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For a Hearing on “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”
Submitted to Senate Judiciary Committee

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The Brennan Center for Justice at NYU School of Law¹ thanks the Senate Judiciary Committee for holding this hearing on mandatory minimum penalties in the federal sentencing system. As the federal prison population continues to grow exponentially in the face of budget constraints, prison overcapacity problems, and the shifting political tides around mass incarceration in the United States, the Brennan Center urges the Committee to focus on curtailing the deleterious effects of mandatory minimum penalties in the federal system as a means to ensure a rational, just, and effective criminal justice system.

The Brennan Center for Justice is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice. The Brennan Center’s Justice Program seeks to ensure a rational, effective, and fair criminal justice system. As part of that mission, we advocate for reforms that will reduce the size and severity of the criminal justice system. Such reforms are part and parcel of a larger effort to reduce mass incarceration, including the harmful collateral consequences of incarceration disproportionately borne by communities of color in the United States.

Individualized sentences that fit the characteristics of the offender and the seriousness of the crime are the hallmark of a fair sentencing system. Mandatory minimum penalties disrupt judges’ ability to make rational and just sentencing determinations in the federal system because they disregard key details about both the offender and the offense. While the majority of states

¹ This letter does not represent the opinions of NYU School of Law.

are now reconsidering their sentencing regimes under the increasing pressures of mass incarceration, the federal government should continue the momentum by implementing reforms that reduce incarceration at the front end of the system. Reforming mandatory minimums provides a pivotal avenue to improve the criminal justice system by increasing fairness at sentencing while maintaining public safety.

The Brennan Center supports reforms designed to reduce the undue harshness and restrictive nature of mandatory minimums. Because there has been extensive attention drawn to the distorting effects of mandatory minimum penalties in the federal system, and because we anticipate that committee will hear substantial testimony on how mandatory minimums have a particularly unjust effect on racial minorities in the criminal justice system, this testimony focuses on contextualizing mandatory minimum reform as part of a national and bipartisan movement to reconsider the problematic policies driving mass incarceration in the United States. We submit this testimony to emphasize that in the federal system smarter criminal justice reform policy requires, at the start, reforming mandatory minimum penalties at sentencing for the broadest scope of offenders possible.

I. BIPARTISAN STATE LEGISLATIVE REFORMS ARE DRIVING NATIONAL RECONSIDERATION OF POLICIES SUSTAINING MASS INCARCERATION IN THE UNITED STATES

Due largely to budgetary constraints during the economic downturn, several states are implementing bipartisan reforms designed to manage the size of their prison populations. For example, Republicans and Democrats in Texas and Kansas joined together to pass legislation which increased diversionary treatment programs for low level drug offenders as a means to reduce the pressures of exponentially increasing prison populations. In South Carolina, New Jersey and Michigan, political opposites came together to adopt legislation reducing or repealing mandatory minimum penalties. Even in California, the majority of the public – regardless of political leanings – supported a referendum reducing the severity of harsh sentencing enhancements for certain lower level offenses.²

Such bipartisan legislative reforms have contributed to notable stabilization or decreases in state prison populations across the country. But not all states are moving in the direction of reducing

² Sixty-eight percent of voters supported reducing the harsh three-strikes law in California, which previously required habitual offenders to serve life sentences for nonviolent third offenses. Julia Zebley, *California Modifies Three-Strikes Law, Keeps Death Penalty in Referendum*, JURIST, Nov. 7, 2012, available at <http://jurist.org/paperchase/2012/11/california-modifies-three-strikes-law-keeps-death-penalty-in-referendum.php>. According to Andrew Gelb, Director of the Pew Center on the States' Public Safety Performance Project, passage of this referendum "sends a powerful message to policymakers in California and across the country that taxpayers are ready for a new direction in criminal justice." Tracey Kaplan, *Proposition 36: Voters Overwhelmingly Ease Three Strikes Law*, MERCURY NEWS, Nov. 7, 2012, available at http://www.mercurynews.com/elections/ci_21943951/prop-36-huge-lead-early-returns.

their incarceration rates. Indeed, the prison population in several states, like in the federal system, has continually increased over the past decade.³ The combination of drastic reforms in some states and steady prison population increases in others resulted in an overall decrease in the total U.S. prison population three years in a row.⁴ In 2012, the total prison population decreased by 1.7%, though just three states – California, Texas, and North Carolina – accounted for 84% of that decline.⁵ The decreasing incarceration rates are a positive development amongst the states, but whether this occurrence signals a larger, long-term trend remains to be seen.

Nevertheless, it is undeniable that criminal justice reform has become a bipartisan issue,⁶ and that the most successful legislation has been implemented with support from both the left and the right.⁷ Numerous states have seen massive reforms that address the increasing prison population crisis in new and innovative ways. For example, North Carolina and California have reallocated responsibility for certain offenders from the state to county level. Colorado overhauled its state sentencing scheme around drug offenses, increasing the amount of drugs necessary to qualify as a felony offense. Other states continue to consider meaningful reforms, the majority of which are bipartisan efforts designed to address the specific factors driving the individual state’s prison population.

II. THE FEDERAL SYSTEM NEEDS BIPARTISAN REFORMS TO MANDATORY MINIMUM PENALTIES IN ORDER TO ADDRESS ITS INCREASING PRISON POPULATION

Despite these strategic steps at the state level, the federal system has been slow to adopt meaningful reforms that would address the rising economic and human costs of

³ JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 1 (2010), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf (between 2000 and 2008 the incarceration rate of six states increased by more than 40%: West Virginia, Minnesota, Arizona, Kentucky, Florida, and Indiana). Between 2010 and 2011, the landscape changed slightly, as Iowa (7.3%), Illinois (7.2%), Oklahoma (5.8%) and West Virginia (4.9%) led the states with the largest increases to their prison population. E. Ann Carson & William J. Sabol, Bureau of Justice Statistics, Prisoners in 2011 tbl. 2 (2012). This demonstrates that there is much fluctuation in incarceration rates among the states, and an overall trend is not yet defined.

⁴ See E. Ann Carson & Daniela Golinelli, Bureau of Justice Statistics, Prisoners in 2012 – Advance Counts 1 (2013).
⁵ Inimai Chettiar, Letter to the Editor, *The Decline of the Prison Population*, N.Y. TIMES, Aug. 2, 2013, at A18.

⁶ See *Liberals, Tea Party Republicans Team Up to Fight Mandatory Prison Terms for Some Drug Crimes*, WASH. POST, Sept. 17, 2013, *available at* http://www.washingtonpost.com/politics/courts_law/liberals-tea-party-republicans-team-up-to-fight-mandatory-prison-terms-for-some-drug-crimes/2013/09/17/322ce9dc-1f68-11e3-9ad0-96244100e647_story_1.html (quoting Rep. Jason Chaffetz as saying, “There’s a new era of bipartisanship on this issue”).

⁷ *Compare* ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011), *available at* http://www.aclu.org/files/assets/smartreformispossible_web.pdf (describing successful bipartisan reforms implemented in Texas, Kansas, Mississippi, South Carolina, Kentucky and Ohio) with Andrew Cohen, *In California Prison Fight, At Last a Bright Idea*, BRENNAN CENTER FOR JUSTICE, Sept. 4, 2013, *available at* <http://www.brennancenter.org/analysis/california-prison-fight-last-bright-idea> (criticizing Governor Jerry Brown’s initial plan to increase use of private prisons as a means to resolve federal court order to reduce prison population before December 31, 2013).

overincarceration in the United States. Since 1980, the federal prison population alone has increased by almost 790 percent.⁸ Today, there are more than 217,000 prisoners incarcerated in federal prisons, and the majority of inmates are incarcerated for nonviolent crimes.⁹

Experts and policymakers agree that two key forces driving overincarceration are the increased number of individuals entering prison every year, along with the increased length of time each prisoner spends on average behind bars.¹⁰ While numerous issues plague the federal justice system, the increased length of prison stays amongst *all* prisoners is a key driver in sustaining the large prison population.¹¹ Increased dependence upon mandatory minimum penalties implemented by Congress contributes to this increase in sentence length.

In 2011, the U.S. Sentencing Commission reported that mandatory minimum sentences are used for more crimes, and have increased in length in recent decades.¹² The Commission reported that, beginning in the 1950s, Congress changed its use of mandatory minimum penalties in three significant ways. First, Congress created *more* mandatory minimum penalties. In 1991, 98 mandatory minimum penalties existed; by 2011 that number increased to 195.¹³ Second, Congress expanded the types of offenses to which mandatory minimum penalties applied. Prior to 1951, mandatory minimum penalties were attached to crimes considered most serious in society, including treason, murder, piracy, rape and slave trafficking.¹⁴ Since 1951, mandatory minimum penalties have been enacted to punish a broader scope of crimes, including drug offenses, firearm offenses and identity theft.¹⁵

Most importantly for this Committee to note, the *length* of mandatory minimum penalties has increased as well. In 1991, the majority of offenders serving sentences carrying a mandatory minimum penalty were convicted of violating a statute that required a penalty of five years.¹⁶ By

⁸ NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES AND OPTIONS 51 (Jan. 2013) [Hereinafter CRS REPORT].

⁹ See Carson & Sabol, *supra* note 3, at 10, tbl. 11 (indicating that less than 10% of federal prisoners sentenced in 2011 committed violent crimes).

¹⁰ PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 1-2 (2012) (“The analysis in this study shows that longer prison terms have been a key driver of prison populations the past 20 years . . .”); Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L. J. 1587, 1631 (2012) (“[T]he scholarly consensus suggests that prison commitments must be reduced and prison release increased and return to prison after parole failure decreased” in order to reduce mass incarceration in the United States”).

¹¹ CRS REPORT, *supra* note 7, at 7 (“[W]hile more offenders are being arrested by federal law enforcement, tried in federal courts, and sentenced to incarceration in federal prisons for increasingly longer periods of time, the abolition of parole ensures that most inmates will serve all or nearly all of their sentences.”).

¹² UNITED STATES SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 71-74 (2011) [hereinafter MANDATORY MINIMUMS REPORT].

¹³ *Id.* at 71.

¹⁴ *Id.* at 22.

¹⁵ *Id.*

¹⁶ *Id.* at 75.

2010, the majority of offenders convicted under statutes carrying mandatory minimum penalties were serving sentences under statutes requiring ten or more years of imprisonment.¹⁷ As the Congressional Research Service recently noted, “the expanded use of mandatory minimum penalties [in the federal system] has resulted in offenders being sentenced to longer terms of imprisonment than they were 20 years ago.”¹⁸ These penalties apply regardless of the individualized characteristics of the offender, and take little account of the manner in which the offense was undertaken. Though these laws were enacted to respond to the genuine concerns of Congress that certain offenses are more serious, the price the federal system bears for such decisions in the long run are now being brought to bear.

Mandatory minimum sentences create problematic results in the justice system. This result is most readily seen in the unfair and unbalanced outcomes of the drug trafficking mandatory minimums: lower-level, frequently nonviolent and disproportionately offenders of color receive longer terms of incarceration than the relatively few high-level drug traffickers incarcerated in federal prisons.¹⁹ This result undermines Congress’s intention to target offenders for their particular role in the offense when creating these statutory limitations.²⁰ However, these results are amplified in other contexts as well – mandatory minimums prevent the criminal justice system from properly considering the characteristics of the offender and the offense. Moreover, they systematically ensure longer sentences for a broader scope of criminal offenders, many of whom would not otherwise be considered the most heinous offenders in society.

Congress has taken some steps to address certain of the more glaring issues in the federal system. In 2011, this Committee spearheaded enactment of the Fair Sentencing Act, which reduced the disparities in sentencing between crack and powder cocaine from the 100:1 ratio, to its current 18:1 ratio.²¹ It also eliminated mandatory minimum sentences for crack possession. This legislation modestly reduced increasing pressures on the federal prison population, and without an increase in crime.²² However, the legislation did not clearly indicate retroactive application,

¹⁷ *Id.* (indicating that 52.6% of offenders serving sentences with mandatory minimum penalties had mandatory sentences of ten or more years).

¹⁸ CRS REPORT, *supra* note 7, at 8.

¹⁹ For example, while 74% of crack defendants faced mandatory minimum penalties in 2011, only 5.4% of them occupied an aggravating role of leader or manager of a drug business. U.S. SENTENCING COMM’N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 40, 44 (2011). *See also* U.S. v. Dossie, 851 F. Supp. 2d 478, 480 (E.D.N.Y. 2012). On average, only 10% of drug cases concern offenders with supervisory roles. *Dossie*, 851 F. Supp. 2d at 480.

²⁰ MANDATORY MINIMUMS REPORT, *supra* note 19, at 24 (“Congress intended to link the five-year mandatory minimum penalties to what some called ‘serious’ traffickers and the ten-year mandatory minimum penalties to ‘major’ traffickers.”).

²¹ The Fair Sentencing Act, Pub. L. 111-220, 111th Cong. (2010).

²² The FSA was implemented in August 2011. Meanwhile, the violent crime rate in the United States has continued to drop since the 1990s. This trend did not change between 2011 and today, and indeed the use of crack cocaine has dropped during this period as well. *See Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences:*

and now almost 17,000 federal prisoners continue to serve sentences under a penalties scheme that Congress, through unanimous support, declared no longer just.²³

The Obama Administration, too, has recently taken steps to address the harshness of the federal system. In August 2013, Attorney General Eric Holder announced new charging policies which require district attorneys to avoid imposing “draconian” mandatory minimum sentences on certain low level, nonviolent drug offenders.²⁴ Moreover, the Justice Department now requires local U.S. Attorneys to clarify which offenses to focus federal prosecution as a means to both reduce the breadth of the federal system and allow states to continue developing innovative alternatives to incarceration where the federal government has lagged behind.²⁵ Additionally, the Justice Department recently clarified its enforcement policy where states have legalized marijuana.²⁶

However, despite these key steps, the federal system continues to struggle with severe and systemic problems caused by overincarceration. Currently, the federal Bureau of Prisons (“BOP”) operates at thirty-seven percent overcapacity.²⁷ In 2013, the BOP commanded twenty-five percent of the Justice Department’s budget, a 4.2 increase from fiscal year 2012.²⁸ This percentage will increase to nearly thirty percent by 2020 absent any change in course.²⁹

The federal government has a unique platform to create a national movement adopting rational and effective criminal justice reform. Attorney General Holder signaled the way with his new Smart on Crime approach to prosecutorial practices. But the Attorney General cannot do this alone, nor should Congress allow the executive branch to take the lead on this issue with simply short-term reform efforts.

Hearing Before the S. Judiciary Committee, Statement of Julie Stewart, President of Families Against Mandatory Minimums 3 (2013).

²³ *But see* United States v. Blewett, 719 F.3d 482 (6th Cir. 2013), *vacated for reh’g en banc* (considering whether the FSA should be applied retroactively based upon equal protection analysis).

²⁴ Eric Holder, Att’y Gen., Remarks at Annual Meeting of the American Bar Association (Aug. 12, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

²⁵ DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2 (2013), *available at* <http://www.justice.gov/ag/smart-on-crime.pdf>.

²⁶ Brady Dennis, *Obama Administration Will Not Block State Marijuana Laws, If Distribution Is Regulated*, WASH. POST, Aug. 29, 2013, *available at* http://articles.washingtonpost.com/2013-08-29/national/41566270_1_marijuana-legalization-attorney-general-bob-ferguson-obama-administration.

²⁷ *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons 2 (April 17, 2013), *available at* <http://appropriations.house.gov/uploadedfiles/hhr-113-ap19-wstate-samuelsc-20130417.pdf> (describing a capacity of 129,000 and a prison population of 176,000, which results in a capacity at 136%, and describing how medium security prisons operate at 44% above capacity and high security prisons operate at 54% above capacity).

²⁷ *Id.* (estimating a net increase of 6,000 inmates annually through 2015).

²⁸ CRS REPORT, *supra* note 7, at 7.

²⁹ NANCY LAVIGNE & JULIE SAMUELS, URBAN INSTITUTE, THE GROWTH AND INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012).

III. RECENTLY INTRODUCED LEGISLATION WOULD PROVIDE MEANINGFUL REFORMS ADDRESSING MASS INCARCERATION

The Brennan Center, along with our coalition partners in the criminal justice advocacy community, urges the Commission to seriously consider endorsing legislation that reduces the undue harshness and restrictive nature of mandatory minimum penalties in the federal system. Currently, two pieces of legislation have been introduced before the Senate, both of which would rationalize federal sentencing, reduce overdependence on mandatory minimums penalties, and generally signal a shift away from overreliance on incarceration. In concluding our testimony to the Committee, we wish to emphasize the unique benefits each bill provides towards improving the federal justice system.

- 1) *The Smarter Sentencing Act*. The Brennan Center recently issued a letter in support of S. 1410, the Smarter Sentencing Act, introduced by Senators Durbin and Lee.³⁰ The SSA proposes to reduce mandatory minimum penalties for drug sentences, expands the drug safety valve, orders the U.S. Sentencing Commission to incorporate the new, lower levels of mandatory minimum penalties into the sentencing guidelines, and permits retroactive application of the Fair Sentencing Act to certain offenders who do not currently benefit from the amendment. These reforms would alleviate the unduly harsh nature of mandatory minimum penalties in the federal system and would signal that punishment levels for drug sentencing across the country should be recalibrated to a more reasonable level. While the bill is limited in its scope because it applies only to drug sentencing, this legislation would prove an important step towards implementing long-term reforms that reduce mass incarceration in the United States.
- 2) *The Justice Safety Valve Act*. The Brennan Center supports S. 619, the Justice Safety Valve Act, introduced by Chairman Leahy and Senator Paul. This legislation would return discretion to judges, who are uniquely positioned to assess both the characteristics of the offender and the offense at sentencing, to determine which offenders are the types envisioned by Congress to fall under the umbrella of mandatory minimum penalties. The bill does not eradicate mandatory minimum penalties, but it would expand the current narrowly tailored safety valve used in drug cases to all offenses carrying a mandatory minimum. This legislation would ensure that Congress's intent would be applied more faithfully, and avoid the over-inclusive nature of mandatory minimum penalties resulting in unduly harsh sentences for a broader swath of criminal offenders.
- 3) *Signaling the "Beginning of the End" of Mass Incarceration*. Passage of either bill would signal pivotal steps away from mass incarceration. As Senator Paul emphasized in his

³⁰ Letter from Lauren-Brooke Eisen, et al, Brennan Center for Justice, to Patrick Leahy and Charles Grassley, U.S. Senators (July 31, 2013), available at <http://www.brennancenter.org/analysis/brennan-center-supports-smarter-sentencing-act-2013>.

testimony before the Committee on September 18, reducing the severity of mandatory minimums in the federal system would be a meaningful, yet modest step towards dismantling the complicated web of policies and practices that sustain mass incarceration – from the perverse financial incentives driving high arrest rates, the overrepresentation of populations of color at every point in the system, to the systemic unemployment, lack of access to housing, and disenfranchisement of individuals who have paid their debt to society. Reducing unduly harsh sentencing laws does not solve all the problems, but it would provide momentum to continue the national dialogue while affecting meaningful and long-term changes to the system. We encourage this Committee to recognize that significance as it weighs the benefits of both proposed pieces of legislation.

IV. CONCLUSION

The Brennan Center thanks the Senate Judiciary Committee for holding a hearing to draw attention to this critical criminal justice and social justice matter. We appreciate the opportunity to provide additional information for the Committee regarding this issue. We urge the Committee to look to other state reforms as it considers shaping federal sentencing policy, but also to be cognizant of the unique dynamics at the federal level, which make mandatory minimum sentences an important place to begin reform efforts.

Finally, we emphasize to the Committee that now is the time to move beyond political reluctance towards criminal justice reform. The “status quo” of overincarceration in the federal system is a relic of the past. Reluctance to address mandatory minimum penalties only contributes to an antiquated approach to criminal justice reform that is neither smart on crime nor smart on limited federal funds. Refusal to implement reforms addressing mandatory minimum penalties contributes to the BOP’s reality of severe overcapacity and an exponentially increasing prison population in the face of sequestration’s newly imposed stringent funding. This Committee has the opportunity to promote legislation that will address these concerns. We urge you to do so in the coming months.