



The American Civil Liberties Union

Written Statement
For a Hearing on

**Examining 287(g):
The Role of State and Local Enforcement in Immigration Law**

Submitted to the U.S. House of Representatives Committee on Homeland
Security

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I. Introduction

The American Civil Liberties Union (ACLU) commends the House Committee on Homeland Security for conducting a hearing on March 4, 2009, concerning the role of state and local law enforcement in immigration law as part of the 287(g) program (hereinafter the “287(g) hearing”). We submit this statement to draw the Committee’s attention to the causal link between the use of the 287(g) program by state and local law enforcement agencies and racial and ethnic profiling. In response to Committee members’ questions on whether 287(g) results in racial profiling, William Riley, Acting Director of the Immigration and Customs Enforcement (“ICE”) Office of State and Local Coordination Program testified at the hearing that ICE has not received any complaints of racial or ethnic profiling in connection with the 287(g) program. Available data, pending litigation, and news reports strongly indicate, however, that racial profiling under the 287(g) program is a serious nationwide problem that ICE has completely failed to monitor or acknowledge, much less address.

The ACLU is a nationwide, non-partisan organization of more than 500,000 members dedicated to enforcing the fundamental rights of the Constitution and United States laws. The Immigrants’ Rights Project (“IRP”) of the ACLU engages in a nationwide program of litigation, advocacy and public education to enforce and protect the constitutional and civil rights of immigrants. The Racial Justice Program (“RJP”) of the ACLU engages in a nationwide program of litigation, advocacy and public education to combat racial profiling and enforce the constitutional and civil rights of people of color. Together, and through a robust network of ACLU affiliates across the country, the IRP and the RJP are actively engaged in assessing state and local law authorities’ role in immigration enforcement, particularly the policies, practices and procedures used in connection with the 287(g) program; investigating the effect of 287(g) programs on people of color in participating jurisdictions; and analyzing the program’s consistency with constitutional values and principles of equal protection and fairness in immigration and criminal law enforcement.

II. Racial and Ethnic Profiling in 287(g) Jurisdictions

Contrary to ICE’s stated position at the House Homeland Security hearing, racial and ethnic profiling by state and local immigration enforcement is a real phenomenon and causes an array of harms to communities of color. Race-based immigration enforcement injures U.S. citizens and lawful permanent residents who are perceived to be undocumented by subjecting them to unwarranted stops, questioning, and arrests. Although the vast majority of Latinos in the United States are U.S. citizens and legal permanent residents—and are expected to constitute nearly 25 percent of the U.S. population by 2050¹—Latinos have often been singled out as a group for immigration stops and inquiries by local law enforcement. Such race-based immigration enforcement imposes injustices on innocent racial and ethnic minorities, in particular reinforcing the harmful perception that Latinos – U.S. citizens and non-citizens alike -- are presumed to be “illegal immigrants” and therefore not entitled to full and equal citizenship unless and until proven innocent or “legal.”

¹ U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin* (March 28, 2004), available at <http://www.census.gov/population/www/projections/usinterimproj/natprojtab01a.pdf>.

That ICE has allegedly not received any complaints of racial or ethnic profiling related to the program does not mean that racial or ethnic profiling is not a significant problem in 287(g) jurisdictions. Available statistical data suggests that 287(g)-deputized officers are using race or Latino appearance to stop, question and arrest for immigration-related offenses. Moreover, pending litigation, news reports and other reported evidence further suggest that 287(g) agreements are leading to racial profiling. The poor administration of the 287(g) program—which lacks internal controls and fails to provide adequate supervision and training—also enhances the risk of racial and ethnic profiling.

A. The Absence of Complaints Does Not Mean The Absence of Racial Profiling.

William Riley, Acting Director of ICE’s Office of State and Local Coordination, testified before this Committee that ICE has not received any complaints of racial or ethnic profiling in connection with the 287(g) program. However, Mr. Riley did not describe what constitutes a “complaint” in ICE’s view or what process, if any, exists for investigating racial profiling allegations in general. As Richard Stana, Director of Homeland Security and Justice Issues at the U.S. Government Accountability Office, testified at the same hearing, the 287(g) complaint procedure is “at best hazy.” There is no information available online on how to file a complaint with either ICE or state or local participating agencies. The available fact sheets and other information on ICE’s website merely refer to an “agreed upon complaint process governing officer conduct during the life of the MOU.”² Each Memorandum of Understanding or Agreement (MOU or MOA), entered into between ICE and the state or political subdivision of a state authorizing local law enforcement officers to perform certain immigration-related functions, provides for its own complaint process. Unless the state or local agency participating in the 287(g) program makes the MOA publicly available, however, the public has no clear way of knowing whether and how it can file a complaint, or what the process is for resolving one. It has been the ACLU’s experience that some sheriffs’ offices or police departments will not release the MOA to the public absent a formal public records request, making it that much more difficult, if not impossible, for the public to report specific incidents of racial profiling.

But even if ICE did provide a straightforward and accessible complaint procedure, which it does not, the absence of formal complaints does not equate to the absence of racial profiling. There are many reasons that help explain why individuals who are victims of racial or ethnic profiling may not come forward to lodge official complaints against local police officers or departments who have discriminated against them. For example, victims of racial profiling may fear retaliation against themselves or their families, whose members may be of mixed immigration status, if they come forward. According to one recent study, “[m]ore than fifteen percent of U.S. families are mixed-

² See <http://www.ice.gov/> (last visited March 13, 2009).

status with at least one parent who is a non-citizen and one child who is a citizen.”³ Indeed, one woman living in Johnston County, North Carolina, who is a legal permanent resident and has three citizen children, told reporters that “many Hispanics feel as if law officers are looking for excuses to deport them.”⁴ Fear of profiling in the community necessarily chills victims or even witnesses of specific incidents of racial profiling from speaking out and complaining about abuses. Another reason that racial profiling in the 287(g) context may be underreported is that many arrested individuals are swiftly deported and have little, if any, access to immigration counsel. The U.S. Government Accountability Office (“GAO”) recently reported in its 287(g) study that almost half of those who are detained and placed in removal proceedings under the 287(g) program are summarily removed.⁵ We have no way of knowing how many of these individuals, like U.S. citizen Pedro Guzman, whose case is discussed below, may have been profiled and wrongly deported.

Moreover, many victims of racial or ethnic profiling may not be aware that they were singled out because of their race or ethnicity, or they may be embarrassed or even ashamed to admit the same because they do not want to feel further humiliated if their complaints go unaddressed or unresolved. As one report, quoting a victim of racial profiling, explained: “It’s almost like somebody pulls your pants down around your ankles. You’re standing there nude, but you’ve got to act like there’s nothing happening.”⁶ Victims of profiling “are left with ‘psychological scar tissue’ which can result in feelings of resentment, frustration, and outrage.”⁷ Rather than rushing to the same agency responsible for their mistreatment to lodge complaints, victims of profiling may “question the very legitimacy” of the criminal justice system and instead go out of their way to avoid it.⁸ Victims of profiling also may believe that complaining will be futile and unlikely to result in an effective remedy.

B. Available Data Suggests Racial Profiling Is a Significant Nationwide Problem.

Independent of the complaint process, ICE has an overarching statutory duty to oversee the 287(g) program and to ensure that state and local actors do not violate the U.S. Constitution and laws, such as by engaging in racial profiling. Notwithstanding

³ Shahani, Aarti; Greene, Judith. *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Enforcement*, A Justice Strategies Report (February 2009) (hereinafter “Justice Strategies Report”), p. 9.

⁴ Kristin Collins, *Tolerance Wears Thin*, News & Observer (Sep. 4, 2008), available at <http://www.newsobserver.com/news/immigration/story/1209646.html>.

⁵ GAO, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, GAO-09-109 (January 2009) (hereinafter the “GAO 287(g) Report”), p. 23.

⁶ Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 17 (2005).

⁷ *Id.* (quoting David Harris)(citations omitted).

⁸ *Id.* at 21 (noting that “legal and illegal immigrants may refrain from interacting with police since they fear being detained, interrogated or deported [and g]iven that these individuals generally live in ‘tightly knit communities,’ news of race-conscious police enforcement may spread fast and help foster a culture of fear and cynicism toward officers”).

ICE's oversight duties, it has neither defined what, if any, data to collect and track from participating agencies⁹ nor investigated the racial and ethnic distribution of traffic stops and other offenses under the 287(g) program. Without collecting racial profiling data or adequately overseeing the program's operation or supervising state and local agents, ICE cannot reasonably support its conclusory and self-serving claim that racial profiling is not a problem.

Indeed, in those states that require racial profiling data collection and where researchers have been able to survey or analyze available data, the data suggests that a significant percentage, if not the vast majority, of individuals who are stopped by 287(g)-deputized officers are Latino and stopped and arrested for traffic or other minor offenses. In Tennessee, which mandates racial profiling data collection and has two MOAs, a study of arrest data found that the arrest rates in Davidson County for Latino defendants driving without a license more than doubled after the implementation of the 287(g) program in that county.¹⁰ Moreover, a newspaper investigation last year showed that of the roughly 3,000 people deported during the Davidson County's 287(g) program's first year, about 81 percent were charged with misdemeanors and half were caught during traffic stops.¹¹ In Alabama 58 percent of motorists stopped by a 287(g) police officer were Latino, although Latinos make up less than two percent of the population.¹² These statistics are consistent with other studies—not specific to 287(g) jurisdictions—indicating that Latinos are generally both stopped and searched by police at higher rates than whites.¹³

Critically, jurisdictions that have been found to engage or have been accused of engaging in racial profiling have signed or are in the process of entering into 287(g) agreements. The City of Rogers, Arkansas, for example, entered into a 287(g) MOA (as part of a Regional Task Force in Northwest Arkansas) in 2007 after it was sued for unlawfully targeting Latino motorists for stops, searches and investigations in 2001.¹⁴ The plaintiffs in the lawsuit obtained a federal court order prohibiting local police from engaging in racial profiling, specifically barring them from checking individuals' documents to prove their immigration status.¹⁵ When the City of Rogers applied for 287(g) authority to enforce immigration law, it was still under federal court supervision pursuant to the lawsuit. ICE authorized the MOA notwithstanding strong objections by

⁹ See GAO 287(g) Report, p. 16-17 (“ICE generally required participating agencies to track data, but the MOA [does] not define what data should be tracked, or how data should be collected and reported to ICE.”)

¹⁰ Tennessee Immigrant and Refugee Rights Coalition, *Arrests for No Drivers License by Ethnicity and Race: A Comparison of May-July 2006 to May-July 2007*, at 1 (July 31, 2007), available at <http://tirrc.bondwaresite.com/photos/File350.pdf>.

¹¹ Kate Howard, *Davidson sheriff defends deportation program*, The Tennessean (March 5, 2009), available at <http://www.tennessean.com/article/20090305/NEWS03/903050353>.

¹² David C. Volk, *Police Join Feds to Tackle Immigration*, Stateline.org (Nov. 27, 2007), available at <http://stateline.org/live/details/story?contentId=259949>.

¹³ Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, *supra* note 6, at 12.

¹⁴ See *Lopez v. City of Rogers*, No. 01-5061 (W.D. Ark. filed Mar. 23, 2001); see also MALDEF Letter to Attorney General Michael Mukasey (April 1, 2008), available at <http://www.bibdailly.com/pdfs/Mukasey%20Chertoff%20MALDEF%204-1-08.pdf>.

¹⁵ *Id.*

community and immigrants' rights groups in light of the lawsuit and continued reports of problems.¹⁶

A recent Chicago Reporter study found that several communities in Illinois that have requested participation in 287(g) may be engaging in racial profiling.¹⁷ The study examined the transportation department's data and found that 44 out of more than 200 communities in the six-county Chicago area recorded a disparity of at least 10 percentage points when the share of Latino drivers stopped is compared to their size in the driving-age population.¹⁸ The Reporter's analysis also found that Latino drivers were asked for permission to search their cars at a higher rate in 25 out of the 44 communities than white counterparts.¹⁹

Not unlike the circumstances in the foregoing 287(g) participating or applicant jurisdictions, in North Carolina, a state that also mandates racial profiling data collection and has eight 287(g) MOAs, researchers found that a high percentage of persons arrested in 287(g) counties were charged with traffic or other minor violations. In Gaston County, for example, 83 percent of the persons arrested by deputized officers were charged with traffic offenses.²⁰ In Mecklenburg County, of the 2,321 undocumented immigrants who were put into removal proceedings in 2007, fewer than five percent of the charges against them were felonies and over 16 percent of the total charges were traffic violations.²¹

While ICE allegedly conducts background checks of individual officers under the 287(g) program, ICE does not appear to evaluate the applicant-jurisdiction's history of actual or perceived racial profiling or other discriminatory treatment toward immigrants or minorities in that community before entering into a MOA. This means that jurisdictions that are known or perceived to target individuals based on race or ethnic appearance may be given unbridled discretion to enforce the immigration laws. This is particularly concerning in jurisdictions with a sordid history of civil rights abuses.²² Indeed, "some evidence suggests that Hispanics in emerging communities [experiencing Latino growth]," which includes the Southeast, host to the most 287(g) programs, "and rural areas are more vulnerable to the harms of racial profiling than their Southwestern

¹⁶ MALDEF Letter to Attorney General Michael Mukasey (April 1, 2008), available at <http://www.bibdaily.com/pdfs/Mukasey%20Chertoff%20MALDEF%204-1-08.pdf>.

¹⁷ Fernando Diaz, *Driving While Latino*, The Chicago Reporter (Mar 2, 2009), available at <http://www.chicagoreporter.com/printi/index.php>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ University of North Carolina, Immigration and Human Rights Policy Clinic & ACLU of North Carolina Legal Foundation, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina* (February 2009), p.29, available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; see also Barrett, Michael, *Officers Decide When to Arrest, But For Immigrant Community, Decision Can Lead to Deportation*, Gaston Gazette (July 1, 2008), available at http://www.gastongazette.com/news/cloninger_22388_article.html/charges_arrested.html.

²¹ Lindsay Haddix, *Immigration and Crime in North Carolina: Beyond the Rhetoric*, Department of City and Regional Planning, UNC Chapel Hill (2008).

²² See generally Justice Strategies Report, p. 6.

counterparts.”²³ In North Carolina alone, eight jurisdictions have signed MOAs, and 16 more are pending approval. Sheriff Steve Bizzell of Johnston County, North Carolina, a 287(g) applicant, has publicly acknowledged that “his goal is to reduce if not eliminate the immigrant population of Johnston County.”²⁴ He has described “Mexicans” as “trashy” people who “breed[] like rabbits” and “rape, rob and murder American citizens.”²⁵ In Alamance County, North Carolina, a 287(g) participant, Sheriff Terry Johnson has expressed similar views, assuming that all undocumented immigrants are Mexican and stating that “[Mexicans’] values are a lot different – their morals – than what we have here. In Mexico, there’s nothing wrong with having sex with a 12-, 13-year-old girl . . . They do a lot of drinking down in Mexico.”²⁶

ICE claiming that racial profiling is not a problem without monitoring or investigating how 287(g) operates in practice is like a doctor ruling out cancer without running any tests on a patient. Although the foregoing arrest data does not conclusively prove that racial profiling is occurring in every 287(g) jurisdiction, it is sufficient evidence of a potential problem of racial profiling to warrant ICE’s attention, investigation, and response.

C. Litigation and News Reports Further Show that Racial Profiling is a Significant Problem.

Despite the many practical challenges to filing official complaints with ICE and the absence of comprehensive racial profiling data in the immigration-enforcement context, there is credible evidence that the 287(g) program in at least some cases has resulted in racial and ethnic profiling and the detention of U.S. citizens and permanent residents. ICE’s position during the 287(g) hearing indeed cannot be reconciled with pending litigation, news reports, and other reported evidence of widespread racial profiling in 287(g) jurisdictions. In particular, at least two pending cases have received widespread media attention and surely would qualify as “complaints” of racial profiling of which ICE should be aware.

In July 2008, for example, several Latino U.S. citizens filed a class-action lawsuit against the Maricopa County Sheriff’s Office (MCSO), Sheriff Joe Arpaio and Maricopa County for racial profiling against Latinos for the purpose of selectively enforcing the immigration laws under the existing 287(g) MOA in that jurisdiction.²⁷ The lawsuit

²³ Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, *supra* note 6, at 12.

²⁴ University of North Carolina, Immigration and Human Rights Policy Clinic & ACLU of North Carolina Legal Foundation, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina* (February 2009), p.30.

²⁵ Kristin Collins, *Tolerance Wears Thin*, News & Observer (Sep. 4, 2008), available at <http://www.newsobserver.com/news/immigration/story/1209646.html>.

²⁶ Kristin Collins, *Sheriffs Help Feds Deport Illegal Aliens*, News & Observer (Apr. 22, 2007), available at <http://www.newsobserver.com/102/story/566759.html>.

²⁷ The ACLU, the Mexican American Legal Defense and Educational Fund and lead counsel Steptoe & Johnson LLP represent the Plaintiffs in the lawsuit. See *Ortega-Melendres v. Arpaio*, No. 07-02513 (D. Az. Amended Complaint filed July 16, 2008), available at <http://www.aclu.org/immigrants/gen/359981g120080716.html>.

specifically alleges that, claiming authority under the 287(g) MOA, the Sheriff and the County have implemented a racially biased policy of stopping, detaining, questioning and/or searching persons in vehicles in Maricopa County who are or appear to be Latino to interrogate them about their perceived immigration status based on nothing more than their race, color and/or ethnicity.

Two of the plaintiffs, siblings Velia Meraz and Manuel Nieto, are U.S. citizens and county residents. On March 28, 2008, the siblings drove into a Quick Stop gas station while singing along to Spanish music with their windows down. As they pulled into the Quick Stop, they noticed a Sheriff's vehicle behind one of the vehicles at the pumps. The officer was speaking with two Latino-looking men in handcuffs. As soon as Mr. Nieto parked the car, the officer yelled over to them that they should leave. After Ms. Meraz asked why, the officer left the two handcuffed gentlemen and approached Ms. Meraz, accusing her and her brother of disturbing the peace. Ms. Meraz explained that she was just singing to her music, and the officer repeated that they had better leave before he arrested them for disorderly conduct. Ms. Meraz said that they would leave, but asked the deputy for his badge number. The officer then started speaking into his radio, evidently calling for additional officers.

As Mr. Nieto and Ms. Meraz pulled out of the Quick Stop, they noticed a motorcycle officer coming down the road. The officer waved at the motorcycle officer, directing him to follow Mr. Nieto and Ms. Meraz. Mr. Nieto then saw the motorcycle officer and three other Sheriff's vehicles behind them. The motorcycle officer told Mr. Nieto to pull over and get out of the car. Mr. Nieto quickly dialed 9-1-1 and reported that he was being harassed by Sheriff's officers for no apparent reason. Mr. Nieto's family business was no more than 50 yards away, so he pulled into the parking lot there. The four police vehicles descended on them, blocking off the street and their business. The officers jumped out of their vehicles and raised their weapons. One of the officers grabbed Mr. Nieto and pulled him out of the car. He was pressed face first against his car. Mr. Nieto's father ran out of the shop, told the deputies that he owned the shop, that Mr. Nieto and Ms. Meraz were his children and that they were U.S. citizens. The deputies then uncuffed Mr. Nieto and ran his identification through their computer system. The deputies did not give him any citation. Mr. Nieto asked why the officers had subjected him and his sister to such treatment. He was not given any explanation, or any apology.

David and Jessica Rodriguez are two other plaintiffs in the same litigation who have sued Sheriff Arpaio and Maricopa County for racial profiling. On December 2, 2007, a Maricopa County deputy gave the Rodriguezes a traffic citation for failing to follow a road sign. The Rodriguezes were the only residents to receive a citation, even though deputies pulled over several other vehicles and gave oral warnings to the drivers – all of whom were Caucasian. In addition, the deputy demanded to see Mr. Rodriguez's Social Security card, which has no bearing on his driving, but did not request Social Security information of the other drivers. In addition to being part of this lawsuit, Mrs.

Rodriguez filed a formal complaint with the MCSO but has not yet received a formal response.

The County and Sheriff's Office's pattern and practice of racial profiling is evidenced by numerous statements of Sheriff Arpaio. For example, he has claimed that physical appearance alone is sufficient to question an individual regarding her immigration status. The federal district court, however, recently denied the County's Motion to Dismiss the lawsuit, finding that Plaintiffs had sufficiently alleged claims upon which relief could be sought and recognizing that a Latino appearance is of "little or no use" in determining which individuals should be stopped by law enforcement seeking "illegal aliens," and that reasonable suspicion of a traffic violation does not justify questioning of drivers or passengers about immigration status.²⁸ In addition, the U.S. Department of Justice announced on March 10, 2009, that it would also conduct an official investigation of the Maricopa County Sheriff's Office, focusing on "alleged patterns and practices of discriminatory police practices and unconstitutional searches and seizures conducted by the MCSO."²⁹ Yet ICE has remained deafeningly silent on this issue.

The practice of deputizing state and local police to enforce federal immigration laws has proven to be highly ineffective and dangerous. No case illustrates this better than that of Pedro Guzman, a Latino U.S. citizen born in California who was deported to Mexico because an employee of the Los Angeles County Sheriff's Office, a 287(g) participant, determined that Mr. Guzman was a Mexican national. Indeed, this story received broad national press attention, and Mr. Guzman's lawyers even testified before Congress.³⁰ Mr. Guzman, cognitively impaired and living with his mother prior to being deported, ended up being dumped in Mexico – a country where he had never lived – forced to eat out of trash cans and bathe in rivers for several months. His mother, also a U.S. citizen, took leave from her job to travel to Mexico to search for her son in jails and morgues. After he was located and allowed to reenter the U.S., Mr. Guzman was so traumatized that he could not speak for some time. The illegal deportation of Mr. Guzman occurred pursuant to a 287(g) MOA between Los Angeles County and ICE. At least one year before the 287(g) hearing at which ICE testified to having received no complaints, the ACLU of Southern California filed a civil suit against ICE on behalf of Mr. Guzman, alleging violation of his constitutional right to liberty without due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.³¹

²⁸ *Ortega-Melendres v. Arpaio*, No. 07-02513 (D. Az. Feb. 10, 2009 Order Dismissing Defendants' Motion to Dismiss), available at <http://www.aclu.org/immigrants/gen/387091gl20090210.html>.

²⁹ U.S. DOJ Letter ordering investigation, available at <http://ndlon.org/images/documents/usdojlettertoarpaio.pdf>.

³⁰ See Paloma Esquivel, *Suit Filed Over Disabled U.S. Citizen's Deportation Ordeal*, Los Angeles Times (Feb. 28, 2008), available at <http://articles.latimes.com/2008/feb/28/local/me-guzman28>; Testimony of James Brosnahan Before House Judiciary Committee For a Hearing on Problems with ICE Interrogation, Detention, and Removal Procedures (Feb. 13, 2008), available at <http://fdsys.gpo.gov/fdsys/pkg/CHRG-110hhrg11040742/pdf/CHRG-110hhrg11040742.pdf>

³¹ *Guzman v. Chertoff*, No. ____ (C.D. Cal. Complaint filed Feb. 2008).

D. The Poor Administration of 287(g) Creates Danger of More Racial Profiling.

While the 287(g) program has expanded tremendously in budget and size in the past three years, it has expanded without purpose, direction or any measure of control. As this Committee is well aware, the GAO recently reported that ICE lacks key internal controls for the implementation of the 287(g) program even though the program has been in operation for approximately *seven years*.³² The report conclusively found, and Mr. Stana, GAO Director of Homeland Security and Justice, reiterated at the 287(g) hearing, that for the past seven years, 287(g) program objectives have not been documented in any program-related materials; guidance on how and when to use program authority is inconsistent; guidance on how ICE officials are to supervise officers from participating agencies has not been developed; data that participating agencies are to track and report to ICE has not been defined; and performance measures to track and evaluate progress toward meeting program objectives have not been developed.

Absent internal controls and objectives, the 287(g) program effectively grants state and local authorities unbridled authority and discretion to enforce the federal immigration laws without the direction or supervision of, and without having to be accountable to, the federal government. In response to criticism that he has not followed the requirements of the MOA, Maricopa County Sheriff Arpaio has said: “Do you think I’m going to report to the federal government? I don’t report to them.”³³ Although ICE claims that the program was intended to address serious crimes committed by removable aliens, the GAO reported that, of 29 local agencies reviewed, four said they used their 287(g) authority to remove immigrants stopped for traffic violations and other minor violations such as carrying an open container of alcohol and urinating in public.³⁴ According to a 2007 ICE Fact Sheet, the program is aimed at “violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering,” and not “designed to allow state and local agencies to perform random street operations” or “impact issues such as excessive occupancy and day labor activities.”³⁵ Despite the program’s limited scope, at least one sheriff told the GAO investigators that his understanding was that “287(g)-trained officers could go to people’s homes and question individuals regarding their immigration status even if the individual is not suspected of criminal activity.”³⁶

The structure of the 287(g) program, without internal controls or careful and constant supervision, creates a more serious risk of racial and ethnic profiling. It is well-documented that police officers may be motivated by prejudices relating to race and ethnicity in their determination of targeted individuals when they have a high degree of discretion, as they do under the 287(g) program, in enforcing the law. Several

³² See GAO 287(g) Report.

³³ Justice Strategies Report, at 51.

³⁴ GAO 287(g) Report, at 10-12.

³⁵ Chishti, Muzaffar. Written Statement for March 4, 2009 House Committee on Homeland Security Hearing on “Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law” (hereinafter “Chishti Written Statement”), p. 5. See also GAO 287(g) Report, p. 11.

³⁶ GAO 287(g) Report, at 11-12.

Northeastern University researchers, who produced a resource guide on racial profiling data collection systems for the U.S. Department of Justice in November 2000, found that “complexities of police discretion emerge more often in the high-discretion stop category,” such as traffic stops.³⁷ “These high-discretion stops invite both intentional and unintentional abuses. Police are just as subject to the racial and ethnic stereotypes they learn from our culture as any other citizen. Unless documented, such stops create an environment that allows the use of stereotypes to go undetected.”³⁸ In order to get a handle on the magnitude of the problems caused by the rampant abuse of 287(g) and to promote some measure of accountability, state and local law enforcement agencies at a minimum must be required to collect data and be subject to regular monitoring.

III. Race-Based Immigration Enforcement, Like All Other Forms of Racial Profiling, Is Illegal and Ineffective

Although the terms “racial profiling” and “driving while black” are relatively new inventions, the practice of racial discrimination by law enforcement officials has been around, in some form or fashion, for most of America’s history.³⁹ From the Black Codes⁴⁰ to the Japanese-American internment camps⁴¹ and beyond, some of the most shameful episodes in American history have been the products of officially sanctioned, racially discriminatory law enforcement policies. The “legalization of racism”⁴² has no place in a nation founded on the principle that all men are created equal. As Justice Murphy wrote in his dissenting opinion in *Korematsu v. United States*,

“[r]acial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must be accordingly treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.”⁴³

Racial profiling is contrary to American values because it devalues the human beings who must deal with its devastating and deadly consequences. For example,

³⁷ Deborah Ramirez, Jack McDevitt, & Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, Nov. 2000, at 9-10, available at <http://www.ncjrs.gov/pdffiles1/bja/184768.pdf>.

³⁸ *Id.* See also David A. Harris, *When Success Breeds Attach: The Coming Backlash Against Racial Profiling Studies*, 6 Mich. J. Race & Law 237 (2001).

³⁹ See Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling is Wrong*, 18 St. Louis Univ. Public Law Rev. 371, 372 (1999).

⁴⁰ *Id.* In the aftermath of the Civil War, among other things, Blacks were stopped during their travels and forced to identify themselves and reveal where they were coming from and where they were going. See generally RANDALL KENNEDY, RACE, CRIME, AND THE LAW 84-85. *Id.*

⁴¹ In February of 1942, President Franklin Roosevelt authorized the forcible relocation of approximately 110,000 Japanese Americans to internment camps in the wake of Japan’s attack on Pearl Harbor. See generally GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS (2001).

⁴² *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting)

⁴³ *Korematsu*, at 242.

according to some human rights organizations, the expansion of racial profiling after the September 11th attacks appears to have contributed to a climate of discrimination that indirectly encourages hate crimes against certain minority groups by conveying the message that such discrimination is acceptable and helpful in combating terrorism.⁴⁴ The same phenomenon is presently occurring with respect to people perceived to be immigrants and of Latino descent.⁴⁵

A. Racial Profiling Violates the United States Constitution.

“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.”⁴⁶ Thus, the decision “whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’”⁴⁷ The same standard applies to the actions of law enforcement officers. Courts have repeatedly held that any general policy of employing “impermissible racial classifications in determining whom to stop, detain, and search” would violate the Equal Protection Clause.⁴⁸ In other words, “to the extent that race is used as a proxy” for criminal behavior, “a racial stereotype requiring strict scrutiny is in operation.”⁴⁹ There is no question that racial profiling in the immigration context also triggers the highest level of scrutiny applied in Equal Protection cases. The Supreme Court has long held that the prohibition against racial discrimination contained in the 14th Amendment protects non-citizens as well.⁵⁰ As such, the same legal protections exist for citizens, lawful permanent residents and non-citizens who are unlawfully discriminated against by law enforcement.

Racial profiling also violates the Fourth Amendment, which is designed to protect individuals from unreasonable searches and seizures.⁵¹ In the context of vehicular stops, the most common reason for contact between police and the public,⁵² including in the 287(g) context, an investigative stop of an automobile “must be justified by some objective indication that the person is, or is about to be, engaged in criminal activity. In other words, some level of reasonable suspicion is required. The law enforcement officer conducting the stop must be able to “point to specific and articulable facts which, when taken together with rational inferences from these facts, reasonably warrant” stopping a

⁴⁴ See generally *Threat and Humiliation: Racial Profiling, Domestic Security and Human Rights in the United States*. Amnesty International. September 2004.

⁴⁵ [CITE recent articles.]

⁴⁶ *Whren v. United States*, 517 U.S. 806, 813 (1996).

⁴⁷ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

⁴⁸ *Chavez v. Illinois State Police*, 251 F.3d 612, 635 (7th Cir. 2001).

⁴⁹ *Bush v. Vera*, 517 U.S. 952, 968 (plurality).

⁵⁰ *Plyler v. Doe*, 457 U.S. 202, 212 (1981) (concluding that the 14th Amendment applies to all individuals within a State); *Yick Wo v. Hopkins* 118 U.S. 356, 369 (1886) (concluding that the 14th Amendment applies to non-citizens).

⁵¹ As a practical matter, criminal defendants claiming that a search or seizure was motivated by racial animus are unlikely to succeed by alleging a Fourth Amendment violation. The Supreme Court has held that the Fourth Amendment is not violated when a minor traffic infraction is a pretext rather than the actual motivation for a stop by law enforcement officers. *Whren v. United States*, 517 U.S. 806, 813 (1996). The *Whren* Court acknowledged that “the Constitution prohibits selective enforcement of the law based on considerations such as race,” but went on to state that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.” *Id.*

⁵² Matthew R. Durose, Erica L. Smith, and Patrick A. Langan, Ph.D., *Contacts Between Police and the Public, 2005*, BUREAU OF JUSTICE STATISTICS, April 2007.

person to conduct further investigation.⁵³ For automobile searches, while a warrant is not required, probable cause to believe that the car contains contraband is still a prerequisite.⁵⁴ “Probable cause means ‘a fair probability that contraband or evidence of a crime will be found.’”⁵⁵ In the absence of probable cause, a search warrant, or exigent circumstances, a search will be deemed legal only if it is conducted with the consent of the party searched.⁵⁶ Depending on the nature and severity of the encounter, allegations generally will be that defendants violated the Fourth Amendment by stopping a motorist of color without reasonable suspicion, searching him and his vehicle without probable cause, detaining him for unreasonably long periods of time, coercing consent to search or searching without consent, or deploying a drug-sniffing dog for an intrusive and unjustified search.⁵⁷ The same infringements occur in the 287(g) context, although 287(g)-targeted victims also have complained of being arrested, not merely cited, for minor violations like broken windshields or improper vehicle tags.⁵⁸ As is true of the Equal Protection rights contained in the 14th Amendment, criminal procedure rights granted in the 4th and 5th Amendments apply to citizens and non-citizens alike.⁵⁹

Acts of racial profiling by state and local law enforcement may be in violation of Title VI of the Civil Rights Act of 1964 and its implementing regulations, which prohibit discrimination by agencies receiving federal funding.⁶⁰ Courts have held that Title VI permits a private right of action against recipients of federal funding, including police, for a policy or practice that discriminates on account of race.⁶¹ Similarly, the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3789) prohibits discrimination by state and local government that receive federal funds for law enforcement, and it authorizes enforcement of the statute in the form of civil actions by the Department of Justice and by private citizens.⁶² Racial profiling in the context of 287(g) programs may also violate the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. § 14141), which authorizes the Department of Justice to file suit for declaratory and equitable relief against law enforcement agencies engaged in “patterns or practices” that

⁵³ Terry v. Ohio, 392 U.S. 1, 21 (1968).

⁵⁴ United States v. Ross, 456 U.S. 798 (1982).

⁵⁵ United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

⁵⁶ See Florida v. Royer, 460 U.S. 491, 497 (1983). The government has the “burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing mere submission to a claim of lawful authority.” *Id.* See also Schneckloth v. Bustamonte, 412 U.S. 218 (233-34 (1973)).

⁵⁷ See, e.g., Maryland State Conference of NAACP Branches, et al. v. Maryland Dep’t of State Police, et al., 72 F. Supp.2d 560 (D.Md. 1999).

⁵⁸ Add cite.

⁵⁹ See Wong Wing v. U.S. (1896)

⁶⁰ 42 U.S.C. § 2000d et seq. Title VI of the Civil Rights Act of 1964. Title VI provides: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. Available at <http://www.usdoj.gov/crt/cor/coord/titlevistat.php>.

⁶¹ See Rodriguez v. California Highway Patrol, 89 F. Supp.2d 1131, 1139 (N.D.Cal. 2000)(finding that plaintiffs adequately pled a claim under Title VI by alleging that the state police engage in “racial discrimination by stopping, detaining, interrogating and searching motorists on the basis of race”) while receiving federal funding. In the aftermath of Alexander v. Sandoval, 532 U.S. 275 (2001), private parties no longer have a right to sue for damages to enforce the “disparate impact” regulations found in Title VI, and may have to rely on enforcement by federal agencies.

⁶² U.S. DOJ Letter ordering investigation, available at <http://ndlon.org/images/documents/usdojlettertoarpaio.pdf>.

violate the Constitution.⁶³ Finally, approximately one-third of state legislatures in this country have adopted laws banning the practice.⁶⁴

B. Racial Profiling Violates Human Rights Standards.

Racial profiling violates international standards against non-discrimination and multiple treaties to which the U.S. is party, including the United Nations Convention for the Elimination of All Forms of Racial Discrimination (CERD) and the International Convention on Civil and Political Rights (ICCPR).⁶⁵

Multiple international bodies have raised concerns about the persistence of racial and ethnic profiling by law enforcement in the U.S., including the United Nations' Human Rights Committee. Similarly, in 2008, the Committee on the Elimination of Racial Discrimination (which monitors implementation of CERD), in its concluding observations to the United States, "note[d] with concern that despite the measures adopted at the federal and state levels to combat racial profiling...such practice continues to be widespread."⁶⁶ The Committee also called on the U.S. to pass the federal End Racial Profiling Act or similar legislation.

C. Racial Profiling Leaves Individuals – Including Children – Vulnerable to Police Abuse.

Victims of racial profiling are sometimes further victimized by acts of severe police abuse. For example, on July 3, 2008, Juana Villegas was driving in Nashville (within Davidson County's 287(g) jurisdiction) when she was pulled over by a Berry Hill police officer for "careless driving." Mrs. Villegas, nine months pregnant, was forced to wait in her hot car with her three children for over an hour. Eventually the children were allowed to leave with a family member without Villegas's permission, and she was taken into custody. By the time she was released from county jail six days later, she had gone through labor with a sheriff's officer standing guard in her hospital room, where one of her feet was cuffed to the bed most of the time. County officers barred her from seeing or speaking with her husband. Up until an hour before the actual birth, her foot remained shackled to the hospital bed. As she was taken back to the Davidson County jail, she was told that her baby would be given to her husband. Mrs. Villegas was never allowed to speak to her husband. On July 9 she appeared in court on the misdemeanor charge of driving without a license, and was sentenced to time served. She did not see her newborn again until the morning of July 19, after she was released from the sheriff's custody on her own recognizance. On August 15, the "careless driving" charge against Villegas was dismissed in Berry Hill Municipal Court.⁶⁷

⁶³ *Id.*

⁶⁴ See Amnesty International USA, *Racial Profiling Laws In Your State*, available at <http://www.amnestyusa.org/us-human-rights/other/racial-profiling---laws-in-your-state/page.do?id=1106665>

⁶⁵ Amnesty International USA, *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States*, at 32.

⁶⁶ http://www.aclu.org/pdfs/humanrights/cerd_concluding_report.pdf

⁶⁷ Mrs. Villegas is still being processed for deportation as a result of the 287(g) program, but she has also filed a lawsuit against the County and ICE for violation of her rights. The lawsuit is *Villegas v. Metropolitan Government of*

In at least one other case, the overzealous immigration enforcement by Alamance County, North Carolina, deputies resulted in the endangerment of children. On June 14, 2008, around 2:00 a.m., Maria Chavira Ventura was pulled over by Alamance County deputies on Interstate 85 near Burlington, North Carolina. In the vehicle were her three young children and an adult male who was a fellow church parishioner but unrelated to the family. The deputies arrested Ms. Ventura for driving without a license and false vehicle tags. When they took Ms. Ventura away, the deputies also took the car keys, leaving her three children with the adult male in the car. Shortly thereafter, the adult male left looking for help. Alone, frightened and crying, the children called their father in Baltimore. He immediately drove down to get them, but it took over six hours to drive from Baltimore to Burlington. During those seven hours the children were stranded in the car on Interstate 85, with one bottle of water to share among them. No deputy or law enforcement official returned to the car to check on them, nor did the deputies take the children's mobile telephone number to confirm they had returned home safely.

D. Racial Profiling Is an Ineffective Law Enforcement Strategy.

In addition to being illegal and contrary to closely held American values, racial profiling is an ineffective law enforcement tactic. A vast majority of individuals subjected to stops and other enforcement activities based on race, ethnicity, national origin, or religion are found to be law-abiding. A 2001 Department of Justice report on citizen-police contacts that occurred in 1999 found that, although blacks and Latinos were *more* likely to be stopped and searched, they were *less* likely to be in possession of contraband.⁶⁸ On average, searches and seizures of black drivers yielded evidence only 8 percent of the time, searches and seizures of Latinos drivers yielded evidence only 10 percent of the time, and searches and seizures of white drivers yielded evidence 17 percent of the time.⁶⁹ A 2000 GAO report on the activities of the U.S. Customs Service during fiscal year 1998 found that among U.S. citizens, black women were nine times more likely than white women to be x-rayed after being frisked or patted down. Nevertheless, black women were less than half as likely as white women who were U.S. citizens to be found carrying contraband.⁷⁰ Similar studies by state governments and civil rights organizations including the ACLU have yielded comparable findings.⁷¹

Davidson County, et al., and was filed in the District Court for the Middle District of Tennessee on March 4, 2009, the day of the 287(g) hearing.

⁶⁸ Patrick A. Langan, Lawrence A. Greenfeld, Steven K. Smith, Matthew R. Durose, and David J. Levin. *Contacts between Police and the Public: Findings from the 1999 National Survey*. Bureau of Justice Statistics February 2001, NCJ 184957

⁶⁹ *Id.*

⁷⁰ U.S. General Accounting Office. *Testimony Before the Subcommittee on Government Management, Information and Technology, Committee on Government Reform and House of Representatives*. April 2001. Available at <http://www.gao.gov/archive/2000/g100150t.pdf>.

⁷¹ See ACLU of Arizona, *Driving While Black or Brown* (<http://www.acluaz.org/DrivingWhileBlackorBrown.pdf>) and ACLU of Louisiana, *Unequal Under the Law: Racial Profiling in Louisiana* (http://www.laclu.org/PDF_documents/unequal_under_law_web.pdf).

In the context of 287(g) programs, the apparent race or ethnicity of an individual functions poorly as a proxy for local law enforcement to determine whether or not that person is in the country legally. There were approximately 45.5 million Latinos residing in the United States in 2007, according to the Census Bureau.⁷² A study by a non-partisan research group, the Pew Hispanic Center, estimates that the total number of unauthorized immigrants living in the United States by the middle of this decade was 11 million. Of those, 78 percent were thought to have immigrated from Latin America.⁷³ Based on these numbers, approximately 81 percent of the entire Latino population of the United States is in this country lawfully (as U.S. citizens, lawful permanent residents, etc.). Thus out of every five Latinos targeted by police for race-based immigration enforcement, at least four are likely to be living in the U.S. legally.

Furthermore, a race-based focus on immigrants may actually be counterproductive to state and local law enforcement goals since studies consistently show that the incidence of criminal activity, both violent and non-violent, conducted by foreign-born residents is actually lower than that of natural-born citizens.⁷⁴ As the undocumented immigrant population has doubled over the past 15 years, the violent crime rate in the U.S. has actually declined 34.2 percent and property crime has dropped 26.4 percent.⁷⁵ A study by the conservative America's Majority Foundation found that crime rates are lowest in states with the highest growth rates of immigrants.⁷⁶ Another study found that U.S. incarceration rates among young men are lowest for immigrants. In 2000, the 3.5 percent incarceration rate for native-born men ages 18 to 39 was five times higher than the 0.7 percent rate for foreign-born men.⁷⁷ As these numbers suggest, directing limited law enforcement resources to racial profiling of foreign-born persons lessens the use of more effective law enforcement techniques, thereby wasting police resources and making our communities less safe.

In addition to the harm individuals subjected to racial profiling experience when they are unjustifiably treated as criminal suspects, our society is damaged by the practice, which furthers residential segregation⁷⁸, provokes fear and mistrust⁷⁹, and gives rise to a reluctance to report crimes and cooperate with police officers.⁸⁰ In the wake of the

⁷² <http://www.census.gov/compendia/statab/tables/09s0018.pdf>

⁷³ Pew Hispanic Center. *Estimates of the Size and Characteristics of the Undocumented Population*, March 21 2005. Available at <http://pewhispanic.org/files/reports/44.pdf>

⁷⁴ See Kristin F. Butcher and Anne Morrison Piehl, *Crime, Corrections, and California: What Does Immigration Have to Do with It?* California Counts: Population Trends & Profiles, Volume 9, Number 3, February 2008 available at <http://www.ppic.org/main/publication.asp?i=776>.

⁷⁵ Patrick A. Langan, Lawrence A. Greenfeld, Steven K. Smith, Matthew R. Durose, and David J. Levin. *Contacts between Police and the Public: Findings from the 1999 National Survey*. Bureau of Justice Statistics February 2001, NCJ 184957

⁷⁶ See Richard Nadler, *Immigration and the Wealth of States*. Overland Park, KS: Americas Majority Foundation, p. 9 (Jan. 2008) available at <http://www.amermaj.com/ImmigrationandWealth.pdf>.

⁷⁷ Immigration Policy Center. *Born Men*. Washington: American Immigration Law Foundation, (Spring 2007) available at [http://www.immigrationpolicy.org/images/File/specialreport/Imm%20Criminality%20\(IPC\).pdf](http://www.immigrationpolicy.org/images/File/specialreport/Imm%20Criminality%20(IPC).pdf).

⁷⁸ See generally Randall Kennedy, *Race, Crime, and the Law*. New York: Random House, 1997.

⁷⁹ David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work*. The New York Press: New York, 2003, p. 126-128.

⁸⁰ Suzanne Gamboa, The Associated Press. *House panel scrutinizes immigration program.*, (March 4, 2009). <http://www.google.com/hostednews/ap/article/ALeqM5jQhWt9Iqg-9VxMBITwNXo2ZZapDgD96NJGRO0>

September 11, 2001 terrorist attacks, many U.S. citizens of Arab, Muslim, Central and South Asian, and Sikh descent, as well as other citizens and immigrants of foreign descent, were treated with generalized suspicion and subjected to searches and seizures based upon religion and national origin, without trustworthy information linking specific individuals to criminal conduct.⁸¹ The most blatant example of post -9/11 racial profiling was the creation of NSEERS – the National Security Entry Exit Registration System - which required all male nationals over the age of 15 from approximately 25 countries to report to the federal government to register and be fingerprinted, photographed, and questioned. With the exception of North Korea, every targeted country was Arab and Muslim, and 95 percent of individuals questioned were Muslim.⁸² Not a single individual interviewed under the NSEERS program was charged with any connection to a violent political organization.⁸³ Such profiling has failed to produce tangible benefits, yet has engendered suspicion of and apprehension towards law enforcement agencies in these communities. Arab and Muslim-American community leaders claim that racial profiling tactics at the federal level have greatly diminished their community members’ desire to assist with anti-terrorism efforts.⁸⁴ Similar effects have been noted in African-American⁸⁵ and Latino⁸⁶ communities targeted by racial profiling police tactics.

Racial profiling undermines the trust between the police and the communities they serve, by sending the message that some citizens do not deserve equal protection under the law and by creating fear in communities, rather than trust. Thus, racial profiling deepens racial rifts, fueling the belief by people of color that law enforcement policies are unfair and justice is not blind. Respect and trust between law enforcement and communities of color are essential to successful police work.⁸⁷ It is for this reason that police organizations such as the International Association of Chiefs of Police (IACP) have adopted resolutions condemning the practice.⁸⁸

(referencing Montgomery County, Md., Police Chief J. Thomas Manger’s decision not to participate in the 287(g) program “because it undermines trust and cooperation between police and immigrants.”)

⁸¹ See Phillip Heyman, *Muslims in America after 9/11: The Legal Situation* available at <http://www.ces.fas.harvard.edu/conferences/muslims/Heymann.pdf> (discussing racial and ethnic profiling experienced by American Muslims as well as private discrimination experienced since September 11, 2001).

⁸² *Special Registration: Discrimination and Xenophobia as Government Policy*. Asian American Legal Defense and Education Fund. January 2004.

⁸³ *Id.*

⁸⁴ Amnesty International Report *Threat and Humiliation*, at 27. (Citing comments by Dr. Jess Ghannam, President of the American-Arab Anti-Discrimination Committee of San Francisco, suggesting that the social and political climate in the U.S. after the attacks on the World Trade Center and the Pentagon destroyed the faith members of his community once had in the American government and justice system).

⁸⁵ See Kevin R. Johnson, *The Case for African American and Latino/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 Fla. L. Rev. 341, 343–44 (2003);

⁸⁶ Anthony E. Mucchetti. *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*. 8 Harvard Latino L. Rev. 1, 16 available at <http://www.law.harvard.edu/students/orgs/llr/vol8/mucchetti.php>

⁸⁷ U.S. Department of Justice Community Relations Service. *Principles of Good Policing: Avoiding Violence Between Police and Citizens* (2003) at 43-44. Available at <http://www.usdoj.gov/crs/pubs/principlesofgoodpolicingfinal092003.pdf>

⁸⁸ International Association of Chief of Police. Resolution Condemning Racial and Ethnic Profiling in Traffic Stops (1999) available at http://www.theiacp.org/resolution/index.cfm?fa=dis_public_view&resolution_id=41&CFID=21616957&CFTOKEN=41368191

IV. ACLU Recommendations to Stop Race-Based Immigration Enforcement

A. DHS should suspend the 287(g) program pending a comprehensive, detailed review of the 287(g) program. Review of the program shall include field hearings in those jurisdictions where 287(g) MOAs have been in place for at least one year. The 287(g) program review should be undertaken by independent experts charged with determining whether and to what extent these programs:

- Increase racial or ethnic profiling
- Enhance public safety
- Undermine community policing efforts
- Result in the arrest, detention, or deportation of U.S. citizens
- Reduce individuals' likelihood of reporting crimes or serving as witnesses
- Reduce access to education, health, fire, and other services by immigrants and members of their families and communities
- Exceed the limitations established in the MOU/MOA
- Are sufficiently supervised by ICE personnel
- Collect data necessary to enable proper oversight
- Are subject to sufficient community, municipal, state and federal oversight
- Result in costs to the state/local participants
- Are cost-effective from the federal government's perspective
- Undermine federal prosecutorial discretion or the ability of DHS to effectively set priorities in immigration enforcement

B. ICE should require that all law enforcement agencies ("LEAs") with 287(g) MOAs or MOUs collect data on all contacts with the public. The data should include the following:

- Date, time and location of the stop or contact
- Length of the stop
- Make and model of the vehicle and whether the motorist was local or from out-of-state
- Race and ethnicity of the motorist
- Reason for the stop
- Result of the stop – i.e., whether a ticket was issued or an arrest was made, or whether the driver was let go without a warning
- Whether a search was conducted
- Type of search – i.e., probable cause, consent, or inventory search after an arrest was made
- What, if anything, was found in the course of the search
- Officer badge number or individual identifier
- Passenger activity, if any

C. DHS should require all LEAs with MOAs or MOUs to create transparent complaint procedures that are communicated to the public. The LEAs should

- print and disseminate brochures describing the complaint procedures that are handed out by law enforcement officers upon every contact with the public. ICE should institute reporting requirements by all LEAs with MOAs or MOUs to ICE, as well as regular review of all reported activities. ICE should also require anti-profiling training by all LEAs entering into 287(g) MOAs or MOUs.
- D. The DHS Office of Policy should issue guidance to all LEAs explicitly clarifying that their authority to engage in immigration enforcement is limited to narrow circumstances (i.e. where there is a criminal immigration violation and any state-law limitations on authority are satisfied) and that any decision to assist DHS or participate in immigration enforcement must be voluntary and must comport with state and/or local laws and policies.
 - E. DHS should require and fund meaningful training on the complexity of immigration laws, limitations of state/local authority, ICE enforcement priorities, and problems with profiling, as a precondition to any officer's participation in 287(g) or any other program envisioning state and local participation in immigration enforcement.
 - F. DHS should stop entering civil immigration violations including records relating to so-called "absconders" and "NSEERS violators" into the NCIC database and remove those records that have previously been entered. The FBI should mandate that all NCIC entries comply with the accuracy standards of the Privacy Act.
 - G. Congress should pass the End Racial Profiling Act ("ERPA") without exemptions for immigration enforcement.

V. Conclusion

The enforcement of immigration laws by state and local law enforcement agencies, pursuant to the 287(g) program, has resulted in racial and ethnic profiling, primarily against those of Hispanic origin. The program has grown without purpose, guidance, or oversight, and has rendered entire communities suspect and vulnerable to severe abuses. Seven studies completed around the country in recent years have reached similar conclusions: people of color are disproportionately targeted by police even though they are less likely than whites to be engaged in criminal activity.⁸⁹ The racial

⁸⁹ Minnesota Department of Public Safety (MDPS) 2003 Minnesota Racial Profiling Report (found that blacks and Hispanics are more likely to be searched than whites during a traffic stop, but searches of whites are more likely to produce contraband). • McCorkle, R.C. 2003 A.B. 500: Traffic Stop Data Collection Study. Carson City, NV: Office of the Attorney General (found that blacks searched at more than twice the rate of white drivers but the hit rate for blacks and Hispanics was lower than for whites and Asians). • Zingraff, M.T. Mason, H.M. Smith, W.R., Tomastovic-Devey, D. (found that blacks are more likely to be searched than whites but contraband is less likely to be found in searches of vehicles operated by black drivers). • Lamberth, J. 2003, Racial Profiling Data Analysis, final report for the San Antonio Police Department. Chadds Ford, PA Lamberth Consulting (found that black and Hispanic drivers are more likely to be searched than white or Asian drivers yet contraband is consistently found at lower rates for black and Hispanic drivers). • Washington State Police, (WSP), 2001. Report to the Legislature on Routine Traffic Stop Data. Olympia: Washington State Police (found that nonwhite minorities are searched at a disproportionately higher rate than whites).

profiling of immigrant communities is not only illegal and ineffective, but also anathema to closely held American values of fairness and equality. Congress should act to rein in these out-of-control, counter-productive practices and suspend the 287(g) program.