

April 12, 2021

The Honorable Dick Durbin
152 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jerrold Nadler
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
2142 Rayburn House Office Building
Washington, DC 20515

Re: EQUAL Act, S. 79 and H.R. 1693

Dear Chairman Durbin, Ranking Member Grassley, Chairman Nadler, and Ranking Member Jordan,

We, the undersigned organizations, write in strong support of the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act. S. 79 and H.R. 1693, introduced by Sens. Cory Booker (D-NJ) and Dick Durbin (D-IL) and Reps. Hakeem Jeffries (D-NY), Bobby Scott (D-VA), Kelly Armstrong (R-ND), and Don Bacon (R-NE). The EQUAL Act would end the federal prison sentence disparity between crack cocaine and powdered cocaine offenses—an idea that may have been well-intentioned in 1986, but we know now is not grounded in evidence and contributes to overincarceration, particularly within communities of color.

In 1986, Congress created a drastic sentencing disparity between the treatment of crack cocaine offenses and powdered cocaine offenses—despite the fact that these substances are two forms of the same drug and one is no more harmful than the other.¹ As a result of that law, five grams of crack cocaine carried the same mandatory minimum prison sentence as 500 grams of powdered cocaine—an extreme 100-to-1 disparity.

This inconsistent approach did not curb the use or sale of crack cocaine, but it did create obvious and harmful racial disparities. According to United States Sentencing Commission data, 85.8 percent of those who were sentenced for federal crack cocaine offenses were Black in FY1996.² Four years after enactment of the disparity, the average federal drug sentence for Black defendants was 49 percent higher than the average for White defendants.³ Moreover, as the United States Sentencing Commission pointed out, even the perception of “improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system” in marginalized communities, weakening the legitimacy law enforcement and the judiciary rely on in their public service.⁴

Congress has already taken bipartisan action to partially address this injustice. In 2010, Congress passed the Fair Sentencing Act, which reduced the disparity from 100-to-1 to 18-to-1, but only applied the reform to pending and future cases. Section 404 of the First Step Act of 2018 finally made this change retroactive. Of the 2,377 people who received retroactive relief under Section 404 of the First Step Act, 91.6 percent were Black.⁵ Included in this group was Matthew Charles, whose story of faith inspires resilience and whose pursuit of second chances inspires Americans from all walks of life.⁶

¹ Dorothy K. Hatsukami, PhD and Marian W. Fischman, PhD, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, JAMA, November 1996 <https://jamanetwork.com/journals/jama/article-abstract/410806>.

² U.S. Sentencing Commission, *1996 Annual Report* (Race of Drug Defendant by Drug Type, Table 29), 1996, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1996/TAB-29_0.pdf.

³ Kevin Ring and Heather Rice-Minus, *Why do we still punish crack and powder cocaine offenses differently?*, The Hill (March 3, 2021), available at <https://thehill.com/opinion/criminal-justice/540816-why-do-we-still-punish-crack-and-powder-cocaine-offenses-differently>.

⁴ U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, 2002, available at https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf.

⁵ U.S. Sentencing Commission, *The First Step Act of 2018: One Year of Implementation*, October 2020, available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20201019-First-Step-Act-Retro.pdf>.

⁶ Maria Mallory White, *The Faith of Matthew Charles: The Incredible Story of a Prisoner Who Garnered a Nation's Support*, Prison Fellowship, August 2019, available at <https://www.prisonfellowship.org/2019/08/the-faith-of-matthew-charles-prisoner-who-garnered-a-nations-support/>.

However, now is the moment for Congress to complete this work. Enhanced mandatory minimums for crack cocaine still more acutely impact Black Americans. In FY2020, 76.8 percent of people sentenced for crack cocaine offenses were Black,⁷ despite available data from around the same time showing that White Americans accounted for 70.2 percent of those who used crack cocaine in 2018.⁸ Over forty states work to keep our communities safe without treating crack cocaine and powder cocaine differently in their sentencing structures.⁹ By passing the EQUAL Act and reducing overincarceration in federal prisons, Congress would free up resources better directed to violence reduction strategies, support for crime survivors, and other proven public safety interventions for underserved communities.¹⁰

The EQUAL Act would finally equalize the treatment of crack cocaine and powdered cocaine offenses. Importantly, the bill also makes this relief retroactive following individualized case review by federal courts in order to ensure the law has the ameliorative effect Congress intends. The EQUAL Act would not only advance consistent sentencing moving forward; it would address in some degree the unjust punishments of the past.

This critical bicameral bill corrects misguided policymaking from 35 years ago and would continue the important bipartisan progress Congress is making on creating more effective, more efficient, and more fair federal sentencing laws. We urge you and the members of your respective committees to take swift action in supporting and passing the EQUAL Act.

If you have any questions, please contact Jason Pye of the Due Process Institute at Jason@iDueProcess.org or (202) 558-6686.

Sincerely,

ALEC Action
American Civil Liberties Union
Americans for Prosperity
Americans for Tax Reform
Association of Prosecuting Attorneys
Black Public Defender Association
Catholic Prison Ministries Coalition
Center for American Progress
Digital Liberty
Dream Corps JUSTICE
Drug Policy Alliance
Due Process Institute
FAMM
Fair Trials

Federal Public and Community Defenders
FreedomWorks
Innocence Project
Jesuit Conference, Office of Justice and Ecology
Justice Action Network
National Association for Public Defense
National Association of Criminal Defense Lawyers
National District Attorneys Association
National Legal Aid & Defender Association
Prison Fellowship
R Street Institute
The Sentencing Project
Taxpayers Protection Alliance
Tzedek Association

⁷ U.S. Sentencing Commission, *FY 2020 Sourcebook of Federal Sentencing Statistics* (Race of Drug Trafficking Offenders, Table D-2), 2020, available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/TableD2.pdf>.

⁸ Substance Abuse and Mental Health Services Administration, *Results from the 2018 National Survey on Drug Use and Health: Detailed Tables* (Crack Use in Lifetime among Persons Aged 12 or Older, by Age Group and Demographic Characteristics, Table 1.31A), June 2020, available at <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf>.

⁹ FAMM, *Crack Cocaine Disparity in the States*, February 17, 2021, available at <https://famm.org/wp-content/uploads/Crack-Disparity-in-the-States.pdf>.

¹⁰ Thomas Abt, *Bleeding Out: The Devastating Consequences of Urban Violence--and a Bold New Plan for Peace in the Streets*, Basic Books, 2019.