People's Defense Initiative
738 N 5th Ave Suite 208
Tucson, AZ 85705

www.peoplesdefenseinitiative.org

This memo is prepared in response to Tucson City Attorney Mike Rankin's Memo to the Tucson Mayor and City Council dated January 16, 2019 addressing the "Tucson Families Free and Together" citizen initiative. Because this memo is written with a broader audience in mind, a few notes about language and terminologies:

1. For purposes of this memo, the "proposed ordinance" refers to the citizens initiative that is currently seeking a place on the November 2019 citywide ballot, and which is variously referred to as "Tucson Families Free and Together" and the Tucson Sanctuary City Initiative.

2. The City Attorney's memo discusses the 2010 Arizona state law commonly known as SB 1070. As the City Attorney correctly points out, this is a single law known by many names. As the result of several lawsuits between 2010 and 2016, many provisions of the original law have been permanently struck down as unconstitutional. Thus, the remaining provisions of the law are now found in Title 11 of the Arizona Revised Statutes (cited as § A.R.S. 11-1051). For simplicity, this memo refers to the commonly-known SB 1070.

3. Both SB 1070 and the proposed ordinance use the term "detainee" – a term describing those who are stopped (or detained) but not arrested. The classic example is a motorist who is stopped for a minor traffic violation. The motorist is detained in the sense that he or she cannot drive away from the scene, yet the motorist is not arrested. This distinction is a significant one, as SB 1070 imposes different immigration-related obligations on police. Although individuals can be detained by police in other contexts outside of a traffic stop, this is the most widely understood example and this memo uses the term "motorist" as a stand-in to describe all types of detainees.

I. Sec. 17-82(d): Prohibiting "any law enforcement activity", the purpose of which is to determine immigration status

The City Attorney contends that this section "is a direct conflict with SB 1070". It is undisputed that local police (even after implementation of SB 1070) cannot initiate a traffic stop or otherwise detain someone for the purpose of checking immigration status. This provision would not limit or hinder an officer's ability to ask questions after stopping or detaining an individual, as is sometimes required by SB 1070.

II. Sec. 17-83(g): Limiting immigration status inquiries in certain locations

The City Attorney contends that this section violates SB 1070 because it limits an officer's ability to inquire about an individual's immigration status in certain locations, such as schools and hospitals. Limiting an officer's ability to make immigration status inquiries is not new. As early as the 1980s, the federal agencies responsible for enforcing immigration laws set restrictions on their own agents. *Murillo v. Musegades*, 809 F. Supp. 487, 495 (W.D. Tex. 1992) (citing a 1980s "sensitive locations" policy issued by a local Border Patrol sector). Indeed, TPD officers themselves have expressed particular concern with the application of SB 1070 in these sensitive locations. One officer sued the State of Arizona on account of these concerns. *Escobar v. Brewer*, 2010 WL 11537784, at *1 (D. Ariz. Aug. 31, 2010) (noting that Officer Martin Escobar sued, in part, because he was concerned that "S.B. 1070 will violate the rights of . . . school children"). And in recent years, both ICE and CBP (the two federal agencies responsible for enforcing immigration laws) have issued so-called "sensitive locations" memoranda "designed to ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches."[1] These federal policies remain in full force during the Trump Administration.[2]

Far from violating SB 1070, this provision of the proposed ordinance would bring TPD policies into line with long-standing federal guidelines. As the Supreme Court has observed, state law cannot "provide state officers even greater authority [on matters of immigration enforcement] than Congress has given to trained federal immigration officers" because "this would allow the State to achieve its own immigration policy" – something prohibited by the federal Constitution. *Arizona v. United States*, 567 U.S. 387, 408 (2012). Thus, a city ordinance

[1] U.S. Immigration and Customs Enforcement, Policy No. 10029.2 (Oct. 24, 2011): https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf

[2] U.S. Immigration and Customs Enforcement, "FAQ on Sensitive Locations and Courthouse Arrests" https://www.ice.gov/ero/enforcement/sensitive-loc ("Does ICE's Sensitive Locations Policy Remain in Effect? Yes.")

dealing with the enforcement of federal immigration law, which closely tracks the limits imposed by the relevant federal agencies, cannot be said to violate a state law that purports to require immigration enforcement by local officers under circumstances that would not be permitted for federal agents.

III. Sec. 17-83(h) & (i): Factors to be considered in developing reasonable suspicion of unlawful status

The City Attorney raises two legal concerns with Sections 17-83(h) & (i). First, that the combined effect of these two provisions "conflict with the obligations imposed under A.R.S. Sec. 11-1051(b)/SB 1070." Second, that the sections are "contrary to the concept of reasonable suspicion under legal precedent." Each is addressed in turn.

The City Attorney fails to explain why this provision conflicts with SB 1070 and cites to no legal authority to support this conclusion. This provision does not conflict with SB 1070. SB 1070 requires officers to investigate a motorist's immigration status only when "reasonable suspicion exists" that the person is undocumented. A.R.S. § 11-1051. Thus, a local ordinance conflicts with SB 1070 only if it prohibits or hinders officers from doing what SB 1070 mandates – investigating immigration status in those circumstances where "reasonable suspicion exists." The proposed ordinance does not. Rather, Sec. 17-83(h) & (j) provides local officers with guidance about what "reasonable suspicion" means when determining a motorist's immigration status.

SB 1070 does not define the term "reasonable suspicion". Nor does it instruct local officers when reasonable suspicion is likely to exist. As the Supreme Court has observed, immigration law is "extensive and complex", *Arizona v. United States,* 567 U.S. 387, 395 (2012), and local law enforcement officers are poorly-positioned to make immigration status determinations. "The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records," *Arizona*, 567 U.S. at 411, but naturally an officer must first decide whether to refer an immigration check to ICE in the first place. In deciding whether to seek the assistance of ICE, an officer is instructed by SB 1070 to consider whether "reasonable suspicion exists", without further explanation. The proposed ordinance would instruct officers to rule out considerations (also called "factors") that, considered alone, are illegal or improper. *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 907 (D. Ariz. 2013) (noting that law enforcement officers had been "erroneously instructed that . . . they could use race as one factor among others in forming that reasonable suspicion."); *United States v. Maricopa Cty.*, 151 F. Supp. 3d 998, 1030 (D. Ariz. 2015) (finding that officers' reliance on race and color "as a factor in forming reasonable suspicion" violated the Equal Protection Clause); *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) ("Hispanic appearance is not, in general, an appropriate factor.")

The proposed ordinance would merely prohibit officers from considering factors that should not be considered in the first place, such as factors that are proxies (ie, pretexts) for race. Under current TPD policy, officers are not only permitted to consider many of these race-proxies but are encouraged to do so.[3] For example, current policy permits (and the proposed ordinance would prohibit) the consideration of one's language abilities. As many courts have observed, "in some communities, 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). Tucson is such a community. *See, e.g.,Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947 (9th Cir. 1995) (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").

Other factors would be prohibited by the proposed ordinance because they violate other core Constitutional protections, such as the First Amendment guarantee of free association (ie, prohibiting the consideration of a "detainee's presence where aliens who are unlawfully present are known to gather"). And yet other factors are prohibited because the "characteristic is of little or no probative" value in drawing inferences about one's immigration status. *United States v. Montero-Camargo*, 208 F.3d 1122, 1131-32 (9th Cir. 2000) (ie, prohibiting the consideration of a "detainee's inability to provide a permanent or local residential address")

In addressing the City Attorney's contention that the proposed ordinance is "contrary to the concept of reasonable suspicion", it is worth understanding the roots of that concept. Reasonable suspicion is a concept historically applied only to determine when an officer may constitutionally detain a person for suspicion of criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (referring to "reasonable suspicion supported by articulable facts that criminal activity may be afoot") The proposed ordinance limits only an officer's ability to develop suspicion "that a detainee is an alien who is unlawfully present in the United States". Sec. 17-83(i). There is no crime involved in this analysis. *See, e.g., Arizona v. United States,* 567 U.S. 387, 396 (2012) ("Removal is a civil, not criminal, matter."); *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012); *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 465 (4th Cir. 2013). For additional clarity, the proposed ordinance clarifies in Sec. 17-89 that it "shall [not] be construed to limit an officer's ability to establish reasonable suspicion or probable cause of a crime." Thus, the proposed ordinance does not alter the "reasonable suspicion" standard as

[3] Tucson Police Department General Order 2300, (Dec 19, 2017), available at: https://www.tucsonaz.gov/files/police/general-orders/2300IMMIGRATION.pdf ("In determining whether reasonable suspicion of unlawful presence exists, officers should consider all possible relevant factors, including, but not limited to: . . . significant difficulty speaking English")

applied to suspected crimes and civil traffic offenses – the only offenses to which the concept of reasonable suspicion applies.

More fundamentally, it is worth noting that the concept of reasonable suspicion forms part of the Fourth Amendment. And while the Fourth Amendment permits local officers to ask questions that may be unrelated to the underlying traffic stop, *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 186 (2004), nothing in the Fourth Amendment requires that local police departments allow their officers to ask any question whatsoever. *State v. Akins*, 206 Ariz. 113, 116 (Ct. App. 2003) (summarizing the limitations placed on Arizona officers when asking for a person's identity). To say that the proposed ordinance is "contrary to the concept of reasonable suspicion" misapprehends the purpose of the Fourth Amendment – to protect community members from unreasonable searches and seizures; not to ensure that police officers be given a broad range of options in questioning members of the public.

IV. Sec. 17-83(j): Circumstances where it is not "practicable" to inquire about immigration status

The City Attorney asserts that this section – restricting an officer's ability to inquire about immigration status during certain traffic stop situations – is "likely not a defensible restriction on the obligations under state law." The City Attorney does not cite any legal authority for this position.

SB 1070 requires officers to make a "reasonable attempt . . . **when practicable** . . . to determine the immigration status" of certain individuals. A.R.S. 11-1051(B) (emphasis added). SB 1070 provides no definition or explanation of the phrase "when practicable", nor do other sections of Arizona statute lend insight into the Legislature's intentions with the phrase. *See, e.g.,* A.R.S. § 28-796 (statute requiring pedestrians to walk against the flow of traffic "when practicable" similarly lacks definition or explanation); *State v. Graham*, 2010 WL 2165073, at *3 (Ariz. Ct. App. May 28, 2010) (declining to interpret the meaning of "when practicable" found in the pedestrian statute).

Absent guidance regarding the meaning of the phrase "when practicable", the proposed ordinance advances the notion that a secondary inquiry into a noncriminal and non-traffic offense is inherently impracticable when the inquiry takes place on the side of a busy thoroughfare. Indeed, Arizona Attorney General Brnovich has written that an officer, "consistent with department policies", may choose not to pursue an immigration inquiry when he or she determines that such inquiry is not practicable "due to factors such as . . . location."[4] The

[4] Attorney General Opinion Opinion No. 16-010, "Advisory Model Policy for Law Enforcement Applying SB 1070" (Sept. 20, 2016), available at: https://www.azag.gov/opinions/i16-010

proposed ordinance, if passed, would form a "department policy" of TPD that articulates a standard for determining when an immigration investigation is impracticable "due to factors such as . . . location."

V. Sec. 17-83(k): categories of crime that may "hinder or obstruct" a criminal investigation

The City Attorney contends that Section 17-83(k) "conflicts with the obligations imposed under SB 1070 in a manner that cannot be reasonably explained or defended." It is worth noting that the City Attorney imputes certain motives to the drafters of Section 17-83(k) without citation or explanation. The City Attorney notes that "the provision attempts to protect detainees of certain crimes" including those under suspicion of domestic violence, child molestation, and child sexual abuse. This unsubstantiated statement articulates an assumption about the drafters' motivations and expresses a policy preference. This commentary neither undermines the legality of this provision nor accurately describes the intent of the drafters.

In addition to the "when practicable" provision of SB 1070 (discussed above), the Arizona Legislature created a second exception to the requirement that officers make "a reasonable attempt . . . to determine the immigration status of the person." SB 1070 allows officers to forego an immigration inquiry when doing so "may hinder or obstruct an investigation." A.R.S. § 11-1051(B). The proposed ordinance instructs officers that specific categories of violent crime be treated specially because of the inherent sensitivity and delicate nature of the crime. The crimes enumerated in Section 17-83(k) have one thing in common: victims are frequently fearful and apprehensive to call 911 or otherwise cooperate with local police. In many instances, experts find that victims are hesitant to work with police precisely because they are fearful of the negative consequences that their alleged abuser may face. Deportation is one such negative consequence. By ensuring an alleged victim that her abuser will not be questioned about immigration status, the hope is that a larger number of victims will feel comfortable speaking openly and candidly with TPD officers. Certainly, within the confines of SB 1070, a local police agency can implement a rule designed to increase the detection and full investigation of violent crime.

VI. Sec. 17-84: Miranda-style advisals prior to asking about immigration status

The City Attorney expresses no legal objection to this provision.

VII. Sec. 17-85(a) & (b): City training offered to federal law enforcement officers

The City Attorney expresses no objection to these provisions.

VIII. Sec. 17-85(c): Collaboration with Federal Law Enforcement

The City Attorney expresses no legal objection to this provision, but rather objects to it as a matter of policy by predicting how certain third parties may or may not act in the future. This is not the proper role of a City Attorney and his comments regarding this section do not bear on the proposed ordinance's legality. Nevertheless, it merits discussion.

Without substantiation, the City Attorney asserts that "it is extremely unlikely that . . . federal agencies would consent to such an agreement" required by the proposed ordinance and therefore concludes that the proposed ordinance would end helpful joint operations between TPD and federal law enforcement agencies. The City Attorney's policy position is rooted in the proposed ordinance's definition of "Federal Officer" found in Sec. 17-81. The definition found in Sec. 17-81 (and thereby applying to Sec. 17-85) tracks identically the definition found in existing Arizona law – A.R.S. §§ 13-3875. A.R.S. § 13-3875 permits a county sheriff to "cross-certify" a "federal peace officer" who is employed by "an agency of the United States." This provision merely clarifies that TPD officers will not do business with federal agents who are exercising this extraordinary and unusual law enforcement power.

It is helpful to understand that in typical scenarios and in most states, federal law enforcement officers (including ICE and Border Patrol agents) are prohibited from arresting or stopping individuals on the basis of purely state-law crimes. Absent this cross-certification authority, federal peace officers operating in Arizona are permitted to arrest, stop, or detain for purely state law violations only where the state violation is a felony or a "misdemeanor amounting to a breach of the peace." A.R.S. § 13-3884; *State v. Goldberg*, 112 Ariz. 202 (1975). Absent a special certification pursuant to A.R.S. § 13-3875, federal law enforcement officers in Arizona may conduct routine traffic stops only where there the state driving violation "amounts to a breach of the peace". In short, federal law enforcement officers in Arizona are typically limited to stopping motorists for reckless driving, drunk driving, and possibly criminal speeding. *State v. Martinez*, 1990 WL 44319 (Ariz. App. 1990) (drunk driving); *State v. Grijalva*, 2015 WL 686025 (Ariz. App. 2015) (drunk driving); *State v. Garcia-Navarro*, 224 Ariz. 38 (2010) ("driving at a high rate of speed" in a slightly erratic fashion not enough to trigger Border Patrol's arrest authority).

This provision of the proposed ordinance would limit the ability of federal law enforcement officers to conduct routine traffic stops within City limits. The language of Sec. 17-85 tracks the realities of our communities. Border Patrol agents are known to unilaterally conduct state-law traffic stops within Tucson city limits under circumstances not permitted by A.R.S. § 13-3884. *United States v. Jones*, 2018 WL 6332522, at *1 (D. Ariz. Oct. 5, 2018). Federal law enforcement agents from other federal agencies are also known to conduct traffic stops. *State v. Torres*, 2012 WL 112677, at *1 (Ariz. Ct. App. Jan. 12, 2012). Thus, Sec. 17-85

Furthermore, far from ending such joint operations, Sec. 17-85 simply requires that an MOU be secured. The City Attorney does not represent any of the federal agencies contemplated

in the proposed ordinance and cannot speak on their behalf. Further, even if some federal law enforcement agencies were unwilling to sign such an MOU, such refusal on their part does not render it violative of any state or federal law. To the contrary, MOUs are commonplace between local governments and federal agencies. This MOU simply requires that the federal agency not arrest individuals within the city limits beyond that permitted by A.R.S. 13-3884. Such an MOU would still allow federal officers to arrest for violations of federal law, state felonies, and state traffic offenses that "amount to a breach of the peace".

IX. Sec. 17-86: Provisions Applying to Civilian City Employees

The City Attorney expresses no objection to this provision.

X. Sec. 17-87: U Visa Certification

The City Attorney expresses no objection to this provision.

XI. Sec. 17-88: Private Cause of Action

The City Attorney asserts that Section 17-88 is "legally void in its entirety" because it would authorize a private person to file a civil lawsuit in Tucson City Court, despite the City Attorney's contention that there exists "no jurisdiction under either the [Arizona] Constitution or statute to hear private civil causes of action."

Contrary to the City Attorney's contention, both the Arizona Constitution and Arizona statutes allow for city courts to adjudicate civil lawsuits brought by private persons. The City Attorney cites Article VI of the Arizona Constitution to support his contention, yet that article reinforces the existence of jurisdiction in this circumstance. Ariz. Const. Art. VI, Sec. 32 ("The civil jurisdiction of courts inferior to the superior court . . . shall not exceed the sum of ten thousand dollars.") The term "courts inferior to the superior court" refers to city courts – the type of court at issue here. *See, e.g., Bruce v. State*, 126 Ariz. 271, 272 (1980) (noting that Art. VI, Sec. 32 refers to city courts); *Jett v. City of Tucson*, 180 Ariz. 115, 118 (1994) (observing that the state constitutional term "judges in courts inferior to the superior court . . . includes city magistrates").

In short, the Arizona Constitution allows city courts to exercise jurisdiction over civil lawsuits that do not exceed $10,000 and that are otherwise "provided by law." Art. VI, Sec. 32. When the term "provided by law" appears in the Arizona Constitution, the term is used to grant authority to the Arizona Legislature to prescribe details not included in the Constitution itself. *See, e.g., Lockwood v. Jordan*, 72 Ariz. 77, 81 (1951). Contrary to the City Attorney's contention, the Arizona Legislature has done just that with regard to the civil jurisdiction of city courts. A.R.S. § 22-402 ("has jurisdiction of all cases arising under the ordinances of the city or town"); *See also, Miller v. Heller*, 68 Ariz. 352, 355 (1949) (noting that the Arizona Legislature

in 1913 gave to municipal courts "jurisdiction of cases arising under the ordinances of such city or town."). Every court to have considered the question has agreed that city courts possess such jurisdiction. *See, e.g., Chalmers v. City of Tucson*, 171 Ariz. 162, 164 (Ct. App. 1991) ("Any action for the enforcement of a penalty is, except where the charter states to the contrary, within the exclusive jurisdiction of the city court."); *Roubos v. Miller*, 213 Ariz. 36, 40 (Ct. App. 2006), *aff'd*, 214 Ariz. 416 (2007). Additionally, a different provision of state law requires cities with ordinance violations to "establish procedures to hear and determine these violations". A.R.S. § 9-500.21. These procedures include the ability of city court judges to act as the "hearing officer" for such violations.

In addition to the State Constitution and state statutes, the Tucson City Charter confers civil jurisdiction on its own city court. Tucson City Charter, Chapter XII, Sec. 2 (conferring jurisdiction on "every action of a civil nature for the enforcement of a penalty, or the recovery of a penalty or forfeiture imposed by any ordinance of said city for violation thereof"). This accurately describes the type of "action of a civil nature" that the proposed ordinance would allow Tucsonans to bring. In a charter city, such as Tucson, the charter confers jurisdiction to the extent that such jurisdiction does not exceed that permitted by state law. *See, e.g., Keller v. State*, 46 Ariz. 106, 119 (1935) ("But the police court of the city of Phoenix . . . derives its powers from chapter 8 of the charter of the city of Phoenix, which establishes the court and defines its jurisdiction.")