

July 27, 2022

The Honorable Dick Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20150

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20150

Re: Opposition to S. 3951, PROTECT Act of 2022

Dear Chairman Durbin and Ranking Member Grassley:

We write to express our continued opposition to S. 3951, the PROTECT Act of 2022. In addition to creating a new five-year mandatory minimum prison sentence for possession of child pornography, the bill would make certain federal sentencing guidelines mandatory, reversing almost two decades of reform ushered in by *United States v. Booker*.¹ The bill would resurrect the failed and disproportionately severe sentencing policies of the past, with no corresponding benefit to public safety. We urge you to oppose it.

Through the bipartisan Fair Sentencing Act of 2010² and the First Step Act of 2018,³ Congress reduced excessive mandatory minimum sentences, recognizing that severe, one-size-fits-all punishment does not enhance public safety. Instead, these punitive policies result in sentences that are disparately and inconsistently applied. The PROTECT ACT of 2022 threatens to reverse the progress started by those reforms, and to set a dangerous precedent: any time it is politically expedient, Congress can resurrect mandatory sentencing guidelines for a category of offenses—effectively destroying reforms that have improved our system of justice.

¹ See *United States v. Booker*, 534 U.S. 220 (2005) (rendering the sentencing guidelines advisory).

² Pub. L. No. 111-220, 124 Stat 2372 (Aug. 3, 2010).

³ Pub. L. No. 115-391, 132 Stat 5194 (Dec. 21, 2018).

The evils of mandatory penalties, whether they come in the form of statutory minimums or required guidelines, are well recognized by Congress.⁴ These penalties fuel mass-incarceration.⁵ From 1987 through 2004, mandatory sentencing caused the federal prison population to skyrocket by 290 percent. The federal prison population peaked in 2013, but growth significantly slowed in the preceding 10 years to 21.9%.⁶ The Supreme Court's 2005 ruling in *Booker* that mandatory sentencing guidelines were unconstitutional likely played a meaningful role in reigning in the BOP prison population's explosive growth.

Despite the clear policy failure of mandatory sentencing, the PROTECT Act proposes to create two new types of mandatory penalties for child pornography possession offenses: statutory minimums and non-discretionary guidelines.

Mandatory Minimums. Mandatory minimums prevent judges from executing their statutory sentencing duties. A court cannot tailor a sentence to reflect the “nature and circumstances of the offense” or the “history and characteristics” of the individual if the sentence is mandated before the judge walks onto the bench.⁷ Nor can they adjust a sentence to best reflect the purposes of punishment such as deterrence, public safety, or rehabilitation.⁸ These penalties act as

⁴ See generally e.g., Press Release, Durbin, Lee Introduce Smarter Sentencing Act (Mar. 26, 2021), <https://bit.ly/3KiT0IF> (“Mandatory minimum penalties have played a large role in the explosion of the U.S. prison population, often leading to sentences that are unfair, fiscally irresponsible, and a threat to public safety,” Durbin said.); 64 Cong. Rec. S7764 (daily ed. Dec. 18, 2018), <https://bit.ly/38qzVai> (statement of Sen. Cory Booker) (describing the mandatory minimum reforms in the First Step Act as “critical sentencing reform that will reduce mandatory minimums and give judges discretion back—not legislators but judges who sit and see the totality of the facts”); (prepared statement of Sen. Rand Paul) (“Each case should be judged on its own merits. Mandatory minimums prevent this from happening.”); Press Release, FAMM, *FAMM Commends Sen. Paul for Urging Repeal of Mandatory Minimum Laws* (Apr. 10, 2013), <https://bit.ly/3vjXF96> (quoting Sen. Rand Paul: “Our federal mandatory minimum sentences are simply heavy handed and arbitrary. They can affect anyone at any time, though they disproportionately affect those without the means to fight them”).

⁵ See, e.g., Press Release, Mike Lee, Sen. Lee Cosponsors the Smarter Sentencing Act (Mar. 26, 2021), <https://bit.ly/3LmJrJX> (“Our burgeoning prison population traces much of its growth to the increasing number and length of certain federal mandatory sentences.”); see also *Sentencing Reform and Corrections Act of 2015: Hearing on S. 2123 Before the S Comm. on the Judiciary* 114th Cong. 1 (2015) (statement of Patti B. Saris, Chair, U.S. Sentencing Commission), <https://bit.ly/3rVrLhb>.

⁶ See https://www.bop.gov/about/statistics/population_statistics.jsp#pop_report_cont.

⁷ 18 U.S.C. § 3553(a)(1).

⁸ 18 U.S.C. § 3553(a)(2).

“sledgehammers rather than scalpels,”⁹ resulting in a system that ignores differences in conduct, proof, and individual circumstance.

Mandatory minimums also transfer sentencing discretion from a judge, who acts in open court, to a prosecutor, who acts behind closed doors. Prosecutors already “exercise virtually complete control over the entire criminal justice process.”¹⁰ Mandatory minimums only make this imbalance worse. Prosecutors “decide who to charge, what to charge, how many counts to charge, the terms of any plea agreement, and all too often what the range of sentence will be.”¹¹ Armed with mandatory minimums, they decide the final sentence as well.

The result is a criminal legal system that is ripe for abuse. Prosecutors routinely threaten defendants with charges that carry mandatory minimums to coerce pleas¹² and to chill the assertion of constitutional rights through meritorious pretrial litigation.¹³ And because federal prosecutors barter away mandatory minimums in exchange for cooperation, sentence length is often determined by who has the most information to share instead of the gravity of the offense.¹⁴ Prosecutors apply these tools differently among and within districts, meaning these increased sentences are inconsistently and arbitrarily imposed.¹⁵

⁹ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2487 (2004).

¹⁰ *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 11 (2013), <https://bit.ly/37OUVrk> (statement of Hon. Brett Tolman, former United States Attorney).

¹¹ *Id.*

¹² See, e.g., National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 25-26 & accompanying notes (2018), <https://bit.ly/3LmKg5v>.

¹³ See, e.g., Scott Hechinger, Opinion, *How Mandatory Minimums Enable Police Misconduct*, N.Y. Times, Sept. 25, 2019), <https://nyti.ms/3xUb0qk>.

¹⁴ Alison Siegler, *End Mandatory Minimums*, Brennan Ctr. For Justice (Oct. 18, 2021), <https://bit.ly/3vkav7k> (explaining the “Cooperation Paradox”).

¹⁵ See e.g., Statement of Patti B. Saris, *supra* note 5 at 7-8 (recognizing that mandatory minimums are applied inconsistently and disparately); And we have seen how the inconsistent application of mandatory minimums have fueled racial disparities as well. See e.g., USSC, *Fifteen Years of Guidelines Sentencing* 116-17, Fig. 4.2 (2004), <https://bit.ly/3OL4o3I> (recognizing widening gap between the average sentences for Black individuals and others commencing at the time mandatory minimums and mandatory guidelines were implemented); see also USSC, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenses*, at 7 (2018), <https://bit.ly/3ELAMxb> (recognizing that Black individuals are impacted most significantly by § 851 enhancements and that Blacks represent 57.9 percent of all individuals who were subject to these enhancements at sentencing); USSC, *Mandatory Minimum Penalties of Drug Offenses in the Federal Criminal Justice System* 8 (2017), <https://bit.ly/3GURU5u> (noting that in FY 2016 Hispanic individuals represented the

Worse still, the steep societal and fiscal costs¹⁶ associated with mandatory minimums do not make us safer. They do not deter or decrease crime.¹⁷ And mandatory minimums do not just affect the person serving the time—they impact families, communities, and the economy. They undermine public safety by separating families for years longer than necessary and diverting taxpayer resources from evidence-informed programs and personnel that have been proven to improve community safety and health. Mandatory minimums also undermine public confidence in the legal system.

Mandatory Guidelines. While statutory minimum and maximum sentences set the outer bounds of punishment, guidelines set a narrower range of punishment within those confines. Since 2005, these guidelines have been the recommended starting point for sentencing determinations: judges must impose a sentence “no greater than necessary” to fulfill the purposes of punishment by considering the advisory guidelines range along with the other factors set forth in 18 U.S.C. § 3553(a), such as the history and characteristics of the person being sentenced and the unique circumstances of the offense. But the PROTECT Act of 2022 would reverse course by *requiring* judges to sentence within the calculated guideline range unless extraordinary circumstances warranting a “specifically identified” guideline departure apply. But there are few departures available, and the ones that are available are generally disfavored. Moreover, of the few available departures, some are categorically prohibited for certain offenses, including sex offenses. The paucity of departures for sex offenses would make these guidelines all but mandatory. In addition, many circumstances that courts find relevant post-*Booker*, including family and community ties, substance abuse addiction, sexual abuse as a child or adult, education and vocational skills, employment record, and lack of guidance as a youth, are deemed irrelevant or ordinarily irrelevant by the sentencing guidelines.¹⁸

largest group (51.9 percent) convicted of an offense carrying a mandatory minimum drug penalty); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. of Pol’y Econ. 1320, 1323 (2014) (“The initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by precharge characteristics.”).

¹⁶ See, e.g., Nancy Gertner & Chiraag Bains, *Mandatory Minimum Sentences Are Cruel and Ineffective. Sessions Wants Them Back*, Wash. Post (May 15, 2017), <https://wapo.st/3vUARfk>. See also *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, Congressional Research Service at 8-19 (April 15, 2014), https://www.everycrsreport.com/files/20140415_R42937_6a7489b006bc01e2d9e8a581c686156ebe32f953.pdf

¹⁷ See, e.g., Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just 199, 201-202 (2013); Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S (2011).

¹⁸ See, e.g., USSG §5H1.2 (education and vocational skills “not ordinarily relevant”); §5H1.3 (drug and alcohol addiction “not ordinarily relevant”); §5H1.5 (employment record “not ordinarily relevant”); §5H1.6 (family ties and responsibilities “not ordinarily relevant” in determining whether a

Mandatory guidelines, particularly those directly amended by Congress, are effectively mandatory minimums and inflict all the same injustices. They eviscerate proportionate sentencing and prevent courts from tailoring a sentence to suit the person or the offense. This is especially true in the child pornography context, where the non-production guideline—replete with “outdated and disproportionate” congressional directives—fails to meaningfully distinguish more culpable defendants from less culpable ones.¹⁹ Making the guideline mandatory would serve only to compound its arbitrariness.

We urge you to oppose S. 3951. Thank you for your consideration of our views and please do not hesitate to reach out if you have any questions.

American Civil Liberties Union
CURE (Citizens United for Rehabilitation of Errants)
Dream Corps JUSTICE
Fair and Just Prosecution
FAMM
Federal Public & Community Defenders
Law Enforcement Action Partnership
The Leadership Conference on Civil and Human Rights
National Association of Criminal Defense Lawyers
NETWORK Lobby for Catholic Social Justice
The Sentencing Project

cc: Members of the Senate Judiciary Committee

departure is warranted and are “not relevant” if convicted of certain offenses involving a minor victim); §5H1.12 (lack of guidance as a youth and disadvantaged upbringing are “not relevant”).

¹⁹ USSC, *2012 Report to the Congress: Federal Child Pornography Offenses* xxi (2012), <https://bit.ly/3vMkvFi>; USSC, *Federal Sentencing of Child Pornography Non-Production Offenses* 68 (2021), <https://bit.ly/3yK6jzL>.