

## Reforming the Federal Criminal System: Lessons from Litigation

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Cornel West has said: “There is no doubt that if young white people were incarcerated at the same rates as young black people, the issue would be a national emergency.” Today, people of color account for nearly eighty percent of those convicted of federal crimes. We are facing a national emergency and systemic change is needed. Congress has the power and the obligation to address this crisis. Joining with the Federal Defender Program for the Northern District of Illinois and private attorneys, our Federal Criminal Justice Clinic’s litigation challenged law enforcement’s fake stash house operations as racially discriminatory. That litigation encapsulates and reveals many of the glaring problems with the federal criminal laws, and especially the drug laws: Mandatory minimum penalties and recidivist enhancements fuel mass incarceration; the drug laws disproportionately impact men of color; non-retroactive legal reforms unjustly leave many behind bars; the federal pretrial detention system casts too wide a net and over-detains people of color; the absence of comprehensive and accessible back-end sentencing relief leaves very limited avenues for people like our stash house clients to avoid an excessive sentence; the trial tax unfairly imposes staggeringly high sentences on people simply because they exercise their constitutional right to trial; prosecutorial discretion is overbroad in charging, plea-bargaining, and sentencing; racial disparities pervade in law enforcement and prosecution; discovery restrictions prevent people like our clients from obtaining information about potential racial discrimination by law enforcement or prosecutors; restrictions on litigating claims of racial discrimination against law enforcement and prosecutors limit the ability of our clients and others to succeed in court; publicly available data about the federal and state criminal systems is limited; and harsh criminal discovery rules trammel the rights of people accused of crimes. In addition, Congress must rectify other systemic problems related to drug policy, law enforcement, and privacy. This Statement was originally submitted to Congress as written testimony in March 2021 and is published here in slightly modified form; it proposes systemic change on these fronts and more.

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## I. INTRODUCTION<sup>1</sup>

In August 2009, Dwayne White—just twenty-two years old—was coming into his own. He had moved in with his girlfriend and was looking forward to their future together. He had a job and enjoyed spending his spare time with his large family.<sup>2</sup> On August 10, 2009, after having dinner with his mother, he received a call from Leslie Mayfield, someone he'd always looked up to as an older brother and trusted deeply. Leslie—twenty years Dwayne's senior—told Dwayne that he needed him but did not give Dwayne any details about why. Out of loyalty, Dwayne agreed to come with Leslie. What Leslie failed to tell Dwayne was that they were going to rob a drug stash house. And what even Leslie did not know was that he was being set up by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

<sup>1</sup> This piece is a lightly edited reprint of the authors' written testimony before the Judiciary Committee of the House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, Hearing on “Controlled Substances: Federal Policies and Enforcement” (Mar. 11, 2021). The original testimony is available at <https://docs.house.gov/meetings/JU/JU08/20210311/111301/HHRG-117-JU08-20210311-SD006.pdf> [<https://perma.cc/GY9M-2QZL>]. The introduction draws heavily on Dwayne White’s Motion for Compassionate Release. See *United States v. White*, No. 09-CR-687 (N.D. Ill. Mar. 1, 2021), Dkt. 372.

<sup>2</sup> Annie Sweeney & Jason Meisner, ‘Stash House’ Stings Have Been Discredited. Now, the Convicted See a Chance for Redemption, CHICAGO TRIB., (Mar. 5, 2021, 1:51 PM), <https://www.chicagotribune.com/news/criminal-justice/ct-stash-house-defendants-compassionate-release-20210305-qiw4codkzabhpalsrns35ae-story.html>.

Leslie told Dwayne to follow his lead and that his contact would explain what was happening once they arrived at the meet-up site. Because the undercover ATF agent had never met nor heard of Dwayne before that day, the agent asked if Dwayne knew what was going on.<sup>3</sup> Dwayne, naively not wanting to appear weak in front of the group, said that he did. But in reality, Dwayne did not know the full extent of the plan. In fact, the first time Dwayne heard the words “stash house robbery” was from the undercover agent. Minutes later, the ATF arrested Dwayne, Leslie, and two others for agreeing to participate in the robbery of a fictitious drug stash house that the undercover agent claimed would have twenty-five to thirty-five kilograms of cocaine inside.<sup>4</sup>

Such fictitious “reverse sting” operations have a simple premise: an undercover informant working at the direction of a federal law enforcement agency—such as the ATF or the Drug Enforcement Administration (DEA)—recruits people to commit a lucrative robbery.<sup>5</sup> In the ATF “stash house cases,” the ATF creates the crime and chooses the target. There is no stash house and there are no drugs—it is all a complete fabrication.<sup>6</sup> Dwayne was never the target of the operation, was not involved in any of the planning, and only agreed to participate in the robbery minutes before his arrest. Nonetheless, federal prosecutors charged Dwayne’s case to the hilt: conspiracy to possess with intent to distribute five kilograms or more of cocaine, which carried a ten-year mandatory minimum penalty; possession of a firearm in furtherance of a drug trafficking crime, which carried a consecutive five-year mandatory minimum penalty; and felon in possession of a firearm.<sup>7</sup> At this juncture, Dwayne was facing a *fifteen-year* mandatory minimum sentence.

Prosecutors offered him a fifteen-year plea deal. But Dwayne—who had just learned that his girlfriend was pregnant—could not fathom taking a deal that would entail missing his son or daughter’s entire childhood; so, he chose to go to trial.<sup>8</sup>

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<sup>3</sup> Complaint at 9–10, United States v. Mayfield, No. 09-CR-687 (N.D. Ill. Aug. 11, 2009), Dkt. 1.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> See Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401, 1446–47 (2013), [https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1775&context=faculty\\_scholarship](https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1775&context=faculty_scholarship) [https://perma.cc/6BZC-LSTC].

<sup>6</sup> *See id.* at 1450–51.

<sup>7</sup> Indictment at 1–3, 7, United States v. White, No. 09-CR-687 (N.D. Ill. Sept. 8, 2009), Dkt. 18.

<sup>8</sup> Motion for Compassionate Release at 4, United States v. White, No. 09-CR-687 (N.D. Ill. Mar. 1, 2021), Dkt. 372.

After Dwayne turned down the plea and just three months before trial, the government filed a 21 U.S.C. § 851 enhancement based on a prior conviction for simple possession of drugs from when Dwayne was eighteen years old.<sup>9</sup> The enhancement doubled the 21 U.S.C. § 841(b)(1)(a) mandatory minimum from ten years to twenty.

Dwayne was convicted at trial. Even though his case presented many mitigating circumstances, the sentencing judge had no discretion to impose any sentence other than the *twenty-five-year* mandatory minimum. While Dwayne sat in prison with a decade left to go on his sentence, Leslie, the person who recruited him for the offense, was released from prison over three years ago after serving a 9.5-year sentence.<sup>10</sup>

Today, prosecutors could not file a Section 851 sentencing enhancement against Dwayne because, in the First Step Act of 2018, Congress eliminated simple possession of drugs as an eligible predicate offense. Tragically for Dwayne, Congress did not make this important legal change retroactive. Congress should make all First Step Act relief retroactive. It makes little sense that someone like Dwayne should be serving a twenty-five-year sentence for something that would lead to a fifteen-year sentence today—a sentence that still far outstrips his culpability.<sup>11</sup>

Since Dwayne was sentenced, the fictitious stash house robbery operation has been widely criticized because it gives the government “virtually unfettered ability” to guarantee a lengthy sentence for the defendants<sup>12</sup> and disproportionately targets men of color.<sup>13</sup> In Chicago, the numbers tell a disturbing story: of the ninety-four individuals arrested and charged in connection with the fictitious stash house operation between 2006

<sup>9</sup> Information Stating Previous Drug Conviction to Be Relied Upon in Seeking Increased Punishment at 1, United States v. White, No. 09-CR-687 (N.D. Ill. Feb. 16, 2010), Dkt. 131.

<sup>10</sup> Motion for Compassionate Release, *supra* note 8, at 1.

<sup>11</sup> The same harsh Section 851 enhancement likewise applies to run-of-the-mill drug cases that do not involve a fictionalized robbery. In fact, fully one quarter of all individuals charged with a federal drug trafficking offense are eligible for a Section 851 enhancement. U.S. SENT’G COMM’N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS 21 (2018), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712\\_851-Mand-Min.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf) [https://perma.cc/JX65-DH58].

<sup>12</sup> See Katharine Tinto, *Fighting the Stash House Sting*, 38 THE CHAMPION 16 (2014), <https://www.nacdl.org/Article/October2014-FightingtheStashHouseSting> [https://perma.cc/4GB5-FHA2].

<sup>13</sup> Jason Meisner & Annie Sweeney, *ATF Sting Operation Accused of Using Racial Bias in Finding Targets, with Majority being Minorities*, CHI. TRIB. (Mar. 3, 2017, 7:22 AM), [https://www.chicagotribune.com/news/breaking/ct-atf-stash-house-sting-racial-discrimination-met-20170303-story.html?print=lat\\_digitaladhouse\\_bx-modal\\_acquisition-subscriber\\_ngux\\_display-ad-interstitial\\_bx-bonus-story](https://www.chicagotribune.com/news/breaking/ct-atf-stash-house-sting-racial-discrimination-met-20170303-story.html?print=lat_digitaladhouse_bx-modal_acquisition-subscriber_ngux_display-ad-interstitial_bx-bonus-story) [https://perma.cc/VE4X-DDQG]; Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA TODAY (July 20, 2014, 3:40 PM), <https://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/> [https://perma.cc/6WFS-V338].

and 2013, eight of those charged were white, while twelve were Hispanic and *seventy-four* were Black—like Dwayne.<sup>14</sup>

After equal protection litigation exposed the troubling nature of the operation, federal prosecutors stopped charging these cases in the Northern District of Illinois. In addition, the prosecutors offered plea deals to all forty-three of the stash house defendants with pending cases.<sup>15</sup> In those plea offers, the prosecutors agreed to dismiss all of the mandatory minimum drug charges and all of the mandatory minimum gun charges.<sup>16</sup> The equal protection litigation that led to these unprecedented dismissals arose from a unique coalition of attorneys who represented all 43 people with then-pending stash house cases. The attorneys who initiated this groundbreaking racial discrimination litigation were now-Seventh Circuit Judge Candace Jackson-Akiwumi (then an attorney with the Chicago Federal Defender Program), civil rights and criminal defense attorney Steven Saltzman, criminal defense attorney Matthew Madden, Federal Defender attorney Paul Flynn, and others. The three of us and students in our clinic built on their work, obtained additional discovery and data, and moved to dismiss the cases, contending that our collective clients were victims of racial discrimination.<sup>17</sup>

Everyone who was offered the plea deal accepted it, and the overwhelming majority received time-served sentences, serving an average of just three years rather than the fifteen- to twenty-five-year mandatory minimums they had originally been facing.<sup>18</sup> Dwayne's co-defendant, Leslie, successfully challenged his conviction on appeal and was therefore part of the group that received plea deals.<sup>19</sup>

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<sup>14</sup> Report of Dr. Jeffrey Fagan, Ph.D. at 14, United States v. Washington, No. 12-CR-632 (N.D. Ill. 2016), Doc. 338, Ex. A, [https://www.law.uchicago.edu/files/files/report\\_of\\_jeffrey\\_fagan.pdf](https://www.law.uchicago.edu/files/files/report_of_jeffrey_fagan.pdf) [https://perma.cc/Y78Q-RZT7].

<sup>15</sup> See Transcript from Compassionate Release Hearing at 26:23–27:5, United States v. Conley, No. 11-CR-779-6 (N.D. Ill. Jan. 6, 2021), Doc. 799; see also Alison Siegler, *Racially Selective Law Enforcement Litigation in Federal Stash House Cases*, 26 THE CIR. RIDER 45, 47 (2019); Jason Meisner, *Under Pressure by Judges, Prosecutors to Offer Plea Deals in Controversial Drug Stash House Cases*, CHI. TRIB. (Feb. 21, 2018, 4:55 PM), <https://www.chicagotribune.com/news/breaking/ct-met-atf-stash-house-prosecutions-20180221-story.html> [https://perma.cc/6VBF-EBCY].

<sup>16</sup> Meisner & Sweeney, *supra* note 13.

<sup>17</sup> As discussed in the text above, the stash house equal protection litigation was a collective effort. The use of the terms “our” and “we” in this piece do not refer to the authors and our clinic only, but rather encompass the entire collective equal protection litigation project. In addition, we also want to acknowledge the tremendous contributions that Professor Jeffrey Fagan made as the defense expert in this litigation. *See supra* note 14.

<sup>18</sup> Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 990, n.6 (2021), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1447&context=nulr> [https://perma.cc/TY55-YCPK].

<sup>19</sup> See *United States v. Mayfield*, 771 F.3d 417, 420 (7th Cir. 2014) (en banc) (reversing Mr. Mayfield's conviction because he was erroneously denied an entrapment instruction at trial).

Yet Dwayne could not join the equal protection litigation or take advantage of the plea deal because his conviction was final. While in prison, Dwayne worked hard each day to become a better man, including maintaining a spotless disciplinary record, earning his G.E.D., completing numerous classes, and building strong relationships with his family.<sup>20</sup> In Dwayne's own words in his letter to the sentencing judge, "I no longer want to fit in and have been doing everything to stand out for the last decade."<sup>21</sup> Dwayne filed a clemency petition and a motion for compassionate release in an effort to receive relief from his unjust sentence.

In August 2021, the sentencing judge granted Dwayne's compassionate release motion, reducing Dwayne's twenty-five-year mandatory minimum sentence to time served, over the prosecutor's opposition. In his order, the sentencing judge found that Dwayne had presented "extraordinary and compelling reasons" for release and that a reduction to time served was appropriate in light of the statutory sentencing factors.<sup>22</sup> In particular, the sentencing judge focused on Dwayne's lengthy mandatory minimum sentence, which was based almost completely on a fictitious drug amount concocted by the ATF that "dramatically overstated the severity of the actual conduct" and which was grossly disproportionate to the 9.5-year sentence of "orchestrator" Leslie Mayfield.<sup>23</sup> The sentencing judge also highlighted the injustice of Dwayne's continued imprisonment in light of the government's disavowal of the fictitious stash house operation: "White continues to be imprisoned solely based on the now abandoned stash house raids and their accompanying prosecution policies."<sup>24</sup>

Dwayne has now been reunited with his family, including his daughter Diera, whom he had never seen outside of prison. He is thrilled to have a second chance at life after twelve years behind bars. Dwayne is one of the lucky ones; countless others like him remain in federal prison with no hope for relief.

## II. THE NEED FOR COMPREHENSIVE REFORM

Renowned scholar Cornel West has said: "There is no doubt that if young white people were incarcerated at the same rates as young black people, the issue would be a national emergency."<sup>25</sup> Today, people of color

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<sup>20</sup> Motion for Compassionate Release, *supra* note 8, at 6–7.

<sup>21</sup> Motion for Compassionate Release, *supra* note 8, at 6.

<sup>22</sup> Memorandum Opinion and Order at 7, United States v. White, No. 09-CR-687 (N.D. Ill. Aug. 5, 2021), Dkt. 386.

<sup>23</sup> *Id.* at 10, 12.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> Cornel West, *Foreword* to MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS x (2012).

account for nearly eighty percent of those convicted of federal crimes.<sup>26</sup> We must recognize that we are, indeed, facing a national emergency. Congress, the House Judiciary Committee, and this Subcommittee on Crime, Terrorism, and Homeland Security have the power and the obligation to address this crisis.

Dwayne's case—and the stash house cases in general—encapsulate and reveal many of the glaring problems with our federal drug laws:

- Mandatory minimum penalties and recidivist enhancements fuel mass incarceration: They are draconian, inflexible, and unjust. They deprive judges of the discretion to make individualized sentencing determinations. They widen the net, over punishing low-level individuals like Dwayne who have a limited role in the offense. And they allow prosecutors and law enforcement to manipulate and increase statutory *and* guidelines' sentences by influencing the drug quantity—or, as in Dwayne's case—pulling that drug quantity out of thin air.
- Our drug laws create racial disparities, disproportionately impacting men of color.
- Non-retroactive legal reforms unjustly leave many behind bars: While Congress recognized in the First Step Act that mandatory minimums and recidivist sentencing enhancements like Section 851 and 18 U.S.C. § 924(c) authorized sentences that were far too long, people like Dwayne continue serving those sentences because the changes are not retroactive. The same was true for people serving longer sentences based on the 100-to-1 crack-powder disparity until Congress made the Fair Sentencing Act of 2010's changes retroactive in the First Step Act. Retroactivity is a necessary component of justice.
- The federal pretrial detention system casts too wide a net and over-detrains people of color, especially in drug cases.
- The absence of comprehensive and accessible back-end sentencing relief leaves very limited avenues for someone like Dwayne to receive relief from an unjust sentence.
- The trial tax unfairly imposes staggeringly high sentences on people like Dwayne simply because they exercised their constitutional right to trial.

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<sup>26</sup> MARK MOTIVANS, BUREAU OF JUST. STAT., NCJ 251770, FEDERAL JUSTICE STATISTICS, 2015-2016, at 8 tbl.5 (2019), <https://www.bjs.gov/content/pub/pdf/fjs1516.pdf> [<https://perma.cc/UJ6D-B98T>] [hereinafter FEDERAL JUSTICE STATISTICS 2015-2016].

The stash house cases also illustrate numerous other systemic issues related to federal law enforcement and prosecutorial power:

- Overbroad prosecutorial discretion in charging, plea-bargaining, and sentencing.
- Racial disparities in law enforcement and prosecution.
- Discovery restrictions that prevent people like Dwayne from obtaining information about potential racial discrimination by law enforcement or prosecutors.
- Restrictions on litigating claims of racial discrimination against law enforcement or prosecutors.
- Restrictions on presenting statistical evidence in criminal cases.
- The absence of publicly available data about the federal and state criminal justice systems, including data about racial disparities.

Beyond the context of Dwayne's case, Congress must rectify other systemic problems related to drug policy, law enforcement, and privacy:

- Do not make permanent the DEA's temporary ban on all fentanyl analogues.
- Pass the MORE Act to end our country's unfair and unjust over-criminalization of marijuana and the racially disparate consequences that flow from it.
- Reform civil asset forfeiture laws.
- Amend our statutory electronic privacy regime to ensure adequate protection for electronic records and communications in the Internet era.
- Enact open-file discovery and ensure fair trials by requiring prosecutors to disclose exculpatory evidence, misconduct by local police officers, and evidence about confidential sources, and by regulating the use of confidential informants more broadly.

James Baldwin once said, "Any real change implies the breakup of the world as one has always known it . . ."<sup>27</sup> In the federal criminal context, the world as we have known it has been in need of reform for decades. This Congress has an opportunity to break up that world and build something better. In the remainder of this piece, we address the pressing issues highlighted above and propose legislative reforms.

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<sup>27</sup> JAMES BALDWIN, NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON 123 (1961).

### III.END FAKE STASH HOUSE OPERATIONS AND REDUCE RACIAL DISPARITIES IN LAW ENFORCEMENT

#### A. Reform Recommendations: Summary

- Expand the statutory remedies for racial discrimination in policing and prosecution to parallel the federal statutory regimes prohibiting employment discrimination, housing discrimination, and the like. Specifically, pass legislation that authorizes defendants to prove racially selective policing or prosecution in a criminal case by showing only “disparate impact,” regardless of discriminatory intent. At a minimum, expressly authorize the use of statistical evidence to show racially selective law enforcement. The related prohibitions on proving discrimination via disparate impact and/or statistical evidence are currently an insurmountable barrier to winning a race discrimination claim in a criminal case. In addition, Congress should expressly authorize money damages for racial discrimination by federal officers.
- Pass legislation to disincentivize federal law enforcement agencies and U.S. Attorney’s Offices from running fake stash house operations and other reverse sting operations. These operations disproportionately target individuals of color and fail even on their own terms to efficiently target the so-called “worst of the worst.” For example, prohibit the government from using mandatory minimums or recidivist sentencing enhancements in reverse sting operations that do not involve any actual drug quantity.
- Order an independent investigation into the ATF’s, the DEA’s, and all other federal law enforcement agencies’ fake stash house and other reverse sting operations. Any investigation should examine, among other things, the race of every confidential informant used in such an operation; the race and criminal history of every individual who was approached or targeted by a confidential informant or law enforcement agent in connection with such operations; the race and criminal history of every individual who agreed to commit the offense—regardless of whether they were ever charged; and the correlation between the race of the confidential informants and the race of the targeted individuals.
- Discovery Reforms:
  - Pass legislation to enact an open-file discovery rule in federal criminal cases.<sup>28</sup> That rule should explicitly direct federal law

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<sup>28</sup> See *infra* Part XII.

enforcement agencies and prosecutors to disclose evidence and data that the defense requests to support a claim of racial disparities or discrimination by law enforcement.<sup>29</sup>

- At a minimum, pass legislation to enable criminal defendants to obtain discovery in support of claims of racial discrimination by law enforcement, akin to the state court rule proposed in Professor Siegler's article, *Discovering Racial Discrimination by the Police*.<sup>30</sup>

#### B. *Expand Statutory Remedies for Racial Discrimination in Policing*

Dwayne's case illustrates a particular problem that Congress must address—federal law enforcement agencies and prosecutors widen the net and deepen systemic racial disparities by targeting unsuspecting and financially strapped low-level offenders. Fake stash house stings, and reverse sting operations more generally, exemplify this problem. To enable the defense bar to effectively challenge these and future government operations that create racial disparities, Congress should allow defendants to prove racial discrimination in criminal cases via disparate impact. At a minimum, Congress should allow defendants to provide statistics to support claims of intentional discrimination.

Nationwide, federal law enforcement agencies have overwhelmingly targeted people of color to commit these fabricated crimes.<sup>31</sup> In Chicago, from 2011 to 2013, only one individual out of the fifty-seven charged by the ATF in a stash house operation was white.<sup>32</sup> In the past decade of DEA stash house cases in New York, none of the 179 defendants charged were white.<sup>33</sup> In Los Angeles, one ATF agent testified that fifty-five out of sixty stash house defendants indicted were people of color.<sup>34</sup> A 2014 review by *USA Today* of 635 stash house cases nationwide found that “[a]t least 91% of the people [federal] agents have locked up using those [stash house] stings were racial or

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<sup>29</sup> See *infra* Part XII.

<sup>30</sup> Siegler & Admussen, *supra* note 18, at 1042–43.

<sup>31</sup> This section of our testimony is drawn in part from Siegler & Admussen, *supra* note 18, at 990–91.

<sup>32</sup> Report of Dr. Jeffrey Fagan, Ph.D., *supra* note 14, at 15 summary tbl.

<sup>33</sup> Shayna Jacobs, *10 years. 179 arrests. No White Defendants. DEA Tactics Face Scrutiny in New York.*, WASH. POST (Dec. 14, 2019, 7:05 PM), [https://www.washingtonpost.com/national-security/10-years-179-arrests-no-white-defendants-dea-tactics-face-scrutiny-in-new-york/2019/12/14/f6462242-12ce-11ea-bf62-eadd5d11f559\\_story.html](https://www.washingtonpost.com/national-security/10-years-179-arrests-no-white-defendants-dea-tactics-face-scrutiny-in-new-york/2019/12/14/f6462242-12ce-11ea-bf62-eadd5d11f559_story.html) [https://perma.cc/7RA2-Q4XY].

<sup>34</sup> Maura Dolan, *U.S. Appeals Court Expresses Concern about Sting Operations that Overwhelmingly Target Blacks and Latinos*, L.A. TIMES (Oct. 15, 2018, 4:10 PM), <https://www.latimes.com/local/lanow/la-me-ln-sting-9th-circuit-20181015-story.html> [https://perma.cc/XXE7-RK7F].

ethnic minorities.”<sup>35</sup> In response to these disparities, we and other defense attorneys across the country have mounted equal protection challenges, alleging racial discrimination by federal law enforcement officers.<sup>36</sup>

However, it is extraordinarily difficult to hold the police accountable for racial discrimination under our current system. The legal standards are so hard to meet that Professor Michelle Alexander predicted that “[t]he racial profiling cases that swept the nation in the 1990s may well be the last wave of litigation challenging racial bias in the criminal justice system that we see for a very long time.”<sup>37</sup> In fact, “the Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment, and it has barred litigation of such claims under federal civil rights laws as well.”<sup>38</sup>

Despite the racial disparities in the ATF’s fake stash house operations, it is nearly impossible to obtain *discovery* to support claims of racially selective prosecution or racially selective law enforcement in violation of constitutional Equal Protection principles.<sup>39</sup> We and other criminal defense attorneys have launched a recent wave of litigation seeking such discovery regarding federal policing tactics. Three courts of appeals have responded to this litigation by holding that the extraordinarily high bar to obtaining discovery regarding racially selective *prosecution* does not apply to racially selective *law enforcement*. The Seventh Circuit in our case, *United States v. Davis*,<sup>40</sup> the Third Circuit in *United States v. Washington*,<sup>41</sup> and the Ninth Circuit in *United States v. Sellers*.<sup>42</sup>

Nevertheless, it continues to be extraordinarily difficult for defense attorneys representing indigent clients to secure data and discovery to support claims of racial discrimination by the police. An overarching systemic problem is the lack of publicly available data about state and federal criminal

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<sup>35</sup> Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA TODAY (Apr. 24, 2019, 11:50 AM), <https://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195> [https://perma.cc/WUA5-8AL8] (identifying 635 stash house defendants nationwide from 2004 to 2014 and finding 579 were people of color).

<sup>36</sup> See e.g., *United States v. Brown*, 299 F. Supp. 3d 976, 991–93 (N.D. Ill. 2018) (alleging an ATF reverse-sting stash house operation constituted racially selective law enforcement); *United States v. Lopez*, 415 F. Supp. 3d 422, 425 (S.D.N.Y. 2019) (alleging a DEA reverse-sting stash house operation constituted racially selective law enforcement).

<sup>37</sup> MICHELLE ALEXANDER, THE NEW JIM CROW 138–39 (2012).

<sup>38</sup> *Id.* at 109.

<sup>39</sup> Siegler & Admussen, *supra* note 18, at 1008.

<sup>40</sup> *United States v. Davis*, 793 F.3d 712, 719–23 (7th Cir. 2015) (en banc).

<sup>41</sup> *United States v. Washington*, 869 F.3d 193, 214–21 (3d Cir. 2017).

<sup>42</sup> *United States v. Sellers*, 906 F.3d 848, 852–56 (9th Cir. 2018).

cases, especially data about racial disparities. Even when such data exists, it is often locked in a black box and is extraordinarily difficult—if not impossible—for the defense to access. In our Chicago stash house litigation, for example, “it took nine months, hundreds of pages of motions, and a related civil subpoena enforcement action to obtain the kind of racially coded criminal history data needed to” obtain an expert analysis to meet just one portion of the legal standard.<sup>43</sup> Yet even after these herculean efforts to obtain discovery and data, the judge ultimately rejected our evidence as insufficient.

Which points to an additional concern: It appears to be genuinely impossible under current law to prove discrimination claims in criminal cases *on the merits*. In the nearly twenty years “[s]ince the Court established Armstrong’s demanding discovery standard, there has not been a single successful [racially] selective prosecution or [racially] selective law enforcement claim on the merits” in a criminal case.<sup>44</sup> In fact, the only successful claim of racial discrimination against a prosecutor in a state or federal criminal case dates back 135 years.<sup>45</sup>

The only way to prove selective enforcement or selective prosecution is to show that the government violated equal protection, and that requires proving “discriminatory intent.” Unlike a plaintiff in an employment discrimination case, an individual charged in a criminal case is barred from showing selective enforcement by proving only “disparate impact”—that is, proving discrimination by showing that a given policy or practice had a racially disparate impact on people of color. Moreover, for criminal cases, the Supreme Court in *McCleskey v. Kemp*<sup>46</sup> established a “near-insurmountable barrier” for proving discriminatory intent under Equal Protection.<sup>47</sup> There, the Court famously declined to infer discriminatory purpose from compelling statistical evidence illustrating pervasive racial disparities in Georgia’s capital punishment scheme. Instead, individuals must present a court with “exceptionally clear proof” of intentional discrimination by a specific prosecutor in a specific case before it.<sup>48</sup>

This rule has since resulted in a near-categorical prohibition on using

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<sup>43</sup> Siegler & Admussen, *supra* note 18, at 1046; *see also id.* at 1024 (arguing that the “discovery standard . . . should be lowered . . . to allow courts to adjudicate police discrimination claims on the merits.”).

<sup>44</sup> *Id.* at 1002.

<sup>45</sup> *Id.* at 1002–03.

<sup>46</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>47</sup> Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2453–55 (2017), <https://www.minnesotalawreview.org/wp-content/uploads/2017/06/Huq.pdf> [<https://perma.cc/KH6N-JU6F>].

<sup>48</sup> *McCleskey v. Kemp*, 481 U.S. at 297 (1987).

statistical evidence to establish racial discrimination in criminal cases.<sup>49</sup> This bar, in turn, has prevented criminal defendants from raising claims of racial discrimination for nearly 40 years. As one scholar put it, “McCleskey’s burden of proof . . . is generally acknowledged to be impossible to meet.”<sup>50</sup>

McCleskey’s outdated framework must be jettisoned. It ignores everything we now know about systemic discrimination and unconscious bias. It makes little sense that a person can use statistics to prove racial discrimination on the job but is effectively barred from presenting those same statistics when their liberty and their life are at stake. It is beyond dispute that statistical analyses “can provide evidence of discrimination, including discriminatory intent.”<sup>51</sup>

To our knowledge, there has never been a successful racial discrimination claim against a law enforcement agency in a state or federal criminal case. We litigated a four-year racial discrimination challenge against the ATF on behalf of 43 clients charged in stash house cases in Chicago, and it ended with a denial of our motion to dismiss for failure to meet the truly insurmountable legal standard.<sup>52</sup> It would be very difficult for a federal public defender with a full caseload to pursue such an extensive litigation project, much less a private attorney who must maintain a law practice. The legal standards therefore virtually guarantee that no indigent criminal defendant will ever be able to successfully dismiss a stash house case—or any other federal criminal case—on race discrimination grounds. Fortunately, our intensive litigation enabled us to extract very favorable plea deals for our clients, and many were sentenced to time served. That freedom came at a price, however; our clients had to agree to abandon their claims of racial discrimination.

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<sup>49</sup> Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1283 (2018), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4765&context=clr> [https://perma.cc/ZH5M-JNA2]. A few states responded to McCleskey by passing laws that would permit individuals to utilize statistics in challenging death penalty sentences—the North Carolina Racial Justice Act, repealed in 2013, and the Kentucky Racial Justice Act. See Tanya Green, *25 Years After McCleskey, Looking Forward to Legislative Fixes of Supreme Court Error*, ACLU (Apr. 22, 2012, 9:54 AM), <https://www.aclu.org/blog/capital-punishment/racial-disparities-and-death-penalty/25-years-after-mccleskey-looking> [https://perma.cc/EWX9-VFJD]; Matt Smith, ‘Racial Justice Act’ Repealed in North Carolina, CNN (June 21, 2013, 3:48 AM), <https://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/index.html> [https://perma.cc/CHV2-JQ7J]. As of 2012, members of Congress had introduced similar legislation at least 15 times, without success. Green, *supra*, note 49.

<sup>50</sup> John M. Powers, *State v. Robinson and the Racial Justice Act: Statistical Evidence of Racial Discrimination in Capital Proceedings*, 29 HARV. J. RACIAL & ETHNIC JUST. 117, 128 (2013).

<sup>51</sup> Siegler & Admussen, *supra* note 18, at 1049.

<sup>52</sup> United States v. Brown, 299 F. Supp. 3d 976, 1010 (N.D. Ill. 2018); see also Siegler & Admussen, *supra* note 18, at 1026 (“Armstrong is a bad fit for the selective law enforcement context . . . because in practice the similarly situated requirement is impossible to meet.”).

It can be even harder for a civil plaintiff to establish racial discrimination by federal law enforcement or prosecutors. The same legal standards in criminal cases that prohibit disparate impact claims and limit the use of statistical evidence also apply in civil cases against federal officials. Worse still, for those seeking civil damages, case law appears to be eliminating even the opportunity to argue that federal law enforcement officers or prosecutors have discriminated on the basis of race.<sup>53</sup> As Judge Willett of the Fifth Circuit Court of Appeals recently observed: “[R]edress for a federal officer’s unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone . . . If you wear a federal badge, you can” violate the Constitution “with little fear of liability.”<sup>54</sup> Congress should create a cause of action expressly authorizing money damages for discrimination by federal officers, including law enforcement and prosecutors.

### C. *Fake Stash House Operations Must End*

Numerous judges have spoken out against these federal fake stash house operations, but there is little they can do because the prosecutors and law enforcement agencies have all the power. In addition to expressing concern about the racial disparities these cases create, courts have criticized the fake stash house operation as a “disreputable tactic,”<sup>55</sup> a “tawdry” and “tired sting operation [that] seems to be directed at unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them by [the government agent].”<sup>56</sup> The Ninth Circuit, for example, has accused law enforcement of “trolling for targets” when the confidential informant “provocatively cast his bait in places defined only by economic and social

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<sup>53</sup> In the 1970s, the Supreme Court recognized an “implied” cause of action for federal equal protection violations. *See Davis v. Passman*, 442 U.S. 228 (1979) (recognizing an implied cause of action for federal equal protection violation under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). Subsequent Supreme Court precedent, however, explains that “expanding the *Bivens* remedy is now considered a ‘disfavored’ judicial activity.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017). The courts of appeals have gotten the message: “Virtually everything beyond the specific facts” of *Davis* and its related cases “is a ‘new context’ . . . And new context = no *Bivens* claim.” *Byrd v. Lamb*, 990 F.3d 879, 883 (5th Cir. Mar. 9, 2021) (quotation omitted) (Willett, specially concurring). No matter how brutal the facts, there is no federal remedy: “Private citizens who are brutalized—even killed—by rogue federal officers can find little solace in *Bivens*.” *Id.*

<sup>54</sup> *See id.* at 884.

<sup>55</sup> *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., concurring in part and dissenting in part), opinion vacated *on reb’g en banc sub nom. United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014); *see also id.* at 416 (remarking that “[t]he operators of stash houses would pay law enforcement to sting potential stash house robbers” because a “sting both eliminates one potential stash house robber (unless the defendant was entrapped) and deters other criminals from joining stash house robberies, since they may turn out to be stings.”).

<sup>56</sup> *United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011).

conditions.”<sup>57</sup> Judges have even expressed “disgust with the ATF’s conduct” in these cases.<sup>58</sup>

Beyond the racial dimension, fake stash house cases like Dwayne’s raise troubling questions about prosecutorial and law enforcement discretion, the trial tax,<sup>59</sup> the restrictive criminal discovery rules, over punishment, sentencing disparities, and the paucity of back-end relief for people unjustly serving decades-long sentences.

Our litigation provides a window into the government’s contention that their drug operations target serious, violent criminals—the “worst of the worst.” Nothing could be further from the truth.

Like many federal drug cases, the stash house operation is perfectly designed to target the *least* culpable offenders. Low-level offenders are the easiest people for a confidential informant to target in the first place. And they also are the most susceptible to the temptations offered by a life-changing but highly risky jackpot: hundreds of thousands of dollars’ worth of (imaginary) drugs, guarded by (imaginary) men with guns.<sup>60</sup> Our expert determined that approximately twenty percent of the ninety-four defendants in the Chicago cases had *no prior conviction at all* prior to the stash house operation.<sup>61</sup> Over forty percent had no prior conviction for a drug or weapons offense.<sup>62</sup> And anywhere from sixty-nine percent to eighty-two percent had no prior convictions for violent offenses, depending on how one defines the term.<sup>63</sup> As one federal court opined:

In this era of mass incarceration, in which we already lock up more of our population than any other nation on Earth,

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<sup>57</sup> United States v. Black, 733 F.3d 294, 303 (9th Cir. 2013). For further criticism of stash house operations, *see* Tinto, *supra* note 5, at 1446–51.

<sup>58</sup> United States v. Paxton, No. 13-CR-0103, 2018 WL 4504160, at \*2 (N.D. Ill. 2018); *see also* United States v. Hudson, 3 F. Supp. 3d 772, 786 (C.D. Cal. 2014), *rev’d and remanded sub nom.*, United States v. Dunlap, 593 F. App’x 619 (9th Cir. 2014) (unpublished) (“Zero. That’s the amount of drugs that the Government has taken off the streets as the result of this case and the hundreds of other fake stash-house cases around the country. That’s the problem with creating crime: the Government is not making the country any safer or reducing the actual flow of drugs.”).

<sup>59</sup> *See generally* NAT’L ASS’N CRIM. DEF. Laws. & Found. for Crim. Just., THE TRIAL PENALTY: THE SIXTH AMENDMENT ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [<https://perma.cc/3EGV-BKMB>].

<sup>60</sup> Tinto, *supra* note 5, at 1446–47.

<sup>61</sup> Report of Dr. Jeffrey Fagan, Ph.D., *supra* note 14, at 19.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

it is especially curious that the government feels compelled to invent fake crimes and imprison people for long periods of time for agreeing to participate in them—people who but for the government’s scheme might not have ever entered the world of major felonies.<sup>64</sup>

In the stash house cases, federal agents failed to comply with their internal targeting criteria, in a racially disparate manner. The ATF’s stash house operation is ostensibly guided by strict targeting guidelines set out in an internal policy manual.<sup>65</sup> Our analysis showed that the ATF rampantly disregarded those criteria, and did so in a racially disparate manner.<sup>66</sup> The only violent home invasion robbery crews the ATF focused on involved primarily *white individuals*. When targeting those mostly white crews, the ATF only occasionally deviated from their own criteria. But when targeting Black and Hispanic men in other stash house operations, the ATF made little effort to meet their internal criteria.<sup>67</sup> These departures from the ATF’s criteria led to absurd and racially disparate results. For example, the ATF ostensibly required that two suspects from every group of codefendants were “violent offenders.” But in fact, when it came to groups comprised mostly of Black individuals, the ATF targeted people with one or zero violent offenders.<sup>68</sup> In violation of its criteria, the ATF likewise targeted groups where *no one* the ATF knew about before arrest had a past violent conviction—and, again, did so exclusively for Black defendants.<sup>69</sup> And, again in violation of its own criteria, the ATF also targeted groups who could not even easily access a firearm—but, again, not for white defendants.<sup>70</sup> In one especially absurd example, the ATF targeted three Black individuals who were able to find “just one barely functional firearm among them—a vintage firearm manufactured

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<sup>64</sup> United States v. Black, 750 F.3d 1053, 1057–58 (9th Cir. 2014) (Reinhardt, J., dissenting from denial of rehearing en banc).

<sup>65</sup> Motion to Dismiss for Racially Selective Law Enforcement at 5–11, 43, United States v. Mayfield, No. 15-CR-497 (N.D. Ill. Jan. 6, 2017), Dkt. 55 [hereinafter Motion to Dismiss]. Much of the material on which our Motions to Dismiss relied remains subject to protective order except to the degree it appeared in the Motions to Dismiss. This Testimony accordingly cites directly to an exemplar Motion to Dismiss where the underlying materials are not available.

<sup>66</sup> See *id.* at 42–59.

<sup>67</sup> These variations from internal policy were evidence of discriminatory intent. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977); *Nabozny v. Podlesny*, 92 F.3d 446, 454–55 (7th Cir. 1996) (reversing dismissal of Equal Protection gender discrimination claim where school administrators departed from a purportedly gender-neutral “policy and practice” when faced with a male victim); see also, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999).

<sup>68</sup> Motion to Dismiss, *supra* note 65, at 48–49.

<sup>69</sup> *Id.* at 51.

<sup>70</sup> *Id.* at 51–52.

sometime between 1904 and 1918, the left grip of which was broken and secured by duct tape.”<sup>71</sup>

In addition, federal agents were invested with enormous discretion that they exercised to target people of color: The stash house operation and other reverse stings are in some ways unique: Agents create a crime and select who will commit it. Without the agents’ intervention, there would be no crime at all—not even the imaginary one charged in our cases. If this is what happens when agents are purportedly subject to strict policy guidelines, how can we trust federal law enforcement agencies to self-regulate when the guidelines are broader?

Despite years of litigation, we never received key discovery in our stash house litigation that would have been standard in civil cases. Charges were filed in 2011–2013 for most of the 43 defendants in our cases. We held an evidentiary hearing in 2017. Due to the cramped criminal discovery rules, we never received discovery that would have been utterly unremarkable in a civil case. For example, we were never able to depose an agent or someone knowledgeable about the operation. We likewise never received agent text messages, emails, notes, rough drafts of reports, and the like that could have revealed what agents were thinking and doing in real time. Nor did we receive any internal audits or assessments by the ATF of whether its stash house operations were fulfilling its purposes and whether its agents were complying with its goals.

Many of these issues are addressed in the latest scathing opinion in a fake stash house case, in which U.S. District Court Judge Sharon Johnson Coleman in Chicago granted a compassionate release motion for Tracy Conley, who was serving a 15-year mandatory minimum sentence.<sup>72</sup> Judge Coleman minces no words in describing the case as arising from “outrageous and disreputable law enforcement tactics, followed by the prosecution’s relentless pursuit of the sentence despite the rebuke of these cases across the country.”<sup>73</sup>

Judge Coleman continues, “[i]f there ever was a situation where compassionate release was warranted based on the injustice and unfairness of a prosecution and resultant sentence, this is it.”<sup>74</sup> She excoriates the government for concocting a drug amount and a scenario in order to set a high mandatory minimum that would apply without regard to a given

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<sup>71</sup> *Id.* at 52.

<sup>72</sup> United States v. Conley, No. 11-CR-0779, 2021 U.S. Dist. LEXIS 40763, at \*15 (N.D. Ill. Mar. 4, 2021), Dkt. 800.

<sup>73</sup> *Id.* at \*11.

<sup>74</sup> *Id.* at \*12.

individual's role or culpability in the offense. Specifically, she says:

[T]he Court's hands were tied by the fake drug amount, namely fifty kilograms of cocaine, that the government arbitrarily decided was in the fake stash house, along with a fictitious guard, who happened to be armed. In short, Conley's sentence was driven by the government's decisions in fabricating a false stash house and not the Court's consideration of what punishment was appropriate under the circumstances.<sup>75</sup>

Judge Coleman further remarks that “[a]dding to the injustice underlying his prosecution and sentence” is the fact that Conley—like Dwayne—was indigent and had a minimal role in the offense, yet received a more severe punishment than his codefendants.<sup>76</sup> She says: “Conley found himself ensnared in the ATF’s scheme, not because he sought to rob a stash house or commit a crime, but because he did not have money to purchase gas for his trip home from his legitimate job and happened to run into Adams.”<sup>77</sup> The judge emphasizes that, although Conley was one of the “least culpable” of the seven defendants, the prosecution’s decision to charge two mandatory minimums forced her to sentence Conley to far more prison time than his codefendants, “who pleaded guilty and received sentences ranging from 46 to 70 months in prison.”<sup>78</sup>

And finally, the judge also says that the “grossly disproportionate sentence” was “the result of a ‘trial tax,’ just because [Conley] maintained his innocence throughout the proceedings and asserted that the false stash house stings were inappropriate.”<sup>79</sup> This trial tax or trial penalty pressures defendants to plead guilty and punishes people like Conley who do not. It helps explain why only 2.4 percent of people charged with federal crimes go to trial, and most of the rest plead guilty.<sup>80</sup> “Mandatory sentencing requirements create a broken process that often requires trading one’s innocence for guilt in a bargain for a lesser sentence, and they always exert undue influence on outcomes.”<sup>81</sup>

Judge Coleman’s concerns echo those of Dwayne’s sentencing judge and

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<sup>75</sup> *Id.* at \*10.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at \*7.

<sup>78</sup> United States v. Conley, No. 11-CR-0779-6, at \*10 (N.D. Ill. Mar. 4, 2021).

<sup>79</sup> *Id.* at \*9–10.

<sup>80</sup> FEDERAL JUSTICE STATISTICS 2015–2016, *supra* note 26, at 9 tbl.6.

<sup>81</sup> Bradley R. Haywood & Kelly Haywood, *Virginia Failed to Repeal Mandatory Minimums, but There’s Hope for Next Year*, WASH. POST (Mar. 2, 2021, 10:39 AM), <https://www.washingtonpost.com/opinions/2021/03/02/virginia-failed-repeal-mandatory-minimums-theres-hope-next-year/> [<https://perma.cc/T2FK-BCUM>].

the Seventh Circuit, which as recently as July 2021 recognized that the fake stash house operations call into question “American criminal justice as a system that treats defendants fairly and equally.”<sup>82</sup> The Court emphasized that these stings are “troubling” in several ways.<sup>83</sup> First, the agents “blindly encourage the initial target to rope in a large group of co-conspirators who otherwise may have stayed out of trouble.”<sup>84</sup> Second, the overwhelmingly majority of people targeted and arrested for these stings are poor people of color.<sup>85</sup> And, third, the stings “give law enforcement free rein to manipulate sentences by setting imaginary drug amounts.”<sup>86</sup>

#### IV. ELIMINATE OR REDUCE HARSH FEDERAL MANDATORY MINIMUMS

##### A. *Reform Recommendations: Summary*

- Repeal all federal mandatory minimums.
- Repeal all mandatory minimums in federal drug cases.
- At a minimum, repeal all mandatory minimums in federal drug cases, except for drug kingpins.
- Pass the Smarter Sentencing Act.
- Eliminate the crack-powder disparity and make that change retroactive.
- Pass legislation to expand safety valve provisions to enable judges to sentence low level and/or non-violent individuals below the mandatory minimum.
- At a minimum, pass legislation making the First Step Act’s safety valve expansion fully retroactive.
- Pass legislation prohibiting federal agents from manipulating drug quantities to create mandatory minimum sentences.
- Make all these changes retroactive and, at a minimum, pass the First Step Implementation Act, which would expand safety valve

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<sup>82</sup> *Conley v. United States*, 5 F.4th 781, 787 (7th Cir. July 21, 2021) (quotation marks and citation omitted).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

and retroactively apply the First Step Act's major sentencing reforms.<sup>87</sup>

### B. *The Problem of Mandatory Minimums*

There is widespread agreement across the political spectrum that "federal mandatory minimum drug laws are inhumane, waste taxpayer money, . . . deprive judges of sentencing discretion[]" and create racial disparities.<sup>88</sup> In the 1970s, "[t]hen-Congressman George H.W. Bush spoke in favor of repealing mandatory minimum drug laws because it would 'result in better justice and more appropriate sentences.'"<sup>89</sup> Voters have likewise criticized these laws. In a recent study done for the Pew Charitable Trusts, eight in ten voters supported "giving judges the flexibility to determine drug sentences based on the individualized facts of a case,"<sup>90</sup> and sixty-one percent of respondents affirmed that "too many drug criminals [are] taking up too much space in our federal prison system."<sup>91</sup>

The solution is simple: Congress should eliminate all federal mandatory minimums, especially in drug cases. Barring that, Congress should enact meaningful mandatory minimum reform.<sup>92</sup>

The original drug mandatory minimums date back to the early twentieth

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<sup>87</sup> First Step Implementation Act, S. 1014 (2021).

<sup>88</sup> Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 OHIO STATE J. CRIM. L. 283, 310 (2020), [https://kb.osu.edu/bitstream/handle/1811/92255/OSJCL\\_V18N1\\_283.pdf?sequence=1&isAllowed=y](https://kb.osu.edu/bitstream/handle/1811/92255/OSJCL_V18N1_283.pdf?sequence=1&isAllowed=y) [<https://perma.cc/Z6D5-A26Z>]; Rebecca U. Thorpe, *Republicans and Democrats Support Sentencing Reform. This is What Stands in Their Way.*, WASH. POST (Oct. 5, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/05/republicans-and-democrats-support-sentencing-reform-this-is-what-stands-in-their-way/> [<https://perma.cc/7UWK-LTJJ>]. Within Parts IV. B. & C., seven paragraphs and a substantial portion of the parentheticals are drawn from our drug law reform piece. *See id.* This section also relies heavily on our written testimony in support of the Smarter Sentencing Act. *See generally Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 223–239 (Sept. 18, 2013) (written testimony of the University of Chicago Federal Criminal Justice Clinic), <https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg88998.pdf> [<https://perma.cc/YA8N-K77Y>] [hereinafter FCJC Senate Written Testimony].

<sup>89</sup> Zunkel & Siegler, *supra* note 88, at 295 (quoting Molly M. Gill, *Correcting Course: Lessons from the 1970s Repeal of Mandatory Minimums*, 21 FED. SENT'G REP. 55, 55 (2008), <https://famm.org/wp-content/uploads/Correcting-Course.pdf> [<https://perma.cc/YQU7-DP3N>]).

<sup>90</sup> Zunkel & Siegler, *supra* note 88, at 310.

<sup>91</sup> *Id.* (quoting MELLMAN GROUP & PUBLIC OPINION STRATEGIES, NATIONAL SURVEY KEY FINDINGS—FEDERAL SENTENCING & PRISONS 1 (2016), [https://www.pewtrusts.org/~mmedia/assets/2016/02/national\\_survey\\_key\\_findings\\_federal\\_sentencing\\_prisons.pdf](https://www.pewtrusts.org/~mmedia/assets/2016/02/national_survey_key_findings_federal_sentencing_prisons.pdf) [<https://perma.cc/7WJT-VQA4>]).

<sup>92</sup> Alison Siegler, *End Mandatory Minimums*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums> [<https://perma.cc/9LJA-SSW9>].

century and were linked to fears about race and crime.<sup>93</sup> The first mandatory minimum was passed in 1914, when Congress set a five-year minimum for manufacturing opium for smoking purposes.<sup>94</sup> The law was influenced by widespread anti-Chinese sentiment. For example, in 1902, the American Pharmaceutical Association's Committee on the Acquisition of the Drug Habit blamed Chinese immigrants for “importing” opium smoking to the United States. The Committee concluded, “[i]f the Chinaman cannot get along without his ‘dope,’ we can get along without him.”<sup>95</sup>

Congress passed the current mandatory minimum laws during the War on Drugs in the 1980s, when fear about crime and drugs was at its apex and concerns about mass incarceration and racial equity were far less prevalent than they are today. Under the 1986 Anti-Drug Abuse Act (the 1986 Act), “the majority of federal drug offenses carry [harsh] mandatory minimum penalties that judges must impose—no matter how compelling the case or mitigating the circumstances—unless the person” qualifies for one of a few exceedingly narrow exceptions.<sup>96</sup>

Current “statistics highlight how the laws that apply to drug cases at . . . sentencing have contributed to mass incarceration and racial injustice.”<sup>97</sup> Today, drug offenses make up nearly thirty percent of the federal docket nationwide.<sup>98</sup> Approximately sixty-six percent of all drug trafficking cases in Fiscal Year 2019 carried a mandatory minimum penalty.<sup>99</sup> As a direct result of these mandatory minimums, it is a virtual certainty that anyone convicted of a federal drug offense will spend time behind bars: 6.3 percent of drug offenders were sentenced to prison in Fiscal Year 2019.<sup>100</sup> “The average expected time served for the 55,000 people in prison sentenced pursuant to a mandatory minimum for drug offenses (59% of those in federal

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<sup>93</sup> MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT 15 (2016).

<sup>94</sup> See Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 278 (1914).

<sup>95</sup> JEFF GOLDBERG & DEAN LATIMER, FLOWERS IN THE BLOOD: THE STORY OF OPIUM 210 (2014).

<sup>96</sup> Zunkel & Siegler, *supra* note 88, at 285.

<sup>97</sup> *Id.* at 286.

<sup>98</sup> U.S. SENT’G COMM’N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 45 (2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf> [https://perma.cc/29PU-2WUR] [hereinafter 2019 ANNUAL REPORT].

<sup>99</sup> U.S. SENT’G COMM’N, MANDATORY MINIMUM PENALTIES IN DRUG TRAFFICKING CASES—FISCAL YEAR 2019 (2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/FigureD2.pdf> [https://perma.cc/M2XA-YV82].

<sup>100</sup> 2019 ANNUAL REPORT, *supra* note 98, at 62, 67, 122.

prison for drugs) is more than 11 years.”<sup>101</sup> Nearly half of those serving federal sentences for drug offenses “have few, if any, prior convictions,” and almost eighty percent “had no serious history of violence. . . .”<sup>102</sup> As a consequence of mandatory minimum penalties and the high federal Sentencing Guidelines that are linked to them, “[t]ens of thousands of people are now in federal prison for drug crimes, including people who have minimal criminal histories, did not use violence, and did not play leadership roles in drug enterprises.”<sup>103</sup>

In the years since the 1986 Act was passed, people of color have borne the brunt of these harsh federal drug laws. The most recent Sentencing Commission data shows that in Fiscal Year 2019, twenty-seven percent of those sentenced for federal drug offenses were Black and forty-four percent were Hispanic.<sup>104</sup> By comparison, the general population is 13.4 percent Black and 18.5 percent Hispanic.<sup>105</sup> Data also shows that people of color ultimately face longer prison terms than white people arrested for the same offenses with the same prior records.<sup>106</sup> For example, the Sentencing Commission recently found that when Black men and white men commit the very same crime, Black men on average receive a sentence that is nearly twenty percent longer.<sup>107</sup> Some of this is certainly a result of mandatory minimum charging, which “introduces sizeable racial disparities” into the

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<sup>101</sup> CHARLES COLSON TASK FORCE ON FED. CORR., TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FED. CORR. 11 (2016), <http://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf> [https://perma.cc/3GSQ-5A4K] [hereinafter COLSON REPORT].

<sup>102</sup> *Id.* at 12.

<sup>103</sup> *Id.* at 21.

<sup>104</sup> 2019 ANNUAL REPORT, *supra* note 98, at 110.

<sup>105</sup> *QuickFacts 2019*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/D88X-QL3W].

<sup>106</sup> See Sonja B. Starr & M. Mari Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1349 (2014), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles> [https://perma.cc/44KQ-R7FT]; ACLU, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING: HEARING ON REPORTS OF RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES 1–2 (2014), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) [https://perma.cc/9D4G-LQ7S]; Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 881–82 (2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2571954](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571954) [https://perma.cc/2WJP-XMZK?type=image] (chronicling the demographics of crack cocaine defendants in federal court and noting that “[n]early 83% of the . . . crack defendants sentenced in 2012 were black”).

<sup>107</sup> U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf) [https://perma.cc/4KJD-WDEH].

system.<sup>108</sup> Data also shows that Black people who are convicted of a federal drug offense carrying a mandatory minimum are least likely to receive a sentence below the minimum.<sup>109</sup>

Mandatory minimum sentences also serve as a major contributor to wrongful convictions by incentivizing unreliable cooperators' testimony.<sup>110</sup> Often the *only* way a person charged with a mandatory minimum can watch their children grow up or attend their children's weddings is to cooperate.<sup>111</sup> This reality introduces an extraordinarily high incentive to lie. Empirical estimates show that lying cooperators account for an astounding fifteen to forty-five percent of wrongful convictions.<sup>112</sup> If anything, those estimates likely underestimate the problem in drug cases subject to harsh mandatory

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<sup>108</sup> Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2, 31 (2013), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles> [https://perma.cc/VJ5Z-B4JL]; *id.* at 10 ("Our research suggests that prosecutorial decisions are important sources of [racial] disparity—especially the decision to file mandatory minimum charges, which are prosecutors' most powerful tools for constraining judges.").

<sup>109</sup> U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf) [https://perma.cc/TL7Z-RP2R] [hereinafter 2017 MANDATORY MINIMUM REPORT].

<sup>110</sup> Reliance on cooperators can also "focus" racial disparities. *See, e.g.*, Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 673 (2004), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=613521](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=613521) [https://perma.cc/PK9S-EF5V?type=image]. Cooperators typically can cooperate only against people they know. *Id.* To the degree that they live racially segregated lives, then law enforcement reliance on them "becomes a kind of focusing mechanism guaranteeing that law enforcement will expend resources in [their] community whether or not the situation there independently warrants it." *Id.*

<sup>111</sup> In the federal system, the process of cooperation typically works as follows: a person is either charged with a crime carrying a lengthy mandatory minimum sentence or informed that they could be so charged. However, if the accused provides "substantial assistance" (i.e., cooperates), then the government can file a motion that removes the mandatory minimum and asks the court to reduce the sentence. *See* 18 U.S.C. § 3553(e); Fed. R. Crim. P. 35(b). Relatedly, the government can enter into a cooperation plea agreement where prosecutors never even file the harshest mandatory minimum sentence(s) for which the accused is eligible.

<sup>112</sup> *See* NW. UNIV. L. SCH. CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004–2005), <https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf> [https://perma.cc/5FBK-K4TL] (45.9%); JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 156 (2000) (21%); *The Causes of Wrongful Conviction*, THE INNOCENCE PROJECT (Mar. 8, 2021), <https://innocenceproject.org/causes-wrongful-conviction/> [https://perma.cc/5HZV-SCCU] (15%).

minimums.<sup>113</sup> The problem is easy to understand: Who wouldn't tell the prosecutors whatever they want to hear if it means getting back to your family before you die?

Federal judges, who are responsible for imposing sentences, are among the most outspoken critics of mandatory minimum penalties. As Judge Jed Rakoff observed: "On one issue—opposition to mandatory minimum laws—the federal judiciary has been consistent in its opposition and clear in its message."<sup>114</sup> The Judicial Conference of the United States has long opposed mandatory minimums and supported legislative reform.<sup>115</sup> In a 2013 letter to Congress, the Judicial Conference's Criminal Law Committee stated: "For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentences" because they waste taxpayer dollars, produce "disproportionately severe sentences," and "undermine confidence in the judicial system."<sup>116</sup> In 2010, federal judges were surveyed about their views on drug mandatory minimum sentences, and the results were overwhelmingly negative. Seventy-six percent responded that the crack cocaine mandatory minimum was too high; fifty-four percent responded that the marijuana mandatory minimum was too high; and approximately forty-four percent responded that the heroin, drug, and powder cocaine mandatory minimums were too high.<sup>117</sup>

Supreme Court justices at both ends of the political spectrum have also called for eliminating mandatory minimums. In 2016, Supreme Court Justice Stephen Breyer went before the House of Representatives' Appropriations Subcommittee and lambasted mandatory minimums: "You want mandatory minimums? I've said publicly many times that I think they're a terrible idea."<sup>118</sup> Retired Justice Anthony Kennedy told the American Bar Association in 2003: "I can accept neither the necessity nor the wisdom of

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<sup>113</sup> See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 937–38 (1999), [http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol\\_68/Yaroshefsky\\_December.pdf](http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_68/Yaroshefsky_December.pdf) [https://perma.cc/LJN6-MNNV] (discussing problems with cooperation in drug cases).

<sup>114</sup> Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. OF BOOKS (May 21, 2015), <https://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges/> [https://perma.cc/6U7Q-4ELZ].

<sup>115</sup> See, e.g., Letter from Honorable Robert Holmes Bell to Senator Patrick J. Leahy 1 (Sept. 17, 2013), <https://www.uscourts.gov/sites/default/files/judge-bell-chairman-leahy-mandatory-minimums.pdf> [https://perma.cc/2SVE-Q3LP] [hereinafter Letter to Senator Leahy].

<sup>116</sup> *Id.* at 1, 2, 4.

<sup>117</sup> U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 5 (2010), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608\\_Judge\\_Survey.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf) [https://perma.cc/6R74-94C8].

<sup>118</sup> Justices Anthony Kennedy & Stephen Breyer, *Supreme Court Fiscal Year 2016 Budget*, C-SPAN (Mar. 23, 2015), <https://www.c-span.org/video/?c4532246/user-clip-justices-kennedy-breyer-criminal-justice> [https://perma.cc/M8SM-7L8G].

federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”<sup>119</sup>

Federal judges with wide-ranging political philosophies have identified many specific problems with drug mandatory minimums:

- They deprive judges of discretion to impose individualized sentences and thus “distort the sentencing process and mandate unjust sentences.”<sup>120</sup>
- They improperly transfer sentencing discretion from judges to prosecutors.<sup>121</sup>
- “They disparately impact people of color.”<sup>122</sup>
- They discourage the accused from exercising their constitutional right to trial.<sup>123</sup>

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<sup>119</sup> Justice Anthony Kennedy, *Speech at the American Bar Association Annual Meeting: An Address by Anthony M. Kennedy* (Aug. 9, 2003), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_08-09-03.html](https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html) [https://perma.cc/4LGW-2JTQ].

<sup>120</sup> Shira A. Scheindlin, *I Sentenced Criminals to Hundreds More Years than I Wanted to. I Had No Choice.*, WASH. POST (Feb. 17, 2017, 9:31 AM), <https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/> [https://perma.cc/NM22-MJKV] (explaining that under the Anti-Drug Abuse Act of 1986, “I was often prohibited from assessing a defendant’s history, personal characteristics or role in the offense. In sentencing, where judgment should matter most, I could not exercise my judgment. I felt more like a computer than a judge.”); see also United States v. Dossie, 851 F. Supp. 2d 478, 478 (E.D.N.Y. 2012).

<sup>121</sup> See, e.g., *Dossie*, 851 F. Supp. 2d at 485 (“The government simply dictated a five-year sentence without even having to allege, let alone prove, the aggravating fact that it implied warranted the sentence.”).

<sup>122</sup> See, e.g., *United States v. Clary*, 846 F. Supp. 768, 772, 792 (E.D. Miss. 1994) (“[T]he ‘100 to 1’ ratio, coupled with mandatory minimum sentencing provided by federal statute, has created a situation that reeks with inhumanity and injustice . . . [I]f young white males were being incarcerated at the same rate as young black males, the statute would have been amended long ago.”); see also Nancy Gertner & Chiraag Bains, *Mandatory Minimum Sentences are Cruel and Ineffective Sessions Wants Them Back*, WASH. POST (May 15, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/05/15/mandatory-minimum-sentences-are-cruel-and-ineffective-sessions-wants-them-back/> [https://perma.cc/6NR5-UJ6R] (“In our experience, mandatory minimums have swelled the federal prison population and led to scandalous racial disparities.”).

<sup>123</sup> *United States v. Bowen*, No. 10-CR-204, 2012 U.S. Dist. LEXIS 50670, at \*31 (E.D. La. 2012) (“The problem with mandatory minimums is that they have a coercive effect . . . This extraordinary pressure can result in false cooperation and guilty pleas by innocent people.”) (quoting *Mandatory Minimum Sentencing Provisions Under Federal Law May 27, 2010, Public Hearing Before the United States Sentencing Commission*, 111th Cong. 13 (2009–2010) (statement of Michael Nachmanoff, Fed. Pub. Def. for E.D. Va.), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony\\_FPD\\_Michael\\_Nachmanoff.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_FPD_Michael_Nachmanoff.pdf) [https://perma.cc/DS77-X4F4]).

- They were created to punish high-level drug traffickers, but often don't.<sup>124</sup>
- The most culpable receive more lenient sentences because they can provide "substantial assistance" to the government, while the least culpable have little, if any, information of value.<sup>125</sup>

Some might be willing to live with this constellation of abominations if mandatory minimums had a significant public safety upside. However, evidence demonstrates that mandatory minimums in fact make us *less safe*. "While Congress instituted these reforms in the name of public safety, its actual policies have ended up making recidivism more likely, while creating glaring disparities and disproportionate sentences."<sup>126</sup> There is now ample evidence that warehousing people in prisons *increases* rates of recidivism.<sup>127</sup> And evidence suggests that mandatory minimums do not serve a general deterrence purpose or prevent others from committing drug crimes in the future.<sup>128</sup>

<sup>124</sup> See, e.g., Statement of Reasons for Imposing Sentence of Probation, United States v. Leitch, No. 11-CR-609, 2013 WL 753445, at \*2 (E.D.N.Y. Feb. 28, 2013), Dkt. 29 ("[M]any low-level drug trafficking defendants are receiving the harsh mandatory minimums that Congress explicitly created only for leaders and managers of drug operations.").

<sup>125</sup> See, e.g., United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992) (conservative Seventh Circuit Judge Frank Easterbrook acknowledging the "troubling" nature of drug mandatory minimums that punish the least culpable most severely because "it accords with no one's theory of appropriate punishments"); see also Dossie, 851 F. Supp. 2d at 487.

<sup>126</sup> Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 207 (2019), [https://harvardlawreview.org/wp-content/uploads/2019/11/200-240\\_Online.pdf](https://harvardlawreview.org/wp-content/uploads/2019/11/200-240_Online.pdf) [https://perma.cc/27N2-73WT].

<sup>127</sup> See, e.g., Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 50S (2011), [https://www.researchgate.net/publication/258194311\\_Prisons\\_Do\\_Not\\_Reduce\\_Recidivism\\_The\\_High\\_Cost\\_of\\_Ignoring\\_Science](https://www.researchgate.net/publication/258194311_Prisons_Do_Not_Reduce_Recidivism_The_High_Cost_of_Ignoring_Science) [https://perma.cc/T9CB-P2CL?type=image].

<sup>128</sup> See, e.g., *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> [https://perma.cc/Z8GK-HL46] ("Despite substantial expenditures on longer prison terms for drug offenders, taxpayers have not realized a strong public safety return. The self-reported use of illegal drugs has increased over the long term as drug prices have fallen and purity has risen."); see also U.S. SENT'G COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 67 (2002), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-coke-sentencing-policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-coke-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf) [https://perma.cc/79VG-CSTR] [hereinafter COCAINE AND FEDERAL SENTENCING POLICY] ("The declining prices for powder cocaine during the period of increasing penalties appear inconsistent with a deterrent effect of federal cocaine penalties."); see also Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES (Jul. 3, 2012), <https://www.nytimes.com/2012/07/04/business/in-rethinking-the-war-on-drugs-start-with-the-numbers.html> [https://perma.cc/LR9B-BWA9]; Tanya Golash-Boza, *America's Mass Incarceration Problem in 5 Charts—or, Why Sessions Shouldn't Bring Back Mandatory Minimums*, THE CONVERSATION (May 29, 2017), <https://theconversation.com/>

Moreover, recent federal drug law reform establishes that “shorter sentences don’t compromise public safety.”<sup>129</sup> In assessing evidence gathered after both the 2010 Fair Sentencing Act and the 2007 Sentencing Guidelines reductions in crack cocaine cases, the Colson Task Force concluded that “recent reforms have demonstrated that policymakers can shorten sentences and time served in federal prison for drug offenses without a corresponding increase in crime or drug abuse.”<sup>130</sup>

### C. Reform Recommendations for Mandatory Minimums

Congress has a panoply of options for addressing the scourge of federal mandatory minimum penalties. To ensure justice for everyone and avoid the kinds of disparities evidenced in Dwayne’s case, any reform must apply retroactively. Accordingly, Congress should pass the First Step Implementation Act, which would retroactively apply the First Step Act’s Major sentencing reforms.<sup>131</sup>

The most comprehensive fix, of course, would be to repeal all mandatory minimums, or at least all mandatory minimums in drug cases. Alternatively, the *Colson Report* recommends “repeal[ing] the mandatory minimum penalties for drug offenses, except for drug kingpins as defined in the ‘continuing criminal enterprise’ statute.”<sup>132</sup> The *Colson Report* estimates that this reform would reduce the federal prison population by 37,300 people by 2024 and would save taxpayers 2.188 billion dollars.<sup>133</sup>

Recent data strongly supports the need for Congress to enact comprehensive reform in the federal criminal system and illustrates that merely tinkering around the edges of the criminal system will not have a meaningful impact. Notably, an empirical assessment of the modest reforms implemented by Attorney General (AG) Holder finds that efforts to reduce reliance on mandatory minimums via the “Holder Memo” did not have a meaningful impact on either sentence length or racial disparities in

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americas-mass-incarceration-problem-in-5-charts-or-why-sessions-shouldnt-bring-back-mandatory-minimums-78019 [<https://perma.cc/9G55-7F2N>].

<sup>129</sup> Gertner & Bains, *supra* note 122 (“A 2014 study by the U.S. Sentencing Commission found that defendants released early (based on [drug] sentencing changes not related to mandatory minimums) were not more likely to reoffend than prisoners who served their whole sentences . . . Indeed, research shows it is the certainty of punishment—not the severity—that deters crime.”).

<sup>130</sup> COLSON REPORT, *supra* note 101, at 21.

<sup>131</sup> First Step Implementation Act, S. 1014 (2021).

<sup>132</sup> COLSON REPORT, *supra* note 101, at 22.

<sup>133</sup> *Id.* at 85.

sentencing.<sup>134</sup> The study's author concludes: "the results suggest that policy changes that do not account for the interconnected nature of criminal systems—the ways different elements and actors self-reinforce—are likely to be ineffective. These findings provide a compelling example for policymakers skeptical of the need for such systemic reform."<sup>135</sup> Moreover, without congressional action, any reforms implemented by one Department of Justice (DOJ) can easily be undone by another.<sup>136</sup>

More targeted reforms would have less impact but would at least begin to ameliorate some of the problems created by mandatory minimums that were not addressed by the First Step Act. One such reform would be to pass the Smarter Sentencing Act (SSA), which was first introduced in 2013 and was recently reintroduced in 2019. We submitted written testimony in support of the SSA in 2014 and incorporate those points here.<sup>137</sup>

Another reform is to eliminate the crack-powder disparity by passing the new EQUAL Act (Eliminating a Quantifiably Unjust Application of the Law).<sup>138</sup> The 1986 Act created an infamous 100:1 crack-powder sentencing disparity,<sup>139</sup> which punished 50 grams of crack cocaine the same as 5,000 grams of powder cocaine.<sup>140</sup> In 2010, the Fair Sentencing Act reduced that sentencing disparity from 100:1 to 18:1,<sup>141</sup> and in 2018, the First Step Act made that reduction retroactive.<sup>142</sup>

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<sup>134</sup> See Stephanie Holmes Didwania, *Challenging Lenience and Federal Sentences* 36 (Univ. Wisc. Law School Legal Stud. Research, Paper No. 1746 Mar. 24, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3556138](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3556138) [https://perma.cc/5CHE-ZE7B?type=image] (finding that the Holder Memo did not have a meaningful impact on sentence length or racial disparities in sentencing).

<sup>135</sup> *Id.* at 38.

<sup>136</sup> See Memorandum from the U.S. Atty Gen. Jefferson Sessions, to the Federal Prosecutors on Department Charging and Sentencing Policy (May 10, 2017), <https://www.justice.gov/archives/opa/press-release/file/965896/download> [https://perma.cc/7A64-VH4K] (rescinding previous guidance counseling against the use of Section 851 enhancements during plea bargaining).

<sup>137</sup> See FCJC Senate Written Testimony, *supra* note 88, at 224–39 (p. 224–28 of the Congressional Record).

<sup>138</sup> See EQUAL Act, S. 79, 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://jeffries.house.gov/2021/03/09/reps-jeffries-scott-armstrong-and-bacon-introduce-bipartisan-bill-to-eliminate-sentencing-disparity-between-crack-and-powder-cocaine/> [https://perma.cc/NX5M-S2HZ]. The EQUAL Act has now passed the House. Sarah N. Lynch, U.S. House Passes Bill to End Disparities in Crack Cocaine Sentence, REUTERS (Sept. 28, 2021, 4:50 PM), <https://www.reuters.com/world/us/us-house-passes-bill-end-disparities-crack-cocaine-sentences-2021-09-28/>.

<sup>139</sup> Pub. L. No. 99-570, 100 Stat. 3207.

<sup>140</sup> *Id.* § 1002, 100 Stat. at 3207-2.

<sup>141</sup> Compare 21 U.S.C. § 841(b)(1)(A)(ii) with *id.* § 841(b)(1)(A)(iii).

<sup>142</sup> First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018).

There is no good reason to continue treating crack any differently from powder cocaine. It has long been understood that the fear of crack cocaine in comparison to powder cocaine was overblown.<sup>143</sup> Moreover, punishing crack cocaine more harshly than powder cocaine has deepened racial disparities in the criminal system. Today, approximately eighty-one percent of people convicted of crack cocaine crimes are Black, despite Black and white people using crack cocaine at similar rates.<sup>144</sup> Ending the disparity will not threaten public safety. Study after study has confirmed that prior federal sentencing reductions did not increase recidivism rates.<sup>145</sup> It is beyond time to relegate the crack-powder disparity to the dustbin of history.<sup>146</sup>

Another important reform is to expand so-called “safety valve” provisions to enable judges to sentence lower level and/or non-violent individuals below the mandatory minimum. Today, there are only two ways drug offenders currently have any hope of receiving a sentence below the mandatory minimum: safety valve and substantial assistance.<sup>147</sup> Both are very difficult to satisfy, often lead to absurd results, and create racial disparities.<sup>148</sup> The current safety valve provision excludes many low-level, non-violent drug offenders who would otherwise be eligible because it disqualifies any person who was sentenced to more than a year and a month in prison at any time within fifteen years of the offense or was sentenced for a “violent” crime to sixty days or more in prison at any time within ten years of the offense,<sup>149</sup> as well as any person who even constructively possessed a gun.<sup>150</sup> The

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<sup>143</sup> See COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 128, at v–vii.

<sup>144</sup> U.S. SENT’G COMM’N, QUICK FACTS: CRACK COCAINE TRAFFICKING OFFENSES (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack\\_Cocaine\\_FY19.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY19.pdf) [https://perma.cc/3JPQ-MB5P].

<sup>145</sup> U.S. SENT’G COMM’N, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 1 (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708\\_Recidivism-Drugs-Minus-Two.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf) [https://perma.cc/27XE-QSMT].

<sup>146</sup> See generally Kevin Ring & Heather Rice-Minus, *Why Do We Still Punish Crack and Powder Cocaine Offenses Differently?*, THE HILL (Mar. 3, 2021, 1:00 PM), <https://thehill.com/opinion/criminal-justice/540816-why-do-we-still-punish-crack-and-powder-cocaine-offenses-differently> [https://perma.cc/8URY-7INX]; *Ending the Disparity between Federal Crack and Powder Cocaine Sentences*, FAMILIES AGAINST MANDATORY MINIMUMS (Mar. 14, 2021), <https://famm.org/wp-content/uploads/Crack-Disparity-One-Pager.pdf> [https://perma.cc/W2AQ-GVGZ].

<sup>147</sup> See U.S. SENT’G COMM’N, GUIDELINES MANUAL § 5C1.2 (2018) (safety valve) [hereinafter U.S.S.G.]; *id.* § 5K1.1 (substantial assistance).

<sup>148</sup> FCJC Senate Written Testimony, *supra* note 88, at 2–3 (p. 225–26 of the Congressional Record).

<sup>149</sup> CHARLES DOYLE, CONG. RSCH. SERV., R41326, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 3 (2019), <https://fas.org/sep/crs/misc/R41326.pdf> [https://perma.cc/9GXU-DUXN].

<sup>150</sup> *Id.* at 5–6.

substantial assistance provision also rarely provides relief to low-level drug offenders because it benefits high-level offenders with the knowledge and contacts to help prosecutors investigate and prosecute others.<sup>151</sup> Lower-level offenders in drug cases tend to lack this kind of information.<sup>152</sup>

“The original sin of drug sentencing is the 1986 Act’s reliance on drug type and quantity to identify ‘major’ and ‘serious’ dealers.”<sup>153</sup> “That framework has failed because drug type and quantity are often very bad proxies for culpability.”<sup>154</sup> The Sentencing Commission recently “observed that while Congress intended the 1986 Act’s mandatory minimums to apply to high-level traffickers, they apply disproportionately to low-level offenders instead.”<sup>155</sup> “In a 2011 report, the Commission wrote that ‘the quantity of drugs involved in an offense is not as closely related to the offender’s function in the offense as perhaps Congress expected.’”<sup>156</sup> As one scholar has observed, “the quantity triggers for the mandatory minimums cover anyone involved in the sale of drugs and are not limited to high-level operatives. Most people sentenced under this law are actually low-level members of drug conspiracies.”<sup>157</sup> In support, she cites the Colson Report’s important finding that only fourteen percent of people incarcerated for federal drug crimes were deemed to have a managerial or leadership role at sentencing.<sup>158</sup>

As we wrote in our testimony in support of the Smarter Sentencing Act, drug type and quantity are bad proxies for culpability.<sup>159</sup> On the southern

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<sup>151</sup> Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDozo L. REV. 965, 1007–08 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1334813](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334813) [<https://perma.cc/QU7C-4GY9>].

<sup>152</sup> *Id.*

<sup>153</sup> Zunkel & Siegler, *supra* note 88, at 297 (quoting *Kimbrough v. United States*, 552 U.S. 85, 95 (2007)).

<sup>154</sup> *Id.*; see also *id.* at 297 n.96 (“For example, the Commission’s data shows that only 7.3% of people who were sentenced for drug offenses in Fiscal Year 2019 were considered to be ‘high-level’ traffickers: leaders, managers, or supervisors in drug enterprises. 2019 ANNUAL REPORT, *supra* note 98, at 117. The First Step Act acknowledges that role in the offense distinguishes drug offenders from one another. It codifies that those who the sentencing judge determines to be an ‘organizer, leader, manager, or supervisor of others in the offense’ are ineligible for ‘earned time credits’ for participating in rehabilitative programming.”) (citing First Step Act of 2018, Pub. L. No. 115-391, § 756, 132 Stat. 5194, 5202 (2018)).

<sup>155</sup> Zunkel & Siegler, *supra* note 88, at 297 (citing 2017 MANDATORY MINIMUM REPORT, *supra* note 109, at 6).

<sup>156</sup> *Id.* at 297.

<sup>157</sup> Barkow, *supra* note 126, at 217.

<sup>158</sup> *Id.* at 297 n.138 (citing COLSON REPORT, *supra* note 101, at 12).

<sup>159</sup> See U.S. SENT’G COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 350 (2011), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_PDF/Chapter\\_12.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_12.pdf) [<https://perma.cc/W4AZ-DQ35>] (“Commission analysis indicates that the

border, for example, dispensable drug mules are promised a few hundred dollars to transport drugs, without any idea about the type or quantity of drugs they are transporting. Yet they face the same mandatory minimum sentences as high-level, sophisticated drug offenders who know all about the drug quantities and reap the financial benefits of the transaction.<sup>160</sup> In its 2013 letter to the Senate Judiciary Committee, the Judicial Conference outlined the problems with the law's misguided focus on drug type and quantity.<sup>161</sup> It must also be remembered that beyond the mandatory minimums, people charged with federal drug offenses often face even higher sentences under the drug sentencing guidelines, which likewise tie punishment to drug type and quantity.<sup>162</sup>

To address the problem with penalties tied to drug quantity, Congress should at a minimum make the First Step Act's expanded safety valve provision retroactive. In addition, Congress should authorize judges to sentence below the mandatory minimum based on a defendant's role in the offense. Lower-level drug offenders should be eligible for sentences below the mandatory minimum if the judge, in her discretion, determines under 18 U.S.C. § 3553(a) that the mandatory minimum sentence is greater than necessary to protect the public, provide rehabilitation, and appropriately punish the offender. This would reduce racial disparities in sentencing and would appropriately transfer sentencing discretion from prosecutors to judges. At minimum, Congress should pass the First Step Implementation Act's ("FSIA") provisions that would expand the current safety-valve provision.<sup>163</sup>

A safety valve based on role would be analogous to what the Supreme Court did in the *Kimbrough* case. *Kimbrough* authorized judges to account for

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quantity of drugs involved in an offense is not as closely related to the offender's function in the offense as perhaps Congress expected."); see also FCJC Senate Written Testimony, *supra* note 88, at 2 (p. 225 of the Congressional Record).

<sup>160</sup> Indeed, it is not uncommon for high-level offenders to receive sentences similar to low-level offenders like those profiled in Part II *infra*. For example, several high-ranking members of a large drug trafficking organization in Southern California received sentences at or near the 10-year mandatory minimum in spite of their leadership roles and their participation in a multi-year methamphetamine conspiracy. *See United States v. David Chavez-Chavez*, No. 07-CR-1408, 2007 WL 4365574, (S.D. Cal. Dec. 1, 2009), Dkts. 1, 699 (121-month sentence for high-level manager of a methamphetamine drug trafficking organization); *United States v. Joel Chavez-Chavez*, No. 07-CR-1408, 2007 WL 4365574, (S.D. Cal. Aug. 10, 2010), Dkts. 1,769 (same).

<sup>161</sup> See, e.g., Letter to Senator Leahy, *supra* note 115, at 5.

<sup>162</sup> See U.S.S.G. § 2D1.1(c) (drug quantity table).

<sup>163</sup> First Step Implementation Act, S. 1014 (2021). The FSIA would allow a judge to apply safety valve to anyone whose criminal history "substantially overrepresents the seriousness of the defendant's crime." *Id.* Sec. 102. However, the Act's expansion expressly does not apply to anyone previously convicted of a "serious drug felony" or a "serious violent crime." *Id.*

the unfair sentencing consequences of the so-called “crack/powder disparity, which was seen as racially biased from its inception. . . .”<sup>164</sup> Notably, the House Committee on the Judiciary has approvingly cited *Kimbrough* as enabling judges to impose “more reasonable prison sentences” in crack cases.<sup>165</sup> Authorizing judges to sentence below the mandatory minimum for lower-level offenders would likewise enable them to impose more reasonable sentences and would advance racial justice.

Yet another problem with penalties tied to drug quantity is that it enables prosecutors and law enforcement to manipulate and increase statutory and guidelines’ sentences. It is common for federal agents to approach a single individual to conduct repeated controlled buys, increasing both the drug quantity and the person’s sentence. A recent case illustrates this problem. In *United States v. Penn*, undercover DEA agent Christopher Labno purchased cocaine from the defendant in November 2010. Rather than arresting the defendant for that illegal behavior, however, the agent proceeded to return to the defendant on at least *eleven* additional occasions to purchase crack cocaine and heroin and also to purchase two firearms.<sup>166</sup> By the end of this process, the defendant was facing a ten-year mandatory minimum and a Guidelines sentence of 292–365 months—twenty-four to thirty years in prison.<sup>167</sup> The judge granted the defense’s motion for a lower sentence under the Guidelines,<sup>168</sup> but could do nothing about the mandatory minimum.

To disincentivize this behavior, Congress should pass legislation that prevents the government from reaping a benefit. Specifically, if the evidence establishes that the government bought drugs from someone on one occasion, then returned to buy more drugs on subsequent occasions before indicting them, the government should be forbidden from increasing the person’s sentence based on any drugs the government purchased after the first transaction.

Mass murderer Francisco Javier Arellano-Felix provides an especially horrifying example of how mandatory minimum sentencing, substantial assistance/cooperation, and safety valve restrictions unite to perpetrate injustice. Arellano-Felix led the violent Arellano-Felix cartel in Mexico and was *personally* responsible for “numerous” murders, and supervised more “murder, kidnapping, torture, assault, extortion, firearms trafficking, bribery

<sup>164</sup> Zunkel & Siegler, *supra* note 88, at 318; see also *id.* at 318–19 n. 254 (“In the early days, people attacked the disparity by alleging racially selective prosecution in crack cases, but the Supreme Court quelled that litigation strategy by setting an insuperable discovery standard in *United States v. Armstrong*, 517 U.S. 456 (1996).”).

<sup>165</sup> H.R. REP. NO. 111-670, at 14 (2010).

<sup>166</sup> Complaint at 4–5, United States v. Penn, No. 13-CR-102, (N.D. Ill. Jan. 31, 2013), Dkt. 1.

<sup>167</sup> Sentencing Memo at 2, United States v. Penn, No. 13-CR-102 (N.D. Ill. Mar. 5, 2015), Dkt. 57.

<sup>168</sup> Judgment and Commitment Order at 3, United States v. Penn, No. 13-CR-102 (N.D. Ill. May 6, 2015), Dkt. 63.

and public corruption.”<sup>169</sup> His organization spent decades “importing hundreds of tons of cocaine and marijuana into the United States from Mexico,” generating approximately “hundreds of millions of dollars.”<sup>170</sup> Yet, due to Arellano-Felix’s extensive cooperation, he is now serving just twenty-five years in prison<sup>171</sup>—the same sentence prosecutors forced a district judge to give to our client Dwayne, a last-minute participant in a fake stash house operation.<sup>172</sup> This is not what justice looks like.

The answer is not to wholly prohibit the government from using cooperators like Arellano-Felix, but rather to stop prosecutors from forcing judges to sentence people like Dwayne White as if he led the Arellano-Felix cartel. The legislative reforms proposed in this testimony would do just that.

## V. ELIMINATE OR REDUCE RECIDIVIST ENHANCEMENTS

### A. Reform Recommendations: Summary

- Section 851 Sentencing Enhancements
  - Repeal 21 U.S.C. § 851 and amend 21 U.S.C. § 841 and § 960 accordingly.
  - Pass legislation making the First Step Act fully retroactive, including its changes to eligible predicate convictions and its reduced penalties. At a minimum, Congress should pass the First Step Implementation Act.
  - At a minimum, further reduce Section 851 penalties.
- ACCA
  - Repeal the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA).
  - At a minimum, build on the First Step Act and the Sentencing Commission’s recommendation regarding the Career Offender directive and remove individuals with prior *drug*

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<sup>169</sup> Order Denying Further Reduction of Sentence at 8, *United States v. Arellano-Felix*, No. 06-CR-2646-LAB (S.D. Cal. June 15, 2015), Dkt. 546.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 6, 9. Mr. Arellano-Felix was originally sentenced to life in prison. *Id.* at 6. It is widely assumed that his original sentence was itself the result of cooperation, to avoid a capital sentence. See Greg Moran, *Source: Cartel Bosses Met Secretly at Miramar*, THE SAN DIEGO UNION-TRIB. (Aug. 18, 2013, 12:00 PM), <https://www.sandiegouniontribune.com/sdut-arellano-felix-brothers-meeting-miramar-2013aug18-story.html> [https://perma.cc/Z2CA-4SMN].

<sup>172</sup> See *supra* notes 7–9 and accompanying text.

convictions from eligibility for ACCA. This would limit ACCA only to recidivist offenders convicted of a federal felon-in-possession offense with three or more prior “violent felony” convictions.

- **Career Offender Statute and Guideline**

- Follow the Sentencing Commission’s recommendation to remove individuals with prior *drug* convictions from the Career Offender directive in 21 U.S.C. § 994(h). This would limit the ambit of the Career Offender Guideline only to recidivist offenders with prior convictions for a “crime of violence.”

Congress must repeal recidivist sentencing enhancements or significantly reduce their use. The federal recidivist laws magnify the problems inherent in mandatory minimum laws by greatly increasing sentences and have a severely disproportionate impact on people of color.

Congress should build on the First Step Act’s recognition that the recidivist enhancements of the past are sorely in need of amendment. Just as the First Step Act reduced the penalties for two separate recidivist enhancements,<sup>173</sup> Congress should repeal or reform three other recidivist enhancements: 851s, ACCA, and the Career Offender Guideline and statute.

Like mandatory minimums more generally, federal recidivist laws that increase sentences for people with prior convictions were enacted during the War on Drugs, when there was little recognition of the impact they would have on communities of color. Our understanding of the draconian consequences of these laws has evolved in the past forty years, but our laws have not kept pace. We know now that people of color have more contacts with the criminal legal system and are over-represented at every stage: arrest, charging, conviction, and sentencing.<sup>174</sup> For example, one study found that federal prosecutors are 1.75 times more likely to levy mandatory minimum charges against Black individuals than against whites charged with similar crimes.<sup>175</sup> As a consequence of the disparate racial impact of the criminal system writ large, people of color are far more susceptible to being charged with a recidivist offense than white people. As writer Ta-Nehisi Coates has said:

Peril is generational for black people in America—and incarceration is our current mechanism for ensuring that the

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<sup>173</sup> First Step Act of 2018, Pub. L. No. 115-391, ch. 229, §§ 401, 403, 132 Stat. 5195, 5220–22 (reducing recidivist enhancements under 21 U.S.C. § 851 and 18 U.S.C. § 924(c)).

<sup>174</sup> Radley Balko, *Opinion: There’s Overwhelming Evidence that the Criminal Justice System is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/> [<https://perma.cc/SZS5-HVSY>].

<sup>175</sup> Starr & Rehavi, *supra* note 106, at 1323.

peril continues. Incarceration pushes you out of the job market. Incarceration disqualifies you from feeding your family with food stamps. Incarceration allows for housing discrimination based on a criminal-background check. Incarceration increases your risk of homelessness. Incarceration increases your chances of being incarcerated again.<sup>176</sup>

#### B. Eliminate or Reduce Harsh Mandatory Minimums Under 21 U.S.C. § 851

Section 851 allows prosecutors to significantly increase a person's mandatory minimum sentence in a federal drug case if they were previously convicted of one or more state or federal felony drug offenses.<sup>177</sup> Until the First Step Act, prosecutors could increase a person's mandatory minimum for a drug offense to twenty years if they had one qualifying conviction for a "felony drug offense," including drug possession; if they had two or more, the mandatory minimum was life in prison. The First Step Act took an initial step toward reform by reducing the length of the sentencing enhancements and limiting the prior convictions that can serve as predicate offenses. Today, only "serious drug felony" or "serious violent felony" prior convictions qualify.

Congress should repeal or further reform 21 U.S.C. § 851. At a minimum, Congress must pass the First Step Implementation Act to make the First Step Act's amendments retroactive.<sup>178</sup> This will avoid sentencing disparities and promote respect for the system.

In the First Step Act, Congress recognized that certain Section 851-enhanced sentences were simply too long. But Congress did not make the change retroactive. That means there are hundreds of people in prison today serving sentences that Congress has admitted are too long with few avenues for relief—including our client Dwayne, whose Section 851 was for simple

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<sup>176</sup> Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246> [https://perma.cc/VLQ8-UU47]; see also *id.* ("In 1900, the black-white incarceration disparity in the North was seven to one—roughly the same disparity that exists today on a national scale.").

<sup>177</sup> 21 U.S.C. §§ 841, 851. This section follows common practice in referring to sentencing enhancements that result from the interplay of Section 841 and Section 851 as "851s."

<sup>178</sup> As discussed in the text above, the First Step Act lowered mandatory minimum sentences for certain offenses. However, those changes applied only *prospectively*, not *retrospectively*. This part of the FSIA would apply to those individuals sentenced under mandatory minimum provisions that have since been modified by the First Step Act. *Id.* Sec. 101 (c). Those individuals could ask the court to reduce their sentences consistent with the revised mandatory minimums, after analyzing the usual sentencing factors, dangerousness, and post-sentencing conduct. *Id.*

possession.<sup>179</sup> The same is true for many people convicted in connection with the fake stash house operation who received 851s that consigned them to extraordinarily long sentences for a quantity of drugs that was wholly fabricated by the government.

Congress's failure to make the changes to Section 851 retroactive falls hardest on people of color. Before the First Step Act, the Sentencing Commission determined that fully *one-quarter* of all drug offenders were eligible for Section 851 enhancements.<sup>180</sup> Not surprisingly, people of color are disproportionately subject to 851s. Black individuals represent over forty percent of those eligible for the enhancements, and prosecutors filed over fifty percent of such enhancements against Black individuals.<sup>181</sup>

In addition to making the First Step Act's changes retroactive, Congress should repeal this law to prevent a small number of U.S. Attorney's Offices from using Section 851 enhancements as a plea bargaining tool—a hammer to exact guilty pleas out of people of color. In 2012, defendants who were eligible for Section 851 enhancements were 8.4 times more likely to receive one if they invoked their right to trial instead of pleading guilty.<sup>182</sup> In five federal districts, the enhancement was sought against more than fifty percent of those eligible for it.<sup>183</sup> In one district, the prosecutors actually described the 851 enhancement as “a hammer,” and said that they filed it against anyone who insisted on taking their case to trial.<sup>184</sup> One judge described the crushing impact of 851s: “Prior felony informations don’t just tinker with sentencing outcomes; by doubling mandatory minimums . . . they produce the sentencing equivalent of a two-by-four to the forehead. The government’s

<sup>179</sup> See *What Is America's 3 Strikes Drug Law?*, THE THIRD STRIKE, <https://www.thirdstrikecampaign.com/policy> [https://perma.cc/Y8WC-7VTX] (listing the people “buried under the 3 Strikes Drug Law”); see also *America's Three Strikes Drug Law Handcuffs Judges*, THE THIRD STRIKE, <https://www.thirdstrikecampaign.com/powerless> [https://perma.cc/VWV9-VW2Z] (“The law requires the judge to impose a life sentence in drug cases – even when the judge believes a life sentence is excessive. For many judges, the 3 Strikes Law is a crisis of conscience. A number of federal judges – powerless from the bench – have spoken out and bravely questioned whether Congress really intended to rubberstamp life sentences onto people.”).

<sup>180</sup> U.S. SENT’G COMM’N, APPLICATION AND IMPACT Of 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS 6 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712\\_851-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf) [https://perma.cc/U3DA-UUZB] [hereinafter USSC 851 REPORT].

<sup>181</sup> *Id.* at 7.

<sup>182</sup> Letter from Fed. Pub. & Cmt. Defs. to Senator Mitch McConnell, Senate Majority Leader, and Senator Chuck Schumer, Senate Minority Leader 15, on The First Step Act (H.R. 5682); Sentencing Reform (Aug. 13, 2018), [https://www.fd.org/sites/default/files/criminal-defense\\_topics/essential\\_topics/sentencing\\_resources/legislative\\_dev/federal\\_defender\\_letter\\_to\\_senate\\_re\\_first\\_step\\_act\\_and\\_sentencing\\_reform\\_8.13.18.pdf](https://www.fd.org/sites/default/files/criminal-defense_topics/essential_topics/sentencing_resources/legislative_dev/federal_defender_letter_to_senate_re_first_step_act_and_sentencing_reform_8.13.18.pdf) [https://perma.cc/TX2X-RS6H] [hereinafter Federal Defenders Letter].

<sup>183</sup> USSC 851 REPORT, *supra* note 180, at 6.

<sup>184</sup> *Id.* at 21.

use of them coerces guilty pleas and produces sentences so excessively severe they take your breath away.”<sup>185</sup> Another described Section 851 enhancements as the “deeply disturbing . . . shocking, dirty little secret of federal sentencing,” and noted that the application of prior felony enhancements was “both whimsical and arbitrary—something akin to the spin of a ‘Wheel of Misfortune’—where similarly-situated defendants in the same district, before the same sentencing judge, sometimes received a doubling of their mandatory minimum sentences and sometimes did not.”<sup>186</sup>

The case of a former client who was ultimately granted clemency captures these many problems. Our client was sentenced to mandatory life in prison after trial because the prosecutor filed two Section 851 enhancements. His two co-conspirators cooperated. After that, the government dropped the case against one of his co-conspirators, and a judge sentenced the other to only twelve months in prison—even though he was equally or more culpable than our client. That co-conspirator was charged in the Eastern District of Missouri, whereas our client was charged in the Central District of Illinois. Though just across the border from each other, federal prosecutors in the two districts take vastly different approaches to 851s: The Central District of Illinois files Section 851 enhancements in a whopping seventy-nine percent of eligible cases, but the Eastern District of Missouri files them in only forty-six percent of eligible cases.<sup>187</sup> Indeed, the Central District of Illinois was the fifth-highest district in the country for filing Section 851 enhancements.<sup>188</sup> And one study found a disturbing link to racial disparities: “[S]maller [sentencing] discounts are offered where African American populations are relatively larger.”<sup>189</sup>

Another stash house client we represent in post-conviction compassionate release proceedings faced a Section 851 enhancement for a prior simple possession conviction because he chose to exercise his constitutional right to trial. The co-defendant who recruited him for the offense and spearheaded the planning was eligible for a mandatory life sentence under Section 851 because he had two prior felony convictions. The co-defendant pled guilty, however, and the government did not file a single

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<sup>185</sup> United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013).

<sup>186</sup> United States v. Young, 960 F. Supp. 2d 881, 882, 889 (N.D. Iowa 2013).

<sup>187</sup> *Id.* at 909, app. A, Table 1A.

<sup>188</sup> *Id.*

<sup>189</sup> BRIAN D. JOHNSON, THE MISSING LINK: EXAMINING PROSECUTORIAL DECISION-MAKING ACROSS FEDERAL DISTRICT COURTS 99 (Nat'l Inst. of Just. Final Tech. Rep. 2010, Award No. 2010-IJ-CX-0012), <https://www.ncjrs.gov/pdffiles1/nij/grants/245351.pdf> [<https://perma.cc/2K44-FEQ4>].

Section 851 enhancement against him.<sup>190</sup> Just a few weeks before our client's trial began, prosecutors filed a Section 851 enhancement against him, doubling the mandatory minimum for the fake drugs from ten to twenty years.<sup>191</sup> The sentencing judge noted that this prosecutorial decision "severely increase[d] the potential penalties."<sup>192</sup> Our client ultimately received a twenty-five-year sentence, which was reduced after the sentencing judge granted the compassionate release motion.<sup>193</sup> At the sentencing hearing, the judge expressed concern about the government's selective use of Section 851 enhancements, noting that they resulted in "the difference in treatment of the defendants who went to trial and who had a § 851 notice filed and also the comparison to [the lead defendant], who pled guilty and did not."<sup>194</sup>

### C. Eliminate or Reduce Harsh Mandatory Minimums Under ACCA

Congress should repeal or reform the harsh fifteen-year mandatory minimum enhancement in the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which applies in certain firearms cases.<sup>195</sup> This enhancement is a mandatory minimum on steroids and has an extraordinarily disproportionate impact on people of color.<sup>196</sup> For federal firearms crimes in general, Black individuals are more likely than individuals of any other race to be arrested, to receive longer sentences, and to receive sentencing enhancements.<sup>197</sup> These racial disparities are most pronounced for those who are subject to ACCA's fifteen-year mandatory minimum, with Black individuals accounting for 70.5 percent of all such offenders.<sup>198</sup> Relatedly, Black individuals sentenced under ACCA received longer sentences than any racial group—185 months in prison (over fifteen years) on *average*.<sup>199</sup> This is

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<sup>190</sup> Tankey Plea Agreement at 12, United States v. Tankey, 06-CR-50074 (N.D. Ill. Apr. 30, 2008), Dkt. 117.

<sup>191</sup> See Notice of Information Regarding Prior Conviction and Penalties at 1, United States v. Tankey, No. 06-CR-50074 (N.D. Ill. filed April 21, 2008), Dkt. 102.

<sup>192</sup> Tankey Sentencing Transcript at 43:8–10, United States v. Tankey, No. 06-CR-50074 (N.D. Ill. filed Nov. 21, 2008), Dkt. 215.

<sup>193</sup> Order, United States v. Tankey, No. 06-CR-50074 (N.D. Ill. June 2, 2021), Dkt. 346.

<sup>194</sup> Lewis Sentencing Transcript at 13:20–23, United States v. Tankey, No. 06-CR-50074 (N.D. Ill. filed Aug. 14, 2008), Dkt. 218.

<sup>195</sup> ACCA applies when someone convicted of unlawfully possessing a firearm has three or more prior convictions for certain drug crimes or violent crimes. 18 U.S.C. § 924(e) (2018).

<sup>196</sup> See U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315\\_Firearms-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf) [<https://perma.cc/CDG8-26CW>] [hereinafter USSC FIREARMS REPORT].

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

higher than the median prison time people serve for murder (13.4 years).<sup>200</sup>

ACCA has also come under fire for giving prosecutors too much power to dictate a person's sentence, for clogging district and appellate courts with complicated constitutional litigation, and for causing “[t]housands of [less culpable] individuals [to] receive[] punishments disproportionate to their offenses because they were treated on par with the worst offenders Congress had in mind when passing its laws.”<sup>201</sup> Moreover, data show that ACCA does not make us safer: “While Congress instituted these reforms in the name of public safety, its actual policies have ended up making recidivism more likely, while creating glaring disparities and disproportionate sentences.”<sup>202</sup> And like 851s, there is a striking geographic disparity in the use of ACCA enhancements, with three-quarters of ACCA cases coming from just four federal Courts of Appeals: the Eleventh, Sixth, Eighth, and Fourth Circuits (in descending order), and twenty percent coming from federal district courts in Florida.<sup>203</sup>

Repealing ACCA would be the simplest way to restore sentencing discretion to judges, rectify the law’s unjust racial impact, reduce reliance on mandatory minimum penalties, and cure the many other problems the Sentencing Commission and others have identified.<sup>204</sup>

At a minimum, Congress should pass legislation so that individuals with prior *drug* convictions are not eligible for ACCA, thus limiting it only to people with three or more prior “violent felony” convictions. This is an easy fix, requiring the removal of just a few words from the statute.<sup>205</sup> And it would begin to ameliorate ACCA’s harsh and racially unjust outcomes. This change is supported by history. Congress passed laws like ACCA and included drug convictions as predicate offenses because it was operating under a misguided, non-evidence-based assumption that people with drug priors were serious criminals who needed to be incapacitated for a very long

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<sup>200</sup> Barkow, *supra* note 126, at 227–28.

<sup>201</sup> *Id.* at 201.

<sup>202</sup> *Id.* at 207.

<sup>203</sup> USSC FIREARMS REPORT, *supra* note 196, at 36–37.

<sup>204</sup> See generally Barkow, *supra* note 126, at 227–40 (discussing the excessive sentencing framework Congress created in the ACCA).

<sup>205</sup> With this limitation, the statute would read as follows: “In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).” 18 U.S.C. § 924(e)(1) (2018).

time.<sup>206</sup> But because prior drug convictions can vary widely, it makes little sense to place individuals with prior drug convictions in the same category as those with prior violence for the purposes of a severe recidivist enhancement. In fact, the Sentencing Commission has recommended a similar reform to the Career Offender directive, which will be discussed next.

ACCA's one-size-fits-all fifteen-year mandatory minimum for people with three prior *drug* convictions sweeps far too broadly, encompassing all sorts of individuals who are not dangerous, including:

- People “with no violence in their backgrounds;”
- People who have never spent a single day in prison before;
- People who ninety-nine percent of the time have not caused any physical injury;
- People who ninety-nine percent of the time will not be convicted of a violent felony in the future, and 98.4 percent of the time will not be arrested for one;
- People who have been crime free for decades or committed their qualifying offenses as juveniles;<sup>207</sup> and
- People who have three qualifying prior drug convictions for what most people would view as a single crime.<sup>208</sup>

Clearly public safety does not justify sending people in these categories to prison for a decade and a half. These same concerns about the important distinctions between people with prior convictions for drug offenses versus those with prior convictions for violence motivated the Sentencing Commission to recommend that Congress amend the Career Offender Guideline. The Commission's words apply equally here: “drug trafficking

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<sup>206</sup> Barkow, *supra* note 126, at 229–30.

<sup>207</sup> *Id.* (percentages are rounded to the nearest whole number).

<sup>208</sup> See generally Aliza Hochman Bloom, *Time and Punishment: How the ACCA Unjustly Creates a “One-Day Career Criminal,”* 57 AM. CRIM. L. REV. 1 (2020), <https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/03/57-1-time-and-punishment-how-the-acca-unjustly-creates-a-one-day-career-criminal.pdf> [<https://perma.cc/RHE7-HRNW>]. At the time this article was written, then-current law improperly considered three interrelated drug counts that arose out of the exact same conduct and were charged in the same indictment to be separate drug convictions. Congress could have easily rectified this situation by “preventing conspiracy from being counted separately from the substantive offenses when one individual has been punished for both,” or by requiring an intervening arrest or conviction between qualifying priors. *Id.* at 24–25. Shortly before publication, the Supreme Court substantially narrowed the applicability of this provision of the ACCA to exclude multiple convictions that arise “from a single criminal episode.” *Wooden v. United States*, 142 S. Ct. 1063, 1067 (2022). There remains some question about how the lower courts will apply this new decision. See *id.* at 1079–81 (Gorsuch, J., concurring in judgment). Nonetheless, the decision provides significant improvement in this area by expressly rejecting the earlier, improper interpretation of the law discussed at the beginning of this footnote.

only offenders generally do not warrant similar (or at times greater) penalties than those . . . who have committed a violent offense.”<sup>209</sup>

#### D. Eliminate or Reduce Harsh Mandatory Minimums Under the Career Offender Guideline

For the same reasons discussed above, Congress should follow the Sentencing Commission’s recommendation to amend the Career Offender directive in 21 U.S.C. § 994(h) to remove individuals with prior *drug* convictions from eligibility for the Guideline enhancement. This would limit the ambit of the Career Offender provision to people with prior convictions for a “crime of violence.”<sup>210</sup>

Like the other recidivist enhancements discussed in this section, the weight of the Career Offender enhancement falls most heavily on Black individuals.<sup>211</sup> The Sentencing Commission’s Fifteen Year Report highlighted the Career Offender Guideline’s “unwarranted adverse impacts” on people of color.<sup>212</sup> In particular, the Fifteen Year Report found that Black people are more often subject “to the severe penalties required by the career offender guideline” than similarly-situated white people because of “the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods.”<sup>213</sup> That reality puts Black people at “higher risk of conviction for a drug trafficking crime,”<sup>214</sup> and makes them more likely to have drug convictions on their record in the first place. As a result, Black individuals constitute 61.6 percent of the people sentenced under this guideline.<sup>215</sup>

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<sup>209</sup> U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 27 (2016), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf) [<https://perma.cc/8JZV-LPRN>] [hereinafter 2016 CAREER OFFENDER REPORT].

<sup>210</sup> *Id.* at 8.

<sup>211</sup> This paragraph and the three that follow are drawn from Zunkel & Siegler, *supra* note 88, at 324.

<sup>212</sup> U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 134 (2004), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf) [<https://perma.cc/FLN2-SS8P>] [hereinafter FIFTEEN YEAR REPORT].

<sup>213</sup> *Id.* at 134–35.

<sup>214</sup> *Id.* at 134.

<sup>215</sup> U.S. SENT’G COMM’N, QUICK FACTS: CAREER OFFENDERS 1 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY18.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY18.pdf) [<https://perma.cc/2TVC-H2DG>].

In addition, the Committee's data demonstrate that the career offender guideline is overly severe, especially in drug cases. Of the career offenders sentenced in Fiscal Year 2018, the overwhelming majority—approximately seventy-six percent—were convicted of drug offenses.<sup>216</sup> In approximately ninety-three percent of these cases, the person's career offender status increased their guideline range.<sup>217</sup> As the Commission itself has observed, the career offender provision has “resulted in some of the most severe penalties imposed under the guidelines,”<sup>218</sup> with “the greatest impact on the offenders in the drug trafficking only category.”<sup>219</sup> Career offender sentences are an average of 147 months in prison (12.25 years).<sup>220</sup> Because their sentences are so lengthy, career offenders now account for over eleven percent of the total BOP population,<sup>221</sup> even though career offender cases only constitute 2.5 percent of the federal sentencing docket.<sup>222</sup>

In a 2016 report to Congress, the Sentencing Commission recommended that Congress remove individuals with prior drug convictions from the reach of the Career Offender Guideline. The Commission explained that the guideline should “differentiate between career offenders with different types of criminal records, and is best focused on those offenders who have committed at least one ‘crime of violence.’”<sup>223</sup> The Commission emphasized that excluding “drug trafficking” only career offenders “would help ensure that federal sentences better account for the severity of the offenders’ prior records, protect the public, and avoid undue severity for certain less culpable offenders.”<sup>224</sup> It would also surely lessen the racial impacts of this enhancement.

The Sentencing Commission reached this conclusion after evaluating data and soliciting feedback from stakeholders.<sup>225</sup> The report was sparked in part by “growing criticisms” about the career offender guideline and the resulting “overly severe penalties” for certain career offenders, which led to “increased departures and variances from the guidelines.”<sup>226</sup> As an example,

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<sup>216</sup> See *id.*

<sup>217</sup> *Id.*

<sup>218</sup> FIFTEEN YEAR REPORT, *supra* note 212, at 133.

<sup>219</sup> 2016 CAREER OFFENDER REPORT, *supra* note 209, at 31.

<sup>220</sup> *Id.* at 24.

<sup>221</sup> *Id.* at 18.

<sup>222</sup> 2019 ANNUAL REPORT, *supra* note 98, at 77.

<sup>223</sup> 2016 CAREER OFFENDER REPORT, *supra* note 209, at 3.

<sup>224</sup> *Id.*

<sup>225</sup> Zunkel & Siegler, *supra* note 88, at 327.

<sup>226</sup> *Id.* at 11; *see also, e.g.*, United States v. Pruitt, 502 F.3d 1154, 1172 (10th Cir. 2007) (“[D]istrict courts should not be overly shy about concluding that particular defendants, even if third-time

in *United States v. Newhouse*, the district court sentenced a “drug trafficking only” career offender to a greatly-reduced sentence, explaining in a written opinion that the guideline range went from seventy to eighty-seven months to “a staggering and mind-numbing 262 to 327 months” on the basis of two prior drug convictions that arose out of a single drug raid.<sup>227</sup> After the report, judges find themselves in a “space in which the Commission disagrees with its own Guidelines as applied” for “drug trafficking only” career offenders, with no timeline for when Congress might act on the Commission’s reform recommendation.<sup>228</sup> Congress should act swiftly to amend the Career Offender directive.

## VI. REFORM THE FEDERAL PRETRIAL DETENTION SYSTEM, ESPECIALLY IN DRUG CASES

### A. Reform Recommendations: Summary

- Pass the Federal Bail Reform Act of 2020 (FBRA), introduced by Chairman of the House Judiciary Committee Jerrold Nadler (D-NY).
- Eliminate all presumptions of detention.
- At a minimum, eliminate the drug presumption by passing the bipartisan Smarter Pretrial Detention for Drug Charges Act of 2020 and pass the FBRA’s data and reporting provision.

### B. The Presumption of Detention

Congress should prioritize reforming the federal *pretrial* detention system, especially in drug cases.<sup>229</sup> Such reform is essential to reducing mass

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drug sellers, do not have the profile Congress and the Commission had in mind when they directed that sentences for career drug offenders be set at or near the top of the statutory range.”). The Commission’s 2016 report notes that “courts were most likely to depart or vary when sentencing offenders in the drug trafficking only pathway, often at the request of the government.” 2016 CAREER OFFENDER REPORT, *supra* note 209, at 44.

<sup>227</sup> United States v. Newhouse, 919 F. Supp. 2d 955, 958 (N.D. Iowa 2013).

<sup>228</sup> United States v. Henshaw, No. 16-CR-30049, 2018 WL 3240982, at \*6–7 (S.D. Ill. 2018) (concluding that the career offender guideline’s “categorical treatment of drug trafficking only offenders as severely as those who have a history of violence is unjust, results in sentences that are unduly harsh for the former, and therefore fails to promote the goals of sentencing.”).

<sup>229</sup> See generally Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, 44 THE CHAMPION 46 (July 2020), <https://www.law.uchicago.edu/files/Rethinking%20Federal%20Bail%20Advocacy%20to%20Change%20the%20Culture%20of%20Detention%20%28NACDL%20Champion%20July%202020%29.pdf> [https://perma.cc/738L-8FTZ]; Alison Siegler & Kate M. Harris, *How Did the Worst of the*

incarceration and advancing racial equity. The Bail Reform Act of 1984 (BRA) is another vestige of the War on Drugs.<sup>230</sup> The BRA has enabled widespread jailing of non-violent, low-risk individuals and has resulted in troubling racial disparities.<sup>231</sup> The BRA sent federal pretrial incarceration skyrocketing; today, federal prosecutors and courts deprive three of every four people of their liberty before trial, despite their presumed innocence.<sup>232</sup> This seventy-five percent federal jailing rate is far higher than the jailing rate for violent state crimes.<sup>233</sup> Incarceration at such levels is unnecessary and counterproductive. Government statistics show that people released pretrial in federal cases overwhelmingly appear for court as required and are not a threat to community safety.<sup>234</sup> At the pretrial stage, judges jail people charged with *drug offenses* at an astonishingly high rate based on two problematic provisions in the BRA. First, at the initial court appearance, the eligibility net is very wide: The BRA allows prosecutors to ask judges to “temporarily detain almost anyone who is charged with a drug offense until a detention hearing.”<sup>235</sup> This mandatory jailing is authorized in nearly half of all federal

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*Worst' Become 3 out of 4?*, N.Y. TIMES (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/opinion/merrick-garland-bail-reform.html> [https://perma.cc/4TUW-DPJG].

<sup>230</sup> See Zunkel & Siegler, *supra* note 88, at 294; Barkow, *supra* note 126, at 210 (“In the Bail Reform Act of 1984, one part of the [Comprehensive Crime Control Act], Congress expanded the availability of pretrial detention.”).

<sup>231</sup> See Siegler & Zunkel, *supra* note 229, at 46–48, 50–51. To the non-violence point, according to the DOJ, just two percent of federal arrests are classified as violent. FEDERAL JUSTICE STATISTICS 2015-2016, *supra* note 26, at 3. In contrast, the DOJ classifies fully 25 percent of all state felony arrests as violent offenses. BUREAU OF JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, at 2 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [https://perma.cc/4YZ-ZDUX] [hereinafter BJS URBAN FELONY REPORT].

<sup>232</sup> See Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROB. J. 52, 53 (2017), [https://www.uscourts.gov/sites/default/files/81\\_2\\_7\\_0.pdf](https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf) [https://perma.cc/9XXQ-E88V].

<sup>233</sup> Siegler & Zunkel, *supra* note 229, at 47 (“[C]ompare the federal detention rate of 75 percent with the 38 percent rate for state felonies in large urban counties nationwide, and the 45 percent detention rate for violent felonies in those same counties. Only one offense—murder—has a higher detention rate than the federal system.”) (citing BJS URBAN FELONY REPORT, *supra* note 231, at 17 tbl.12).

<sup>234</sup> ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS: FEDERAL PRETRIAL SERVICES TABLES TBL. H-15 (Dec. 31, 2019), [https://ecf.wied.uscourts.gov/cgi-bin/show\\_multidocs.pl?caseid=85506&arr\\_de\\_seq\\_nums=171&magic\\_num=&pdf\\_header=1&hdr=&pdf\\_toggle\\_possible=1&ca seid=85506&zipit=&rmagic\\_num=&arr\\_de\\_seq\\_nums=171&got\\_warning=&create\\_roa=&create\\_appendix=&bates\\_format=&dkt=&got\\_receipt=1](https://ecf.wied.uscourts.gov/cgi-bin/show_multidocs.pl?caseid=85506&arr_de_seq_nums=171&magic_num=&pdf_header=1&hdr=&pdf_toggle_possible=1&ca seid=85506&zipit=&rmagic_num=&arr_de_seq_nums=171&got_warning=&create_roa=&create_appendix=&bates_format=&dkt=&got_receipt=1) [https://perma.cc/LYG4-AX4H] (showing a nationwide failure-to-appear rate of 1.2 percent and a rearrest rate of 1.9 percent).

<sup>235</sup> Zunkel & Siegler, *supra* note 88, at 284–85; *id.* at 284 n.5 (“18 U.S.C. § 3142(f)(1)(C) (1984) provides that prosecutors can move for temporary detention in any case that involves ‘an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of Title 46 [46 USCS § 70501 et seq.]’ 18 U.S.C. § 3142(f)(1)(C) (2008). This encompasses nearly all federal drug offenses.”).

cases, including low-level drug cases.<sup>236</sup> Second, at the detention hearing, the BRA mandates a presumption that nearly everyone charged in a drug case must be detained throughout the case, even though they are presumed innocent.<sup>237</sup>

As a result of these two statutory provisions, the percentage of people in federal drug cases who were jailed while awaiting trial increased from seventy-six percent to eighty-four percent from 1995 to 2010.<sup>238</sup> A 2017 government study found that the “presumption of detention” applied in ninety-three percent of all federal drug cases.<sup>239</sup>

This is not what Congress intended. When the BRA was passed, Congress expected the presumption “to apply to rich drug traffickers who could buy their way out of jail.”<sup>240</sup> Since 2017, the Judicial Conference has repeatedly called on Congress to reform the presumption of detention in drug cases.<sup>241</sup>

Federal pretrial detention reform is especially critical considering the persistent racial disparities. Data establishes that “[w]hite defendants are more likely to be released pending trial than otherwise similar Black and Hispanic defendants,” even after controlling for other factors that are predictive of detention or release.<sup>242</sup> The presumption of detention in drug

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<sup>236</sup> See 2019 ANNUAL REPORT, *supra* note 98, at 45 (demonstrating that mandatory detention under § 3142(f)(1) is authorized in at least forty-three percent of cases, assuming the breakdown of cases charged is roughly similar to the breakdown of cases sentenced).

<sup>237</sup> *Id.* (citing 18 U.S.C. § 3142(e)(3)(A)).

<sup>238</sup> *Id.* at 53.

<sup>239</sup> Austin, *supra* note 232, at 55.

<sup>240</sup> Zunkel & Siegler, *supra* note 88, at 287.

<sup>241</sup> See Siegler & Harris, *supra* note 229. The Judicial Conference is presided over by Chief Justice Roberts and includes the chief judge of every federal circuit—including Attorney General Garland during his time as Chief Judge of the DC Circuit. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10–11 (2017), [https://www.uscourts.gov/sites/default/files/17-sep\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf) [<https://perma.cc/69VE-993X>]. The Judicial Conference reiterated this same recommendation during the COVID-19 pandemic. See Letter from the Judicial Conference of the United States to the House and Senate Appropriations Committees 2 (Apr. 28, 2020), [https://www.uscourts.gov/sites/default/files/judiciary\\_covid-19\\_supplemental\\_request\\_to\\_house\\_and\\_senate\\_judiciary\\_and\\_approps\\_committees.4.28.2020\\_0.pdf](https://www.uscourts.gov/sites/default/files/judiciary_covid-19_supplemental_request_to_house_and_senate_judiciary_and_approps_committees.4.28.2020_0.pdf) [<https://perma.cc/E8L6-KY92>].

<sup>242</sup> Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1261 (2021), <https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss5/1/> [<https://perma.cc/VN4H-8VWD>] (detailing the results of an empirical study of 300,000 federal cases from 2002 to 2016). A recent op-ed situated these racial disparities within the context of the release on personal recognizance of many charged in the wake of the insurrection: “[t]he bail outcomes in the Capitol insurrection cases are just the latest illustration

cases, specifically, “also creates racial disparities, as Black and Latino individuals are jailed in drug cases at a higher rate than white individuals.”<sup>243</sup> In fact, one study found that “white defendants (60%) were more than one and a half times more likely to receive a pretrial release than black defendants (36%),” and even more likely to be released than Latino defendants (who had a twenty-six percent release rate).<sup>244</sup>

### C. Pass the 2020 FBRA and Eliminate the Presumption of Detention

The best solution is for Congress to enact the Federal Bail Reform Act of 2020 introduced by Chairman Nadler. The FBRA would implement wide-reaching reforms of the federal pretrial detention system. For federal drug cases, it would narrow the eligibility net by removing mandatory detention provisions and authorizing judges to make individualized determinations. In addition, it would eliminate all presumptions of detention, including those in drug cases. And it includes an essential data and reporting provision that would address a major systemic problem, which is that the criminal defense bar is blocked from accessing most data about federal pretrial detention—and *all* detention data related to race.<sup>245</sup> At a minimum, Congress should eliminate the presumption of detention in federal drug cases by passing the bipartisan Smarter Pretrial Detention for Drug Charges Act of 2020 introduced in the Senate.

## VII. ENACT POST-CONVICTION REFORM

### A. Reform Recommendations: Summary

- **Clemency:** Pass legislation to support and fully fund reforming the clemency process so that it is transparent and straightforward and so that the DOJ does not have undue influence, and to allow for an independent commission.

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of the privilege not generally afforded to defendants of color.” Seema Ahmad, *Alleged Capitol Rioters Getting Released on Bail Smacks of Racial Bias and Hypocrisy*, NBC NEWS (Mar. 16, 2021, 4:40 PM), <https://www.nbcnews.com/think/opinion/alleged-capitol-rioters-getting-released-bail-smacks-racial-bias-%20hypocrisy-ncna1261223> [https://perma.cc/CGC7-LXFT].

<sup>243</sup> Siegler & Harris, *supra* note 229; see also BUREAU OF JUST. STAT., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010, at 10 tbl.9 (2012), <https://bjs.ojp.gov/content/pub/pdf/prmfldc0810.pdf> [https://perma.cc/6VG5-FRZJ] [hereinafter BJS PRETRIAL MISCONDUCT REPORT] (showing federal pretrial detention rates by race in drug cases).

<sup>244</sup> BJS PRETRIAL MISCONDUCT REPORT, *supra* note 243, at 10.

<sup>245</sup> The data tables released publicly by the Administrative Office of the U.S. Courts contain very little information, and zero information about the race effects of federal pretrial detention. Meanwhile, research into racial disparities in federal pretrial detention has been virtually non-existent for at least the past decade, with the notable exception of a just-released study. See Didwania, *supra* note 242.

- Second Look Legislation: Pass Senator Cory Booker's (D-NJ) Second Look Act of 2019.
- Repeal the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): AEDPA has greatly reduced the availability of habeas corpus relief, leaving people with meritorious legal claims in prison. Congress should repeal the law.

#### B. *The Absence of Back-End Relief and the Need for Reform*

As discussed above, people of color have borne the brunt of our federal drug laws. The tragic reality is that there is often no way to correct these disparities and injustices after a person's conviction is final. Moreover, with the abolition of federal parole in 1986, there are few avenues to reevaluate a long sentence and consider whether a person's rehabilitation or changed circumstances warrant early release. As a result, we incarcerate too many people who do not need to be in prison any longer.<sup>246</sup>

There are several ways for Congress to expand "second looks" to address this problem: (1) reforming the clemency process to make it more objective, transparent, and straightforward; (2) enacting formal "second look" legislation; and (3) eliminating AEDPA.

Clemency is a broad constitutional power that grants the President alone the ability to "grant Reprieves for Offenses against the United States, except in Cases of Impeachment."<sup>247</sup> While clemency was intended to be a back-end safety valve to correct unlawful or unjust sentences, today the clemency process is "fundamentally broken" for three principal reasons: (1) the DOJ plays an outsized role; (2) it is "grossly bureaucratic, requiring multiple layers of review" of a petition before it even reaches the president; and (3) it has "atrophied" from disuse.<sup>248</sup> The problem with the DOJ's involvement is that prosecutors have trouble being objective about cases they or their colleagues prosecuted.<sup>249</sup> And the bureaucratic hurdles make the process inefficient.

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<sup>246</sup> Shon Hopwood, *How Joe Biden Can Fix the Broken Clemency Process*, THE APPEAL (Jan. 11, 2021), <https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/> [https://perma.cc/5VM9-QU6C] ("[National] forgiveness is urgently needed, as nearly 20 percent of the federal prison population is now over the age of 50 and has effectively aged out of . . . crime.").

<sup>247</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>248</sup> Hopwood, *supra* note 246; Rachel Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 13 (2015), [https://uchicagolawjournalsmshaytiubv.devcloud.acquia-sites.com/sites/lawreview.uchicago.edu/files/01%20Barkow\\_SYMP\\_Internet.pdf](https://uchicagolawjournalsmshaytiubv.devcloud.acquia-sites.com/sites/lawreview.uchicago.edu/files/01%20Barkow_SYMP_Internet.pdf) [https://perma.cc/D8RB-9HM6].

<sup>249</sup> See Rachel Barkow & Mark Osler, *Where Reform Goes to Die*, THE INQUEST (July 26, 2001), <https://inquest.org/doj-where-reform-goes-to-die> [https://perma.cc/5LFD-JQJN] ("DOJ is

During the Trump era, many sidestepped the formal process entirely, leading to complaints that Trump “showered clemency on people with connections to him and his allies.”<sup>250</sup> During his term, Trump often highlighted his commutation for Alice Marie Johnson, a grandmother was serving a life sentence for drugs. Kim Kardashian famously brought Ms. Johnson’s case to Trump’s attention and lobbied him to grant the commutation. There is no doubt that commuting Ms. Johnson’s sentence was the right thing to do, but it raises important questions about the fairness of the process.<sup>251</sup> There are many more Alice Marie Johnsons in federal prison today serving excessive sentences for drug crimes. They should not have to catch the eye of a celebrity to secure clemency. Instead, the President should use the clemency power expansively and programmatically to address some of the systemic injustices of the criminal legal system.<sup>252</sup>

Even President Obama’s well-publicized clemency initiative failed to grapple with these fundamental problems in the clemency process. Eugene Haywood received clemency in Obama’s “Clemency Project 2014” initiative. Eugene was—and is—extraordinary, and President Obama’s initiative rightly recognized him as deserving clemency.<sup>253</sup> But the initiative’s structure left it largely toothless. Where the administration had initially projected approximately 10,000 clemency grants, it granted only 1,715 applications.<sup>254</sup> That result was hardly a surprise given the enormous barriers the administration imposed on the process: an application narrowly focused on whether an applicant was “deserving” rather than on systemic injustices, a process run by the Department of Justice, and many layers of bureaucratic review.<sup>255</sup>

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bold in the easy job of locking people up and timid in the more difficult task of crafting alternatives to brute-force incarceration.”).

<sup>250</sup> Rosalind S. Helderman et al., *In One of His Final Acts, Trump Showered Clemency on People with Connections to Him and His Allies*, WASH. POST (Jan. 20, 2020, 7:11 PM), [https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/dfc79216-5b49-11eb-8bcf-3877871c819d\\_story.html](https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/dfc79216-5b49-11eb-8bcf-3877871c819d_story.html) [https://perma.cc/GPS6-3L7Q].

<sup>251</sup> German Lopez, *Alice Johnson Deserved a Commutation. But the Way Trump Granted It was a Disaster*, VOX (June 6, 2018), <https://www.vox.com/policy-and-politics/2018/6/6/17434760/trump-alice-johnson-pardon-kim-kardashian> [https://perma.cc/APX6-SCRB].

<sup>252</sup> Judith Miller, *Not Just the Deserving*, 29 FED. SENT’G REP. 259, 261 (2017); Judith Miller, *The Case of Eugene Haywood: Why it’s Time to Scrap Mandatory Minimum Sentencing*, CHI. TRIB. (Dec. 26, 2015), <https://www.chicagotribune.com/opinion/commentary/ct-sentence-eugene-haywood-clemency-perspec-122820151226-story.html> [https://perma.cc/9ZS4-QXSK].

<sup>253</sup> Judith Miller, *supra* note 252, at 259 (“By the time my students and I met him, [Eugene] was working three jobs in custody—one for UNICOR prison industries, a second as a suicide watch companion, and a third as a GED tutor. He had learned he was especially talented at math; he was going to correspondence school for his second post-secondary degree, and he’d successfully completed a 4000-hour apprenticeship program.”)

<sup>254</sup> *Id.* at 260.

<sup>255</sup> *Id.* at 259–61.

Many have pushed for removing the clemency process from the DOJ and instituting greater transparency. Leading clemency experts Professor Rachel Barkow and Professor Mark Osler recommend the creation of an independent clemency commission that has a membership that “reflects the range of interests that play a role in the criminal justice process.”<sup>256</sup> A Commission should rely as much as possible on data about, among other things, racial disparities, recidivism, prosecutors’ charging decisions across the country, and who is applying for and receiving clemency.<sup>257</sup> It is also important to create standards for the clemency process. Congress should support establishing an independent clemency commission that sets clear standards for the review of clemency petitions.

Yet, expanding clemency is not a substitute for formal second chance legislation. Congress should pass Senator Cory Booker’s (D-NJ) Second Look Act of 2019 to ensure that our federal criminal system uses resources more efficiently than it does today and that it accounts for a person’s growth in prison. At the federal level, fifty-three percent of those incarcerated are serving sentences of ten years or more and thirty percent are serving sentences of fifteen years or more.<sup>258</sup> There are also tremendous racial disparities at play: In 2020, fifty-nine percent of the approximately 6,252 individuals serving federal life and “virtual life” sentences were Black.<sup>259</sup> Senator Booker’s bill “would allow any individual who has served at least 10 years in federal prison to petition a court to take a ‘second look’ at their sentence.”<sup>260</sup> At the hearing, the judge would decide whether to reduce the sentence, with a presumption of release for petitioners age fifty or older.<sup>261</sup> Judges would rely on factors such as whether the person demonstrates a readiness for reentry and is not a danger to the safety of any person or the

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<sup>256</sup> Barkow & Osler, *supra* note 248, at 22.

<sup>257</sup> *Id.*

<sup>258</sup> JANEANNE MURRAY ET AL., SECOND LOOK = SECOND CHANCE: TURNING THE TIDE THROUGH NACDL’S MODEL SECOND LOOK LEGISLATION 1 (2021), <https://www.nacdl.org/getattachment/c0269ccf-831b-4266-bbaf-76679aa83589/second-look-second-chance-turning-the-tide-through-nacdl-s-model-second-look-legislation.pdf> [https://perma.cc/9QDQ-5BX9].

<sup>259</sup> ASHLEY NELLIS, NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT 19 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> [https://perma.cc/MP9U-WJWW].

<sup>260</sup> Booker, Bass to Introduce Groundbreaking Bill to Give “Second Look” to Those Behind Bars, CORY BOOKER (July 15, 2019), <https://www.booker.senate.gov/news/press/booker-bass-to-introduce-groundbreaking-bill-to-give-and-ldquosecond-look-and-rdquto-to-those-behind-bars> [https://perma.cc/8VAS-QN9Q].

<sup>261</sup> *Id.*

community.<sup>262</sup> This commonsense legislation would ensure that our system is more flexible, while at the same time protecting public safety.

To complement these reforms, Congress should also repeal AEDPA. AEDPA has been called “the worst criminal justice law of the past 30 years” because it has “all but slammed the federal courthouse door on the wrongly convicted.”<sup>263</sup> There are numerous critiques of AEDPA. First, it requires federal judges to give great deference “to state courts even when they believe those courts are wrong.”<sup>264</sup> This “near-total deference” to state courts was not inevitable.<sup>265</sup> Rather, it was caused by the Supreme Court’s increasingly “needless and highly restrictive view” of when a state court’s adjudication of a person’s “federal claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court”—a requirement of AEDPA.<sup>266</sup> As a result, “the Court’s unsurpassed veneration of state courts comes at the expense of individual constitutional rights.”<sup>267</sup> Other major problems with AEDPA are the law’s strict time limits and often byzantine procedural rules to avoid default. The law should be repealed to restore “the Great Writ.”

### VIII. CONGRESS SHOULD NOT MAKE PERMANENT THE DEA’S TEMPORARY FENTANYL BAN

#### A. Reform Recommendation: Summary

- Congress should not make permanent the DEA’s temporary ban on and scheduling of all fentanyl analogues.

Prosecutors, law enforcement, and the Biden administration have asked Congress to make permanent a 2018 temporary ban on fentanyl analogues.<sup>268</sup>

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<sup>262</sup> *Id.*

<sup>263</sup> Radley Balko, *Opinion: It’s Time to Repeal the Worst Criminal Justice Law of the Past 30 Years*, WASH. POST (Mar. 3, 2021, 4:09 PM), <https://www.washingtonpost.com/opinions/2021/03/03/its-time-repeal-worst-criminal-justice-law-past-30-years/> [https://perma.cc/LZ5L-ULXB]; see also Lincoln Caplan, *The Destruction of Defendants’ Rights*, NEW YORKER (June 21, 2015), <https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights> [https://perma.cc/HV8F-VECD].

<sup>264</sup> *Id.*

<sup>265</sup> Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1224 (2015), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1217&context=mlr> [https://perma.cc/FJU3-AYRY].

<sup>266</sup> *Id.* at 1225 (quotations omitted).

<sup>267</sup> *Id.* at 1229.

<sup>268</sup> These are also referred to as “fentanyl-related substances.” Last fall, the Biden administration asked Congress to permanently categorize all fentanyl-related substances as

This would be a mistake. These cases constitute a very small percentage of all federal drug offenses and in almost all instances are already covered by existing laws. Indeed, in 2019, prosecutors chose to charge *only two cases* under the temporary ban.<sup>269</sup> There is simply no need—and a very high cost—to expanding our drug dragnet to include all fentanyl analogues, especially because there are beneficial medical uses for them.

Fentanyl is already illegal. It is a Schedule II substance under the Controlled Substances Act (CSA), and many of its harmful analogues are controlled substances as well. The vast majority of all fentanyl offenses in the federal system are criminalized under existing law, making an extension of the temporary ban unnecessary. Thus, law enforcement agencies and prosecutors already have ample enforcement tools to address fentanyl.

The potential harms to expanding the temporary ban on fentanyl analogues greatly outweigh the potential benefits for a sliver of cases. First, history has shown that using the weight of law enforcement to address a public health problem often backfires. Second, data suggest that intensifying regulation, policing, and enforcement of fentanyl-related substances risks exacerbating existing racial disparities in the criminal legal system. Third, extending the ban is likely to hinder beneficial scientific research into fentanyl's medical possibilities by creating bureaucratic barriers that make it more difficult for researchers to study the substance.

#### B. *The Federal Focus on Expanding Fentanyl Laws is Misplaced.*

##### 1. Fentanyl Cases Comprise a Small Portion of the Federal Docket

In spite of the media frenzy around fentanyl, very few federal cases would be impacted by declining to make permanent the ban on all fentanyl analogues lapse. Fentanyl offenses are a vanishingly small part of the federal

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Schedule I drugs. THE WHITE HOUSE, *Biden-Harris Administration Provides Recommendations to Congress on Reducing Illicit Fentanyl-Related Substances* (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> [https://perma.cc/VS64-3A43]. This article and the underlying testimony on which it is based were written *before* the temporary ban on fentanyl-related substances was extended in May 2021. Rebecca Shabad, *Biden Extends Ban on Fentanyl-like Substances*, NBC NEWS (May 4, 2021), <https://www.nbcnews.com/politics/white-house/biden-extends-ban-fentanyl-substances-n1266283> [https://perma.cc/5ZKB-VWJR].

<sup>269</sup> See U.S. SENT’G COMM’N, FENTANYL AND FENTANYL ANALOGUES 23 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125\\_Fentanyl-Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf) [https://perma.cc/WH8K-W56D] [hereinafter 2021 FENTANYL REPORT] (stating that the Commission could only find “several” cases involving fentanyl-related substances that were not listed in the CSA prior to the 2018 DEA emergency order, and in just two cases was the unlisted fentanyl-related substance the only determinant for sentencing purposes).

criminal landscape, constituting just 1.5 percent of all federal criminal cases in 2019.<sup>270</sup> Out of the 1,119 cases involving fentanyl or fentanyl analogues, most—886—involved fentanyl—a drug already criminalized as a Schedule II substance.<sup>271</sup> Those fentanyl cases constituted only 4.5 percent of all federal drug cases and only 1.2 percent of all federal criminal cases.<sup>272</sup> The number of fentanyl analogue cases was even smaller—just 233 cases, constituting a 1.2 percent of all federal drug cases and 0.3 percent of federal criminal cases.<sup>273</sup> Moreover, of the fentanyl analogue cases, in only two was an unlisted fentanyl analogue the primary drug establishing the basis for prosecution; in the remainder, there was a different basis for prosecution.<sup>274</sup> The vast majority of fentanyl offenses involved substances already scheduled and criminalized under the CSA, such that no additional ban is needed.<sup>275</sup>

Law enforcement agencies and prosecutors already have numerous enforcement tools to address the exceedingly small number of *unlisted* fentanyl analogue cases. Under the CSA, the DEA has the authority to temporarily schedule newly-discovered analogues on a substance-by-substance basis as Schedule I or II, allowing federal prosecutors to charge them under the federal drug laws.<sup>276</sup> Additionally, under the Analogue Act, prosecutors can treat unlisted substances as Schedule I substances if they can show that the unlisted substances have a substantially similar chemical makeup as a categorized controlled substance and produce a similar bodily effect.<sup>277</sup>

Given these existing tools and the significant downsides of extending the ban on fentanyl analogues, it is simply not worth Congress's limited time and resources.

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<sup>247</sup> *Id.* at 19 (1,119 total fentanyl and fentanyl-analogue offenses out of the 76,538 federal criminal offenses).

<sup>271</sup> *Id.* at 18 (886 offenses involving basic fentanyl); *see also* 21 USC § 812(b) (the Sentencing Commission classifies fentanyl cases in two ways based on the type of substance: (1) fentanyl; and (2) fentanyl analogues).

<sup>272</sup> *Id.* at 19.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 23.

<sup>275</sup> *Id.*

<sup>276</sup> KEVIN L. BUTLER, WRITTEN STATEMENT OF KEVIN L. BUTLER, FEDERAL PUBLIC DEFENDER FOR THE NORTHERN DISTRICT OF ALABAMA FOR THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY ON FENTANYL ANALOGUES: PERSPECTIVES ON CLASSWIDE SCHEDULING 8–9 (2020), <https://www.congress.gov/116/meeting/house/110392/witnesses/HHRG-116-JU08-Wstate-ButlerK-20200128.pdf> [<https://perma.cc/4CVC-YRKC>] [hereinafter BUTLER WRITTEN STATEMENT].

<sup>277</sup> *Id.* at 9–10.

## 2. A Ban on All Fentanyl Analogues Risks Repeating the Mistakes of the Past

Some have claimed that the War on Drugs is coming to an end.<sup>278</sup> But the recent efforts to criminalize all fentanyl analogues demonstrate that legislators have simply “dusted off the drug war playbook” to propose a wide range of new punitive measures.<sup>279</sup> This approach risks repeating the mistakes of the past. First, by using a criminal approach to a public health issue, harsher fentanyl laws drive “people who use drugs away from health services and encourage[] them to engage in more risky drug-taking activity to avoid detention and prosecution.”<sup>280</sup> Second, if past is prologue, harsher laws will not impact the supply and demand for fentanyl and may actually exacerbate the problem.<sup>281</sup> Third, increasing the eligibility net for fentanyl analogues will have downstream consequences that will be hard to correct. We have seen this play out over and over again with other drugs: crack cocaine in the 1980s, heroin in the 1990s, and methamphetamine in the 2000s.<sup>282</sup> With crack cocaine, for example, we have been trying to unwind the overly harsh penalties for decades, with only relatively recent success in Congress. This is cautionary tale for fentanyl.

## 3. The Class-wide Scheduling of Fentanyl Exacerbates Racial Disparities

Fentanyl prosecutions mirror the racial disparities present in other areas of policing and prosecution, with people of color bearing the brunt of the laws. In 2019, Black individuals comprised the largest portion of those sentenced for fentanyl offenses by a long shot (40.5 percent of fentanyl offenses generally and 58.9 percent of fentanyl-analogue offenses).<sup>283</sup> Altogether, people of color constituted at least 74.4 percent of those sentenced for fentanyl offenses and 68 percent of fentanyl-analogue offenses during the same time period (33.9 and 9.1 percent Hispanic respectively).<sup>284</sup>

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<sup>278</sup> See Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. 1323, 1324 (2016) (describing efforts by President Barack Obama’s drug “czars” to retire the War on Drugs “concept”); Nicholas Kristof, *Seattle Has Figured Out How to End the War on Drugs*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/opinion/sunday/opioid-crisis-drug-seattle.html> [https://perma.cc/Z9S2-5GHD].

<sup>279</sup> MICHAEL COLLINS ET AL., THE DRUG POLICY ALLIANCE, CRIMINAL JUSTICE REFORM IN THE FENTANYL ERA: ONE STEP FORWARD, TWO STEPS BACK 3 (2020), [https://drugpolicy.org/sites/default/files/dpa-cj-reform-fentanyl-era-v.3\\_0.pdf](https://drugpolicy.org/sites/default/files/dpa-cj-reform-fentanyl-era-v.3_0.pdf) [https://perma.cc/P8LQ-NH9K] [hereinafter DRUG POLICY ALLIANCE REPORT].

<sup>280</sup> *Id.* at 16.

<sup>281</sup> *Id.* at 15.

<sup>282</sup> See *id.* at 8, 13.

<sup>283</sup> 2021 FENTANYL REPORT, *supra* note 269, at 24.

<sup>284</sup> *Id.*

Relatedly, because law enforcement efforts have been ineffective at targeting high-level traffickers, only 5.5 percent of fentanyl offenders and 7.7 percent of fentanyl-analogue offenders had a leadership or supervisory role in the offense.<sup>285</sup> This suggests that prosecutions have primarily focused on street-level sellers who are people of color—many of whom may not even know that they are distributing a substance containing fentanyl.<sup>286</sup>

This focus on low-level sellers has resulted in only a small percentage of fentanyl-related cases where defendants clearly knew that they were distributing fentanyl and not some other drug.<sup>287</sup> Higher-ups may decide to lace other drugs, such as heroin, with fentanyl, leaving the lower-level distributors unaware that the drugs they are selling are laced with fentanyl or an analogue.<sup>288</sup> Moreover, these sellers are often themselves users, who only engage in drug sales to support their own drug use.<sup>289</sup> Because these sellers are easily replaced, fentanyl prosecutions have been relatively ineffective in reducing overall overdoses.<sup>290</sup>

The push to police all fentanyl analogues parallels the racial disparities at the heart of the War on Drugs. The majority of those who died from synthetic opioid overdoses are white.<sup>291</sup> Yet the majority of those who are charged and prosecuted for fentanyl-related offenses are people of color.<sup>292</sup> While there has been growing sympathy for the victims of drug addiction and overdoses in the wake of the opioid crisis,<sup>293</sup> policymakers and law enforcement officials are pushing for intensified policing and harsh penalties for anyone distributing synthetic opioids like fentanyl and its analogues. Thus, while white victims of opioids garner compassion, people of color bear the cost of ramped-up drug enforcement efforts. This merely furthers our

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<sup>285</sup> *Id.* at 38.

<sup>286</sup> See U.S. SENT'G COMM'N, PUBLIC DATA PRESENTATION FOR SYNTHETIC CATHINONES, SYNTHETIC CANNABINOIDS, AND FENTANYL AND FENTANYL ANALOGUES AMENDMENTS (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018\\_synthetic-drugs.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf) [<https://perma.cc/JM9T-P2NE>] [hereinafter PUBLIC DATA PRESENTATION]; see also 2021 FENTANYL REPORT, *supra* note 269, at 29 (“street-level dealers” comprised 39.6% of fentanyl offenses, and 45.5% of fentanyl-analogue offenses); DRUG POLICY ALLIANCE REPORT, *supra* note 279, at 9 (citation omitted).

<sup>287</sup> See PUBLIC DATA PRESENTATION, *supra* note 286.

<sup>288</sup> See DRUG POLICY ALLIANCE REPORT, *supra* note 279, at 9 (citation omitted).

<sup>289</sup> BUTLER WRITTEN STATEMENT, *supra* note 276, at 12–13 (citation omitted).

<sup>290</sup> *Id.* at 10; see also Nancy Gertner, *William Barr's New War on Drugs*, WASH. POST (Jan. 26, 2020), <https://www.washingtonpost.com/opinions/2020/01/26/william-barrs-new-war-drugs/> [<https://perma.cc/4KSH-2UH2>].

<sup>291</sup> Nana Wilson et al., *Drug and Opioid-Involved Overdose Deaths – United States 2017–2018*, 69 MORBIDITY AND MORTALITY WKLY. REP. 290, 294 tbl.2 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6911a4-H.pdf> [<https://perma.cc/YL28-RKUY>].

<sup>292</sup> See 2021 FENTANYL REPORT, *supra* note 269, at 24.

<sup>293</sup> See DRUG POLICY ALLIANCE REPORT, *supra* note 279, at 13 (citation omitted).

country's long history of visiting harsher punishments on people of color for offenses that are perceived to victimize whites, most notably in meting out the death penalty.<sup>294</sup>

The current push to criminalize all fentanyl analogues should be examined in the context of anti-drug efforts that historically portray white victims falling prey to people of color.<sup>295</sup> Examples include "white women being seduced by Chinese men and their opium" and Mexican immigrants using marijuana to "corrupt white women and destroy society."<sup>296</sup> Racially tinged narratives were also at the heart of the 1980's War on Drugs, perpetuating unfounded fears of "crack babies." During that time, crack cocaine use was heavily policed while law enforcement let powder cocaine—used primarily by white people—go largely unnoticed.<sup>297</sup> Today, headlines such as "U.S. drugs bust uncovers enough Chinese fentanyl to kill 14 million people"<sup>298</sup> and "Death, made in Mexico"<sup>299</sup> perpetuate a racially-charged framing of fentanyl, while law enforcement officials use apocalyptic language to bolster their calls for a permanent class-wide ban.<sup>300</sup> Examining these recent trends alongside history casts the efforts to expand the reach of fentanyl offenses in a harsh light.

#### 4. A Class-wide Ban on Fentanyl Analogues Will Likely Make it More Difficult to Conduct Beneficial Scientific Research.

Fentanyl analogues have important and beneficial uses. In particular,

<sup>294</sup> A recent study of the death penalty found that "Seventy-five percent of murder victims in cases resulting in an execution have been white," although Blacks and whites are equally likely to be victims of murder. DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF DISCRIMINATION IN THE U.S. DEATH PENALTY 29 (2020), <https://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf> [<https://perma.cc/EL8Q-UP2E>]; *see also* McCleskey v. Kemp, 481 U.S. 279, 296 (1987) (discussing the Baldus study, which examined over 2000 murder cases in Georgia during the 1970s and found that the death penalty was imposed in twenty-two percent of cases involving black defendants and white victims, but just one percent of cases involving black defendants and black victims); *see generally* BRYAN STEVENSON, JUST MERCY (2014) (recounting the case of Walter McMillian, a Black man sentenced to death in a racially charged prosecution for a crime he did not commit, the murder of a white woman).

<sup>295</sup> See DRUG POLICY ALLIANCE REPORT, *supra* note 279, at 13.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 13–14.

<sup>298</sup> *Id.* at 13 (citation omitted).

<sup>299</sup> *Id.* (citation omitted).

<sup>300</sup> See William P. Barr, *Fentanyl Could Flood the Country Unless Congress Passes This Bill*, WASH. POST, (Jan. 10, 2020), [https://www.washingtonpost.com/opinions/william-barr-congress-pass-this-bill-so-we-can-attack-the-onslaught-of-illegal-fentanyl/2020/01/10/cbb8ccdc-33cb-11ea-a053-dc6d944ba776\\_story.html](https://www.washingtonpost.com/opinions/william-barr-congress-pass-this-bill-so-we-can-attack-the-onslaught-of-illegal-fentanyl/2020/01/10/cbb8ccdc-33cb-11ea-a053-dc6d944ba776_story.html) [<https://perma.cc/4M4K-J7M8>] (anticipating a "tsunami of newly legalized fentanyl analogues" if Congress fails to pass a class-wide ban).

researchers need to be able to develop and test analogues when searching for beneficial and life-saving remedies.

This is because analogues do not necessarily have the same physiological effect as basic fentanyl.<sup>301</sup> In fact, in some cases, analogues can produce the opposite effect of the original substance. This is the case for naloxone, the life-saving antidote for those suffering a drug overdose.<sup>302</sup> Naloxone is an analogue to morphine, a highly potent opioid, and used to reverse the effects of an opioid overdose.<sup>303</sup> Thus, while some analogues of controlled substances can be highly potent and dangerous, others may hold the key to effective treatment.

Researchers worry that a permanent ban on all fentanyl analogues would make it much more difficult to conduct beneficial research.<sup>304</sup> Class-wide scheduling would put all potentially beneficial fentanyl analogues in Schedule I, requiring researchers to go through the DEA to research them.<sup>305</sup> As it has for marijuana, this would create bureaucratic barriers to the research and development of crucial, life-saving compounds.<sup>306</sup> In fact, Congress added certain protections to the Analogue Act at the urging of the American Chemical Society specifically to protect the research and development of beneficial analogues.<sup>307</sup> A class-wide ban on fentanyl analogues upends the protections Congress intended for legitimate research and development. If the goal is to reduce and prevent overdose deaths, a ban may do more harm than good by hindering medical research.

## IX. PASS THE MORE ACT

### A. Reform Recommendation: Summary

- Pass the Marijuana Opportunity Reinvestment and Expungement Act of 2020 (the MORE Act) into law.

### B. The Problem of Marijuana Criminalization

Despite its growing legalization in the states, marijuana is illegal under federal law. In fact, the federal government designates it as a Schedule I substance—a designation it shares with heroin, fentanyl, and

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<sup>301</sup> Gertner, *supra* note 290.

<sup>302</sup> *Id.*; see also BUTLER WRITTEN STATEMENT, *supra* note 276, at 10.

<sup>303</sup> BUTLER WRITTEN STATEMENT, *supra* note 276, at 10.

<sup>304</sup> See *id.* at 17–18; see also Sandra D. Comer et al., *Potential Unintended Consequences of Class-wide Drug Scheduling Based on Chemical Structure: A Cautionary Tale for Fentanyl-related Compounds*, 221 DRUG & ALCOHOL DEPENDENCE 108530, at 2 (Apr. 2021).

<sup>305</sup> BUTLER WRITTEN STATEMENT, *supra* note 276, at 4.

<sup>306</sup> *Id.* at 1.

<sup>307</sup> *Id.* at 9–10 (citation omitted).

methamphetamine.<sup>308</sup> This means the federal government currently deems marijuana to have a “high potential for abuse” and “no currently accepted medical use,” and to “lack . . . accepted safety for [medical] use,” notwithstanding evidence to the contrary.<sup>309</sup> And although federal policy has de-prioritized marijuana-related drug enforcement in the recent past, far too many individuals remain subject to arrest and criminal penalties for such offenses.

Unsurprisingly, these individuals disproportionately come from poorer communities with more people of color—the victims of our failed War on Drugs. It is now urgent that Congress pass the MORE Act to address these concerns.<sup>310</sup>

“Marijuana is one of the world’s mostly widely used psychoactive substances.”<sup>311</sup> Sixteen states have fully legalized marijuana for individuals over twenty-one,<sup>312</sup> and thirty-six states have “[a]pproved comprehensive, publicly available medical marijuana/cannabis programs.”<sup>313</sup> Current evidence suggests that there is little relationship between marijuana legalization and crime rates.<sup>314</sup> If anything, marijuana legalization is inversely correlated with both property and violent crime.<sup>315</sup>

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<sup>308</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202(c), 84 Stat. 1242, 1249 sched. I(c)(10) (1970).

<sup>309</sup> 21 U.S.C. § 812(b)(1)(A)–(B).

<sup>310</sup> Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3884, 116th Cong. (2019–2020). Representative Nadler reintroduced the MORE Act in 2021. *Press Release: Nadler, Blumenauer, Lee, Jackson Lee Jeffries, and Velázquez Reintroduce Comprehensive Marijuana Reform Legislation* (May 28, 2021), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394656> [<https://perma.cc/M4G4-LMGL>].

<sup>311</sup> Magdalena Cerdá et al., *Association Between Recreational Marijuana Legalization in the United States and Changes in Marijuana Use and Cannabis Use Disorder From 2008 to 2016*, 77 J. AM. MED. ASS’N PSYCHIATRY 165, 166 (2019), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2755276> [<https://perma.cc/3JRZ-UGZR>].

<sup>312</sup> Mona Zhang, *Virginia Joins 15 Other States in Legalizing Marijuana*, POLITICO (Feb. 27, 2021), <https://www.politico.com/news/2021/02/27/virginia-legalizes-marijuana-471840> [<https://perma.cc/4F8J-83SX>].

<sup>313</sup> NAT’L CONF. OF STATE LEGISLATURES, STATE MEDICAL MARIJUANA LAWS (Aug. 23, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/JU7W-WA2D>].

<sup>314</sup> See, e.g., Shana L. Maier et al., *The Implications of Marijuana Decriminalization and Legalization on Crime in the United States*, 44(2) CONTEMP. DRUG PROBS. 125, 136 (2017), [https://journals.sagepub.com/doi/abs/10.1177/0091450917708790?journalCode=cdxa&\[https://perma.cc/FJJ4-SSW9?type=image\]](https://journals.sagepub.com/doi/abs/10.1177/0091450917708790?journalCode=cdxa&[https://perma.cc/FJJ4-SSW9?type=image]) (“The data analyses reveal a lack of relationships between crime rates and the legal status of recreational and medical marijuana.”).

<sup>315</sup> Davide Dragone et al., *Crime and the Legalization of Recreational Marijuana*, 159 J. ECON. BEHAV. & ORG. 488, 498 (2018), <https://ideas.repec.org/a/eee/jeborg/v159y2019icp488->

Marijuana's Schedule I status has had, and continues to have, a debilitating impact on individuals, families, and communities. Though the CSA broadly grants the AG the authority to determine drug scheduling under its provisions,<sup>316</sup> and even though the office of the AG has previously, at times, expressly directed the DEA to shift enforcement away from marijuana offenses,<sup>317</sup> individuals continue to be arrested for marijuana offenses at high rates. In 2019 alone, according to the FBI, there were 545,602 marijuana arrests made in the United States<sup>318</sup>—about thirty-five percent of all drug arrests<sup>319</sup>—with simple possession representing the vast majority of *federal* marijuana-related offenses.<sup>320</sup> This, in spite of evidence that illicit marijuana trafficking has plummeted.<sup>321</sup> Between fiscal years 2015 and 2019, the Sentencing Commission reports that the number of marijuana trafficking offenders decreased by 51.6 percent.<sup>322</sup>

Predictably, the vast majority of those affected by arrests and convictions for marijuana-related offenses are people of color. Marijuana criminalization

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<sup>316</sup>See *id.*

<sup>317</sup> Memorandum from James M. Cole, Dep. Att'y Gen., to all U.S. Attorneys on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/ML62-AFSC>].

<sup>318</sup> Emily Earlenbaugh, *More People Were Arrested for Cannabis Last Year Than for All Violent Crimes Put Together, According To FBI Data*, FORBES (Oct. 6, 2020), <https://www.forbes.com/sites/emilyearlenbaugh/2020/10/06/more-people-were-arrested-for-cannabis-last-year-than-for-all-violent-crimes-put-together-according-to-fbi-data/?sh=39c3fc0a122f> [<https://perma.cc/QBS8-TN8V>].

<sup>319</sup> JUST. ROUNDTABLE, TRANSFORMATIVE JUSTICE: RECOMMENDATIONS FOR THE NEW ADMINISTRATION AND THE 117TH CONGRESS 34 (2020), <https://justiceroundtable.org/wp-content/uploads/2020/11/Transformative-Justice.pdf> [<https://perma.cc/6W4Y-H5ML>].

<sup>320</sup> U.S. SENT'G COMM'N, WEIGHING THE CHARGES: SIMPLE POSSESSION OF DRUGS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 3 (2016), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609\\_Simple-Possession.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf) [<https://perma.cc/V8RQ-XEKJ>].

<sup>321</sup> DRUG ENFT' ADMIN., 2020 NATIONAL DRUG THREAT ASSESSMENT 47 (2021), [https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment\\_WEB.pdf](https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf) [<https://perma.cc/SI42-MLF7>] [hereinafter 2020 DRUG THREAT REPORT] (reporting an 81% decrease in marijuana seizures between 2013 and 2019).

<sup>322</sup> U.S. SENT'G COMM'N, QUICK FACTS: MARIJUANA TRAFFICKING OFFENSES 1 (2019), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Marijuana\\_FY19.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Marijuana_FY19.pdf) [<https://perma.cc/7346-EYNX>] [hereinafter MARIJUANA QUICK FACTS].

has always had racially dubious origins.<sup>323</sup> It devastated minorities as the War on Drugs ramped up during the early 1980s,<sup>324</sup> with soon-to-be president Ronald Reagan opining, “marijuana — pot, grass, whatever you want to call it — is probably the most dangerous drug in the United States.”<sup>325</sup> In 2019, the Sentencing Commission reported that 67.4 percent of those convicted of federal marijuana-offenses were Hispanic, while another 14.2 percent were Black—most of whom had had “little or no prior criminal history” (65.2 percent).<sup>326</sup> Yet, it is well documented that the marijuana usage rates of white and non-white individuals are similar.<sup>327</sup> The ACLU highlights that black people are approximately four times more likely to be arrested for marijuana possession than are white people—“a disparity that increased 32.7% between

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<sup>323</sup> See, e.g., Steven W. Bender, *Joint Reform: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 361–365 (2013), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1116&context=faculty> [<https://perma.cc/Y397-RLMU>]; Michael Vitello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 797–800 (2019), <https://law.lclark.edu/live/files/28624-lcb23article1vitellowebsitedpdf> [<https://perma.cc/FJL2-XAVV>]; Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 104 (2018), <https://www.bjcl.org/assets/files/23.1-Todd.pdf> [<https://perma.cc/JQ7Q-TX9U>]. Although prohibitions on marijuana enacted because of their association with minority groups is nothing new in world history; see Ryan Stoa, *A Brief Global History of the War on Cannabis*, THE MIT PRESS READER (Jan. 23, 2020), <https://thereader.mitpress.mit.edu/a-brief-global-history-of-the-war-on-cannabis/> [<https://perma.cc/X3ZC-KDPC>].

<sup>324</sup> See Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 691 (2016), [https://lawreview.law.ucdavis.edu/issues/50/2/Topic/50-2\\_Bender.pdf](https://lawreview.law.ucdavis.edu/issues/50/2/Topic/50-2_Bender.pdf) [<https://perma.cc/V3KA-DPVF>] (“Marijuana use by youth of color has been the focal point of the War on Drugs from its inception. Most U.S. drug arrests stem from unlawful possession rather than trafficking in drugs, and most of those possession arrests are for marijuana, amounting to near a million arrests annually. Evidencing the racial inequity of the War on Drugs, African Americans and Latinos account for most of those arrests despite their smaller population numbers than whites and studies confirming that white youths use marijuana in the same percentage as African American and Latino Youth.”); see also Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/> [<https://perma.cc/F3HM-FVLV>].

<sup>325</sup> Simon Moya-Smith, *Marijuana Legalization Must Make War on Drugs' Victims Whole Before Companies Profit*, THINK, NBC NEWS (Mar. 11, 2019, 3:37 AM), <https://www.nbcnews.com/think/opinion/marijuana-%20legalization-must-make-war-drugs-victims-whole-companies-profit-ncna981391> [<https://perma.cc/9J6D-X242>].

<sup>326</sup> MARIJUANA QUICK FACTS, *supra* note 322, at 1.

<sup>327</sup> See Todd, *supra* note 323, at 105 (“Blacks and whites use and sell marijuana at very similar rates”); see also *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> [<https://perma.cc/STG4-Y59K>] (“In the 2015 National Survey on Drug Use and Health, about 17 million white people and 4 million African Americans reported having used an illicit drug within the last month.”).

2001 and 2010.”<sup>328</sup> This disparity continues today.<sup>329</sup>

The impact of marijuana enforcement on persons of color has only been exacerbated by the “civic death” that often follows criminal conviction. Marc Mauer, the former executive director of the Sentencing Project, explained:

[P]olicymakers have had to expand their reach beyond just sentencing enhancements, and have enacted a new generation of collateral sanctions that impose serious obstacles to a person’s life prospects long after a sentence has been completed. Many obstacles are related to initiatives of the ‘war on drugs,’ with a seemingly endless series of restrictions being placed on people convicted of a drug offense.”<sup>330</sup>

Some of the collateral consequences of a conviction for a marijuana-related offense include the loss of professional licenses, denial of educational loans and aid, barriers to employment, refusal of public housing, and deportation.<sup>331</sup> Ironically, even in states that have chosen to fully legalize marijuana, these consequences can throw salt on the racial wounds of those convicted of marijuana offenses by failing to expunge such offenses from criminal records, effectively barring them from participating in what has now become not only a legal, but a lucrative business.<sup>332</sup> Past rationales surrounding federal marijuana policy are also undermined by recent data.

The vast majority of the individuals convicted of federal marijuana offenses serve a prison sentence,<sup>333</sup> the average length of which is over two and a half years.<sup>334</sup> Yet the Sentencing Commission reports that very few marijuana offenses involved the possession of a weapon (16.2 percent), and fewer still pertained to individuals with leadership or supervisory roles in

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<sup>328</sup> ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 9 (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rel1.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf) [https://perma.cc/WRF2-BGWR]; *id.* at 12 (“Blacks were arrested for marijuana possession at almost four times the rate as whites.”).

<sup>329</sup> ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 37 (2020), [https://www.aclu.org/sites/default/files/field\\_document/marijuanareport\\_03232021.pdf](https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf) [https://perma.cc/X5ZK-SWEA] (“In 2018—unchanged from 2010—Black people were still nearly 4 times more likely than white people to get arrested for marijuana possession, despite similar usage rates.”).

<sup>330</sup> Marc Mauer, *Thinking About Prison and its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 610 (2005), <https://www.sentencingproject.org/publications/thinking-about-prison-and-its-impact-in-the-twenty-first-century/> [https://perma.cc/M9VF-W2J8].

<sup>331</sup> Todd, *supra* note 323, at 107–08; *see also* Bender, *supra* note 323, at 380–83.

<sup>332</sup> See Moya-Smith, *supra* note 325.

<sup>333</sup> MARIJUANA QUICK FACTS, *supra* note 322, at 1.

<sup>334</sup> *Id.*

marijuana-trafficking (six percent).<sup>335</sup> These are a far cry from your “career criminals”<sup>336</sup> or the “big-fish drug dealers” stereotyped to the public for decades. Indeed, according to the DEA, illicit marijuana seizures along the Southwest border have plummeted from 1.3 million kilograms in 2013 to 249,000 kilograms in 2019—an over eighty-one percent decline.<sup>337</sup> Not only do those convicted of federal marijuana offenses tend to be people of color, but they are also typically non-violent and lack significant criminal histories.

### C. Enact the MORE Act

Given these realities, Congress must pass legislation to decriminalize and deschedule marijuana. In July 2019, House Representative Jerrold Nadler (D-NY) and Vice President Kamala Harris (D-CA) introduced the Marijuana Opportunity Reinvestment and Expungement Act as a way to curb the destructive effects of longstanding federal drug policy.<sup>338</sup> The bill passed in the House in a 228-164 vote (mostly along party lines) on December 4, 2020.<sup>339</sup> The bill did not pass in the Senate, however. Representative Nadler reintroduced the MORE Act in May 2021, and Senators Booker, Schumer, and Wyden have introduced a “discussion draft” of a similar bill in the Senate.<sup>340</sup>

The MORE Act would begin to repair the racially-disparate effects of past marijuana policy,<sup>341</sup> and assist minority communities in obtaining

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<sup>335</sup> *Id.*

<sup>336</sup> *Id.* (“65.2 % had little or no prior criminal history” while only “3% were Career Offenders”).

<sup>337</sup> 2020 DRUG THREAT REPORT, *supra* note 321, at 47. It seems that DEA uses this statistic as a proxy for trafficking activity carried out by Mexican “transnational criminal organizations” (TCOs). *See generally passim.*

<sup>338</sup> See H.R. 3884, 116th Cong. (2019–2020); S. 2227, 116th Cong. (2019–2020).

<sup>339</sup> Catie Edmonson, *House Passes Landmark Bill Decriminalizing Marijuana*, N.Y. TIMES (Dec. 6, 2020), <https://www.nytimes.com/2020/12/04/us/politics/house-marijuana.html> [https://perma.cc/V2ZJ-VF3J].

<sup>340</sup> Press Release: *Marijuana Opportunity and Reinvestment & Expungement (MORE) Act Reintroduced in the House*, DRUG POL’Y ALL. (May 28, 2021), <https://drugpolicy.org/press-release/2021/05/marijuana-opportunity-reinvestment-expungement-more-act-reintroduced-house> [https://perma.cc/6MHD-G2FH]; Press Release: *Majority Leader Schumer, Senate Finance Committee Chair Wyden And Senator Booker Release Discussion Draft Of Cannabis Administration And Opportunity Act, Legislation To End The Federal Cannabis Prohibition And Unfair Targeting Of Communities Of Color*, SENATE DEMOCRATS (July 14, 2021), <https://www.democrats.senate.gov/newsroom/press-releases/majority-leader-schumer-senate-finance-committee-chair-wyden-and-senator-booker-release-discussion-draft-of-cannabis-administration-and-opportunity-act-legislation-to-end-the-federal-cannabis-prohibition-and-unfair-targeting-of-communities-of-color> [https://perma.cc/FUH9-4K4G].

<sup>341</sup> April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men*

employment and business opportunities, thus helping their members on the road to financial security. The MORE Act's stated purpose is to "decriminalize and deschedule cannabis [and] to provide for reinvestment [in those] adversely impacted by the War on Drugs."<sup>342</sup> The Act also acknowledges that "[p]eople of color have been historically targeted by discriminatory sentencing practices resulting [in increased sentencing of Black and Hispanic men]."<sup>343</sup> Among other things, the MORE Act mandates the removal marijuana from "inclusion in any schedule" of the CSA,<sup>344</sup> retroactively expunges most federal convictions relating to marijuana and provides for resentencing of those who have endured such convictions,<sup>345</sup> provides an outline for a regulatory and tax regime regarding the manufacture and sales of marijuana-related businesses, creates an Opportunity Trust Fund designed to benefit those individuals who have been negatively impacted by the War on Drugs,<sup>346</sup> and ensures that the provisions of the MORE Act retroactively amend the CSA.<sup>347</sup> Importantly, the Act would assist impacted individuals in working and starting businesses in the budding marijuana industry<sup>348</sup> and would ensure that adverse immigration consequences no longer stem from marijuana offenses.<sup>349</sup>

Moreover, the Act would shore up a growing, and unnecessary, rift between federal and state law. The administrative authorities heading up drug scheduling, legislation, and the MORE Act, in particular, have a unique opportunity to address the many issues surrounding marijuana policy. The CSA broadly grants the AG and the Secretary of the Department of Health and Human Services the authority to determine the scheduling of particular drugs under its provisions; these officials, in turn, delegate their authority to the DEA<sup>350</sup> and the Food and Drug Administration, respectively.

For its part, the DEA's position is that it has a broad prerogative to interpret the requirements pertaining to a Schedule I substance. For example, in 1992, the DEA promulgated a test consisting of five individually necessary and jointly sufficient conditions pertaining to the meaning of the "accepted

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*Stay in Prison*, ALTERNET (Mar. 16, 2014), <https://www.alternet.org/2014/03/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison/> [https://perma.cc/U3XN-JLLP] ("I think we have to be willing, as we're talking about legalization, to also start talking about reparations for the war on drugs, how to repair the harm caused.").

<sup>342</sup> H.R. 3617, 117th Cong. (2021).

<sup>343</sup> *Id.* § 2(8).

<sup>344</sup> *Id.* § 3(a)(2).

<sup>345</sup> *Id.* § 10(a)–(c).

<sup>346</sup> *Id.* § 5.

<sup>347</sup> *Id.* § 3(d).

<sup>348</sup> *Id.* § 4.

<sup>349</sup> *Id.* § 9.

<sup>350</sup> Organization of the DOJ, 28 C.F.R. § 0.100 (2021).

medical use” requirement.<sup>351</sup> According to the agency’s interpretation, such a use requires (i) chemistry which is known and reproducible, (ii) that there are adequate safety studies as well as (iii) studies that are “[a]dequate and [w]ell-[c]ontrolled [s]tudies [p]roving [its] [e]fficacy,” (iv) that it is accepted by qualified experts, and (v) that “[t]he [s]cientific [e]vidence [is] [w]idely [a]vailable.”<sup>352</sup> The agency holds that marijuana has not yet been shown to any of those conditions<sup>353</sup> and is undisturbed by the recent wave of legalization reforms in states across the country.<sup>354</sup> Further, the DEA sees itself as having broad discretion to change drug scheduling as part of the rulemaking process<sup>355</sup> as well as to fashion other standards intended to guide the interpretation of the CSA.<sup>356</sup> Possession (even simple) and distribution of Schedule I substances, including marijuana, are subject to various criminal penalties defined in the CSA.<sup>357</sup>

Given the DEA’s delegated authority to interpret the CSA—to which courts have thus far deferred<sup>358</sup>—as well as the agency’s long-standing view that marijuana has “no currently accepted medical use,” it will likely be extremely difficult to pursue administrative or litigation remedies. This point is magnified by the fact that the DEA has pursued policies that hamper the kind of scientific research it claims is essential to establish that marijuana has an “accepted medical use.”<sup>359</sup> If such use could be established, a petition to

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<sup>351</sup> Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10506 (Mar. 26, 1992).

<sup>352</sup> *Id.*

<sup>353</sup> See, e.g., Petitioner’s Reply Brief at 38–41, *Sisley v. Drug Enf’t Admin.*, 11 F.4th 1029 (9th Cir. 2021) (No. 20-71433).

<sup>354</sup> *Id.* at 30–31.

<sup>355</sup> Controlled Substances Act, 21 U.S.C. § 811(a)–(b) (2011).

<sup>356</sup> *Grinspoon v. Drug Enf’t Admin.*, 828 F.2d 881, 892 (1st Cir. 1987) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

<sup>357</sup> See 21 U.S.C. § 841 (2018).

<sup>358</sup> See *All. for Cannabis Therapeutics v. Drug Enf’t Admin.*, 930 F.2d 936, 939 (D.C. Cir. 1991); see also *All. for Cannabis Therapeutics v. Drug Enf’t Admin.*, 15 F.3d 1131, 1134 (D.C. Cir. 1994) (“We noted the ambiguity of the phrase and the dearth of legislative history on point and deferred to the Administrator’s interpretation as reasonable.”); *Americans for Safe Access v. Drug Enf’t Admin.*, 706 F.3d 438, 449 (D.C. Cir. 2013) (explaining that the court “expressly approved” DEA’s five-factor test); see also *Krumm v. Drug Enf’t Admin.*, 739 F. App’x 655, 655 (D.C. Cir. 2018) (per curiam).

<sup>359</sup> U.S. SEN. CAUCUS ON INT’L NARCOTICS CONTROL, CANNABIS POLICY: PUBLIC HEALTH AND SAFETY ISSUES AND RECOMMENDATIONS 13–14 (2021), <https://www.drugcaucus.senate.gov/wp-content/uploads/2021/08/02-March-2021-Cannabis-Policy-Report-Final.pdf> [<https://perma.cc/E3WU-RZ6M>] (“The DEA and the DOJ have long held the view that, pursuant to the United Nations Single Convention on Narcotic Drugs and the CSA, *there can be only one source of cannabis in the United States.*”) (emphasis added).

change marijuana's schedule status would be successful.

Other potential remedies are also not ideal. The DEA *should* shift resources away from drug enforcement for marijuana-related offenses<sup>360</sup> in light of current legislative efforts. However, strategic administrative discretion lasts only as long as the given administration is in power. For instance, former Deputy Attorney General David Ogden penned a memorandum that directed DOJ to focus marijuana enforcement efforts on production and distribution, instead of use and possession, in states that have legalized marijuana. His successor under President Obama, Deputy Attorney General James Cole, affirmed these priorities. But later, AG Sessions "rescinded the Obama-era guidance that deprioritized federal enforcement. . . ."<sup>361</sup>

Recently, AG Merrick Garland testified that low-level cannabis crimes would not be a priority of the Justice Department, saying,

The marijuana example is a perfect example. Here is a nonviolent crime that does not require us to incarcerate people and we are incarcerating at significantly different rate(s) in different communities. That is wrong and it's the kind of problem that will then follow a person for the rest of their lives. It will make it impossible . . . to get a job and will lead to a downward economic spiral. We can focus our attention on violent crimes and other crimes. . . . and not allocate our resources to something like marijuana possession. We can look at our charging policies and stop charging the highest possible offense with the highest possible sentence.<sup>362</sup>

While our current political winds are favorable, the instability in federal drug enforcement priorities, coupled with recent numbers on marijuana arrests and convictions, reinforces the idea that administrative abstention in federal marijuana enforcement would be unsatisfactory. Even if diverting enforcement were sustainable, that would not help the countless individuals

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<sup>360</sup> Legalization of marijuana has not supported an increase in violent crime and has supported the proposition that it has actually had the opposite effect. *See, e.g.*, Dragone et al., *supra* note 315, at 498 ("The concern that legalizing cannabis for recreational purposes may increase crime occupies a prominent position in the public debate about drugs. Our analysis suggests that such a concern is not justified. We reach conclusion in line with . . . a crime drop.").

<sup>361</sup> Ed Chung et al., *Rethinking Federal Marijuana Policy*, CTR. FOR AM. PROGRESS (May 1, 2018, 9:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/05/01/450201/rethinking-federal-marijuana-policy/> [https://perma.cc/588E-EM53].

<sup>362</sup> John Hudak, *Merrick Garland, Cannabis Policy, and Restorative Justice*, BROOKINGS (Feb. 24, 2021), <https://www.brookings.edu/blog/fixgov/2021/02/24/merrick-garland-cannabis-policy-and-restorative-justice/> [https://perma.cc/FJ8Y-P9BL].

whose lives have been negatively impacted by the War on Drugs.<sup>363</sup> Similarly, mere federal decriminalization of marijuana would be an unsettling half-measure. Decriminalization would fail to help those affected individuals, and, indeed, would simply replace one problem with another: leaving vulnerable individuals open to civil penalties<sup>364</sup> that are often difficult, if not impossible, for them to pay.<sup>365</sup>

For these reasons, the best solution is for Congress to pass the MORE Act, or a comparable piece of legislation, to deschedule marijuana and counter the effects of decades of devastating federal marijuana policy. The MORE Act's many reforms would be significant steps in addressing the harmful legacy of the War on Drugs, would bring federal law in line with a growing number of state laws, and would do so better than the alternatives.

## X. CIVIL ASSET FORFEITURE

### A. Reform Recommendations: Summary

- Pass legislation revoking the Sessions authorization for federal agencies to commence civil asset forfeiture proceedings. This would serve to limit the federal involvement in the state systems of civil forfeiture and mitigate some of the harms that this policy causes.
- Pass legislation limiting the federal authority to commence civil asset forfeiture proceedings. This would require federal agencies to instead use criminal asset forfeiture proceedings, which require a higher standard of proof and mitigate the underlying concerns with civil asset forfeiture.
- Pass legislation that forbids the distribution of revenue resulting from federal civil asset forfeitures to state law enforcement

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<sup>363</sup> AG Garland, it seems, was (at least) implicitly sympathetic with our view when he also testified that “[it is important] to focus on the crimes that really matter [...] and not have such an overemphasis on marijuana possession, for example, which has disproportionately affected communities of color and damaged them far after the original arrest because of the inability to get jobs.” *Attorney General Confirmation Hearing, Day 1*, C-SPAN, at 3:46:27 (Feb. 22, 2021), <https://www.c-span.org/video/?508877-1/attorney-general-confirmation-hearing-day-1> [https://perma.cc/3EFF-X9GC].

<sup>364</sup> See Sam Wood et al., *Despite Marijuana’s Increasing Legalization and Acceptance, Arrests Soar*, PHILA. INQUIRER, (Oct. 4, 2018), <https://www.inquirer.com/philly/news/weed-marijuana-legalization-arrests-pennsylvania-new-jersey-african-american-20181004.html-2> [https://perma.cc/9BEE-VFS4].

<sup>365</sup> Todd, *supra* note 323, at 108 (“[e]ven a small fine for a person who cannot pay it can quickly escalate into a larger fine, then a warrant, and then the person is swept into the criminal justice system.”).

entities. This would prevent federal funds from being used in a way that violates federal policy.

### B. *The Problem of Civil Asset Forfeiture and the Need for Reform*

Former AG Sessions authorized the DOJ and other federal agencies to forfeit assets that were originally seized by state and local law enforcement agencies. This policy substantially increases the magnitude of the underlying problems with civil asset forfeiture, namely, the imposition of punishment on innocent people, and the perverse incentives to police for profit or bounty hunt instead of enforcing the law neutrally. Congress should formally repeal the Sessions authorization and consider limiting federal civil asset forfeiture proceedings.

In July 2017, AG Sessions signed an order that allowed the DOJ and other federal agencies to forfeit assets that state and local law enforcement agencies initially seized.<sup>366</sup> This order unquestionably strengthened the federal forfeiture program, making civil asset forfeiture a priority for the DOJ. The DOJ should rescind this order, and the practice of adopting state forfeiture proceedings into the federal system should end.

Current civil asset forfeiture law permits the seizure of property that is even *suspected* of being connected to criminal activity.<sup>367</sup> As long as law enforcement officials have probable cause to believe that the property is properly subject to forfeiture proceedings, law enforcement officials can bring an action against the property *in rem*.<sup>368</sup> The burden of proof for these proceedings is a preponderance of the evidence, and the government must show that there is a substantial connection between the property and the offense.<sup>369</sup> Innocent owners must prove by a preponderance of the evidence that they “did not know of the conduct giving rise to forfeiture; or upon learning of the conduct giving rise to forfeiture, did all that reasonably could

<sup>366</sup> OFF. OF THE ATT’Y GEN., ORDER NO. 3946-2017 (July 19, 2017), <https://www.justice.gov/criminal-mlars/file/985631/download#:~:text=Federal%20forfeiture%20of%20property%20seized%20lawfully%20by%20state%20and%20local,in%20violation%20of%20federal%20law.&text=This%20order%20is%20effective%20immediately%20and%20applies%20prospectively%20to%20all%20federal%20adoptions> [https://perma.cc/MH26-2ZQE]; see also U.S. DEP’T OF JUST., POLICY DIRECTIVE 17-1, POLICY GUIDANCE ON THE ATTORNEY GENERAL’S ORDER ON FEDERAL ADOPTION AND FORFEITURE OF PROPERTY SEIZED BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1 (2017), <https://www.justice.gov/file/982616/download> [https://perma.cc/FWB7-4MLW]; DEP’T OF JUST., ASSET FORFEITURE POLICY MANUAL 1 (2021), <https://www.justice.gov/criminal-afmls/file/839521/download> [https://perma.cc/AQN6-XZ78].

<sup>367</sup> Luis Suarez, *Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense*, 5 TEX. A&M J. PROP. L., 1001, 1002 (2019), <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1104&context=journal-of-property-law> [https://perma.cc/5ZYD-9GR6].

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 1003.

be expected under the circumstances to terminate such use of the property.”<sup>370</sup>

Modern day civil asset forfeiture dates to the War on Drugs of the Nixon and Reagan administrations. The original goals of civil asset forfeiture were to provide a method for law enforcement to seize profits from drug offenses.<sup>371</sup> However, these goals have been perverted by the low standards of proof and financial incentives to engage in civil asset forfeiture.

*In rem* proceedings lower the burden on the government in several ways. First, the culpability of the party does not need to be proven for *in rem* proceedings. There is no requirement that the civil forfeiture proceedings accompany a criminal conviction or a criminal proceeding of any nature.<sup>372</sup> Additionally, the government needs only to prove that it is more likely than not that the property is connected to a crime.<sup>373</sup> This limited burden of proof is especially concerning given that the Supreme Court has recognized that civil *in rem* forfeitures are at least partially punitive in nature.<sup>374</sup>

Additionally, there are strong financial incentives for law enforcement to engage in civil asset forfeiture, which perverts the intended purposes of the policy. All agencies that deposit assets into the federal Asset Forfeiture Fund are eligible to receive an annual allocation from that fund.<sup>375</sup> In 1986, the second year after the creation of the Assets Forfeiture Fund, proceeds totaled over \$93 million.<sup>376</sup> By 2008, the Fund topped \$1 billion in net assets for the first time.<sup>377</sup> The Fund’s revenue has only increased since that, hitting \$1.7 billion in total assets in 2020.<sup>378</sup> As the Fund’s size increases, so does its payments to local law enforcement agencies.<sup>379</sup> This increases state and

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<sup>370</sup> *Id.* (quoting 18 U.S.C. § 983(d)(2)(A) (2018)).

<sup>371</sup> *Id.* at 1005.

<sup>372</sup> Suarez, *supra* note 367, at 1007.

<sup>373</sup> *Id.*

<sup>374</sup> See *Austin v. United States*, 509 U.S. 602, 618 (1993) (“forfeiture serves ‘punitive and deterrent purposes’”) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 686 (1974)).

<sup>375</sup> Suarez, *supra* note 367, at 1008–09.

<sup>376</sup> Jennifer Levesque, *Property Rights—When Reform Is Not Enough: A Look Inside the Problems Created by the Civil Asset Forfeiture Reform Act of 2000*, 37 W. NEW ENG. L. REV. 59, 82 (2015), <https://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1731&context=lawreview> [https://perma.cc/9JKF-EPWX].

<sup>377</sup> *Id.*

<sup>378</sup> DEP’T OF JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2020, 7 (2021), <https://oig.justice.gov/sites/default/files/reports/21-015.pdf> [https://perma.cc/85MD-WSP5].

<sup>379</sup> Levesque, *supra* note 376, at 83.

federal interconnection, which is especially concerning given the low standards applied to state civil asset forfeiture proceedings.

Payouts from the Asset Forfeiture Fund to local law enforcement agencies sometimes violate federal law. Under federal asset forfeiture laws, money that is forfeited in the federal system can only be used for law enforcement purposes.<sup>380</sup> One independent audit indicated that approximately one-third of the checks written out of the asset forfeiture account in a local police department constituted questionable expenses that violated federal guidelines.<sup>381</sup> This particular department used revenue from forfeitures to pay for benefits, dinners, football tickets, fundraisers, and a staff Christmas party.<sup>382</sup> Additionally, state and local law enforcement agencies sometimes use civil asset forfeiture proceeds to pay officers' salaries in multiple jurisdictions, which directly conflicts with federal forfeiture policy.<sup>383</sup> Many local law enforcement agencies also depend on forfeiture revenue for a significant portion of their annual budget, despite federal guidelines that limit forfeiture proceeds to increasing, not replacing, budget appropriations.<sup>384</sup> In some jurisdictions, law enforcement officers are permitted to use the property that they seize, and some departments have "wish lists" to determine which property should be forfeited.<sup>385</sup>

Federal courts have recognized that this lucrative and relatively effortless process creates a "'built-in' conflict of interest" for law enforcement.<sup>386</sup> This perversion in purpose "gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain for the government."<sup>387</sup> The pull of profit is not localized to the state system—a DOJ publication goes so far as to state that law

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<sup>380</sup> *Id.* at 84.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J. L. & POL'Y 315, 334 (2017), [https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle\\_probable\\_cause\\_to\\_plunder.pdf](https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle_probable_cause_to_plunder.pdf) [https://perma.cc/N5YH-BL94].

<sup>384</sup> *Id.* at 334–35; U.S. DEP'T OF JUST., GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 22 (2009), <https://www.justice.gov/sites/default/files/usa-ri/legacy/2012/03/26/esguidelines.pdf> [https://perma.cc/B2GH-SNH2].

<sup>385</sup> Crepelle, *supra* note 383, at 335; Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), <https://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html> [https://perma.cc/8GC2-FZKA].

<sup>386</sup> Crepelle, *supra* note 383, at 337; *see, e.g.*, United States v. 632-636 Ninth Ave., 798 F. Supp. 1540, 1551 (N.D. Ala. 1992).

<sup>387</sup> Crepelle, *supra* note 383, at 337 (citing United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 735 (C.D. Cal. 1994)).

enforcement priorities in drug enforcement should be guided by what enforcement tactics are most lucrative.<sup>388</sup>

The traditional justifications for civil asset forfeiture are inadequate. AG Sessions argued that civil asset forfeiture benefits the public at large because “it helps return property to the victims of crime.”<sup>389</sup> However, a study of over 100 federal cases *conducted by the government* showed that over half of the seizures had “no discernable connection between the seizure and the advancement of law enforcement efforts.”<sup>390</sup>

## XI.FOURTH AMENDMENT AND PRIVACY REFORMS

### A. *Reform Recommendations: Summary*

To confront present day realities, Congress should make sweeping changes to the Stored Communications Act (SCA) and related statutes protecting electronic privacy. We recommend the following changes:

- Expand and revise the SCA’s warrant requirement: The SCA currently allows law enforcement to use nothing more than a subpoena to obtain vast swaths of personal information. Congress should significantly expand the scope of the statutory warrant requirement to provide increased privacy protections without requiring extensive revisions to the statutory framework.
- Suppression remedy for violations of electronic privacy: The SCA and related statutes provide no suppression remedy for their violation. Congress should revise these statutes to require the exclusion of evidence obtained in violation of the law to encourage compliance with the laws.<sup>391</sup>

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<sup>388</sup> *Id.* at 338. Law enforcement must figure out whether it is more lucrative “to target major dealers or numerous smaller ones.” U.S. DEP’T OF JUST., MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE YEAR REVIEW 1988-1992, at 23 (1993), <https://www.ojp.gov/pdffiles1/Digitization/146395NCJRS.pdf> [<https://perma.cc/KYR3-U289>].

<sup>389</sup> Press Release, U.S. Dep’t Just., Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement, U.S. Dep’t of Just. (July 19, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state> [<https://perma.cc/ABU2-DNWT>].

<sup>390</sup> OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF THE DEPARTMENT’S OVERSIGHT OF CASH SEIZURE AND FORFEITURE ACTIVITIES 21 (2017), <https://oig.justice.gov/reports/2017/e1702.pdf> [<https://perma.cc/ZT7N-BJSE>].

<sup>391</sup> See Orin S. Kerr, *Lifting the “Fog” of Internet Surveillance: How A Suppression Remedy Would Change Computer Crime Law*, 54 HASTINGS L.J. 805, 807–08 (2003), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3518&context=hastings\\_law\\_journal](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3518&context=hastings_law_journal) [<https://perma.cc/CW2H-JYBP>] (arguing that a suppression remedy would serve both liberty and law enforcement).

- Right to present a defense: Congress should amend the statute to expressly authorize people charged with crimes to obtain electronic records that are material in their defense.
- Rewrite the SCA to include standards that adapt as technology advances: The Stored Communications Act and the related statutes are mired in outdated concepts from the 1980s, such as the distinction between opened and unopened communications. Resting our statutory framework for electronic privacy on irrelevant distinctions degrades our decision-making and leads to absurd results.

### B. Our Statutory Electronic Privacy Framework Does Not Work.

In its 2018 decision in *Carpenter v. United States*, the Supreme Court upended decades of Fourth Amendment case law and the thirty-year old SCA.<sup>392</sup> *Carpenter* held that people have a legitimate expectation of privacy in electronic records that track their physical movements.<sup>393</sup> Accordingly, the Court found that obtaining third-party cell-site records that had tracked the defendant's movements for seven days was a Fourth Amendment search.<sup>394</sup> Although *Carpenter* moved electronic privacy law in the right direction, the opinion made plain just how easily law enforcement can obtain huge swaths of extremely personal information with only a subpoena: “the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy.”<sup>395</sup>

Unfortunately, *Carpenter* only scratched the surface; far more reform is needed to bring this area of law up to speed and to adapt to modern technologies. Understanding the problem requires taking a step back to the Fourth Amendment’s “third party doctrine” and Congress’s statutory responses. In general terms, the Fourth Amendment broadly protects “persons, houses, papers, and effects.”<sup>396</sup> In the 1970s, however, the Supreme Court concluded that we have no expectation of privacy when our records are held by third parties such as banks. Accordingly, taking those records does not invoke the Fourth Amendment and does not require a warrant.<sup>397</sup> This is known as the “third-party” doctrine.<sup>398</sup>

The rise of electronics in the 1980s complicated the third-party doctrine by increasing the type and quantity of records held by third parties. On a computer network, “a user does not have a physical ‘home,’ nor really any private space at all. Instead, a user typically has a network account consisting

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<sup>392</sup> *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>393</sup> *Id.* at 2217.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 2224 (Kennedy, J., dissenting).

<sup>396</sup> U.S. CONST. amend. IV.

<sup>397</sup> See *Carpenter*, 138 S. Ct. at 2216–17 (discussing *Smith v. Maryland*, 442 U.S. 735 (1979) and *United States v. Miller*, 425 U.S. 435 (1976)).

<sup>398</sup> *Id.*

of a block of computer storage that is owned by a network service provider. . . .”<sup>399</sup> Our “most private information”—not just email but *all* electronic interactions—“ends up being sent to private third parties and held far away on remote network servers.”<sup>400</sup> In response, in the mid-1980s, Congress enacted a complex statutory regime to provide some privacy protections where the Fourth Amendment appeared to run out: the Electronic Communications Privacy Act (ECPA), which contained and/or revised the Stored Communications Act (SCA), the Wiretap Act, and the Pen Register Act.<sup>401</sup> This “cryptic” statutory framework provides varying levels of statutory privacy rights depending on outdated and now irrelevant statutory distinctions. Troublingly, the statute requires only a subpoena for all non-content information, such as the date on which the communication was sent and its recipient—Internet-age analogies to the pen registers that escape Fourth Amendment protection.<sup>402</sup>

Both the electronic privacy framework and the Fourth Amendment’s third-party doctrine predate the widespread use of technology in daily life—email for nearly all correspondence, online bill-pay as the default, “smart” devices in the home from birth (baby bassinets) through death (remote heart monitoring devices), important social life taking place via social media, widespread use of “the cloud” to store the most personal information such as calendars or photos. It also predates contemporary law enforcement surveillance regimes—cell-site emulators such as Stingrays that pretend to be cell phone towers, facial recognition algorithms, widespread license plate readers, state-run video surveillance in cities, etc. All of these technological developments present privacy problems under the statutes, and many or most of them have little protection under the Fourth Amendment.

### C. Specific Examples of Problem Areas

The problems with the SCA and related statutes are myriad. This section describes a few issues in depth.

#### 1. Easy Government Access to Pervasive, Intimate Electronic Records

Even after *Carpenter*, law enforcement can still obtain vast swaths of

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<sup>399</sup> Orin S. Kerr, *A User’s Guide to the Stored Communications Act*, 72 GEO. WASH. L. REV. 1208, 1209 (2004), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=421860](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=421860) [<https://perma.cc/7N7S-ENC9>].

<sup>400</sup> *Id.* at 1209–10.

<sup>401</sup> See *id.* at 1210; Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in 18 U.S.C.).

<sup>402</sup> Compare 18 U.S.C. § 2703(a), (b) (content information) with *id.* § 2703(c) (non-content information); see also *Smith*, 442 U.S. at 745–46; Kerr, *supra* note 399, at 1227–28.

extraordinarily personal information with only a subpoena. As Justice Kennedy observed:

[I]t is well established that subpoenas may be used to obtain a wide variety of records held by businesses, even when the records contain private information. Credit cards are a prime example. . . . Subpoenas also may be used to obtain vehicle registration records, hotel records, employment records, and records of utility usage, to name just a few other examples.<sup>403</sup>

If anything, this disturbing list *understates* the problem. The dramatic expansion in the type and quantity of electronic records has transformed the nature of government surveillance.

The sheer quantity of electronic versions of traditional business records enables a more pervasive form of surveillance than the “third party” doctrine ever anticipated.<sup>404</sup> A record of all of one’s Amazon purchases during the pandemic, for example, paints a detailed picture of daily life in a way that a record of one’s purchases at a single corner store does not. Likewise, collecting credit card data can reveal a family’s entire purchase history in our cash-less society—something the Supreme Court could hardly have anticipated in the 1970s.

The so-called “Internet of Things” adds a qualitatively new intimacy to these pervasive records.<sup>405</sup> Law enforcement can now collect granular information about us via the “smart” devices that track minute aspects of our lives. Some especially disturbing examples include fitness trackers that collect medical data,<sup>406</sup> linked to location data and personally identifiable information in user accounts; Internet-connected automobiles that track not only our location but also every time we brake or accelerate, our musical choices, and which cars come near us; and smart homes and buildings that collect data on who is in them, when, and what we do—from baby monitors

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<sup>403</sup> *Carpenter*, 138 S. Ct. at 2228–29 (Kennedy, J. dissenting).

<sup>404</sup> See *id.* at 2217–18 (majority opinion).

<sup>405</sup> See *id.* at 2218 (characterizing historical cell-site records as “a category of information otherwise unknowable”). For a helpful overview of the “Internet of Things,” see generally U.S. GOV’T ACCOUNTABILITY OFF., TECHNOLOGY ASSESSMENT: INTERNET OF THINGS: STATUS AND IMPLICATIONS OF AN INCREASINGLY CONNECTED WORLD (2017), <https://www.gao.gov/assets/gao-17-75.pdf> [<https://perma.cc/4LHU-4H6L>] [hereinafter GAO TECHNOLOGY REPORT].

<sup>406</sup> The GAO found that “health and fitness apps” collected data on “names, email addresses, exercise habits, diets, medical symptom searches, location, gender, and more.” GAO TECHNOLOGY REPORT, *supra* note 405, at 34.

to washing machines to garage door openers.<sup>407</sup>

The SCA and its counterparts were not written to account for the modern world of electronic records. The now-irrelevant categories on which the statutory regime rests result in strange legal arguments. For example, as of at least 2012, the DOJ maintained that federal agents could search emails without a warrant if the emails were opened or over 180 days old.<sup>408</sup> That absurd position was legally well-grounded in the SCA, but orthogonal to any relevant issue about when or why the government should be able to search our emails. Likewise, today, there is little question that the SCA authorizes the DOJ to access nearly all the “non-content” information described in this section with only a subpoena—a distinction that simply elides the issues that matter to mass surveillance.<sup>409</sup>

## 2. Modern and Emerging Technologies Allow Law Enforcement to Track You in Fine-grained Detail

Law enforcement also uses new technologies under their or private control to track us in fine-grained and previously impossible detail. Law enforcement argues that the use of these technologies requires neither a warrant nor a subpoena. One especially disturbing and emblematic example is automated license plate readers—a technology to which the SCA’s dated language does not even apply.<sup>410</sup>

The DEA houses the National License Plate Recognition Initiative, a national database containing what are surely millions—if not billions—of

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<sup>407</sup> See *id.* at 16–20, 22, 33. For a disturbing catalogue of “always on” devices in the home and their data collection practices, see Letter from Elec. Priv. Info. Ctr. to Loretta Lynch, U.S. Atty Gen., & Edith Ramirez, Fed. Trade Comm’n Chairwoman, ELEC. PRIV. INFO. CTR. (July 10, 2015), <https://epic.org/privacy/internet/fcc/EPIC-Letter-FTC-AG-Always-On.pdf> [<https://perma.cc/LMC8-UGWF>].

<sup>408</sup> FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 18.6.8.4.2.4 (2012), [https://www.aclu.org/sites/default/files/field\\_document/June%202012%20FBI%20DIOG.pdf](https://www.aclu.org/sites/default/files/field_document/June%202012%20FBI%20DIOG.pdf) [<https://perma.cc/XX2X-ZR45>]. But see United States v. Warshak, 631 F.3d 266, 274 (6th Cir. 2010) (discussing Fourth Amendment protection for emails).

<sup>409</sup> See Kerr, *supra* note 399, at 1219–20.

<sup>410</sup> Law enforcement does not publicly release information about its tracking technologies, and sometimes even goes to some lengths to obscure its use of them. See, e.g., Cyrus Farivar, *FBI would rather prosecutors drop cases than disclose stingray details*, Ars Technica (Apr. 7, 2015, 4:35 PM), <https://arstechnica.com/tech-policy/2015/04/fbi-would-rather-prosecutors-drop-cases-than-disclose-stingray-details/> [<https://perma.cc/XA7N-GJ9B>] (quoting agreement expressly requiring prosecutor to drop case rather than disclose “Stingray” technology, at the request of the FBI). This written testimony does not attempt to catalogue the confirmed, likely, and possible emerging forms of law-enforcement surveillance and instead focuses on license plate readers as emblematic of the problem.

snapshots of license plate records.<sup>411</sup> Databases like this transform what was once the unremarkable practice of an officer running your plates into a pervasive system for tracking your movements—both in real time and as far back in time as data is saved. Automated license plate reader systems are established when cities, law enforcement agencies such as the DEA, and private businesses place special license plate cameras throughout the country.<sup>412</sup> The cameras record the license plates of passing vehicles, day and night, then upload that information nearly immediately to enormous databases.<sup>413</sup> The city of Atlanta alone managed to collect snapshots of nearly thirty million license plates with 347 cameras in just one month.<sup>414</sup>

The scope of these databases is staggering—especially considering that law enforcement has regularly queried them for real-time hits or historical data without even a subpoena.<sup>415</sup> The exact size of the DEA's federal database is unknown, but similar databases reveal the enormous number of people being swept into this law enforcement dragnet. For example, the largest commercial database for law enforcement contained at least five *billion* snapshots in 2016—with 100 million new scans each month.<sup>416</sup> The database is not limited to any one jurisdiction: As the company owner testified, his database aggregates license plate snapshots from law enforcement and private cameras.<sup>417</sup>

These databases make it easy for law enforcement to conduct startlingly broad searches that reveal intimate information about where we go and when.

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<sup>411</sup> Little information is publicly available about this initiative. Most articles appear to rely on the documents collected via FOIA requests by the ACLU and available online. See generally Jay Stanley & Bennett Stein, *FOLA Documents Reveal Massive DEA Program to Records American's Whereabouts with License Plate Readers*, ACLU (Jan. 26, 2015, 7:15 PM), <https://www.aclu.org/blog/free-future/foia-documents-reveal-massive-dea-program-record-americans-whereabouts-license> [https://perma.cc/22QU-66ZP].

<sup>412</sup> Alison Klein & Josh White, *License Plate Readers: A Useful Tool for Police Comes with Privacy Concerns*, WASH. POST (Nov. 19, 2011), [https://www.washingtonpost.com/local/license-plate-readers-a-useful-tool-for-police-comes-with-privacy-concerns/2011/11/18/gIQAuEApcN\\_story.html](https://www.washingtonpost.com/local/license-plate-readers-a-useful-tool-for-police-comes-with-privacy-concerns/2011/11/18/gIQAuEApcN_story.html) [https://perma.cc/EWW9-M8Q8].

<sup>413</sup> The scope of these databases is staggering. In just one month, the city of Atlanta managed to collect snapshots of nearly 30 million license plates with just 347 cameras. Josh Wade & Aaron Diamant, *Eyes on the Road*, ATLANTA J. CONST., <http://specials.ajc.com/plate-data/> [https://perma.cc/47YN-R8VJ].

<sup>414</sup> *Id.*

<sup>415</sup> *Id.* The question of whether the Fourth Amendment applies to stored license plate reader data after *Carpenter* is an open question. See, e.g., United States v. Yang, 958 F.3d 851, 853, 863–65 (9th Cir. 2020) (Bea, J., concurring in judgment).

<sup>416</sup> Yang, 958 F.3d at 853; Vigilant Solutions, *Vigilant Solutions Bolsters Commercial LPR Database through Agreement with MVTRAC*, PR NEWSWIRE (May 20, 2015, 7:00 ET), <https://www.prnewswire.com/news-releases/vigilant-solutions-bolsters-commercial-lpr-database-through-agreement-with-mvtrac-300086183.html> [https://perma.cc/2FEJ-8BNU].

<sup>417</sup> Reporter's Transcript of Proceedings at 31, United States v. Yang, 958 F.3d 851 (E.D. Nev. Dec. 6, 2016) (No. 16-CR-00231), Dkt.41.

The commercial database owner explained that officers could search his database by entering in a location and then pull up each and every license plate “scanned within that radius.”<sup>418</sup> Or, officers can input a simple query that pulls the dates, times, and locations of a single license plate in the database’s billions of license plate snapshots.<sup>419</sup> In *United States v. Yang*, for example, a postal service inspector learned his target’s home address after performing just such a search.<sup>420</sup> Following you and your car—via your license plate—can likewise reveal your private beliefs and associations, including “marital fidelity; religious observance; and political activities.”<sup>421</sup>

The SCA appears to impose no limitations on law enforcement’s use of this relatively new technology. That is because the SCA’s limitations apply only to “public” services.<sup>422</sup> The DEA’s National License Plate Recognition Initiative is not public, nor is it a commercial service available to law enforcement subscribers only.<sup>423</sup> Thus, the SCA, which was adopted for the very purpose of providing some kind of statutory privacy protection, provides none at all against emerging technologies.

The lack of fit between new technologies and our statutory regime for governing electronic privacy is not limited to license plate readers. Similar problems arise for many other government-only technologies. For example, facial recognition software attached to surveillance cameras allows the government to track your movements through the streets in real time—and historically, if the data is stored.<sup>424</sup> The SCA appears to provide no barrier to this or other similarly intrusive law-enforcement-only technologies.

### 3. Privacy Statutes Appear to Prohibit People Accused of Crimes from Obtaining Exculpatory Electronic Evidence

The SCA and related statutes also appear to prohibit people accused of

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<sup>418</sup> *Id.* at 25.

<sup>419</sup> *Id.*

<sup>420</sup> *Yang*, 958 F.3d at 853.

<sup>421</sup> N. CAL. REG’L INTEL. CTR., INITIAL PRIVACY IMPACT ASSESSMENT FOR AUTOMATED LICENSE PLATE READER TECHNOLOGY 3 (Mar. 3, 2021), <https://ncric.org/html/NCRIC%20ALPR%20PIA.PDF> [https://perma.cc/DP58-2HEA].

<sup>422</sup> 18 U.S.C. §§ 2702(a)(1), 2711(2).

<sup>423</sup> See Kerr, *supra* note 399, at 1226.

<sup>424</sup> This is not a dystopian projection of *future* capabilities but rather appears to describe capabilities the government already has or nearly has. China already purports to use such technology, and Detroit and Chicago have purchased systems that allow it. See Clare Garvie & Laura M. Moy, *America Under Watch: Face Surveillance in the United States*, GEORGETOWN L. CTR. ON PRIV. & TECH. (May 16, 2019), <https://www.americaunderwatch.com/> [https://perma.cc/HV43-ZWCR].

crimes from obtaining electronic records necessary to their own defense. The SCA forbids service providers from disclosing covered records except as authorized by statute.<sup>425</sup> Those statutory exceptions include law enforcement (via the mechanisms discussed above), but do not include people charged with crimes.<sup>426</sup> Thus, where the government can obtain electronic records such as social media with only a subpoena, the defense cannot, no matter how compelling the need. This “privacy asymmetry” is not only arguably unconstitutional but also “risks wrongful convictions.”<sup>427</sup>

A recent California case that turned on social media companies’ refusal to turn over such records illustrates the unfairness of this practice, as well as its questionable constitutional footing. California charged Lee Sullivan with murder on a shaky case: Only one witness—Mr. Sullivan’s ex-girlfriend—claimed that he was involved with the crime.<sup>428</sup> Mr. Sullivan accordingly subpoenaed social media companies for his ex-girlfriend’s communications to show that she had lied about his involvement with the murder as revenge for him breaking up with her.<sup>429</sup> Had the records been produced and shown as much, they would have devastated the government’s primary evidence against Mr. Sullivan, presumably resulting in a not-guilty verdict.

Mr. Sullivan never received those records and instead was convicted after trial without them.<sup>430</sup> For over six years, the social media companies have fought disclosure at every level of the California courts, and all the way to the Supreme Court, arguing that the SCA prohibited them from turning over the materials.<sup>431</sup>

There is no question that the privacy rights of a third party deserve some respect, just as they do when the police are investigating a crime.<sup>432</sup> But those rights can and should be balanced with a defendant’s need for, and constitutional entitlement to, exculpatory evidence. Authorizing the

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<sup>425</sup> 18 U.S.C. § 2702(a).

<sup>426</sup> See 18 U.S.C. §§ 2702(b), 2703.

<sup>427</sup> Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Investigations*, 68 UCLA L. REV. 212, 215 (2021), <https://www.uclalawreview.org/privacy-asymmetries-access-to-data-in-criminal-defense-investigations/> [https://perma.cc/3N63-CU3K]. The specifics of the constitutional conflict can vary, but the core issue is that a person accused of a crime has a Sixth Amendment right to subpoena favorable evidence. See U.S. CONST. amend. VI. To the degree that the SCA purports to prohibit companies from complying with that constitutional command, then it would seem to be unconstitutional.

<sup>428</sup> Facebook, Inc. v. Superior Court, 417 P.3d 725, 733 (Cal. 2018).

<sup>429</sup> *Id.*

<sup>430</sup> Brief in Opposition for Respondent Lee Sullivan at 5, *Facebook, Inc.*, P.3d 725 (No. 19-1006).

<sup>431</sup> See Petition for a Writ of Certiorari at 1, *Facebook, Inc.*, P.3d 725 (No. 19-1006).

<sup>432</sup> In addition to standing on their statutory rights, the social media companies purported to be standing up for the privacy rights of the third parties whose accounts they hold. *Id.* at 15–21.

government to obtain inculpatory evidence while categorically prohibiting the defense from accessing that evidence is not the answer. The answer is to provide a statutory mechanism expressly granting people accused of crimes access to electronic records to present their defense (including social media records). At a minimum, Congress should add a “savings provision” expressly providing that the statute does not prohibit disclosing information “otherwise required by law.”<sup>433</sup>

## XII. ENACT OPEN-FILE DISCOVERY AND ENSURE FAIR TRIALS

### A. Reform Recommendations: Summary

- Pass legislation to enact a mandatory open-file discovery rule in federal criminal cases. Require prosecutors to automatically disclose all discovery in a timely manner, early enough in the pretrial process that the accused can consider any evidence in determining whether to take their case to trial or plead guilty.
- At a minimum, pass legislation that requires early disclosure of all evidence that is potentially favorable or exculpatory, without any consideration of whether the evidence meets the traditional “materiality” standard that allows prosecutors to withhold evidence.
- Pass legislation requiring thorough and early investigation and disclosure of all complaints and investigations into local police officers involved in cases that are ultimately charged in federal court, as well as any allegations of involvement with white supremacist organizations. This investigation and disclosure requirement should apply to proven, unproven, and under-investigation allegations.
- Require federal prosecutors to keep a database of all credibility findings regarding local or federal law enforcement officers and require disclosure to the defense on a case-by-case basis. At a minimum, the database should include all adverse credibility findings by federal and local courts in their district. Failure to expeditiously put such a system in place should warrant a rebuttable presumption of discovery sanctions.
- Pass legislation regulating the use of confidential informants in federal criminal cases.
  - Require a presumption of early disclosure of informant identity and information.

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<sup>433</sup> Wexler, *supra* note 430, at 259.

- Require agents and prosecutors to record their conversations with informants and cooperators. At a minimum, require contemporaneous documentation of the date and content of each meeting.
- Require pretrial reliability hearings before allowing a cooperator to testify.
- Prohibit federal law enforcement agents and prosecutors from relying on evidence gathered from “John Doe” warrants to support federal prosecutions. At a minimum, pass legislation requiring federal law enforcement agents and prosecutors to obtain identifying and criminal history information for any John Doe informant who is relied on to support a federal prosecution, and to disclose that information to the defense, subject to *in camera* review by a federal judge.
- Require federal law enforcement agents and prosecutors to provide documentation to the federal judge regarding steps taken to independently vet and verify the reliability of each John Doe’s information.
- These revisions should be guided by our *Touchstones for Proposed Legislation to Reform Criminal Discovery, infra* Part J.

In our criminal legal system, all people who are charged with a crime have a constitutional right to mount a complete defense.<sup>434</sup> Protecting this right is crucial to the integrity of the system. In addition, prosecutors are supposed to pursue truth and justice.<sup>435</sup> This involves both zealously advocating for the government’s interest and ensuring that every person accused of a crime is treated fairly. At times, these interests conflict and threaten to jeopardize the integrity of the system. Nowhere is this more apparent than in the modern doctrine governing pretrial discovery in federal criminal cases.

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<sup>434</sup> See, e.g., Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution’s Files*, THE CHAMPION (May 2013), <https://www.nacl.org/Article/May2013-PursuingDiscoveryinCriminalCas> [https://perma.cc/6LMJ-E4NC] (“[A]n effective argument can be made that the Sixth and Fourteenth Amendments to the U.S. Constitution require full disclosure to the defense of all records and materials prior to trial in a criminal case.”).

<sup>435</sup> Berger v. United States, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is *not that it shall win a case, but that justice shall be done*. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, *while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*”) (emphasis added).

*B. The Need for Broad Discovery Reform*

Discovery is the process by which parties obtain information and evidence from each other. In federal civil cases, both parties are entitled to discovery of any piece of evidence held by the other side. Parties must preserve all potentially relevant evidence, their attorneys must seek out that evidence, and each side is entitled to written and oral interviews of key witnesses.<sup>436</sup> But in federal criminal cases, discovery is much more limited. The government can destroy evidence that would be preserved in the civil context; the defense must restrict their discovery requests to specific pieces of evidence set forth in Rule 16 of the Federal Rules of Criminal Procedure,<sup>437</sup> and the defense is nearly always prohibited from interviewing government witnesses.

Congress should pass a law requiring open-file discovery of the government's evidence in federal criminal cases, similar to the standard used in civil cases.<sup>438</sup> This law should have teeth, such as a presumption of sanctions for failure to disclose. Even when prosecutors pledge in court to comply with their discovery obligations, it is not uncommon for the defense attorney to learn later that some critical piece of evidence was destroyed or not turned over—sometimes through concealment, but most often through sheer inattentiveness.

At a minimum, Congress should pass a law that requires prosecutors to automatically disclose all relevant or favorable evidence to the defense early enough in the pretrial process that the accused can consider any favorable evidence in determining whether to take their case to trial or plead guilty. As one federal judge said in responding to a survey about criminal discovery practices: “[A] move toward a completely open file approach from the prosecution, with appropriate discovery from the defense, is more likely to lead to a fair result, which increases public confidence in the system.”<sup>439</sup>

Broader criminal discovery is necessary to enable the defense to conduct

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<sup>436</sup> FED. R. CIV. P. 26–37.

<sup>437</sup> FED. R. CRIM. P. 16.

<sup>438</sup> “Mandatory and open-file discovery, in which prosecutors make their entire case file available to the defense and disclose particular items at required times, leads to a more efficient criminal justice system that better protects against wrongful imprisonment and renders more reliable convictions.” THE JUST. PROJ., EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 2 (2007), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewrtstsorg/reports/death\\_penalty\\_reform/expanded20discovery20policy20briefpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewrtstsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf) [https://perma.cc/36B3-Z5RS] [hereinafter EXPANDED DISCOVERY REVIEW].

<sup>439</sup> FED. JUD. CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 20 (2011), [https://www.uscourts.gov/sites/default/files/rule16rep\\_2.pdf](https://www.uscourts.gov/sites/default/files/rule16rep_2.pdf) [https://perma.cc/F4DE-9B7C] [hereinafter RULE 16 SURVEY RESPONSES].

a full and complete pretrial investigation. Many defendants—especially those who are innocent of the crime for which they have been charged—are “not equipped to provide their attorneys with the information needed for an effective investigation.”<sup>440</sup> By contrast, prosecutors and law enforcement agents are sophisticated actors who have well-established and well-funded investigatory processes.<sup>441</sup>

Open-file discovery would also enhance access to effective assistance of counsel for indigent clients and safeguard the presumption of innocence. Defense counsel must be able to assess and respond to the case against their client, *especially* in the pretrial context. Since “[t]he vast majority of cases never proceed to trial, . . . it is the attorney’s work in the preparation of the case” that is crucial to ensure a just outcome.<sup>442</sup> Defense attorneys are severely hampered by the limited discovery granted under Rule 16 and *Brady v. Maryland*.<sup>443</sup> It is fair to say that this “highly restrictive discovery” regime in fact “constitutes government interference with” the constitutional guarantee of “effective assistance of counsel.”<sup>444</sup> This injustice disproportionately burdens indigent defendants with appointed counsel whose ability to acquire evidence independently is understandably constricted by limited resources.

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<sup>440</sup> Jenny Roberts, *Too Little Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1153 (2004), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1898&context=ulj> [https://perma.cc/2BJC-LRZH].

<sup>441</sup> Scott Hardy, Note, *The Right to a Complete Defense: A Special Brady Rule in Capital Cases*, 87 S. CAL. L. REV. 1489, 1497 (2014), [https://southernkalifornialawreview.com/wp-content/uploads/2014/09/87\\_1489.pdf](https://southernkalifornialawreview.com/wp-content/uploads/2014/09/87_1489.pdf) [https://perma.cc/QJV5-DESK] (“The government has a number of investigative advantages over the defense in preparing its case: the government is able to begin gathering evidence immediately after the crime is discovered; the government has experienced personnel with expert training, sophisticated investigative equipment and facilities, and cooperation from other law enforcement agencies; the government usually has the cooperation of citizens in gathering evidence and witnesses; and the government can use pretrial procedures (such as grand jury investigations or coroner inquests) as information gathering tools. In contrast, defendants often have very limited resources. . . .”) (internal citations omitted).

<sup>442</sup> Klinkosum, *supra* note 434.

<sup>443</sup> Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There’s More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298, 1308–09 (1988). “A reviewing court that uses outcome-determinative analysis determines whether a given error or event affected the outcome of lower court proceedings.” *Id.* at 1298 n.1. Using such analysis, the defendant bears “the burden of proving the impact of the error on the outcome of the proceeding.” *Id.* at 1308. The standard for materiality established in *Bagley* (evidence is material only if there is a “reasonable probability” that its disclosure to the defense would have changed the result of the proceeding) means that, unlike with harmless error analysis, “convictions will stand when neither party would be able to carry the burden of proof.” *Id.* at 1308. This creates a substantial obstacle for defendants, and some have even gone so far as to claim that such outcome-determinative tests are “equivalent to requiring the defendant to prove his innocence.” *Id.* at 1308–09 & n.62.

<sup>444</sup> Klinkosum, *supra* note 434 (quoting Jenny Roberts, *Too Little Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1100 (2003)).

The outcome of this disparity—a legal system where a person’s ability to adequately prove their innocence hinges on their financial resources—is antithetical to the foundational values that undergird our system.<sup>445</sup>

### C. The Flaws of the Brady Doctrine and the Need for Clear Standards

In *Brady*, the Supreme Court declared that “our system of the administration justice suffers when any accused is treated unfairly.”<sup>446</sup> But the current standard is unfair, inefficient, and costly. Congress should take immediate action to protect this right and provide much-needed clarity.

One problem with the narrow scope of discovery in criminal cases is that the defense is not automatically entitled to any piece of evidence—even evidence that is favorable and might exculpate the accused at trial. Under the rule the Supreme Court set forth in 1963 in *Brady*, a prosecutor’s failure to provide exculpatory evidence will only constitute a violation of the defendant’s rights if the withheld evidence “is material either to guilt or to punishment.”<sup>447</sup> In the *Brady* context, the word “material” has a very specific meaning. Evidence is “material” only if there is a reasonable probability that it will affect the outcome of the accused’s trial or sentencing—that is, if it will change the result.<sup>448</sup>

This “materiality” standard has wreaked havoc on our justice system. Congress must legislate a new standard that eliminates the materiality requirement.

The problems with the materiality requirement are legion.<sup>449</sup> At the most basic level, the materiality requirement exempts a prosecutor from disclosing to the defense all sorts of evidence that might be relevant at trial or might mitigate the accused’s sentence. It allows a prosecutor to withhold evidence—even evidence that has the potential to negate the guilt of the accused, impeach a witness, or lower the accused’s sentence—any time the prosecutor thinks that the evidence is unlikely to change the result of the trial or sentencing.<sup>450</sup> As Justice Thurgood Marshall warned in 1985, the *Brady*

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<sup>445</sup> For a discussion of the many benefits of reform, see generally EXPANDED DISCOVERY REVIEW, *supra* note 438.

<sup>446</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>447</sup> *Id.*

<sup>448</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985) (“The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”).

<sup>449</sup> *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases*, NAT’L ASS’N OF CRIM. DEF. LAW (Nov. 17, 2014), <https://www.nacdl.org/Document/MaterialIndifferenceHowCourtsImpedeFairDisclosure> [https://perma.cc/GSU3-X7QV].

<sup>450</sup> Klinkosum, *supra* note 434.

materiality requirement “enables prosecutors to avoid disclosing obviously exculpatory evidence” by deeming that evidence nonmaterial.<sup>451</sup> This is wrong. The fact that evidence is favorable, helpful, exculpatory, or mitigating should be sufficient to require its disclosure.

This standard puts the prosecutor in the difficult—if not impossible—position of serving as both a strong advocate for the government’s interests and as an impartial decisionmaker on whether evidence will be helpful to the defense: “[T]he prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case.”<sup>452</sup> Relatedly, the materiality requirement expects prosecutors to put themselves in the shoes of the defense attorney and consider how their adversary might view a given piece of evidence: “What may appear exculpatory to a defense attorney — or lead to the discovery of exculpatory evidence through additional investigation — may appear only tangentially relevant to a prosecutor.”<sup>453</sup>

It is especially important to eliminate the materiality requirement in the pretrial context, as the relative weight of a piece of evidence cannot yet be considered within the full evidentiary context of the case. As the Washington, D.C. Court of Appeals said in a related context, “there can be no objective, ad hoc way for a prosecutor to evaluate *before* trial whether [evidence or information] will be material to the outcome.”<sup>454</sup> During the pretrial phase, any materiality analysis a prosecutor conducts is prospective and utterly speculative. Notably, *Brady* is “the only area of constitutional criminal procedure in which the fairness of a prosecutor’s pretrial decision is governed by an outcome-determinative standard.”<sup>455</sup> Moreover, there is no way for a court to police the prosecution’s compliance with *Brady* during the pretrial phase of a case because the prosecution’s file is a black box that neither the court nor the defense can access.

*Brady* violations are a systemic, longstanding, and ongoing problem. A study by the North California Innocence Project of Santa Clara University School of Law found *Brady* violations to be “among the most pervasive forms

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<sup>451</sup> *Bagley*, 473 U.S. at 700 (Marshall, J., dissenting) (explaining that a materiality standard means “there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial[] . . . permit[ting] prosecutors to withhold with impunity large amounts of undeniably favorable evidence”).

<sup>452</sup> *Id.* at 696–97 (Marshall, J., dissenting).

<sup>453</sup> Klinkosum, *supra* note 434.

<sup>454</sup> *In re Kline*, 113 A.3d 202, 209 (D.C. 2015) (emphasis added) (quotation omitted).

<sup>455</sup> Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH. L. REV. 969, 975 (2012), <https://digitalcommons.pace.edu/lawfaculty/819/> [<https://perma.cc/5XV-D-GYUE>].

of prosecutorial misconduct.”<sup>456</sup> There has been at least one Supreme Court case involving *Brady* violations every decade since *Brady* was and in the last decade alone, there have been *five* cases involving prosecutors’ failures to turn over exculpatory evidence.<sup>457</sup> Given that the Supreme Court “accepts less than one percent of cases for review, it would seem that the number of cases involving *Brady* claims, and for which relief was granted, signifies a systemic problem with prosecutors failing to disclose *Brady* material.”<sup>458</sup> In March of 2021, a state judge in Queens threw out the convictions of three men who had spent the last 24 years in prison.<sup>459</sup> Prosecutors in the 1996 case never turned over multiple pieces of exculpatory evidence, including police reports “showing that investigators had linked the killings to other men.”<sup>460</sup> In releasing the men, the judge opined that the prosecution in these cases had “completely abdicated its truth-seeking role.”<sup>461</sup>

This standard is untenable and leads to manifestly unjust results for the accused. The right to a complete defense hinges on defense counsel’s ability to evaluate all of the relevant evidence in a case. The materiality requirement gives prosecutors too much discretion and expects them to act against their own self-interest and in contravention of their own adversarial role.<sup>462</sup> The copious evidence of prosecutors’ inability to abide by their *Brady* obligations in the ensuing sixty-odd years shows it to be a failed experiment. And such violations have disproportionately impacted people of color.

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<sup>456</sup> KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 36 (2010), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1001&context=ncippubs> [https://perma.cc/4F44-BN4B].

<sup>457</sup> *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (per curiam); *Smith v. Cain*, 565 U.S. 73 (2012); *Connick v. Thompson*, 563 U.S. 51 (2011); *Cone v. Bell*, 556 U.S. 449 (2009); *District Attorney’s Office v. Osborne*, 557 U.S. 52 (2009).

<sup>458</sup> *Klinkosum*, *supra* note 434.

<sup>459</sup> Troy Closson, *They Spent 24 Years Behind Bars. Then the Case Fell Apart*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/nyregion/queens-wrongful-convictions.html> [https://perma.cc/RGA2-U499].

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> See *Federal Discovery Reform*, NAT’L ASS’N OF CRIM. DEF. LAW. (Mar. 1, 2021), <https://www.nacdl.org/Content/FederalDiscoveryReform> [https://perma.cc/L5K7-UK7M] (“The materiality standard asks a prosecutor to forecast whether disclosure of a particular piece of information would probably cause them to lose the trial; this standard has often been used to justify withholding extremely favorable information on the ground that it is ‘not material’ since the prosecutor still believes they can win the trial despite this information. In addition, prosecutors rely on the materiality standard to withhold inadmissible information even though its disclosure may lead to the discovery of admissible favorable information.”)

#### D. Racial Equity and the Need for Discovery Reform

Legislation is also needed because *Brady* violations fall disproportionately on people of color and are especially prevalent in cases where the potential prison time is highest, like murder. A 2017 study by the National Registry of Exonerations found that more than half of all murder exonerations involved *Brady* violations.<sup>463</sup> In the exonerations, official misconduct—including *Brady* violations—occurred at a rate of seventy-six percent for cases involving black defendants, compared to sixty-three percent for white defendants.<sup>464</sup> Fully eighty-seven percent of death-row exonerations of black defendants involved official misconduct, including *Brady* violations.<sup>465</sup> Meanwhile, an “analysis of recent death-row exonerations found that police or prosecutorial misconduct was a major factor in sixteen of the last eighteen exonerations.”<sup>466</sup> These disparities in the death row context spurred North Carolina to adopt open-file discovery in 2004.<sup>467</sup> In his recent confirmation hearings, AG Garland testified about the death penalty’s disparate impact on Black individuals and highlighted the many exonerations of Black individuals sentenced to death.

#### E. The Due Process Protections Act Does Not Prevent Discovery Disclosure Problems

The Due Process Protections Act of 2020 (DPPA) was a good first step toward addressing the criminal discovery crisis, but it unfortunately does not rectify the fundamental problems with the current disclosure rules.

Recent high-profile *Brady* violations by the U.S. Attorney’s Office for the Southern District of New York serve as a stark illustration that additional legislative action in this area is badly needed. Prosecutors charged Ali Sadr with evasion of sanctions against Iran but failed to disclose a crucial piece of exculpatory evidence before trial. The jury voted to convict Mr. Sadr, but the judge found that the discovery violation constituted “grave derelictions of prosecutorial responsibility” and vacated the jury’s verdict.<sup>468</sup>

The judge did not conclude that the discovery violation was

<sup>463</sup> NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 6 (2017), [http://www.law.umich.edu/special/exoneration/Documents/Race\\_and\\_Wrongful\\_Convictions.pdf](http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf) [https://perma.cc/4DWT-5G4W].

<sup>464</sup> *Upcoming Supreme Court Cases Could Clarify Standard Requiring Disclosure of Exculpatory Evidence*, DEATH PENALTY INFO. CTR. (Mar. 17, 2017), <https://deathpenaltyinfo.org/news/upcoming-supreme-court-cases-could-clarify-standard-requiring-disclosure-of-exculpatory-evidence> [https://perma.cc/GU3Z-KAGH].

<sup>465</sup> *Reports Find Record Number of Exonerations in 2016, Blacks More Likely to be Wrongfully Convicted*, DEATH PENALTY INFO. CTR. (Mar. 8, 2017), <https://deathpenaltyinfo.org/news/reports-find-record-number-of-exonerations-in-2016-blacks-more-likely-to-be-wrongfully-convicted> [https://perma.cc/YQY5-DMXV].

<sup>466</sup> *Upcoming Supreme Court Cases Could Clarify Standard Requiring Disclosure of Exculpatory Evidence*, *supra* note 464.

<sup>467</sup> EXPANDED DISCOVERY REVIEW, *supra* note 438, at 8.

<sup>468</sup> United States v. Sadr Nejad, 521 F. Supp. 3d 438, 443 (S.D.N.Y. 2021).

intentional,<sup>469</sup> but stressed that “[p]rosecutors have an obligation to ensure that their disclosures to the defense are complete. . . . These obligations require affirmative diligence, not only the absence of abject bad faith. . . . [T]he prosecutor’s first duty is not to prevail in every case but to ensure ‘that justice shall be done.’”<sup>470</sup> The judge also noted the complexity of materiality determinations in the pretrial context, finding that it was not clear “that the AUSAs in fact appreciated [the evidence’s] exculpatory value at the time, however apparent it may be in hindsight.”<sup>471</sup> This highlights how the current standards lead to substantive disagreement and confusion, even where misconduct is unintentional.<sup>472</sup> As the *Sadr Nejad* court concluded, “only institutional reforms can ensure these mistakes are not repeated.”<sup>473</sup>

#### F. Making Discovery More Fair

Legislation is needed to expand discovery under Rule 16 and to provide clear timelines for disclosure of evidence, exculpatory or not.

Rule 16 requires the prosecution to disclose to the defense only a narrow subset of the evidence in the prosecutor’s file. There is no requirement that the government disclose most law enforcement reports from their investigation nor summaries of what a witness said, nor must the government typically preserve its agents’ notes. Simply put, this “limited discovery subverts the effectiveness of the adversarial system.”<sup>474</sup> It is embarrassing and unfair that federal civil litigants receive so much more information about their cases, so much earlier, when so much less is on the line. Rule 16 should be amended to require mandatory government disclosure of information similar

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<sup>469</sup> *Id.* at 454.

<sup>470</sup> *Id.* at 450 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

<sup>471</sup> *Id.* at 446.

<sup>472</sup> Numerous other high-profile *Brady* violations have occurred in the last two decades: former United States Senator Theodore “Ted” Stevens: *In re Special Proceedings*, 842 F. Supp. 2d 232, 243 (D.D.C. 2012) (prosecution withheld several critical pieces of evidence of Senator Ted Stevens’ innocence, introduced false business records, and refused to disclose grand jury testimony of an exculpatory witness by representing the testimony was not material); *United States v. Aguilar*, No. CR-10-1031(A) (C.D. Cal. 2011) (prosecution withheld grand jury transcripts that substantially weakened the government’s case); *United States v. Rivas*, 377 F.3d 195, 198 (2d Cir. 2004) (prosecution intentionally withheld a primary witness statement that included an admission of guilt, thereby completely exculpating the defendant; the Second Circuit threw out the defendant’s conviction after the admission came to light after trial, but if it had remained undisclosed the defendant would have spent over ten years in prison); *United States v. Washington*, 263 F. Supp. 2d 413, 421 (D. Conn. 2003) (prosecution failed to disclose that the 911 caller whose testimony was central to its case had previously been convicted of making a false emergency report).

<sup>473</sup> *Sadr Nejad*, 521 F. Supp. 3d at 443.

<sup>474</sup> EXPANDED DISCOVERY REVIEW, *supra* note 438, at 7.

to that required under the Federal Rules of Civil Procedure.<sup>475</sup>

Witness statements are especially problematic. Except where *Brady* applies, the government's only obligation in this area is to disclose the witness's prior statements and to do so only *after* the witness testifies at trial.<sup>476</sup> That is absurdly late. "Early disclosure of information, especially police reports and witness statements, is essential to locating and memorializing potentially relevant evidence."<sup>477</sup> Witness statements disclosed in the middle of trial are effectively useless for investigation and are nearly impossible to incorporate into a cross-examination on the fly.<sup>478</sup>

These timing problems are not unique to Rule 16 documents. Exculpatory evidence under *Brady* should also be disclosed early enough in a case to be of use. Such evidence is especially critical in deciding whether a client should plead guilty or go to trial. Beyond that, late disclosure can unjustly subject someone to criminal charges and result in the unnecessary expenditure of untold sums of federal money if attorneys prepare, litigate, and defend a case that is ultimately dismissed. In one case, for example, the prosecutor produced pivotal documents that he characterized as "at least potentially" subject to *Brady* and immediately dismissed a related charge.<sup>479</sup> Had the prosecutor reviewed those documents earlier in the case, the defense would have saved much time investigating and preparing a defense.

The narrowness of the required disclosures is also deeply unfair.<sup>480</sup> Federal agents and prosecutors can interview a witness repeatedly, take copious notes on that interview, and write any number of reports on it. Yet none of those written documents must be disclosed at *any* time unless they are a "substantially verbatim" recording of the witness's remarks or constitute *Brady* material.<sup>481</sup> There are also disturbing reports of federal agents intentionally refraining from taking notes or writing reports of witness interviews to sidestep any production requirement, or even destroying their notes after writing a report. It is a challenge to prepare a defense without knowing the prosecution's evidence.

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<sup>475</sup> See *id.* at 8.

<sup>476</sup> These witness statements are typically known simply as "Jencks," after the Jencks Act, where the obligation is codified. 18 U.S.C. § 3500(e)(2); FED. R. CRIM. P. 26.2(f)(2).

<sup>477</sup> EXPANDED DISCOVERY REVIEW, *supra* note 438, at 5.

<sup>478</sup> Klinkosum, *supra* note 434 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 67 (1987)) ("Effective cross-examination is entirely destroyed by the denial of access to information that would serve as the basis for cross-examination. As Justice Brennan observed, '[w]here denial of access is complete, counsel is in no position to formulate a line of inquiry potentially grounded on the material sought.'").

<sup>479</sup> Source on file with the authors.

<sup>480</sup> EXPANDED DISCOVERY REVIEW, *supra* note 438, at 4 ("Though an open-file policy grants access to all material contained in the prosecution's file, information must actually be in the file for the policy to have value.").

<sup>481</sup> FED. R. CRIM. P. 26.2(f)(2).

#### G. Systemically Address Failure to Investigate and Disclose Local Police Misconduct

In *Giglio v. United States*, the Supreme Court required the government to disclose evidence that undermines the testimony of any of its witnesses as part of its *Brady* obligations.<sup>482</sup> *Giglio* evidence includes, for example, any information that undermines a witness' credibility, prior inconsistent witness statements, evidence of witness bias, and more. All of the problems that apply to *Brady* in general also apply to *Giglio* in particular. Two areas of disclosure requirements pose special problems for *Giglio*: police misconduct (discussed in this section) and informants.<sup>483</sup>

Given the abundant evidence of misconduct and racial disparities in local policing, legislation is needed to ensure that the federal government thoroughly investigates all local police officers involved in federal criminal cases and discloses to the defense any information that might impact the credibility of a given police department or officer, including evidence of ties to white supremacist organizations.

Federal criminal jurisdiction has expanded enormously over the last century, accompanied by increased collaboration between federal law enforcement agencies and local police forces.<sup>484</sup> Such collaboration has been on the rise since September 11th. "In the past several decades, the Federal government has assumed a significant role in local law enforcement" in connection with the War on Drugs, and such involvement has "intensified" over time.<sup>485</sup> In fact, in a national survey of local and state police agencies, seventy-five percent reported that the assignment of their personnel to federal task forces had "increased or significantly increased" after September 11, 2001.<sup>486</sup>

Today, there are many joint and multiagency task forces composed of federal and state law enforcement agents.<sup>487</sup> The largest such task force is the

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<sup>482</sup> *Giglio v. United States*, 405 U.S. 150, 154 (1972).

<sup>483</sup> *Infra* Part XII.G.

<sup>484</sup> See, e.g., MALCOLM RUSSELL-EINHORN ET AL., FEDERAL-LOCAL LAW ENFORCEMENT COLLABORATION IN INVESTIGATING AND PROSECUTING URBAN CRIME, 1982-1999: DRUGS, WEAPONS, AND GANGS 11 (2000), <https://www.ojp.gov/pdffiles1/nij/grants/201782.pdf> [<https://perma.cc/NH7C-ANK5>] ("Federal law enforcement could not have expanded as it did in the 20th Century without a steady enlargement of Federal criminal jurisdiction."); Daniel M. Stewart, *Collaboration Between Federal and Local Law Enforcement: An Examination of Texas Police Chiefs' Perceptions*, 4 POLICE Q. 407, 411 (2011) ("[A]pproximately 95% of all federal criminal cases in 1997 could have been tried in state courts.").

<sup>485</sup> RUSSELL-EINHORN ET AL., *supra* note 484, at i, 1.

<sup>486</sup> Stewart, *supra* note 484, at 413.

<sup>487</sup> See, e.g., *id.* (discussing the fact that FBI Joint Terrorism Task Forces increased from 36 in 2001 to 102 in 2008).

giant Organized Crime Drug Enforcement Task Forces (OCDETF), which is aimed at combatting drug trafficking.<sup>488</sup> The OCDETF includes “over 500 federal prosecutors, 1,200 federal agents, and some 5,000 state/local police,” with federal agents drawn from the DEA, the ATF, the FBI, and many other agencies.<sup>489</sup> The task force also has permanent “Strike Forces” located in eighteen major U.S. cities and San Juan.<sup>490</sup>

The prevalence of collaboration between federal and state law enforcement raises new concerns in the wake of the killing of George Floyd, especially given the many studies finding racial disparities in policing<sup>491</sup> and overt racism among police. It has been argued that the presence of joint federal/state strike forces in cities with “progressive prosecutors . . . do[es] an end-run around a core tenet of the progressive prosecutor movement, which is to reduce the disproportionate impact of mass incarceration on communities of color.”<sup>492</sup> In addition, the FBI and others have uncovered new evidence of “explicit racism” within policing agencies,<sup>493</sup> including copious data showing “white supremacist infiltration of law enforcement.”<sup>494</sup> In a recent case of withheld exculpatory evidence, the central police officer in the case was documented as having ties to a white supremacist motorcycle law enforcement group, including being photographed wearing patches with the Confederate flag, as well as one reading, “I only speak English.”<sup>495</sup> These concerns have taken on new urgency in the wake of the January 6, 2021, insurrection, which “only amplifies the need for . . . deep reform in American law enforcement.”<sup>496</sup> In this context, it is heartening that AG Garland spoke

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<sup>488</sup> *About OCDETF*, U.S. DEP’T OF JUST. (last updated Mar. 1, 2021), <https://www.justice.gov/ocdetf/about-ocdetf> [https://perma.cc/2FJJ-FLMK].

<sup>489</sup> *Id.*

<sup>490</sup> *Strike Forces*, U.S. DEP’T OF JUST. (last updated July 21, 2020), <https://www.justice.gov/ocdetf/ocdetf-strike-forces> [https://perma.cc/9X2R-8KYX].

<sup>491</sup> See Balko, *supra* note 174 (summarizing a non-exhaustive list of studies on racial bias in the U.S. criminal justice system).

<sup>492</sup> Mona Lynch, *Regressive Prosecutors: Law and Order Politics and Practices in Trump’s DOJ*, 1 HASTINGS J. CRIME & PUNISHMENT 195, 212 (2020), [https://repository.uchastings.edu/hastings\\_journal\\_crime\\_punishment/vol1/iss2/4/](https://repository.uchastings.edu/hastings_journal_crime_punishment/vol1/iss2/4/) [https://perma.cc/XHQ6-DBLU].

<sup>493</sup> Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [https://perma.cc/8PY4-GF3W].

<sup>494</sup> *Id.* (citing FBI COUNTERTERRORISM DIV., WHITE SUPREMATIC INFILTRATION OF LAW ENFORCEMENT (2006), <http://s3.documentcloud.org/documents/402521/doc-26-white-supremacist-infiltration.pdf> [https://perma.cc/DL2H-W7QH]).

<sup>495</sup> Edwin Brown’s Sur-Reply Opposing the Government’s Motion for Reconsideration at 8, United States v. Brown, 299 F. Supp. 3d 976 (N.D. Ill. 2018) (No.15-CR-00564), Dkt. 88.

<sup>496</sup> William Finnegan, *Law Enforcement and the Problem of White Supremacy*, NEW YORKER (Feb. 27, 2021), <https://www.newyorker.com/news/daily-comment/law-enforcement-and-the-problem-of-white-supremacy> [https://perma.cc/GLU3-P449].

of “the pursuit of white supremacists” as a central component of his agenda for the DOJ.<sup>497</sup>

*Brady/Giglio* also requires prosecutors to obtain and disclose *Giglio* information held by law enforcement agencies with whom they are working.<sup>498</sup> But when federal prosecutors and agents work closely with local police who lack strict internal accountability mechanisms for investigating and recording dishonest behavior, it is impossible to ensure that federal prosecutors comply with their *Brady/Giglio* obligations. Likewise, there is a risk of undermining the reliability of federal convictions. DOJ’s investigation into the Chicago Police Department (CPD) provides a rare window into these dangers. The DOJ found that CPD’s internal accountability mechanisms appeared to be “broken.”<sup>499</sup> “[I]nvestigations foundered because of the pervasive cover-up culture among CPD officers,” including pervasive, uninvestigated, and unpunished dishonesty.<sup>500</sup> The CPD did not

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<sup>497</sup> *Id.*

<sup>498</sup> Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).

<sup>499</sup> U.S. DEP’T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 46 (2017), <https://www.justice.gov/opa/file/925846/download> [<https://perma.cc/H3D9-8Z2B>].

<sup>500</sup> *Id.* at 45. Some of the DOJ’s findings on this point are so disturbing as to be worth quoting in full given that they describe a police department to which members of state/federal task forces belong:

We cannot determine the exact contours of this culture of covering up misconduct, nor do we know its precise impact on specific cases. What is clear from our investigation, however, is that a code of silence exists, and officers and community members know it. This code is apparently strong enough to incite officers to lie even when they have little to lose by telling the truth. In one such instance, an officer opted to lie and risk his career when he accidentally discharged his pepper spray while dining in a restaurant—a violation that otherwise merits minor discipline. Even more telling are the many examples where officers who simply witness misconduct and face no discipline by telling the truth choose instead to risk their careers to lie for another officer. We similarly found instances of supervisors lying to prevent IPRA from even investigating misconduct, such as the case discussed elsewhere in this Report in which a lieutenant provided a video to IPRA but recommended that the case be handled with non-disciplinary intervention rather than investigated, describing the video as only depicting the use of “foul language” and affirmatively denying that it contained any inflammatory language or that the victim made any complaints—both patently false statements as demonstrated by the video. High ranking police officials and rank-and-file members told us that these seemingly irrational decisions occur in part because officers do not believe there is much to lose by lying.

Rather than aggressively enforcing and seeking discharge for violations of CPD’s Rule 14, which prohibits making false statements, enforcement in this area is rarely taken seriously and is largely ignored. . . . In practice,

even have a “system in place to ensure that all officer disciplinary findings bearing on credibility . . . are supplied to the State’s Attorney’s Office and criminal defendants[.]”<sup>501</sup>

Congress can directly address and ameliorate this alarming situation by passing legislation that requires federal prosecutors and law enforcement agencies to thoroughly investigate all local police departments and local police officers who are involved in their cases and to quickly disclose that information to the defense in federal criminal cases. Such legislation should draw on the excellent proposal of Georgetown Professor Vida B. Johnson, who identifies “an epidemic of white supremacists in police departments.”<sup>502</sup> Federal prosecutors and agents should be required to actively investigate and disclose any ties between the local police officers on whom they rely and white supremacist or militia organizations.<sup>503</sup> This must include “examining their social media accounts and monitoring their emails and texts for key words that could be suggestive of racial animus.”<sup>504</sup> In addition, federal prosecutors and agents should, at a minimum, locate *any* complaints or investigations against local police and likewise disclose those to the defense. Disclosure should include open complaints and even unsubstantiated or unsustained complaints—as the Chicago example shows, they too bear directly on the officer’s credibility.

Finally, the law should require federal prosecutors to keep a database of all credibility findings regarding local or federal law enforcement officers and require disclosure to the defense on a case-by-case basis. At a minimum, the database should include all adverse credibility findings by federal and local courts in their district. Failure to expeditiously put such a system in place

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IPRA rarely asserts Rule 14 charges when officers make false exculpatory statements or denials in interviews about alleged misconduct, even when the investigation results in a sustained finding as to the underlying misconduct. This is true even in some cases we reviewed in which video shows the accused officer lied about the underlying misconduct or tried to cover up evidence. . . . Nor do investigators hold witness officers responsible for covering up misconduct of others.

*Id.* at 75–76.

<sup>501</sup> *Id.* at 76–77.

<sup>502</sup> Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 205 (2019), <https://law.lclark.edu/live/files/28080-lcb231article2johnsonpdf> [https://perma.cc/QMA7-FT83]; see also *Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—The Infiltration of Local Police Departments: Hearing Before the Subcomm. on C.R. and C.L. of the Comm. On Oversight and Reform H.R.*, 116th Cong. 11 (2020) (statement of Vida B. Johnson, Associate Professor of Law, Georgetown University).

<sup>503</sup> See *Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—The Infiltration of Local Police Departments: Hearing Before the Subcomm. on C.R. and C.L. of the Comm. On Oversight and Reform H.R.*, 116th Cong. 12 (2020) (statement of Vida B. Johnson, Associate Professor of Law, Georgetown University) (proposing legislation requiring “[p]rosecutors . . . to investigate their officers and turn that information over for use at a public trial.”).

<sup>504</sup> Johnson, *supra* note 502, at 237–38.

should warrant a rebuttable presumption of discovery sanctions.

This reform would rectify another common “black box” problem illustrated by a set of cases in one federal court. In the case of *United States v. Thompkins*, the defense filed a motion to suppress evidence in a case that turned on the credibility of a particular Chicago police officer. The defense attached a report from the Chicago Civilian Office of Police Accountability (COPA) finding that officer was not credible.<sup>505</sup> Subsequently, the same U.S. Attorney’s Office put the same officer on the stand during another suppression hearing in the same federal courthouse.<sup>506</sup> Although the officer’s credibility was at issue again,<sup>507</sup> the government did not disclose the COPA report. Requiring the government to keep a database of adverse credibility findings and to disclose them to the defense would rectify this problem.

#### *H. The Problem of Confidential Informants*

The use of confidential informants by federal law enforcement agencies has drawn scrutiny from Congress and scholars.<sup>508</sup> In 2016, for example, the Office of the Inspector General (OIG) conducted an audit of the DEA’s confidential source program and concluded: “The deficiencies we identified in this audit raise significant concerns about the adequacy of the current policies, procedures, and oversight associated with the DEA’s management of its Confidential Source Program.”<sup>509</sup> For example, the DEAs mismanagement led to reactivating informants who had been deactivated due

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<sup>505</sup> Michael Thompkins’s Post-Hearing Memorandum in Support of Motion to Suppress at 6, *United States v. Thompkins*, No. 18-CR-664 (N.D. Ill. Apr. 16, 2019), Dkt. 40 (presenting a report from COPA that found “[Officer] Farias detained the complainant without justification, continued that detention for an excessive period of time, and used force without justification,” and concluding, “[Officer] Farias, whose testimony is essential to the government’s version of events, was found to lack credibility less than three months after Mr. Thompkins’s arrest in this case”).

<sup>506</sup> *United States v. Phillips*, 430 F. Supp. 3d 463, 466 (N.D. Ill. 2020) (identifying Officer Farias as one of the Chicago police officers who testified at the hearing).

<sup>507</sup> *Id.* at 475 (“This is a classic case of the circumstantial evidence standing alone presenting a close call, but the in-court testimony providing the ultimate answer.”); *id.* at 481 (ultimately denying motion to suppress).

<sup>508</sup> See, e.g., *Use of Confidential Informants at ATF and DEA: Hearing Before the H. Comm. on Oversight and Gov’t Reform H.R.*, 115th Cong. 3–4 (2017), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg26553/pdf/CHRG-115hhrg26553.pdf> [https://perma.cc/NB5Z-U742] (opening statement of Rep. Stephen F. Lynch); Natapoff, *supra* note 110, at 646 (“Snitches increase crime and threaten social organization, interpersonal relationships, and socio-legal norms in their home communities, even as they are tolerated or under-punished by law enforcement because they are useful.”).

<sup>509</sup> OFF. OF THE INSPECTOR GEN., AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION’S MANAGEMENT AND OVERSIGHT OF ITS CONFIDENTIAL SOURCE iv (2016), <https://oig.justice.gov/reports/2016/a1633.pdf> [https://perma.cc/6CGK-W5SC].

to misconduct and, in at least one case, reactivating a source who had previously lied under oath.<sup>510</sup> A 2017 OIG report found that the ATF's implementation of its confidential informant "policies did not ensure the level of oversight required by" DOJ, and that the ATF's ways of managing higher-risk informants "did not provide for adequate oversight or management . . ."<sup>511</sup> Others have described how law enforcement's reliance on informants negatively impacts communities of color: "[L]ike mass incarceration, heavy informant use in such communities imposes collateral harms," including "erosion of personal relationships and trust."<sup>512</sup> These failures create serious concerns about the use of informants in federal cases.

Somewhere between approximately fifteen to forty-five percent of the blame for wrongful convictions can be laid at the feet of lying informants or cooperators.<sup>513</sup> Our commitment to fair trials and conviction integrity calls for reforms that focus specifically on ensuring informant and cooperator reliability. "[T]he least transparent and therefore most problematic informant arrangement occurs where the informant is 'flipped' by a law enforcement agent at the moment of initial confrontation and potential arrest" and begins cooperating on behalf of the government.<sup>514</sup> The agent typically does not record that interaction and may not even document it. The agent and cooperator thus wholly control the subsequent narrative of what happened during those early meetings.<sup>515</sup> Professor Ellen Yaroshefsky interviewed federal prosecutors in the Southern District of New York and documented their beliefs about cooperator reliability. As one of them memorably put it, "the black hole of corroboration is the time that cooperators and agents spend alone."<sup>516</sup>

*Giglio* requires prosecutors to disclose information bearing on an informant's credibility regardless of whether the agent has written it down. But prosecutors can't disclose what they don't know. In *United States v. Chavez*, for example, agents concealed from prosecutors their first two or three meetings with a cooperator.<sup>517</sup> The agents were ultimately forced to reveal the initial meetings days before the scheduled trial, but the absence of any contemporaneous documentation of the meetings allowed the agents to

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<sup>510</sup> *Id.* at i.

<sup>511</sup> OFF. OF THE INSPECTOR GEN., AUDIT OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES' MANAGEMENT AND OVERSIGHT OF CONFIDENTIAL INFORMANTS 26 (2017), <https://oig.justice.gov/reports/2017/a1717.pdf> [<https://perma.cc/SW2Y-4CTW>].

<sup>512</sup> Natapoff, *supra* note 110, at 684.

<sup>513</sup> See DWYER ET AL., *supra* note 112.

<sup>514</sup> Natapoff, *supra* note 110, at 659.

<sup>515</sup> *Id.*

<sup>516</sup> Yaroshefsky, *supra* note 113, at 936.

<sup>517</sup> See generally Manuela Chavez's Motion for Discovery and an Evidentiary Hearing at 1–5, *United States v. Chavez*, No. 16-CR-00337 (2019).

claim without contradiction that the informant's cooperation started *after* his unlawful drug dealing ended. That timeline mattered; had the cooperators been engaging in unauthorized criminal conduct while working for the government, prosecutors would have been forced to abandon the cooperators—and likely the case.

At the other end of the spectrum, prosecutors are not immune from structural and personal biases that can undermine their ability to assess cooperators and informant reliability. For example, prosecutors rely on corroboration to ensure that their cooperators are telling the truth.<sup>518</sup> But corroboration of verifiable facts still leaves room for cooperators to "embellish" key facts that can't be verified—including what was said during unrecorded conversations.<sup>519</sup> One prosecutor explained: "[A] cooperator can tell you about a telephone conversation he had with a defendant. When you ask for the date, the telephone records establish that they did, indeed, have a conversation on that date. So that's the corroboration. . . . You have no independent way to know the substance of the conversation."<sup>520</sup>

Moreover, when prosecutors meet with cooperators for debriefing, proffer, and testimony preparation sessions, there is always a risk that they may intentionally or unintentionally induce cooperators to present false information. Prosecutors inevitably develop relationships with their cooperators ("falling in love with your rat") and sometimes place too much trust in their cooperators.<sup>521</sup> So, too, relying on an overly "rigid theory of guilt" can lead prosecutors to trust unreliable cooperators and to reject truthful evidence that doesn't fit with their theory.<sup>522</sup> Prosecutors can also over-identify with federal agents out of a desire to "get[] the bad guys off the street."<sup>523</sup> Coupling this with the cooperator's incentives for telling the government what they want to hear can lead to unreliable testimony:

[Federal prosecutors] often have a theory of the case and a specific factual scenario they believe to be true when they confront a cooperator . . . [T]he AUSA will give the cooperator facts to get him to come clean. For instance, a cooperator might be explaining a drug deal differently from the information available to the agent and assistant. The assistant says, 'the agent said this and this happened. Are

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<sup>518</sup> Yaroshefsky, *supra* note 113, at 934.

<sup>519</sup> *Id.* at 935.

<sup>520</sup> *Id.* at 936.

<sup>521</sup> *Id.* at 944.

<sup>522</sup> *Id.* at 945–48.

<sup>523</sup> Yaroshefsky, *supra* note 113, at 949–52.

you sure that it happened the way you said it did?" The cooperator then pipes up and tells you it happened the way the agent said.<sup>524</sup>

To make matters worse, the prosecutors Yaroshefsky interviewed admitted that "inconsistencies by cooperators in the debriefing sessions often are not disclosed" to the defense, despite *Giglio*.<sup>525</sup> Prosecutors themselves "rarely take notes," and sometimes they even order agents not to take notes.<sup>526</sup> Of course, *Giglio* applies to inconsistent witness statements, whether oral and written. However, "[t]he prosecutor is paper conscious about its Brady obligations but not oral conscious," meaning when no notes are taken, nothing is disclosed.<sup>527</sup>

Three reforms that open up the informant/cooperation process would begin to resolve these problems. First, prosecutors and law enforcement should record—or, at the very least, contemporaneously document—all conversations with informants or potential. Recording would shed light on "the black hole of corroboration" when cooperators and agents spend time alone.<sup>528</sup> It also would help ensure proper *Giglio* disclosures about how cooperator testimony evolves across multiple meetings with agents or prosecutors. Second, pretrial "reliability hearings" for cooperator testimony, such as those called for by Professor Alexandra Natapoff, would ensure that an independent authority reviews the reliability of informant evidence, subject to cross-examination, before it can be presented to the jury.<sup>529</sup> Third, the same early disclosure of *Brady/Giglio* evidence proposed earlier in this testimony would help enable the defense to adequately investigate and challenge improper use of cooperator testimony.

### I. Confidential Informants and John Doe Warrants

One particularly troubling issue arises in connection with informants in places like Chicago, where federal and local law enforcement agencies collaborate, but local law enforcement does not adhere to the standards required under federal law. Local police commonly rely on so-called "John Doe informants," confidential informants who are not registered and wish to

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<sup>524</sup> *Id.* at 960–61.

<sup>525</sup> *Id.* at 961.

<sup>526</sup> *Id.* at 961–62.

<sup>527</sup> *Id.* at 962.

<sup>528</sup> *Id.* at 936.

<sup>529</sup> Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 112–29 (2006).

stay anonymous.<sup>530</sup> In theory, even local warrants resting on John Doe informants must meet the same Fourth Amendment standards as in federal court. In practice, however, the “John Doe warrants” issued in state court do not always meet these standards. As collaboration between state and federal law enforcement agencies increases, a growing number of these John Doe warrants are entering the federal system, and some are based on fabricated or insufficiently documented information.<sup>531</sup>

The Supreme Court’s test for finding probable cause and issuing a warrant based on a confidential informant in the federal system is rarely met by the lax state processes surrounding John Doe informants. In 1983, the Court held that magistrates must not issue warrants based on the unvarnished word of a confidential informant.<sup>532</sup> Under that test, courts should consider, among other things, whether the informant was acting against their own penal interest and whether the information they provided was corroborated.<sup>533</sup>

Problems arise when local judges sign “John Doe” search warrants despite minimal independent verification of the John Doe informant’s

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<sup>530</sup> See, e.g., David McAfee, *Search Warrants Supported Mostly by Confidential Informant OK'd*, BLOOMBERG L. (Nov. 18, 2019, 2:11 PM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/search-warrants-supported-mostly-by-confidential-informant-okd> [https://perma.cc/H6BX-TCSG]. A 2014 study showed that approximately 38.5% of the prosecutions in southwestern Pennsylvania involved a complaint from a confidential informant. Rich Lord, *How Data on Confidential Informants was Gathered and Analyzed*, PITTS. POST-GAZETTE (Oct. 18, 2014, 11:00 PM), <https://www.post-gazette.com/local/region/2014/10/19/How-data-on-confidential-informants-was-gathered-and-analyzed/stories/201410190077> [https://perma.cc/5S9T-6K52]; see generally Sam Charles, *City Watchdog Calls for Immediate Changes to CPD's Search Warrant Policy*, CHI. SUN-TIMES (Jan. 22, 2021, 1:01 PM), <https://chicago.suntimes.com/news/2021/1/22/22244631/chicago-police-raids-search-warrants-oig-inspector-general-changes-anjanette-young> [https://perma.cc/BR2H-LCWM].

<sup>531</sup> See, e.g., United States v. Glover, 755 F.3d 811, 814–16 (7th Cir. 2014).

<sup>532</sup> See Illinois v. Gates, 462 U.S. 213, 227, 230–46 (1983).

<sup>533</sup> *Id.* at 241–46 (factors that support a finding of probable cause include whether the informant’s information was based on personal knowledge, whether the information was inherently credible, whether the informant had previously given reliable information, the level of detail provided, whether the informant was acting against his penal interest, and police corroboration of the information); *see also* United States v. Buckley, 4 F.3d 552, 554, 557 (7th Cir. 1993) (finding probable cause when a confidential informant admitted that she had purchased cocaine from the defendant); United States v. Ciampa, 793 F.2d 19, 20–25 (1st Cir. 1986) (finding probable cause because the information provided by the named informant to a confidential informant was consistent with the information provided by the confidential informant); United States v. Jewell, 60 F.3d 20, 20–24 (1st Cir. 1995) (finding probable cause based on the consistency of two confidential informants and police corroboration).

claims.<sup>534</sup> For example, over a three-year period, police officers in Chicago who obtained search warrants for drug offenses “failed to find any [drugs] in 95 %” of executed searches.<sup>535</sup> The problem of judges signing off on warrants where the police have not independently verified the informant’s claims is well documented.<sup>536</sup> In some cases, judges ask no questions at all about the warrant presented.<sup>537</sup> Sham John Doe warrants—where the unnamed confidential informant doesn’t even exist—are also shockingly common in Chicago, and they are used by other local police departments as well.<sup>538</sup>

Loose standards and lax practices at the local level can enable outright criminal conduct. The high-profile trial of two Chicago police officers, Sgt. Xavier Elizondo and Officer David Salgado, brought to light the problematic process local police officers use to obtain John Doe search warrants.<sup>539</sup> This Chicago prosecution arose, in part, because the police officers fabricated a John Doe affidavit to provide probable cause to issue a warrant.<sup>540</sup> On occasion, these same officers would bring confidential informants before a judge to claim that they were the source of information, when, in fact, they were not.<sup>541</sup> The officers were convicted in fall 2019 and are now awaiting sentencing, but the systemic failures that allowed these warrants to be issued in the first place have not been remedied.<sup>542</sup>

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<sup>534</sup> Dave Savini et al., *Chicago Police Raids Rarely Turn Up Drugs. So Why Do Judges Keep Signing Off on Bad Search Warrants?*, CBS CHI. (Nov. 17, 2020, 2:44 PM), <https://chicago.cbslocal.com/2020/11/17/chicago-police-raids-rarely-turn-up-drugs-so-why-do-judges-keep-signing-off-on-bad-search-warrants/> [https://perma.cc/UT9E-32XG].

<sup>535</sup> *Id.*

<sup>536</sup> *Id.*; see also Dave Savini, *CPD Officers Raid Wrong Home, Point Guns At 9-Year Old Boy; ‘My Life Flashed Before My Eyes,’* CBS CHI. (Aug. 14, 2018, 10:15 PM), <https://chicago.cbslocal.com/2018/08/14/chicago-police-cpd-raid-wrong-home-point-guns-at-9-year-old-boy-peter-mendez/> [https://perma.cc/MMX2-XVDZ].

<sup>537</sup> Savini, *supra* note 536.

<sup>538</sup> See, e.g., Paige Fernandez & Carl Takei, *The Use of ‘Confidential Informants’ Can Lead to Unnecessary and Excessive Police Violence*, ACLU (Feb. 25, 2019), <https://www.aclu.org/issues/criminal-law-reform/reforming-police/use-confidential-informants-can-lead-unnecessary-and> [https://perma.cc/B6TY-W92A].

<sup>539</sup> Jason Meisner, *Search Warrant Signed Outside Chicago Steakhouse to be Key at Trial of Two Veteran Chicago Cops on Charges of Stealing Drugs, Cash*, CHI. TRIB. (Oct. 7, 2019, 8:32 PM), <https://www.chicagotribune.com/news/criminal-justice/ct-chicago-cops-corruption-trial-20191007-j2cc5z47yvc4jdfxkgwnqbz3ly-story.html>.

<sup>540</sup> *Id.*

<sup>541</sup> Jason Meisner & Jeremy Gorner, *Two Chicago Gang Cops Indicted on Federal Charges They Stole Cash and Drugs*, CHI. TRIB. (May 11, 2018), <https://www.chicagotribune.com/news/ct-met-chicago-cops-charged-stealing-cash-drugs-20180510-story.html> [https://perma.cc/6QER-WVTE].

<sup>542</sup> John Seidel, *Feds Want 10 Years in Prison for Chicago Cops Who Used Bogus Warrants to Steal Cash, Drugs*, CHI. SUN-TIMES (Mar. 2, 2019), <https://chicago.suntimes.com/crime/2020/3/2/21161502/feds-want-10-years-prison-chicago-cops-used-bogus-warrants-steal-cash-drugs> [https://perma.cc/XA5H-2HLC].

This is not a matter of a few bad apples. Some local judges systematically apply a much lower level of scrutiny to John Doe warrants—scrutiny that falls far short of federal standards.<sup>543</sup> Some federal courts have even explicitly recognized that the state processes for obtaining John Doe warrants do not meet the probable cause requirements of the federal system. For example, in *United States v. Glover*, the Seventh Circuit examined a warrant obtained by local law enforcement on the basis of a John Doe informant.<sup>544</sup> The court noted that the complaint omitted all information regarding the informant's credibility—including “his criminal record, especially while serving as an informant; his gang activity; his prior use of aliases to deceive police; and his expectation of payment.”<sup>545</sup> The court concluded that in the absence of such highly relevant information, the judge did not have a sufficient basis to “find[] probable cause to support the search warrant.”<sup>546</sup>

The infiltration into the federal system of local John Doe warrants is especially concerning because once a warrant is issued, any resulting evidence seized will likely be admitted, even when the underlying warrant does not meet federal standards. The legal rule is that the government can use the evidence unless the defense can show the police officer who procured the warrant wasn't acting in “good faith.”<sup>547</sup> For a John Doe warrant, meeting that standard would typically require showing that there was a problem with the officer's John Doe informant, and the officer knew it. But given the strong protections our system grants to confidential informants, that can be nearly impossible to do. “The common law ‘informer’s privilege’ generally shields an informant’s identity.”<sup>548</sup> While theoretically the Court can order disclosure of that identity under certain narrow circumstances, such disclosure is exceedingly rare in practice.<sup>549</sup> Importantly, if the local police do not know the informant's identity, this becomes a right without a remedy.

The standards that require prosecutors to disclose an informant's identity create a catch-22 for anyone seeking disclosure about an informant—John

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<sup>543</sup> In some cases, state judges ask *no* questions of the law enforcement officers seeking a warrant. See *Savini*, *supra* note 540. In others, there is no attempt at interrogating the trustworthiness of a particular confidential informant or seeking corroborating information. See *Meisner & Gorner*, *supra* note 541.

<sup>544</sup> *United States v. Glover*, 755 F.3d 811, 815 (7th Cir. 2014).

<sup>545</sup> *Id.* at 817.

<sup>546</sup> *Id.* at 818.

<sup>547</sup> *United States v. Leon*, 468 U.S. 897, 922–23 (1984).

<sup>548</sup> OFF. OF THE INSPECTOR GEN., U.S. DEPT OF JUST., THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES 74 (2005), <https://oig.justice.gov/sites/default/files/legacy/special/0509/final.pdf> [<https://perma.cc/2ZDR-UXZS>].

<sup>549</sup> See *Roviaro v. United States*, 353 U.S. 53, 59–61 (1957).

Doe or otherwise. They are confronted with a black box and are told that the only key is inside that same box. For example, in *United States v. Brown*, the defense filed a motion for disclosure of a John Doe informant's identity.<sup>550</sup> In this case, as in many others, the government argued that the standard was not met. As the defense noted in its response, if the "CPD and the state court authorities relied on this Doe to provide information that formed the basis of two search warrants," surely the defense's investigation would benefit from that same information.<sup>551</sup> The judge initially ordered the government to disclose the John Doe's identity, but later rescinded that order in the face of the government's vociferous objections.

#### J. Enact Legislation to Increase Reliability and Fairness in John Doe Informant Cases

Congress must enact legislation to prevent these abusive practices from permeating the federal system and subverting the more stringent federal standards. Congress should forbid federal law enforcement agents and prosecutors from using evidence gathered from John Doe warrants to support federal prosecutions regardless of whether a state or federal judge already approved them.

At a minimum, Congress should pass legislation that requires federal law enforcement agents and prosecutors to obtain identifying and criminal history information for any John Doe—state or federal—who is relied on to support a federal prosecution. The prosecution should provide such information about the John Doe *in camera* to the judge in the federal case to facilitate independent judicial scrutiny of the basis for the warrant. Additionally, that information should presumptively be disclosed to defense counsel.

Moreover, in any federal case where the complaint rests even in part on John Doe evidence, Congress should require federal law enforcement agents and prosecutors to document the steps they have taken to independently vet and verify the reliability of the information the John Doe provided, and to give that documentation to the federal judge *in camera*. Requiring federal law enforcement agencies to engage in this vetting, documentation, review, and disclosure process would provide much-needed accountability.

#### K. Touchstones for Proposed Legislation to Reform Criminal Discovery

Congress should pass legislation that implements open-file discovery, eliminates *Brady's* materiality requirement, and requires the pretrial disclosure of *all* evidence that is potentially favorable or exculpatory. Key touchstones for such legislation include:

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<sup>550</sup> Edwin Brown's Sur-Reply Opposing The Government's Motion for Reconsideration, *United States v. Brown*, No. 15-CR-564 (N.D. Ill. 2015).

<sup>551</sup> *Id.* at 3.

- **Definition:** Open-file discovery is defined as “discovery in which everything contained in the files of law enforcement and the prosecution, with the exception of work product and privileged material, is provided to defense attorneys.”<sup>552</sup>
- **Mandatory:** The new law should make all discovery in federal criminal cases mandatory and automatic, such that the defense does not need to *request* discovery production. This will ensure efficiency and prevent parties from filing time-consuming motions for discovery with the court.<sup>553</sup>
- **Timing:** The new law should create specific timelines specifying how far in advance of the trial or proceeding the information must be exchanged, as already occurs in the civil context. There is a disparity between the Federal Rules of Criminal Procedure and the ABA standards, which disadvantages both sides.<sup>554</sup> For example, a witness’s prior statements must be produced only *after* a witness testifies, plainly undermining the defense’s ability to investigate or even use these statements.<sup>555</sup> Early discovery is essential to ensure the protection of defendants’ rights.
- **Scope**
  - In addition to all the evidence already dictated by Rule 16, open-file discovery would require the production of:<sup>556</sup>
    - All evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense for sentencing purposes, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.<sup>557</sup>

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<sup>552</sup> Klinkosum, *supra* note 434.

<sup>553</sup> CONN. BAR ASS’N, OPEN-FILE DISCOVERY 2 (2019), <https://www.ctbar.org/docs/default-source/rules-committee/november-18-2019/item-03-02b2-docs-supporting-proposal---open-file-discovery-primer.pdf> [<https://perma.cc/PV43-LPNH>] [hereinafter OPEN FILE PRIMER].

<sup>554</sup> EXPANDED DISCOVERY REVIEW, *supra* note 438, at 1–2, 4–5.

<sup>555</sup> These are known as Jencks materials, discussed *supra* note 480.

<sup>556</sup> See, e.g., OPEN FILE PRIMER, *supra* note 553.

<sup>557</sup> This is a simpler formulation of the ABA’s ethical rule. See MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR. ASS’N 2020) (“The prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that . . . tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”).

- A list of all potential witnesses and a copy of their statements. Statements are defined to include not only statements a witness has adopted, but also any recordings, transcripts, summaries, or notes of what a witness has said. If such transcripts, summaries, or notes do not exist, the government must create them.
- All statements by co-defendants.
- All forensic evidence.
- All information regarding line-ups.
- All law enforcement reports on the case.
- All communications related to the case, including notes and emails between law enforcement agents. During the investigation, once the case is charged, and after the case has concluded, agents may not destroy or tamper with the originals.
- Open-file discovery would *not* include notes, theories, opinions, conclusions, or legal research conducted by the prosecution. However, the new law should stipulate that prosecutors and law enforcement agents may not destroy or edit their notes or communications before, during, or after the case has concluded.
- The prosecution and law enforcement agents must provide the defense with any and all evidence requested to support a claim of racial discrimination by law enforcement or the prosecution.
- Purpose of a Criminal Case: All discovery revisions must advance the maxim that the prosecution's primary *purpose* in every federal criminal prosecution "is not that it shall win a case, but that justice shall be done."<sup>558</sup>

#### L. This Proposed Legislation Incorporates Best Practices

These reforms would ensure jurisdictional uniformity and require federal prosecutors to follow best practices already in use in many parts of the country. Focusing specifically on *Brady*, the problems with the current standard are well-known, and the federal system is outdated.<sup>559</sup> Since 2009, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility has declared that prosecutors are required to disclose *all* exculpatory information, without regard to materiality, under Rule 3.8(d) of the ABA Model Rules of Professional Conduct.<sup>560</sup> Both state courts

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<sup>558</sup> Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

<sup>559</sup> The points in this section rely heavily on Siegler & Admussen, *supra* note 18, at 1031–35.

<sup>560</sup> MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020).

and federal district courts have recognized the need to “expand[] criminal defendants’ right to obtain exculpatory evidence beyond the federal constitutional standard set in *Brady*” and have amended their local rules accordingly.<sup>561</sup>

In 2019, the Supreme Court of Pennsylvania’s Criminal Procedural Rules Committee issued notice of a rules amendment to remove the materiality requirement, explaining:<sup>562</sup>

[The exculpatory evidence rule] was amended in 2019 to remove the provision of “materiality” from the requirement of mandatory disclosure by the prosecution of information favorable to the defense. While originally intended to convey the idea that the information was relevant to the case at issue, the term had become more narrowly defined in practice and used as an obstacle for disclosure.<sup>563</sup>

In addition, Alaska<sup>564</sup> and Hawaii<sup>565</sup> also have state court rules that remove or modify the materiality requirement. A number of federal district courts have enacted similar reforms by amending their local rules to explicitly require disclosure of favorable evidence “without regard to materiality.”<sup>566</sup>

States also see the legislative process as an appropriate vehicle for

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<sup>561</sup> Siegler & Admussen, *supra* note 18, at 1031.

<sup>562</sup> Proposed Amendment of Pa. R. Crim. P. 573, 49 Pa. Bull. 7173 (Dec. 7, 2019), <https://www.pacodeandbulletin.gov/secure/pabulletin/data/vol49/49-49/49-49.pdf> [<https://perma.cc/8UMF-CP5K>].

<sup>563</sup> *Id.* at 7176.

<sup>564</sup> ALASKA R. CRIM. P. 16(b)(3) (requiring prosecutors to disclose “information . . . which tends to negate the guilt of the accused . . . or would tend to reduce the accused’s punishment” without reference to materiality). Interpreting this rule, Alaska courts have articulated a relatively lower requirement for disclosure than *Brady*. When evidence “was known to the prosecution and subject to discovery under Criminal Rule 16 but not disclosed, the defendant[] . . . need only show that the ‘undisclosed evidence might have affected the judgment of the jury or the outcome of the trial.’” Roseman v. State, No. A-659, 1985 WL 1078004, at \*5 (Alaska Ct. App. Dec. 26, 1985) (quoting Maloney v. State, 667 P.2d 1258, 1264–65 (Alaska Ct. App. 1983)).

<sup>565</sup> Hawaii Rule of Penal Procedure 16(b)(1)(vii), which governs the disclosure of exculpatory evidence in felony cases, does not contain a materiality requirement on its face. Cf. Haw. R. Penal P. (16)(d) (providing discovery in misdemeanor cases only “[u]pon a showing of materiality”). The explicit inclusion of a materiality requirement in misdemeanor cases suggests that the court intentionally omitted any materiality requirement for the disclosure of favorable evidence in felony cases. See State v. Townsend, 784 P.2d 881, 883–84 (Haw. Ct. App. 1989) (“[I]n a case involving a felony, Rule 16 discovery is automatically available to the parties as a matter of right. However, the parties in a misdemeanor case may resort to discovery only by grace of the court’s discretion, upon a showing of materiality and reasonableness.”).

<sup>566</sup> RULE 16 SURVEY RESPONSES, *supra* note 439, at 12 & n.32.

discovery reform.<sup>567</sup> It is common for state laws to “determine the scope and duties of the discovery process [in both the civil and criminal contexts], such as the default number or length of depositions, the scope of discovery, or procedures for electronically stored evidence.”<sup>568</sup> And many of these state laws define relevant evidence more broadly than Rule 16 and *Brady*, and require prosecutors to automatically turn over all such evidence to defendants.<sup>569</sup> Two states—Minnesota and North Carolina—have enacted the “most expansive open-file discovery statutes in the country.”<sup>570</sup>

Texas enacted open-file discovery in 2013 “in response to a series of high-profile instances of prosecutorial misconduct, later rectified by exonerations.”<sup>571</sup> The Michael Morton Act, named after a man who served 24 years on death row for a murder he did not commit after the prosecution failed to turn over critical exculpatory evidence at trial, “radically changed criminal discovery in Texas by creating an open-file policy.”<sup>572</sup> The Act also eliminates the materiality standard and requires automatic disclosure of all “exculpatory, impeachment, or mitigating” evidence that “tend[s] to reduce the punishment for the offense charged.”<sup>573</sup>

At the national level, the Advisory Committee on Criminal Rules has repeatedly considered mandating broader disclosure requirements by amending Rule 16 since the 1968 *Brady* decision.<sup>574</sup> The DOJ has consistently opposed the codification of the *Brady* standard or any substitute standard.<sup>575</sup>

Notably, federal prosecutors profess to hold themselves to a higher standard and to disclose favorable evidence without regard to materiality. Taking prosecutors at their word, eliminating the materiality standard will not impose any greater burden on them. In 2011, the Advisory Committee commissioned a report providing a nationwide overview of discovery practices.<sup>576</sup> The survey was highly representative, with ninety-four percent

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<sup>567</sup> *Id.* at 10.

<sup>568</sup> Siegler & Admussen, *supra* note 18, at 1034.

<sup>569</sup> See Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 779 (2017) (“About thirty states provide defendants with broader discovery than the federal rule by partially or fully embracing these standards, which are more generous with respect to both witness lists and witnesses’ prior statements.”) (citation omitted). New York, for example, recently overhauled its criminal discovery statute, instituting an open-file system that requires prosecutors to automatically disclose a wide variety of evidence and implementing timelines for disclosure. N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2020).

<sup>570</sup> Siegler & Admussen, *supra* note 18, at 1035.

<sup>571</sup> *Id.* at 1034.

<sup>572</sup> *Id.*

<sup>573</sup> *Id.*

<sup>574</sup> RULE 16 SURVEY RESPONSES, *supra* note 439, at 3.

<sup>575</sup> *Id.*

<sup>576</sup> See generally, *id.*

of U.S. Attorneys' Offices responding.<sup>577</sup> The report found that, according to prosecutors, the most common approach is to provide discovery without regard to materiality (to "err on the side of disclosure regardless of materiality").<sup>578</sup> And in districts where the materiality requirement has been eliminated, "[t]he majority of U.S. Attorneys' Offices report that the elimination made no difference."<sup>579</sup>

Finally, eliminating the materiality requirement for pretrial discovery is consistent with the opinions of some federal courts. The Eastern District of Wisconsin, for example, has held that disclosure should be required "without attempting to analyze . . . [favorable evidence's] 'materiality' at trial."<sup>580</sup> The Ninth Circuit Court of Appeals stated in 2013 that "the retrospective definition of materiality is appropriate only in the context of appellate review," and so—in the pretrial phase of a case—"prosecutors must disclose favorable information without attempting to predict whether its disclosure might affect the outcome of the trial."<sup>581</sup> The court further explained that "it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be 'material' after trial."<sup>582</sup> However, three years later, the Ninth Circuit clarified that their 2013 decision "did not alter the fundamental construct of *Brady*, which makes the prosecutor the initial arbiter of materiality and disclosure."<sup>583</sup> These two somewhat inconsistent opinions have left district courts confused about whether the materiality standard applies in the pretrial context.<sup>584</sup> Congress is well-poised to eliminate confusion and guarantee uniform federal criminal discovery through legislative action.

#### *M. Discovery Reform will Receive Bipartisan Support and Benefit All Stakeholders*

Congress has endeavored to enact discovery reform in the past. For example, in the *Brady* context, Senator Lisa Murkowski (R-AK) and the late Senator Daniel Inouye (D-HI) introduced the Fairness in Disclosure of

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<sup>577</sup> *Id.* at 32.

<sup>578</sup> *Id.*

<sup>579</sup> *Id.* at 10.

<sup>580</sup> United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004).

<sup>581</sup> United States v. Olsen, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013).

<sup>582</sup> *Id.* at 1197 n.3.

<sup>583</sup> United States v. Lucas, 841 F.3d 796, 809 (9th Cir. 2016).

<sup>584</sup> See United States v. Lischewski, No. 18-CR-00203, 2019 WL 2211328, at \*2 (N.D. Cal. May 22, 2019); United States v. Lampkin, No. 15-CR-00005, 2016 WL 11680667, at \*2-\*4 (D. Ala. May 3, 2016).

Evidence Act in 2012.<sup>585</sup> The Senate Judiciary Committee held a hearing on the bill in June of 2012, but no further action was taken. The Act would have eliminated *Brady*'s materiality standard and instead required the prosecution to disclose all evidence that "reasonably appear[s] to be favorable to the defendant" without regard to the admissibility of that evidence.<sup>586</sup> The Act also provided a new standard for post-conviction review of violations of the disclosure requirement.<sup>587</sup> Under the new standard, courts would be empowered to consider the totality of the circumstances of the violation and its impact on the proceeding and impose any remedy deemed appropriate, including ordering a new trial.<sup>588</sup>

Defense attorneys support discovery reform more than ninety percent of defense attorneys surveyed by the Advisory Committee favored an amendment to Rule 16.<sup>589</sup> In districts where *Brady*'s materiality requirement has been eliminated, defense attorneys reported that "the elimination of the materiality requirement has reduced problems and confusion regarding government disclosure in most or some cases."<sup>590</sup>

Federal judges in districts that have already implemented broader disclosure requirements (through local rules) than *Brady* indicated greater support for amending Rule 16 than judges in traditional districts.<sup>591</sup> This supports the idea that, once enacted, discovery reforms gain support as stakeholders experience their benefits. The materiality requirement was a key concern for judges that favored amendment.

### XIII. CONCLUSION

Today, the federal criminal system is in crisis, and comprehensive reform is needed. Congress has the power and the obligation to address this crisis through legislation that addresses mandatory minimums and recidivist enhancements, reverse sting operations, front-end pretrial detention, back-end sentencing relief, changed views on marijuana, civil asset forfeiture, *Brady* evidence, and more. The time to act is now.

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<sup>585</sup> S. 2197, 112th Cong. (2012).

<sup>586</sup> *Id.* § 2.

<sup>587</sup> *Id.*

<sup>588</sup> *Id.*

<sup>589</sup> RULE 16 SURVEY RESPONSES, *supra* note 439, at 8.

<sup>590</sup> *Id.* at 10.

<sup>591</sup> *Id.* at 19.