

ALESSANDRA SOLER
EXECUTIVE DIRECTOR

ZENAIDO QUINTANA
PRESIDENT



May 2, 2016

Chris Magnus
Chief of Police
Tucson Police Department
270 S. Stone Ave.
Tucson, AZ 85701

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
ARIZONA

**Re: Constitutional Violations Resulting from Tucson
Police Department Enforcement of SB 1070**

P.O. Box 17148
Phoenix, AZ 85011

Tel: 602-650-1854
Fax: 602-650-1376

Visit: www.acluaz.org

Dear Chief Magnus:

We are writing to convey our concerns with Tucson Police Department (TPD) immigration policies, in particular TPD's enforcement of Section 2(B) of Arizona Senate Bill 1070 (SB 1070).¹ These concerns are based on our review of TPD stop records from June 2014 to December 2015, summarized below, which indicate that in many cases—the majority of the 110 stops we reviewed—TPD officers are prolonging routine stops far beyond the time reasonably required to resolve the underlying issue, solely to pursue investigations of immigration status or wait for immigration officials to respond. In many of these cases, officers are going out of their way to transfer custody to U.S. Border Patrol, regardless of the delay that results.

These practices go well beyond Section 2(B)'s requirement that officers make a "reasonable attempt" to determine immigration status, and reflect fundamental misunderstanding of the Fourth Amendment's prohibition on prolonging stops and limits on the authority of local police to enforce immigration laws. *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012) (explaining that "to delay the release of detainees for no reason other than to verify their immigration status" would "raise constitutional concerns"); *see also Rodriguez v. United States*, 135 S.Ct. 1609, 1612 (2015) ("[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures.").

These problems are compounded by inadequate guidance, training, and oversight. We therefore urge you to conduct an immediate review of TPD

¹ Ariz. Rev. Stat. Ann. §11-1051.

immigration policies and practices and to implement all necessary changes to ensure officers are not exceeding the lawful scope of their authority. To put these concerns into context, we summarize below some recent changes to TPD immigration policies, provide case examples of constitutionally problematic practices described in TPD's records, and outline our recommendations for addressing the problems identified herein.

Background

TPD immigration policies have undergone multiple revisions in recent years, largely in response to the demands of the many local community members whose families, friends, and neighbors have been harmed by those policies, both prior to and following the enactment and implementation of SB 1070.²

In November 2013, following weeks of community protests, the Tucson City Council voted unanimously in favor of multiple changes to TPD immigration policy, including enhanced stop data collection, as well as a provision discouraging (but not prohibiting) status inquiries of crime victims and witnesses. The ACLU and other local organizations submitted testimony prior to the vote, in which they described rights violations arising in the course of TPD immigration enforcement, and called for changes to TPD policy.³

In the months that followed, the ACLU continued to receive reports of TPD and other Arizona law enforcement officials unlawfully extending stops solely to investigate immigration status.⁴

TPD did not implement electronic data collection for stops involving SB 1070-mandated status checks (aka "TWX checks") until June 2014. TPD then began to record stop data, including stop times, TWX check times, and Border Patrol response times in an electronic database. TPD also began requiring TWX checks in all cite and release situations.⁵

² See, e.g., Fernanda Echavarri, *Activists Ask Tucson City Council to Change Enforcement of SB 1070*, ARIZ. PUB. MEDIA, Oct. 23, 2013, available at <http://bit.ly/1TCu4Pj>; Paul Ingram, *Immigration Arrests Spark TPD HQ Protests*, TUCSON SENTINEL, Feb. 19, 2013, available at <http://bit.ly/1Mf7GtQ>.

³ See TESTIMONY OF JAMES LYALL, STAFF ATTORNEY, ACLU OF ARIZONA, TUCSON CITY COUNCIL HEARING, Nov. 13, 2013, available at <http://bit.ly/1TCEwpW>; see also Regina Romero, *Councilwoman Regina Romero: Tucson Police Shouldn't Ask Status of Crime Victims, Witnesses*, AZ DAILY STAR, Nov. 11, 2013, available at <http://bit.ly/1SdoKJI>.

⁴ See, e.g., Michael Kiefer, *ACLU Sues Ariz. County Cops for Detaining Immigrant*, USA TODAY, Sept. 26, 2014, available at <http://usat.ly/2o8ElmW>; Notice of Claim on behalf of Augustin Reyes and Arturo Robles, to Tucson Police Department Chief Roberto Villaseñor (Apr. 4, 2014), available at <http://bit.ly/23izBgr>; Notice of Claim on behalf of Jesus Reyes Sepulveda, to Tucson Police Department Chief Roberto Villaseñor (July 1, 2014), available at <http://bit.ly/1Mf7Ykd>; Jamie Ross, *Cops Said to Abuse 'Show Your Papers' Law*, COURTHOUSE NEWS SERVICE, Nov. 13, 2013, available at <http://bit.ly/1Wdgz9j>.

⁵ Those procedures went into effect shortly after the City of South Tucson announced reforms to its immigration policy, adopted pursuant to a settlement agreement with the ACLU, which included data collection as well as a full prohibition on status inquiries of students, crime victims and witnesses. See Carli Brosseau, *South Tucson, ACLU Reach Deal Over SB 1070*, AZ

In December 2014, the Tucson City Council unanimously voted to direct TPD to prohibit immigration status inquiries of Tucson students, after City Councilmember Regina Romero, the TUSD School Board, and other community members objected to a draft MOU governing TPD School Resource Officers that failed to include such a prohibition.⁶

In February 2015, TPD again revised its immigration policies to narrow the range of individuals it would refer to Border Patrol, consistent with the Obama Administration's new enforcement priorities, and adding other limits on officer conduct long sought by the community, including a full prohibition on status inquiries of crime victims and witnesses, among other changes.⁷

Current TPD policy clearly prohibits officers from delaying the release of detained individuals to pursue immigration status investigations:

When reasonable suspicion exists to believe a detainee is unlawfully present in the U.S. but there are not state or local criminal violations, or any other lawful basis to continue the detention (i.e. completion of a traffic stop), the officer shall release the detainee without delay.

...If no information concerning the subject is obtained by ICE/CBP by the time that the basis for the detention is concluded, the detainee shall be released without delay.

- The fact that ICE/CBP cannot verify a person's status does not mean a person is lawfully or unlawfully present in the United States and provides no basis for any enforcement action to include transport or continued detention.
- ...Courts have clearly held that state and local peace officers do not have the authority to transport a person or take any other enforcement action for a civil violation of federal law.⁸

DAILY STAR, May 19, 2014, available at <http://bit.ly/25LN7eX>; see also Carli Brosseau, *Law Enforcement Agencies Revisit SB 1070 Policies After South Tucson Settlement*, AZ DAILY STAR, May 30, 2014, available at <http://bit.ly/1VaoEsm>.

⁶ See Darren DaRonco, *Police Back at TUSD, Can't Ask Immigration Status*, AZ DAILY STAR, Dec. 17, 2014, available at <http://bit.ly/23izPUUD>; Alexis Huicochea, *TUSD Vote Could Kill Cops-in-Schools Program*, AZ DAILY STAR, Oct. 15, 2014, available at <http://bit.ly/1qt2SXZ>; Darren DaRonco, *Immigration Issue Delays Program to Put Cops in Schools*, AZ DAILY STAR, Sept. 24, 2014, available at <http://bit.ly/1nBLLFr>.

⁷ See Perla Trevizo and Luis F. Carrasco, *Tucson Police Revise Immigration Policy*, AZ DAILY STAR, Feb. 24, 2015, available at <http://bit.ly/1SQPrdg>; See Letter to Mayor Jonathan Rothschild and Tucson City Council, *Community Proposal Regarding Tucson Police Department Immigration Policies*, Jan. 20, 2015, available at <http://bit.ly/1riNH3H>.

⁸ TPD General Order 2335.

Cumulatively, these revisions constitute significant improvement upon past TPD immigration policies. Our review of TPD records, however, indicates that these reforms are still inadequate to ensure officers understand and do not overstep the strict constitutional limits on their authority to enforce immigration laws.

ACLU Records Requests

In July 2015, after another Tucson community member was stopped and detained for referral to Border Patrol, the ACLU submitted two public records requests to TPD: one sought information related to that traffic stop, the other requested records of TPD communications with Border Patrol, including status verification checks (“TWX checks”) and entries from TPD’s electronic database, as well as immigration-related training and policy records.

In response, TPD ultimately identified 148 instances from June 2014 to December 2015 in which Border Patrol responded to the scene of a TPD stop. TPD then produced to the ACLU police reports for approximately 110 of those stops (38 other stops involving a Border Patrol response were listed as “citation only,” for which no police report was recorded). TPD also produced internal memos, training logs, and other immigration policy records. In addition, we reviewed a spreadsheet from TPD’s electronic database—obtained by the *Arizona Daily Star* and posted to its website—containing stop data from approximately June 2014 to October 2015.⁹

Constitutional Violations Resulting from TPD Enforcement of SB 1070

The TPD records reviewed by the ACLU contain substantial evidence of constitutional violations arising in the course of officers’ enforcement of SB 1070—specifically, officers extending stops for the sole purpose of investigating immigration status. Such actions violate the Fourth Amendment, as has been clear from well before the time Section 2(B) of SB 1070 first went into effect. *See, e.g., Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009) (A seizure remains lawful only “so long as [unrelated] inquiries do not measurably extend the duration of the stop”).

Interpreting Section 2(B), the Supreme Court warned that “to delay the release of detainees for no reason other than to verify their immigration status” would “raise constitutional concerns.” *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012). That is because local police do not have authority to enforce federal civil immigration laws. *See Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012).

Recently, in *Rodriguez v. United States*, in which a completed traffic stop was extended “seven or eight minutes” to await a canine search unrelated to the purpose of the original stop, the Supreme Court reiterated that a traffic stop “becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a

⁹ *See* Joe Ferguson, *Search TPD’s SB1070 Database*, AZ DAILY STAR, Dec. 12, 2015, available at <http://bit.ly/1TCFxD>.

ticket for the violation.” 135 S. Ct. 1609, 1612 (2015) (quoting *Illinois v. Caballes*, 125 S. Ct. 834, 837 (2005) (internal quotation marks omitted)).

As with the dog sniffs at issue in *Rodriguez*, the “critical question” in these TPD stops is not whether Border Patrol’s arrival occurs before or after the officer issues a citation, but whether in conducting an immigration inquiry or awaiting a response from Border Patrol the officer extended the stop beyond the time reasonably required to complete the original purpose of the stop. 135 S. Ct. at 1616; *see also United States v. Sharpe*, 470 U.S. 675, 686 (1985) (in determining the reasonable duration of a stop, “it [is] appropriate to examine whether the police diligently pursued [the] investigation”). TPD records show that officers are doing just that.

In recent years, other Arizona law enforcement agencies have been enjoined from engaging in the very practice at issue here. *See, e.g., Melendres*, 695 F.3d at 1001 (9th Cir. 2012) (“While the seizures of the named plaintiffs based on traffic violations may have been supported by reasonable suspicion, any extension of their detention must be supported by additional suspicion of criminality. Unlawful presence is not criminal.”).¹⁰

As noted above, these constitutional principles have been incorporated into TPD’s policies. *See* TPD General Order 2335. Nonetheless, of the 110 TPD stops involving a Border Patrol response recorded in police incident reports from June 2014 to December 2015, we identified constitutionally problematic stops in approximately 85 cases—more than three quarters of the stops reviewed.

These problems include: completed stops that were explicitly extended for the sole purpose of awaiting Border Patrol’s arrival; stops in which TPD officers transported subjects to TPD stations in order to meet Border Patrol in situations that would otherwise have resulted in cite and release; stops in which vehicle passengers were detained absent probable cause in order to be transferred to Border Patrol custody; and

¹⁰ A growing number of local law enforcement agencies in Arizona and around the country have faced litigation resulting from traffic stops unlawfully prolonged for immigration-related investigations. *See, e.g., Cortes v. Lakosky*, No. 14-02132 (D. Ariz., filed Sept. 25, 2014) (ACLU lawsuit filed on behalf of a woman with a pending U-Visa who was “cited and released” for a traffic violation and then driven to Border Patrol custody); *Vargas Ramirez v. United States of America*, No. 13-02325 (W.D. Wash., filed Dec. 27, 2013) (lawsuit filed by individual detained by local police following routine traffic stop at the direction of Border Patrol, despite Border Patrol’s inability to find any immigration history); *Rios-Diaz v. Montana Highway Patrol*, No. 13-77 (D. Mont., filed Oct. 7, 2013) (lawsuit involving Montana Highway Patrol policy and practice of seizing Latino drivers or passengers for the sole purpose of contacting immigration officials to take custody); *Martinez-Castro, et al. v. Village of Wakeman, et al.*, No. 12-2364 (N.D. Ohio; filed Nov. 26, 2012) (lawsuit filed by two married couples detained in order to be transferred to Border Patrol custody); *Ramirez-Rangel, et al. v. Kitsap County, et al.*, No. 12-2-09594-4 (Wash. Super. Ct., filed Jan. 31, 2012) (lawsuit on behalf of three individuals whose stop was extended for immigration questioning and referral to Border Patrol); *Muniz-Muniz, et al. v. United States Border Patrol, et al.*, No. 09-02865 (N.D. Ohio, filed Dec. 10, 2009) (challenging systematic racial profiling of Hispanic residents in three Ohio towns by Border Patrol and three local law enforcement agencies.).

more than a dozen immigration checks producing false positives, or “hits,” resulting in prolonged detention of lawfully present individuals.¹¹

TPD’s data shows stops lasting anywhere from fifteen minutes to three hours before Border Patrol’s arrival. The majority of the stops we reviewed lasted between one to two hours. Most of these incidents were routine traffic stops—many involving minor infractions, such as suspended license or lack of insurance—which would ordinarily result in field release, but in these cases led to prolonged detention, sometimes including transport to the custody of Border Patrol. In some cases, families with young children were detained in order for the parents to be handed over to Border Patrol agents.

As described below, the records obtained by the ACLU further indicate that TPD supervisors have provided inconsistent and inaccurate guidance on officers’ legal authority to extend stops—guidance that has absolutely no basis in existing law or TPD policy. The records provided also suggest that officers have not received specific training in TPD immigration policy since July 2014, despite significant changes to that policy and to relevant case law.

These and other problems identified by our review and summarized below demand immediate attention, and ultimately, revisions to TPD immigration policies and practices to ensure that officers are complying with constitutional requirements. Problems include:

1) Cite and release concluded but subject detained to wait for Border Patrol

TPD records include several cases in which officers expressly stated that the original basis for the stop had been addressed before the stop was extended to wait for Border Patrol.¹² As reflected in General Order 2335, TPD officers do not have legal authority to delay release in order to investigate immigration status.¹³ For example:

- **Incident No. 1412080289** (Dec 8, 2014). Two shoplifting subjects were contacted at 1:50 p.m. The officer reports, “I cited and released both individuals. Before releasing the subject, I conducted...an SB 1070 check.” The report notes the check was done at 2:15 p.m., and came back with a “hit.”

¹¹ In some cases, additional information is needed to determine whether or to what extent a given stop may have been extended. In light of the significant number of discrepancies in TPD’s database, discussed below, it is possible that additional cases involving Border Patrol were not identified as such. We are still in the process of obtaining additional stop records, but we urge you to review all cases in which Border Patrol responded to a stop, as well as any cases in which TWX operators contacted Border Patrol to report someone suspected of unauthorized presence, regardless of whether Border Patrol ultimately responded.

¹² In addition to the stops described *see* Incident No. 1501120312 (Jan. 12, 2015); Incident No. 1411070243 (Nov. 7, 2014); Incident No. 1410220058 (Oct. 22, 2014); Incident No. 1408150543 (Aug. 15, 2014);

¹³ “[When] there are no state or local criminal violations, or any other lawful basis to continue the detention (i.e., the complete of a traffic stop), the officer shall release the detainee without delay.” TPD General Order 2335.

Border Patrol was notified, responded to the scene at 3:00 p.m.—forty-five minutes after the officer was ready to cite and release—and took custody.

- **Incident No. 1408100298** (Aug 10, 2014). A driver was stopped for an illegal turn and did not have a valid license. The vehicle was impounded, but the officer “explained I was not arresting him for his traffic violation.” TPD did a TWX check at 3:00 p.m. and it returned positive at 3:14 p.m. The officer then placed the subject in handcuffs in a squad car, where he was detained until Border Patrol arrived and took custody at 3:31 p.m.
- **Incident No. 1407200495** (July 20, 2014). Two suspects were detained at 11:09 a.m. on suspicion of shoplifting. A TWX check was done at 11:35 a.m. and found one of the suspects was “possibly illegal.” The officer released the first suspect from the scene at 11:40 a.m.,¹⁴ while detaining the subject suspected of being undocumented in order to wait for Border Patrol. Border Patrol responded thirty-two minutes later, at 12:12 p.m. Border Patrol confirmed the individual was a U.S. citizen, “at which point [he] was released” at 12:19 p.m., thirty-nine minutes after the first subject was released.

2) *No citation issued—stop extended solely to investigate status*

In some cases in which individuals were held to await Border Patrol’s arrival, no charges or citations appear to have been issued.¹⁵ In some of these instances, individuals involved in the same underlying conduct were released while only the subjects suspected of having unauthorized status were detained further in order to wait for Border Patrol to respond.¹⁶ These scenarios undermine the notion that officers could have had a legitimate, non-immigration rationale for extending the stops.

- **Incident No. 1508080197** (Aug 8, 2015). Following a TWX check conducted at 10:06 a.m. in the course of a shoplifting investigation, the officer was advised that Border Patrol wanted to respond (TPD’s database lists CBP’s response as “undetermined”). The officer “moved to north east side of the Walmart and waited for Border Patrol” which arrived and took custody at 10:58 a.m., one hour and ten minutes after stop and fifty-two minutes after the TWX check. The report notes, “At this time he was not cited.”
- **Incident No. 1407170112** (July 17, 2014). Following a report of a possible abduction, TPD arrived at the scene at 6:05 a.m. and proceeded to interrogate multiple individuals. Officers “determined [the] report was not an abduction.” TPD records indicate the subjects were released, but also that TPD conducted

¹⁴ The second subject’s release time is recorded in a separate entry in TPD’s database (same Incident Number).

¹⁵ In other stops, the only crime listed in the report is “immigration/border patrol contacted responded. See Incident No. 1505230564 (May 23, 2015); Incident No. 1406190019 (June 19, 2014).

¹⁶ In addition to the incident described see Incident No. 1412280248 (Dec. 28, 2014); Incident No. 1407200495 (July 20, 2014).

a TWX check of at least three individuals, including two “detainees” who allegedly informed officers they were Mexican citizens.¹⁷ Border Patrol “advised they would respond to take custody.” One of the three subjects for whom TPD conducted a TWX check was released at 7:20 a.m. At least two others were held until Border Patrol arrived at 8:17 a.m.—over two hours after the stop, one and a half hours after the TWX check, and one hour after one of the other subjects was released. Border Patrol took custody of one of the two remaining subjects. No charges or citation appear to have been issued.

- **Incident No. 1406160423** (June 16, 2014). At 7:37 p.m., TPD responded to a report of an attempted car burglary. No damage was found, but the subject admitted to being undocumented. TPD called Border Patrol, which arrived to take custody at 8:50 p.m., one hour and thirteen minutes after the stop was initiated. The officer did not issue a citation or other charging document.

3) False “hits” resulting in prolonged detention

TPD records contained more than a dozen false positives,¹⁸ or “hits”—instances in which TPD and/or Border Patrol’s status check indicated an individual was unlawfully present when in fact the individual either had status (including several U.S. citizens) or Border Patrol declined to take custody for some other reason. In these cases, the false positives were apparently the sole basis for prolonging the stops of individuals who were ultimately released. In many instances, the subjects were cited and released minutes after Border Patrol declined to take custody. For example:

- **Incident No. 1510270358** (Oct 27, 2015). A routine shoplifting stop at 5:37 p.m. led to a TWX check which produced a positive “hit.” Border Patrol arrived at 7:24 p.m., almost two hours after the stop was initiated, but ultimately released the subject, “stating that he was a citizen.” The subject was then cited and released.
- **Incident No. 1408010422** (Aug. 1, 2014). An 8:03 p.m. stop in which the driver had a suspended license resulted in a TWX check at 8:21 p.m. The officer was advised of a “hit.” Border Patrol arrived at 9:13 p.m. Border Patrol determined the driver was a U.S. citizen at 9:21 p.m., one hour after the TWX check was initiated. TPD cited and released the driver four minutes later.
- **Incident No. 1406290230** (June 29, 2014). An officer stopped a subject on a bicycle at 11:10 a.m. After a consensual search led to the discovery of

¹⁷ TPD’s database lists three individuals with Incident No. 1407170112 and indicates TWX checks were conducted for two of those subjects at 6:43 a.m. and for the third subject at 7:02 a.m.

¹⁸ See, e.g., Incident No. 1510240394 (Oct. 15, 2015); Incident No. 1504200294 (Apr. 20, 2015); Incident No. 1502160271 (Feb. 16, 2015); Incident No. 1501270419 (Jan. 27, 2015); Incident No. 1410050432 (Oct. 5, 2014); Incident No. 1408140004 (Aug 14, 2014); Incident No. 1408050479 (Aug. 5, 2014); Incident No. 1408040383 (Aug. 4, 2014); Incident No. 1408020214 (Aug. 2, 2014); Incident No. 1407010637 (July 1, 2014).

marijuana, TPD initiated a TWX check that returned positive at 11:23 a.m. Border Patrol arrived at 12:10 p.m. and Border Patrol's "check" was negative. TPD then cited and released the subject at 12:20 p.m., almost an hour after running the TWX check.

4) *Detentions based on Border Patrol uncertainty regarding subjects' status*

In several instances, Border Patrol requested that individuals be detained not because of a recorded immigration history, but because Border Patrol had no record of the person or was otherwise interested in "verifying" status. In almost one third of these cases, TPD's database recorded Border Patrol's "remarks" on the immigration status of a given subject as either "no record," "undetermined," "blank," or "?" (as opposed to "positive" or "unauthorized" in other cases).¹⁹ Detaining individuals in these situations extends stops beyond the time permitted by law, and directly violates specific provisions of TPD General Order 2335.²⁰ For example:

- **Incident No. 1412280248** (Dec. 28, 2014). An officer responded to the scene of an accident in which neither driver had identification. The officer did a TWX check at 3:03 p.m. and was informed that "Border Patrol was not able to verify" the status of the second of the two drivers. The officer cited and released the first subject (the time of release is not recorded in TPD's database), but detained the other until Border Patrol arrived at 4:15 p.m., over an hour after the TWX check was conducted. TPD's database records Border Patrol's "remarks" regarding that subject's immigration status as "undetermined."
- **Incident No. 1407290193** (July 29, 2014). A shoplifting suspect was contacted at 12:10 p.m. The officer called TWX and was told a Border Patrol agent wanted to speak with the subject "as Border Patrol did not have him in their system." The officer called Border Patrol, which indicated an agent would be sent. An agent arrived at 1:34 p.m.—almost one and a half hours after the stop—and TPD transferred custody to Border Patrol. Border Patrol's remarks for the subject are listed as "no records."
- **Incident No. 1506300399** (June 30, 2015). An officer stopped a subject at 3:57 p.m. and issued an open container citation. The "required immigration check was completed [at 4:05 p.m.] and per DHS they requested that we remain with Juan until they send out an agent. Juan remained in my custody until the arrival of USBP" at 5:00 p.m., fifty-five minutes after the TWX check was initiated. Border Patrol's remarks for the subject are listed as "?".

¹⁹ See, e.g., Incident No. 1501120312 (Jan 22, 2015) ("no records"); Incident No. 1501170453 (Jan. 17, 2015) ("blank"); Incident No. 1410220058 (Oct. 22, 2014) ("?"); Incident No. 1409160243 (Sept. 16, 2014) ("?"); Incident No. 1409080355 (Sept. 8, 2014) ("blank").

²⁰ "The fact that ICE/CBP cannot verify a person's status does not mean a person is lawfully or unlawfully present in the United States and provides no basis for any enforcement action including transport or continued detention" (emphasis added). TPD General Order 2335.

5) *Subjects transported from scene of stop in order to meet Border Patrol*

In multiple cases,²¹ officers transported subjects to a TPD station—not for booking, but specifically in order to hand them over to Border Patrol. In some cases, Border Patrol did not take custody, either because the person had lawful status or for some other reason. Officers appear to be prolonging these stops solely to meet Border Patrol in cases that would otherwise result in field release. This practice unlawfully extends the duration of stops and is expressly prohibited by General Order 2335.²² For example:

- **Incident No. 1502160271**²³ (February 16, 2015). Following the stop of a trespassing suspect at 1:14 p.m., TPD conducted an immigration check at 1:27 p.m., which showed positive for immigration history. The officer then transported the subject to the Santa Cruz Substation to meet Border Patrol. Border Patrol arrived at 2:18 p.m., fifty-one minutes after the immigration check, and confirmed the subject was a lawful resident (TPD’s database shows Border Patrol’s record for the subject as “unauthorized?”). TPD then cited and released the subject for trespass and transported the subject back to the area of the arrest.
- **Incident No. 1411180309** (Nov. 18, 2014). A driver with expired registration and a suspended license was stopped at 7:36 p.m. TPD conducted a TWX check at 7:54 p.m. and it resulted in a positive “hit” for immigration history. The officer transported the subject to TPD’s South Substation and handed the subject over to Border Patrol at 8:43 p.m., forty-nine minutes after the check.
- **Incident No. 1407010637** (July 1, 2014). A subject was stopped at 10:45 p.m. and found to be in possession of marijuana. TPD conducted an immigration check at 11:19 p.m. and it resulted in a positive hit. The officer then drove the subject to a substation “to meet” Border Patrol. Border Patrol did not take custody. TPD cited and released the subject at 12:30 a.m., one hour and forty-five minutes after initiating the stop, and one hour and eleven minutes after the immigration check.

6) *Passengers subject to unlawfully prolonged detention*

In several cases,²⁴ officers detained vehicle passengers to wait for Border Patrol. In some cases, the passengers could have been cited and released for minor infractions; in

²¹ In addition to the stops described see Incident No. 1501240161 (Jan. 24, 2015); Incident No. 1410050042 (Oct. 5, 2014); Incident No. 1408070626 (Aug. 7, 2014).

²² “[O]fficers do not have the authority to transport a person or take any other enforcement action for a civil violation of federal law.” TPD General Order 2335.

²³ Also listed as Incident No. 1410020266.

²⁴ In addition to the stops described see Incident 1501240161 (Jan. 24, 2015); Incident No. 1412160082 (Dec. 16, 2014); Incident No. 1408260598 (Aug. 26, 2014); Incident No. 1408150543 (Aug. 15, 2014); Incident No. 1407280467 (July 28, 2014).

others, there was no apparent civil or criminal law basis to detain the passenger. Such practices are clearly unlawful.²⁵ For example:

- **Incident No. 1410050042** (Oct 5, 2014). At 12:55 a.m., an underage driver was stopped for speeding and was in possession of alcohol. The driver was cited and released. The officer asked the passenger for identification, and the passenger produced a fake Sonoran license. The report states the officer “detained [the subject and] he was placed inside of my patrol vehicle.” TPD’s database shows a TWX check conducted at 1:47 a.m.²⁶ and was negative, but the passenger was transported to the Santa Cruz Substation. Border Patrol arrived at 2:47 a.m., one hour and fifty-two minutes after the original stop, and one hour after the TWX check. The passenger was allegedly “cited and released” into Border Patrol custody (the records produced to the ACLU did not include a citation for the passenger).
- **Incident No. 1408260547** (Aug. 26, 2014). A vehicle was stopped following an illegal turn at 9:21 p.m. Of the three occupants, the driver had a suspended license, one passenger was noted as a possible sex offender absconder, and the other passenger allegedly admitted to being undocumented. The officer released the two other occupants, but the undocumented passenger was “turned over to Border Patrol who responded” at 10:35 p.m., one hour and fourteen minutes after the stop was initiated.
- **Incident No. 1406210499** (June 21, 2014). Following an 11:39 a.m. stop for speeding, both the driver and passenger identified themselves as “DREAMers.” The officer “advised both males they were being detained as they had provided no evidence of being in the US legally.²⁷ (emphasis added). I also advised [the driver] he was being detained for misdemeanor speeding.” Following a 1070 check (time not recorded), Border Patrol said it would respond, “if needed.” TPD affirmatively requested Border Patrol respond to the scene. Border Patrol arrived but declined to take either subject into custody. The stop was not concluded until 1:06 p.m., nearly one and a half hours after it was initiated.

²⁵ See *Melendres v. Arpaio*, 989 F.Supp.2d 822, 827 (D. Ariz., May 24, 2013)(“[O]fficers, as a matter of practice, investigate the identities of all occupants of a vehicle when a stop is made, even without individualized suspicion...When the deputies have no adequate reasonable suspicion that the individual occupants of a vehicle are engaging in criminal conduct to justify the stop to investigate the existence of such a crime, the extension of the stop violates the Fourth Amendment’s prohibition against unreasonable seizures.”).

²⁶ TPD’s database entry for the driver (same Incident number) indicates a TWX check was done at 1:09 a.m., thirty-eight minutes ahead of the time listed for the passenger.

²⁷ The officers’ statement reflects the mistaken understanding—contradicted by TPD policy and controlling legal authority—that police have authority to detain a subject based on suspicion of a civil immigration violation alone. It is well-established that they do not. See TPD General Order 2335.

7) Family separation

Finally, TPD records paint a troubling picture of the impact these practices have on the Tucson community, including multiple stops in which families with young children were detained in order for the parents to be handed over to Border Patrol:

- **Incident No. 1409290125** (Sept 29, 2014). At 7:50 a.m., a mother driving her two children to school was stopped and found to have a suspended license and no insurance. TPD did a 1070 check at 8:05 a.m., which returned positive. The registered owner of the car came to pick up the children and take them to school. Border Patrol arrived to take custody of the mother, over an hour after the TWX check and one hour and twenty minutes after the stop was initiated.
- **Incident No. 1409150121** (Sept. 15, 2014). A subject was “contacted in reference to a traffic accident.” The subject did not have identification and his son helped translate to get his name and date of birth. The TWX check was first negative, then returned positive. TPD notified Border Patrol and the parent “was told to stay at the scene.” Border Patrol arrived one hour after the stop was initiated and took custody.
- **Incident No. 1409080355** (Sept. 8, 2014). A family of four was stopped by a TPD officer. The driver had no license, and both the driver and his wife admitted to being undocumented. According to TPD’s database, Border Patrol responded 45 minutes after stop was initiated and took custody of the parents, while a family friend came to get the children. The police report does not state the basis for the stop and TPD’s database lists the TWX check as occurring 47 minutes *after* Border Patrol’s arrival.

Our review of TPD records raised additional concerns not enumerated above, including TPD officers’ requests for translation by Border Patrol agents (in spite of the fact that CBP has directed its agents not to respond to such requests);²⁸ TPD officers asking children to translate for detained parents;²⁹ TPD officers requesting a Border Patrol

²⁸ See e.g., Incident No. 1408110530 (Aug. 11, 2014) (officer requested translation assistance from TPD but because no officers were available called Border Patrol “to see if they could assist with the investigation”); Incident 1410020545 (Oct. 2, 2014) (TPD officer requested Border Patrol respond to scene of stop “to assist with language barrier”); see also Memorandum from U.S. Customs and Border Protection Deputy Commissioner David Aguilar, Guidance on Providing Language Assistance to Other Law Enforcement Organizations 1 (Nov. 21, 2012) available at <http://1.usa.gov/1VdqD2A>; Lisa Graybill, *Border Patrol Tightens Up Its Policy on Providing Interpretation Services*, AM. IMMIGR. COUNCIL BLOG (Dec. 17, 2012) available at <http://bit.ly/1WhOLkl>.

²⁹ See e.g., Incident No. 1409150121 (Sept. 15, 2014); Incident No. 1501270419 (Jan 27, 2015).

response when none was required;³⁰ and numerous discrepancies and omissions in TPD stop data.³¹

Flawed Policy Guidance Regarding Constitutional Limits on Officers' Immigration Authority

TPD's own records show that many TPD officers fundamentally misunderstand or disregard Fourth Amendment limits on their authority to engage in immigration enforcement, as well as existing TPD immigration policy. This appears to be at least in part the result of inadequate training: the records provided to the ACLU indicate that officers have not received specific training on TPD immigration policy since July 2014—when officers apparently took a twelve-page “online training” course—notwithstanding significant changes in TPD immigration policies and developments in relevant areas of Fourth Amendment law.³²

Officers' confusion has likely been compounded by supervisors' inaccurate and misleading statements regarding relevant legal authority. For example, TPD records produced to the ACLU include a June 2015 letter from former TPD Chief Roberto Villaseñor to the Tucson City Council, describing a TPD traffic stop that resulted in the driver being referred to Border Patrol:

The break in time between the TWX notification by the officer and the notification that CBP will respond [in this case, 30 minutes] is indicative of the lag time of inter-agency notification and vetting of record check returns. It was during this break that the officer assumed that CPB [sic] would not be responding and provided the driver with his signed citation. Shortly thereafter he informed the driver that CPB [sic] was responding to interview him. The driver was never restrained by TPD, however in an arrest and release situation the law allows the officer more latitude (time) to deal with the administrative issues of citing and

³⁰ See, e.g., Incident No. 1406210499 (June 21, 2014) (Following stop of two “DREAMers,” Border Patrol informed TPD it would respond “if needed.” TPD affirmatively requested Border Patrol respond to the scene.).

³¹ An internal TPD memo produced in response to the ACLU's records request states: “After less than a month of gathering the data, it is evident that we are not accurately capturing the true information.” There is no further indication in the records provided of what if any remedial actions TPD undertook in response to these concerns, but continuing problems include omitted stop times and Border Patrol response times and other discrepancies (for example, indicating Border Patrol did not take custody when the police report states that Border Patrol did take custody). Over 100 of the Border Patrol-involved stops we reviewed were marked in the database as involving no civil or criminal “hit,” while the police reports in many of those cases recorded TWX “hits.” As noted above, thirty-eight cases involving Border Patrol referrals—some of which lasted up to three hours—were not recorded in a police incident report.

³² The ACLU requested records including internal memoranda, training logs, training materials, and other guidance “relating to implementation of any changes in TPD immigration policies, including but not limited to the February 2015 revisions to TPD General Order 2300.” In response, we received twelve pages of presentation materials from a July 2014 online training course along with an attendance log, but no other training-related records.

releasing someone, the person is in custody and not allowed to leave. This was not a case where the officer was restrained by time. (emphasis added).³³

By contrast, an undated and unattributed internal TPD memo produced to the ACLU states: “[I]f the wait time in a traffic stop or investigative detention is going beyond the time it takes you to finish your business you do not have to continue waiting for TWX to call you back.” (emphasis added). The memo continues, that in cite and release situations officers have “more latitude with the wait time, however again be cognizant of the scrutiny we are under an[d] inquire with CBP what the wait time will be, generally speaking it is ‘driving time’ which is acceptable in most circumstances.” (emphasis added).

It is unclear how many officers are following these instructions—which contain multiple misstatements of legal authority—but of the few police reports that made explicit reference to any constraints on their ability to conduct immigration investigations (most do not), at least some TPD officers are operating under the assumption that twenty minutes marks the outer limit of their authority to investigate status.³⁴ For example:

- **Incident No. 1411070243** (Nov. 7, 2014). After a traffic stop at 2:53 p.m., an officer issued a citation for an illegal turn and suspended license. The officer reports conducting TWX checks at 3:08 p.m. and at 3:17 p.m. (TPD’s database indicates a check at 3:10 p.m.). TWX responded that Border Patrol “had a record” of the driver and “wanted to respond to the stop in order to contact him.” The officer finished writing the citation at 3:36 p.m. and a tow truck arrived. The officer released the driver at 3:56 p.m., twenty minutes after the citation was issued, which the officer “believed to be a reasonable amount of time after my investigation was completed.” (emphasis added).

We must emphasize that each of these varying theories of TPD detention authority—that officers can extend stops for up to twenty minutes after the investigation is completed, or can “generally” wait for Border Patrol’s “driving time,” or that officers are “not restrained by time” at all—has absolutely no basis in existing law or TPD policy. These and similar misstatements contained in past iterations of TPD immigration policy should long since have been rejected by TPD officials.³⁵ To the extent officers are relying on any of them, many of the constitutional rights violations described herein are the predictable result.

³³ In that case, Border Patrol arrived forty-seven minutes after the TWX check and more than one hour after the stop was initiated.

³⁴ In addition to the incident described *see* Incident No. 1407160057 (July 16, 2014) and Incident No. 1408150543 (Aug. 15, 2014), both stops in which officer noted twenty minutes as the cut-off for further extending detention to investigate status.

³⁵ *See* TESTIMONY OF JAMES LYALL, *supra* note 3, regarding General Order 2119.1 (since superseded by General Order 2300), which allowed for transportation of subjects to CBP custody and instructed officers to wait a “reasonable period of time” while awaiting a response from CBP.

Recommendations

In order to remedy the many problems described herein, provide officers with sufficient direction and oversight, and prevent further violations of the rights of Tucson residents, TPD must implement immediate changes to TPD immigration policy and properly train and supervise officers for proper implementation of that policy. Among the necessary changes we wish to discuss with you further, several of which we have raised with TPD and the City of Tucson previously, are the following:

- TPD policy should clearly state that SB 1070 only requires officers to make a “reasonable attempt...to determine the immigration status” of individuals lawfully seized,³⁶ while still “protecting the civil rights of all persons.”³⁷ Section 2(B) does not—and cannot—require that a status verification check be completed if that check prolongs the stop.³⁸
- TPD policy must emphasize that absent probable cause to believe an individual is engaged in criminal activity it is unlawful for officers to delay release in order to await the processing of or response to a status verification check (including responses from TWX operators and immigration officials) or to facilitate transfer of a subject to Border Patrol custody.
- TPD policy should remind officers that suspicion or knowledge of unauthorized status does not provide officers with a lawful basis to delay release in order to await the processing of or response to a status verification check (including responses from TWX operators and immigration officials) or to facilitate transfer of a subject to Border Patrol custody.³⁹
- TPD policy must emphasize that both prior and subsequent to the initiation of a status verification check, officers are to continue processing the stop at issue as diligently as they otherwise would absent any such check.

³⁶ Ariz. Rev. Stat. Ann. §11-1051(B).

³⁷ *Id.* at §11-1051(F).

³⁸ See *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012) (Section 2(B) “does not require the [status] verification be completed during the stop or detention if that is not reasonable or practicable.”) (quoting Reply Brief for Petitioner).

³⁹ A “detention beyond the duration of the initial traffic stop must be supported independently by reasonable suspicion of criminality.” *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (citing *Arizona v. Johnson*, 555 U.S. at 333 and *United States v. Mendez*, 476 F.3d 1077, 1080–81 (9th Cir. 2007)). Thus, “possible criminality is key to any *Terry* investigatory stop or prolonged detention.” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The Ninth Circuit has “long made clear that, unlike illegal entry, mere unauthorized presence in the United States is not a crime.” *Id.* (citing *Martinez-Medina v. Holder*, 673 F.3d 1029, 1036 (9th Cir. 2011); *Gonzales v. City of Peoria*, 722 F.2d 468, 476–77 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (1999)).

- TPD policy should remind officers that the legal limitations on officers' immigration authority described in TPD policy apply to cite and release situations as to any other stops. Cite and release situations involving known or suspected unauthorized immigrants should not be handled differently from any others, and that a decision to detain rather than field release cannot be made for the purpose of awaiting the processing of or response to a status verification check (including responses from TWX operators and immigration officials) or facilitating transfer of a subject to Border Patrol custody.
- TPD policy must clarify that in there is no fixed time limit such as twenty minutes or Border Patrol "drive time" within which it is acceptable to prolong a stop beyond the time needed to diligently address the underlying issue, and that any extension of a stop solely for processing of or response to a status verification check is unlawful.
- Because SB 1070 only requires officers to make a "reasonable effort" to determine immigration status, and cannot authorize officers to wait for Border Patrol to arrive to the scene of a stop, absent probable cause of a federal criminal violation officers should not call upon Border Patrol to respond to field stops, including vehicle stops. Such responses are likely to result in unlawfully prolonged detention.
- TPD must prohibit officers from transporting subjects—including but not limited to passengers—based only on subjects' suspected (or known) immigration status in order to meet Border Patrol at TPD stations or at other locations. Likewise, agents should not affirmatively call upon Border Patrol to meet officers at TPD stations or other locations for custody transfers in such situations.
- TPD must prohibit officers from detaining vehicle passengers (absent probable cause of criminal activity) in order to await the processing of or response to a status verification check (including responses from TWX operators and immigration officials) or to facilitate transfer of a subject to Border Patrol custody, including physically transporting passengers to TPD stations or other locations.
- TPD policy must prohibit officers from calling on Border Patrol agents to act as translators, consistent with CBP's own policy.⁴⁰
- TPD policy must require that supervisors be immediately notified of any incident involving a TWX referral to Border Patrol and direct supervisors to intervene where necessary to ensure full compliance with TPD policy.
- TPD should improve data collection practices to improve accuracy and capture additional key data in the TPD database, including officers' specific

⁴⁰ See *supra* note 28.

basis for initiating a stop and the complete timeline for TWX referrals and Border Patrol responses. All stops involving a TWX referral to Border Patrol—regardless of whether Border Patrol responds or takes custody—must be documented in a full police report, and must be reviewed promptly by TPD supervisors and leadership.⁴¹

- Supervisors should review at least monthly all available data for stops involving referral to ICE/CBP. Supervisors should monitor stop data for violations of law and/or TPD policy as well as disparities in data collection or the administration of stops (for example, comparing the circumstances of stops in which individuals were detained rather than field released), and take remedial action as necessary.
- A monthly breakdown of all stops involving referral to Border Patrol, including any violations of policy and any remedial measures undertaken in response, should be made publicly available.
- TPD should implement immediate and continuing in-person, supervisor-led training on TPD immigration policies, including existing provision of General Order 2335 and any future changes, and incorporating developments in relevant case law.

Conclusion

TPD's records show that officers enforcing SB 1070 are exceeding the strict constitutional limits on their authority. While various revisions to TPD immigration policy in past years constitute significant progress, the guidance currently provided to officers—including current TPD immigration policy as well as officer training and oversight—must be improved substantially.

There is no question that Section 2(B) of SB 1070 places local law enforcement in a difficult position—that is one of the reasons the City of Tucson has long opposed SB 1070—but that is precisely why robust policies must be in place to provide appropriate guidance and promptly address errors. Furthermore, it is insufficient to claim, as some have, that SB 1070 precludes localities from enacting policies to promote community trust in police or protect the civil rights of all residents. There is still much that TPD can and must do to ensure that its officers comply with constitutional requirements and to mitigate the tremendous harm SB 1070 inflicts upon this community. While we recognize that the incidents and policies described herein predate your tenure, your leadership and commitment is needed to ensure that these problems are addressed promptly.

⁴¹ As noted, 38 of the 148 incidents TPD identified as involving a Border Patrol response were not recorded in a police incident report. The ACLU is in the process of obtaining any other records relating to those incidents, but all stops involving a Border Patrol response should be described in a written police report.

We look forward to discussing this matter with you in greater detail in the near future.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

James Lyall
Staff Attorney
ACLU of Arizona

Copy to: Tucson Mayor Jonathan Rothschild

Tucson City Council:
Karin Uhlich
Paul Cunningham
Regina Romero
Richard Fimbres
Shirley Scott
Steve Kozachik

Tucson City Attorney Michael G. Rankin