñor), ¶ 9 ("Under Section 2(B) if we cannot get immediate confirmation from federal officials of the immigration status of [detainees such as Mr. Green], we will have to extend their detentions in the field until we get a status determination from federal officials . . . .").

impermissibly prolong an otherwise lawful detention. *E.g.*, *Gorman*, 859 F.3d at 715 (finding that computer check for outstanding warrants and criminal history unlawfully prolonged the stop); *United States v. Evans*, 786 F.3d 779, 786 (9th Cir. 2015) (finding that computer-based ex-felon registration check unlawfully prolonged the stop). That agencies and officers might consider these computer checks "routine" does not justify prolonging the stop. *United States v. Esteban*, 283 F. Supp. 3d 1115, 1130-31 (D. Utah 2017) (finding that a stop was unconstitutionally prolonged where officer ran a routine criminal-history check); *State ex rel. Geary Cnty. Sheriff's Dep't v. One 2008 Toyota Tundra, VIN: 5TBBV54158S517709*, 415 P.3d 449, 460 (Kan. Ct. App. 2018) (same). No check, "routine" or otherwise, may constitutionally justify prolonging a stop unless the task is related to the "mission" of the stop. *Rodriguez*, 135 S. Ct. at 1615.

The same is true of immigration checks required by SB 1070. Even before *Rodriguez*, federal courts predicted "potentially serious Fourth Amendment concerns" with what one court described as "the inevitable increase in length of detention" resulting from the new requirements to check immigration status. *United States v. Arizona*, 703 F. Supp. 2d 980, 1006 (D. Ariz. 2010), *rev'd in part*, 567 U.S. 387 (2012). And like the checks at issue in *Gorman* and *Evans*, *supra*, immigration registry checks are never "fairly characterized as part of the officer's traffic mission." *Rodriguez*, 135 S. Ct. at 1615.

In a traffic-stop setting, an officer may prolong a stop only when he can "point to specific facts demonstrating that [the officer] had a reasonable suspicion that [the driver] was engaged in some nonimmigration-related illegal activity." *United States v. Urrieta*, 520 F.3d 569, 574 (6th Cir. 2008); *see also Muehler v. Mena*, 544 U.S. 93, 101 (2005) (observing that asking about one's immigration status may trigger Fourth Amendment concerns if doing so "extended the time [the subject] was detained"). Indeed, the Arizona Attorney General's Advisory Opinion—issued just one month after Mr. Green's arrest—admonishes officers that they must fulfill their obligations without "prolong[ing] a stop or detention for an immigration inquiry to request or obtain verification of immigration status." Ariz. Att'y Gen. Op. No. I16-010.[5] This Court should reach the same conclusion.

B. Inquiring about Immigration Status Always Falls Outside the Mission of an Arizona Peace Officer.

Whenever a stop is extended to determine immigration status, *any* prolongation, however short, converts a lawful stop into an unlawful seizure. This is because, in assessing whether an officer "prolonged [the stop] beyond the time

[5] While Arizona Attorney General opinions are not binding on state courts, "the reasoned opinion of a state attorney general should be accorded respectful consideration." *Ruiz v. Hull*, 191 Ariz. 441, 449 (1998). *See also United States v. Maricopa Cnty.*, 151 F. Supp. 3d 998, 1015 (D. Ariz. 2015) (ruling, in part, based on "the Arizona Attorney General's interpretation of the relevant statutes"), *aff'd*, 889 F.3d 648 (9th Cir. 2018).

reasonably required to complete [his] mission," *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), the "mission" never includes investigating civil violations of immigration law. *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 892 (D. Ariz. 2013), *aff'd*, 784 F.3d 1254 (9th Cir. 2015); *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 465 (4th Cir. 2013). Thus, an immigration-status check is never "reasonably necessary to carry out the mission." *Gorman*, 859 F.3d at 715. Even a *de minimus* extension of the stop violates the Constitution. *Rodriguez*, 135 S. Ct. at 1615–16.

While Arizona officers may initiate questioning on a wide range of topics, *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 185 (2004), they cannot prolong a person's detention to inquire into noncriminal matters bearing no relation to the safety of the driver, the officer, or the vehicle. *Evans*, 786 F.3d at 786 (noting that traffic-stop inquiries that are properly "incidental" to the mission include only those things calculated to "ensuring that vehicles on the road are operated safely and responsibly"). Thus, an officer is permitted to inquire into a person's immigration status only while the core tasks related to the mission are still ongoing. *Muehler*, 544 U.S. at 101 (distinguishing between questioning a detained individual about his immigration status and prolonging the detention for the same inquiry). The same is true even when the officer possesses "actual knowledge"—and not mere reasonable suspicion—that an individual is unlawfully in the country. *Ortega-Melendres v.*

Arpaio, 836 F. Supp. 2d 959, 973 (D. Ariz. 2011), *aff'd sub nom. Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012). Arizona courts have similarly affirmed that asking questions during a stop and prolonging the stop are two quite different matters. *See, e.g.*, *State v. Sweeney*, 224 Ariz. 107, 112 (Ct. App. 2010) (distinguishing between an officer's permissible questioning "while . . . completing the paperwork" and the subsequent unconstitutional prolongation of the stop to make similar inquiries).

The only courts to have considered the question have read Section 2(B) to require officers only to "inquire into the immigration status" of certain individuals and not to take "any other action." *United States v. Arizona*, 641 F.3d 339, 379 (9th Cir. 2011) (Bea, J., dissenting); *see also Friendly House v. Whiting*, 2010 WL 11452277, at *16 (D. Ariz. Oct. 8, 2010) (finding "persuasive" the argument that Section 2(B) does not permit the extension of a stop to await the results of an immigration check). Furthermore, the Supreme Court suggested—without deciding—that Section 2(B) could be interpreted by state courts in this way. *Arizona v. United States*, 567 U.S. 387, 413 (2012) ("§ 2(B) could be read to avoid these [Fourth Amendment] concerns.").

Indeed, Arizona law does not permit police to arrest (or prolong an existing arrest) absent "probable cause to believe . . . that a crime has been committed." *State v. Keener*, 206 Ariz. 29, 32 (Ct. App. 2003). While the Arizona legislature attempted

to amend state law to allow officers to arrest or detain on suspicion that a person "committed any public offense that makes the person removable from the United States," A.R.S. § 13-3883(A)(5), that provision was permanently enjoined in 2012. *Arizona*, 567 U.S. at 410. Consequently, Arizona law continues to prohibit its officers from arresting someone for a suspected civil violation of federal immigration law. *Gonzales v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (in Arizona, the "[a]rrest of a person for illegal presence would exceed the authority granted [a local police department] by state law").

The Fourth Amendment requires that officers, in discharging their duties under Section 2(B), not detain a person for any longer than necessary to perform stop-related inquiries.

II. Section 2(B) of SB 1070 Does Not Require an Officer to Determine Immigration Status When the Officer Elects to Cite and Release under A.R.S. § 13-3903.

Mr. Green's initial detention in this case was not an "arrest" for purposes of Section 2(B) of SB 1070.[6] Section 2(B) requires that officers inquire (or attempt to inquire) into immigration status in two limited circumstances: (1) when a person is stopped or detained and there exists reasonable suspicion to believe that the person

[6] Even though not an "arrest" for purposes of Section 2(B), Mr. Green's initial detention could have triggered the need for certain constitutional protections (such as *Miranda* warnings).

lacks lawful immigration status, and (2) when a person is "arrested." A.R.S. § 11-1051(B). Section 2(B) does *not*, however, require an officer to inquire into and determine a person's immigration status when, as here, the officer intended to issue a citation and release the individual. That is because the "mission" of a cite and release is to issue a citation; the seizure cannot be extended to conduct an unrelated immigration check. *See Rodriguez*, 135 S. Ct. at 1615. Thus, a person is "arrested" for purposes of Section 2(B) only when an officer takes the person into custody and books him into jail.

Moreover, the Arizona legislature could not have intended Section 2(B) to require an officer to "determine" the immigration status of every person the officer cites and releases. The text of Section 2(B) itself shows that the legislature did not mean to include within "arrested" those who are cited and released. Under the statute, officers must only make "a reasonable attempt" to determine immigration status "[f]or any lawful stop, detention or arrest." A.R.S. § 11-1051(B). Additionally, Section 2(B) requires that a "person's immigration status [be] determined *before* the person is released" when the person is "arrested." *Id*. (emphasis added). Clearly, the legislature intended to treat a person subject to a "stop" or a "detention" differently than a person who is "arrested." *Arizona*, 703 F. Supp. 2d at 994 (concluding that the sentence discussing police obligations during a "stop, detention or arrest" in

Section 2(B) should be read independently from the sentence addressing obligations during an "arrest").[7]

Furthermore, the legislature is presumed to know the "common and approved use" of those words "which have acquired a peculiar and appropriate meaning in the law." A.R.S. § 1-213; *see also State v. Garza Rodriguez*, 164 Ariz. 107, 111 (1990) ("We presume that the legislature knows the existing laws when it enacts or modifies a statute."). Both before and after the enactment of SB 1070, courts have distinguished between those who are arrested and those who are cited and released in lieu of an in-custody arrest. *Sembach v. Cuthbertson*, 2006 WL 3627502, at *6 (D. Ariz. Dec. 13, 2006) ("Instead of taking Plaintiff into custody [the officer] wisely decided to utilize the cite-and-release procedure authorized by A.R.S. § 13–3903."); *Williams v. City of Mesa*, 2011 WL 836856, at *9 (D. Ariz. Mar. 9, 2011) (distinguishing between cite and release and "arrest").

[7] Consistent with the argument below, the federal district court in *United States v. Arizona* noted that, if Section 2(B) required officers to check the immigration status of everyone who is cited and released, for at least one category of individuals, "detention time . . . will *certainly* be extended during an immigration status verification." 703 F. Supp. 2d at 995 (emphasis added). Contrary to the reading advocated here, however, the federal court assumed that those cited and released were under "arrest" for purposes of Section 2(B). *Id.* That assumption is dicta and not binding on this Court, and its logical extension—that many stops would necessarily be prolonged in violation of the Fourth Amendment—provides a justification for not reading Section 2(B) to apply in a cite-and-release situation.

Finally, a cite-and-release situation occurs wholly at the site of the officer-citizen interaction, it is typically brief, and it does not involve taking a person into custody. Thus, cite and release more closely resembles other shorter officer-citizen interactions that might be characterized as a "stop" or "detention" for purposes of Section 2(B). Indeed, the Arizona Supreme Court has distinguished between full-custody arrests and traffic stops when an officer intends to cite and release the driver. *State v. Susko*, 114 Ariz. 547, 549 (1977). The Ninth Circuit has similarly relied upon "common usage" and "case law" to conclude that an arrest, for purposes of federal statutory construction, does not include circumstances in which the person was neither informed he was under arrest nor transported to the police station. *United States v. Leal-Felix*, 665 F.3d 1037, 1041 (9th Cir. 2011) (concluding that a defendant's previous driving citations do not count as "arrests" for purposes of the federal sentencing guidelines); *see also Yith v. Nielsen*, 881 F.3d 1155, 1168 (9th Cir. 2018) ("[T]he common meaning of the word 'arrest' does not include merely issuing a citation, but requires a formal 'arrest'").

The arresting officer in this case erroneously believed that, upon issuing a citation with the intention to release a person, "you have to do an SB 1070 check . . . to make sure the person is not an illegal alien." (R.T. 3/20/17 at 34.) But Mr. Green was not—when the officer checked his immigration status—under "arrest" for purposes of SB 1070. Because the officer had already decided to cite and release Mr.

Green (and there was no suspicion that Mr. Green was in the country unlawfully), no immigration check was required by Section 2(B).

The trial court also wrongly read SB 1070's requirements and found that the prolonged detention was justified based on "the officer's need to conduct an SB 1070 inquiry." (ROA 55 at 4.) This reading of Section 2(B) is incorrect: when the officer initiated the immigration check, Mr. Green was neither "arrested" nor suspected of being in the country unlawfully. Thus, the officer was not required by state law to inquire into Mr. Green's immigration status.

CONCLUSION

A stop prolonged beyond the original purpose justifying the law enforcement contact is unconstitutional when the prolongation is not related to the mission of the stop. That principle applies to immigration checks, including those required by Section 2(B) of SB 1070. The immigration check in this case unconstitutionally prolonged the stop of Mr. Green. Moreover, that check was not even required by state law. Amicus curiae ACLU of Arizona, therefore, urges this Court to overturn Mr. Green's conviction, as it rests on an unlawfully extended traffic stop in violation of the Fourth Amendment, and to clarify that Section 2(B) does not require officers to conduct an immigration check when citing and releasing someone pursuant to A.R.S. § 13-3903.

Respectfully submitted, this 20th day of July, 2018.

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Certificate of Service

I hereby certify that on July 20, 2018, I electronically filed Amicus Curiae's Brief with the Clerk of the Court of Appeals, Division Two, by using the Court's e-filing system.

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Pursuant to Rule 32.12, Arizona Rules of Criminal Procedure, undersigned counsel certifies that this brief is double spaced, uses a 14-point proportionally spaced t typeface and contains 4,244 words.

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