



May 27, 2015

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Sheriff Clarence W. Dupnik  
Pima County Sheriff's Department  
1750 E. Benson Highway  
Tucson, Arizona 85714

Sheriff Dupnik:

It has recently come to our attention that Pima County Sheriff's Department has a policy and/or practice of selectively referring certain 911 calls to the U.S. Border Patrol's "BORSTAR" unit. We are writing to advise you that Pima County has a legal obligation to provide emergency services in a nondiscriminatory manner. Any policy or practice which fails to do so violates the Equal Protection Clause of the Fourteenth Amendment.

A recent news report<sup>1</sup> disclosed that since 2007 Pima County Sheriff's Department has been transferring 911 calls from migrants or perceived unauthorized border crossers to BORSTAR, a Border Patrol "search and rescue" unit. By contrast, 911 calls from people who are not known or perceived to be unauthorized immigrants are either handled in-house or are transferred to county rescue services. According to the article, the Sheriff's Department leaves the decision of which calls to transfer to BORSTAR to the discretion of county 911 operators.

The county's differential treatment of these calls is deeply troubling. BORSTAR officials openly acknowledge that search and rescue efforts are not their main objective, and are "secondary" to their border enforcement operations. Moreover, the same article quotes the Sheriff's Department's own estimate that *seventy percent* of calls forwarded to BORSTAR do not even go through, and of those that do, it is "not uncommon" for agents to miss the call. Even if a caller is successful in contacting an agent, BORSTAR does not respond to individuals lost or in distress if their precise coordinates are unknown. This practice effectively eliminates the "search" from "search and rescue."

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<sup>1</sup> Puck Lo, *For Migrants in Arizona Who Call 911, It's Border Patrol On the Line*, AL JAZEERA, March 25, 2015, available at <http://america.aljazeera.com/articles/2015/3/25/for-migrants-in-arizona-who-call-911-its-border-patrol-on-the-line.html>.

The Sheriffs' Department's practice of selectively referring calls to Border Patrol's ineffectual BORSTAR unit results in wide disparities in search and rescue responses, likely resulting in preventable deaths in the desert. It also violates the Fourteenth Amendment. A state actor violates the Equal Protection Clause when it selectively denies "its protective services to certain disfavored minorities." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 n. 3 (1989) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

The Ninth Circuit has made clear that there is a constitutional right to have law enforcement services administered in a nondiscriminatory manner, and this right is violated when a state actor denies such protection to disfavored persons. *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) (denying motion to dismiss where officer's failure to investigate crime or make arrest due to races of victim and alleged perpetrator would violate the Fourteenth Amendment). The Fourteenth Amendment is violated even when services are *diminished* on a discriminatory basis. *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000) (reversing summary judgment where officials' provision of inferior police protection on account of decedent's status as a woman, a Latina, and a victim of domestic violence would violate her equal protection rights).

Even where the state imposes a facially neutral policy or practice, the policy or practice cannot invidiously discriminate without violating the Fourteenth Amendment. *Yick Wo*, 118 U.S. 356. The constitutional right to be free from "invidious discrimination is so well established...that all public officials must be charged with knowledge of it." *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.1980).

Under 42 U.S.C. § 1983, counties are liable for the acts of employees that violate the Equal Protection Clause where the act was made pursuant to a written policy or a "permanent and well settled" practice. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978) (local governments are responsible for practices and custom, even when such "custom has not received formal approval through the body's official decisionmaking channels"). Further, where there are "repeated constitutional violations for which the errant municipal officials were not discharged or reprimanded," a county can be liable "irrespective of whether official policy-makers had actual knowledge of the practice at issue." *Navarro v. Block*, 72 F.3d 712, 714-15 (9th Cir. 1995) (reversing summary judgment where county's practice of failing to classify 911 calls involving domestic violence as emergencies, if established, would fail rational basis review.)

Because the Pima County Sheriff is the final decision maker for the County in the area of law enforcement, the Sheriff's decision to handle 911 calls in a discriminatory manner would constitute County policy, even without official action by the County Board of Supervisors. *Harper v. City of Los Angeles*, 533 F.3d 1010, 1024-25 (9th Cir. 2008)(imposing municipal liability where police chief was "an authorized policymaker on police matters."); *see also Flanders v. Maricopa County*, 203 Ariz. 368, 378, 54 P.3d 837, 847 (Ct. App. 2002) (holding Maricopa County liable for Sheriff Arpaio's jail policies); *Guillory v. Greenlee County*, CV-05-352-TUC-DCB, 2006 WL 2816600, \*5 (D.

Ariz. Sept. 28, 2006) (holding County liable for Sheriff's training policies that applied to all officers for an extended period of time).

In sum, Pima County's policy and/or practice of transferring the 911 calls of those known or perceived to be migrants to BORSTAR is discriminatory and unconstitutional. The result of the policy and/or practice is the denial and diminishment of critical, potentially life-saving measures to a disfavored minority: migrants and individuals perceived to be unauthorized immigrants. The county can be liable, regardless of whether the call referrals—to the extent the majority of calls that do not go through can even be deemed "referrals"—result from a written policy or a well settled practice of 911 operators acting within their discretion.

U.S. border policy is designed to divert immigrants into the deadliest reaches of the desert to "deter" migration. This policy has resulted in a protracted humanitarian crisis. From 1998 to 2013, more than 2,700 bodies of men, women, and children were discovered in the Arizona desert, more than anywhere else in the country.<sup>2</sup> Over the last decade, the average number of annual deaths has topped 200. In light of the fact that BORSTAR does not respond to individuals whose coordinates are unknown, does not receive the majority of calls transferred by county operators, and does not view search and rescue as its primary objective, the selective handling of 911 calls unquestionably places individuals' lives in danger, likely contributing to preventable deaths in the desert. The Pima County Sheriff's Department has a constitutional duty to provide the same emergency services as it would provide to every other person lost or in distress in the desert who calls 911, as is the practice in other Arizona counties.

For the foregoing reasons, we write to demand an immediate and permanent cessation of any policy or practice by which Pima County denies or provides diminished search and rescue services to migrants or those perceived to be unauthorized border crossers, including the selective referral of such calls to BORSTAR. We further request the opportunity to discuss this matter with you in the hope that litigation can be avoided. I can be contacted by phone at (520) 344-7857 or by email at [jlyall@acluaz.org](mailto:jlyall@acluaz.org).

Sincerely,



James Lyall  
Staff Attorney  
ACLU of Arizona

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<sup>2</sup> Ryan Van Velzer, *Arizona Border Deaths Remain Highest in U.S.*, AZ REPUBLIC, Aug. 8, 2014, available at <http://www.azcentral.com/story/news/local/arizona/2014/08/08/arizona-undocumented-border-deaths-highest-in-the-country/13738253/>.

PO Box 1529  
Tucson, AZ 85702  
(520) 344-7857  
[jlyall@acluaz.org](mailto:jlyall@acluaz.org)

Cc: Barbara LaWall  
Pima County Attorney  
32 N. Stone Ave.  
Tucson, Arizona 85701

Pima County Board of Supervisors  
130 W. Congress Street, 11th Floor  
Tucson, Arizona 85701

Ally Miller, District 1  
Ramon Valadez, District 2  
Sharon Bronson, District 3  
Ray Carroll, District 4  
Richard Elias, District 5