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Statement from:

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Federal Bureau of Prisons Listening Session with Director Colette Peters

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Director Peters and Bureau staff,

Thank you for the invitation to this listening session and for considering my statement. My name is Sarah Anderson. I am the associate director of Criminal Justice & Civil Liberties for the R Street Institute (R Street), a nonprofit, nonpartisan public policy research organization. Our mission is to engage in policy research and outreach to promote free markets and limited, effective government in many areas, including criminal justice reform. That is why the policies, practices and efforts of the Federal Bureau of Prisons (Bureau) are of particular interest to us.

Although only about 10 percent of the total incarcerated population is detained in federal prisons and jails, if we know anything about American policymaking, it is that federal policy—regardless of the direct impact—takes center stage nationally.¹ From individuals to the media to state and local public officials, all eyes are on the federal government to lead—or not—on matters of concern to American citizens and to draw attention to matters which American citizens should be concerned about.

The role that the Bureau can and should play in setting an example for states and localities to follow when it comes to best practices before, during and after incarceration cannot be overstated. The policies which directly impact the Bureau's approximately 200,000 currently incarcerated individuals can, by example, become those which affect the remaining approximately 1.8 million incarcerated in state prisons, local jails and other facilities across the country.²

This is not to mention the impact that the Bureau's policies can have on those formerly incarcerated in these systems, as well as those who will be incarcerated in the future. We would be remiss not to mention the lesser-seen and lesser-acknowledged impact these policies will have on law-abiding

¹ Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2022," Prison Policy Initiative, March 14, 2022. <https://www.prisonpolicy.org/reports/pie2022.html#datasection>.

² Ibid.

communities when previously incarcerated individuals return. The magnitude of change the Bureau can affect, especially with new leadership and coordination with reform advocates in Congress, is an exciting prospect.

The invitation for this listening session indicated four primary topics for our input: pretrial and post-confinement detention; the First Step Act; inmate programs; and post-release or recidivism reduction opportunities. R Street's current work primarily focuses on the first and last of these topics, which I will highlight today.³ Our recommendations come in the form of support for bills in Congress representing certain policy priorities for which the chances of passing would improve with input from, and close coordination with, the Bureau.

However, I will start with briefly mentioning one bill regarding the implementation of the First Step Act, which we support and encourage the Bureau to work with Congress to pass. The Terry Technical Correction Act (H.R. 5455 and S. 2914) would remedy a drafting error in the First Step Act that renders lower-level crack cocaine offenders who did not trigger the mandatory minimum sentence ineligible for resentencing under the reduced disparity now available to those who did trigger a mandatory minimum in their offense.⁴ This unintentional injustice is nonsensical, and we encourage the Bureau to advocate for those in its custody unfairly affected by this blunder.

Turning to the topic of pretrial and post-confinement detention, I want to first note why this is of particular concern to R Street. As advocates for individual liberty and limited government, detention prior to proof-of-guilt runs counter to the very core of our beliefs. Therefore, when detention needs to be used in the interest of the rule of law and of public safety, it is critical that the governmental body tasked with custody of these individuals ensures their humane treatment; advocates for their rights to counsel and speedy trial; and, perhaps most importantly, makes every effort to deflect or divert individuals from the justice system entirely and utilize alternatives to incarceration. We encourage the Bureau to focus on such policies as follows:

- Eliminating the existing blanket presumption of pretrial detention for federal drug charges, instead allowing federal judges to determine this on a case-by-case basis, as in the Smarter Pretrial Detention for Drug Charges Act (H.R. 5722 and S. 309).⁵
- Modifying the Medicaid Inmate Exclusion Policy to remove pretrial detainees who are definitionally presumed innocent from being denied Medicaid coverage, as in the Due Process Continuity of Care Act (H.R. 6636 and S. 2697).⁶
- Supporting efforts by Congress to reduce overcriminalization and therefore reduce the number of individuals facing pretrial detention to begin with. Examples of this include the States Reform Act (H.R. 5977) to deschedule marijuana federally; the Smarter Sentencing Act (S. 1013); the First Step Implementation Act (H.R. 3510 and S. 1014); the Eliminating a Quantifiably Unjust Application of the Law Act (EQUAL) Act (H.R. 1693 and S. 79) to reduce the mandatory

³ "Criminal Justice and Civil Liberties," R Street Institute, last accessed Sept. 29, 2022.

<https://www.rstreet.org/issue/criminal-justice-civil-liberties>.

⁴ S. 2914, Terry Technical Correction Act, 117th Congress.

⁵ Dick Durbin et al., "Durbin, Lee, Coons Introduce Bipartisan Smarter Pretrial Detention For Drug Charges Act," Press Release, Sept. 9, 2020. <https://www.durbin.senate.gov/newsroom/press-releases/durbin-lee-coons-introduce-bipartisan-smarter-pretrial-detention-for-drug-charges-act>.

⁶ Tom Emmer et al., "Emmer, Trone, Turner, Tonko Introduce Legislation Provide Mental Health Treatment to Pre-Trial Detainees," Press Release, Feb. 7, 2022. <https://emmer.house.gov/press-releases?ID=C1C38FDC-5224-43DB-A53A-7B6FF9E90C69>.

minimums or sentence length of certain federal offenses; and the Count the Crimes to Cut Act (H.R. 5597) to make a list of all federal crimes on the books, which is currently unknown.⁷

- Ending the practice of suspending driver's licenses for non-driving related offenses or simple failure to pay fines or fees, as in the Driving for Opportunity Act (H.R. 2453 and S. 998).⁸

To the question of post-release and recidivism-reduction opportunities, it must be noted that the successful reentry and rehabilitation associated with this goal begins on the first day of incarceration, if not the first moment an individual interacts with the justice system. Therefore, the way that individuals are treated before and during incarceration by law enforcement, correctional officers and other justice system staff is critical to reducing recidivism.

As an example, we believe the Bureau should focus on establishing minimum standards of care for pregnant women and newborns and work with medical professionals for training, as in the Pregnant Women in Custody Act (H.R. 7718).⁹ Looking into the effects and real life impacts of solitary confinement and developing certain standards and new practices around its use, as in the Solitary Confinement Study and Reform Act (H.R. 8048), is necessary as well.¹⁰ Further, improving prison system transparency and gathering accurate data and reporting on misconduct or other inadequate treatment of individuals is necessary to understand existing practices and what may need to be changed.

Much remains to be improved in terms of traditional post-release and recidivism reduction, spanning from probation and parole policies, to compassionate release and clemency, to record sealing and expungement. A criminal record should not shut out most individuals from many opportunities post-incarceration, nor should it mean a lifetime of hurdles to overcome for these individuals, no matter how rehabilitated and motivated they may be. Fortunately, there are policy changes that can remedy this. We encourage the Bureau to focus on such policies as follows:

- Implementing probation and parole terms that align with facts of individual cases; creating appropriate incentives for good behavior on supervision such as presumption for early termination; and limiting the violations for which probation or parole are revoked and an individual is incarcerated.

⁷ Caroline Kitchens, "R Street applauds introduction of GOP cannabis decriminalization bill," R Street Institute, Nov. 15, 2021. <https://www.rstreet.org/2021/11/15/r-street-applauds-introduction-of-gop-cannabis-decriminalization-bill>; Anthony Lamorena, "R Street leads coalition letter from conservative groups in support of Smarter Sentencing Act," R Street Institute, April 12, 2021. <https://www.rstreet.org/2021/04/12/r-street-leads-coalition-letter-from-conservative-groups-in-support-of-smarter-sentencing-act>; Jillian Snider, "R Street Institute Supports Bipartisan Criminal Justice Reform Legislation in the 117th Congress," R Street Institute, Oct. 26, 2021. <https://www.rstreet.org/2021/10/26/r-street-institute-supports-bipartisan-criminal-justice-reform-legislation-in-the-117th-congress>; Sarah Anderson and Jillian Snider, "The Equal Act and the Federal Cocaine Sentencing Disparity," R Street Institute, Sept. 27, 2021. <https://www.rstreet.org/2021/09/27/the-equal-act-and-the-federal-cocaine-sentencing-disparity>; Jesse Kelley, "Rep. Chip Roy On His Bill H.R. 7270, the Count The Crimes To Cut Act," R Street Institute, June 23, 2020. <https://www.rstreet.org/2020/06/23/rep-chip-roy-on-his-bill-h-r-7270-the-count-the-crimes-to-cut-act>.

⁸ Christi Smith, "Debt-based license suspensions: Drivers of poverty and incarceration," *R Street Policy Study* No. 254, April 18, 2022. <https://www.rstreet.org/2022/04/18/debt-based-license-suspensions-drivers-of-poverty-and-incarceration>.

⁹ Anthony Lamorena, "Resenthaler, Bass Reintroduce Bipartisan Legislation to Support Pregnant Prisoners and their Babies," R Street Institute, March 7, 2022. <https://www.rstreet.org/2022/03/07/resenthaler-bass-reintroduce-bipartisan-legislation-to-support-pregnant-prisoners-and-their-babies>.

¹⁰ David Trone et al., "Trone, Bice Introduce Bipartisan Bill to Study Effects and Impacts of Solitary Confinement," Press Release, June 14, 2022. <https://trone.house.gov/2022/06/14/solitary-confinement>.

- Promoting opportunities for individuals who have completed the terms of their sentence to have a second chance by getting their record sealed or expunged, as in the Clean Slate Act (H.R. 2864 and S. 1380), the Kenneth P. Thompson Begin Again Act (H.R. 1924) and the Fresh Start Act (H.R. 5651).¹¹
- Expanding compassionate release options to reduce the federal prison population safely, as in the Emergency GRACE Act (H.R. 6900 and S. 3698) and the COVID-19 Safer Detention Act (H.R. 3369 and S. 312).¹²
- Developing a clemency system by which this explicitly granted executive power can be used to advance justice for those deserving of a pardon or a commutation, as in the FIX Clemency Act (H.R. 6234).¹³

Of course, while the Bureau is unable to make such sweeping policy changes as outlined in the above legislation on its own, we strongly believe that the Bureau should take all steps possible to do three primary things: 1) ensure that its staff are aligned with and embody the above policy goals that would create a more just federal criminal system; 2) identify areas of these policy goals where its practices can be adjusted through internal changes to reflect a commitment to the ideals of a just federal criminal system more deeply (including assistance to those in its custody of the best opportunities available to them to rehabilitate and succeed); and 3) work with others throughout the federal government—particularly those in Congress—to express support for, offer assistance with, and ultimately make into law some of the changes the Bureau cannot itself take action to implement.

Thank you again for the opportunity to participate in this listening session, for your leadership at the Bureau and your commitment to a just criminal system that defends constitutional rights, preserves individual liberty and protects public safety. We look forward to our continued work together.

Respectfully submitted,

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¹¹ Jillian Snider, “Letter to House Judiciary Committee on the Clean Slate Act, H.R. 2864 and S. 1380,” R Street Institute, April 18, 2022. <https://www.rstreet.org/2022/04/18/letter-to-house-judiciary-committee-on-the-clean-slate-act-h-r-2864-and-s-1380>; Christi Smith, “In Support of H.R. 1924, Kenneth P. Thompson Begin Again Act,” R Street Institute, April 5, 2022. <https://www.rstreet.org/2022/04/05/in-support-of-h-r-1924-kenneth-p-thompson-begin-again-act>; H.R. 5651, Fresh Start Act of 2021, 117th Congress.

¹² S. 3698, Emergency Grants of Release And Compassion Effectively Act of 2020, 116th Congress; S. 312, COVID-19 Safer Detention Act of 2021, 117th Congress.

¹³ Cori Bush et al., “Bush, Pressley, Jeffries Unveil FIX Clemency Act,” Press Release, Dec. 10, 2021. <https://bush.house.gov/media/press-releases/bush-pressley-jeffries-unveil-fix-clemency-act>.