We are a group of nearly 100 current and former elected prosecutors, Attorneys General, and law enforcement leaders, and former United States Attorneys and Department of Justice officials writing in opposition to the application of the death penalty, and in support of clemency, for those individuals scheduled for federal execution in the coming months. Case after case has revealed that our nation’s long experiment with the death penalty has failed. The process is broken, implicates systemic racism and constitutional concerns, and distinguishes our country from many other democratic nations in the world. If ever there were a time to revisit this practice, that time is now.

Many have tried for over forty years to make America’s death penalty system just. Yet the reality is that our nation’s use of this sanction cannot be repaired, and it should be ended. The death penalty raises serious concerns in tension with the constitutional ban against cruel and unusual punishment and the guarantees of due process and equal protection under the law. It is unequally and arbitrarily applied, ineffective at improving public safety, and a waste of taxpayer resources; and its use presents the perilous risk of executing an innocent person.

We also now know that we have not executed the worst of the worst, but often instead put to death the unluckiest of the unlucky – the impoverished, the poorly represented, and the most broken. Time and again, we have executed individuals with long histories of debilitating mental illness, childhoods marred by unspeakable physical and mental abuse, and intellectual disabilities that have prevented them from leading independent adult lives. We have executed individuals with trial lawyers so derelict in their duties and obligations that they never bothered to uncover long histories of illness and trauma. We have also likely executed the innocent.

Race also plays a deeply disturbing and unacceptable role in the application of the death penalty. Studies have documented that defendants of color are disproportionately likely to be sentenced to die – this is particularly and uniquely true when the victim is white. The pernicious and racially disparate legacy of the death penalty is incontrovertible: people of color have accounted for a disproportionate 43% of executions in the United States since 1976, and 55% of defendants

2 Id.
3 Andrew Cohen, Yes, America, We Have Executed an Innocent Man, The Atlantic, May 14, 2012 (available at https://www.theatlantic.com/national/archive/2012/05/yes-america-we-have-executed-an-innocent-man/257106/).
Currently awaiting execution are people of color. Moreover, there are stark disparities in executions relative to the race of the victim: since 1976, a total of 21 white defendants were executed for crimes perpetrated against a Black victim; in contrast, in that same time period, 296 Black defendants were executed for crimes perpetrated against a white victim. Strikingly, while 80% of all death penalty cases involve white victims, only one-half of all murder victims are white. This research underscores the systemic racism evident throughout our justice system.

The federal government should not ignore these issues in the best of times, but these concerns are especially acute in the midst of a global pandemic and calls for racial justice that have led to an ever-deepening erosion of trust in government and our criminal legal system. Moreover, rushing through executions during a surge in COVID-19 infections also implicates Sixth Amendment right to counsel concerns. The COVID-19 pandemic is at its peak; in mid-November there were 140,000 new cases in the nation, with these numbers continuing to grow. It is impossible for attorneys to effectively represent their clients during this time, either in clemency or in their motions to stay or reverse the sentence of death. There are many things that attorneys must do in the weeks and days leading up to an execution, including investigating last minute leads, helping their clients prepare for any religious counseling (and litigating any barriers to receiving that counseling), making decisions about what proceedings to file and in what court, selecting the facts to highlight in petitions for clemency, and deciding whose voices to elevate in those petitions and in supporting affidavits. Right now, attorneys cannot visit those awaiting execution, making it extremely difficult to consult with their client about legal or factual strategies. Indeed, some counsel are suffering from illness themselves. At a time when the country is struggling through a deadly pandemic, spending scarce resources to carry out federal executions and forcing defense lawyers to risk their lives to defend clients on death row is simply unthinkable.

Our nation’s use of the death penalty separates us from many other democratic nations. Germany abandoned the death penalty after the Holocaust and enshrined protecting human dignity as a core value of its justice system. Italy abolished the death penalty to reckon with the horrors of fascism. Abolition of the death penalty was part of how these nations said “never again” to atrocity and oppression – and it is time for our nation to revisit its place in this history.

For all these reasons, we support clemency for those individuals that the Department of Justice is seeking to execute over the coming two months that remain in this administration.

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6 Id.
8 See Anne E. Marimow and Spencer Hsu, Death row inmate’s lawyers suffering from coronavirus, seek delay in execution, Washington Post, Nov. 13, 2020 (available at https://www.washingtonpost.com/local/legal-issues/death-row-inmate-lawyers-covid/2020/11/13/44bce97a-252b-11eb-a688-5298ad5d580a_story.html). Describing the harrowing ordeal faced by death row inmate Lisa Montgomery, who faces execution in December. Ms. Montgomery’s attorneys cannot meaningfully help her in that they have COVID-19. They are experiencing “debilitating fatigue that prevents them from working on Mrs. Montgomery’s clemency application,” along with “headaches, chills, sweats, gastrointestinal distress, inability to focus, and impaired thinking and judgment.”
imprisonment without parole – which is the sentence these individuals would receive if the President grants clemency – is an extreme punishment, commensurate with the most egregious of crimes. It protects public safety and can adequately vindicate society’s interest in punishing even the most serious wrongdoing.

Failing to grant clemency and rushing forward with executions in the midst of a pandemic, and in the waning days of this administration, will undermine public trust and thus compromise public safety. As current and former elected prosecutors, Attorneys General, and law enforcement leaders, and former United States Attorneys and Department of Justice officials who have been empowered with promoting safe communities, we know our tasks become increasingly difficult when people do not believe that the legal system is operating fairly. Public safety is inextricably tied to the community’s trust in the fairness and moral authority of our justice system. When people believe the state is executing a person, or applying the death penalty, unjustly – as do many in our nation who oppose the death penalty in increasing numbers – their trust in our system of government and law enforcement is undermined. Our jobs get harder, as do the jobs of others who seek to keep our communities safe.

Clemency is appropriate for a sentence of death in normal times; for all of the reasons discussed above, it is especially fitting right now. This President can set an example by showing mercy and converting the pending death sentences into sentences of life in prison without the opportunity for parole. Granting clemency will not only help restore public trust in the legal system, but will also show the public that compassion is never the wrong choice.

Respectfully,

Aramis Ayala
State Attorney, Ninth Judicial Circuit, Florida

Donald Ayer
Former Deputy Attorney General, U.S. Department of Justice
Former U.S. Attorney, Eastern District of California

Chiraag Bains
Former Trial Attorney, Criminal Section, Civil Rights Division, U.S. Department of Justice
Former Senior Counsel to the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

Hector Balderas
Attorney General, New Mexico

Diana Becton
District Attorney, Contra Costa County, California

Wesley Bell
Prosecuting Attorney, St. Louis County, Missouri
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Buta Biberaj
Commonwealth’s Attorney, Loudoun County, Virginia

Richard Biehl
Chief, Dayton Police Department, Ohio

Shay Bilchik
Former Administrator, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice

Chesa Boudin
District Attorney, City and County of San Francisco, California

RaShall M. Brackney
Chief, Charlottesville Police Department, Virginia

Aisha Braveboy
State’s Attorney, Prince George’s County, Maryland

Jim Bueermann
Former Chief, Redlands Police Department, California
Former President, National Police Foundation

Chris Burbank
Former Chief, Salt Lake City Police Department, Utah
Vice President of Law Enforcement Strategy, Center for Policing Equity

John T. Chisholm
District Attorney, Milwaukee County, Wisconsin

John Choi
County Attorney, Ramsey County, Minnesota

Jerry L. Clayton
Sheriff, Washtenaw County, Michigan

Dave Clegg
District Attorney, Ulster County, New York

Tristram J. Coffin
Former U.S. Attorney, District of Vermont

Shameca Collins
District Attorney, Sixth Judicial District, Mississippi

Laura Conover
County Attorney, Pima County, Arizona
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Brendan Cox
Former Chief, Albany Police Department, New York
Director of Policing Strategies, LEAD National Support Bureau

John Creuzot
District Attorney, Dallas County, Texas

William B. Cummings
Former U.S. Attorney, Eastern District of Virginia

Satana Deberry
District Attorney, Durham County, North Carolina

Parisa Dehghani-Tafti
Commonwealth’s Attorney, Arlington County and the City of Falls Church, Virginia

Steve Descano
Commonwealth’s Attorney, Fairfax County, Virginia

W. Thomas Dillard
Former U.S. Attorney, Northern District of Florida
Former U.S. Attorney, Eastern District of Tennessee

Thomas J. Donovan, Jr.
Attorney General, Vermont

Michael Dougherty
District Attorney, Twentieth Judicial District, Colorado

Keith Ellison
Attorney General, Minnesota

Kimberly M. Foxx
State’s Attorney, Cook County, Illinois

Gil Garcetti
Former District Attorney, Los Angeles County, California

Stanley Garnett
Former District Attorney, Twentieth Judicial District, Colorado

José Garza
District Attorney, Travis County, Texas
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**George Gascón**  
District Attorney, Los Angeles County, California  
Former District Attorney, City and County of San Francisco, California  
Former Chief, San Francisco Police Department, California  
Former Chief, Mesa Police Department, Arizona

**Sarah F. George**  
State’s Attorney, Chittenden County, Vermont

**Joe Gonzales**  
District Attorney, Bexar County, Texas

**Eric Gonzalez**  
District Attorney, Kings County, New York

**Mark Gonzalez**  
District Attorney, Nueces County, Texas

**Christian Gossett**  
District Attorney, Winnebago County, Wisconsin

**Melinda Haag**  
Former U.S. Attorney, Northern District of California

**Andrea Harrington**  
District Attorney, Berkshire County, Massachusetts

**Scott Harshbarger**  
Former Attorney General, Massachusetts  
Former District Attorney, Middlesex County, Massachusetts

**Eve Hill**  
Former Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

**Jim Hingeley**  
Commonwealth’s Attorney, Albemarle County, Virginia

**John Hummel**  
District Attorney, Deschutes County, Oregon

**Natasha Irving**  
District Attorney, Sixth Prosecutorial District, Maine

**Kathleen Jennings**  
Attorney General, Delaware
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Peter J. Kadzik  
Former Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice

Melinda Katz  
District Attorney, Queens County, New York

Peter Keisler  
Former Acting Attorney General, U.S. Department of Justice

Robert Klonoff  
Former Assistant to the Solicitor General, U.S. Department of Justice  
Former Dean, Lewis & Clark Law School

Justin F. Kollar  
Prosecuting Attorney, Kauai County, Hawaii

Lawrence S. Krasner  
District Attorney, Philadelphia, Pennsylvania

Miriam Aroni Krinsky  
Former Assistant U.S. Attorney, Criminal Appellate Chief, and General Crimes Chief, Central District of California  
Former Chair, Solicitor General’s Criminal Appellate Advisory Group

William Lansdowne  
Former Chief, San Diego Police Department, California  
Former Chief, San Jose Police Department, California  
Former Chief, Richmond Police Department, California

John Leonardo  
Former U.S. Attorney, District of Arizona

Chris Magnus  
Chief, Tucson Police Department, Arizona

Beth McCann  
District Attorney, Second Judicial District, Colorado

Mary McCord  
Former Acting Assistant Attorney General for National Security, U.S. Department of Justice  
Former Principal Deputy Assistant Attorney General, National Security Division, U.S. Department of Justice

Karen McDonald  
Prosecuting Attorney, Oakland County, Michigan

Garry McFadden  
Sheriff, Mecklenburg County, North Carolina
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Ryan Mears
Prosecuting Attorney, Marion County, Indiana

Stephanie Morales
Commonwealth’s Attorney, Portsmouth, Virginia

Marilyn J. Mosby
State’s Attorney, Baltimore City, Maryland

Charles Oberly
Former U.S. Attorney, District of Delaware
Former Attorney General, Delaware

Jody Owens
District Attorney, Hinds County, Mississippi

Joseph Platania
Commonwealth’s Attorney, City of Charlottesville, Virginia

Bryan Porter
Commonwealth’s Attorney, City of Alexandria, Virginia

Abdul Pridgen
Chief, Seaside Police Department, California

Karl A. Racine
Attorney General, District of Columbia

Kwame Raoul
Attorney General, Illinois

Ira Reiner
Former District Attorney, Los Angeles County, California
Former City Attorney, Los Angeles, California

Margaret Richardson
Former Chief of Staff and Counselor to the Attorney General, U.S. Department of Justice

Mimi Rocah
District Attorney, Westchester County, New York

Rachael Rollins
District Attorney, Suffolk County, Massachusetts

Jeff Rosen
District Attorney, Santa Clara County, California
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Marian T. Ryan
District Attorney, Middlesex County, Massachusetts

Dan Satterberg
Prosecuting Attorney, King County, Washington

Eli Savit
Prosecuting Attorney, Washtenaw County, Michigan

Lois Schiffer
Former Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice

Mike Schmidt
District Attorney, Multnomah County, Oregon

Daniella Shorter
District Attorney, Twenty-Second Judicial District, Mississippi

Carol A. Siemon
Prosecuting Attorney, Ingham County, Michigan

Norm Stamper
Former Chief, Seattle Police Department, Washington

Darrel Stephens
Former Chief, Charlotte-Mecklenburg Police Department, North Carolina
Former Chief, St. Petersburg Police Department, Florida
Former Chief, Newport News Police Department, Virginia
Former Chief, Newport News Police Department, Florida
Former President, Major Cities Chiefs Association

David E. Sullivan
District Attorney, Northwestern District, Massachusetts

Shannon Taylor
Commonwealth’s Attorney, Henrico County, Virginia

James Tierney
Former Attorney General, Maine

Brett L. Tolman
Former U.S. Attorney, District of Utah

Steven Tompkins
Sheriff, Suffolk County, Massachusetts
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Raúl Torrez
District Attorney, Bernalillo County, New Mexico

Gregory Underwood
Commonwealth’s Attorney, City of Norfolk, Virginia

Matthew Van Houten
District Attorney, Tompkins County, New York

Cyrus R. Vance
District Attorney, New York County, New York

Joyce Vance
Former U.S. Attorney, Northern District of Alabama