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-ARTICLE-

RACIAL PROFILING IN GREATER MINNESOTA AND THE CASE FOR EXPANDING THE DRIVER'S LICENSE PRIVILEGE TO ALL MINNESOTA RESIDENTS

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I. INTRODUCTION

Racial profiling is a pervasive issue for immigrants in the United States, and it is becoming increasingly problematic for Latinos² living and working in the predominantly rural communities of Greater Minnesota. Reports from throughout the state indicate that Latinos are disproportionately targeted by the police on a regular basis.

In the waning days of the 2013 session of the Minnesota Legislature, advocates filled the Capitol rotunda to demand action on a myriad of unresolved social and economic issues. Often ignored by passing legislators, lobbyists and staff, a handful of Latino immigrants sat quietly on folding chairs in front of the entrance to the chamber of the House of Representatives. They held hand-made signs to explain that they were on a hunger strike to prompt action on a bill that would allow Minnesota residents to obtain a driving-only license regardless of immigration status.³ In spite of the days-long hunger strike, the House failed to act on the bill before the end of session.⁴

This issue remains a priority for immigrants' rights advocates and we will likely see similar efforts in future sessions of the Minnesota Legislature. Advocates have raised numerous arguments in support of expanding the driver's license privilege. Their arguments focus

² For purposes of this article, we will use terms "Hispanic" and "Latino" interchangeably.

³ See John Croman, *Immigrants stage hunger strike over driver's licenses*, USA TODAY (May 14, 2013), <http://www.usatoday.com/story/news/nation/2013/05/14/immigrant-hunger-strike/2159419/>.

⁴ Allison Herrera, *Hungering for a driver's license: Effort by undocumented immigrants comes close, but not this year*, TWIN CITIES DAILY PLANET (May 21, 2013), <http://www.tcdailyplanet.net/news/2013/05/21/hungering-drivers-license-effort-undocumented-immigrants-comes-close-not-year>.

primarily on the benefits to public safety.⁵ Often overlooked in this discussion is the effect that expanding the privilege could have on decreasing instances of the racial profiling of Latino residents.

This article begins with a discussion of the work of the American Civil Liberties Union (“ACLU”), and its Minnesota affiliate, relating to immigrants’ rights. Next, this article provides an overview of current federal and state laws dealing with racial profiling. This discussion of current laws will focus on law enforcement stops of Latino drivers. Third, this article analyzes the debate over providing driver’s licenses to state residents regardless of immigration status. Finally, this article concludes that, given the current state of racial profiling law, allowing a driver’s license privilege to all Minnesota residents is sound public policy that has the potential to decrease instances of racial profiling.

II. THE GREATER MINNESOTA RACIAL JUSTICE PROJECT

The ACLU concerns itself with the constitutional rights and liberties of all people in the United States, not just U.S. citizens.⁶ The fundamental constitutional protections of due process and equal protection embodied in the United States Constitution and Bill of Rights apply to every "person" and are not limited to citizens.⁷

⁵ See, e.g., Nat’l Immigration Law Ctr., *Fact Sheet: Why Denying Driver’s Licenses to Undocumented Immigrants Harms Public Safety and Makes Our Communities Less Secure*, NILC.ORG (Jan. 12, 2008), <http://www.nilc.org/document.html?id=878>.

⁶ ACLU, *Immigrants’ Rights: No Human Being is Illegal*, ACLU.ORG, <https://www.aclu.org/immigrants-rights> [hereinafter “*No Human Being is Illegal*”].

⁷ See U.S. CONST. amend. XIV; *Plyler v. Doe*, 457 U.S. 202, 210 (1982); see generally *No Human Being is Illegal*, *supra* note 6.

A. IMMIGRANTS' RIGHTS ADVOCACY

The national ACLU organization formed due to concerns of civil libertarians regarding the treatment of immigrants in the 1920s.⁸ In late 1919 and early 1920, the government summarily detained and deported many immigrants because of their political views.⁹ In what became known as the “Palmer Raids,” Attorney General Mitchell Palmer targeted, arrested, and deported so-called “radical” immigrants without regard to constitutional protections or individual civil liberties.¹⁰ Since then, the ACLU has defended non-citizens trying to exercise their rights and has fought anti-immigrant laws throughout the country.¹¹ For example, the ACLU was instrumental in the recent racial profiling case against Sheriff Joe Arpaio in Maricopa County, Arizona, for his aggressive persecution of racial minorities in his community.¹²

The ACLU of Minnesota¹³ was founded in 1952, and its Greater Minnesota Racial Justice Project (“GMRJP”) opened an office in Mankato, Minnesota in 2011.¹⁴ The goal of the GMRJP

⁸ ACLU, *ACLU History*, <https://www.aclu.org/aclu-history> [hereinafter “*ACLU History*”].

⁹ ACLU, *About the ACLU’s Immigrants’ Rights Project*, <https://www.aclu.org/immigrants-rights/about-aclus-immigrants-rights-project> [hereinafter “*About the Immigrants’ Rights Project*”].

¹⁰ See *ACLU History*, *supra* note 8.

¹¹ See *About the Immigrants’ Rights Project*, *supra* note 9. For example, the ACLU has litigated cases in the United States Supreme Court, including *Demore v. Kim*, 538 U.S. 510 (2003), and *INS v. St. Cyr*, 533 U.S. 289 (2001), which upheld immigrants’ right to habeas corpus and reversed deportation of longtime legal residents.

¹² *Melendres v. Arpaio*, No. PHX–CV–07–02513–GMS, 2013 WL 2297173 (D. Ariz. May 24, 2013); see also Press Release, ACLU, Federal Court Rules Arizona Sheriff Joe Arpaio Violated U.S. Constitution (May 24, 2013), <https://www.aclu.org/print/immigrants-rights-racial-justice/federal-court-rules-arizona-sheriff-joe-arpaio-violated-us>.

¹³ The ACLU of Minnesota is a nonpartisan, nonprofit organization dedicated to protecting the civil liberties of all Minnesotans under the United States and Minnesota constitutions. It promotes its mission through litigation, public education and lobbying efforts.

¹⁴ See ACLU of Minnesota, *Why We Chose Mankato: A Message from the ACLU-MN’s Executive Director, Chuck Samuelson*, <http://www.aclu->

is to address the problems of unequal and biased treatment of communities of color in all levels of the criminal justice system in Greater Minnesota.¹⁵

B. CHANGING DEMOGRAPHICS IN SOUTHERN MINNESOTA

Southern Minnesota is home to many small and isolated communities dealing with a rapid influx of immigrants. United States Census Bureau data, which is often low when counting undocumented populations, shows a significant increase in the number of Latinos living in the region over the last ten-year period.¹⁶ This rise in the number of Latino residents can be attributed to economic considerations and jobs marketed toward migrant workers, including several food processing plants in Southern Minnesota.¹⁷ An Equal Opportunity Commission report from 1998 notes that 33% of workers in the meat and poultry products industries in South Central Minnesota are Latino.¹⁸ As the chart below demonstrates, several counties in Southern Minnesota have seen dramatic changes in their demographics between 2000 and 2010, showing continued growth of the Latino population.

mn.org/issues/racialjustice/gmrjpsouth/whywechosemankato/ [hereinafter “*Why We Chose Mankato*”].

¹⁵ *Id.*

¹⁶ *Mankato, Minnesota Population: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts*, CENSUSVIEWER, <http://censusviewer.com/city/MN/Mankato>.

¹⁷ See generally James J. Kielkopf, *Estimating the Economic Impact of the Latino Workforce in South Central Minnesota*, CTR. FOR RURAL POL’Y AND DEV. (Sept. 2000), <http://www.ruralmn.org/wp-content/uploads/2010/04/latinoworkforce.pdf>.

¹⁸ James J. Kielkopf, *The Economic Impact of Undocumented Workers in Minnesota*, HISPANIC ADVOCACY AND COMMUNITY EMPOWERMENT THROUGH RESEARCH (HACER), 9 (Sept. 2000), <http://www.uwlax.edu/faculty/giddings/ECO108/hacer.pdf>.

County	2000 Hispanic population	2000 Hispanic population (%)	2010 Hispanic population (%)	2010 Hispanic population (%)	Annual growth (%)	Ten year growth (%)
Blue Earth	988	1.8	1,600	2.5	6.1	62
Brown	545	2.0	854	3.3	5.6	57
Faribault	566	3.5	815	5.6	4.4	44
Freeborn	2,049	6.3	2,750	8.8	3.4	34
Le Sueur	997	3.9	1,441	5.2	4.4	45
Martin	421	1.9	750	3.6	7.8	78
McLeod	1,268	3.6	1,811	4.9	4.2	43
Mower	1,646	4.2	4,138	10.6	15.1	151
Nicollet	535	1.8	1,211	3.7	12.7	126
Nobles	2,325	11.1	4,820	22.5	10.7	107
Rice	3,117	5.5	5,122	8.0	6.4	64
Sibley	834	5.4	1,096	7.2	3.1	31
Steele	1,266	3.7	2,282	6.2	8.0	80
Waseca	566	2.9	976	5.1	7.2	72
Watonwan	1,804	15.2	2,343	20.9	3.0	30
Total pop.	18,927		32,009		6.9	69

*This chart was compiled by the authors using data from the United States Census Bureau.
*See Mankato, Minnesota Population, supra footnote 15.**

Since 2011, the GMRJP has conducted community outreach to identify and assist with civil liberties issues faced by Latino communities in Southern Minnesota.¹⁹ The Project found that these communities often face hardships based on the language barrier, cultural differences, and a lack of understanding of their rights and the U.S. criminal justice system.²⁰ Based on extensive outreach activities and interviews, the GMRJP found that Latino residents routinely face issues of racial profiling, fear of law enforcement and disengagement from the community.²¹

¹⁹ See *Why We Chose Mankato*, supra note 14.

²⁰ See generally *Greater Minnesota Racial Justice Project Newsletter*, Vol. 1, Issue 1, (ACLU), Winter 2013, http://www.aclu-mn.org/files/7013/8687/1945/ACLU_south_newletter_Winter_2013.pdf.

²¹ See, e.g., Dan Linehan, *Gaylord defends officer against claims of profiling*, THE FREE PRESS, MANKATO, MN (April 6, 2013), <http://www.mankatofreepress.com/local/x1319127296/Gaylord-defends-officer-against-claims-of-profiling>.

C. DATA ON ARREST RATES AND PENDING LITIGATION

Prior to opening the GMRJP office in Mankato, the ACLU of Minnesota filed Data Practices Requests in order to obtain data on arrests and juvenile apprehensions by race and ethnicity.²² This data, coupled with stories of racial profiling of immigrants related to the ACLU of Minnesota by members of the community, raised concerns of over-policing of minorities throughout Southern Minnesota, particularly in the Mankato area.²³ As outlined in the following chart compiled from data reported by the individual counties to the Minnesota Bureau of Criminal Apprehension from 2008 to 2010, the percentage of Latinos arrested in these counties appears disproportionately high.²⁴

County	Hispanic county population (%)	Hispanic adult arrests (%)
Blue Earth	2.5	6.2
Faribault	5.6	6.9
Le Sueur	5.2	10.4
Martin	3.6	9.8
Nicollet	3.7	14.8
Nobles	22.5	27.5
Steele	6.2	13.8
Waseca	5.1	9.6
Watonwan	20.9	20.3

Chart data obtained by the ACLU in Data Practices requests. For more information, contact the authors.

In 2011 and 2012, the Mankato office of the American Civil Liberties Union of Minnesota (ACLU-MN) received complaints of racial profiling and harassment of Latino residents in the small town of Gaylord, Minnesota.²⁵ The ACLU-MN launched an investigation,

²² See *Why We Chose Mankato*, *supra* note 14; Minn. Stat. Ann. § 13.03 (West 2012).

²³ *Why We Chose Mankato*, *supra* note 14.

²⁴ Source data on file with the authors.

²⁵ John Tevlin, *ACLU review of one cop's record is point of contention*, STAR TRIBUNE (Jan. 15, 2013), <http://www.startribune.com/local/187057871.html>.

focused specifically on Gaylord police officer Eric Boon, including reviewing tapes from a dashboard camera, dispatch records, citations and reports from 261 of his stops.²⁶ When viewed by race, the data indicated that 54% of Boon's stops were of minority residents and 59% of the tickets he issued were to minorities.²⁷ While this investigation received attention in the media, we are concerned that these issues will not be addressed by the government actors without formal action in the courts.

Following a separate incident, the ACLU of Minnesota filed a lawsuit against the Gaylord Police Department on February 12, 2013.²⁸ The Complaint, filed in Federal District Court, alleges violations of Plaintiff Jesus Manuela Mendoza Sierra's Fourth, Fifth and Fourteenth Amendment rights when the defendant officers and deputies arrested, detained and interrogated her without probable cause to suspect that she had committed any criminal activities.²⁹ The Complaint further alleges that the police illegally targeted Ms. Mendoza Sierra based on her color, ethnicity and national origin.³⁰ The ACLU of Minnesota is concerned these actions remain common place in Southern Minnesota, where the ACLU perceives that residents

²⁶ *Id.*

²⁷ *Id.*

²⁸ Complaint, *Mendoza Sierra v. City of Gaylord, et al.*, No. 0:13CV00347 (D. Minn. Feb. 12, 2013), available at http://www.aclu-mn.org/files/3613/6140/0623/Filed_Complaint_w_judge_assignment_Gaylord.pdf. The Complaint names the City of Gaylord, Sibley County and numerous other governmental actors as defendants. *Id.*

²⁹ Press Release, ACLU of Minnesota, ACLU-MN Files Discrimination Lawsuit Against Gaylord Police and Others (Feb. 19, 2013), <http://www.aclu-mn.org/news/2013/02/19/aclu-mn-files-discrimination-lawsuit-against-gaylord-police>.

³⁰ Complaint, *supra* note 28, at ¶ 1. Ms. Mendoza Sierra is a lawful permanent resident who immigrated to Minnesota in May of 2009. *Id.* at ¶ 7.

like Ms. Mendoza Sierra are treated differently by local law enforcement officials simply due to their background and race.³¹

III. RACIAL PROFILING LAW

The ACLU defines racial profiling as the “discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion or national origin.”³² Although some states define racial profiling as the practice of police relying “solely” on the basis of race or ethnicity in determining who to police, racial profiling occurs any time police use race as a factor in deciding who to stop or investigate. Racial profiling does not include police considering race when they are looking for a suspect and the description of the suspect includes information about the suspect’s race or ethnicity along with other identifying information.

In addition to violating the constitutional right to equal protection, racial profiling can have devastating effects on communities of color. Racial profiling results in minority communities being disproportionately targeted for law enforcement activities, making them more likely to have an arrest or even criminal record. The collateral effects of having an arrest or criminal record include difficulties finding stable housing and employment. Racial profiling also sows the seeds of distrust in the community, making people less likely to turn to the police when they are in trouble and making it more difficult to get cooperation from the public when they are investigating crimes. For members of immigrant communities, some of whom are present in the U.S. without authorization, the collateral effects of racial profiling are amplified by their immigration status.

³¹ *Id.*

³² ACLU, *Racial Profiling: Definition* (Nov. 23, 2005), <https://www.aclu.org/racial-justice/racial-profiling-definition>.

A. LEGAL OVERVIEW

One means of addressing racial profiling is through litigation; however, litigation is not a panacea because the bar is high to prove that racial profiling has occurred.

1. Racially-motivated stops under the Fourth Amendment

Under the Fourth Amendment, an officer's subjective intent to stop an individual is immaterial if the officer had probable cause to believe a traffic violation occurred.³³ Probable cause exists when an officer sees a traffic violation. When the officer sees such a violation, he or she may stop the vehicle and conduct a reasonable investigation.³⁴ A reasonable investigation includes asking the driver and passengers about their destination, route, and purpose.³⁵ If an encounter after completion of a traffic stop is consensual, then an officer may ask questions unrelated to the stop and request consent to search the vehicle.³⁶ However, police may not expand the scope of a traffic stop unless the expansion is supported by a reasonable articulable suspicion.³⁷

2. Racial profiling as a violation of the right to equal protection under the Fourteenth Amendment

In *Whren*, the Supreme Court noted that “the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth

³³ United States v. Gomez-Serena, 368 F.3d 1037, 1041 (8th Cir. 2004) (defendant who conceded officer had probable cause to conduct traffic stop failed to show officer stopped him solely on account of race) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

³⁴ United States v. Sanchez, 417 F.3d 971, 974 (8th Cir. 2005).

³⁵ *Id.* at 975.

³⁶ United States v. Santos-Garcia, 313 F.3d 1073, 1078 (8th Cir. 2002).

³⁷ State v. Fort, 660 N.W.2d 415, 419 (Minn. 2003).

Amendment.”³⁸ The Fourteenth Amendment right to equal protection may become relevant prior to the initiation of a traffic stop.³⁹ An officer’s discriminatory motivation to stop a vehicle because of the race or ethnicity of its occupants can give rise to an Equal Protection claim.⁴⁰ To prevail on an Equal Protection claim, one must prove that the police officer subjected them “to unequal treatment based upon their race or ethnicity during the course of an otherwise lawful traffic stop”⁴¹

“[O]rdinary equal protection standards” govern claims alleging racially selective enforcement of facially neutral laws.⁴² To prevail on an equal protection claim, one must prove that the police officer’s decision to stop the vehicle or his conduct during the traffic stop was both: (1) motivated by a discriminatory purpose, and (2) had a discriminatory effect on the identifiable group to which the defendants belong.⁴³

³⁸ 517 U.S. at 813.

³⁹ *United States v. Avery*, 137 F.3d 343, 352 (6th Cir. 1997).

⁴⁰ *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002).

⁴¹ *Id.* “The Supreme Court has held that ‘purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate [18 U.S.C.] § 1981.’” *Giron v. City of Alexander*, 693 F. Supp. 2d 904, 944 (E.D. Ark. 2010) (citing *Gratz v. Bollinger*, 539 U.S. 244, 275–76 n.23 (2003)).

⁴² *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

⁴³ *Armstrong*, 517 U.S. at 465 (citing *Hunter v. Underwood*, 471 U.S. 222 (1985) (equal protection violation where evidence proved state had enacted a provision for the purpose of disfranchising blacks and the law had a discriminatory effect on blacks as compared to similarly situated whites)). *See also* *Johnson v. Crooks*, 326 F.3d 995, 999–1000 (8th Cir. 2003) (§ 1983 claim alleging selective enforcement of traffic laws in violation of the Equal Protection Clause); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) (alleged selective enforcement of bicycle headlamp law); *Farm Labor Organizing Comm.*, 308 F.3d at 533–36; *Chavez v. Ill. State Police*, 251 F.3d 612, 635–36 (7th Cir. 2001) (§ 1983 suit alleging state police used racial classifications in deciding whom to stop, detain, and search in enforcing traffic laws); *United States v. Bullock*, 94 F.3d 896, 899 (4th Cir. 1996) (applying *Armstrong* in denying defendant’s attempt to present evidence of trooper’s prior traffic stops to prove officer escalated traffic stops of young black

In *United States v. Bell*, the Eighth Circuit held that proof of discriminatory effect requires a plaintiff to prove that “people of another race violated the law and the law was not enforced against them.”⁴⁴ For example, specific evidence of similarly situated non-minority motorists who were not stopped for the traffic violation, or statistical or other evidence which generally proves that members of a protected racial group receive less favorable treatment than nonmembers may both serve to prove discriminatory effect.⁴⁵ There continues to be debate on whether it is necessary to name a similarly-situated individual.⁴⁶

The second proof requirement – proof of discriminatory purpose – is much more difficult to establish. Proof of discriminatory purpose requires one to show that the police officer’s decision to stop the vehicle was at least partially based on race.⁴⁷ Discriminatory purpose “implies more than . . . intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.”⁴⁸

It is not necessary to prove that an officer lacked any race-neutral reason for conducting the traffic stop.⁴⁹ However, the absence of a race-neutral reason for the stop, coupled with statistics showing that the officer disproportionately stops minorities, may lead a reasonable juror

males into drug investigations); *United States v. Anderson*, 923 F.2d 450, 453–54 (6th Cir. 1991) (no discriminatory purpose found where sheriff checked felony record of black defendant following traffic stop though he did not perform background checks on all persons he arrested).

⁴⁴ 86 F.3d at 823.

⁴⁵ *Chavez*, 251 F.3d at 636; *Farm Labor Org. Comm.*, 308 F.3d at 534; *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002).

⁴⁶ See Albert. W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 201 (2002).

⁴⁷ *Bell*, 86 F.3d at 823 (citing *United States v. Brown*, 9 F.3d 1374, 1376 (8th Cir. 1993)).

⁴⁸ *Brown*, 9 F.3d at 1376 (quoting *Wayte*, 470 U.S. at 610).

⁴⁹ See *Farm Labor Org. Comm.*, 308 F.3d at 538.

to conclude that the stop was based on a discriminatory purpose.⁵⁰ In addition, “[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another.”⁵¹ If a litigant makes a prima facie showing of both discriminatory effect and purpose, the burden shifts to the government to show the same enforcement decision would have been made even if race had not been considered.⁵²

While a prima facie equal protection claim may be proved by direct evidence of racial discrimination,⁵³ it is more commonly based on circumstantial evidence.⁵⁴ A police officer’s discriminatory selective law enforcement may be inferred from evidence of the officer’s pattern and method of performing traffic stops and arrests, relevant departmental policies and training governing the officer’s conduct, failure to uniformly comply with the relevant training and supervisory instruction received, the questions presented and statements made by the officer to vehicle occupants, the specific events of the traffic stop at issue, and any other relevant information which may support an inference of discriminatory purpose in this context.⁵⁵

To the extent they are reliable, statistics may be used to evaluate whether the officer’s “pattern” of traffic stops and arrests raises an inference of racial discrimination or tends to prove

⁵⁰ See *Berg v. United States*, CIV 03-4642 MJD/JSM, 2007 WL 425448 (D. Minn. Feb. 2, 2007).

⁵¹ *Washington v. Davis*, 426 U.S. 229, 242 (1976).

⁵² *Bell*, 86 F.3d at 823 (citing *Sylvia Dev. Corp. v. Calvert Cnty, Md.*, 48 F.3d 810, 819 n.2 (4th Cir. 1995)).

⁵³ See *Crooks*, 326 F.3d at 1000.

⁵⁴ See *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997) (“[T]here will seldom be ‘eyewitness’ testimony as to [racially discriminatory] mental processes.”) (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

⁵⁵ See *Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003); see also *United States v. Woods*, 213 F.3d 1021, 1022–23 (8th Cir. 2000) (discussing Minnesota’s policy and task force report on racial profiling).

that similarly situated members of non-minority groups were treated better.⁵⁶ While statistics alone will rarely be sufficient to prove racially discriminatory conduct, personal accounts of actual discrimination or the effects of discriminatory practices may complement this empirical evidence and bring “cold numbers convincingly to life.”⁵⁷

Challenges “to the specific acts of a particular police officer bears some resemblance to a claim of racial discrimination in the use of peremptory jury challenges, which also involves the acts of a single state actor (the prosecutor) in the course of a single incident (the selection of the jury).”⁵⁸ “In such cases, the Supreme Court has instructed that the court should ‘consider all relevant circumstances,’ including the prosecutor’s ‘pattern of strikes against black jurors,’ and the prosecutor’s ‘questions and statements,’ which may ‘support or refute an inference of discriminatory purpose.’”⁵⁹ “Similarly, a police officer’s pattern of traffic stops and arrests, his questions and statements to the person involved, and other relevant circumstances may support an inference of discriminatory purpose in this context.”⁶⁰

⁵⁶ *Marshall*, 345 F.3d at 1171.

⁵⁷ *Int’l Broth. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (evaluating sufficiency of evidence in a Title VII racial discrimination action); *see also* *Catlett v. Mo. Highway & Transp. Com’n*, 828 F.2d 1260, 1265 (8th Cir. 1987) (statistical evidence revealing gender disparity in hiring and anecdotal evidence of discriminatory acts may establish pattern or practice of discrimination); *Coral Constr. Co. v. King Cnty*, 941 F.2d 910, 919 (9th Cir. 1991) (“[T]he combination of convincing anecdotal and statistical evidence is potent.”).

⁵⁸ *Marshall*, 345 F.3d at 1168.

⁵⁹ *Id.* (quoting *Batson v. Kentucky*, 476 U.S. 79, 96–97 (1986)).

⁶⁰ *Id.* at 1168.

B. EXAMPLES OF SUCCESSFUL AND UNSUCCESSFUL EQUAL PROTECTION CLAIMS

In *Giron v. City of Alexander*,⁶¹ plaintiffs proved that defendant police officers purposefully and unlawfully considered their ethnicity in exercising discretion to stop their vehicles, violating their rights under the Fourteenth Amendment, 18 U.S.C. § 1981, and state law.⁶² The plaintiffs used direct evidence and numerical evidence gathered from citations issued by the police officer to prove their claim.⁶³ The direct evidence included the testimony of a friend of the police officer who had accompanied the officer on ride alongs.⁶⁴ The friend's testimony spoke of the police officer's use of certain traffic laws as a pretext to pull over Latinos.⁶⁵ The plaintiffs also had a fellow police officer testify against the defendant, whom the witness viewed as his boss.⁶⁶ For numerical evidence, the plaintiffs introduced the citation statistics of a defendant police officer, which showed a heavy bias towards Latinos.⁶⁷ The claims were also buttressed with the fact of the city's financial difficulties, providing incentive for the defendant's superiors to overlook defendant's actions in lieu of increasing city revenue.⁶⁸ The court used this evidence to prove both discriminatory effect and purpose, rejecting defendant's claim that the plaintiffs must show a similarly-situated individual who was not investigated or cited.⁶⁹

⁶¹ 693 F. Supp. 2d 904 (E.D. Ark. 2010).

⁶² *Id.* at 939–42.

⁶³ *Id.* at 937–39.

⁶⁴ *Id.* at 925.

⁶⁵ *Id.* at 924–26.

⁶⁶ *Giron v. City of Alexander*, 693 F. Supp. 2d 904, 927 (E.D. Ark. 2010).

⁶⁷ *Id.* at 928–31.

⁶⁸ *Id.* at 913–16.

⁶⁹ *Id.* at 938.

In *United States v. Alcaraz-Arrellano*,⁷⁰ the court held that defendant did not carry his burden in producing some evidence of discriminatory purpose or effect.⁷¹ The court rejected a statistical study of police stops in the state because it did not include the jurisdiction of this particular police department, nor did the defendant show that the data was transferable due to an equal racial composition of the area studied and the area where the incident occurred.⁷² The circuit court also upheld the district court's finding that the statistical data was unreliable because it did not include an appendix describing how the data was collected, because the sample size was too small, because the survey classified individuals' races subjectively, because the police departments monitored were not random, and because the officers knew they were being monitored.⁷³ In sum, the court found the statistics insufficient to show discriminatory effect.⁷⁴ The court disjointed discriminatory effect from discriminatory intent,⁷⁵ noting that the defendant must "present some non-statistical evidence to demonstrate that [the police officer] acted with discriminatory intent when he stopped defendant."⁷⁶

In *United States v. Barlow*,⁷⁷ the court rejected the statistical evidence offered by the defendant as neither reliable nor relevant, noting concern with the methodology of the study.⁷⁸ The court noted that even if it accepted the validity of the statistical evidence, the defendant "still

⁷⁰ 441 F.3d 1252 (10th Cir. 2006).

⁷¹ *Id.* at 1265.

⁷² *Id.* at 1262.

⁷³ *Id.*

⁷⁴ *Id.* at 1263.

⁷⁵ *United States v. Alcaraz-Arrellano*, 441 F.3d 1252, 1263 (10th Cir. 2006).

⁷⁶ *Id.*

⁷⁷ 310 F.3d 1007 (7th Cir. 2002).

⁷⁸ *Id.* at 1011.

presented no evidence that he received less favorable treatment than similarly situated white travelers.”⁷⁹ “To meet his burden under *Armstrong*, [defendant] needed to present evidence that the DEA agents observed whites engaging in the same behavior as defendant—i.e., looking nervously over their shoulders—but chose not to approach them.”⁸⁰ The court also stated that the defendant had no evidence of discriminatory purpose, noting that the DEA agents made “no racial comments during their encounter with [defendant].”⁸¹

In *United States v. Duque-Nava*,⁸² the court rejected the same study as in *United States v. Alcaraz-Arrellano* for the same reasons.⁸³ However, the court concluded that because the data of the individual deputy’s stops of Hispanic motorists was so much higher than the data in the discredited study, there was still a strong showing of discriminatory effect.⁸⁴ As for discriminatory purpose, the court was much stricter. The court noted that the defendant offered “scant direct evidence” to “support an inference that racial considerations played a part in his stop.”⁸⁵

There is no evidence that [the police officer] treated, spoke to, or otherwise exhibited discriminatory behavior towards defendant, the driver or any other persons previously stopped by [the officer] for a traffic violation . . . In fact, [the police officer] testified that at the moment he decided to stop the pick-up truck because of the cracked windshield, he had ‘no idea’ of the driver’s or defendant’s race or ethnicity.⁸⁶

⁷⁹ *Id.* at 1012.

⁸⁰ *Id.* (citing *Armstrong*, 517 U.S. at 465).

⁸¹ *Id.*

⁸² 315 F. Supp. 2d 1144 (D. Kan. 2004).

⁸³ *Id.* at 1156–57.

⁸⁴ *Id.* at 1159.

⁸⁵ *Id.* at 1161.

⁸⁶ *Id.*

Defendant noted that the police officer “pulled next to the truck before signaling the driver to stop, implying that [the officer] observed the driver's or defendant's appearance before making the stop,” but the police officer testified that it is a “standard practice that allows the officer to determine the number of occupants of the car for purposes of officer safety.”⁸⁷ The court did note that, “[a]lthough statistics alone are generally viewed as insufficient evidence of intent, certainly a comparison of an officer's stops with similarly situated officers in his own police department might be evidence of an officer's particular pattern of discriminatory intent or motive.”⁸⁸ For statistics to work to show intent, the court noted that “one must show causality” which has “three components: temporal order; correlation; and lack of alternative plausible explanations.”⁸⁹

In *Berg v. United States*,⁹⁰ the Minnesota District Court found that fact questions remained for a jury to decide whether DEA agents, who stopped and searched an airline passenger because her bag looked heavy, had adequate suspicion to justify the stop.⁹¹ In addition, because the data showed that the agent's cold stops were overwhelmingly minorities, there was sufficient evidence for a jury to conclude that the stop of Berg was racially motivated.⁹²

⁸⁷ *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1161 (D. Kan. 2004).

⁸⁸ *Id.* at 1163.

⁸⁹ *Id.*

⁹⁰ No. CIV 03-4642 MJD/JSM, 2007 WL 425448 (D. Minn. Feb. 2, 2007).

⁹¹ *Id.* at *6–7.

⁹² *Id.* at *8 (“Common sense suggests that the ‘no bags,’ ‘little bags,’ ‘computer bags,’ ‘heavy bags,’ and other innocuous criteria upon which Key based her suspicions must apply equally to people of all races who deplane from source cities. Thus, a question remains as to why Key’s cold-stops were overwhelmingly minority persons, and particularly why Key stopped Berg.”).

Finally, in *Anderson v. Cornejo*,⁹³ a group of African-American women sued, alleging that they were subjected to non-routine searches by U.S. Customs employees following their arrival on international airline flights in violation of their Fifth Amendment right to Equal Protection.⁹⁴ Although numerous claims were dismissed based on qualified immunity or failure to adequately prove both discriminatory treatment and purpose, the District Court concluded that several of the plaintiffs were able to show that customs agents lacked adequate suspicion for the non-routine searches, that some of the plaintiffs were treated differently than similarly-situated white individuals,⁹⁵ and that factors, including the inadequate basis for searches, false statements by customs agents as to the reasons for the searches, and statistical disparities, were sufficient to establish that some of the defendants acted with discriminatory intent.⁹⁶

C. RACIAL PROFILING CLAIMS IN MINNESOTA COURTS

Minnesota courts have addressed the issue of police racial profiling in several cases. In *City of Minneapolis v. Richardson*, the Minnesota Supreme Court established the standard for a claim of unfair discriminatory practices in the provision of public services under the Minnesota Human Rights Act.⁹⁷ The court held that proof of racial discrimination in the area of public services could be established with either: (1) proof that, in the provision of public services, the individual's treatment was worse than similarly situated individuals of a different race, or (2) proof that the way in which the individual was treated was so at variance with what is reasonably

⁹³ 284 F. Supp. 2d 1008 (N.D. Ill. 2003).

⁹⁴ *Id.* at 1017–18.

⁹⁵ *Id.* at 1045 (“With only one exception, African-American women are subjected to intrusive searches more than twice as often as the compared groups in each type of situation in which a defendant is involved.”).

⁹⁶ *Id.* at 1054–55.

⁹⁷ 293 N.W.2d 197, 202 (Minn. 1976).

anticipated in the absence of racial discrimination that the probable explanation for the treatment is racial discrimination.⁹⁸

Two recent Minnesota Court of Appeals decisions applied the *Richardson* “at variance” test in the context of racial profiling allegations against the Minneapolis Police Department. In *Williams v. Minneapolis Police Department*,⁹⁹ the court of appeals upheld a decision by the Minneapolis Commission on Civil Rights that police engaged in racial discrimination when they detained an African American man based on an officer’s observation that the man was standing on a grassy area near a lake frequently used by runners, dressed in jogging clothes, stretching while talking on a cell phone, and across the street from another African American on a bike in an area with a high incidence of thefts from vehicles. The court concluded that police did not have specific and articulable facts to establish reasonable grounds to suspect Williams of criminal activity and the length of time that Williams was detained (30 minutes in a squad car) was unreasonable.¹⁰⁰

In *Minneapolis Police Department v. Kelly*,¹⁰¹ the court of appeals affirmed a Minneapolis Commission on Civil Rights awarding damages to an individual arrested by Minneapolis police.¹⁰² In *Kelly*, a Minneapolis Park Police officer detained an African American Minneapolis resident who was walking to a convenience store because the officer thought he matched the description of a robbery suspect.¹⁰³ Kelly did not understand why police stopped

⁹⁸ *Richardson*, 239 N.W.2d at 202.

⁹⁹ No. A09-1650, 2010 WL 2650495 (Minn. App. July 6, 2010).

¹⁰⁰ *Id.* at *8.

¹⁰¹ 776 N.W.2d 760 (Minn. Ct. App. 2010).

¹⁰² *Id.* at 763.

¹⁰³ *Id.*

him and he resisted being handcuffed and placed in the squad car.¹⁰⁴ Police brought Kelly to the scene of the robbery and witnesses told them that he was not the robber. By this time, Kelly had calmed down and he asked to be released. Instead of releasing him, police decided to charge him with misdemeanor disorderly conduct and obstruction. Instead of issuing him citations for the charges, they took him to jail where he was held for approximately five hours.¹⁰⁵ The charges were later dropped.¹⁰⁶ The Commission concluded that jailing Kelly was a clear violation of Minnesota Rules of Criminal Procedure, which requires police to issue a citation for misdemeanor offenses except in limited circumstances that were not present in this case. Thus, police treatment of Kelly was so “at variance” with what would reasonably be expected under the circumstances that racial discrimination was the probable explanation.¹⁰⁷ The court held that the Commission’s decision was not arbitrary and capricious or unsupported by substantial evidence.¹⁰⁸

¹⁰⁴ *Id.* at 764.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Minneapolis Police Dep’t v. Kelly*, 776 N.W.2d 760, 768 (Minn. Ct. App. 2010). The court of appeals explained the rule and its history, stating “[a] key component of the commission’s determination is the Minnesota rule for when to detain and jail and when to issue a citation. That rule holds that officers are to give citations for misdemeanor charges unless ‘it reasonably appears to the officer that ... there is a substantial likelihood that the accused will fail to respond to a citation.’ Minn. R.Crim. P. 6.01. This portion of the rule was adopted in 1975 when there was a national effort to prevent the discriminatory use of arrests for minor offenses. *See ABA Standards of Criminal Justice* §§ 10–2.2 cmt., 10–2.3 cmt. (2d ed. 1980) (‘A standard that permits officers to arrest or not according to their personal assessment of a defendant inevitably is bound to lead to unequal enforcement of the laws.’) (citing Kenneth Davis, *Discretionary Justice* 80–96 (1971)). The rule and its comments recognize that arrest is justified if there is a substantial likelihood that the defendant will fail to appear in court in response to a citation. Minn. R.Crim. P. 6.01 cmt.” *Id.*

¹⁰⁸ *Id.* at 769.

This line of cases offers a useful roadmap for individuals claiming racial profiling against police. Police practices such as full custodial arrest in lieu of issuing a citation, interrogating vehicle passengers without any reasonable suspicion,¹⁰⁹ stopping out of state vehicles for excessive window tint,¹¹⁰ and questioning relating to immigration status¹¹¹ could all potentially serve as a basis for arguing that police conduct was so “at variance” with what is reasonably expected under the circumstances that racial discrimination was the probable explanation.

Minnesota law does, however, have some loopholes that would allow police to engage in racial profiling in a manner that would not be considered “at variance” with what is reasonably expected under the circumstances.¹¹² For example, police routinely run random license plate checks on vehicles they encounter.¹¹³ The Minnesota Court of Appeals held in *State v. Setinich* that computerized license plate checks do not constitute a search under the Fourth

¹⁰⁹ See generally *Fort*, 660 N.W.2d at 415 (expanding the scope of a seizure to interrogate passenger violated Fourth Amendment and Minnesota Constitutional prohibition against unreasonable searches and seizures); *Arpaio*, No. PHX–CV–07–02513–GMS, 2013 WL 2297173, at *3 (D. Ariz. May 24, 2013) (noting that some officers routinely investigate vehicle occupants without reasonable suspicion and noting the Sheriff’s office’s policy and practice to use the race of occupants in determining if there is reasonable suspicion to investigate vehicle occupants for immigration violations).

¹¹⁰ *United States v. Billups*, 442 F. Supp. 2d 697, 702 (D. Minn. 2006) (noting that windows were tinted in excess of allowable levels in Minnesota but that the vehicle was not licensed in Minnesota so it was not a basis for a stop of the vehicle).

¹¹¹ *Arpaio*, No. PHX–CV–07–02513–GMS, 2013 WL 2297173, at *3 (D. Ariz. May 24, 2013). *But cf.* *Muehler v. Mena*, 544 U.S. 93 (2005) (no independent suspicion needed to question about immigration status as long as it does not prolong the detention); *United States v. Slater*, 411 F.3d 1003 (8th Cir. 2005).

¹¹² See *supra* notes 101–111 and accompanying text.

¹¹³ See, e.g., *State v. Snegirev*, No. C7-02-991, 2003 WL 21008598, at *1 (Minn. Ct. App. May 6, 2003) (describing St. Cloud police officer on patrol and running random license plate checks of vehicles); *State v. Parker*, No. C9-02-247, 2002 WL 31891856, at *1 (Minn. Ct. App. Dec. 31, 2002) (describing officer patrolling Mall of America parking lots and ramps conducting random license plate checks).

Amendment.¹¹⁴ Further, it is common for police to initiate a traffic stop when the vehicle license query indicates that the owner of the vehicle does not have a valid driver's license. The owner's lack of a valid driver's license has been upheld as valid grounds for a stop by the Minnesota Supreme Court.¹¹⁵ In the days before random computerized checks, the Minnesota Supreme Court upheld a stop based on the officer's knowledge that one month prior, the owner had a suspended license.¹¹⁶

Fifteen years later in *State v. Pike*, the Minnesota Supreme court noted that it is reasonable for an officer to infer that the vehicle's owner is the one driving the vehicle and reiterated that knowing that the owner of the vehicle does not have a valid license is sufficient to form reasonable suspicion for a stop.¹¹⁷ The court clarified that the assumption may be unreasonable when the actual driver does not match the description of the owner.¹¹⁸ Thus, where the owner is a young male and the driver is an older female, "any reasonable suspicion of criminal activity evaporates."¹¹⁹

D. CONCLUSION

It is the ACLU's opinion that because a valid vehicle stop will not, absent other evidence, lead to liability for racial profiling, targeting Latino-looking drivers and making pretextual stops based on minor traffic infractions (or the registered owner's lack of a driver's license) can be a low-risk, high-reward proposition for police officers who feel compelled to engage in informal

¹¹⁴ 822 N.W.2d 9 (Minn. Ct. App. 2012).

¹¹⁵ *State v. Duesterhoeft*, 311 N.W.2d 866 (Minn. 1981).

¹¹⁶ *Id.*

¹¹⁷ 551 N.W.2d 919, 922 (Minn. 1996).

¹¹⁸ *Id.*

¹¹⁹ *Id.* See also *Snegirev*, 2003 WL 21008598, at *2.

immigration enforcement. Discriminatory policing may also occur when officers who have unrecognized, internalized racial biases or anti-immigrant biases when they choose to focus their efforts on identifying unlicensed drivers as opposed to observable traffic violations such as speeding or careless driving.

While litigation can be a powerful tool when pursued with the right set of facts and documentation, it can also be very difficult to obtain the statistical records and other evidence needed to prove discriminatory treatment and discriminatory purpose. Litigation is even more difficult when the victims of racial profiling are present in the U.S. without authorization. Even though driving without a license is a misdemeanor requiring a citation rather than custodial arrest, some officers may choose custodial arrest anyway. Once an individual is booked into jail, their information, including country of birth, can be reviewed by Immigration and Customs Enforcement (ICE) who may ask the local jail to put a hold on the individual while they decide whether or not they want to take custody of the person. Although ICE holds are voluntary, it is common for local jails to honor them. The ICE hold often leads to removal proceedings. Even where the person is the victim of blatant racial profiling, their most pressing concern is to fight removal, not seek vindication for racial profiling. Even if they do seek vindication for the racial profiling, the person may end up being deported long before litigation moves forward. Transnational litigation is not impossible, but it is much more complicated and expensive.

IV. ANALYSIS OF STATE DRIVER'S LICENSE LAWS

Reducing restrictions on an immigrant's ability to obtain a driver's license or driving permit has been a longtime goal of immigrant communities and advocates.¹²⁰ While this remains a highly politicized issue, recent legislation suggests that many states are currently working toward expanding access to driver's licenses rather than creating new restrictions.¹²¹ In 2013, bills were introduced in 19 states, as well as the District of Columbia and Puerto Rico, that would allow for driver's licenses or permits for undocumented immigrants.¹²² Eight states, the District of Columbia and Puerto Rico enacted laws expanding immigrants' access to licenses, and another three states, including Minnesota, are likely to revisit similar legislation introduced last session.¹²³ This upswing in activity reverses a trend that began shortly after the events of September 11, 2001.¹²⁴

A. REAL ID ACT

The enactment of the federal REAL ID Act¹²⁵ in 2005 “prompted some states to impose restrictions and document requirements that prevent[ed] certain [undocumented] immigrants from obtaining licenses.”¹²⁶ Passed as part of the Emergency Supplemental Appropriations Act

¹²⁰ Nat'l Immigration L. Ctr., *Inclusive Policies Advance Dramatically in the States: Immigrants' Access to Driver's Licenses, Higher Education, Workers' Rights, and Community Policing I*, NILC.ORG (Oct. 2013), available at <http://www.nilc.org/document.html?id=963>.

¹²¹ *Id.* at 1–2.

¹²² *Id.* at 1.

¹²³ *Id.* at 3–4.

¹²⁴ See Hansi Lo Wang, *More States Let Unauthorized Immigrants Take The Wheel*, NAT'L. PUB. RADIO (Jun. 23, 2013, 7:00 AM), <http://www.npr.org/blogs/codeswitch/2013/06/23/194281121/more-states-let-unauthorized-immigrants-take-the-wheel>.

¹²⁵ Real ID Act of 2005, Pub. L. 109-13, §§ 101–502, 119 Stat. 302 (2005).

¹²⁶ Nat'l Immigration Law Ctr., *supra* note 120, at 2.

for Defense, the Global War on Terror, and Tsunami Relief, REAL ID provides, in pertinent part, that “driver’s licenses cannot be accepted by federal agencies for any ‘official’ purpose unless they meet the act’s documentation-related requirements,” including proof of U.S. citizenship or valid immigration status.¹²⁷ The sponsors of the Act were responding to findings in the 9/11 Commission report that several of the 9/11 hijackers obtained state driver’s licenses and used them to board the planes.¹²⁸ Although REAL ID was initially set to go into effect by 2008, the U.S. Department of Homeland Security (“DHS”) has continually pushed back its enforcement schedule.¹²⁹ A recent press release from DHS states that “[t]he Transportation Security Administration (TSA) will continue to accept driver’s licenses and state-issued identification cards from all jurisdictions until at least 2016.”¹³⁰

Since the enactment of REAL ID, only 19 states have been found to be in full compliance, with over half of the states, including Minnesota,¹³¹ passing laws or resolutions in opposition.¹³² Real ID has been attacked on several grounds, with opponents claiming that it places an undue burden on taxpayers, citizens, immigrants and state governments, as well as creating a privacy risk that highly sensitive personal data will be compiled in a single, national

¹²⁷ *Id.*

¹²⁸ Gregory A. Odegaard, *A Yes Or No Answer: A Plea To End The Oversimplification Of The Debate On Licensing Aliens*, 24 J.L. & POL. 435, 470 (2008).

¹²⁹ Press Release, DHS, DHS Releases Phased Enforcement Schedule for REAL ID (December 20, 2013), available at <http://www.dhs.gov/news/2013/12/20/dhs-releases-phased-enforcement-schedule-real-id>.

¹³⁰ *Id.*

¹³¹ See Press Release, ACLU, Minnesota Rejects REAL ID Act of 2005 (May 18, 2009), available at <https://www.aclu.org/technology-and-liberty/minnesota-rejects-real-id-act-2005> [hereinafter “Minnesota Rejects REAL ID Act”].

¹³² Nat’l Immigration Law Ctr., *supra* note 120.

database.¹³³ Regardless of its effect, or lack thereof, REAL ID's provisions still allow states to also issue driver's licenses that do not meet the minimum standards for official federal use,¹³⁴ thus allowing states to issue driving privilege licenses or permits to immigrants for non-identification purposes.

B. STATES LAWS ALLOWING LICENSES REGARDLESS OF IMMIGRATION STATUS

As of 2012, only three states, New Mexico, Washington and Utah, issued driver's licenses or permits to residents regardless of immigration status. First, New Mexico's law went into effect in 2003.¹³⁵ It allows an individual to obtain a driver's license even if they do not have a Social Security number, as long as they provide other required documentation, including proof of identity and residency.¹³⁶ Second, Washington's law went into effect in 2004.¹³⁷ It allows an individual to obtain a driver's license even if they cannot show proof of legal presence, if they can present proof of identity through acceptable documents.¹³⁸ New Mexico, Washington, and Utah are the only states to issue the same type of driver's license to all drivers, regardless of immigration status.¹³⁹ The final state in this group, Utah, passed its law in 2005.¹⁴⁰ Utah provides for a one-year driving privilege card for those who do not present a Social Security number, if they can show acceptable documentation to verify their identity and Utah

¹³³ See Minnesota Rejects REAL ID Act, *supra* note 131.

¹³⁴ Nat'l Immigration Law Ctr., *supra* note 120.

¹³⁵ N.M. STAT. ANN. § 66-5-9 (West 2011).

¹³⁶ *Id.*

¹³⁷ See WASH. REV. CODE ANN. § 46.20.035 (West 2008).

¹³⁸ *Id.*

¹³⁹ Nat'l Immigration Law Ctr., *supra* note 120.

¹⁴⁰ UTAH CODE ANN. § 53-3-205 (West 2005).

residence.¹⁴¹ This card is distinguished from other Utah driver’s licenses with the statement “for driving privileges only—not valid for identification.”¹⁴²

Eight additional states, the District of Columbia and Puerto Rico passed legislation in 2013 to allow immigrants to obtain driver’s licenses or permits regardless of their immigration status. These include: California (effective January 1, 2015 or potentially earlier);¹⁴³ Colorado (effective August 1, 2014);¹⁴⁴ Connecticut (effective January 1, 2015);¹⁴⁵ District of Columbia (effective May 1, 2014);¹⁴⁶ Illinois (effective November 28, 2013);¹⁴⁷ Maryland (effective January 1, 2014);¹⁴⁸ Nevada (effective January 1, 2014);¹⁴⁹ Oregon (effective January 1, 2014);¹⁵⁰ Puerto Rico (effective August 7, 2014),¹⁵¹ and Vermont (effective January 1, 2014).¹⁵² While there are significant differences between the laws, including specific requirements, restrictions, and time periods for validity, the key similarities are that each state sets forth

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ CAL. VEH. CODE § 12801.9 (West 2014).

¹⁴⁴ COLO. REV. STAT. § 42-2-505 (West 2013).

¹⁴⁵ CONN. GEN. STAT. § 14-36 (West 2013).

¹⁴⁶ D.C. CODE § 50-1401.01 (West 2013).

¹⁴⁷ CH. 6 ILL. COMP. STAT. ANN. 5/6.105.1 (West 2013).

¹⁴⁸ S.B. 715, 430th Gen. Assemb., Reg. Sess. (Md. 2013), *available at* http://mgaleg.maryland.gov/2013RS/Chapters_noln/CH_309_sb0715t.pdf. MD. CODE ANN., TRANSP. § 16.122 (West 2014).

¹⁴⁹ S.B. 303 (Nev. 2013), *available at* http://www.leg.state.nv.us/Session/77th2013/Bills/SB/SB303_EN.pdf.

¹⁵⁰ S.B. 833 (Or. 2013), *available at* <https://olis.leg.state.or.us/LIZ/2013R1/Measures/Text/SB0833/Enrolled>.

¹⁵¹ P C0900 (P.R. 2013), *available at* <http://www.oslpr.org/2013-2016/leyes/pdf/ley-97-07-Ago-2013.pdf>.

¹⁵² S. 38, 2013–2014 Leg., Reg. Sess. (Vt. 2013), *available at* <http://www.leg.state.vt.us/docs/2014/Acts/ACT074.pdf>.

acceptable documentation to establish identity and state residence, and requires a distinguishing feature on the document that separates it from other state-issued driver's licenses.

C. EFFORTS IN MINNESOTA

According to a 2010 report from the Pew Hispanic Center, Minnesota is estimated to have a population of 95,000 undocumented immigrants.¹⁵³ Prior to 2003, Minnesota residents without lawful immigration status were not barred from obtaining a driver's license. The change in requirements occurred through an Administrative Rule change under the administration of Governor Tim Pawlenty. Four months after 9/11, Pawlenty's Commissioner of the Department of Public Safety (DPS) initiated the rulemaking process to require driver's license applicants to provide proof of lawful presence.¹⁵⁴ The rulemaking process was put on hold while the Legislature considered anti-terrorism legislation.¹⁵⁵ When the session ended without action on driver's license applications, DPS picked up the rulemaking process and adopted it through emergency rulemaking procedures, claiming that the rules were necessary to address a serious and immediate threat to public safety (i.e. terrorism) and that it would be contrary to the public interest to allow the public review and comment that would be required under the ordinary rulemaking process.¹⁵⁶ The emergency rulemaking process was challenged by the ACLU of Minnesota and a group of organizations and individuals who would be affected by the new rules and who wished to have input into the rulemaking process.¹⁵⁷ The Court of Appeals invalidated

¹⁵³ Report, Pew Hispanic Center, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, 14 (Sept. 1, 2010), <http://pewhispanic.org/files/reports/126.pdf>.

¹⁵⁴ *Jewish Cmty. Action v. Comm'r of Pub. Safety*, 657 N.W.2d 604, 606 (Minn. Ct. App. 2003).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 606–7.

¹⁵⁷ *Id.* at 607.

the emergency rules, finding that DPS failed to demonstrate how using the ordinary public rulemaking process would be harmful to the public interest.¹⁵⁸

In 2003, after the Court of Appeals decision, DPS again adopted the rules through the ordinary rulemaking process. Among other things, the rules stated that “[t]he department shall not issue a driver’s license, permit, or identification card if an individual has no lawful admission status to the United States.”¹⁵⁹ Since the Administrative Rule change did not apply to driver’s license renewals, undocumented immigrants who received a license prior to 2003 are still able to renew their licenses under the same procedures as other Minnesota drivers.

The public campaign for expanding the driver’s license privilege to all Minnesotans was already in full force at the beginning of the 2013 session of the Minnesota Legislature.¹⁶⁰ Bills were introduced in the House and Senate on February 4, 2013 that would allow identification issued by another country to be an acceptable proof of identity for Minnesota’s licensure requirements.¹⁶¹ Advocates generally framed the issue in terms of public safety, while

¹⁵⁸ *Id.* at 611.

¹⁵⁹ Sasha Aslanian, *House Committee Approves Bill Allowing Driver’s Licenses for Illegal Immigrants*, MINN. PUBLIC RADIO NEWS (Mar. 13, 2013), <http://www.mprnews.org/story/2013/03/13/politics/bill-drivers-licenses-illegal-immigrants>.

¹⁶⁰ Lisa Peterson-de la Cueva, *Minnesota Immigrants Explain Why They Support Driver’s Licenses for All*, TWIN CITIES DAILY PLANET (Jan. 27, 2013), <http://www.tcdailyplanet.net/news/2013/01/27/minnesota-immigrants-explain-why-they-support-drivers-licenses-all>.

¹⁶¹ H.F. 348, 88th Leg., Reg. Sess. (Minn. 2013), available at <http://wdoc.house.leg.state.mn.us/leg/LS88/HF0348.0.pdf>; S.F. 271, 88th Leg., Reg. Sess. (Minn. 2013), available at https://www.revisor.mn.gov/bills/text.php?number=SF271&version=0&session=ls88&session_year=2013&session_number=0&format=pdf.

individuals in the Latino community shared personal stories of living in fear and the logistical difficulty of living and working in Minnesota without a valid driver's license.¹⁶²

In March 2013, both the House and the Senate bills passed the necessary committees, clearing the important policy committee deadlines.¹⁶³ However, the Senate version was amended to create a "driving privilege license" for Minnesota residents who are "unable to demonstrate legal presence in this country through current lawful admission status, permanent resident status, indefinite authorized presence status, or United States citizenship."¹⁶⁴ It also contained a provision that "[a] driving privilege license must be plainly marked 'FOR DRIVING ONLY.'"¹⁶⁵

In mid-May 2013, with only days remaining in the Legislative session, immigrant advocacy groups and individual Latinos began a hunger strike at the Capitol to raise awareness and demand action on the pending bills.¹⁶⁶ At that time, Governor Mark Dayton stated that he was opposed to allowing undocumented immigrants to get driver's licenses, but agreed to meet with the bill's supporters if the legislation passed in both houses of the Legislature.¹⁶⁷ The Senate bill finally received a floor vote on May 18, 2013, only three days before the scheduled

¹⁶² Peterson-de la Cueva, *supra* note 160.

¹⁶³ See Aslanian, *supra* note 160; Kyle Potter, *Minnesota Senate Panel OKs Bill Granting Driver's Licenses to Illegal Immigrants*, ASSOCIATED PRESS (March 18, 2013), http://www.twincities.com/ci_22818322/minnesota-senate-bill-seeks-liberalize-driver-licenses?IADID=Search-www.twincities.com-www.twincities.com.

¹⁶⁴ S.F. 271 (Minn. 2013).

¹⁶⁵ *Id.*

¹⁶⁶ Jim Ragsdale, *Hot Dish Politics: Heat rises over immigrant driver's license bill in Minnesota*, STAR TRIBUNE (May 18, 2013), <http://www.startribune.com/politics/statelocal/208019941.html>.

¹⁶⁷ *Id.*

end of the Legislative session, where it passed on a vote of 36-28.¹⁶⁸ The House of Representatives failed to take further action before the end of the Legislative session on May 21, 2013.¹⁶⁹

D. ARGUMENTS IN OPPOSITION TO EXPANDING THE PRIVILEGE

Opponents of expanding the driver's license privilege to undocumented immigrants often argue that it rewards illegal behavior, raises national security concerns, and facilitates voting fraud. Each of these arguments will be addressed in turn.

First, critics often argue that the state should not validate individuals who are present in the United States in violation of immigration laws.¹⁷⁰ Regardless of one's moral view of undocumented immigrants, these individuals live, work, and often have U.S. citizen family members in our communities. As noted above, Minnesota is estimated to have a population of roughly 95,000 undocumented immigrants.¹⁷¹ It would be both impractical and cost-prohibitive to put all of these individuals into removal proceedings. Immigration law is a federal matter, and a state's role in issuing driver's licenses to its residents should not be dictated by federal immigration policy.

Second, opponents argue that allowing undocumented immigrants to obtain a state issued driver's license raises national security concerns.¹⁷² These concerns are typically linked to a fear of terrorism and the fact that all but one of the nineteen terrorists responsible for the September

¹⁶⁸ Herrera, *supra* note 4. For information regarding the vote count, see <https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF0271&ssn=0&y=2013>.

¹⁶⁹ *Id.*

¹⁷⁰ Odegard, *supra* note 128, at 450–51.

¹⁷¹ Report, Pew Hispanic Center, *supra* note 153, at 14.

¹⁷² Odegard, *supra* note 128, at 452–53.

11th attacks obtained some form of state issued identification.¹⁷³ These concerns are easily countered as myths by Professor Margaret Stock of the U.S. Military Academy at West Point in her leading article on driver's licenses and national security.¹⁷⁴ Professor Stock states that “[t]he national debate about the connection between driver licenses and security has been characterized by misinformation, and a lack of appreciation of the role that driver license and state identification databases play in national security and law enforcement.”¹⁷⁵ In fact, Professor Stock argues that “[d]enying drivers licenses to illegal immigrants will hurt our national security by depriving law enforcement officials of critical information on substantial numbers of adults who are physically present in the United States.”¹⁷⁶

Finally, some have raised concerns that issuing driver's licenses to undocumented immigrants will enable voting fraud by non-citizens. Even though some officials in other states, such as Arizona, claim that undocumented immigrants commit voter fraud in large numbers, reports have found that this simply is not the case.¹⁷⁷ States that have recently investigated whether non-citizens register to vote have found extremely low numbers of voter registration fraud. A report from 2013 noted that “[i]n Colorado, election officials found 141 noncitizens on the voter rolls, which was 0.004% of the state's nearly 3.5 million voters. Florida officials found

¹⁷³ *Id.* at 452.

¹⁷⁴ Margaret D. Stock, *Driver Licenses and National Security: Myths and Reality*, 10 BENDER'S IMMIGRATION BULLETIN, 422 (Mar. 1, 2005), <http://w3.lexisnexis.com/practiceareas/immigration/pdfs/web785a.pdf>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 424.

¹⁷⁷ Editorial, *Here's How Often Undocumented Immigrants Commit Voter Fraud in Arizona*, HUFFINGTON POST (Nov. 18, 2013), http://www.huffingtonpost.com/2013/11/18/arizona-voter-fraud_n_4296907.html.

207, or 0.001% of the state's 11.4 million registered voters.”¹⁷⁸ These numbers are hardly surprising given the fact that in order to register to vote, one must declare under penalty of perjury that one is a U.S. citizen, which creates a strong disincentive for undocumented immigrants to register to vote. Federal immigration law carries severe sanctions for anyone who falsely claims to be a U.S. citizen or votes in an election. For example, a person who makes a false claim to U.S. citizenship is deemed inadmissible.¹⁷⁹ In addition, any person who votes in violation of federal, state or local law is inadmissible to the United States.¹⁸⁰ Even a lawfully admitted immigrant who makes a false claim to citizenship is subject to removal from the United States.¹⁸¹ Based on these extreme penalties, it is highly unlikely that an undocumented immigrant that has availed himself or herself of the state to obtain a driving privilege license would risk committing voter fraud.

E. ARGUMENTS IN SUPPORT OF EXPANDING THE PRIVILEGE

As noted above, the primary argument in support of expanding the driver's license privilege to all residents regardless of immigration status is promoting public safety. In addition, one may persuasively argue that the expansion would also increase the percentage of insured drivers, allow for increased participation in society, and decrease instances of racial profiling of Latino immigrants.

¹⁷⁸ Jesse J. Holland & Jacques Billeaud, *Supreme Court Voter Registration Case Addresses Citizenship Issue*, HUFFINGTON POST (Mar. 17, 2013), http://www.huffingtonpost.com/2013/03/17/supreme-court-voter-registration_n_2896634.html.

¹⁷⁹ Immigration and Nationality Act § 212(a)(6)(C)(ii) (West 2013) [hereinafter “INA”].

¹⁸⁰ INA § 212(a)(10)(D)(i).

¹⁸¹ INA § 237(a)(3)(D)(i).

Driving is a part of everyday life in this country, and licensing those who drive on a state's roads and highways is clearly a benefit to public safety.¹⁸² With expanded licensure, undocumented immigrants would be required to take the same road tests and written exams required to establish basic driving competence, as well as eyesight exams, before the state would issue a driver's license. Licensed undocumented immigrants would also have less fear of interaction with law enforcement, potentially resulting in a lower rate of hit-and-run accidents.¹⁸³ Studies have shown that a license increases the willingness of immigrant witnesses and victims to cooperate with police and aid in investigations.¹⁸⁴ Not surprisingly, many law enforcement officials have supported efforts to expand the driver's license privilege to all immigrants regardless of immigration status.¹⁸⁵

Another argument linked to public safety is that allowing licenses for undocumented immigrants will decrease the percentage of drivers in the state who are uninsured. After enacting their laws, Utah saw a nearly 80% drop in uninsured drivers, and New Mexico saw a nearly 60% drop.¹⁸⁶ The increase in insured drivers reduces insurance premiums for all drivers as the pool of insured drivers expands.¹⁸⁷ It also reduces the number of accidents involving uninsured drivers.¹⁸⁸

¹⁸² Odegaard, *supra* note 128, at 446.

¹⁸³ *Id.* at 446–47.

¹⁸⁴ See COMPARISON OF STATES WITH SIMILAR DRIVER'S LICENSE STATUTES: NEW MEXICO, UTAH, AND WASHINGTON, www.nilc.org/document.html?id=1007 (last visited April 3, 2014).

¹⁸⁵ See Nat'l Immigration Law Ctr., *Driver's Licenses for All Immigrants: Quotes from Law Enforcement*, NILC.ORG (Oct. 2004), available at www.nilc.org/document.html?id=881.

¹⁸⁶ Odegaard, *supra* note 128, at 448.

¹⁸⁷ Dan Olson, *Experts Suspect More People Driving Without Insurance*, MINN. PUBLIC RADIO NEWS (June 3, 2009), http://www.mprnews.org/story/2009/06/03/cost_of_uninsured_drivers.

¹⁸⁸ *Id.*

Next, the ability to obtain a valid driving privilege license allows for increased participation in society. In most parts of the country, one needs to drive in order to conduct all types of daily business, including visits to health care providers, schools and shopping centers. A study from 2005 showed that only 4.7% of Americans used public transportation to get to work, compared with 87.7% who drove.¹⁸⁹ It is increasingly hard to function in the United States without being able to drive, and especially difficult in rural areas like those in Greater Minnesota.

Finally, expanding the privilege could also decrease instances of the racial profiling of Latino residents. As discussed above, racial profiling of immigrant communities often begins with stops of vehicles based on the ground that the registered owner does not have a valid driver's license. Accordingly, by allowing undocumented immigrants to obtain a driving privilege license, policy makers could remove one often-abused tool in the commission of racial profiling.

V. CONCLUSION

As the ACLU of Minnesota has seen through its experience in Greater Minnesota, racial profiling is a serious problem, the causes of which are multifaceted. Consequently, there is no one strategy that will identify and eliminate all forms of racial profiling by law enforcement. It is important for policymakers to consider whether and to what extent various laws and policies will alleviate or exacerbate racial biases in our criminal justice system. Making driver's licenses available to all qualified drivers regardless of their immigration status will not end racial profiling, but it will help eliminate a tool that can be used by police to engage in the profiling of Latino immigrants. While it is clear that state laws that restrict driver's licenses will not fix the

¹⁸⁹ See Odegaard, *supra* note 128, at 448.

United States' broken immigration system, laws that make driver's licenses available regardless of immigration status will improve public safety and help insulate immigrant communities, like those in Greater Minnesota, from the devastating effects of racial profiling.