



**STATEMENT OF
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**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY**

**HEARING ON “OVERSIGHT OF THE UNITED STATES DEPARTMENT OF JUSTICE”
OCTOBER 21, 2021**

Chairman Nadler, Ranking Member Jordan, and members of the committee: 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 230 national organizations to promote and protect civil and human rights in the United States, we write to underscore the critical need for the Department of Justice to take immediate, bold action on the most pressing issues within the 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. Across the country, people marched last year in response to the murder of George Floyd and the vast injustices facing Black Americans and other people of color. However, 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. Our recommendations regarding some of those priorities are as follows:

I. Take Meaningful Action on Law Enforcement Accountability

The 2020 killing of George Floyd sparked national protests in all 50 states calling for an end to police brutality against Black and Brown communities and a demand for 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 law enforcement accountability.

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/>.

We applaud the Department of Justice's rescission of the previous administration's policy that limited consent decrees in law enforcement investigations.² We are also pleased that the department has embarked upon several pattern and practice investigations of police departments and other law enforcement entities.³ 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 accountability and oversight of these entities.⁴

There are, however, other actions the department could take to enhance law enforcement accountability. Among these is improved data collection. It is imperative that the department improve its data collection efforts surrounding law enforcement. For years, the department has delayed full implementation of the Deaths in Custody Reporting Act of 2013 (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. The department should ensure the collection and publication of nationwide statistics on police shootings in accordance with the Violent Crime and Enforcement Act (1994) and fully implement the 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.⁵

During Attorney General Merrick Garland's confirmation hearing, the attorney general indicated that he was troubled by the death penalty and that he would follow the administration's position on the issue.⁶

² Phillips, Kristine. "AG Garland reverses Trump-era policy limiting consent decrees in police investigations." *USA Today*. April 16, 2021. <https://www.usatoday.com/story/news/politics/2021/04/16/merrick-garland-resumes-consent-decree-use-police-investigations/7254308002/>; "Garland Restores Key Accountability Tool." *The Leadership Conference on Civil and Human Rights*. April 16, 2021. <https://civilrights.org/2021/04/16/garland-restores-key-accountability-tool/>.

³ See, e.g., Breuninger, Kevin. "Justice Department investigating Phoenix police practices, including use of deadly force, in civil rights probe." *CNBC*. Aug. 5, 2021. <https://www.cnn.com/2021/08/05/justice-department-investigating-phoenix-police-department-in-civil-rights-probe.html>; Farivar, Masood. "US Justice Department Ramps Up Investigations of Police." *Voice of America*. May 20, 2021. <https://www.voanews.com/a/usa-us-justice-department-ramps-investigations-police/6206017.html>.

⁴ Gupta, Vanita. "Review of the Department's administrative enforcement of Title VI and the Safe Streets Act." *U.S. Department of Justice*. Sep. 15, 2021. <https://www.justice.gov/asg/page/file/1433211/download>.

⁵ "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/>.

⁶ "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->

The Department of Justice, unfortunately, has taken actions that run counter to President Biden's stated commitment to ending the federal death penalty.⁷ While the administration has paused federal executions, the department is still pursuing the death penalty in certain cases.⁸ 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.⁹ 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 thirteen people in a mere seven months. The Department of Justice must take further action to discontinue the use of this final punishment.¹⁰

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 October 18, 2021, the Bureau of Prisons reports that at least 262 people in its custody have died due to the virus.¹¹ Since the onset of the pandemic, close to 43,000 people in federal prisons and detention, residential reentry centers, and in home confinement have tested positive for COVID-19.¹² 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.¹³ Then-Attorney General William Barr severely limited the effect of this new authority, 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 in April¹⁴ only slightly

independence-of-justice-department-as-doj-asks-supreme-court-to-reinstate-death-sentence-in-boston-marathon-bombing.

⁷ See Kruzal, John. "DOJ asks Supreme Court to revive Boston Marathon bomber death sentence." *The Hill*. June 14, 2021. <https://thehill.com/regulation/court-battles/558424-shifting-course-biden-urges-supreme-court-to-revive-boston-marathon>.

⁸ 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.

⁹ Ibid.

¹⁰ Ibid.

¹¹ "COVID-19 Coronavirus." *Federal Bureau of Prisons*. Accessed October 18, 2021.

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

¹² Ibid.

¹³ P.L. 116-136. Sec. 12003.

¹⁴ "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.

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.¹⁵ 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 as of October 18, 2021.¹⁶ This population also represents a cohort of individuals most at risk of serious illness if infected by the virus. The department 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 also troubled by the Department of Justice's reported acceptance¹⁷ of 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.

This news, if true, is worrisome on several levels. As a legal matter, the 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 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

¹⁵ 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>.

¹⁶ "Inmate Age." *Federal Bureau of Prisons*. https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

¹⁷ Savage, Charlie & Kanno-Youngs, Zolan. "Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency." *The New York Times*. July 19, 2021. <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html>.

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>.

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>.

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 reestablished themselves outside of prison and began planning for the next steps of their lives. The mere prospect of reincarceration is destabilizing, as it interrupts one's ability to plan for the future, secure employment, and build up relationships with family. The Department of Justice must reconsider its position.

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; as of mid-2021, under the new administration, it had 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 thirteen 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: As stated earlier, approximately 43,000 people incarcerated in federal facilities have contracted COVID-19, and at least 262 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

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>.

²⁴ "COVID-19 Coronavirus." *Federal Bureau of Prisons*. Accessed August 20, 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>.

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. The attorney general 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, May 2021, and October 2021, Congress temporarily extended the class-wide scheduling. Unfortunately, the Biden administration has supported the 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 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. With regard to class-wide scheduling, 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

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/>.

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>.

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 opioid epidemic without relying on outdated and harmful punishment-centered approaches.

b. Change Department of Justice Charging Policies

Prior to Attorney General Garland's 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 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

³⁰ "Groups Urge US to End Emergency Scheduling of Fentanyl-related Substances." *Human Rights Watch*. April 8, 2021. <https://www.hrw.org/news/2021/04/08/groups-urge-us-end-emergency-scheduling-fentanyl-related-substances#>.

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/>.

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*.

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. The department should also adopt policies that revitalize the historic deference to courts in making sentencing decisions. By making these and other changes, the department will take critical steps toward 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 previously 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, the Justice Department 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 Justice Department should support efforts to do this, as well as push for the expungement of past and current marijuana convictions.

It is worth noting that the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act), passed by the House of Representatives in December 2020, would decriminalize marijuana by removing it from the list of scheduled substances under the CSA. The bill also provides for the expungement and resentencing of marijuana convictions.³⁹ There is congressional precedent and support for decriminalizing marijuana that the Justice Department should strongly consider in determining its stance on the MORE Act.

V. Effectively 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 Act's core prison reform, a system to provide incentives for participation in

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-convict-enhancements-in-certain-drug-cases.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 H.R.3884 - MORE Act of 2020. <https://www.congress.gov/bill/116th-congress/house-bill/3884>.

activities designed to reduce recidivism.⁴⁰ Both the Department of Justice and the Bureau of Prisons have failed to meet mandates designed to implement the reforms. 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.⁴¹ In May 2018, The Leadership Conference urged the House Judiciary Committee to vote “No” on the First Step Act because we feared the Act’s lack of transformative front end reform would stall our justice system in the broken status quo.⁴² Further, we criticized the bill for “using risk assessment tools in an unconventional manner [because they] are unreliable and exacerbate racial and socioeconomic disparities.”⁴³ After members of Congress made key changes to move the bill toward meaningful reform, we ultimately supported the legislation while continuing to articulate concerns regarding the use of a risk and needs assessment tool.⁴⁴

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.⁴⁵ 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. Conclusion

⁴⁰ “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.

⁴¹ 18 U.S.C. § 3632(a).

⁴² 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/>.

⁴³ Ibid.

⁴⁴ 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/>.

⁴⁵ “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>.

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.⁴⁶ Unfortunately, when it comes to the criminal-legal system, too often the action has failed to match the rhetoric. 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. We urge the Department of Justice to end these regressive policies and move forward on necessary, transformative reforms.

⁴⁶ “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/>.