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**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY**

**“Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform”
June 17, 2021**

Chairwoman Jackson Lee, Ranking Member Biggs, and members of the Subcommittee, thank you for the opportunity to submit a statement for the record for this critical hearing. 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, I write to underscore the critical need for sentencing reform and urge the Subcommittee and all of Congress to heed President Biden’s call for the end of mandatory minimums and other overly-punitive policies that undermine the very foundation of justice in our country.

Over the past five decades, U.S. criminal-legal policies have driven an increase in incarceration rates that is unprecedented in this country’s history and unmatched globally: the United States incarcerates more people than any other country in the world, with more than 2 million people currently incarcerated in U.S. prisons and jails.¹ Over-criminalization and over-incarceration have devastating impacts on those ensnared in the criminal-legal system and on their families, do not produce any proportional increase in public safety, and disproportionately harm low-income communities and communities of color. In particular, mandatory minimum penalties are a key driver of the burgeoning prison population, and eliminating them is crucial to any sentencing reform legislation. The Leadership Conference is categorically opposed to mandatory minimums sentences, and urges Congress to take steps toward repairing the damage wrought by these penalties by ending blanket policies that do not allow for judicial discretion and promoting alternatives to arrest and incarceration.

¹ “Trends in U.S. Corrections.” *The Sentencing Project*. Last Updated May 2021. Pg. 2.
<https://www.sentencingproject.org/wp-content/uploads/2021/06/Trends-in-US-Corrections.pdf>.

Mandatory Minimums and the War on Drugs Have Fueled Explosive Prison Population Growth

Since the mid-20th century, Congress has expanded its use of mandatory minimum penalties by broadening it to include different offenses and lengthening the mandatory minimum sentences.² The proliferation of the use of mandatory minimum sentences has fueled skyrocketing prison populations.³ The federal prison population has increased from approximately 25,000 in FY1980 to nearly 152,894 today.⁴ For each year between 1980 and 2013, federal prisons added almost 6,000 more inmates than the previous year.⁵ As of 2016, 55% of the federal prison population was comprised of those who had been sentenced under a mandatory minimum provision.⁶ While drops in prosecutions and in the severity of sentences for drug-related crime, as well as releases due to the COVID-19 pandemic, have led to a decline in the federal prison population in recent years, by and large these piecemeal changes are insufficient to reverse nearly forty years of explosive growth.⁷ The Bureau of Prisons' (BOP) budget has grown in tandem: the President's FY22 budget request for BOP is \$8 billion, which accounts for nearly a quarter of the Department of Justice's (DOJ) entire budget.⁸

Draconian drug laws and their resulting enforcement are the source of much of this growth. Under the banner of the War on Drugs, the Reagan administration imposed particularly harsh mandatory minimum penalties for drug offenses under the Anti-Drug Abuse Act of 1986 and dedicated more than a billion dollars (\$2.3 billion in today's dollars) to law enforcement efforts to increase drug arrests. The Violent Crime Control and Law Enforcement Act of 1994 (known colloquially as the 1994 Crime Bill) instituted a "three strikes" penalty that mandated a life sentence for anyone convicted of certain prior drug or violent felonies and incentivized states to adopt similar 'tough-on-crime' policies.⁹ The "arrest-first"

² "Mandatory Minimum Penalties in the Federal Criminal Justice System." *The U.S. Sentencing Commission*. Oct. 2011. Ch. 2, Pg. 22. https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf.

³ See, e.g., Samuels, Julie, & La Vigne, Nancy, & Thomson, Chelsea. "Next Steps in Federal Corrections Reform: Implementing and Building on the First Step Act." *Urban Institute*. May 2019. https://www.urban.org/sites/default/files/publication/100230/next_steps_in_federal_corrections_reform_1.pdf; Travis, Jeremy, Bruce, & Redburn, Steve. "The Growth of Incarceration in the United States: Exploring Causes and Consequences." *Nat'l Research Council*. 2014. Pg. 336. <http://blogs.law.columbia.edu/praxis1313/files/2019/04/Chapter-13-NAS.pdf>.

⁴ "Statistics: Total Federal Inmates." *Federal Bureau of Prisons*. Last updated June 10, 2021. https://www.bop.gov/about/statistics/population_statistics.jsp.

⁵ James, Nathan. "The Federal Prison Population Buildup: Options for Congress." *Congressional Research Service*. May 20, 2016. Pg. 1. <https://crsreports.congress.gov/product/pdf/R/R42937>.

⁶ "An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System." *United States Sentencing Commission*. Jul. 2017. Pg. 49. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

⁷ Ghandnoosh, Nazgol. "U.S. Prison Decline: Insufficient to Undo Mass Incarceration." *The Sentencing Project*. May 19, 2020. <https://www.sentencingproject.org/publications/u-s-prison-decline-insufficient-undo-mass-incarceration/>; "Policy Shifts Reduce Federal Prison Population." *United States Courts*. April 25, 2017. <https://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population>.

⁸ "Federal Prison System (BOP) FY22 Budget Request." *Department of Justice*. <https://www.justice.gov/jmd/page/file/1398986/download>.

⁹ "Violent Crime Control and Law Enforcement Act of 1994: U.S. Dep't of Justice Fact Sheet." *U.S. Dep't of Justice*. Oct. 24, 1994. <https://www.ncjrs.gov/txtfiles/bills.txt>. The First Step Act of 2018 reduced this sentence to 25 years. Pub. L. No. 115-391 (2018).

policies of the 1980s and '90s led to a surge in drug arrests, with a particularly large impact on cannabis arrests,¹⁰ and an attendant use of long mandatory minimum sentences that caused the federal prison population to explode. The Urban Institute has found that increases in expected time served for drug offenses was the largest contributor to growth in the federal prison population between 1998 and 2010.¹¹ The Charles Colson Task Force on Federal Corrections, a Congressionally-mandated, bipartisan organization, attributes the growth both to the number of people admitted to prison for drug crimes as well as to the increased length of their sentences.¹² Currently, people convicted of drug offenses make up 46.3 percent of the BOP population.¹³

Overly Punitive Sentencing Does Not Deter Crime and Exacerbates Racial Disparities

Yet, despite the dramatic uptick in incarceration, there is no indication that these sentences deter crime, protect public safety, or decrease drug use or trafficking. Increasing the severity of punishment has little impact on crime deterrence, and studies of federal drug laws show no significant relationship between drug imprisonment rates and drug use or recidivism.¹⁴ The punishment-based approach to the War on Drugs, with its dramatic increase in the use of mandatory minimums — and corresponding increase in incarceration — has produced lasting harm in communities across the country while having little effect on actual drug use or crime. Unfortunately, the myth that punishment and harsh mandatory minimums will reduce drug use and crime persists in real and consequential ways: just this past April, Congress extended the temporary “class wide” emergency scheduling of fentanyl-related substances, which will exacerbate untenable federal sentencing trends and give rise to harsh mandatory minimum penalties for offenses involving fentanyl analogues.¹⁵ Statistics about the growth in mass incarceration due to mandatory minimums, combined with data showing they have no positive effect on public safety, illustrate the harmful impact of these sentences on prison growth and the need to turn away from such antiquated “tough on crime” policies.

Mandatory minimums also eliminate judicial discretion, preventing judges from tailoring punishment to a particular defendant by taking into account an individual’s background and the circumstances of his or

¹⁰ “Crime in the United States 1996. Section V. Drugs in America: 1980-1995.” *FBI Uniform Crime Reporting*. 1996. Pg. 280. <https://ucr.fbi.gov/crime-in-the-u.s/1996/96sec5.pdf>.

¹¹ Mallik-Kane, Kamala & Parthasarathy, Barbara & Adams, William. “Examining Growth in the Federal Prison Population, 1998 to 2010.” *Urban Institute*. 2012. Pg. 3. <https://www.urban.org/sites/default/files/publication/26311/412720-Examining-Growth-in-the-Federal-Prison-Population--to--.PDF>.

¹² “Drivers of Growth in the Federal Prison Population.” *Charles Colson Task Force on Federal Corrections*. March 2015. <https://www.urban.org/sites/default/files/publication/43681/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf>.

¹³ “Statistics: Inmate Offenses.” *Federal Bureau of Prisons*. Updated June 5, 2021. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

¹⁴ See, e.g., Luna, Erik. “Mandatory Minimums.” *The Academy for Justice*. 2017. Pgs. 127-130. https://law.asu.edu/sites/default/files/pdf/academy_for_justice/7_Criminal_Justice_Reform_Vol_4_Mandatory-Minimums.pdf; Nat’l Inst. of Justice. “Five Things about Deterrence.” May 2016. <https://www.ojp.gov/pdffiles1/nij/247350.pdf>; “Federal Drug Sentencing Laws Bring High Cost, Low Return.” *Pew Charitable Trusts*. Aug. 27, 2015. <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>.

¹⁵ H.R. 2630, the Extending Temporary Emergency Scheduling of Fentanyl Analogues Act (P.L. 117-12).

her offenses when determining his or her sentence. Mandatory minimums instead place more power in the hands of prosecutors and their charging decisions, which is particularly concerning given that prosecutors are more likely to charge Black people with a crime that carries a mandatory minimum than a White person.¹⁶ Mass incarceration as a whole has had a markedly disproportionate impact on communities of color. Today, BOP reports that 38 percent of its current prison population is Black and 30.2 percent is Hispanic, an enormous disparity given that both groups represent only about one third of the nation's population combined.¹⁷ These disparities are also reflected in mandatory minimum penalties. In a 2017 review of mandatory minimum sentencing policies, the U.S. Sentencing Commission found that Black people in BOP custody were more likely to have been convicted of an offense carrying a mandatory minimum penalty than any other group.¹⁸ Hispanic and Black people accounted for a majority of those convicted with an offense carrying a drug mandatory minimum,¹⁹ despite the fact that White and Black people use illicit substances at roughly the same rate, and Hispanic people use such substances at a lower rate.²⁰ The study also showed that Black people were the least likely to receive relief from mandatory minimum sentences compared to White and Hispanic people.²¹ Finally, the review found racial disparities in convictions of a federal offense subject to a mandatory minimum penalty: 73.2 percent of Black people convicted of a federal offense received a mandatory minimum sentence, compared to 70 percent of White people and 46.9 percent of Hispanic people.²² It is clear that mandatory minimums create stark racial disparities in federal sentencing.

Congress Can Turn Back the Clock on the War on Drugs

Congress has made some progress toward addressing the harms of mandatory minimums. In 2010, Congress passed the Fair Sentencing Act (FSA), which reduced the disparities between the mandatory penalties for crack and powder cocaine from 100:1 to 18:1. Building on this legislation, the First Step Act of 2018 made necessary, though modest, improvements to the federal sentencing scheme by making the FSA retroactive and through expanding the federal safety valve, which permits a sentencing court to disregard minimum sentences for low-level, nonviolent defendants. Under this provision, judges have discretion to make a person eligible for the safety valve in cases where the seriousness of his or her record

¹⁶ Starr, Sonja B., and M. Marit Rehani. "Racial Disparity in Federal Criminal Sentences." *University of Michigan Law School Scholarship Repository*. 2014. Pg. 1323.
<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles>.

¹⁷ "Inmate Statistics." *Federal Bureau of Prisons*. Updated June 5, 2021.
https://www.bop.gov/about/statistics/statistics_inmate_race.jsp. Hispanics make up 18.5% of the U.S. population, while Black people make up 13.4%. "United States QuickFacts." *U.S. Census Bureau*. Last updated July 1, 2019.
<https://www.census.gov/quickfacts/fact/table/US/PST045219>.

¹⁸ "An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System." *United States Sentencing Commission*. Jul. 2017. Pg. 53. https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

¹⁹ "Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System." *United States Sentencing Commission*. Oct. 2017. Pg. 57. https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

²⁰ "Results from the 2018 Nat'l Survey on Drug Use and Health: Detailed Tables." *Substance Abuse and Mental Health Service Administration*. 2018. Table 1.23B. <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf>.

²¹ *Ibid.* at 7.

²² *Ibid.* at 40.

is over-represented, or it is unlikely he or she would commit other crimes. The law also reformed and reduced the unfair three-strike mandatory minimum sentence from life to 25 years. The First Step Act further eliminated 924(c) stacking, which had permitted consecutive sentences for gun charges stemming from a single incident committed during a drug crime or a crime of violence. Unfortunately, the law does not make most of its sentencing reforms retroactive, leaving thousands of people in prison. The First Step Implementation Act of 2021, which will soon go to the Senate floor for a vote, makes these key reforms retroactive and further expands the safety valve. Additionally, the House last year voted to address the collateral consequences of federal marijuana criminalization by passing the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, which would, among provisions, provide for the expungement and resentencing of marijuana offenses. We urge you to support this year's version of the MORE Act, H.R. 3617, in order to right the wrongs of decades of this criminalization.

Yet, these small, measured steps cannot adequately redress years of cruel and lengthy sentencing policies. To address fully the immense harms perpetrated by mandatory minimums and other sentencing practices, Congress must go beyond these incremental reforms and pass meaningful and expansive legislation that transforms the federal sentencing scheme. Such reform would reduce unnecessarily lengthy stays, enabling people to rebuild their lives, reducing the exorbitant costs of the prison system, and give redress to those serving unreasonably long sentences.

Conclusion

Mandatory minimum penalties have incurred devastating economic, societal, and human costs, destroying families and irreparably damaging communities of color. The penalties are lengthy, with almost no room for discretion or mercy. As one federal judge has declared, these are sentences that “no one – not even the prosecutors themselves – thinks are appropriate.”²³ President Biden has also recognized this destructive impact and has called for an end to federal mandatory minimum sentences and other harmful practices.²⁴ These sentences, and particularly those for drug offenses, have led to an explosion in the federal prison population with no attendant positive impact on crime deterrence or public safety. As we mark the 50th anniversary of the War on Drugs in 2021, we strongly urge Congress to take bold steps to address the damage wrought by mandatory minimum sentencing and transform our criminal-legal system into one that delivers true justice and equality.

²³ U.S. v. Kupa, 11 CR-345 (E.D.N.Y.). Oct. 9, 2013. Pg. 4.
<https://img.nyed.uscourts.gov/files/opinions/11cr345SOR.pdf>.

²⁴ “The Biden Plan for Strengthening America’s Commitment to Justice.” <https://joebiden.com/justice/>.