an immigration inquiry if, for example, the deputy observes illegal narcotics sitting on the passenger's lap. Similarly, this proposal would not prohibit a deputy from asking for a passenger's name.

This proposal is intended to limit the incidence of racial profiling, one of the primary objectives of Condition Four. The current policy accurately defines racial profiling as "an inappropriate reliance on factors such as race . . . in deciding whether to take law enforcement action." Whether to initiate an immigration inquiry is, by itself, a "law enforcement action." By permitting deputies to initiate immigration-status inquiries of passengers, the current policy invites deputies to develop "reasonable suspicion" of unlawful status, for example, solely on the basis that a passenger is in the same vehicle with another individual (likely of the same race) who an officer might suspect of being undocumented. The Constitution does not permit an officer to find reasonable suspicion or probable cause merely on the basis of companionship. *United States v. Vaughan*, 718 F.2d 332, 333-34 (9th Cir. 1983) (finding no probable cause to believe that a passenger was involved in wrongdoing even though his two travel companions were known felons); *United States v. Soyland,* 3 F.3d 1312, 1314 (9th Cir. 1993) (finding that a passenger's "mere presence" in the vehicle was not enough to connect him to the driver's wrongdoing); *State v. Primous*, 242 Ariz. 221, 225, ¶ 20 (2017). And allowing deputies to initiate immigration inquiries of passengers, absent independent reasonable suspicion of criminal wrongdoing, allows deputies to draw improper inferences related to race – precisely the type of "law enforcement action" this policy is designed to prevent.

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B. Difficulty Speaking English as a Factor in Developing Reasonable Suspicion of Unlawful Status

The current policy does a good job of clarifying that a deputy may not rely merely on a "single factor" in determining whether there exists reasonable suspicion that an individual is undocumented. Nevertheless, the ACLU of Arizona recommends strengthening this section to make clear that a person's language abilities (i.e., difficulty speaking English) may not be considered at all in developing reasonable suspicion. Difficulty speaking English is a characteristic shared by a "substantial number of people," such that the "characteristic is of little or no probative" value in drawing inferences about immigration status. *United States v. Montero-Camargo*, 208 F.3d 1122, 1131-32 (9th Cir. 2000). In Arizona, for example, there are more than 1.6 million people who speak a

language other than English at home.[6] A small fraction of that number lack lawful immigration status,[7] and, indeed, federal immigration law does not require that lawful permanent residents speak English at all.

More troubling, reliance on language ability as a factor leading to reasonable suspicion would raise racial-profiling concerns. In Arizona, where the vast majority of non-native-English speakers are Latinos, reliance on language ability is a proxy for race and national origin. Long ago, the U.S. Supreme Court recognized that a policy regulating language in a seemingly neutral fashion ought to be viewed as discriminatory when the demographics of the community suggest that the negative effects would be felt almost entirely by one ethnic group. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524 (1926). More recently, the Supreme Court has acknowledged the possibility that "for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an Equal Protection analysis." *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (Kennedy, J., concurring). Arizona is such a community. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997) (observing that an English-only provision in the Arizona Constitution "is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics"); *United States v. Maricopa Cnty.*, 915 F. Supp. 2d 1073, 1081 (D. Ariz. 2012) (noting that, in light of Maricopa County's "large Latino LEP [limited English proficient] population," the county's refusal to provide services in any language other than English may be viewed as a form of national origin discrimination).

C. Interactions at Border Patrol Checkpoints

The current policy prohibits deputies from "participat[ing]" in operations at border checkpoints "except when requested to respond and enforce a specific State or local statute." Implementation of this policy will be a marked improvement over past practice, in which deputies routinely stationed themselves at Border Patrol checkpoints for entire work shifts. As noted in the ACLU of Arizona's February 19, 2018 memo to the Board of Supervisors, this practice raised many constitutional concerns, as "the mere presence of PCSD deputies at a Border Patrol checkpoint taints the whole enterprise because it converts a limited-purpose checkpoint into one whose primary purpose is general law

[6] Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 years and Over: 2009-2013., U.S. CENSUS BUREAU (Oct. 2015), https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html.
[7] U.S. Unauthorized Immigration Population Estimates, PEW RESEARCH CENTER (Nov. 2016), http://www.pewhispanic.org/interactives/unauthorized-immigrants/.