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Dear Attorney General Barr, Director Keith, Vice-Chair Sullivan, and Members of the President's Commission on Law Enforcement and the Administration of Justice:

In response to the President's Commission on Law Enforcement and Administration of Justice's invitation to provide verbal testimony at one of its hearings, I am submitting the written testimony contained herein.

At the outset, I note that the Commission's working group on Respect for Law Enforcement has been instructed to "specifically evaluate how *under-enforcement* of the criminal law in certain jurisdictions affects: [p]ublic safety; [p]ublic perception of law enforcement and the laws they enforce; [p]olice resources and morale; [t]he rule of law (emphasis added)." ¹ With all due respect to the Commission, Vera's research shows that far from an issue of under-enforcement, there is a distinct pattern of systematic *over-enforcement* of the law nationwide that has targeted Black people and other communities of color in particular. This over-enforcement and over-criminalization along racial lines has led directly to the dual, interconnected crises that have recently erupted into the public eye: police violence against unarmed Black people and the dangerous conditions faced by those behind bars in this ongoing pandemic.

¹ Office of the Attorney General, *Implementation Memorandum for Heads of Department Components: The Commission on Law Enforcement and the Administration of Justice* (Washington, DC: OAG, 2020), <https://www.justice.gov/ag/page/file/1236906/download>.

In order for this Commission to fulfill its mandate to recommend actions to prevent, reduce, and control crime, as well as increase respect for the law in all our communities, I urge it to address these crises and adopt our recommendations detailed below.

Background on the Vera Institute of Justice

Founded in 1961, the Vera Institute of Justice, a nonpartisan and nonprofit organization, has led efforts to study and develop effective solutions to some of the most serious and persistent justice system challenges at the federal, state, and local levels. Our work began with the Manhattan Bail Project that aimed to end New York City's overreliance on cash bail and ultimately led to the federal Bail Reform Act of 1966. Vera is unique among justice reform organizations in that we harness research, technical assistance, and advocacy expertise to produce significant solutions, at scale, to America's problem of over-criminalization and mass incarceration.

Our work encompasses close to 60 projects in 47 states in reforms that include:

- a federal pilot program with the U.S. Department of Education to expand access nationwide to prison postsecondary education programs, which enrolled nearly 17,000 incarcerated students over its first three years;
- working with state correctional agencies to limit the use of solitary confinement, with previous or current partnerships across 16 jurisdictions, 13 states, and 3 county jails;
- building restorative correctional settings for young adults in 6 states;
- partnering with local jurisdictions across 7 states to reduce their overuse of jail incarceration; and
- collaborating with reform-minded prosecutors in 6 cities and counties to implement new policies.

The Crisis of Over-Enforcement and Over-Criminalization

Widespread overpolicing of communities of color has allowed the worst abuses in policing, such as police violence and murders, to go unchecked because of a systemic lack of accountability and transparency for police misconduct. The spate of recent police killings of unarmed Black men and women, including Breonna Taylor and George Floyd, are just two visible to the public among a long line of invisible others. In just the past five years, there have been 1,254 documented incidents of police officers shooting and killing Black people. This devastating statistic represents just a fraction of our nation's problem of police violence—and its legacy in slavery and white supremacy.

Two years ago, Vera created *Arrest Trends*, a data tool to explore comprehensive national and local arrest trends that primarily drew from the Federal Bureau of Investigation's (FBI) Uniform Crime Report data from 1980 to 2016. We found that in 2016, an estimated **10,662,252 arrests** were made in the United States for all offenses. Although the numbers have decreased since 1997, roughly 28,000 arrests still happen every day. Contrary to public perception, less than 5 percent of these arrests are for serious violent crimes.² By far the most common arrest

² Rebecca Neusteter and Megan O'Toole, *Every Three Seconds: Unlocking Police Data on Arrests* (New York: Vera Institute of Justice, 2019), 5, https://www.vera.org/publication_downloads/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds.pdf.

category is a group of low-level offenses labeled by the FBI as “other non-traffic offenses,” which accounts for more than 30 percent of all arrests.³

The vast majority of arrests are for low-level, minor offenses and disproportionately impact people of color. **Twenty-seven percent** of the people arrested in 2016 were Black,⁴ even though Black people constitute only **13 percent** of the U.S. population.⁵ For all offenses, Black people were arrested at a rate of **2.17** times that of white people.⁶ For arrests for suspicion of a crime, Black people were arrested at a rate of **5.36** times that of white people.⁷

Drug arrests increased by **171 percent** from 1980 to 2016, and—despite recent, smaller declines—now account for more than 1.5 million arrests annually, the vast majority of which are made for drug possession, most often marijuana possession.⁸ Black people were arrested at a rate of **2.12** times that of white people for drug abuse, and this rate has increased by about 61 percent since 1980.⁹ One out of every three Americans will have experienced arrest by age 23, but the rate among young Black men is almost one in two.¹⁰

The data on arrest trends also indicates that over-policing impacts people across gender and geography. Arrests of women have skyrocketed over the past several decades, increasing by **83 percent** from 1980 to 2014. In 1980, women accounted for an estimated 16 percent of all arrests, but in 2014, they accounted for 27 percent.¹¹ Although metropolitan areas account for 78 percent of all arrests, cities outside metropolitan areas have the highest average arrest *rates* (5,176 per 100,000), followed by suburban cities (3,311 per 100,000), principal cities (3,193 per 100,000), nonmetropolitan counties (3,097 per 100,000), and metropolitan counties (2,806 per 100,000).¹²

The problem of police violence is at least partially steeped in over-enforcement and the resources required to support this apparatus. In every arrest lies the threat of escalation, injury, and death. The excessive use of arrests also helps fuel mass incarceration, diminished public health and economic prosperity, racial inequities, and mistrust between police and

³ “Other non-traffic offenses” are classified by the FBI as non-serious, low-level offenses, but little else is known about these arrests, making it difficult to understand their utility and effect in maintaining public safety.

⁴ Vera Institute of Justice, “Arrest Trends” (Demographics), database, <https://arresttrends.vera.org/demographics?race=B&estimated=0#infographics>.

⁵ Erin Duffin, “Percentage Distribution of Population in the United States in 2016 and 2060, by Race and Hispanic Origin,” Statista, January 28, 2020, <https://www.statista.com/statistics/270272/percentage-of-us-population-by-ethnicities/>.

⁶ Vera Institute of Justice, “Arrest Trends” (All Offenses; Black, White), database, <https://arresttrends.vera.org/demographics?unit=rate&estimated=0&type=national&race=B#bar-chart>.

⁷ “Suspicion” is defined as an arrest for no specific offense and release without formal charges being placed. Vera Institute of Justice, “Arrest Trends” (Suspicion; Black, White), database, <https://arresttrends.vera.org/demographics?unit=rate&estimated=0&type=national&race=B&offense=27#bar-chart>

⁸ Neusteter and O’Toole, *Every Three Seconds*, 2019, 6-7.

⁹ Drug abuse is defined as the unlawful cultivation, manufacture, distribution, sale, purchase, use, possession, transportation, or importation of any controlled drug or narcotic substance. Vera Institute of Justice, “Arrest Trends” (Drug abuse; Black, White), database, <https://arresttrends.vera.org/demographics?unit=rate&estimated=0&type=national&race=B&offense=18#bar-chart>.

¹⁰ S. Rebecca Neusteter, Ram Subramanian, Jennifer Trone et al., *Gatekeepers: The Role of Police in Ending Mass Incarceration* (New York: Vera Institute of Justice, 2019), <https://www.vera.org/downloads/publications/gatekeepers-police-and-mass-incarceration-fact-sheet.pdf>.

¹¹ Neusteter and O’Toole, *Every Three Seconds*, 2019, 9.

¹² A “principal city” is the main core city in a metropolitan area. *Ibid.*, 8.

communities.¹³ Cities and communities spend far more on policing than other services, such as welfare or housing. Police department budgets remain at an all-time high, while state and local budgets face a period of austerity and cuts likely to reduce critical public services such as education and community mental health resources.

Although arrests dropped by more than 25 percent from 2006 to 2016, they remain far too high. However, the decline and its timing parallel widespread changes in policing policies, such as the decriminalization of certain offenses (such as “runaways” and “vagrancy”), changing practices around pedestrian and vehicle stops, and the growing recognition that America incarcerates too many people. This trend indicates that public policy reforms can impact policing practices—and that the need for much greater reforms remains.

To meet this need, the Commission should address over-enforcement and recommend, at a minimum, the following steps: (1) require all local law enforcement agencies to collect accurate and complete data on police misconduct and use of force; disaggregated by all demographic categories; (2) prohibit all forms of excessive force and require implementation of de-escalation and non-enforcement policies and responses; and (3) shift resources from local law enforcement to communities for services for low-income and vulnerable residents, such as free medical clinics, community mental health centers, public housing, and workforce training and assistance.

Racial Disparities in Arrests Contribute to Disparities in Prosecution

When Black people are arrested at disproportionately higher rates, it kicks off a process through the criminal justice system in which Black people are penalized more harshly at every stage.¹⁴ As Vera has documented, these disparities have driven our system of mass incarceration along racial lines, and this process is borne out by the data, including prosecution and charging data.

At the beginning of the legal process, Vera’s data shows that higher arrest rates for Black people leads to higher prosecution rates. In an upcoming report, our research on the charging decisions in St. Louis, Missouri, revealed that Black people were vastly overrepresented in the criminal justice system. Despite making up 46 percent of the city’s population, they accounted for 74 percent of people prosecuted by the office. That disparity is heavily influenced by whom the police arrest and present to the Circuit Attorney’s Office.

The same trends have been identified in other cities. One analysis found that in Washington, DC, the large racial disparities in the arrest phase continued through the post-arrest and dispositional phases.¹⁵ While Black residents made up 47.6 percent of the population from 2009 to 2011, they represented most of the arrests for nonviolent offenses, include traffic, drug, disorderly conduct, and non-aggravated assaults. These huge racial disparities persisted as these cases were processed through the criminal justice system.

¹³ Elizabeth Hinton, LeShae Henderson, and Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (New York: Vera Institute of Justice, 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

¹⁴ Ibid.

¹⁵ Washington Lawyers’ Committee for Civil Rights and Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011* (Washington, DC: WLC, 2013), https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/page_content/attachments/wlc_report_racial_disparities_o.pdf.

Addressing the COVID-19 Crisis

Excessive and racially disproportionate arrests and prosecution have led to the over-incarceration of far too many people in the United States—a whopping 2.3 million. As Vera has found, high incarceration rates that exceed a “tipping point” at the neighborhood and state level can actually lead to higher crime rates, contravening public safety goals.¹⁶ It can also harm those unnecessarily incarcerated, which has never been more apparent than during the ongoing COVID-19 pandemic. Yet, despite the fact that 11 of the 15 COVID-19 “clusters”—places that have the largest number of known infections in the country—are correctional facilities,¹⁷ the known number of people who have been released from jails and prisons since March is only a small fraction of those behind bars.

The vast majority of jails, prisons, and detention centers house people in inhumane conditions that make it impossible to maintain six feet of distance; have not provided enough masks, disinfectant, and cleaning supplies to prevent infection and spread; and lack basic medical infrastructure to quarantine or medically isolate those who are symptomatic or who test positive. Given these conditions, it is unsurprising that the little data available from correctional facilities has shown a spike in infections and deaths among those inside.

As of June 2, 2020, a total of 40,656 incarcerated people in prisons have tested positive; among those cases, 496 have died.¹⁸ In one prison in Marion, Ohio, the Marion Correctional Institution, around 85 percent of the incarcerated population—2,181 of 2,564—tested positive for COVID-19. The Ohio Department of Rehabilitation & Correction only uncovered this infection rate—the highest known in the world—by taking a unique approach and testing every single person in their custody, including asymptomatic individuals.¹⁹

Within the federal system, there are 2,068 people incarcerated and 185 people working within the Bureau of Prisons (BOP) nationwide who have confirmed positive test results for COVID-19 as of June 8, 2020. Seventy-eight people incarcerated in the BOP system have died of COVID-19, with a single BOP staff member death reported. A total of 62 BOP facilities and 24 residential reentry centers have been affected.²⁰

Because of the disproportionate representation of people of color serving time in U.S. prisons and jails, they are more likely to face the unsafe conditions inside correctional facilities. Of the people in state or federal prison, approximately 33 percent are Black, 30.3 percent are white,

¹⁶ Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (New York: Vera Institute of Justice, 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

¹⁷ “Coronavirus in the U.S.: Latest Map and Case Count,” *New York Times*, accessed June 10, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#hotspots>.

¹⁸ 21,832 incarcerated people have recovered. The Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, accessed May 27, 2020, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>. Data from *Covid Prison Data* indicates, similarly, that 20,593 incarcerated people and 7,061 correctional staff across 50 jurisdictions have tested positive as of June 4, 2020: <https://covidprisondata.com/>.

¹⁹ 2,181 reflects the total number of confirmed cases over the entire testing period, starting April 11, 2020. Of that figure, 2,100 have recovered and 14 have died: Ohio Department of Rehabilitation & Correction, *COVID-19 Inmate Testing*, updated May 26, 2020, <https://coronavirus.ohio.gov/static/DRCCOVID-19Information.pdf>.

²⁰ 3,957 incarcerated people and 452 staff have recovered. Federal Bureau of Prisons, “COVID-19 Cases,” accessed June 9, 2020, <https://www.bop.gov/coronavirus/index.jsp>.

and 23.4 percent are Hispanic.²¹ Similarly for those in local jails, 49.9% are white, 32.8% are Black, 14.8% are Hispanic, 2.5% are categorized as “other.”²²

It is urgent that the Commission address this crisis and include in its recommendations that federal, state, and local government stakeholders immediately take the following steps: (1) reduce the number of people incarcerated in jails, prisons, and detention centers for the health and safety of our communities, including those released, people who remain incarcerated, and staff who work in correctional facilities; (2) protect the people who remain incarcerated by enacting emergency policies, practices, and conditions to maintain their dignity and health consistent with COVID-19 best practices for social distancing and protective measures against infection and spread; and (3) respond effectively to COVID-19 outbreaks behind bars by creating high-quality quarantine, medical isolation, and treatment units within facilities without resorting to solitary confinement cells or practices.

²¹ U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics*, “Prisoners in 2017,” April 2019, <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

²² U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics*, “Jail Inmates in 2018,” March 2020, <https://www.bjs.gov/content/pub/pdf/ji18.pdf>.