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The Honorable Charles E. Schumer
Majority Leader
United States Senate
Washington, DC 20150

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20150

Dear Majority Leader Schumer and Minority Leader McConnell:

At any given time, Federal Public and Community Defenders and other appointed counsel under the Criminal Justice Act represent 80 to 90 percent of all individuals in the federal criminal system. Our clients, families and communities—who are disproportionately people of color—bear the direct cost of our country’s severe sentencing laws.

We write today to share our views on four measures intended to help reform that system: the Eliminating Quantifiably Unjust Application of the Law Act (“EQUAL Act”) (S. 79), the First Step Implementation Act (S. 1014), the COVID-19 SAFER Detention Act (S. 312), and the Prohibiting Punishment of Acquitted Conduct Act (S. 601). Although broader reforms are needed, enactment of these bills would be a critical step towards a fairer criminal legal system.

Thirty-five years ago, President Reagan signed the Anti-Drug Abuse Act of 1986 (“ADAA”) into law.¹ The ADAA, together with other laws passed in the eighties and early nineties, transformed the federal criminal legal system by arming prosecutors with the cudgel of harsh mandatory minimum penalties for drug offenses. Mandatory minimums hand immense power to prosecutors, whose charging decisions too often dictate the outcome of a case. For most individuals who face federal criminal charges, the threat of outsize sentences have made the potential consequences of going to trial so extreme that in the federal criminal legal system, trials are “on the verge of extinction.”² In 2020, about 98.2 percent of federal criminal convictions came from guilty pleas.³ People of color

¹ Anti-Drug Abuse Act of 1986, H.R. 5484 (99th Cong.) (P.L. 99-570) (1986).

² Nat’l Ass’n of Crim. Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* at 6 (2018), <https://bit.ly/3zo7ZwJ> (“Trial Penalty Report”).

³ U.S. District Cts., *Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Entering Dec. 31, 2020* (Dec. 2020), <https://bit.ly/3vTLNw>.

have disproportionately borne the brunt of this regime: decades of data show that Black and Latinx people are over-represented in mandatory minimum sentences.⁴

Over the past decade, Congress has taken important bipartisan steps towards righting this injustice,⁵ but there is an urgent need for further action. During the 117th Congress, we have been pleased to see continuing bipartisan support for the following, albeit incremental, next steps to advance reform:

- **First Step Implementation Act.** In 2018, Congress passed the First Step Act with overwhelming bipartisan support, reducing sentences for certain drug offenses, curtailing “stacking” of § 924 charges, and making the Fair Sentencing Act of 2010 retroactive.⁶ As a result, more than 3,880 individuals serving unduly long sentences imposed under the discriminatory 100-to-1 crack-cocaine ratio have seen reductions in their sentences.⁷ Preliminary recidivism rates for those who have been released under the First Step Act are extremely low: in December 2020, the Department of Justice reported that only 11 percent of that group had recidivated.⁸ But other critical sentencing reforms of the First Step Act were *not* made retroactive, leaving too many behind. The First Step Implementation Act would make those sentencing reforms retroactive, modestly expand the safety valve, and make technical corrections to the First Step Act, in addition to other reforms.⁹
- **COVID-19 SAFER Detention Act.** COVID-19 has torn through Bureau of Prisons (BOP) facilities, leading to deaths that could have been prevented and revealing the shortcomings and dysfunction of the federal prison system.¹⁰ The COVID-19 Safer Detention Act would improve tools to reduce prison populations by expanding the use of home confinement for some older people, shortening the period individuals must wait before filing a motion for compassionate release during the pendency of the COVID-19 pandemic, and clarifying that individuals sentenced before November 1, 1987 are eligible for compassionate release.¹¹

⁴ Marit Rehavi and Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. of Pol. Econ. 6 at 1350–1351 (Dec. 2014) (hereinafter Rehavi, *Racial Disparity*); U.S. Sent’g Comm’n, *Quick Facts, Mandatory Minimum Penalties*, <https://bit.ly/2Tu5LLZ>.

⁵ *See, e.g.*, Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat 2372 (Aug. 3, 2010); First Step Act of 2018 (FSA), Pub. L. No. 115-391, 132 Stat 5194 (Dec. 21, 2018).

⁶ *See* FSA at Title IV (Sentencing Reform).

⁷ Federal Bureau of Prisons, *First Step Act*, <https://bit.ly/3vqD13J> (Jan. 24, 2020).

⁸ Off. of Att’y Gen. U.S. Dep’t of Justice, *The Attorney General’s First Step Act Section 3634 Annual Report* at 14 (Dec. 2020), <https://bit.ly/2M3Mr4b>.

⁹ First Step Implementation Act of 2021, S. 1014, 117th Cong. (2021).

¹⁰ *See* Letter from David Patton and Jon Sands, Co-Chairs, Federal Public & Community Defenders Legislative Committee to Hon. Dick Durbin, Chair, Committee on the Judiciary & Hon. Chuck Grassley, Ranking Member at 2-8 (May 4, 2021), <https://bit.ly/2ZrbGo3>.

¹¹ COVID-19 Safer Detention Act of 2021, S. 312, 117th Cong. (2021).

- **Prohibiting Punishment of Acquitted Conduct Act.** Current law allows federal judges to sentence people based on charges for which a jury found them to be not guilty. In addition to being profoundly unfair, this practice weakens the finality and citizen oversight that a jury trial provides, and disincentivizes people from going to trial. The bipartisan Prohibiting Punishment of Acquitted Conduct Act would prohibit federal sentencing courts from increasing a person’s punishment based on acquitted conduct.¹²
- **EQUAL Act:** On September 28, 2021, the U.S House of Representatives passed the EQUAL Act by an overwhelmingly bipartisan margin. The EQUAL Act (Eliminating a Quantifiably Unjust Application of the Law) would eliminate the 18-1 crack-cocaine to powder-cocaine ratio.¹³ Despite overwhelming evidence that distinguishing between these two forms of cocaine drives flawed policy, crack cocaine is still penalized more harshly than powder cocaine, and prosecutors continue to disproportionately target Black individuals for enforcement relative to the overall population. In fiscal year 2019, over 80 percent of those prosecuted for crack offenses were Black, even though Black individuals make up about 13 percent of the total United States population¹⁴ and studies have shown that upwards of 66 percent crack users are white.¹⁵ Indeed, the Drug Policy Alliance cites data that shows that Black and White people sell and use drugs at similar rates.¹⁶

We were glad to see the Department of Justice voice support for the EQUAL Act.¹⁷ But the Department continues to indict mandatory-minimum cases triggered by the disparity, demonstrating the need for Congressional action. Until the disparity is eliminated as a matter of law it will continue to perpetuate injustice.

The need for reform in the federal criminal system is acute, and Congress must pass legislation that will meaningfully and equitably achieve significant reductions in the prison population. Passage of these bills would be an important—albeit modest—step towards that goal. We ask Congress to treat these issues with the urgent attention they demand.

¹² Prohibiting Punishment of Acquitted Conduct Act of 2021, S. 601, 117th Cong. (2021).

¹³ EQUAL Act, H.R. 1693, 117th Cong. (2021); Reps. Jeffries, Scott, Armstrong, and Bacon Introduce Bipartisan Bill to Eliminate Sentencing Disparity Between Crack and Powder Cocaine (Mar. 9, 2021), <https://bit.ly/3xnewWQ>.

¹⁴ U.S. Sent’g Comm’n, *Quick Facts: Crack Cocaine Trafficking Offenses* (FY 2019), <https://bit.ly/3wkMhrw>; U.S. Census Bureau, *United States Quick Facts*, (last accessed Jun. 14, 2021), <https://www.census.gov/quickfacts/fact/table/US/PST045219> (U.S. population estimates as of July 2019).

¹⁵ Joseph J. Palamar, *et al.*, *Powder Cocaine and Crack Use in the United States: An Examination of Risk for Arrest and Socioeconomic Disparities in Use*, *J. Drug Alcohol Depend.* (Apr. 2015), <https://bit.ly/3gw5NdW> (67.4% in this study); Deborah Vagins & Jesselyn McCurdy, *Twenty Years of the Unjust Federal Crack Cocaine Law*, The Am. Civil Liberties Union; Washington, DC: 2006. (Oct. 2006), <https://bit.ly/3gv98Ks>.

¹⁶ See Drug Policy Alliance, *The Drug War, Mass Incarceration and Race* at 3 n.2 (Jun. 2015) fn. 2 (gathering sources), <https://bit.ly/2ZuWWo8>.

¹⁷ Statement of the U.S. Dept. of Justice Before the Committee on the Judiciary United States Senate, Examining Federal Sentencing for Crack and Powder Cocaine (June 22, 2021), <https://bit.ly/3GwdLzO>.

Sincerely,

/s/

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Co-Chair, Federal Defender Legislative Committee

/s/

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cc: Chairman Richard J. Durbin, United States Senate Committee on the Judiciary
Ranking Member Chuck Grassley, United States Senate Committee on the Judiciary