**IOWA-NEBRASKA and DES MOINES BRANCH NAACP**

**LEGAL REDRESS COMMITTEES:**

**Advocacy & Education, Successes & Setbacks**

**March 22, 2022**

The NAACP is America’s largest and oldest civil rights organization. Founded in 1909, it is a non-profit corporation chartered by the State of New York. From the outset its mission has been to “ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination.” With limited resources, the Legal Redress Committee (LRC) is charged by the NAACP with engaging only in matters that can either help to establish a new legal precedent or protect existing precedent, offer a broad remedy promising benefit to the members of the Association and the public, or redress a violation of a constitutional or fundamental right. Comprised only of volunteers, the Legal Redress Committee works in various ways to achieve these objectives and fulfill the NAACP’s mission. These include litigation and advocacy within the Judicial Branch, proposing and drafting legislation and lobbying the Legislative Branch, and seeking administrative reform and policy goals with the Executive Branch of Iowa Government.

**30-Year Anniversary of Historic NAACP Civil Rights Victory:**

***Moore, Perry, and NAACP v. City of Des Moines***

A single act of racial discrimination against an individual that causes an injury can be the basis for a Federal or State Court judgment of liability, even if it was the only time the employer discriminated—once can be enough if it causes demonstrable harm. As interpreted by the U.S. Supreme Court, racial or sexual harassment can constitute discrimination but it must be “severe or pervasive enough to create an objectivelhy hostile or abusive work environment.” Because proving racially discriminatory intent or motivation is difficult to do, individual civil rights cases are challenging, and not many lawyers will take them on. The NAACP is grateful to those lawyers who do provide such representation, recognizing they serve as “private attorneys general” enforcing Federal civil rights law.

A “pattern and practice” civil rights case is considerably more difficult because it requires proving that racial discrimination is the company’s standard operating procedure—that racial discrimination has been and is the company’s regular course of business. Such cases often require proof of 15, 20, or more cases of individual racial discrimination, both current and past, and statistical proof that demonstrates that the individual cases that have been proven are just the tip of the iceberg of the company’s ongoing pervasive discriminatory practices. Pattern and practice cases are a massive undertaking, especially when brought against a major public service agency such as police and fire departments, and are most frequently brought by the U.S. Department of Justice with its very substantial staffing and resources. But sometimes they have been brought by the NAACP with its volunteer attorneys—*Moore et al v. City of Des Moines* was such a case. NAACP litigation almost always springs from its grass roots advocacy. The research of Des Moines NAACP Labor & Industry Committee Chair Herman Wadsworth, an EEO Officer himself, produced the City’s EEO reports for the Civil Service Commission’s hiring process that were the basis for our statistical arguments; Des Moines President Larry Carter regularly participated in strategic decisions throughout all fifteen years of the case, including monitoring.

In 1980, there was only 1 Black firefighter out of 311 uniformed Firefighters on the Des Moines Fire Department (DMFD)—and there were no women firefighters. Dennis Moore and Greg Perry, two highly qualified Blacks whose firefighter applications had been rejected by the Des Moines Civil Service Commission, sought representation by the NAACP. NAACP Legal Redress Committee (LRC) volunteer Russ Lovell (then a young Drake law professor) took on the case, serving as lead NAACP counsel throughout all fifteen years of the litigation, from 1980 -1994. Suit was filed in Federal Court in 1982, 30 years ago! Lovell was assisted by one of his former students, Greg Biehler, and Robert Wright, Sr., often referred to as “Mr. Iowa NAACP.” At the final stages of the negotiation on the Consent Decree, NAACP General Counsel Tom Atkins played a helpful role.

It is impossible to condense a pattern and practice case into a few words, but here’s the nutshell. In Des Moines there had been no Black firefighters during the first 100 years of the DMFD. Not just discrimination—total exclusion! Then, following passage of the Iowa Civil Rights Act in 1965, a civil rights suit in 1968 by the Iowa Civil Rights Commission resulted in the hiring of the first three Black firefighters by the City of Des Moines. But the discrimination didn’t end. All three experienced daily, unrelenting racial harassment, segregation in the dormitory sleeping area, refusal to take messages from their family, photos of apes posted on the bulletin board with their names on them, and being blasted with a fire hose on every fire run, even in the midst of winter. The word of their harassment spread quickly through the Des Moines Black community, and two of the Black firefighters, Melford Fonza and Terry Knox, eventually resigned when the harassment never ended. The City contended that what the Black firefighters claimed was harassment was just the normal “hazing” to be expected in a para-military setting and Fonza and Knox just didn’t have the grit necessary for a demanding job. When located in 1982, Fonza was the Battalion Commander of the Pasadena Fire Department in California and Knox was a Lieutenant in the Atlanta Fire Department. The City’s EEO hiring records for the DMFD confirmed that not a single Black or woman applied to be a firefighter in the period from 1970—1975—the “inexorable zero!”

The problem wasn’t just the DMFD. The City Civil Service Commission (CSC) was in charge of the recruitment and hiring process, and our investigation revealed the CSC ran what essentially was a “secret” “old boy network” firefighter application process The CSC would not take the name and contact information of persons wishing to make an application. The CSC restricted the application period to only two weeks and relied principally on “word of mouth” recruiting. As a result very few people outside of relatives and friends of current firefighters got notice. With an all-White DMFD, the exclusionary result was predictable.

In *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), a systemic, race-based employment discrimination case brought by the Justice Department, the U.S. Supreme Court provided the following real world insight:

A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. \* \* \**When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application.*

Id. at 365-367 (emphasis added). The Supreme Court recognized the most discriminatory system of all is one which deters Blacks and persons of color from even making an application.

After securing a consent temporary restraining order at the outset of the case that resulted in the hiring of 6 Black firefighter, negotiations stalled and two years of intensive investigation and pretrial litigation followed on which NAACP attorneys expended nearly 2,000 hours of work. After researching, drafting and redrafting, and after months of negotiating, Lovell and the NAACP achieved a comprehensive Federal Court Consent Decree that, on the eve of trial, was approved by the NAACP National Office and ultimately by the Des Moines City Council, on a 4-3 vote. After review by Federal Judge Harold Vietor, the Federal Court approved as fully protecting the interests of the Black, plaintiffs class and entered it as a formal Federal Court Injunction.

The core remedy of the NAACP Consent Decree was mandated affirmative action in (1) recruitment and hiring and (2) the opportunity for Blacks who experienced discrimination to reapply under revised nondiscriminatory standards, with full seniority credit if hired. The Decree mandated reform of the application process, criteria, testing, recruitment, and hiring. The detailed Decree was 40 single-spaced pages long, and sought to address every single aspect of the City’s existing discriminatory hiring process. Space permits mention of only a few provisions. The City was required to keep the contact information of persons interested in firefighting and to contact them, using postcards, in advance of the next firefighter application process. The application period had to be at least 6 weeks long. The City was required to do extensive recruitment targeted at the Black community in advance of each application period. Most importantly, it required the City to hire one Black for every nonblack firefighter hired until the uniformed force, after completion of the probationary year, was at least equal to the percentage Blacks in the Des Moines workforce.

It will surprise no one that compliance with such Court Orders is far from certain. It took 10 years of NAACP attorneys Lovell and Wright monitoring the City’s implementation of the Decree, troubleshooting when problems arose, and negotiating firmly but flexibly so that its affirmative action remedy could not be challenged by the Reagan Justice Department as an inflexible quota. At the conclusion of the Consent Decree in 1994 there were 36 African American firefighters out of 288, more than 12%. The first women firefighters were hired as a result of changes in the physical agility test that we negotiated. More often than not, the named plaintiffs in class action cases pave the way for a later generation to take advantage of the benefits of the decree, but they themselves do not benefit because of passage of so many years during the litigation. We were very pleased that both lead plaintiffs, Dennis Moore and Greg Perry, were able to qualify for firefighter employment with the DMFD under the revised job-related criteria required by the Consent Decree, and both were hired. Each served as leaders among the newly-hired Black firefighters and enjoyed a successful 25-year career and retired from DMFD.

It was gratifying that the Des Moines Register wrote a lead editorial praising the Consent Decree and the racial progress it accomplished. The Register especially praised the parties for reaching a Consent Decree/settlement, rather than pursuing long, contentious and expensive litigation that might have taken a decade or more to resolve. Federal Judge Harold Vietor presided over the entire 15-years of the case and made the following findings as to the NAACP attorneys’ contribution when he approved and issued the Consent Decree: “This case was a difficult and complex civil rights class action litigation. \* \* \* The result is a detailed consent decree that is a very professional work product reflecting a high level of skill in the field of complex civil rights litigation.” Two years later, the U.S. Court of Appeals for the 8th Circuit quoted Judge Vietor’s praise of the NAACP counsel in its opinion in *Moore v. City of Des Moines, Iow*a, 766 F.2d 343, 344-45 (8th Cir. 1985), cert. denied, 106 S.Ct. 805 (1986).

**Text

Description automatically generated**

**Iowa-Nebraska and Des Moines LRC Successes & Setbacks, 2014 - 2022**

A special strength of the NAACP over the years has been its combination of grass roots advocacy and law reform lawyering. This will be evident throughout this portion of the Report, with the co-chairs of the LRC, Russell Lovell and David Walker, working in tandem with State President Betty Andrews, and in Des Moines cases, for the past two years, with Des Moines President Victoria Henderson Weber and during the preceding decade, with Des Moines President Arnold Woods. As a result of the Legal Redress Committee’s work, the Iowa-Nebraska NAACP and the Des Moines Branch NAACP have had a number of important successes in the years 2014-2021 and have many initiatives under way. Of course there have been setbacks, some in the Iowa Supreme Court, and certainly in the Legislature with respect to selected statewide legislative priorities. In the meantime we are grateful for and take pride in the successes we have had, and we keep in mind the wise counsel and encouragement of legendary Congressman John R. Lewis’s: “Be hopeful, be optimistic. Our struggle is not the struggle of a day, a week, a month, or a year, it is the struggle of a lifetime. Never, ever be afraid to make some noise and get in good trouble, necessary trouble.” NAACP members know well that civil rights and racial justice advocacy is not always onward and upward, but emboldened by our mission and the rightness of our cause, we persist, and we press toward the mark of eliminating racial discrimination and ensuring the civil rights of all persons.

**I. Legislative Branch Activity and Advocacy**

1. *Governor Branstad’s Working Group on Criminal Justice Policy Reform* (2015) (“Branstad

Committee”). Governor Branstad appointed the Committee in September 2015 following discussions with NAACP leadership to identify proposals for criminal justice reform that could be introduced and considered in the coming legislative session. The NAACP’s grass roots advocacy and law reform lawyering were instrumental. NAACP State President Betty Andrews served and took a lead role on the Committee. LRC co-chair Russ Lovell made presentations on behalf of the NAACP and negotiated the Committee Recommendations which identified aspects of the jury selection process that appeared to be contributing to the lack diversity of Iowa’s juries. The Committee urged and made strong recommendations on the need to increase the diversity of jury pools, to improve data collection as to “the racial composition of jury pools,” and to “improve the response rates to jury summonses.” Most importantly, it emphasized “the responsibility of [the State Judicial Branch and each Judicial District] to take affirmative steps to ensure jury pools that truly reflect a fair cross section of the community, which require ongoing monitoring and coordination at both the State and District Court levels.” The Report put jury reform front and center on the Judicial Branch’s priorities and set the stage for a comprehensive NAACP litigation, legislative, and administrative advocacy effort that is ongoing.[[1]](#footnote-1) The Committee recommended significant revisions to Iowa Code Chapter 607A [Jury Management] that were enacted in the course of the next two legislative sessions. https://comment.iowa.gov/Notice/Details/JusticePolicyReform.

1. *Anti-Racial and Ethnic Profiling Legislation.* The LRC drafted legislation defining

and prohibiting racial and ethnic profiling by law enforcement and discriminatory pretextual stops; requiring data collection and analysis regarding stops, including subsequent conduct by law enforcement such as searches, by all law enforcement officers and agencies; providing for compilation and analysis of the data; further providing for the establishment of a community policing advisory board to review such data and analysis and make recommendations to ensure equal treatment of all citizens in law enforcement; and providing remedies. The bill was introduced in consecutive sessions of the Iowa Legislature. Despite concerted NAACP grass roots advocacy and law reform lawyering, it has not been enacted—yet. However, it provided the foundation for negotiations and enactment of Unbiased Policing Ordinances at the local level

1. *Unbiased Policing Ordinances Enacted in University Heights, Des Moines,*

*Coralville, and Iowa City, Iowa.* The anti-racial and ethnic profiling bill that the LRC drafted formed the basis for ordinances Iowa cities could consider. University Heights was the first city in Iowa to enact an ordinance based on the bill. It sought the NAACP’s assistance and enacted an ordinance substantially based on the NAACP’s anti-racial and ethnic profiling bill. Next was the City of Des Moines. Working with an alliance comprised of the ACLU of Iowa and CCI and the NAACP, the LRC served as the architect, primary drafter, and negotiation partner with NAACP President Andrews who served as the lead negotiator with the City of Des Moines that led to the City Council’s unanimous approval of an Unbiased Policing Ordinance in June 2020.

The Ordinance is much broader than an anti-racial profiling law. It requires unbiased, fair and impartial law enforcement and delivery of police services, and expressly applies not only to uniformed officers but all DMPD employees. It prohibits racial and ethnic profiling and discriminatory pretextual stops, and prohibits law enforcement action based on private citizen “calls for service” that DMPD “know or reasonably should know” are motivated by bias. It requires supervisors to “ensure the working environment is free of bias and free of racial profiling,” requires training of all City employees about the Ordinance, including diversity, cultural and de-escalation training, and requires police to intervene where another officer is using unreasonable or excessive force and it is safe do so. It provides for making and filing complaints with the Des Moines Human Rights Commission or internally with the Police Department’s Office of Professional Responsibity, and directs the Human Rights Commission to assist with drafting and filing a complaint with the Iowa Civil Rights Commission if the complainant desires to do so.

Achievement of the Des Moines Unbiased Policing Ordinance was a major grass roots advocacy and law reform lawyering success. In turn, the NAACP was asked to assist both the City of Coralville and the City of Iowa City in the consideration of Unbiased Policing Ordinances based on the Des Moines Ordinance. NAACP and LRC leadership met with the City Managers and Police Chiefs in both cities, and both cities passed Unbiased Policing Ordinances.

1. *Proposed Legislation Updating and Expanding Jury Pool Source List.* In 2015 the Branstad Committee recommended the use of additional source lists to create jury pools in order to ensure greater diversity, recommended that jury pool lists be updated annually, and further recommended that the Judicial Branch study ways to improve response rates to jury summonses, among other things. LRC Co-Chair Russ Lovell was appointed by then Chief Justice Mark Cady to the Advisory Committee on Jury Selection, which built upon its recommendations in regard to expanding the jury pool, updating information, and strengthening jury management practices. As a follow up, the LRC worked with representatives of the Office of State Court Administration, the Judicial Branch, the Attorney General’s Office, and the Department of Revenue to draft a bill that, among other improvements, would authorize the Department of Revenue to share name and address information of taxpayers whose names and addresses it had on file, but no financial or other information (except for the last four number of the Social Security Number, which are needed in order to detect and prevent duplication). The bill would update the dated information OSCA receives from the Department of Transportation and the Office of the Secretary of State, and thereby reduce the number of “undeliverable” jury summons, and likely expand the jury pool source list. In the 2021 General Assembly the bill was HF455. The bill enjoyed wide support, including strong support from the Judicial Branch and the Attorney General’s Office, but it did not advance. It remains on the NAACP’s legislative agenda.
2. *Lobbying Activity and Declarations on Bills Introduced in General Assembly.* Each

year numerous bills are introduced in the Iowa General Assembly which are of interest to the NAACP. These are considered by the Legal Redress Committee and positions for the NAACP to determine whether to take. The co-chairs of the LRC, together with the State President, register as lobbyists for the NAACP, speak to legislators about the bills, attend legislative subcommittees in which the bills are considered for recommendation to full committees, and communicate the NAACP’s position on the bills and reasons supporting the NAACP’s position

**II. Judicial Branch Advocacy: 8 NAACP Amicus Curiae Briefs**

1. *Amicus Curiae Brief on behalf of the NAACP re “Ban the Box”—Fair Chance for Employment*

In *ABI v. City of Waterloo*, 961 N.W.2d 465 (Iowa 2021), the Iowa Supreme Court upheld a Waterloo Ordinance that prohibits employers from inquiring about or having a “box” on their application forms asking about an applicant’s criminal history or record until a job interview or conditional offer. The Court concluded that, contrary to the argument of ABI, the Iowa Code provision that precluded local governments from raising the minimum wage did not purport to restrict local governments from regulating pre-employment conduct. This issue had not been raised by the City or ABI and was raised and argued only by LRC co-chairs in an *amicus curiae* brief filed on behalf of the NAACP. The Court acknowledged that it was unusual to decide the case on an issue not raised by the parties, but pointed out that “ABI has had an opportunity to respond, [and] it would be the better course of action not to strike down an entire ordinance on state-law preemption if, in fact, it isn’t preempted.”

The NAACP has long identified as a major policy goal requiring employers to eliminate “the box” and otherwise delay until the job interview or the making of a conditional offer an inquiry into a job applicant’s criminal history or record, if any. Too often the disclosure results in denial of any interview notwithstanding that there may have been no conviction, only an arrest, or that the conviction occurred long in the past, or that the crime for which the applicant was convicted has no relation to the qualifications for the job for which the person was applying. It is estimated that some 80 million Americans have a criminal history or record, and in any event, it is documented that African Americans and Blacks are disproportionately subject to arrests, traffic stops and searches, and other criminal and juvenile justice disparities.

1. *Amicus Curiae Briefs on behalf of the NAACP re Right to an “impartial jury”—Achieving Fair Cross-Sections on Iowa’s Juries*

The right to an “impartial jury” is guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, Section 10 of the Iowa Constitution as well as section 607A.1 of the Iowa Code. It requires that the trial jury be drawn from a fair cross-section of the community and that a distinctive group like African Americans not be underrepresented in the jury pool and jury panel from which the trial jury is selected as a result of systematic exclusion by the State. Studies show that trial juries drawn from jury panels that include even one African American, and a fortiori juries themselves, convict African Americans 15% less than all-white juries, while mixed jury panels result in convictions of white defendants equal to that of all-white juries. Since 2014 the NAACP has been extensively involved in advocacy to secure this right. LRC co-chairs Lovell and Walker have filed NAACP Amicus Briefs in the Iowa Supreme Court on behalf of the defendants in four cases raising major fair cross-section issues. Because of the systemic nature of the NAACP arguments made, the NAACP Brief filed in *State v. Veal* was also relied upon by the Court in *State v. Lilly*, a companion case to *State v. Veal.*

Citing the NAACP Amicus Brief nine times, the Iowa Supreme Court issued a pathbreaking decision in *State v. Lilly,* 930 N.W.2d 293 (Iowa 2019) (4-3) (Lilly I). The Iowa Supreme Court, as urged by the NAACP, invoked its independent authority under the Iowa Constitution to construe its Impartial Jury Clause to provide greater protection than the comparable provision of the U.S. Constitution has been construed by the U.S. Supreme Court. This authority goes back to 1868, when the Iowa Supreme Court construed the Iowa Constitution’s Equality Clause to bar racial segregation in Iowa’s public schools—86 years before the U.S. Supreme Court decided *Brown v. Board of Education* in 1954. In *Lilly I* the Court held that underrepresentation of African Americans on jury pools and panels should be measured by standard deviation analysis, and that underrepresentation at the 1 standard deviation level should be sufficient to make out a fair cross-section claim under the Iowa Constitution (rather than 2 standard deviations under the Federal Constitution). Further, the Court held that the State was responsible not only for express laws and policies that cause the underrepresentation of people of color but also for the failure by the Judicial Branch to utilize effective jury management practices that contributed to the statistically significant underrepresentation. Negligent jury management practices, such as failing to use the Postal Service’s National Change of Address system (NCOA) to ensure the most recent address of prospective jurors or failing to enforce juror summons, could therefore constitute systematic exclusion under the Iowa Constitution. The Court quoted Paula Hannaford-Agor, Director of the National Center for State Courts:

“Although the socioeconomic factors that contribute to minority underrepresentation in the jury pool do not systematically exclude distinctive groups, the failure of courts to mitigate the underrepresentation through effective jury system practices is itself a form of systematic exclusion.”

In *State v. Veal,* 930 N.W.2d 319 (Iowa 2019), the factual record was sufficient that the Court could make a preliminary application of its *Lilly I* holdings, giving lower courts and counsel guidance. In veal the NAACP argued for reform of the ineffective procedures courts have historically used when they decide Batson challenges to prosecutor’s peremptory strikes of jurors of color. Although the majority upheld the prosecutor’s strikes, three justices wrote opinions in which they acknowledged the validity of the NAACP’s concerns and urged reform of the Batson procedures, and two justices suggested it was time to abolish peremptory challenges entirely.[[2]](#footnote-2) As discussed in Part III.B below, the LRC believes rule making by the Court is the most likely way in which needed reform can occur.

*State v. Lilly II (2022), State v. Plain II (2022),* and *State v. Veal II (still pending decision).* As it had in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), the Iowa Supreme Court conditionally affirmed convictions of defendants in *State v. Lilly* and *State v. Veal* but remanded the cases to the district court for application of principles refined and announced in *State v. Lilly*. The District Court in *Plain* ruled that the Court Rules only allow Amicus Curiae participation at the appellate level, and therefore the NAACP could not participate in the rehearings on remand. [The NAACP did provide extensive assistance/guidance to the state public defenders.] In each case the District Court denied defendant’s fair cross-section claim and upheld the conviction on remand. Each case was appealed, and the NAACP filed *amicus curiae briefs* in all three cases, *State v. Lilly II, State v. Plain II*, and *State v. Veal II,* and participated in the oral arguments in *Lilly* and *Plain* on October 20, 2021.

The Iowa Supreme Court upheld the District Court’s denial of the fair cross-section claims in *Plain II* and *Lilly II*. *Veal II* is still pending decision. The *Plain II* and *Lilly II* rulings were very disappointing, but arguably were on narrow grounds that have limited precedential impact. The Court had held in *Plain I* that the defendant had relied only upon the Federal Constitution’s Sixth Amendment, and not the Iowa Constitution. For that reason in *Plain II* the Iowa Court held that it would not consider evidence the NAACP regarded as substantial that negligent jury management practices were the cause of the significant underrepresentation of African Americans in Black Hawk County. Thus, the Court’s more favorable ruling in *Lilly I* that under the Iowa Constitution jury management practices matter and will be considered did not apply. The NAACP urged that even under the Sixth Amendment negligent jury management practices should be considered, but its argument was rejected as foreclosed by the U.S. Supreme Court. We believe the Court’s decision in *Plain II* will have limited impact on the relevance of jury management practices because defense counsel are now regularly asserting a *Lilly I* fair cross-section claim under the Iowa Constitution in addition to the Federal Constitution; and arguably it would be malpractice for defense counsel not to do so.

In *Lilly II*, the NAACP sought leave to appear Amicus Curiae because of concern as to how the State was arguing that underrepresentation should be determined in a fair cross-section claim and necessarily, therefore, on the issue of systematic exclusion of African Americans and Blacks. However, defense counsel had not retained an expert or introduced expert witness testimony on jury management practices, which the Court had held was essential to making out a fair cross-section claim under *Lilly I*. Without an expert’s opinion on jury management practices, the Court held, there was insufficient evidence that the Court System’s failure to utilize lists other than voter registration and drivers license/nonoperator IDs, authority jury constituted systematic exclusion. Of concern, the three dissenters in *Lilly I* wrote a concurring opinion in *Lilly II* which indicates they will ask the Court to reconsider *Lilly I* and perhaps overrule it.

C. *Amicus Curiae Brief on behalf of the NAACP re* challenging constitutionality of pretextual traffic stops

The LRC filed a joint ACLU/NAACP/LULAC/1000 Kids for Iowa Amicus Brief in *Scottize Danyelle Brown v. State of Iowa* challenging the constitutionality of pretextual traffic stops as a violation of the Iowa Constitution. Ms. Brown’s OWI conviction resulted when her auto was stopped ostensibly for a traffic violation, but the officer acknowledged that the reason he made the stop was that he wanted to investigate because his computer search indicated the car had been designated as “connected with gang activity.” That alone wouldn’t constitute “reasonably articulable suspicion” that a violation of law was occurring or “probable cause,” as the law requires. In consequence, our Amicus Brief argued that pretextual traffic stops are an unconstitutional abuse of police power and also serve as the justification for racial profiling. The Iowa Supreme Court, in a 4-3 decision, found that there was no violation of the Federal Constitution and declined to hold that the search and seizure protections under the Iowa Constitution were greater than the limited privacy holding of the U.S. Supreme Court. Three justices, including Chief Justice Cady, would have placed limits on police authority to make such traffic stops.

D. Amicus Curiae Brief on behalf of NAACP Challenging State Government Hiring Practices as Disparate Impact Violation of Civil Rights Law

In *Pippen v. State of Iowa* (2014) the NAACP filed an Amicus Brief in support of a class action on behalf of African Americans alleging employment discrimination by Departments of State Government on account of class-wide practices with racially disparate impact . The NAACP Brief contended that an employer who delegates unstructured discretion to those with the power to hire, fire, and promote, and fails to monitor the subjective decision-making it has authorized for its possible racial impact on people of color, should be held liable for the discrimination that it has allowed to flourish unchecked—whether conscious or unconscious—because it has failed its responsibility under federal and state antidiscrimination laws to eliminate criteria and practices that have an adverse racial impact. The NAACP argued that the evidence showed significant adverse racial impact at the getting-an-interview stage and in hiring by eight state government departments that employ 58% of the state employees, including the departments of human services and transportation. The Court should find liability as to those departments, the NAACP argued, even if the Court concluded that there was not adverse racial impact in every State department.

In a narrow ruling, the Iowa Supreme Court concluded there was sufficient evidence to affirm the trial judge’s finding of fact that the plaintiffs’ proof failed to identify the specific components of the State’s hiring processes that were causing the adverse impact on African American applicants, as required by Federal civil rights law. Although the Court affirmed the trial court’s dismissal of this class action, Justice Waterman’s Concurring Opinion (joined by Justices Mansfield and Zager) referenced the NAACP’s “well argued amicus brief” and observed that “the NAACP’s brief raises serious questions as to whether the State committed unlawful discrimination.” Hindsight is always 20-20, but it appears that had plaintiffs narrowed their challenge to specific offending state departments rather than a frontal challenge to all State Executive Branch hiring, it is likely they would have been successful.

E. Amicus Curiae Brief on behalf of the NAACP in support of the authority of the Iowa Civil Rights Commission (ICRC)

The NAACP contended that the ICRC, as the governmental enforcement authority for the State civil rights act, could not be bound by a provision in an employee’s employment agreement requiring arbitration of employment disputes, as the ICRC was not a party to the contract. Accordingly, the ICRC should be able to proceed against the employer for sex/gender discrimination pursuant to the Iowa Civil Right Act in a public proceeding before the Commission or an Administrative Law Judge with full opportunity for appeal and not the closed proceeding that arbitration is with stringently limited grounds for appeal. The Iowa Supreme Court agreed and, in a unanimous opinion, reversed the District Court decision. In *Iowa Civil Rights Commission v. Rent-a-Center* (2014), the Court held that the ICRC could proceed independently with its enforcement proceedings even though the named plaintiff it represented had signed a pre-employment agreement that required arbitration of employment matters. The decision received national coverage.

<http://www.washingtontimes.com/news/2014/feb/28/court-bias-case-against-rent-a-center-can-proceed/>.

**III. Judicial Branch Advocacy: Dialogue, Administrative Rulemaking**

*A. Office of State Court Administration’s Jury Management* *Policy (2018)*

Following the remand of *State v. Plain,* the LRC met on numerous occasions with the State Court Administrator and OSCA staff to discuss ways to improve jury management practices statewide in order to address problems, especially underrepresentation of African Americans and Blacks, and achieve jury pools and panels representing a fair cross-section of the community. Examples included failure to update the jury pool, failure to utilize the U.S. Postal Service’s National Change of Address (NCOA) system to address the problem of “undeliverable” summons, changes in the jury summons and questionnaire to enhance responses and secure better data on race, ethnicity, and gender of prospective jurors, and lack of enforcement of jury summonses and almost no response as a practical matter for failure to appear in court as ordered. The result was issuance by OSCA in December of 2018 of a new and comprehensive Jury Management Policy, effective January 1, 2019. Available evidence shows that the Policy is reducing the number of prospective jurors needing to be summoned, improving the rate of responses to juror questionnaire, and increasing the number reporting for jury service. There is also evidence that representation of African Americans and Black in jury pools has improved.

*B. Criminal Justice Reform: NAACP Public Comments on Proposed Amendments to the Iowa Rules of Criminal Procedure*

In June 2020 the Legal Redress Committee submitted extensive comments on behalf of the NAACP on the Iowa Supreme Court’s Proposed Amendments to the Iowa Rules of Criminal Procedure, which it supplemented in 2021. NAACP comments and proposals focused on (1) the need to address peremptory challenges, which too often result in striking African Americans in the jury pool or jury panel resulting in underrepresentation; (2) the need to address and change the procedure and test approved in *Batson v Kentucky* for challenging peremptory strikes; (3) the need to liberalize the rule for changing the venue of a criminal trial if in the interests of justice; (4) the need to transcribe the voir dire process to ensure and protect grounds for appeal when a *Batson* challenge has been rejected; (5) the need to authorize the trial judge to hold an individualized voir dire of a prospective juror when a “sensitive subject” such as racial bias becomes an issue; and (6) revision of Rule 2.18(5)(a) of the Iowa Rules of Criminal Procedure to make eligible for jury service persons previously convicted of a felony if the person has had his or her citizenship rights restored.

With one exception, noted immediately below, the Iowa Supreme Court continues to have the proposed amendments and comments from the Bar, and the NAACP proposal that the Court create a *Batson* Study Committee, under consideration. The January 31, 2022, proposed Amendments on the above-mentioned topics, if they were to become final, would represent positive steps though not all that the NAACP advocated. The NAACP LRC co-chair Lovell and State President Andrews began their jury diversity advocacy in the fall of 2014 with a formal presentation on the ineffectiveness and frankly injustice of the *Batson* procedures at the Annual Iowa Judges Conference; in October 2021 LRC co-chairs Lovell and Walker and State President Andrews gave an updated presentation at the Annual Iowa Judges Conference on the continuing need to reform *Batson* procedures.

1. *Supreme Court Order Amending I.R.Cr.Proc. 2.18(5)(a)*

Until February 19, 2021, it was grounds to dismiss a prospective juror for cause if the person had previously been convicted of a felony regardless of restoration of citizenship rights. A different rule has prevailed in Federal Courts, including Federal Court in Iowa, since 1968, more than 50 years ago. Following Iowa Governor Reynolds’ issuance of Executive Order Number Seven on August 5, 2020, restoring the citizenship rights (with limited exceptions) of those previously convicted of a felony who had discharged their sentences, NAACP leadership and the LRC requested the Iowa Supreme Court to amend the Rules of Criminal Procedure to make all such persons eligible for jury service. The Supreme Court did so on February 19, 2021. Together, Governors Vilsack and Culver had restored the citizenship rights of approximately 115,000 persons, but none was eligible to serve on a jury in state court. A different rule has prevailed in the federal courts since 1968 allowing jury service by those whose citizenship rights have been restored. It’s estimated that Governor Reynolds’ Executive Order restored the citizenship rights of 45,000 persons, making a total of some 160,000 people newly eligible to be jurors. The NAACP has determined that a disproportionate number of such persons are African American or Black, so the NAACP applauds the Governor’s Order as having a positive racial justice impact.

The NAACP leadership and LRC continues to work with OSCA and in meetings with the Chief Justice to ensure that those affected will have notice of their new right and responsibility to serve as a juror. The NAACP has proposed amendment to the Juror Questionnaire that would provide such notice, and also amendments to the Judicial Branch web pages providing explanations relating to jury service. The NAACP has under consideration proposals that trial judges must be especially sensitive that voir dire inquiries as to whether a person previously convicted of a felony holds a disqualifying bias against law enforcement should be done through individualized voir dire and perhaps only by a judge because of the judiciary’s extensive implicit bias training.

1. *Jury Composition Monitoring Policy Adopted by Office of State Court Administration, Supporting Constitutional Right to an Impartial Jury*

Both the United States and the Iowa Constitutions guarantee to a criminally accused the

right to an “impartial jury,” which requires that the jury be drawn from a jury pool and jury panel that represents a fair cross-section of the community. That requires record-keeping, data collection and analysis, and publicly available reporting in order for defense counsel—and for that matter, the prosecutor and the trial judge—to determine whether a valid claim can be made and proven. The Judicial Branch was not gathering data on jury composition regularly or uniformly, in a consistent or complete manner, nor was it regularly available, nor even, when obtained, comprehensible without inquiry into definition of terms. Following the Iowa Supreme Court’s holding in *State v. Plain,* 898 N.W.2d 801 (Iowa 2017), that “the constitutional fair cross-section purpose alone is sufficient to require access to the information necessary to prove a prima facie case,” the LRC promptly began working with the Judicial Branch and its Office of State Court Administration to secure the needed data collection, record-keeping, monitoring, and reporting. Meetings, discussions, and negotiations were numerous and continued over several years, and are still ongoing. In April 2021 the OSCA Director notified LRC Co-Chairs that OSCA had developed a Judicial Composition Monitoring Policy under which it “will direct jury managers to monitor the racial and ethnic composition of their jury pools in relation to the estimated racial and ethnic composition of their jurisdiction” and, if anomalies are revealed, OSCA will investigate to determine and identify the causes. Further, on an annual basis OSCA will conduct a review independent of the monitoring conducted by the jury managers.

The OSCA also has in development “an analytical tool that can be applied in a uniform fashion to jury pools drawn from each county each year. This tool will include: 1) a feature that displays the range of observed values of representation from distinctive groups that would fall within one, two, and three standard deviations, 2) functionality to calculate the difference between observed and expected jury pool composition, and 3) the calculated standard deviation of observed values of representation from a distinctive group.”

The process under development should go far to achieve long-sought goals of the NAAC{ and the LRC, beginning at least with recommendations in 2015 of the Governor’s Working Group on Criminal Justice Policy Reform that 1) “The Judicial Branch should begin collecting and maintaining statistics regarding the racial composition of jury pools [and] 2) that “Oversight and accountability should be restored to the jury selection process . . . [with] ongoing monitoring and coordination at both the State and District Court levels.”

**IV. Executive Branch Activity and Advocacy**

1. *Felon Enfranchisement and Executive Order Number Seven.*

It has long been the position of the NAACP that personsconvicted of a felony should have their right to vote, their citizenship rights, restored when they have discharged their sentences. That was not the law in Iowa, and Iowa stood as one of the last, then finally the last, State in the Nation to permanently take away from persons convicted of a felony their right to vote and participate in the democratic process. “Iowa becomes the last state to end lifetime felony disenfranchisement.” <https://www.jurist.org/news/2020/08/iowa-becomes-last-state-to-end-lifetime-felony-disenfranchisement/>. By Executive Order Governors Vilsack and Culver restored their right to vote upon discharge of sentence, but immediately upon assuming office in January 2011, Governor Branstad revoked those Executive Orders. In the ensuing six years until assuming the Ambassador to China position, Governor Branstad granted the individual petitions for restoration of very, very few persons, despite meetings with NAACP leadership that included discussion of that policy and the need to simplify and streamline the process. The NAACP urged Governor Reynolds to restore the franchise of persons previously convicted of a felony by Executive Order if the Legislature did not do so by legislation, and in collaboration with the ACLU of Iowa drafted, proposed, and advocated language of an Executive Order for the Governor to consider and sign. The Governor did so on August 5, 2020, and at a special signing ceremony the Governor invited the NAACP State President to speak and she commended the NAACP for its work on the issue. Executive Order No. 7 also committed the Governor to continue to renew the Executive Order on a daily basis restoring citizenship rights for those who complete their sentence in the future.

1. *Changes and Additions to the Website of the Iowa Secretary of State to Reflect Executive Order Number Seven to Publicize the Order*

The automatic restoration of the right to vote for most persons previously convicted of a

felony who had discharged their sentences made it imperative to publicize the dramatic change made by the Order to the estimated 160,000 persons affected. The website of the Secretary of State is a primary vehicle for communicating to Iowans the qualifications for voting, the need to register to vote, and the process and form for doing so; but its website was now out-of-date, wrong, and unhelpful to those tens of thousands affected. The NAACP and LRC leadership promptly contacted the Office of the Secretary of State, identified changes in substance and

approach that needed to be taken, proposed deletions and additions to the SOS webpage, and met with the relevant staff in the Secretary of State’s Office. Numerous changes and additions were made as a result, including the addition of a short video to guide persons through the process and answer questions. The NAACP also met with the committee in charge of the Voter Registration Form and suggested and secured changes in language on the form to correct a statement that was now misleading and inconsistent with the Executive Order. The NAACP continues work on this issue, including speaking with the Governor and making recommendations.

1. *Participation on and Recommendations to Governor Reynolds FOCUS Committee on Criminal Justice Reform*

At the urging of the NAACP, at the 2019 Summit on Justice and Disparities sponsored by the NAACP State Conference, Governor Reynolds announced the formation of a FOCUS Committee on Criminal Justice Reform. State President Betty Andrews was appointed as a member, and LRC co-chairs appeared before and made presentations on the need to reform occupational licensing laws in Iowa, the need for “fair chance for employment” (also known as “Ban the Box”) legislation, and the adoption of anti-racial and ethnic profiling legislation that would prohibit such profiling by law enforcement, prohibit discriminatory pretextual stops, require data collection, and provide a means for broad publication of such data and consideration of best practices in law enforcement. The Committee met over two years’ time and LRC co-chairs, following LRC discussions, continued their participation.

As a result the FOCUS Committee recommended adoption of (1) legislation to make Iowa’s occupational licensing laws consistent, cohesive, and fair; (2) legislation ensuring fair chance for public employment—reaching not only state agencies and departments but all political subdivisions, including counties and municipalities—that would prohibit inquiry into criminal record or history until the job interview or a conditional offer; and (3) unbiased policing legislation prohibiting profiling and discriminatory pretextual stops, requiring data collection, compilation, and analysis, and providing a forum for review and consideration of the data and its implications. Occupational licensing reforms were enacted into law. In January 2021 the Governor’s office drafted an anti-racial profiling bill that included most of the FOCUS Committee’s recommendations, but pressure from Republican legislators packed the bill with “Back the Blue” anti-protester measures that effectively made the bill a “poison pill” for the NAACP.

1. *Work with State Data Center to Secure Annual Determination and Posting of Jury-Eligible Population in Every One of Iowa’s Counties in Fair Cross-Section Cases*

Essential to a defendant’s Constitutional claim that a jury pool or panel doesn’t represent

a fair cross-section of the community is evidence that the representation of a distinctive group in

a jury pool or panel, for example, African Americans or women, is less than the percentage

of that group in the county’s jury-eligible population. That in turn requires being able to

determine what in fact the group’s percentage of the jury-eligible population in the county is.

That can be done using U.S. Census and American Community Survey Reports but, in 2019, that required careful following of a complicated set of nearly 30 steps through Census Bureau charts. LRC Co-Chair Russ Lovell explained the need to and inquired of State of Iowa Data Center (SDC) Director Gary Krob whether the SDC might accomplish that for each Iowa County, publish the results, and update them annually when the Census Bureau published the most recent annual survey data.

Director Krob was able to do so, and he now annually publishes and updates the data on line. <https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity>. His user-friendly, publicly available State Data Center web page has a drop-down menu that provides the jury-eligible population for each of the 99 counties in Iowa, broken down by race and ethnicity. This web page has greatly facilitated the necessary Census research that must be undertaken by jury managers, counsel, and judges so that the Constitutional right to an “impartial jury” and the issue of underrepresentation can be raised. In April of 2021 the Director of the Office of State Court Administration reported as part of its Jury Composition Monitoring Plan, “Given the rather involved process of accessing these (U.S. Census Bureau) tables directly from The US Census Bureau, we intend to share links to the much more easily accessible and user-friendly presentation of the data available from Iowa’s State Data Center.” That is the position that the NAACP and LRC had been recommending to OSCA.

1. See Lovell & Walker, *Achieving Fair Cross-Sections on Iowa’s Juries in the Post-Plain World: The Trilogy of Lilly-Veal-Williams*, 68 Drake L. Rev. 499 (2020). Part II, “It Takes a Village: Collective Engagement, Dialogue, Collaboration, and Progress,” pages 519-529, describes this NAACP grass roots advocacy and law reform lawyering effort that began with the Branstad Committee and has been ongoing, continuing at the present time. <https://lawreviewdrake.files.wordpress.com/2021/01/lovell-walker-final.pdf>. [↑](#footnote-ref-1)
2. Russ Lovell and David Walker discussed the need for Batson reform and other racial justice issues in the jury selection process in a second Drake Law Review article: Lovell and Walker, *“A Fair and Impartial Trial Free from Racial Discrimination Will Require an Across-the-Board Approach”: Systemic Reforms Still Needed in Light of the “Other” Racial Justice Jury Trial Rulings in State v. Veal & State v. Williams*,

   <https://lawreviewdrake.files.wordpress.com/2021/06/a-fair-and-impartial-trial-free-from-racial-discrimination-will-require-an-across-the-board-approach22-systemic-reforms-still-needed-in-light-of-the-22other22-racial-justice-jury-trial-r.pdf>. [↑](#footnote-ref-2)