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May 26, 2021

The Honorable Dick Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Durbin, Ranking Member Grassley, and members of the Senate Judiciary Committee:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 220 national organizations to promote and protect civil and human rights in the United States, we write to express our support for the First Step Implementation Act of 2021 (S. 1014), the Prohibiting Punishment of Acquitted Conduct Act of 2021 (S. 601), and the COVID-19 Safer Detention Act of 2021 (S. 312). In total, these three bipartisan measures would bring about narrow, yet meaningful improvements to federal sentencing. While The Leadership Conference believes that further, and stronger, legislation is necessary to transform our nation's untenable criminal-legal system, these bills are a welcome step in that direction. We urge you to support these bills and to oppose any amendments in committee that substantially change these provisions.

The First Step Implementation Act of 2021, S. 1014

The First Step Implementation Act of 2021 furthers the goals of the First Step Act of 2018 (FSA),¹ which markedly changed sentencing laws and curbed the number of individuals entering prison. Sentencing practices, such as federal mandatory minimum sentences, are the fundamental building blocks of our system's use of unnecessarily harsh prison sentences that have fueled our crisis of mass incarceration. While the FSA made necessary advancements to the federal sentencing scheme, it represents only modest improvements to our system and did not implement retroactively key provisions — a necessary component of any federal sentencing legislation.

Accordingly, the First Step Implementation Act of 2021 corrects implementation and interpretation errors that contravene the spirit of the FSA — such as implementing retroactively key sentencing reforms. For instance, the legislation would make the FSA's sentencing reforms retroactive to individuals who received enhanced mandatory minimum sentences for prior drug offenses and to individuals who received "stacked" mandatory minimum sentences; permit judges to expand the sentencing safety valve in federal drug cases if the court finds that the defendant's criminal history score overrepresents their

¹ FIRST Step Act, Pub. L. No. 115-391 (2018).

record's seriousness or likelihood of recidivism; allow courts to reduce sentences for offenses committed by those under the age of 18 if the defendant has served at least 20 years; enable sealing or expungement of nonviolent juvenile delinquency adjudications and juvenile criminal records; and require the attorney general to establish procedures to ensure criminal records exchanged for employment purposes are accurate.

We are pleased that the First Step Implementation Act includes this necessary change, and we urge you to support the bill.

While we support the First Step Implementation Act, we urge the committee to additionally address other issues arising from the FSA through other mechanisms. In particular, we urge you to continue robust oversight over and investigations into the Bureau of Prisons' (BOP) implementation of the use of the "Prisoner Assessment Tool Targeting Estimated Risk and Needs" (PATTERN). BOP continues to use PATTERN to make release decisions, even though experts have cautioned that it is scientifically unverified and built on historically biased data resulting in bias against Black people, Latino people, poor people, unhoused people, and people with mental illness.² In fact, a January 2021 report by the National Institute of Justice reveals that the Department of Justice was unable to revalidate PATTERN due to errors and inconsistencies — meaning the BOP is using an unvalidated risk-assessment tool to make life and death decisions during the global pandemic.³ We urge the committee to address this issue in several ways: by continuing its vigorous and robust oversight to ensure BOP is meeting its commitments under the FSA, by advising BOP to halt the use of PATTERN until it is validated, and by introducing legislation to fix this unreliable and discriminatory assessment.

The Prohibiting Punishment of Acquitted Conduct Act of 2021 (S. 601)

The Prohibiting Punishment of Acquitted Conduct Act of 2021 similarly makes meaningful improvements to sentencing laws. In particular, S. 601 would ensure that federal judges cannot consider acquitted or dismissed charges in their sentencing decisions. S. 601 would amend 18 U.S.C. §3661 to preclude federal courts from considering acquitted conduct at sentencing, except for the purposes of mitigating a sentence. While juries must convict based on the higher standard of "beyond a reasonable doubt," current federal law permits judges to impose enhanced sentencing based on acquitted or dismissed charges under the less demanding standard of "preponderance of the evidence." The consideration of such conduct in sentencing decisions compounds the trial penalty and can often lead to longer federal sentences, exacerbating mass incarceration and depriving defendants of basic due process. This legislation would correct an unjust facet of federal sentencing laws.

² See Letter from the Leadership Conference for Civil and Human Rights to Attorney General Barr RE: The use of the PATTERN risk assessment in prioritizing release in response to the COVID-19 pandemic, *available at* <https://civilrights.org/resource/letter-to-attorney-general-barr-re-the-use-of-the-pattern-risk-assessment-in-prioritizing-release-in-response-to-the-covid-19-pandemic/>.

³ Nat'l Inst. Justice. *2020 Review and Revalidation of the First Step Act Risk Assessment Tool* at 7 (Jan. 2021), <https://www.ojp.gov/pdffiles1/nij/256084.pdf>.

The COVID-19 Safer Detention Act of 2021 (S. 312)

The COVID-19 Safer Detention Act of 2021 (S. 312) clarifies and expands the eligibility for the Elderly Home Detention Pilot Program introduced within the FSA. S. 312 ensures that eligibility decisions for the program are subject to judicial review and explicitly names COVID-19 vulnerability as a basis for compassionate release. S. 312 also shortens the judicial review waiting period for elderly home detention and compassionate release during the pandemic from 30 to 10 days. The COVID-19 virus has swept through federal prisons: as of May 21, 2021, more than 45,000 federally incarcerated individuals have contracted the coronavirus, and more than 200 federally incarcerated individuals, more than half of whom were over 60 years old, have died of the virus.⁴ High rates of underlying health issues among incarcerated populations place many individuals in custody in high-risk categories that make them more susceptible to complications if they contract the virus.⁵ This legislation provides for meaningful expansion of the pilot program and removes arbitrary benchmarks that ultimately endanger lives. Moreover, while this legislation is written within the context of the global health crisis, the pandemic has shown that release has not had a deleterious impact on public safety, and we encourage Congress to make permanent effective programs such as this even after the end of the pandemic.

These three bills represent meaningful improvements to address faults in the federal sentencing scheme and further fulfill the promise of the First Step Act. These bills, as written, will immediately save lives and curb the number of individuals forced into the criminal-legal system. We thank you for introducing these bills and urge you to support them, unamended, in committee and on the floor. If you have any questions, please contact Sakira Cook, Senior Director of the Justice Reform Program, at cook@civilrights.org.

Sincerely,



Wade Henderson
Interim President & CEO

⁴ U.S. Department of Justice, Federal Bureau of Prisons. COVID-19 Cases. (May 24, 2021). <https://www.bop.gov/coronavirus/>.

⁵ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (Oct. 4, 2016). Special Report: Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12. <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>.