



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>Informal Attorney General Opinion</p> <p>September 20, 2016</p>	<p>No. I16-010</p> <p>Re: Advisory Model Policy for Law Enforcement Applying SB 1070</p>
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This informal Attorney General opinion sets forth an advisory model policy to guide law enforcement agencies and officers as to their duties under state law.¹ This advisory model policy reflects the Attorney General’s view as to the constitutional interpretation of § 2(B) and 2(D) of S.B. 1070, A.R.S. § 11-1051(B) and (D), and acknowledges the Legislature’s admonition that § 2 must “be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.” A.R.S. § 11–1051(L). In particular, this policy is intended to articulate the constitutional limits demarcated in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015); *Arizona v. United States*, 132 S. Ct. 2492 (2012); and *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012), among other applicable authority.

I. The Statute

The relevant sections of A.R.S. § 11-1051 provide:

B. For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal

¹ Although this opinion is designated “informal”, the analysis contained herein has the same persuasive weight as the analysis in a formal Attorney General opinion.

government pursuant to 8 United States Code § 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona nonoperating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

D. Notwithstanding any other law, a law enforcement agency may securely transport an alien who the agency has received verification is unlawfully present in the United States and who is in the agency's custody to a federal facility in this state or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain judicial authorization before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside of this state.

II. Policy

Law enforcement officers shall conduct contacts with individuals suspected of being unlawfully present in the United States in a manner consistent with federal and state laws. See A.R.S. § 11-1051(L). Officers shall protect the civil rights, privileges, and immunities of all persons. Officers shall not prolong a stop, detention, or arrest solely for the purpose of verifying immigration status. *Arizona*, 132 S. Ct. at 2509 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”) If an officer deviates from this policy, the officer must notify a supervisor at the first reasonable opportunity. Officers shall not contact, stop, detain, or arrest an individual based on race, color, or national origin, except when it is part of a suspect description linking that individual to a particular unlawful incident and said description is timely, reliable, and geographically relevant or when otherwise authorized by law. See A.R.S. § 11-1051(B).

III. Definitions

The following definitions will apply to the terms below as discussed in this informal opinion:

Alien: Any individual not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3).

Civil immigration violation: A violation of a federal civil immigration law. Offenses include, but are not limited to, unlawful presence of an alien in the United States; an alien whose visa has expired and has not been renewed; or an alien who seeks or engages in unauthorized employment. *See, generally*, 8 U.S.C. §1227(a)(1)(B)-(C).²

Criminal immigration violation: A violation of a federal criminal immigration law. Offenses include, but are not limited to, violations of Title 8, U.S.C., §1324; Title 8, U.S.C. §1325(a); and Title 8, U.S.C. §1326.

Determine: To ascertain or conclude, especially after observation or consideration. *See* Dictionary.com, <http://www.dictionary.com> (15 Apr. 2016). Only the federal government may determine immigration status. *Arizona*, 132 S. Ct. at 2498 (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”); *see also Plyler v. Doe*, 457 U.S. 202, 225 (1982) (“The States enjoy no power with respect to the classification of aliens.”).

ICE/CBP: Immigration and Customs Enforcement/Customs and Border Protection.

Immigration status: The legal standing of an alien’s presence in the United States.

Probable cause: Reliable information based on facts and circumstances sufficient to lead to the conclusion that it is more likely than not that a crime has been committed and that the individual to be arrested has committed it. *See, e.g., Maryland v. Pringle*, 540 U.S. 366, (2003) (“The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”) (internal quotation marks and citation omitted)

Reasonable suspicion: Specific facts which taken together with rational inferences from those facts support an objective belief that an individual has committed or is about to commit an offense; based upon the facts that exist, there is reason to investigate further. An officer may stop or briefly detain an individual for further investigation based on reasonable suspicion (a *Terry* stop), but may not arrest on that basis alone. *See Terry v. Ohio*, 88 S.Ct. 1868 (1968).

Unlawfully present: For the purpose of applying § 2(B) and 2(D) of S.B. 1070, officers may consider an alien “unlawfully present” only if the alien is NOT: (1) a lawful or conditional permanent resident; (2) a nonimmigrant in an authorized period of stay; (3) a refugee or asylee; or (4) otherwise authorized or allowed to remain in the United States by federal law or the federal Department of Homeland Security.³

Verify: To prove to be true; confirm; substantiate. Dictionary.com, <http://www.dictionary.com> (15 Apr. 2016).

² State law enforcement officers generally lack authority to detain individuals for civil violations of immigration law. *Arizona*, 132 S. Ct. at 2506 (“Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer.”).

³ This definition is for purposes of this policy alone.

IV. Consensual Contacts

State laws related to immigration enforcement neither expand nor limit an officer's ability to approach an individual and engage in a consensual contact. During a consensual contact, the officer may inquire about any subject matter. However, the individual contacted does not have to answer questions or produce any identification, but may choose to do so voluntarily. *See, e.g., Florida v. Royer*, 460 U.S. 491, 497 (1983). During a consensual contact, officers may ask, but shall not demand, that an individual produce immigration documents.

V. Individuals Lawfully Stopped or Detained

Officers shall not prolong a stop or detention for an immigration inquiry to request or obtain verification of immigration status, or prolong a criminal investigation or inquiry in order to accommodate or complete immigration-related tasks. *Arizona*, 132 S.Ct.at 2509; *see also Rodriguez*, 135 S.Ct. at 1614-16.

An officer shall presume that a person is lawfully present in the United States if the person provides any of the following: a valid Arizona driver license or nonoperating identification license; a valid tribal enrollment card or other form of tribal identification; or any valid United States federal, state or local government issued identification, provided the issuing entity requires proof of legal presence in the United States. A.R.S. § 11-1051(B)(1)-(4).

If in the course of duty an officer has reasonable suspicion that an individual is unlawfully present in the United States, based on all available facts, except race or ethnicity, the officer shall attempt to verify the individual's immigration status by contacting ICE/CBP unless doing so would prolong the stop or detention, or the circumstances below apply. The officer shall, consistent with department policies, document the verification attempt, including the basis for the officer's reasonable suspicion as to unlawful presence and any response from ICE/CBP, in the stop data collection system.⁴

If it is not practicable for an officer to investigate or verify an individual's immigration status due to factors such as call load, staffing, emergencies, other present duties, availability of personnel on scene, location, available back-up, ability to contact ICE/CBP, or the availability of ICE/CBP, the officer may, consistent with department policies, use discretion not to pursue an investigation into the individual's immigration status, but shall document the justification for such a decision in the stop data collection system.

If an officer has reasonable suspicion that an individual is unlawfully present, but believes that investigating or verifying immigration status may hinder or obstruct an investigation, the officer may, consistent with department policies, use discretion not to inquire into the individual's

⁴ "In January 2003, the Arizona Department of Public Safety began voluntarily collecting data regarding traffic and pedestrian stops, including information pertaining to the characteristics of the traffic stop, driver, vehicle and officer(s)."

See http://www.azdps.gov/about/reports/docs/Traffic_Stop_Response_2008.pdf (last visited 09/13/16)

immigration status. A.R.S. § 11-1051(B). The officer shall, consistent with department policies, document the justification for such a decision in the stop data collection system. Factors to consider that may indicate an immigration inquiry could hinder or obstruct an investigation may include the need for suspect, victim, and witness cooperation in any investigation.

VI. Immigration Violations

If an officer has probable cause to believe that an individual has committed a civil immigration violation, the officer has no authority to arrest the individual and shall not detain the individual longer than necessary to complete the state law basis for the contact.⁵ *See Melendres*, 695 F.3d at 1001 (any extension of a lawful stop “must be supported by additional suspicion of criminality. Unlawful presence is not criminal.”).

If an officer has probable cause to believe that an individual has committed a federal criminal immigration violation, the officer may arrest the individual and contact ICE/CBP to clarify its interest in detaining the individual.⁶ *See Melendres*, 695 F.3d at 1001 (citing *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983), for the proposition that “federal law does not preclude local law enforcement of the criminal provisions’ of federal immigration law.”). Officers may wait a reasonable time period for ICE/CBP response and should document any response or direction from ICE/CBP. If ICE/CBP fails to respond or take disposition within a reasonable amount of time and there is no other criminal violation, the officer shall release the individual.

If ICE/CBP agrees to take disposition of the individual, officers may assist by transporting the individual to an ICE/CBP facility if ICE/CBP so directs. A.R.S. § 11-1051(D). When making the determination to transport, officers shall, consistent with department policies, consider department and division priorities.

Officers shall not arrest an individual simply because the individual lacks proper documentation. *See Melendres*, 695 F.3d at 1000-01.

VII. Arrests

An officer or jail official shall not prolong an arrest or detention for an immigration inquiry, including to request or obtain verification of immigration status. *Arizona*, 132 S.Ct. at 2509 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”).

⁵ This restriction on non-federal law enforcement does not apply where such officials have been specifically trained and delegated to exercise the authority of an immigration officer under § 287(g) of the INA, 8 U.S.C. § 1357(g), and are acting pursuant to that authority. *Melendres*, 695 F.3d at 1001.

⁶ It remains an open issue whether reasonable suspicion of illegal entry or another immigration crime would be a basis for prolonging a detention. *Arizona*, 132 S. Ct. at 2509.

If, after reviewing all available facts (except race or ethnicity) and/or evidence, an officer has reasonable suspicion that an arrestee is unlawfully present in the United States, a reasonable attempt shall be made to contact ICE/CBP to verify the arrestee's immigration status prior to releasing the arrestee, but release may not be delayed in order to request or obtain verification. *Id.* The presumptions and the exceptions in section V above apply to this paragraph. Officers shall, consistent with department policies, document any response or direction from ICE/CBP in the stop data collection system.

The officer shall proceed to handle the arrestee according to department policy, which may result in the issuance of a citation, referral, and the release of the arrestee.

VIII. Contact with ICE/CBP

Officers attempting to verify an individual's immigration status shall do so by contacting Operational Communications. Operational Communications shall submit an inquiry through the National Law Enforcement Telecommunications System (NLETS) for verification of an individual's immigration status. After a response is received from ICE/CBP, Operational Communications shall forward the information to the officer. If information verifying an individual's immigration status is received from another source (such as an ICE/CBP officer on scene), the verification shall, consistent with department policies, be documented in the stop data collection system.

If an officer wishes to request verification prior to the release of an individual or arrestee, Operational Communications may follow the NLETS submission with a phone call to the Law Enforcement Support Center (LESC).⁷ As explained above, however, officers may not extend a stop or detention in order to make a verification request or to wait for a verification response.

IX. Consular Notification

Officers should follow consular notification procedures set forth in the Vienna Convention on Consular Relations (the Convention), *see* Article 30 of the Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820, namely, "when a national of one country is detained by authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 339 (2006) ("[Article 36 of the Convention] provides that 'if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.'"). Law enforcement officials may refer to the following for guidance on such notification procedures: Law Bulletin 2009-05, *Foreign Nationals—Advice of Rights in Addition to Miranda Warnings*; the

⁷ "ICE's LESLSC operates '24 hours a day, seven days a week, 365 days a year' and provides, among other things, 'immigration status, identity information and real-time assistance to local, state and federal law enforcement agencies.'" *Arizona*, 132 S. Ct. at 2508 (internal citations omitted).

U.S. Department of State’s *Consular Notification and Access Manual*, (Fourth ed. 2016), https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf (last visited 9/13/16).⁸

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⁸ This informal opinion does not confer upon aliens any legal rights beyond those recognized by binding court precedent. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. at 2681 (“Indeed, Article 36 [of Vienna Convention on Consular Relations] does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention.”).