

Via Email

February 19, 2018

Pima County Board of Supervisors
130 W. Congress St; 11th Floor
Tucson, AZ 85701

Re: *Pima County Continued Acceptance of Federal "Operation Stonegarden"*

**AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
OF ARIZONA**

Pima County Supervisors:

As an organization with several thousand members in Pima County, the ACLU of Arizona writes to urge you to discontinue participation in the Operation Stonegarden grant program. While there has been much information provided by Sheriff Napier in recent days to greater illuminate the details of the program, the ACLU of Arizona believes that the Pima County Sheriff's Department (PCSD) has not adequately addressed the concerns outlined below. We urge the Board of Supervisors to decline continued Operation Stonegarden funding, or, in the alternative, to delay a final decision until the Sheriff and other stakeholders are able to provide more thorough information related to the below concerns.

I. Operation Stonegarden Leads to Unlawful PCSD Presence at Border Patrol Checkpoints and Opens the County to Unnecessary Legal Liability on this Basis.

As part of its activities pursuant to Operation Stonegarden, the PCSD routinely violates the Fourth Amendment prohibition against road checkpoints conducted for the purpose of general law enforcement. Through a review of public records documents, the ACLU has verified that Sheriff deputies routinely station themselves at Border Patrol checkpoints during Operation Stonegarden deployments. Public records reveal that deputies will station their patrol vehicles at the checkpoints and visually inspect passing motorists for potential violations of Arizona law.

While there is nothing facially impermissible about a local law enforcement officer patrolling on public highways, such officer is prohibited from maintaining a road checkpoint for the purpose of "detect[ing] evidence of ordinary criminal wrongdoing." City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000). Indeed, the U.S. Supreme Court has indicated that there are only two limited purposes for which a road checkpoint may be maintained:

immigration near an international border and sobriety checks. In the Ninth Circuit – the judicial district controlling matters of federal law in Arizona – the Court has emphasized that a checkpoint is lawful only where there is a “close connection between the checkpoint and the harm it was seeking to prevent.” United States v. Fraire, 575 F.3d 929, 933 (9th Cir. 2009).

All Border Patrol checkpoints located in Pima County are permitted under the federal Constitution precisely because their primary purpose is to detect violations of federal immigration law. Unlike Border Patrol agents; however, PCSD deputies are prohibited from investigating an individual’s immigration status. Melendres v. Arpaio, 989 F. Supp. 2d 822, 892 (D. Ariz. 2013), *aff’d*, 784 F.3d 1254 (9th Cir. 2015) (“As a local law enforcement agency without 287(g) authority, the [Maricopa County Sheriff Office] has no statutory, inherent, or constitutional authority to detain people for civil violations of federal immigration law.”) This is true even following the passage of SB 1070 in Arizona. Arizona v. United States, 567 U.S. 387, 407 (2012) (finding that suspicion of a person’s unlawful immigration status does not give a local police officer authority to arrest the individual, even if state law purports to allow it). Given that PCSD officers cannot enforce federal immigration laws, their only conceivable purpose at a Border Patrol checkpoint is to detect violations of state and local laws. Indeed, Sheriff Napier seems to agree with this assessment when he wrote in his February 7, 2018 memorandum to Supervisor Valadez that Stonegarden allows PCSD to “provide a stronger presence and deter criminal activity.” Arguably, 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 enforcement. See Section IV (page 6), below, for examples of the reasons that motorists have been detained at the Route 86 checkpoint as a result of Stonegarden.

While the Sheriff’s Department suggests that its Border Patrol checkpoint operations are relatively limited, early evidence suggests that the practice is pervasive. For example, records reveal that at least \$12,665.08 was spent in Operation Stonegarden overtime during a three-week period in early 2017, exclusively for deployments at the Route 86 checkpoint. Assuming similar staffing levels at the other three checkpoints located in non-tribal portions of Pima County (Route 83, Arivaca Road, and Route 286), PCSD spends approximately \$608,000 per year on operations that are of questionable legality. See attached Daily Activity Report attached as Ex. A. Even if PCSD were staffing only the one checkpoint, records currently available to the ACLU of Arizona indicates that the Department may spend as much as \$152,000 of its annual Stonegarden grant award for this purpose (or approximately 15% of its total overtime allotment from Stonegarden).

A “Stonegarden Daily Activity Report” recently obtained by the ACLU of Arizona shows that 2 to 4 deputies may be stationed at the Route 86 Border Patrol checkpoint during any given Stonegarden shift. Alarming, the number of local deputies stationed at the checkpoint during Stonegarden deployments may be equal to the number of Border Patrol agents. United States v. Brown, 2017 WL 6403069, at *5 (D. Ariz. Oct. 4, 2017) (citing figures provided by a local Border Patrol official that “typically, there are three or four Border Patrol agents assigned to the checkpoint” on Route 86).

II. PCSD Uses Stonegarden Funding to Enforce a State Law that has been Declared Unconstitutional.

In his February 7th and February 9th memoranda addressed to the Board of Supervisors, Sheriff Napier notes that a portion of the annual Stonegarden funding is devoted to the enforcement of A.R.S. § 13-2319, a state criminal statute outlawing the “smuggling of human beings for profit or commercial purpose.” Sheriff Napier’s claim is particularly alarming because the state anti-smuggling statute was permanently enjoined by the federal court in 2014. United States v. State of Arizona, 119 F. Supp. 3d 955, 961 (D. Ariz. 2014). The County is opening itself to potential legal liability by allowing PCSD to enforce a state law that no longer exists. Prior to considering any renewal of Stonegarden funding, the Board of Supervisors should seek all internal PCSD documentation related to the investigation and arrest of individuals for violations of A.R.S. § 13-2319 since November 7, 2014 (the date that the law was stricken from the books).

III. Operation Stonegarden Creates an Incentive for PCSD Deputies to Make Pretextual Traffic Stops, Including Possible Incidences of Racial Profiling.

Far from contributing to a general atmosphere of deterrence, Operation Stonegarden exists in large measure because it provides the Border Patrol additional justifications to stop motorists on the highway. As a federal law enforcement agency, the U.S. Border Patrol has authority to investigate only violations of immigration laws, smuggling laws, drug laws, and a limited number of similar federal violations. The PCSD, by contrast, is responsible for enforcing hundreds of Arizona traffic laws. By enlisting the cooperation of the PCSD, the Border Patrol can investigate and question motorists under circumstances that would be impermissible if they were acting alone.

The law enforcement community argues that this cooperation enhances public safety, but evidence suggests that PCSD deputies on the clock with Stonegarden routinely stop motorists for minor traffic offenses that they have no intention to enforce. This is the very definition a pretextual stop. As the American Immigration Lawyers Association recently illustrated in an open letter to the Pima County Board of Supervisors (Attached here as Ex. B), Sheriff deputies will frequently initiate a traffic stop and immediately surrender the stop to a nearby Border Patrol agent without even asking for the motorist's license or registration.

This phenomenon is not merely anecdotal. A recent analysis of PCSD data derived from Operation Stonegarden suggests that deputies rarely cite motorists for the violations that supposedly formed the basis of the stop. From 2012-2017, only 13% of Stonegarden-initiated stops resulted in a traffic citation. (Attached here as Ex. C). By contrast, data from the Tucson Police Department shows that 64% of their traffic stops during a three-month period in 2015 resulted in civil or criminal citations. Data from other police agencies not under Stonegarden influence show similar stop-to-citation ratios.

At the very least, this ratio reveals a trend of stopping motorists – mostly local residents – with no basis in reasonable suspicion or probable cause. At worst, it reveals a pattern of racial profiling. In other words, this ratio may be a “canary in a coal mine”, suggesting a pattern of stopping motorists for “driving while Mexican”. While the ACLU of Arizona has been unable to obtain race or ethnicity data from the PCSD in the limited time available, statistical studies from other jurisdictions indicate that the stop-to-citation ratio exhibited by PCSD is consistent with racial profiling. See, e.g., G. Ridgeway, Assessing the Effect of Race Bias in Post-Traffic Stop Outcomes Using Propensity Score, *Journal of Quantitative Criminology* (March 2006) (finding that black drivers in Oakland, CA in the mid-2000s were statistically less likely to receive traffic citations than similarly-situated white drivers).

The concerns in Pima County are consistent with the Stonegarden experiences in other border communities. In 2007 in Otero County, New Mexico, for example, local community members noticed a disturbing shift in local law enforcement practices immediately following their county's initiation of Operation Stonegarden. As detailed in a 2007 federal lawsuit, Sheriff deputies used much of the additional funding to systematically harass a predominantly Hispanic working-class community that was not suspected of being connected to international crime. Border Network for Human Rights, et al. v. County of Otero, New Mexico, et al., Dk. 6:07-cv-01045 (D. NM), Doc. 7 (Complaint). See also, United States v. Hernandez-Chaparro, Dk. 09-2037 (10th Cir. 2009), appeal from United States v.

Hernandez-Chaparro, 07-cr-2437 (D. NM) (detailing local police’s arrest of a man in the same community, suggesting that immigration enforcement was their primary motivation). In Ohio, at least three northern border towns receiving Stonegarden subsidies are alleged to have routinely stopped Hispanic motorists and demanded immigration papers. Muniz-Muniz, et al. v. Gallegos, et al., Dk. 3:09-cv-02865 (N.D. Ohio), Doc. 1 (Complaint).

While there is no evidence that PCSD has used Stonegarden funding in this precise manner, public documents and complaints received by the ACLU of Arizona raise serious concerns about the lack of Stonegarden-related oversight within the PCSD. In one example, a PCSD deputy on Stonegarden duty placed a motorist in handcuffs because “I felt he was lying to me”, following the motorist’s failure to provide his SSN. There is no state law requiring a motorist to produce his SSN to local law enforcement officers, there is no state law criminalizing the act of driving without a license, and the federal Privacy Act of 1974 prohibits police from demanding an individual’s SSN in the traffic stop setting. See, e.g., 5 U.S.C. § 552a (related to SSNs); A.R.S. § 28-3315(F) (distinguishing an unlicensed driver from a driver with a suspended or cancelled license); A.R.S. § 28-3473 (criminalizing only the driving on a suspended, revoked, cancelled, or refused license). PCSD Incident Report No. 170320276, prepared by Deputy Ryan Roher, Mar 20, 2017 (on file with the ACLU of Arizona and attached here as Ex. D).

IV. Despite the Sheriff’s Claims to the Contrary, the Bulk of Operation Stonegarden Funding is Currently Devoted to Routine Law Enforcement Activities that have no Relation to Large-Scale Drug Interdiction or Combatting Human Trafficking.

Since the program’s inception in 2004, the story of Operation Stonegarden has been primarily the story of increased surveillance of law-abiding local residents, not of border-related crime enforcement. A review of recent criminal court filings reveals local police using their Stonegarden time to stop motorists for minor traffic-related offenses rather than pursuing drug traffickers and human smugglers. State v. Wallace, 2016 WL 1728902, at *1 (Ariz. Ct. App. Apr. 29, 2016) (Cochise Sheriff deputy, during Stonegarden shift, stopping motorist for cracked windshield and “something hanging from his rearview mirror”); State v. Huez, 240 Ariz. 406, 408–09 (Ct. App. 2016) (Tucson police officer, during Stonegarden time, stopping bicyclist riding “on a raised dirt area adjacent to a roadway in Tucson” and against the flow of traffic).

PCSD's use of Stonegarden funding follows a similar pattern. The ACLU of Arizona pulled PCSD incident reports generated during Stonegarden time from just one deputy during a three-month period in 2017. This limited sample reveals a troubling pattern of stopping vehicles for minor violations that cannot be said to be related to Sheriff Napier's stated purpose of targeting human smugglers and drug traffickers:

- PCSD Incident Report No. 170320253, prepared by Deputy Ryan Roher, Mar 20, 2017 (on file with the ACLU of Arizona and attached here as Ex. E). The deputy stopped a vehicle because it was missing a lug nut on one rear wheel.
- PCSD Incident Report No. 170410260, prepared by Deputy Ryan Roher, April 10, 2017 (on file with the ACLU of Arizona and attached here as Ex. F). The deputy stopped a vehicle because it had a cracked windshield.
- PCSD Incident Report No. 170410284, prepared by Deputy Ryan Roher, April 10, 2017 (on file with the ACLU of Arizona and attached here as Ex. G). The deputy arrested a motorist for allegedly "blocking a checkpoint" after motorist stopped for a lengthy period of time at the Border Patrol checkpoint at the specific direction of Border Patrol agents.
- PCSD Incident Report No. 170320345, prepared by Deputy Ryan Roher, March 20, 2017 (on file with the ACLU of Arizona and attached here as Ex. H). The deputy stopped a vehicle for having a faulty brake light and turn signal.
- PCSD Incident Report No. 170410310, prepared by Deputy Ryan Roher, April 10, 2017 (on file with the ACLU of Arizona and attached here as Ex. I). The deputy stopped a vehicle for speeding in a construction zone.

V. Continued Operation Stonegarden Funding Should not be Approved Until the Sheriff Establishes Specific Protocols, Training, and Transparency Measures

The Board of Supervisors should not pave the way for additional Stonegarden funding until the Sheriff has established adequate protocols and training designed to protect the rights and liberties of local residents. The ACLU of Arizona has recently discovered that the PCSD has no written policies, directives, or procedures related to the responsibilities of its deputies during Stonegarden time. See Ex. J. Additionally, deputies participating in Stonegarden overtime receive no additional training.

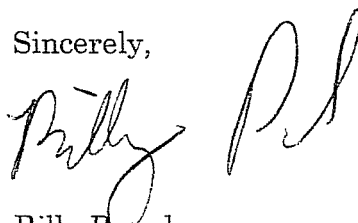
Currently, there are no measures in place to ensure that the violations and overreaches described in this letter do not repeat themselves.

Additionally, the Board of Supervisors simply does not have enough information to properly assess the risks and benefits of continued Stonegarden participation at this time. While the Sheriff has provided several additional documents related primarily to the finances associated with Stonegarden, he has provided no documents related to the concerns shared in this letter. Among other things, we have yet to obtain adequate documentation to assess the possibility that Stonegarden participation increases incidences of racial profiling.

Lastly, in January 2018 – prior to the current public debate surrounding Stonegarden – the ACLU of Arizona requested several categories of documents about whether Stonegarden may have been implicated in the surveillance and arrest of humanitarian aid worker Scott Warren in Ajo. As of February 16th, the PCSD has yet to provide any documents in response to our request. See Ex. K. The Board of Supervisors (and the public) ought to know whether Stonegarden-subsidized activities aided the first felony prosecution of a humanitarian aid worker in Pima County since 2005.

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Sincerely,



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