Congress of the United States
Washington, DC 20510

April 17, 2012

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

We write to you about a civil rights issue that goes to the heart of our nation's promise of equal justice under law – protecting all Americans from the illegal and un-American practice of racial profiling.

Despite the fact that the vast majority of law enforcement officers perform their jobs honorably and courageously, putting their personal safety at risk to protect the communities they serve, the specter of racial profiling has contaminated the relationship between the police and minority communities. The inappropriate actions of the few who engage in racial profiling are magnified, creating mistrust and suspicion that undermine community cooperation with law enforcement. For that reason, numerous law enforcement organizations, including the International Association of Chiefs of Police (IACP), the National Organization of Black Law Enforcement Executives (NOBLE) and the National Council of Law Enforcement Organizations (NCLEO), strongly oppose racial profiling.

There is a bipartisan consensus about the need to end racial profiling. In a February 27, 2001 Joint Address to Congress, President George W. Bush said that racial profiling is "wrong and we will end it in America." You have spoken eloquently about your personal experiences with racial profiling and your opposition to profiling as a law-enforcement official. As you said in a 2010 speech: "Racial profiling is wrong. It can leave a lasting scar on communities and individuals. And it is, quite simply, bad policing."

In June 2003, under then-Attorney General John Ashcroft, the Civil Rights Division issued "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies" ("Profiling Guidance") to ban racial profiling by federal law enforcement. Unfortunately, this Profiling Guidance includes loopholes that would permit racial profiling in some circumstances. With respect to what it calls "traditional law enforcement activities," the Profiling Guidance states: "In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description." This prohibition, while

commendable, does not apply to profiling based on national origin or religion, and it does not apply to national security and border security investigations.

The Profiling Guidance correctly concludes, "Racial profiling in law enforcement is not merely wrong, but also ineffective." This principle applies with equal force to national origin and religious profiling. Under the Equal Protection Clause of the Bill of Rights, national origin and religion, like race, are suspect classifications, and discrimination on the basis of these factors is subject to strict scrutiny. Moreover, targeting individuals based on their race, ethnicity, religion or national origin, rather than evidence of criminal activity, is a counterproductive law enforcement strategy. Casting a wide net based on broad racial, ethnic, religious or national origin profiles wastes limited law-enforcement resources and fosters mistrust and fear in the community that is targeted, reducing the likelihood of cooperation.

This is equally true for profiling in national security and border security investigations. The Director of National Intelligence's standard for Information Sharing Environment Suspicious Activity Reporting recognizes this, stating that "factors such as race, ethnicity, national origin, or religious affiliation should not be considered as factors that create suspicion (except if used as part of a specific suspect description)."

It is important to note that the terrorism and border security loopholes have an even greater impact because the Profiling Guidance governs conduct by the Federal Bureau of Investigation and the U.S. Department of Homeland Security (DHS), including U.S. Border Patrol. The Profiling Guidance is incorporated into the Attorney General's Guidelines for Domestic FBI Operations and DHS has incorporated the Profiling Guidance into its own racial profiling policy.

In late 2009, you created an intra-agency working group to review the Profiling Guidance. In a 2010 speech, you explained:

> "I'm committed to ensuring that department policy allows us to perform our core law enforcement and national security responsibilities with legitimacy, accountability and transparency. That's why, last fall, I initiated an internal review to evaluate the 2003 Guidance and to recommend any changes that may be warranted."

The intra-agency working group has been operational for over two years, more than enough time to complete its internal review and make recommendations to you. Accordingly, we urge you to revise the Justice Department's Profiling Guidance as soon as possible to make it clear that:

- Profiling on the basis of national origin and religion are included in the prohibition on racial profiling; and
- The prohibition on profiling for "traditional law enforcement activities" extends to national security and border security investigations.

The Profiling Guidance should prohibit inappropriate profiling of all Americans in all circumstances, consistent with our nation's commitment to equal protection for all. Thank you for considering our views. We look forward to your response.

Sincerely,

Richard J. Durbin
Assistant Majority Leader
U.S. Senate

John Conyers, Jr.
Ranking Member, Judiciary Committee
U.S. House of Representatives

Daniel K. Akaka
U.S. Senator

Richard Blumenthal
U.S. Senator

Sherrod Brown
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