



December 14, 2021

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Attorney General Garland,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 230 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, and the 6 undersigned organizations, we urge the Department of Justice to prioritize immediately policy and agency changes that advance racial equity and end the harms caused by the federal criminal-legal system.

The Biden administration has publicly articulated a commitment to advancing racial justice in the federal criminal-legal system,¹ but as we approach the end of the first year of this administration, there are several issues the civil rights community would like to see prioritized. Indeed, nowhere are racial disparities and inequalities more glaring than in our criminal-legal system, and we believe the Attorney General and the Department of Justice have a vital role to play in overcoming these challenges. Individuals marched across the country last year in response to the murder of George Floyd and the vast injustices facing Black Americans and other racial and ethnic minorities. Immediate bold action on some of the most pressing issues within the criminal-legal system is critical. Key policy decisions and/or inaction by the administration raise concerns for us about the progress the Department of Justice is making on its racial justice priorities. For example:

- The Department of Justice has yet to implement fully the Deaths in Custody Reporting Act.
- Prosecutors at the Department of Justice continue to pursue the death penalty in federal cases despite announcing a moratorium on executions earlier this year.
- COVID-19 continues to threaten the health and safety of people in federal custody, and the danger presented by the Delta variant should intensify Department of Justice efforts to limit possible spread and save lives. Compassionate release and the Coronavirus Aid, Relief, and Economic Security (CARES) Act home confinement expansion provision provide excellent opportunities for the department to expedite releases to protect older people and those with pre-existing health conditions in particular. Unfortunately, the

¹ Lerer, Lisa. "Biden's Sky-High Promises on Racial Justice." *The New York Times*. April 24, 2021. <https://www.nytimes.com/2021/04/24/us/politics/biden-racial-justice.html>.



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department continues to severely limit eligibility and approval for these programs despite clear indications of success among people who have benefited. Moreover, the Office of Legal Counsel's interpretation of the CARES Act would require potentially thousands of individuals who were transferred to the relative safety of home confinement because of COVID-19 to return to federal prison. This misguided decision to resume in-prison sentences will cause needless disruption and pain to families and communities even when no public safety interest exists.

- In April, the Biden administration announced its support for the continued class-wide scheduling of fentanyl analogues subjecting more people, disproportionately Black and Brown individuals, to extreme mandatory minimum sentences for drug offenses despite previous commitments to end mandatory minimum sentences. In September, the administration released a proposal to make this scheduling permanent. Unfortunately, this proposal set a dangerous, radical new precedent in terms of drug scheduling and drug sentencing and continues to promote criminalization rather than public health recourse.

A core lesson from the Obama administration's criminal-legal system initiatives, which contributed to the first reduction in the federal prison population in decades,² is the importance of swift action in stakeholder engagement and the development and dissemination of new policies.³ Waiting too long to act leaves inadequate time for implementation and also makes it easier for a future administration to undermine reforms. Time is of the essence, and the Biden administration and the Department of Justice must assert its commitment to promoting justice and opportunity for all people in America.

We look forward to working with you to advance change within the federal criminal-legal system and our shared goals of racial equity and transformative justice. As such, we make the following recommendations:

I. Take Meaningful Action on Law Enforcement Accountability

The 2020 murder of George Floyd sparked national protests in all 50 states calling for an end to police violence against Black and Brown communities and a demand for justice and accountability in every sector of law enforcement. Unfortunately, Congress has so far failed to pass comprehensive police accountability legislation. The administration and the Department of Justice must rise to meet the moment and take advantage of this opportunity to enact administrative responses to enhance transparency and accountability in law enforcement.

We applaud the Department of Justice's rescission of the previous administration's policy that limited consent decrees in law enforcement investigations. We are also pleased that the department has embarked

² Lopez, German. "Obama is the first president in decades to leave office with a smaller federal prison population." *Vox*. Jan. 6, 2017. <https://www.vox.com/policy-and-politics/2017/1/6/14189862/obama-mass-incarceration-prison>.

³ "Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the Smart on Crime Initiative." *Office of the Inspector General*. June 2017. <https://www.oversight.gov/sites/default/files/oig-reports/e1704.pdf>.



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upon several pattern or practice investigations of police departments and other law enforcement entities. Furthermore, we are hopeful that the recently initiated review of Title VI compliance by law enforcement entities that receive federal funding will help to strengthen oversight and accountability of these entities.

The department must now take further action to enhance transparency of the use of force by law enforcement through improved data collection by finally implementing and enforcing the Death in Custody Reporting Act of 2013 (DCRA). For many years now, the department has delayed full implementation of DCRA. The department's delayed implementation of DCRA is unacceptable, as there continues to be an unreliable national census of custodial and arrest-related deaths, including national statistics on mortality rates, demographic impact, circumstances of these deaths, and implicated law enforcement agencies. Simply put, the federal government does not know how many people are killed by law enforcement every year. DOJ should ensure the collection and publication of nationwide statistics on law enforcement use of excessive or deadly force in accordance with the Violent Crime and Enforcement Act of 1994 and fully implement DCRA. We recommend the immediate adoption of the compliance guidelines that were published in the Federal Register on December 19, 2016, which reflect comprehensive deliberation and public engagement by the department to enforce DCRA.

II. Fully Commit to Ending the Death Penalty

The application of the death penalty is subject to the type of vast racial disparities that this administration has committed itself to eradicating. As The Leadership Conference has made clear, state-sanctioned killing, in all cases, is both inhumane and in conflict with our country's most fundamental principles.⁴

The Department of Justice, unfortunately, has taken actions that run counter to President Biden's stated commitment to ending the federal death penalty.⁵ The independence of the Department of Justice is an important principle. But this does not mean that President Biden is powerless in preventing his administration from pursuing a policy that directly contradicts a campaign promise. President Biden spoke on the campaign trail about the need to end the federal death penalty and to encourage states to move away from the practice.⁶ Unfortunately, while the administration has paused federal executions, DOJ is still pursuing the death penalty in certain cases,⁷ including *United States v. Tsarnev*, which would weaken evidentiary standards in the context of the death penalty.⁸

⁴ "Letter to President Biden about Death Penalty Actions." *The Leadership Conference on Civil and Human Rights*. Jan 26, 2021. <https://civilrights.org/resource/letter-to-president-biden-about-death-penalty-actions/>.

⁵ See Liptak, Adam. "Supreme Court Seems Ready to Restore Death Sentence for Boston Marathon Bomber." *The New York Times*. Oct. 13, 2021. <https://www.nytimes.com/2021/10/13/us/politics/supreme-court-death-sentence-boston-marathon-bomber.html>.

⁶ "Editorial | Biden's pause on death penalty a betrayal of campaign promise." *The Tribune Democrat*. July 8, 2021. https://www.tribdem.com/news/editorial-bidens-pause-on-death-penalty-a-betrayal-of-campaign-promise/article_2cbf0d96-e057-11eb-8d48-33fdafe2a9ba.html.

⁷ See, e.g., Marimow, Ann E. "Dylann Roof appeals death sentence in Charleston church slayings." *The Washington Post*. May 25, 2021. https://www.washingtonpost.com/local/legal-issues/dylann-roof-appeals-sentence-charleston-church/2021/05/24/78b171be-bcb5-11eb-b26e-53663e6be6ff_story.html.

⁸ See Chemerinsky, Erwin. "Op-Ed: Biden's death penalty hypocrisy." *LA Times*. Oct. 16, 2021. <https://www.latimes.com/opinion/story/2021-10-16/joe-biden-death-penalty-hypocrisy-boston-bombing>; Geidner,



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During your confirmation hearing, you indicated that you were troubled by the death penalty and that you would follow the administration's position on the issue.⁹ Without clear guidance to stop seeking and defending death sentences, the Biden administration will leave the door open to its continued use by a future administration.¹⁰ A moratorium on executions alone is not enough. The decisions of former Attorneys General Eric Holder and Loretta Lynch to not carry out executions proved only a temporary respite from the horrors of the machinery of death employed during the end of the Trump administration, executing 13 people in a mere seven months. The Department of Justice must take further action to discontinue the use of this final punishment.¹¹

When it comes to the death penalty, mere lip service to its wrongs is not enough. The Department of Justice should end the pursuit of capital punishment in all cases, and neither seek nor carry out the death penalty. The Department of Justice, and the entire Biden administration, must commit itself to action and leave this punishment with irrevocable consequences in our nation's past.

III. Expedite and Expand Early Release Programs, Especially During the COVID-19 Pandemic

The death and trauma caused by the COVID-19 pandemic has left few communities unscathed. Indeed, as of December 13, 2021, the Bureau of Prisons reports that at least 271 people have died in its custody due to the virus.¹² Since the onset of the pandemic, over 41,000 people in federal prisons and detention, residential reentry centers, and in home confinement have tested positive for COVID-19.¹³ Countless complaints, lawsuits, and personal accounts sadly point to severe inadequacies in the bureau's response, causing needless pain, illness, and death. These unprecedented circumstances offer an opportunity for the Department of Justice to reevaluate its traditional utilization of early release mechanisms in order to protect public health, with additional benefits and lessons for advancing justice.

a. Expand Home Confinement Eligibility Under CARES Act Authority

Congress granted the Department of Justice authority in 2020 under the CARES Act to reduce the federal prison population and alleviate crowding by lengthening the period a person can spend on home confinement.¹⁴ Then-Attorney General William Barr severely limited the effect of this new authority,

Chris. "Supreme Court couldn't consider death penalty case if not for Biden's broken promise." *MSNBC*. Oct. 13, 2021. <https://www.msnbc.com/opinion/supreme-court-couldn-t-consider-death-penalty-case-if-not-n1281474>.

⁹ "White House Reasserts Opposition to Death Penalty, Stresses Independence of Justice Department as DOJ Asks Supreme Court to Reinstate Death Sentence in Boston Marathon Bombing." *Death Penalty Information Center*. June 16, 2021. <https://deathpenaltyinfo.org/news/white-house-reasserts-opposition-to-death-penalty-stresses-independence-of-justice-department-as-doj-asks-supreme-court-to-reinstate-death-sentence-in-boston-marathon-bombing>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² "COVID-19 Coronavirus." *Federal Bureau of Prisons*. Accessed Dec. 13, 2021. <https://www.bop.gov/coronavirus/>.

¹³ *Ibid.*

¹⁴ P.L. 116-136. Sec. 12003.

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however, by creating a long list of eligibility criteria, including that individuals must have a certain PATTERN risk score, have completed at least 50 percent of their sentence, and reside in a low- or minimum-security facility. Unfortunately, an updated memorandum issued under your leadership in April¹⁵ only slightly modified the long list of eligibility criteria, despite criminological evidence that if released many more incarcerated people would not pose an unreasonable public safety risk. For example, the department's criteria ignores research that finds older people in prison have very low rates of recidivism upon release regardless of their offense type or history of violent behavior.¹⁶ Known as "aging out of crime," this phenomenon has been long established and should be considered in decisions to determine whether or not an individual presents a threat to public safety and is suitable for transfers. According to Bureau of Prisons data, approximately 20 percent of its population is age 51 or older.¹⁷ This population also represents a cohort of individuals most at risk of serious illness if infected by the virus. DOJ must act to expand home confinement, loosening the strict eligibility standards and safeguarding the health and wellness of those in BOP custody as well as that of BOP staff.

b. *Allow Successful Individuals to Remain on Home Confinement*

We are troubled that this administration has not yet overturned the Trump administration's determination¹⁸ that the thousands of people who are currently serving sentences on home confinement through a provision of the CARES Act will eventually need to be returned to prison regardless of their success or how their return to incarceration would impact their families and communities. Indeed, Bureau of Prisons Director Michael Carvajal testified in April that since passage of the CARES Act, only three people of the nearly 24,000 sent to home confinement have been returned to prison for new criminal conduct, and another 148 were returned to BOP custody for technical violations of release conditions.¹⁹ These miniscule recidivism numbers should motivate the department to expand and enhance participation in home confinement into the future, not undermine it.

As a legal matter, the Trump administration's interpretation is unsupported by the text of the CARES Act, which neither requires nor permits individuals transferred to home confinement to be returned to prison absent a violation of their home confinement conditions and does not require those transferred to home

¹⁵ "Memorandum for Chief Executive Officers." *Federal Bureau of Prisons*. April 13, 2021.

https://www.fd.org/sites/default/files/news/2021.4.13_-_bop_home_confinement_cares_memo.pdf.

¹⁶ National Research Council. "The Growth of Incarceration in the United States: Exploring Causes and Consequences." 2014. <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

¹⁷ "Inmate Age." *Federal Bureau of Prisons*. Accessed Dec. 13, 2021.

https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

¹⁸ Mascott, Jennifer. "Memorandum Opinion for General Counsel, Federal Bureau of Prisons: Home Confinement of Federal Prisoners After the COVID-19 Emergency." Jan. 15, 2021.

<https://www.justice.gov/sites/default/files/opinions/attachments/2021/01/17/2021-01-15-home-confine.pdf>.

¹⁹ Hearing on Oversight of the Federal Bureau of Prisons Before the S. Comm. on the Judiciary 117th Cong. Apr. 15, 2021. 55:40–58:32.

<https://www.c-span.org/video/?510804-1/senate-judiciary-committee-hearing-federal-prison-system>.



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confinement during the emergency period to return to prison after the emergency period is over.²⁰ Further, returning those released to home confinement back to federal prison would be cruel and inhumane. Those sent to home confinement under the CARES Act were transferred after meeting very strict criteria, and they remain under intensive supervision.

Most of those transferred to home confinement have reunited with their families and loved ones and many have been at home for over a year. These individuals have re-established themselves outside of prison and began planning for the next steps of their lives. The mere prospect of re-incarceration is destabilizing, as it interrupts one's ability to plan for the future, secure employment, and build-up relationships with family. We urge the Department of Justice to reconsider its position, and we ask the President to consider all options to ensure that these individuals are not forced to return to prison after the emergency period ends.

c. Support Expanded Use of Compassionate Release

Despite the intensity of the pandemic, the BOP has continued to deny compassionate release requests at alarming rates and has issued decisions with complete opacity. In the first year following the First Step Act's enactment, the BOP director granted only 55 compassionate release requests (or 3 percent of the requests filed), without tracking reasons for denials.²¹ In calendar year 2020, as COVID-19 tore through the Bureau of Prisons, BOP's director approved only 43 compassionate release requests; in 2021, under the new administration, it has approved only nine such requests.²²

It is deeply concerning that the BOP's approval rate has decreased during the COVID-19 pandemic, despite the fact that national and international health organizations promptly raised the alarm about the uniquely deadly impact the virus would have on correctional facilities. In the first 13 months of the pandemic, the BOP received more than 30,969 compassionate release requests, yet it approved only 36 cases, or 0.1 percent.²³ These shortcomings have had tragic implications: over 41,000 incarcerated in

²⁰ P.L. 116-136, Sec. 12003. The Leadership Conference on Civil and Human Rights and others recently signed onto a letter critiquing the OLC's incorrect interpretation of the CARES Act. "Letter Seeking Reconsideration of OLC Home Confinement Memo." Aug. 4, 2021. <https://democracyforward.org/wp-content/uploads/2021/08/Letter-Seeking-Reconsideration-of-OLC-Home-Confinement-Memo-8.4.21.pdf>.

²¹ "Federal Prison Officials Granted Only 36 of 31,000 Compassionate Release Requests During Pandemic." *Equal Justice Initiative*. June 6, 2021. <https://eji.org/news/federal-prison-officials-granted-only-36-of-31000-compassionate-release-requests-during-pandemic/>.

²² Bureau of Prisons. *Federal Prison System FY 2022 Performance Budget Congressional Submission*. 2021. Pg. 28. <https://www.justice.gov/jmd/page/file/1398306/download>.

²³ Blakinger, Keri & Neff, Joseph. "31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36." *The Marshall Project*. June 11, 2021. <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36>.



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federal facilities have contracted COVID-19, and at least 271 have died from the disease.²⁴ Thirty-five of those who died were waiting for a decision on a compassionate release petition.²⁵

If a global pandemic that is disproportionately deadly for the elderly and medically vulnerable does not qualify as an “extraordinary and compelling circumstance” for compassionate release, it is difficult to imagine what would qualify under the BOP’s criteria. Indeed, federal prosecutors have followed BOP’s lead by opposing the majority of petitions for compassion release.²⁶ This must change. We urge the Department of Justice to reform its harsh and unjustifiable approach to compassionate release petitions from people in federal custody now and in the future. You should direct the Bureau of Prisons to bring compassionate release motions for medically vulnerable individuals, and direct line prosecutors to support those compassionate release motions filed directly by medically vulnerable individuals.

IV. End the War on Drugs and Eliminate Mandatory Minimums

a. Support the Expiration of the Emergency Scheduling of Fentanyl Analogues

The administration’s position on fentanyl represents an example of choosing fear-based policymaking in place of an evidence-based approach that prioritizes justice and equity. In 2018, the Drug Enforcement Administration placed a class of substances with chemical properties similar to fentanyl on Schedule I of the federal Controlled Substances Act. The move applied overly punitive mandatory minimum sentencing laws to the broad class of fentanyl-related compounds. In January 2020, and again in May 2021, Congress temporarily extended the class-wide scheduling. Unfortunately, the Biden administration supported the most recent extension of class-wide scheduling,²⁷ despite President Biden’s call for the end of mandatory minimum sentencing.²⁸

The scourge of overdoses from drugs like fentanyl is a serious crisis that warrants sustained federal action. However, attempting to solve this challenge through harsher criminal punishments is simply doubling down on failed policies of the past and will do nothing to address overdose rates while imposing heavy costs on vulnerable communities. Moreover, this scheduling action represents an unprecedented break from an evidence-based drug control approach by *preemptively* placing substances on Schedule I

²⁴ “COVID-19 Coronavirus.” *Federal Bureau of Prisons*. Accessed Dec. 13, 2021.

<https://www.bop.gov/coronavirus/>.

²⁵ Blakinger, Keri & Neff, Joseph. “31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.” *The Marshall Project*. June 11, 2021.

<https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36>.

²⁶ *Ibid*.

²⁷ See Testimony of Regina LaBelle, Acting Director, ONDCP, at House Energy & Commerce Hearing on “An Epidemic Within a Pandemic: Understanding Substance Use and Misuse in America.” April 14, 2021.

https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_LaBelle_HE_2021.04.14.pdf.

²⁸ Schwartzapfel, Beth. “Biden Could Have Taken the War on Drugs Down a Notch. He Didn’t.” *The Marshall Project*. June 6, 2021. <https://www.themarshallproject.org/2021/06/16/biden-could-have-taken-the-war-on-drugs-down-a-notch-he-didn-t>; “The Biden Plan for Strengthening America’s Commitment to Justice.” *JoeBiden.com*. <https://joebiden.com/justice/>.



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without scientific confirmation of their dangerousness or potential for abuse. We know from experience that public health strategies, not overloading jails and prisons, offer the best approach for dealing with problematic drug use. In this instance, the Government Accountability Office found the policy change had no impact on the amount of fentanyl-related substances in the United States, and instead found that “the number of reports of all fentanyl analogues and other related compounds (e.g., precursors), including individually scheduled analogues, have *increased* since [the implementation of class-wide scheduling.]”²⁹ These harsh laws also disproportionately affect marginalized communities, with people of color comprising close to 75 percent of those sentenced in fentanyl cases and 68 percent of those sentenced in fentanyl analogue cases in 2019.³⁰

Earlier this year, The Leadership Conference and more than 100 other organizations wrote to urge Congress to let the Trump administration’s emergency scheduling expire.³¹ As noted at the time, a continuation of the emergency scheduling was in direct conflict with the view of the human rights, criminal justice, and public health communities.³² We are deeply disappointed by the administration’s recent proposal making this scheduling policy permanent.³³ The proposal is unscientific, as it endorses the Schedule I placement and prosecution of a large group of substances based on chemical structure alone with no checks to ensure those substances are actually harmful. The proposal would also still lead to harsh criminal penalties, despite claims that the policy avoids mandatory minimums. In fact, the proposal would expand mandatory minimums to explicitly apply to substances charged under the Federal Analogue Act. This policy relies on outdated tactics and fails to provide any evidence-based solutions rooted in true harm reduction and treatment. The administration should, at minimum, address the shortcomings in its proposal, but to truly address the opioid epidemic, the administration should work with Congress to ensure the class-wide scheduling policy expires and that health-centered measures that can reduce overdose rates are passed into law. We can address the overdose epidemic without relying on outdated and harmful punishment-centered approaches.

b. *Change Department of Justice Charging Policies*

Prior to your confirmation, the Department of Justice rescinded the Trump administration’s policy directing prosecutors to charge the most serious offenses that carry the most substantial sentences and reintroduced the Obama administration policy that directs prosecutors to conduct an individualized

²⁹ “Synthetic Opioids: Considerations for the Class-Wide Scheduling of Fentanyl-Related Substances.” *United States Government Accountability Office*. April 2021. <https://www.gao.gov/assets/gao-21-499.pdf>.

³⁰ “Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns.” *U.S. Sentencing Commission*. Pg. 24. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

³¹ “Letter in Opposition to Class-Wide Scheduling of Fentanyl Analogues.” *drugpolicy.org*. April 8, 2021. https://drugpolicy.org/sites/default/files/class_wide_scheduling_of_fentanyl_analogues_opposition_letter_to_congress_4_13_21.pdf.

³² *Ibid.*

³³ “Biden-Harris Administration Provides Recommendations to Congress on Reducing Illicit Fentanyl-Related Substances.” Office of National Drug Control Policy. Sept. 2, 2021. <https://www.whitehouse.gov/ondcp/briefing-room/2021/09/02/biden-harris-administration-provides-recommendations-to-congress-on-reducing-illicit-fentanyl-related-substances/>.

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assessment of relevant facts in making charging and sentencing decisions.³⁴ However, the changes were billed as an interim step, with more charging and sentencing guidelines to come.³⁵ It is critical to introduce these new guidelines as quickly as possible and work diligently with stakeholders to ensure they are implemented effectively. Priorities should include expanding the 2013 Holder memo, which gave prosecutors discretion to avoid charging mandatory minimums in certain drug cases by directing prosecutors to not bring charges that trigger mandatory minimum sentences in all cases where alternative charges are available.³⁶ Prosecutors should also stop seeking longer sentences under the U.S. Sentencing Guidelines based on the racially unjust 18:1 disparity between crack and powder cocaine, conduct that was acquitted at trial, and the accused's decision to exercise their constitutional right to a fair trial. DOJ should also adopt policies that revitalize the historic deference to courts in making sentencing decisions. By making these and other changes, DOJ will take critical steps towards realizing and exercising equal justice.

c. *Support the Decriminalization of Cannabis*

The administration's actions around fentanyl outlined above are emblematic of larger failures in unwinding the drug war. The Biden administration committed to working to "decriminalize the use of cannabis and automatically expunge all prior cannabis use convictions," and to "support the legalization of cannabis for medical purposes, leave decisions regarding legalization for recreational use up to the states, and reschedule cannabis."³⁷

In the spirit of decriminalization, DOJ must commit to ending the prosecution of marijuana offenses. It should reinstate the Obama-era Cole Memo to ensure state-legal programs can continue to operate without fear of federal intervention and prosecution.³⁸ But the only way to truly decriminalize cannabis is to remove it from the list of scheduled substances under the Controlled Substances Act (CSA). The DOJ should support efforts to do this, as well as push for the expungement of past and current marijuana convictions. At the state level, decriminalization of cannabis has been shown to reduce arrest rates significantly for people of color, particularly Black people, who continue to carry the disproportionate weight of cannabis enforcement across the country.³⁹

³⁴ Reilly, Ryan J. "DOJ Pulls Trump Administration's Harsh Charging and Sentencing Policy." *The Huffington Post*. January 29, 2021. https://www.huffpost.com/entry/doj-biden-sentencing-charging-policy_n_601441aac5b63b0fb2808ce7?3dl.

³⁵ Ibid.

³⁶ "Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division." *Office of the Attorney General*. August 12, 2013. <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

³⁷ "Lift Every Voice: The Biden Plan for Black America." *JoeBiden.com*. <https://joebiden.com/blackamerica/>.

³⁸ "Memorandum for all United States Attorneys." *Office of the Deputy Attorney General*. August 29, 2013. <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

³⁹ Sheehan, Brynn, et al. "Association of Racial Disparity of Cannabis Possession Arrests Among Adults and Youths With Statewide Cannabis Decriminalization and Legalization." *JAMA Health Forum*. 2021. <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2785582>.

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It is worth noting that the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, passed by the House of Representatives in December 2020, would decriminalize cannabis at the federal level and allow states to decide the course they wish to take on cannabis policy by removing it from the list of scheduled substances under the CSA. The bill also provides for the expungement and resentencing of cannabis convictions.⁴⁰ The MORE Act demonstrates that there is congressional precedent and support for decriminalizing cannabis that DOJ should strongly consider in determining its stance on cannabis policy.

V. Fully Implement the First Step Act

a. Implement Promised First Step Act Reforms

The passage of the First Step Act was an important, if modest, step forward for justice and human dignity. But much depended on agencies effectively implementing the mandated reforms. Unfortunately, little has been done to advance the law's core prison reform, a system to provide incentives for participation in activities designed to reduce recidivism.⁴¹ Both the Department of Justice and the Bureau of Prisons have failed to meet mandates designed to implement the reform, as detailed by a recent memorandum from the Office of the Inspector General.⁴² It is imperative that the Biden administration and the Department of Justice prioritize implementation of the First Step Act and avoid hollowing out what should be a critical advancement for criminal justice reform.

b. Discontinue the Use of PATTERN

The Department of Justice has advanced PATTERN as a new gender-specific risk and needs assessment tool that fulfills the First Step Act's statutory requirement to assign a "recidivism score" to each incarcerated person that predicts their risk of committing a new crime within three years of release.⁴³ In May 2018, The Leadership Conference urged the House Judiciary Committee to vote "No" on the First Step Act because we feared its lack of transformative "front end" reform would stall our justice system in the broken status quo.⁴⁴ Further, we criticized the bill for "using risk assessment tools in an unconventional manner [because they] are unreliable and exacerbate racial and socioeconomic disparities."⁴⁵ After members of Congress made key changes to move the bill toward meaningful reform,

⁴⁰ H.R.3884 - MORE Act of 2020. <https://www.congress.gov/bill/116th-congress/house-bill/3884>.

⁴¹ "Testimony from the Federal Public & Community Defenders Legislative Committee to the Senate Judiciary Committee." May 4, 2021.

https://www.fd.org/sites/default/files/news/2021.05.04_letter_from_federal_defenders_to_sjc_0.pdf.

⁴² Horowitz, Michael. "Impact of the Failure to Conduct Formal Policy Negotiations on the Federal Bureau of Prisons' Implementation of the FIRST STEP Act and Closure of Office of the Inspector General Recommendations." *U.S. Dep't of Justice Office of the Inspector General*. Nov. 2021.

<https://oig.justice.gov/sites/default/files/reports/22-007.pdf>.

⁴³ 18 U.S.C. § 3632(a).

⁴⁴ Letter from The Leadership Conference on Civil & Human Rights. "Vote "No" on The FIRST STEP Act." May 8, 2018. <https://civilrights.org/resource/voteno-first-step-act/>.

⁴⁵ *Ibid.*



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we ultimately supported the legislation while continuing to articulate concerns regarding the use of a “risk and needs assessment tool.”⁴⁶

It seems that our fears have been substantiated. The Bureau of Prisons 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. 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 Bureau of Prisons is using an unvalidated risk-assessment tool to make life and death decisions during the global pandemic.⁴⁷ The Department of Justice’s development of this tool has been opaque, undermining accountability and frustrating the ability of outside researchers and advocates to effectively test tools and advocate for those who are incarcerated. The Department of Justice and the Biden administration should abandon the use of PATTERN for any form of release recommendation or decision-making, now and in the future.

VI. Forge A New Path Forward

President Biden has spoken forcefully about racial injustice and the inequities that plague our criminal-legal system, and the administration should be commended for some of the steps it has taken, such as the January executive order on racial equity.⁴⁸ Unfortunately, when it comes to the criminal-legal system, the action taken is not always reflective of the stated objectives. The examples above reflect instead in some instances a doubling down on the failed policies of the past administration instead of charting a bold new course.

There is still an opportunity to choose a different path. We urge the Department of Justice and the Biden administration to recommit themselves to the principles of justice and equality and work to end the scourge of systemic racism that plagues our criminal-legal system and all aspects of our society. If you have any questions, please feel free to contact Sakira Cook, Senior Director of the Justice Program at The Leadership Conference on Civil and Human Rights, at cook@civilrights.org.

Sincerely,

Amnesty International USA
American Civil Liberties Union
Drug Policy Alliance

⁴⁶ See “The ACLU and The Leadership Conference Urge Members of Congress to Support S. 756, the FIRST STEP Act.” *The Leadership Conference on Civil and Human Rights*. Dec. 19, 2018. <https://civilrights.org/resource/the-aclu-and-the-leadership-conference-urge-members-of-congress-to-support-s-756-the-first-step-act/>.

⁴⁷ “2020 Review and Revalidation of the First Step Act Risk Assessment Tool.” *National Institute of Justice*. January 2021. <https://www.ojp.gov/pdffiles1/nij/256084.pdf>.

⁴⁸ “Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.” *The White House*. January 20, 2021. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.



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Federal Public and Community Defenders
The Leadership Conference on Civil and Human Rights
NAACP
NAACP Legal Defense and Educational Fund, Inc.
The Sentencing Project

CC: Deputy Attorney General Lisa O. Monaco
Associate Attorney General Vanita Gupta