



**REPORT BY THE CORRECTIONS AND COMMUNITY REENTRY COMMITTEE,
CRIMINAL COURTS COMMITTEE, AND
CRIMINAL JUSTICE OPERATIONS COMMITTEE**

**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO THE BIDEN-HARRIS
ADMINISTRATION REGARDING INCARCERATION AND REENTRY**

The New York City Bar Association’s (the “City Bar”) Corrections and Community Reentry Committee, Criminal Courts Committee, and Criminal Justice Operations Committee (the “Committees”) respectfully submit the following recommendations to the Biden-Harris Administration. The mission of the City Bar, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest of our community, our nation, and throughout the world. The Committees’ members include prosecutors, public defenders, attorneys in private practice, public policy professionals and advocates for social justice. Our voice and perspective are also enriched by having members who have had contact with the criminal justice system. We share a commitment to sound policy and the just application of laws related to incarceration and reentry. Providing access to justice, combating recidivism, encouraging innovation and practicality in sentencing, establishing safe, vibrant communities and emphasizing the equitable provision of critical services to support mental and physical health are some of the founding principles that guide our work. In this spirit, we make the following recommendations:

I. ENACT NECESSARY FOLLOW-UP MEASURES TO THE FIRST STEP ACT

Our Committees believe that passage of the First Step Act of 2018—which was intended to reduce unnecessarily long prison sentences and to improve federal prison conditions—was precisely as its name implies: a down payment on the critical work that must be done to reform an outmoded criminal justice system that is too often motivated by racial, gender and economic disparities. As The Brennan Center for Justice noted, the First Step Act at its essence has dual aims: (i) to reduce unnecessarily long, overly harsh federal prison sentences; and (ii) to improve conditions in federal correctional facilities.¹ As enacted, the

¹ Tim Lau, “Historic Criminal Justice Reform Legislation Signed into Law,” The Brennan Center for Justice, Dec. 21, 2018, <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law>; see also Federal Bureau of Prisons, “The First Step Act requires the Attorney General to develop a risk and needs assessment system to be used by BOP to assess the recidivism risk and criminogenic needs of all federal prisoners and to place prisoners in recidivism reducing programs and productive activities to address their needs and reduce this risk,” <https://www.bop.gov/inmates/fsa/overview.jsp>. (All sites last visited May 3, 2021).

About the Association

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First Step Act was expected to have a modest impact on prison reform, reducing the sentences of approximately 9,000 incarcerated persons.² Yet, with over 152,000 people incarcerated in federal facilities, further reforms are essential.³

The bipartisan support the First Step Act garnered is emblematic of wide-spread societal desire to create a more just and humane system that focuses on an individual's successful rehabilitation and reentry. As such, we urge your administration to enact critical measures that were omitted from the prior legislation to ensure continued progress towards these goals. Specifically, we suggest that future legislation include the following actions:

a) Carrying out certain administrative reforms to assure that the First Step Act's leniency mandates are properly implemented.

The Federal Bureau of Prisons (the "BOP") is tasked with a long to-do list in implementing the First Step Act.⁴ However, more is needed to ensure the implementation of these prison reforms.⁵ We urge your administration to curtail administrative deviations by assuring the necessary independent oversight.

We also ask that your administration focus on two main areas that have proven bureaucratically problematic: the struggle to consistently assure the proper calculation of "good time" credit; and utilizing the proper metrics and tools for assessment-based classifications.⁶ One way to address these concerns would be to make passage of the Safe, Accountable, Fair and Effective (SAFE) Justice Act a legislative priority.

The SAFE Justice Act is bipartisan legislation introduced in 2017 by Representatives Bobby Scott (D-VA) and Jason Lewis (R-MN).⁷ Among a range of other valuable initiatives, this Act aimed to incentivize "completion of evidence-based prison programming and activities through expanded earned time credits," and offered "credits for compliance with conditions of supervision."⁸ Importantly, the Act received broad community support for its efforts to reduce recidivism and reimagine ways to achieve

² Justin George, "Okay, What's the Second Step?" The Marshall Project, Dec. 19, 2018, www.themarshallproject.org/2018/12/19/okay-what-s-the-second-step.

³ Statistics as of Apr. 8, 2021, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp.

⁴ Sarah Anderson, "DOJ Offers a Mixed Bag Update on First Step Act Implementation," FreedomWorks, Apr. 12, 2019, <https://www.freedomworks.org/content/doj-offers-mixed-bag-update-first-step-act-implementation>.

⁵ See, e.g., Justin George, "How Jeff Sessions is Undermining Trump's Prison Reform Agenda," The Marshall Project, Oct. 25, 2018, <https://www.themarshallproject.org/2018/10/25/how-jeff-sessions-is-undermining-trump-s-prison-reform-agenda>, (discussing BOP's efforts to undermine the use of halfway houses in implementing prison reform).

⁶ An array of stakeholders, ranging from the NAACP to the ACLU, expressed these and other concerns in voicing their belief that the First Step Act would not achieve needed reforms. See "The Leadership Conference on Civil and Human Rights Letter to House Judiciary Committee Members," May 8, 2018, [http://civilrightsdocs.info/pdf/policy/letters/2018/not-retroactive-Sign-On-Letter-Oppose-First percent20Step percent20Act-5.8.18-FINAL.pdf](http://civilrightsdocs.info/pdf/policy/letters/2018/not-retroactive-Sign-On-Letter-Oppose-First%20Step%20Act-5.8.18-FINAL.pdf).

⁷ SAFE Justice Act, <https://www.congress.gov/bill/115th-congress/house-bill/4261>. There were 15 cosponsors of the bill consisting of members from both sides of the aisle.

⁸ *Id.*

community safety.⁹ For example, the National Police Foundation voiced its support, describing the Act as “a comprehensive criminal justice reform bill that would overhaul the federal sentencing and corrections system, as well as provide a wide range of reforms for law enforcement.”¹⁰ The Act represents an opportunity to both solidify and expand much needed reforms in transitioning individuals back to their home communities.

b) Helping former inmates successfully reintegrate into their communities and families by removing barriers to employment.

We also respectfully urge your administration to take the lead in devising ways to help formerly incarcerated individuals find employment. New initiatives should strive to both remove the legal impediments that bar returning individuals from finding work and erase any preconceived notions and workplace stigmas that are often tied to those with contact with the criminal justice system.

It is estimated that over 10,000 individuals are released from the country’s state and federal prisons each week, with over 650,000 people released every year.¹¹ These individuals arrive back in their communities with significant needs, facing numerous hurdles in their efforts to reintegrate themselves into their civic and family lives. What’s more, the hardships do not simply stop at the reintegrated person’s own doorstep. Obstacles to a person’s successful reentry have negative consequences that impact many segments of society. Recidivism, substance misuse and domestic disputes are but a few of the negative consequences stemming from the inability to successfully equip individuals returning to the community with the tools necessary to gain employment and achieve active community participation.

We urge your administration to advance the following steps—as articulated by numerous stakeholders¹²—to help the formerly incarcerated community achieve successful employment reentry: (i) provide a temporary basic income and guarantee the availability of essential social services to build a bridge to an effective return;¹³ (ii) vigorously investigate racial discrimination in the hiring of individuals with criminal records and subject organizations and employers to liability under Title VII of the Civil Rights Act of 1964 when a disparate racial impact is found; (iii) expand the availability of tax credits, job set-asides, and health insurance so that employers hiring those with a criminal record can be incentivized

⁹ See e.g., “SAFE Justice Act Introduced with Support from Police Foundation,” National Police Foundation, <https://www.policefoundation.org/safe-justice-act-introduced-with-support-from-police-foundation/>.

¹⁰ *Id.*

¹¹ See “Prisoners and Prisoner Re-entry, Introduction,” Department of Justice, https://www.justice.gov/archive/fbci/progmenu_reentry.html.

¹² See e.g., Lucius Couloute & Daniel Kopf, “Out of Prison & Out of Work: Unemployment among Formerly Incarcerated People,” Prison Policy Initiative, July 2018, <https://www.prisonpolicy.org/reports/outofwork.html#recommendations>.

¹³ Daniel Munczek Edelman, “Cash for Leaving Prison: A New Solution to Recidivism?” Stanford Social Innovation Review, Aug. 15, 2017, https://ssir.org/articles/entry/cash_for_leaving_prison_a_new_solution_to_recidivism. While proposals can vary concerning the amount and length of providing a temporary basic income, no proposal should artificially curtail such support while a returning individual is in the process of establishing themselves back in their communities, fighting health and mental instability, and on the cusp of finding permanent living and working arrangements.

in their employment decisions;¹⁴ (iv) create a mechanism for automatic record expungement that takes into account the practical reality of the offense and the unique circumstances of every criminal defendant; and (v) enact occupational licensing reform so that returning individuals are not categorically frozen out of employment opportunities, most notably in fields in which they may have prior experience and can quickly reassimilate.¹⁵

The Pennsylvania Clean Slate Act may serve as a useful model to kick-start nationwide reforms. Passed in June 2018, this legislation originally allowed individuals who had been conviction-free for 10 years for certain non-violent underlying offenses that resulted in a year or more in prison and had paid all court-ordered financial debts, to petition courts to seal their records.¹⁶ Critically, the Act also authorizes the automatic sealing of records for second or third-degree misdemeanor offenses that include a less than two-year prison term, if a person has been free from convictions for 10 years, as well as the sealing of criminal history related records of charges that did not result in convictions.¹⁷ In October 2020, noting that the Act was beginning to set up a system of *de facto* “debtor’s prisons,” the Pennsylvania Legislature also enacted an amendment to allow records to be sealed even if fines and court fees remained unpaid.¹⁸ The flexible approach adopted by Pennsylvania, with an emphasis on its willingness to amend the law after considering real-world circumstances and impacts, may serve as an effective roadmap for your administration. Building off such a model, your administration should take further steps and advocate that sealing procedures be used in conjunction with “ban the box” legislation that assures that pertinent criminal conviction history is being properly excluded by employers. This could be done by requiring companies that currently offer background checks on applicants, to update their records for every individual whose crime occurred 10 years ago.

c) Reforming the federal statutes so that laws cannot operate to unjustly transform a person’s minor offense into a compounded felony carrying significantly more incarceration time.

While the First Step Act brought much needed reductions in mandatory sentences for low-level drug crimes, we ask that your administration examine the structure and mechanics of other federal criminal

¹⁴ For example, the Department of Labor’s Federal Bonding Program “provides Fidelity Bonds for ‘at risk,’ hard-to-place job seekers. The bonds cover the first six months of employment at no cost to the job applicant or the employer,” <https://bonds4jobs.com/>. In addition, The Work Opportunity Tax Credit (currently in effect with a certification deadline that lapsed on January 28, 2021) “is a Federal tax credit available to employers for hiring individuals from certain target groups [including formerly incarcerated individuals] who have consistently faced significant barriers to employment,” <https://www.dol.gov/agencies/eta/wotc>.

¹⁵ See e.g., Beth Avery & Michelle Natividad Rodriguez, “Unlicensed and Untapped: Removing Barriers to State Occupational Licenses for People with Records,” National Employment Law Project, Apr. 26, 2016, <https://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/>.

¹⁶ “Governor Wolf Signs Clean Slate Bill, Calls for More Criminal Justice Reform,” Jun. 28, 2019, <https://www.governor.pa.gov/newsroom/governor-wolf-signs-clean-slate-bill-calls-for-more-criminal-justice-reform/>.

¹⁷ *Id.*

¹⁸ Paul Muschick, “Clean Slate: How a New Pennsylvania Law Helps Block More Criminal Records from Public View,” The Morning Call, Oct. 29, 2020, <https://www.mcall.com/opinion/mc-opi-clean-slate-law-pennsylvania-muschick-20201029-imbhin2tkvayfhz6ypp4bry42m-story.html>.

statutes with the goal of establishing more just and uniform sentencing. The array of federal conspiracy statutes is one such area.

Application of the federal conspiracy statute shows how oftentimes an enhanced sentence or upgraded charge occurs as a result of an individual's mere tangential connection to the underlying crime which may stem from a living arrangement or social contact and not any material participation in the offense. Sentencing reform is urgently needed to address these issues, and the person's role and culpability in the offense should be the focus.

Mandatory minimum sentences also remain a stubborn impediment to criminal justice reform. While the First Step Act began to address easing mandatory minimums, we urge your administration to consider advocating for a complete elimination of mandatory minimum sentencing for certain drug related offenses and other non-violent crimes. Specifically, as groups such as the Sentencing Project have articulated,¹⁹ the opioid crisis must not be used to usher in a return to a harsh era where mandatory minimum sentences become more prevalent. Rather, instead of mandatory minimum sentences, a public health approach is warranted. Additionally, we urge your administration to support the Second Look Act.²⁰ This proposed legislation would create a review process for sentence reduction for federal defendants who have served over ten years and are not a threat to public safety.²¹

d) Guaranteeing adequate funding for the social reentry programs contemplated by prior initiatives.

The First Step Act authorized \$75 million per year for fiscal years 2019 to 2023 to implement the First Step Act.²² This equates to setting aside approximately \$400 per incarcerated person for rehabilitative purposes. Stakeholders agree that this amount of funding is inadequate.²³ Analyzing the DOJ's data demonstrates this shortcoming. It is estimated that among the 223,000 released from the BOP's custody between the years 2009 and 2015, 49 percent had not completed any programming while in custody and 57 percent of those in need of substance use treatment received no services.²⁴ A recent

¹⁹ Kara Gotsch, "One Year After the First Step Act: Mixed Outcomes," The Sentencing Project, Dec.17, 2019, <https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/>.

²⁰ Second Look Act of 2019, <https://www.congress.gov/bill/116th-congress/senate-bill/2146?s=1&r=11>.

²¹ It is noteworthy that this kind of initiative is also taking place at the state level, such as in Florida. *See e.g.*, Jim Ash, "'Second-Look Act' Would Examine the Sentences of Youthful Offenders," Florida Bar News, Jan. 3, 2020, <https://www.floridabar.org/the-florida-bar-news/second-look-act-would-examine-the-sentences-of-youthful-offenders/>.

²² "Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System," Department of Justice, Jul. 19, 2019, <https://www.justice.gov/opa/pr/departments-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and-needs-assessment-system#:~:text=July%202019%20of%2019-2020%20of%20Justice%20Announces%20the%20Release%20of%203%20100%20Inmates%20Under%20Risk%20And%20Needs%20Assessment%20System&text=Over%203%20100%20federal%20prison%20inmates,conduct%20time%20under%20the%20Act>.

²³ Gotsch, *supra* note 19.

²⁴ *Id.* (discussing DOJ's statistical findings).

BOP budget analysis detailed a lengthy waiting list for basic literary services.²⁵ Simply stated, more funding is essential if reforms are to be successfully implemented.

We urge your administration to secure a significant increase in appropriation levels for prison reform initiatives. Appropriate funding ensures that the needs of people in prison are met. Absent adequate funding, the substantial benefits of the First Step Act's earned-time credit programs go unrealized. Increased funding will also aid the Department of Justice ("DOJ") in directing funds to the areas it has targeted for First Step Act implementation.²⁶

With increased resources comes increased opportunities and compliance with already enacted legislative mandates. Appropriate funding also fosters innovation, as has been seen in the successful problem-solving courts throughout the country. We urge your administration to support a new round of legislation to provide funding for federal-state (and local) criminal justice partnerships. Grants are a valuable tool in assisting local communities to eradicate the root causes of crime.²⁷ Targeted resources can help address issues that have traditionally proven to be a major driver of crime—poverty, homelessness, substance misuse, and a lack of mental health resources. Moreover, funding of state criminal justice initiatives will help assure that each state can attempt to address structural racism and keep pace with an ever-evolving set of complex circumstances that continuously challenge every aspect of the criminal justice system.

We also urge your administration to support passage of the Reverse Mass Incarceration Act of 2019 and eliminate federal funding sources that promote mass state incarcerations. The Reverse Mass Incarceration Act seeks to invest in evidence-based programs and state grants that focus on reducing the prevalence of mass incarceration.²⁸

II. ASSURE THE AVAILABILITY OF ADEQUATE HOUSING FOR COMMUNITY REENTRY

Many people leaving prison are at risk of homelessness. For example, in 2016 and 2017, it was estimated that over 50 percent of all persons released from New York state prisons to New York City

²⁵ Ames Grawert, "What Is the First Step Act – and What's Happening with It?," The Brennan Center for Justice, Jun. 23, 2020, <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>; see also United States Department of Justice, Federal Prison System FY 2021 Performance Budget Congressional Submission, <https://www.justice.gov/doj/page/file/1246231/download>.

²⁶ The DOJ re-directed funds in FY2019 for First Step Act implementation included, *inter alia*: increased vocational training, expanded educational programs, enhanced medication-assisted treatment to treat substance misuse, and meeting the needs of the female inmate population. See Department of Justice Report, *supra*, note 25.

²⁷ John F. Pfaff, *A Second Step Act for the States (and Counties, and Cities)*, Cardozo Law Review, Vol. 41 Issue 1 (Oct. 2019), <http://cardozolawreview.com/a-second-step-act-for-the-states-and-counties-and-cities/>.

²⁸ Reverse Mass Incarceration Act of 2019, <https://www.congress.gov/bill/116th-congress/senate-bill/1557?q=%7B%22search%22%3A%5B%22reverse+mass+incarceration+act%22%5D%7D&s=1&r=3>.

utilized the New York City shelter system.²⁹ For these people, the risks of physical and mental harms are ever present. And the risk of contracting COVID-19 in a homeless shelter is now another frightening issue to confront. Too often homelessness leads to a cycle of recidivism and an inevitable (and avoidable) swelling of our prison populations.

Poor economic circumstances, lack of family stability and diminished job prospects are all connected to homelessness and contribute to a vicious cycle of crime, recidivism and poverty. Moreover, as the U.S. Department of Health & Human Services' Centers for Medicare & Medicare Services has recognized, these "social determinants of health" have been found to cause or contribute to health inequities and poor health outcomes, further compounding the formerly incarcerated person's successful re-entry into society.

U.S. Housing and Urban Development ("HUD") regulations have also proven to be a barrier for the formerly incarcerated to find basic housing. Currently, because incarceration time does not satisfy the regulatory definition, HUD's definition of homelessness excludes a majority of the returning incarcerated population, particularly those with lengthier sentences.³⁰ This rigidity works to deny access to HUD-funded programs for homeless returning people until they have lived on the street or in a shelter post-release. This definition can, perversely, incentivize dangerous and unsanitary street living. Exacerbating this plight is the fact that because of their prison time, returning individuals have not accrued the requisite shelter time or street homeless time needed to qualify for most of the permanent federal supportive housing programs. Discriminatory practices by certain landlords also exacerbate this situation. Individuals returning back to their communities are, more often than not, financially destitute. Failing to take into consideration this reality fosters a damaging cycle whereby individuals, and families as a whole, suffer the evils of homelessness and the community is left powerless to find the resources needed to assist them. Undoubtedly, this cycle results in both the returning person and their communities being damaged. We ask that your administration address homelessness among people newly released from prison by revising the applicable HUD regulations so that formerly incarcerated people can access the most basic of human rights—housing— upon their return to society.

Therefore, we urge your administration to take the following actions:

²⁹ Robert Mascali, "A Way Forward on Homelessness: the Population Keeps Growing, But It Doesn't Need to. Think Outside the Shelter," New York Daily News, Mar. 24, 2019, <https://www.nydailynews.com/opinion/ny-oped-a-way-forward-on-homelessness-20190324-7qrq13zd4jbhvjmdzftmbz4ysy-story.html>.

³⁰ HUD's definition of "Literally Homeless" is defined as an "Individual or family who lacks a fixed, regular, and adequate nighttime residence, meaning:

- (i) Has a primary nighttime residence that is a public or private place not meant for human habitation;
- (ii) Is living in a publicly or privately operated shelter designated to provide temporary living arrangements (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state and local government programs); or
- (iii) Is exiting an institution where (s)he has resided for 90 days or less and who resided in an emergency shelter or place not meant for human habitation immediately before entering that institution."

https://files.hudexchange.info/resources/documents/HomelessDefinition_RecordkeepingRequirementsandCriteria.pdf (describing HUD's criteria for defining "homeless").

a) Advocate for a new definition of homeless.

Your administration should propose legislation that amends the definition of “chronically homeless” found in 42 USC §11360(2).³¹ The statute’s current definition is underinclusive, leaving out a large portion of a vulnerable population. Your administration should advance legislation that amends this definition so that people in prisons and jails who are unable to afford suitable, stable and safe housing because of their insufficient financial resources would be deemed “chronically homeless” upon their release and reentry into their communities. It simply cannot be that the state keeps a person in their custody and then that person is hampered in finding humane housing because of the state’s custody. This situation is, in essence, a type of punitive double sentence. Establishing a new baseline definition is an important first step towards achieving a level of equity in criminal justice reform.

b) Provide necessary funding to support emergency and transitional housing.

Recognizing that a large segment of homeless people returning from prisons and jails have special needs, your administration can be a voice for this underserved and often forgotten population by assuring that sufficient funding and programming is available for their successful reentry into their communities.

A shelter is not a substitute for effective transitional housing. There exists a critical need for specialized, tailored transitional housing designed to meet the needs of those trying to rebuild their lives following a period of incarceration. We urge your administration to establish a robust funding structure to meet the unique emergency and transitional housing needs of previously incarcerated homeless individuals. Increased funding for transitional housing should be established for both capital projects and to sustain service programs.

Under HUD definitions, transitional housing is that which provides temporary housing and supportive services for up to 24 months. In contrast, emergency housing/shelters are those which seek to limit stays to 30 to 45 days. For many homeless people on parole, transitional housing is vital in providing the support needed for a stable reentry. Transitional housing also provides a crucial bridge that allows people to successfully return to their families, find gainful employment and sustain themselves long term in independent housing.

³¹ 42 USC §11360(2) defines “Chronically Homeless” as the following,

(A) In general

The term “chronically homeless” means, with respect to an individual or family, that the individual or family—

- (i) is homeless and lives or resides in a place not meant for human habitation, a safe haven, or in an emergency shelter;
- (ii) has been homeless and living or residing in a place not meant for human habitation, a safe haven, or in an emergency shelter continuously for at least 1 year or on at least 4 separate occasions in the last 3 years; and
- (iii) has an adult head of household (or a minor head of household if no adult is present in the household) with a diagnosable substance use disorder, serious mental illness, developmental disability (as defined in section 15002 of this title), post traumatic stress disorder, cognitive impairments resulting from a brain injury, or chronic physical illness or disability, including the co-occurrence of 2 or more of those conditions.

In New York State, there are successful models of transitional housing created to serve the specific needs of homeless individuals with incarceration histories.³² One such model was developed through the Fortune Academy, in buildings called the Castle, Castle Gardens, and Freedom House. These buildings provide a combination of transitional and affordable housing, as well as emergency housing for the Castle. Operating under the auspices of the Fortune Society, this model utilizes close collaboration with parole officers having caseloads dedicated to program residents. The Center for Community Alternatives and Syracuse Housing Authority also opened Freedom Commons in the fall of 2019 in Syracuse, New York³³. It is the first example in the nation of a public housing authority partnering with a reentry organization to provide emergency, transitional and permanent supportive housing for formerly incarcerated homeless individuals in a smaller urban setting. Successful transitional housing models are tailored to the communities they serve. The result is individuals finding permanent housing in the community, fewer parole violations, and decreased recidivism.

While successful models exist, they have not been successfully replicated because sufficient streams of capital and operational funding are lacking. Regrettably, HUD's funding limitations are a roadblock to creating these types of transitional housing opportunities. HUD's funding for transitional housing programs has been scaled back,³⁴ and is now generally limited to certain specific populations such as homeless youth, veterans, and victims of domestic violence. We believe your administration should add formerly incarcerated individuals to HUD's list of special populations, which will remove artificial administrative constructs inhibiting needed funding levels.³⁵

c) Utilize the DOJ in the battle against homelessness.

The DOJ, both civilly and criminally, plays an active role in fighting the scourge of homelessness. This role takes on a greater importance in assuring housing is provided to the reentry community. Federal public housing laws currently categorically exclude two groups, those: (i) on a lifetime registry; and (ii) convicted of preparing methamphetamine in public housing. Yet, federal law gives housing authorities and project-based Section 8 providers significant leeway in crafting their own admission and eviction policies. For the New York City Housing Authority ("NYCHA"), this discretion includes implementing waiting periods before admission based on severity of crime and permanent exclusion for some individuals arrested on NYCHA property. NYCHA policy has been carried out in a way that results in *de facto*

³² See "Report of the New York State Bar Association Task force on the Parole System," New York State Bar Association, November 2019, <https://nysba.org/app/uploads/2019/12/NYSBA-Task-Force-on-the-Parole-System-Final-Report.pdf>.

³³ See Center for community Alternative, Freedom Commons, <https://www.communityalternatives.org/programs/freedom-commons/>.

³⁴ See Ann Marie Oliva, "SNAPS Weekly Focus: What about Transitional Housing?" HUD Exchange, Sept. 18, 2013, www.hudexchange.info/news/snaps-weekly-focus-what-about-transitional-housing, (discussing HUD's terse 2013 explanation regarding its scaling back of funding for transitional housing).

³⁵ Increased funding for Permanent Supportive Housing ("PSH") for those with disabilities is also needed. PSH has proven to be one long-term pathway out of homelessness. This model assures individuals receive coordinated access to the resources and expertise of multiple disciplines, from mental health services to vocational training, across different government platforms. This model can facilitate successful community reentry.

exclusions never intended under the law. We urge your administration to direct the DOJ to act swiftly when discriminatory practices present themselves in such circumstances.

Not surprisingly, there is also discrimination in private housing. The City of Seattle has banned housing denials based on a person's criminal record and there is currently a bill in the New York City Council to address this issue as well. The Fortune Society has also brought a lawsuit on the basis of disparate impact in housing, achieving a beneficial settlement.³⁶ Your administration can help address this problem by ensuring that the DOJ takes an active role in fighting this type of pervasive discrimination in access to housing, and that the DOJ is equipped with ample resources to enforce provisions of the Fair Housing Act ("FHA") and Title II of the Civil Rights Act of 1964. "Under the FHA, the Department of Justice may bring lawsuits where there is reason to believe that a person or entity is engaged in a 'pattern or practice' of discrimination or where a denial of rights to a group of persons raises an issue of general public importance."³⁷ The Civil Rights Act prohibits discrimination in public accommodations. Your administration can act to assure that DOJ policy recognizes the real risk of housing discrimination that returning individuals face. We ask that your administration assure that the DOJ is actively: (i) bringing the appropriate enforcement actions and seeking injunctive relief, when appropriate; (ii) ensuring landlords have received adequate training to comply with the applicable housing regulations; (iii) imposing appropriate civil penalties; and (iv) identifying pervasive patterns of discrimination in housing decisions.

III. GUARANTEE MEDICAID COVERAGE FOR THE OFFENDER COMMUNITY

Imprisoned people are entitled to healthcare during their incarceration. The state has a fundamental obligation to provide adequate, effective healthcare to those in its custody. However, research has found that incarcerated individuals are less healthy than the general population. Nationally, it is estimated that 80 percent of individuals released from prison have at least one chronic health condition.³⁸

Incarcerated individuals also suffer from high rates of substance misuse as well as mental disorders. A New York Department of Corrections and Community Supervision ("DOCCS") report from

³⁶ "Landmark Settlement of Lawsuit Establishing National Precedent that Advocacy Organization Can Challenge Private Landlords' Blanket Ban on Renting Apartments to People with Criminal Records," The Fortune Society, Nov. 5, 2019, https://fortunesociety.org/media_center/landmark-settlement-of-lawsuit-establishing-national-precedent-that-advocacy-organization-can-challenge-private-landlords-blanket-ban-on-renting-apartments-to-people-with-criminal-records/.

³⁷ Department of Justice, "Recent Accomplishments of the Housing and Civil Enforcement Section," updated Feb. 1, 2021, <https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section>.

³⁸ See "Incarceration and Health: A Family Medicine Perspective (Position Paper)," AAFP, <https://www.aafp.org/about/policies/all/incarceration.html>, and "Incarceration," Healthy People 2020, Office of Disease Prevention and Health Promotion, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/incarceration>, (discussing overall poor health among this population). In New York, for example, Department of Corrections and Community Supervision statistics from 25 facilities visited by the Correctional Association of New York (CANY) between 2012 and 2017 found that 15.6 percent of those incarcerated in these facilities suffered from asthma, 6.9 percent suffered from diabetes and 14.3 percent from hypertension, <https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c5b05f90d9297552eab7d35/1549469179469/2017+-+CANY+testimony+on+the+state+of+prison+healthcare.pdf>.

2018 found that 21 percent of state incarcerated individuals had been identified by the Office of Mental Health as having some level of mental illness. For substance use, 86 percent of those in DOCCS custody were identified as having a substance use disorder in December 2007, the last year for which statistics are available.

There is some evidence that behavioral health conditions are even more common in local jails. New York City Health + Hospitals reports that, in November 2019, 43 percent of individuals detained in New York City jails had a mental illness. Additionally, of the 29,391 individuals discharged from New York City jails during the 2018 calendar year, 26 percent had mental health issues, 11 percent suffered from a severe mental illness, and 63 percent struggled with substance misuse.

Compounding these problems is that, upon release, individuals are rarely connected to community care, meaning that any benefit received during incarceration is quickly lost. This results in increased rates of illness and death, increased use of expensive emergency health services and a greater likelihood of rearrest and reincarceration. A limited number of studies have examined the impact of increased access to healthcare on the likelihood of recidivism. These studies have found mixed results.³⁹ However, more research is needed to identify the extent of the impact and what models of care would maximize positive outcomes.

Lack of access to health insurance is one of the many barriers preventing continuation of care for people released from incarceration. To help remedy this, we also urge your administration to:

a) Support legislation to allow states to bill Medicaid for services received during the last 30 days of incarceration.

In 2017, Representative Paul Tonko (D-NY) introduced the Medicaid Reentry Act. This legislation required the Centers for Medicare and Medicaid Services (the “CMS”) to: (i) convene a stakeholder workgroup to develop best practices for states to improve the health care transition of incarcerated individuals back to the community; and (ii) issue a letter to states outlining opportunities for Medicaid demonstration waivers based on identified best practices. The legislation had three Republican co-sponsors. The text was incorporated into the SUPPORT for Patients and Communities Act (H.R. 6), which was signed into law in October 2018.

The Medicaid Reentry Act has again been reintroduced in the new Congress (H.R. 1329, S. 285). Efforts to have the bill included in the recent COVID-19 relief package were unsuccessful, so this legislation remains pending in Congress.⁴⁰

³⁹ Erkmen G. Aslim, *et al.*, “The Effect of Public Health Insurance on Criminal Recidivism” Oct. 24, 2019, http://perc.tamu.edu/perc/media/perc/working%20papers/wp_1906.pdf?ext=.pdfday; *see also* and Emily A. Wang, *et al.*, “Propensity-Matched Study of Enhanced Primary Care on Contact with the Criminal Justice System among Individuals Recently Released from Prison to New Haven,” *BMJ Journals*, <https://bmjopen.bmj.com/content/9/5/e028097>.

⁴⁰ It is extremely unfortunate that this important piece of legislation was not included in the COVID-19 relief package as a result of the arcane rules of reconciliation in the Senate, even though the legislation had bi-partisan sponsorship in the Senate and had already been approved by the House.

For those returning home from incarceration, Medicaid coverage now is a critical component of COVID-19 relief, as well as overdose and suicide prevention. Providing this relief will help achieve a strong national public health policy and health equality. At the same time, while ensuring that individuals have access to health insurance is an important tool in supporting their successful return to the community, it is generally not sufficient by itself to achieve desired health and other outcomes. Many returning individuals will also need additional counselling to help them develop trust and to assist them with locating and accessing care. Education sessions that occur prior to an individual's release will improve their ability to locate and access care after their reentry. These types of reentry programs are referred to as "reentry from the inside out," and recognize that reentry support should occur well before an individual is released. They will also need services that are trauma-informed and non-judgmental. Your administration should therefore ensure that funding levels remain adequate to meet the continuing care and counseling needs of those returning from incarceration.

b) In the absence of legislation, direct CMS to approve New York's application for an amendment to its Medicaid Redesign 1115 Demonstration to authorize the use of federal Medicaid matching funds for the provision of targeted Medicaid services to eligible justice-involved populations.

In 2016, New York applied to CMS for authorization to amend its existing 1115 Medicaid waiver. Granting this waiver would have allowed the use of federal Medicaid matching funds to pay for certain services for incarcerated individuals with serious behavioral and physical health conditions during the critical last 30 days prior to release. These funds would have provided significant help to transition these individuals back into the community and provide health coverage upon release. Regrettably, following the 2016 election, New York withdrew this application. The withdrawal was born out of concern that the then incoming administration would use the opportunity of reopening the state's waiver to make other changes that would negatively impact the health of New Yorkers and the state's Medicaid program.

In 2019, with New York seeking to extend its existing Medicaid waiver, which was set to expire, the state announced that it planned to submit a new application for a waiver amendment to allow the use of federal Medicaid matching funds to pay for transitional services during the last 30 days of incarceration for high needs individuals. To date, this application has not been submitted.

Your administration should encourage New York, and other similarly situated states, to submit a new application to amend its 1115 waiver to pay for essential health services for high needs incarcerated individuals.⁴¹ It should be made clear that there will be no reprisal if states make such a request. The health and wellbeing of these individuals, and in fact the entire community, dictates that the state's request be approved on an expedited basis. In light of the current pandemic and the health risks faced by incarcerated individuals being released to the community, improving access to care during early reentry is now more vital than ever. Providing this care will save lives of individuals at the highest risk, improve

⁴¹ Section 1115 of the Social Security Act gives the Secretary of Health and Human Services authority to approve experimental, pilot, or demonstration projects that are found by the Secretary to be likely to assist in promoting the objectives of the Medicaid program. "About Section 1115 Demonstrations," Medicaid.gov, <https://www.medicaid.gov/medicaid/section-1115-demonstrations/about-section-1115-demonstrations/index.html>.

the health of thousands of formerly incarcerated New Yorkers, while at the same time saving money through the reduced use of emergency services.

Furthermore, as mentioned above, increased healthcare may help improve public safety by reducing recidivism and reincarceration. For example, certain studies suggest a link between access to substance use disorder (“SUD”) care and reduced criminal justice involvement.⁴² To the extent that insurance coverage results in increased access to SUD care, the implication is that it would result in reduced recidivism. While providing insurance may not by itself reduce recidivism, it is undoubtedly a necessary step that, when combined with other forms of outreach and service, is necessary to help address any health factors contributing to recidivism.

IV. ENSURE ACCESS TO SCIENTIFICALLY BASED CARE FOR SUBSTANCE USE DISORDERS FOR ALL INDIVIDUALS INVOLVED IN THE CRIMINAL LEGAL SYSTEM

According to the National Institute on Drug Abuse, an estimated 65 percent of those incarcerated nationally have an active SUD. Another 20 percent (although they do not meet the official criteria for SUD) were under the influence of drugs or alcohol at the time of their crime.⁴³ As indicated above, statistics from New York State and New York City indicate similarly high rates of SUD.

Over the last few years, the scientific understanding of drug use and addiction has expanded dramatically. Yet, all too often, both corrections and community supervision systems limit or even bar access to treatment based on current best practices. What treatment is made available is often out-of-date or even counterproductive to the goals of improved health, successful reintegration into the community and reduced recidivism.

Of the many problems with treatment options offered by the correctional system, none is more damaging than the justice system’s continued opposition to allowing individuals with an SUD to access medications for addiction treatment (“MAT”). MAT is widely considered to be the best way to treat opioid use disorder (“OUD”). Limiting access to these medications is especially problematic in the midst of an overdose epidemic that is killing over 70,000 Americans a year, a number that preliminary data suggests may have increased as a result of the isolation and other negative psychological impacts caused by the COVID-19 pandemic.

Studies have shown that the likelihood of death by overdose during the first two weeks following release from incarceration is up to 129 times greater than for the general population.⁴⁴ When researchers have looked at the limited pool of correctional facilities that do offer access to MAT, they have consistently found that individuals who receive these medications during their incarceration have lower

⁴² See e.g., support for this connection being advanced at a National Academy of Sciences workshop, <https://www.ncbi.nlm.nih.gov/books/NBK201972>.

⁴³ “Criminal Justice Drug Facts,” National Institute on Drug Abuse, <https://www.drugabuse.gov/publications/drugfacts/criminal-justice#:~:text=85%25%20of%20the%20prison%20population,overdose%20following%20release%20from%20incarceration>.

⁴⁴ Ingrid A. Binswanger, *et. al.*, “Release from Prison — A High Risk of Death for Former Inmates,” *New England Journal of Medicine*, Jan. 11, 2007, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2836121/>.

rates of illicit opioid use, fewer non-fatal overdoses, lower mortality, higher adherence to OUD treatment, are less likely to be reincarcerated and, in some studies, are more likely to be working one year post-incarceration.⁴⁵ As an example, the establishment of an MAT program within the Rhode Island correctional system in 2016 contributed to a 61 percent reduction in overdose deaths post-release.⁴⁶

There have been a number of lawsuits brought against federal, state, and local correctional facilities for denying individuals access to MAT. These lawsuits have included claims that denying these medications violates the Americans with Disabilities Act and the Eighth Amendment of the U.S. Constitution. At least two courts have found that MAT denial likely violates the ADA and at least one found that doing so likely violates the Eighth Amendment.⁴⁷

Addressing substance misuse saves lives and reduces criminal justice involvement, particularly when this care is provided in line with scientific best-practices. In order to ensure this occurs, we urge your administration to:

a) Ensure that individuals incarcerated in federal prisons and under federal probation supervision are offered treatment that employs best practices, including the use of MAT.

Like most other correctional systems, the BOP does not offer MAT to individuals in its custody, except in certain limited cases, often as part of a settlement to a lawsuit challenging the denial of these medications.⁴⁸ Similarly, according to a 2019 Federal Probation report, a survey of all 94 judicial districts found only 828 cases of individuals under supervision receiving MAT.⁴⁹

It is essential that the federal government provide an example. We urge you to: (i) require the BOP to provide substance use disorder programming based on best practices to all those in its custody, including through the use of MAT; and (ii) work with the federal courts to ensure that individuals supervised by Probation and Pretrial Services (“Probation”) who need these medications are able to access them. In designing these programs, it is essential that any decisions about whether to take these medications, as well as the type, dosage, and duration of treatment be made by the individual in consultation with a medical professional. It is also essential that access to these medications not be withheld by the BOP or Probation as punishment for misbehavior, including for drug use.

⁴⁵ See Monica Malta, *et al.*, “Opioid-Related Treatment, Interventions, and Outcomes among Incarcerated Persons: a Systematic Review,” National Library of Medicine, December 2019, <https://pubmed.ncbi.nlm.nih.gov/31891578/>; See also Jun Ma, *et al.*, “Effects of Medication-Assisted Treatment on Mortality among Opioids Users: a Systematic Review and Meta-Analysis,” MOLECULAR PSYCHIATRY, Jun. 22, 2018, <https://www.nature.com/articles/s41380-018-0094-5>.

⁴⁶ Traci C. Green, *et al.*, “Postincarceration Fatal Overdoses After Implementing Medications for Addiction Treatment in a Statewide Correctional System,” JAMA Psychiatry, April 2018, <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2671411>.

⁴⁷ Substance Use Disorder Cases, Legal Action Center, <https://www.lac.org/historic-cases#question-21014>

⁴⁸“Bureau of Prisons Sued for Refusing to Let People with Opioid Use Disorder Stay on Their Prescribed Medication,” ACLU (Washington), Sept. 19, 2019, <https://www.aclu-wa.org/news/bureau-prisons-sued-refusing-let-people-opioid-use-disorder-stay-their-prescribed-medication>.

⁴⁹ Christopher Mangione, “Overview of Substance Use Disorder Occurrence and Treatment in the Federal Judiciary,” Probation and Pretrial Services, Sept. 2019, https://www.uscourts.gov/sites/default/files/83_2_2.pdf.

b) Take actions to ensure that individuals incarcerated in state and local correctional facilities and under local justice supervision have access to MAT.

As described above, a number of lawsuits have been brought against correctional facilities for denying individuals access to MAT, and at least two courts have found that such denials may violate the ADA and the Constitution. Separately, in 2018, the U.S. Attorney for the District of Massachusetts notified the state that it had opened an investigation into the Massachusetts Department of Correction's policy of denying MAT as a possible violation of the ADA.⁵⁰

We urge you to encourage the DOJ to continue investigating state and local correctional facilities that deny incarcerated individuals access to MAT and to take enforcement actions where it finds that facilities are violating the ADA, other statutes, or the Constitution.

Your administration should also look for other opportunities to encourage state and local correctional and community supervision systems to use best practices in providing SUD care, including through the use of MAT, especially through the use of funding. In 2015, both the Bureau of Justice Assistance and the Substance Abuse and Mental Health Services Administration ("SAMHSA") issued solicitations offering funding for drug courts. Both solicitations specifically discussed the importance of "not deny[ing] any eligible client for a drug court access to the program because of their use of FDA-approved medications" and tied funding to other requirements around type of medication, dose and duration.⁵¹ We urge you to ensure that future funding for state and local correctional and community supervision programming be specifically tied to the provision of SUD treatment based on best practices, including through full access to MAT.

c) Encourage SAMHSA to work with New York to enable DOCCS to obtain certification as an opioid treatment program.

Methadone is one of three medications approved for the treatment of OUD. It was first approved by the Food and Drug Administration for use in treating OUD in 1972 and decades of research have shown its effectiveness. Methadone for OUD is among the most regulated medications in the U.S. It can generally only be dispensed by opioid treatment programs ("OTPs"). Obtaining certification as an OTP is a complex process that can take many years.

As a result, most correctional facilities that offer methadone do so in partnership with a community-based OTP, thereby limiting their ability to provide this medication, particularly in more remote locations. However, a limited number of facilities have been certified as OTPs, including the New York City Department of Corrections, which was first certified in 1987.

⁵⁰ Letter from the U.S. Attorney District of Massachusetts, "Investigation of the Massachusetts Department of Correction Pursuant to the Americans with Disabilities Act," Mar. 16, 2018, <http://d279m997dpfwgl.cloudfront.net/wp/2018/03/20180322172953624.pdf>.

⁵¹ "Joint Adult Drug Court Solicitation to Enhance Services, Coordination, and Treatment FY 2015 Competitive Grant Announcement," Department of Justice, Jul. 31, 2016, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BJA-2015-4179.pdf>. (SAMHSA's solicitation is no longer available online.)

In his 2020 State of the State address, Governor Cuomo announced that DOCCS would pursue certification to become an OTP. According to the state, the COVID-19 pandemic has slowed this process. However, the state has submitted an application to the National Commission on Correctional Health Care for accreditation and has taken other steps towards establishing an OTP. Accreditation would allow DOCCS to expand access to methadone and improve the quality of care received by individuals in its custody. We urge the administration to support DOCCS's efforts to obtain accreditation and offer any assistance that will move this process forward.

Our Committees are grateful for your administration's interest in tackling much needed criminal justice reform and we appreciate your willingness to consider our requests. We are enthusiastic about your willingness to work with New York State (and other states) in achieving impactful results. We stand ready to provide any assistance and resources we can to assist your administration in realizing the historically elusive goal of transforming a criminal justice system shackled by, among other things, a cycle of insidious discrimination into one that promotes an end to recidivism, and individual renewal.

Corrections & Community Reentry Committee
Gregory D. Morril, Chair

Criminal Courts Committee
Terri S. Rosenblatt, Chair

Criminal Justice Operations Committee
Tess M. Cohen, Chair

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Contact

Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | mmargulis-ohnuma@nycbar.org
Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org