April 12, 2017

VIA E-MAIL

Bruce Praet, Chairman
Lexipol, LLC
bpraet@aol.com

Re: Lexipol Policy On "Immigration Violations"

Dear Mr. Praet,

It has come to our attention that your company has provided legally erroneous policy language on the enforcement of "Immigration Violations"—Policy No. 428/429 ("the Policy")—to a number of California law enforcement agencies. (See attached.) We strongly urge you to revise the Policy so that it comports with current law, and to promptly rescind and replace the products you have already provided to law enforcement agencies in this state.

The Policy's provisions on detention and arrest are defective in several ways: (1) the Policy authorizes police officers to make arrests for misdemeanors committed outside their presence, contrary to the California Penal Code and federal law; (2) the Policy encourages officers to detain individuals for federal crimes on less than reasonable suspicion and make arrests unsupported by probable cause when officers suspect a violation of civil immigration law; and (3) the Policy incorrectly suggests that officers may systematically consider English proficiency and even race as a basis for reasonable suspicion of a crime. We discuss each of these problematic features of the Policy in detail below.

(1) The Policy authorizes police officers to make arrests for misdemeanors committed outside their presence, contrary to the California Penal Code and federal law.

California Penal Code § 836 sets forth the circumstances in which officers may make warrantless arrests. Per Penal Code § 836(a)(1), an officer may make a warrantless arrest for a misdemeanor offense only when he or she has probable cause to believe the person has committed the offense in his or her presence. *See, e.g.*, *Mercer v. Dep't of Motor Vehicles*, 53 Cal. 3d 753, 769 (1991) (warrantless arrest for misdemeanor DUI unlawful where arresting officer did not see arrestee driving); *see also United States v. Di Re*, 332 U.S. 581, 591 (1948) (state law's in-presence requirement for warrantless arrests applied to arrest for federal crime).

The Policy contradicts Penal Code § 836(a)(1) by purporting to authorize officers to make arrests for *any* "criminal immigration violation," without excluding misdemeanors committed

outside the arresting officers' presence. *See* Policy § 428.4.2 (authorizing officer to "continue" a detention upon "probable cause" of a criminal immigration offense); *id.* § 428.4.3 (authorizing officer to take a person into custody where there is probable cause of a criminal immigration offense). The Policy suggests that officers may arrest individuals for misdemeanor offenses generally, *see* Policy § 428.4.2, and specifically for the misdemeanor offense of improper entry. *See* Policy § 428.4.1 ("An individual who enters into the United States illegally has committed a misdemeanor (8 USC § 1325(a))".) The Policy does not, however, mention California's "in-presence" requirement for misdemeanor arrests. Furthermore, Lexipol has distributed the Policy to California agencies that do not operate on the U.S.-Mexico border or any other international point of entry. It is physically impossible for officers in those localities to witness a violation of § 1325(a) occurring in their presence.[1] Thus, the Policy encourages officers to unlawfully arrest individuals for misdemeanor offenses committed outside their presence. *See Gates v. Superior Court*, 193 Cal.App.3d 205, 216 (1987) ("Once an alien has reached a place of repose within the country, the misdemeanor of improper entry ends. At that point, an LAPD officer may not arrest for this offense because it did not occur in the officer's presence.").

(2) The Policy encourages officers to illegally detain individuals for federal crimes on less than reasonable suspicion and make arrests unsupported by probable cause, when they suspect a violation of civil immigration law.

Mere unauthorized presence in the United States is not a criminal offense. *Arizona v. United* States, 132 S.Ct. 2492, 2505 (2012); *Martinez-Medina v. Holder*, 673 F.3d 1029, 1036 (9th Cir. 2011). Reason to suspect that person is not lawfully present cannot, therefore, supply the basis for reasonable suspicion of a crime. *See Melendres v. Arpaio*, 989 F. Supp. 2d 822, 892 (D. Ariz. 2013) ("When [officers] merely suspect[ ] a person of being in the country without authorization, [they] do[ ] not, in the absence of additional facts that would make the person guilty of an immigration-related crime, have a basis to arrest or even engage in a brief investigatory detention of such persons.").

The Policy superficially recognizes the distinction between the federal misdemeanor that results when an individual enters the United States illegally and the civil violation that results when an individual remains in the country beyond an approved period of time. However, the Policy fails to provide proper guidance to officers on how to practically distinguish mere suspicion of unauthorized presence from reasonable suspicion of a federal immigration crime. Instead, the Policy's guidance on reasonable suspicion conflates civil and criminal immigration violations and encourages officers to detain without legal justification.

The Policy states that the following factors may be considered in determining reasonable suspicion of a criminal immigration violation: (a) an admission that the person entered the United States illegally; (b) reason to suspect that the person possesses immigration documentation "indicative that the person is not legally present in the United States"; (c) lack of

[1] Unlawful entry is not a continuing offense. Rather, it is completed upon crossing the border. *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1194 (9th Cir. 1979).

English proficiency; and (d) other factors based upon training and experience. Of these factors, only the first, an admission of illegal entry, is specific grounds for suspecting the crime of improper entry. A person's possession of documents suggesting that he or she is not legally present in the United States may simply show that he or she has legally entered into the country but remained beyond an approved period of time – a civil violation, as the Policy itself recognizes. And lack of English proficiency is a factor so tenuously related to any offense that it should be disregarded as a matter of law, as we discuss further below.

The Policy noticeably omits clear examples of factors that officers may properly rely on to establish reasonable suspicion of improper entry. *See, e.g.*, *U.S. v. Mendoza-Alvarez*, No. 13CR1653 WQH, 2013 WL 5530791, at *2 (S.D. Cal., Oct. 4, 2013) (reasonable suspicion of improper entry existed where agents tracked footprints from border fence directly to detainees); *U.S. v. Vasquez-Olea*, No. 10CR1754-LAB) 2011 WL 197582, at *1 (S.D. Cal., Jan. 19, 2011) (reasonable suspicion of improper entry existed where agent tracked line of muddy footprints, broken branches, and debris from location where border sensor activated to detainee's hiding place in the brush). By omitting examples of such concrete factors, the Policy turns officers' attention away from the specific crime of improper entry to general speculation about the civil immigration status of individuals they encounter.

The Policy also authorizes officers to arrest when they have "facts that establish probable cause to believe that a person already lawfully detained has committed a criminal immigration offense," but it does not offer any further guidance on what factors may give rise to probable cause in this context. The Policy thus suggests that the factors enumerated as grounds for reasonable suspicion of a criminal immigration offense may be considered part of the basis for establishing probable cause. For the same reasons discussed, documents suggestive of unauthorized presence and lack of English proficiency are not proper bases for establishing probable cause of a crime. *See Martinez-Medina*, 673 F.3d at 1036 (an individual's "admission of illegal presence . . . does not, without more, provide probable cause of the criminal violation of illegal entry"); *see also Santos v. Frederick County*, 725 F.3d 451, 465 (4th Cir. 2013) ("suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity").

In each of these ways, the Policy encourages officers to violate the Fourth Amendment. *See Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (upholding preliminary injunction against policy of detaining persons based only on suspicion that they have committed a civil infraction of federal immigration law); *on remand*, *Ortega Melendres v. Arpaio*, No. 07-02513, 2013 WL 2297173, *60-63 (D. Ariz. May 24, 2013) (entering permanent injunction).

(3) The Policy incorrectly suggests that officers may systematically consider English proficiency and even race to arrive at reasonable suspicion of a crime.

To establish reasonable suspicion, officers cannot rely on factors that apply to large segments of the general population. *U.S. v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006). Where a substantial number of people share a specific characteristic, the characteristic is of little

or no probative value in the reasonable suspicion analysis, and officers must disregard it as a matter of law. *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000) (en banc); *see also Ortega Melendres v. Arpaio*, 598 F. Supp. 2d 1025, 1033 (D. Ariz. 2009) ("The Ninth Circuit has repeatedly rejected profiles that are likely to sweep many ordinary citizens into a generality of suspicious appearance.").

According to the 2013 Census, 19% of California's population has limited English proficiency. Yet the Policy specifically lists lack of English proficiency as a factor that officers may rely on to detain individuals on suspicion of a criminal immigration violation. Policy § 4.28.4.1(c). By instructing officers to rely on a characteristic shared by a significant number of people in this state, the Policy encourages officers to detain in the absence of sufficiently particularized suspicion.[2] *See Manzo–Jurado*, 457 F.3d at 932 (individuals' appearance as a Hispanic work crew, inability to speak English, proximity to the border, and unsuspicious behavior, taken together, did not provide a federal immigration officer reasonable suspicion to conduct a stop).

The Policy also states: "Reasonable suspicion that a criminal immigration violation has occurred shall not be based on race, color, [or] national origin . . . *except to the extent permitted by the United States or California Constitutions*." Policy § 428.31. This language inaccurately implies that in some circumstances, officers may appropriately use race, color, or national origin to determine reasonable suspicion of a crime. But "at this point in our nation's history, and given the continuing changes in our ethnic and racial composition," officers should *never* consider such factors when determining whether reasonable suspicion exists. *Montero-Camargo*, 208 F.3d at 898 (Hispanic appearance may not be considered a relevant factor where particularized or individualized suspicion is required).

By suggesting that officers may systematically consider characteristics widely-shared by Californians to arrive at reasonable suspicion of a crime, the Policy encourages profiling and illegal detentions, and runs afoul of the Fourth Amendment. *See Melendres*, 989 F.Supp.2d at 896 (Sheriff's policy that "institutionalize[d] the systematic consideration of race as one factor among others in forming reasonable suspicion or probable cause in making law enforcement decisions" violated the Fourth Amendment).

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Thank you in advance for your attention to our concerns. We are happy to speak with you in more detail about the actions you can take to bring the Policy into compliance with the law and to protect your company and the police agencies you serve from liability.

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[2] Even assuming, for the sake of argument, that limited English proficiency may be combined with other factors to establish reasonable suspicion of unauthorized presence (*i.e.* a civil immigration violation), it is still too unrelated to the specific conduct underlying any federal immigration crime (*e.g.* improper entry) to support reasonable suspicion of a criminal offense.

Sincerely,

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