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RACIAL DISCRIMINATION IN THE UNITED STATES

Human Rights Watch / ACLU joint submission
regarding the United States' record under
the International Convention on the Elimination
of All Forms of Racial Discrimination



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United States' Record Under the International Convention on
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Introduction

The United States signed the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD” or “Convention”) in 1966. President Lyndon Johnson’s administration noted at the time that the United States “has not always measured up to its constitutional heritage of equality for all” but that it was “on the march” toward compliance.¹ The United States finally ratified the Convention in 1994 and first reported on its progress in implementing the Convention to the Committee on the Elimination of Racial Discrimination (“CERD” or “Committee”) in 2000. In August 2022, the Committee will examine the combined 10th – 12th periodic reports by the United States on compliance with the Convention. This report supplements the submission of the government with additional information in key areas and offers recommendations that will, if adopted, enhance the government’s ability to comply with ICERD.

In its 2000 report, the United States stated that “overt discrimination” is “less pervasive than it was thirty years ago” but admitted it continued due to “subtle forms of discrimination” that “persist[ed] in American society.”² The forms of discrimination reported to the United Nations by the United States included “inadequate enforcement of existing anti-discrimination laws”; “ineffective use and dissemination of data”; economic disadvantage experienced by minority groups; “persistent discrimination in employment and labour relations”; “segregation and discrimination in housing” leading to diminished educational opportunities for minorities; lack of equal access to capital, credit markets and technology; discrimination in the criminal legal system; lack of adequate access to health insurance and health care; and discrimination against immigrants, among other harmful effects.³ The United States also noted the heightened impact of racism on women and children.

¹ “Goldberg Says U.S. Will Sign U.N. Pact for Racial Equality,” *New York Times*, July 7, 1966, https://timesmachine.nytimes.com/timesmachine/1966/07/07/82473546.pdf?pdf_redirect=true&ip=0 (accessed July 15, 2022).

² Government of the United States, Initial, Second, and Third Periodic Report to the Committee on the Elimination of Racial Discrimination, CERD/C/351/Add.1, October 10, 2000, <https://digitallibrary.un.org/record/432925?ln=en> (accessed July 28, 2022), para. 71.

³ *Ibid.*

It has now been more than 50 years since the US signed the ICERD, nearly 30 years since it ratified the Convention, and more than 20 since it identified the extensive foregoing list of impediments to its effective implementation. Yet progress toward compliance remains elusive—indeed, grossly inadequate—in numerous key areas including reparative justice; discrimination in the US criminal legal system; use of force by law enforcement officials; discrimination in the regulation and enforcement of migration control; and stark disparities in the areas of economic opportunity and health care. Structural racism and xenophobia persist as powerful and pervasive forces in American society.

During his first days in office, President Joseph Biden called for urgent action to advance equity for all, calling this a “battle for the soul of [the] nation” because “systemic racism” is “corrosive,” “destructive” and “costly.”⁴ As this report and its annex, jointly authored by the American Civil Liberties Union and Human Rights Watch, demonstrate, the US has a great deal of work ahead to realize the promises of the ICERD.⁵ This report therefore includes important recommendations in areas in which our organizations have specialized expertise, for addressing some of the US’s most flagrant violations of the Convention. Additionally, although we recognize the political challenges facing the Biden Administration as it seeks to promote racial equity, we note that its recent declarations on racial justice are disconnected from the government’s longstanding human rights obligations under the ICERD. The attached annex therefore identifies additional, more targeted measures to align President Biden’s commitments with the ICERD. These measures are both fully within the control of the executive branch of the federal government and powerful enough to give life to the President’s stated commitment to put “every branch of the White House and the federal government” to work in the effort to “eliminate systemic racism” in the United States.⁶

⁴ The White House, “Remarks by President Biden at Signing of an Executive Order on Racial Equity,” January 26, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/> (accessed July 15, 2022).

⁵ Human Rights Watch will also submit a report to CERD on racial discrimination and reproductive health in the United States together with the Global Justice Center, Amnesty International USA, and the Southern Rural Black Women’s Initiative, and on child labor in agriculture in the United States together with the Child Labor Coalition and Justice for Migrant Women. The American Civil Liberties Union will also join coalition reports on racial disparities in sentencing and on educational discrimination against Indigenous students.

⁶ The White House, “Remarks by President Biden at Signing of an Executive Order on Racial Equity,” January 26, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/> (accessed July 15, 2022).

President Biden has declared that racism, xenophobia, nativism, and other forms of intolerance are “global problems.”⁷The ICERD is an important part of the solution and to confront these global problems effectively, the US should fulfill its obligations under the treaty.⁸This report and its detailed annex offer an initial roadmap for the US to do exactly that.

⁷ The White House, “Statement by President Biden on the International Day for the Elimination of Racial Discrimination,” March 21, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/21/statement-by-president-biden-on-the-international-day-for-the-elimination-of-racial-discrimination/> (accessed July 15, 2022).

⁸ Committee on the Elimination of Racial Discrimination (CERD), “Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures Statement 1 (2020) United States of America, Advanced Unedited Version,” June 12, 2020, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/earlywarning/statements/USA.PDF> (accessed July 15, 2022).

Reparative Justice for the Legacy of Enslavement

Article 6 of the ICERD establishes the right to remedy and to seek just and adequate reparation for acts of racial discrimination such as enslavement, the many post-emancipation crimes against Black people in the United States, and the insufficiently remediated ongoing discriminatory structures. The US government has never adequately addressed the gross human rights violations perpetrated against Black people as part of chattel slavery or the exploitation, segregation, and violence unleashed on Black people that followed. The discrimination against Black people that is a legacy of enslavement persists and is perpetuated by economic, health, education, law enforcement, and housing, and other policies and practices that fail to adequately address racial disparities—part of the ongoing structural racism and racial subjugation that prevents many Black people from advancing, and facilitates police violence, housing segregation, and a lack of access to education and employment opportunities, among other things. States are obligated under the ICERD to overcome such structural discrimination, both through effective remedies—such as reparations and “special measures”—and through the Convention’s obligation to “[t]ake steps to remove all obstacles that prevent the enjoyment of economic, social and cultural rights by people of African descent especially in the areas of education, housing, employment and health.”⁹

The ICERD requires States Parties to “assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination” and to ensure “the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”¹⁰ The CERD has noted that the right to seek just and adequate reparation “is not necessarily secured by the punishment of the perpetrator of the discrimination” and that “the courts and other competent authorities should consider

⁹ CERD, “Racial Discrimination Against People of African Descent,” General Comment No. 34, CERD/C/GC/34 (2011), <https://www.refworld.org/docid/4ef19d592.html> (accessed July 15, 2022), para. 6.

¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, Article 6. The United States acceded to ICERD on November 20, 1994. See also *Ibid.*, Article 1(c), (d) (Requiring States to take effective measures to review government policies and amend any regulations and laws which have the effect of perpetuating racism, and to bring to an end racial discrimination by any persons, group, or organization).

awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.”¹¹ The UN has also established principles on the right of victims to remedies and reparations, and specifically set forth the right to reparations for people of African descent.¹² Although States generally only incur international responsibility for acts that are both internationally wrongful and attributable to the State, this principle does not apply to slavery and its legacy.¹³ While the US has enacted civil rights statutes since the 1950s, such legislation has been largely ineffective at curbing structural discrimination and racial inequality because of judicial decisions that significantly undermined their scope and meager government enforcement and investment, as well as the onerous requirements of discriminatory intent instead of discriminatory effect. Further, the US has consistently indicated in its ICERD reporting that “inadequate funding” is one of the central reasons for insufficient federal enforcement.¹⁴ The failure of the US to expand

¹¹ CERD, General Recommendation No. 26, Article 6 of the Convention (Fifty-sixth session, 2000), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/Gen/1/Rev.8 (2006), https://digitallibrary.un.org/record/576098/files/HRI_GEN_1_Rev.8-EN.pdf?ln=en, p. 259 (accessed July 15, 2022), para. 1-2.

¹² UN General Assembly, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” Resolution 60/147, A/RES/60/147; CERD, “The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination,” General Recommendation No. 32, CERD/C/GC/32 (2009), <https://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc> (accessed July 21, 2022), para. 22 (stating that “Such disparities include but are not confined to persistent or structural disparities and de facto inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality. It is not necessary to prove ‘historic’ discrimination in order to validate a programme of special measures; the emphasis should be placed on correcting present disparities and on preventing further imbalances from arising.”); UN General Assembly, “The International Decade for People of African Descent,” Resolution 69/16, A/RES/69/16 (2014), <https://undocs.org/en/A/RES/69/16> (accessed July 21, 2012). In September 2021, the 20th Anniversary of the Durban Declaration and Program of Action produced a comprehensive international framework for fighting discrimination and intolerance that includes investment in health systems, education, housing, electricity, drinking water, and environmental control measures, promoting equal opportunities in employment, and inclusion of the history and contribution of Africans and people of African descent in the education curriculum. UN General Assembly, “Elimination of racism, racial discrimination, xenophobia and related intolerance: comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action,” Resolution 75/237, A/RES/75/237 (2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/000/03/PDF/N2100003.pdf?OpenElement> (accessed July 25, 2022).

¹³ UN International Law Commission (ILC), “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” art. 48, 2001, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed Jul 22, 2022); UN General Assembly, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, Tendayi Achiume, A74/321, August 21, 2019, https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/SR/A_74_231_Reparations__SR_Racism.pdf (accessed July 22, 2022).

¹⁴ Government of the United States, Initial, Second, and Third Periodic Report to the Committee on the Elimination of Racial Discrimination, October 10, 2000, para. 71(a-b) (Reporting “[i]nadequate enforcement of existing anti-discrimination laws

enforcement efforts and resources while acknowledging these widespread disparities over the last twenty-two years since it became a party to ICERD requires immediate redress.

Reparative intervention for historical and contemporary racial injustice is urgent and required by ICERD.¹⁵ The deep racial harms and unequal structures that are inextricably rooted in chattel slavery remain unremedied, perpetuating systemic inequality. Scholars have estimated that the US benefited from 222,505,049 hours of forced labor between 1619 and the end of slavery in 1865, which would be valued at \$97 trillion today.¹⁶ In 1860 alone, there were four million enslaved Africans whose labor is valued at least \$3 billion,¹⁷ which was more than all the capital invested in railroads and factories in the United States combined.¹⁸ Enslaved people were subjected to brutal forced labor as well as formal and informal state-sanctioned discrimination that resulted in severe economic damage, in addition to psychological, social and political harm.¹⁹

due to under-funding of federal and state civil rights agencies. Resource limitations cause delays in investigation, compliance review, technical assistance and enforcement.” In this report, the US also acknowledged “[t]he persistence of attitudes, policies and practices reflecting a legacy of segregation, ignorance, stereotyping, discrimination and disparities in opportunity and achievement.”). See also Exec. Order No. 13985, 86 Fed. Reg 7009 (January 21, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government> (accessed July 22, 2022) (Acknowledging the need to “allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities.”).

¹⁵ ICERD, art. 6.

¹⁶ This estimate is tabulated at the US minimum wage and accounting for interest. Jason Hickel, *The Divide: Global Inequality from Conquest to Free Markets*, (New York: W.W. Norton & Company, 2018); Breeanna Hare and Doug Criss, “Six questions about slavery reparations, answered,” *CNN*, August 15, 2020, <https://www.cnn.com/2020/08/15/us/slavery-reparations-explanation-trnd/index.html> (accessed July 20, 2022).

¹⁷ Walter Johnson, “King Cotton’s Long Shadow,” *New York Times*, March 30, 2013, https://scholar.harvard.edu/files/wjohnson/files/king_cottons_long_shadow.pdf (accessed July 22, 2022).

¹⁸ In 1861, the cotton produced by enslaved Black people was valued at \$250 million. Id.; Rashawn Ray and Andre M. Perry, *Why we need reparations for Black Americans* (Washington, DC: Brookings Institute, 2020), <https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans/> (accessed July 15, 2022).

¹⁹ Dreisen Heath (Human Rights Watch), “H.R. 40: Exploring the Path to Reparative Justice in America,” written testimony, US House Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, February 17, 2001, <https://www.hrw.org/news/2021/02/17/hr-40-exploring-path-reparative-justice-america>.

Black people in the US continue to endure severe economic disadvantages in wealth²⁰ and income²¹ and suffer from discriminatory policies in land and home ownership,²² denial of health care,²³ and segregation in education.²⁴ The resulting disparities are staggering: The average white family has roughly ten times the wealth of the average Black family and white college graduates have over seven times more wealth than Black college graduates.²⁵ With the current pace of growth in wealth among Black families, it will take an estimated 230 years for Black families to obtain the same amount of wealth that white families currently have.²⁶ About 21 percent of Black people in the United States live in poverty, more than double the rate for white people (8.8 percent).²⁷ Although “these wealth disparities are rooted in historic injustices and carried forward by recent and ongoing practices and policies that fail to reverse inequitable trends,”²⁸ to date the US government has not done nearly enough to address the lasting and contemporary racially discriminatory effects of structures of inequality and racial subordination. It has also

²⁰ “Merkley, Clay Propose Constitutional Amendment to Close Slavery Loophole in 13th Amendment,” Jeff Merkley for Senate, December 2, 2020, <https://www.merkley.senate.gov/news/press-releases/merkley-clay-propose-constitutional-amendment-to-close-slavery-loophole-in-13th-amendment-2020> (accessed July 22, 2022).

²¹ Kriston McIntosh et al., “Examining the Black-white wealth gap,” post to “Up Front” (blog), Brookings Institute, February 27, 2020, <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> (accessed July 20, 2022).

²² Keri Leigh Merritt, “Land and the Roots of African-American Poverty,” *Aeon*, March 11, 2016, <https://aeon.co/ideas/land-and-the-roots-of-african-american-poverty> (accessed July 20, 2022).

²³ Denial of health care has resulted in a large life expectancy gap between Black and white people. See Kerri L. Hunkele, “Segregation in United States Healthcare: From Reconstruction to Deluxe Jim Crow” (Senior Honors Thesis, University of New Hampshire, 2014), <https://scholars.unh.edu/honors/188> (accessed July 20, 2022).

²⁴ Dale J. Cohen, Sheida White and Steffaney B. Cohen, “Mind the Gap: The Black-White Literacy Gap in the National Assessment of Adult Literacy and Its Implications,” *Journal of Literacy Research* 44, no. 2 (2012) pp. 123-148, accessed July 20, 2022, doi:10.1177/1086296X12439998.

²⁵ Rashawn Ray and Andre M. Perry, *Why we need reparations for Black Americans* (Washington, DC: Brookings Institute, 2020), <https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans/> (accessed July 15, 2022).

²⁶ Dedrick Asante-Muhammed et. al, *The Ever-growing Gap* (Washington, DC: Institute for Policy Studies and Corporation for Enterprise Development, 2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf (accessed July 15, 2022), p. 5.

²⁷ Kayla Fontenot, Jessica Semega, and Melissa Kollar, *Income and Poverty in the United States: 2017* (Washington, DC: US Census Bureau, 2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf>, (accessed July 15, 2022), p. 12.

²⁸ Laura Sullivan et. al, *The Racial Wealth Gap: Why Policy Matters* (New York: Demos and Institute for Assets and Social Policy, 2016), https://www.demos.org/sites/default/files/publications/RacialWealthGap_2.pdf (accessed July 15, 2022).

openly admitted to failing to provide sufficient resources for civil rights enforcement even though ICERD requires restitution, compensation, and restoration.²⁹

While the CERD has not yet made specific recommendations to the US with regard to reparative justice, the UN High Commissioner for Human Rights, in her 2021 report on systemic racism in law enforcement, urged the US (alongside other governments) to initiate reparations.³⁰ Although some localities have implemented reparation initiatives or commissions to address past racially motivated harms,³¹ there remains no formal

²⁹ Government of the United States, Initial, Second, and Third Periodic Report to the Committee on the Elimination of Racial Discrimination, October 10, 2000, para. 71(a-b) (Reporting “[i]nadequate enforcement of existing anti-discrimination laws due to under-funding of federal and state civil rights agencies. Resource limitations cause delays in investigation, compliance review, technical assistance and enforcement.” In this report, the US also acknowledged “[t]he persistence of attitudes, policies and practices reflecting a legacy of segregation, ignorance, stereotyping, discrimination and disparities in opportunity and achievement.”). See also Exec. Order No. 13985, 86 Fed. Reg 7009 (January 21, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government> (accessed July 22, 2022) (Acknowledging the need to “allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities.”).

³⁰ United Nations High Commissioner for Human Rights, “Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers,” A/HRC/47/53, June 1, 2021, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/122/03/PDF/G2112203.pdf?OpenElement> (accessed July 22, 2022) (Stating that “[m]easures taken to address the past should seek to transform the future. Structures and systems that were designed and shaped by enslavement, colonialism and successive racially discriminatory policies and systems must be transformed. Reparations should not only be equated with financial compensation. They also comprise measures aimed at restitution, rehabilitation, satisfaction and guarantees of non-repetition, including, for example, formal acknowledgment and apologies, memorialization and institutional and educational reforms.”); “UN Rights Boss Urges ‘Wide Range’ of Reparations Over Racism,” *Associated Press*, July 12, 2021, <https://apnews.com/article/europe-death-of-george-floyd-race-and-ethnicity-racial-injustice-united-nations-99acc43a3a2b14182968bcefd8bobb56> (accessed July 20, 2022); The Inter-American Commission on Human Rights (IACHR) also called on the US to provide reparations. Inter-American Commission on Human Rights, *Police Violence Against Afro-descendants in the United States* (Washington, DC: Inter-American Commission on Human Rights, 2018), <https://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf> (accessed July 22, 2022) (stating: “That is, actions to prevent police violence or remedies or reparations for police violence that have the effect of maintaining or reestablishing the same structural context of violence and discrimination are not acceptable. Rather, reparations must aim to address and redress the underlying situation of inequality and the ongoing context of racial discrimination.”).

³¹ For example, the Maryland Lynching Truth and Reconciliation Commission was established in 2020 to research forty-two known racially-motivated lynchings and hold public meetings and regional hearings. Additional initiatives were undertaken by the state of California and Asheville, North Carolina’s city council. See Maryland Lynching Truth and Reconciliation Commission, *Maryland Lynching Truth and Reconciliation Commission Interim Report* (Maryland: Maryland Lynching Truth and Reconciliation Commission, 2020), <https://msa.maryland.gov/lynching-truth-reconciliation/pdf/interim-report.pdf>; Task Force to Study and Develop Reparation Proposals for African Americans, California A.B. 3121, (2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=2019202000AB3121 (accessed July 15, 2022); North Carolina Department of Administration, “Welcome to the Office of Justice for Sterilization Victims,” undated, <https://ncadmin.nc.gov/about-doa/special-programs/welcome-office-justice-sterilization-victims> (accessed July 22, 2022);

nationwide federal initiative to advance reparations. Neither US courts nor other tribunals have provided reliable remedies for the descendants of enslaved people.³² H.R. 40 - Commission to Study and Develop Reparation Proposals for African Americans Act, a bill currently before the House of Representatives, would establish a commission to study the effects of slavery and recommend appropriate remedies.³³ But no progress has been reported as of this writing.³⁴ In sum, the US federal government continues to neglect its

“North Carolina County Becomes Latest to Back Reparations,” *Associated Press*, December 9, 2020, <https://apnews.com/article/race-and-ethnicity-discrimination-north-carolina-slavery-raleigh-4e975e1c68704aae5bf3121050983c1c> (accessed July 20, 2022). In 2019, the City Council in Evanston, Illinois implemented a reparations program for African Americans using funding from a tax on legalized marijuana to address intergenerational disparities of slavery and the War on Drugs. See Eric Lutz, “One city’s reparations program that could offer a blueprint for the nation,” *Guardian*, January 19, 2020, <https://www.theguardian.com/us-news/2020/jan/19/reparations-program-evanston-illinois-african-americans-slavery> (accessed July 20, 2022). In 2015, Chicago, Illinois approved a reparations package for victims of a police torture under police commander John Burge from the 1970s through the early 1990s. The package included financial compensation, counseling services, free tuition at Chicago’s city colleges, plans for a memorial, and other social programming. Peter C. Baker, “In Chicago, reparations aren’t just an idea. They’re the law,” *Guardian*, March 8, 2019, <https://www.theguardian.com/news/2019/mar/08/chicago-reparations-won-police-torture-school-curriculum> (accessed July 20, 2022); In 2013, North Carolina appropriated \$10 million for survivors of a racist eugenics law. “); North Carolina Department of Administration, “Welcome to the Office of Justice for Sterilization Victims,” <https://ncadmin.nc.gov/about-doa/special-programs/welcome-office-justice-sterilization-victims>; Eric Mennel, “Payments Start For N.C. Eugenics Victims, But Many Won’t Qualify,” *National Public Radio*, October 31, 2014, <https://www.npr.org/sections/health-shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify> (accessed July 20, 2022). In 1994, survivors of the 1923 Rosewood Race Massacre and their heirs were the first group of victims of a racial massacre in the US to be compensated for their material losses. Jerry Fallstrom, “Senate Oks \$2.1 Million for Rosewood Reparations,” *Sun Sentinel*, April 9, 1994, <https://www.sun-sentinel.com/news/fl-xpm-1994-04-09-9404080701-story.html> (accessed July 20, 2022); Robert Samuels, “After reparations: How a scholarship helped – and didn’t help – descendants of victims of the 1923 Rosewood racial massacre,” *Washington Post*, April 3, 2020, <https://www.washingtonpost.com/graphics/2020/national/rosewood-reparations/> (accessed July 20, 2022).

³² See, e.g., Peter Viles, “Suit Seeks Billions in Slave Reparations,” *CNN*, March 27, 2002, <https://edition.cnn.com/2002/LAW/03/26/slavery.reparations/> (accessed July 20, 2022).

³³ Sheila Jackson Lee, “H.R. 40 Is Not a Symbolic Act. It’s a Path to Restorative Justice,” American Civil Liberties Union, May 22, 2020, <https://www.aclu.org/news/racial-justice/h-r-40-is-not-a-symbolic-act-its-a-path-to-restorative-justice/> (accessed Jul 28, 2022); “Reparations, H.R. 40 and the Path Forward,” American Civil Liberties Union campaign webpage, June 21, 2021, <https://www.aclu.org/news/topic/reparations-h-r-40-and-the-path-forward?redirect=node%2F91006> (accessed July 20, 2022); “Repair Can’t Wait. Pass Reparations Bill Now,” Human Rights Watch campaign webpage, <https://www.hrw.org/ReparationsNow>; Dreisen Heath (Human Rights Watch), “H.R. 40: Exploring the Path to Reparative Justice in America,” written testimony, US House Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, February 17, 2001, https://www.hrw.org/sites/default/files/media_2021/02/Heath%20Dreisen_HRW_H.R.%2040%20Testimony_2.17.21.pdf. The bill was moved to the House floor for full consideration on April 14, 2021. “Historic Progress on US Slavery Reparations Bill,” Human Rights Watch news release, April 15, 2021, <https://www.hrw.org/news/2021/04/15/historic-progress-us-slavery-reparations-bill>.

³⁴ Other attempts to repair past injustices are sporadic and disproportionate to the legacy of slavery and discrimination suffered by Black people. In 2020, a resolution was tabled before the US House of Representatives to establish a “Truth, Racial Healing, and Transformation Commission” to acknowledge, memorialize, and catalyze progress in eliminating

ICERD commitments to remedy the systemic, longstanding and grave legacy of enslavement and racial discrimination.

To address ongoing structural racism and legacies of enslavement, the US should:

- Establish a federal commission by legislative action or executive order to study and develop reparations proposals for the descendants of enslaved people.
- Appropriate effective resources for federal economic and civil rights programs to address long-term structural racism and provide assistance to low-wealth and low-income Black communities.

persistent racial inequities. Urging the establishment of a United States Commission on Truth, Racial Healing, and Transformation, H.Con.Res. 19, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-concurrent-resolution/19?q=%7B%22search%22%3A%5B%22racial+healing%22%5D%7D&s=6&r=2> (accessed July 22, 2022).

Racial Discrimination in the Criminal Legal System

Mass Incarceration

Article 2(1) of ICERD states that States Parties need to pursue the elimination of racial discrimination in all its forms. ICERD prohibits discriminatory practices and requires that States Parties “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws which have the effect of creating or perpetuating discrimination.”³⁵ Additionally, Article 5 guarantees equality before the law, including “the right to equal treatment before tribunals and all other organs administering justice”;³⁶ and article 6 requires states to guarantee “effective protection and remedies, through competent national tribunals,” against acts of racial discrimination.³⁷

The CERD has broadly articulated that “the mere fact of belonging to a racial or ethnic group . . . is not a sufficient reason, de jure or de facto, to place a person in pretrial detention”³⁸ and that States should “ensure that the courts do not apply harsher punishments solely because of an accused person’s membership of a specific racial or ethnic group.”³⁹ Additionally, the UN, in its 2021 common position on incarceration, stated that “incarceration should be used as a last resort,” and recommended shifting to non-custodial alternatives.⁴⁰

The CERD has repeatedly emphasized profound concerns with the US criminal legal system, first articulated in its 2001 Concluding Observations to the US, in which it noted that “the incarceration rate is particularly high with regard to African-Americans and

³⁵ ICERD, art 2.

³⁶ ICERD, art 5.

³⁷ ICERD, art 6.

³⁸ CERD, “Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System,” General Recommendation No. 31, A/60/18 (2005), <https://www.refworld.org/docid/48abd56dd.html> (accessed July 21, 2022), para. 26.

³⁹ *Ibid.*, para. 34.

⁴⁰ United Nations, *United Nations System Common Position on Incarceration* (New York: United Nations, 2021), https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN_System_Common_Position_on_Incarceration.pdf (accessed July 22, 2022), p. 9.

Hispanics.”⁴¹ It thus recommended that the US take “firm action to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin,” to equal treatment before all organs administering justice.⁴² In its most recent review, the Committee went further, expressing its concern that “members of racial and ethnic minorities, particularly African Americans, continue to be disproportionately arrested, incarcerated and subjected to harsher sentences, including life imprisonment without parole and the death penalty.”⁴³ It specifically recommended that the US amend “laws and policies leading to racially disparate impacts in the criminal justice system” at all levels of government and implement “effective national strategies or plans of action aimed at eliminating structural discrimination.”⁴⁴ In its 2021 submission, the US reported that the federal prison population had dropped to its lowest level since 2000, “declining almost 31% since 2013,”⁴⁵ though it is worth noting that the federal prison population only represents about 10 percent of the total US prison population.⁴⁶ Further, the federal prison population has grown under President Biden.⁴⁷ The US also cited the First Step Act, enacted by Congress in December 2018,⁴⁸ as central in making reductions possible. In its

⁴¹ CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” CERD/C/59/Misc.17/Rev.3, 2001, <http://hrlibrary.umn.edu/usdocs/conclcomments-usa.html> (accessed July 22, 2022); CERD, “Report of the Committee on the Elimination of Racial Discrimination, Fifty-eighth session, (March 6-23, 2001), and Fifty-ninth session, (July 30-August 17), 2001,” A/56/18, October 30, 2021, <https://www.refworld.org/docid/3f52f3ad2.html> (accessed July 22, 2022), para. 395.

⁴² CERD, “Report of the Committee on the Elimination of Racial Discrimination, Fifty-eighth session, (March 6-23, 2001), and Fifty-ninth session, (July 30-August 17, 2001),” October 30, 2021, para. 395.

⁴³ CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” CERD/C/USA/CO/7-9, August 29, 2014, para. 20, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf (accessed July 22, 2022).

⁴⁴ *Ibid.*, para. 20(a).

⁴⁵ Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, CERD/C/USA/10-12, December 20, 2021, <https://www.ecoi.net/en/file/local/2053891/G2138109.pdf> (accessed December 20, 2021), para. 114. It should also be noted that 2021 brought the first annual increase in the federal prison population since 2013.

⁴⁶ John Grambligh, “Under Trump, the federal prison population continued its recent decline,” Pew Research Center, February 17, 2021, <https://www.pewresearch.org/fact-tank/2021/02/17/under-trump-the-federal-prison-population-continued-its-recent-decline/> (accessed July 5, 2022).

⁴⁷ Carrie Johnson, “Activists wanted Biden to revamp the justice system. Many say they’re still waiting,” *National Public Radio*, December 12, 2021, <https://www.npr.org/2021/12/12/1062485458/biden-criminal-justice-system-clemency> (accessed July 5, 2022).

⁴⁸ The First Step Act: (i) authorized reforms of the federal prison system to prevent recidivism, (ii) authorized changes to mandatory minimum sentences for certain drug offenses, (iii) retroactively applied the Fair Sentencing Act of 2010 to certain

2021 submission the US reported that of the total number of people who received reduced sentences as a result of the First Step Act, 91 percent were Black, which is consistent with the historic over-policing and overcharging of Black communities.⁴⁹ At the same time, the US failed to mention that its own Department of Justice (DOJ) found the risk assessment tool the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) created by DOJ in connection with the First Step Act, resulted in racial disparities.⁵⁰ Despite repeated attempts at reform, the tool continues to overestimate the number of Black women who will engage in recidivism, compared to white women, and produces other racial disparities.⁵¹

While some reforms have taken effect over the last decade, the US has failed to systematically address the immense breadth and depth of harm caused by its criminal legal system—harms that are the product of deliberate legal and policy choices created by a dominant white population supported by a culture of white supremacy.⁵²

incarcerated individuals , and (iv) expanded the ability of courts to sentence people convicted of low-level, nonviolent drug offenses to less than the required mandatory minimum; Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, December 20, 2021, para. 114.

⁴⁹ Ibid.

⁵⁰ Carrie Johnson, “Flaws plague a tool meant to help low-risk federal prisoners win early release,” *National Public Radio*, January 26, 2021, <https://www.npr.org/2022/01/26/1075509175/justice-department-algorithm-first-step-act> (accessed June 28, 2022); Carrie Johnson, “Justice Department works to curb racial bias in deciding who’s released from prison,” *National Public Radio*, April 19, 2022, <https://www.npr.org/2022/04/19/1093538706/justice-department-works-to-curb-racial-bias-in-deciding-whos-released-from-pris> (accessed June 28, 2022); US Department of Justice, Office of Attorney General, “First Step Act Annual Report: April 2022,” 2022, <https://www.ojp.gov/first-step-act-annual-report-april-2022> (accessed June 28, 2022); “Pattern Risk Assessment,” Federal Bureau of Prisons, <https://www.bop.gov/inmates/fsa/pattern.jsp> (accessed July 20, 2022).

⁵¹ Carrie Johnson, “Justice Department works to curb racial bias in deciding who’s released from prison,” *National Public Radio*, April 19, 2022, <https://www.npr.org/2022/04/19/1093538706/justice-department-works-to-curb-racial-bias-in-deciding-whos-released-from-pris> (accessed June 28, 2022); US Department of Justice, Office of the Attorney General, “First Step Act Annual Report,” April 2022, <https://www.ojp.gov/first-step-act-annual-report-april-2022> (accessed June 28, 2022), p. 17.

⁵² See, e.g., 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>; Dan Baum, “Legalize it All: How to Win the War on Drugs,” *Harper’s Magazine*, April 2016, <https://harpers.org/archive/2016/04/legalize-it-all/> (accessed July 20, 2022).

US authorities hold almost two million people in detention and correctional facilities across the United States,⁵³ and they imprison Black people at a rate three times higher than white people.⁵⁴ Black women are imprisoned at a rate that is 1.7 times the rate of white women.⁵⁵ While systemic discrimination against Black people is particularly blatant, the US also disproportionately punishes Indigenous⁵⁶ and Latinx⁵⁷ people.

Racial discrimination is also deeply woven into the policing and charging practices that harass, target, and subject Black people and other people of color to the most severe punishments available. One out of seven people in prison are serving a life sentence,⁵⁸ and nearly half of that group is Black.⁵⁹ US authorities continue to apply the death penalty both discriminatorily and arbitrarily.

In 2021, more than half of people executed were Black, and approximately 60% of people sentenced to death were Black or Latinx.⁶⁰ Nearly 200 people on death row have been

⁵³ Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2022* (Massachusetts: Prison Policy Initiative, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> (accessed July 5, 2022).

⁵⁴ Terry-Ann Craigie, Ames Grewert and Cameron Kimble, et.al., *Conviction, Imprisonment, and Lost Earnings. How Involvement with the Criminal Justice System Deepens Inequality* (New York: Brennan Center for Justice at New York University School of Law, 2020), https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf (accessed July 22, 2022); The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparities in State Prisons* (Washington, DC: The Sentencing Project, 2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>, (accessed July 20, 2022), (stating that “Black Americans are incarcerated in state prisons at nearly 5 times the rate of white Americans.”), p. 6.

⁵⁵ The Sentencing Project, “Incarcerated Women and Girls,” May 2022, <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> (accessed July 22, 2022).

⁵⁶ The Sentencing Project, “Race & Justice News: Native Americans in the Justice System,” March 28, 2016, <https://www.sentencingproject.org/news/race-justice-news-native-americans-in-the-justice-system/> (accessed July 22, 2022).

⁵⁷ Amelia Vorpahl, “How Are Hispanic Individuals Represented in the Criminal Justice System?,” Council of State Governments Justice Center, October 12, 2021, <https://csgjusticecenter.org/2021/10/12/how-are-hispanic-individuals-represented-in-the-criminal-justice-system/> (accessed July 22, 2022).

⁵⁸ Ashley Nellis, *No end in sight: America’s Enduring Reliance on Life Imprisonment* (Washington, DC: The Sentencing Project, 2021), <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/> (accessed July 21, 2022).

⁵⁹ The Sentencing Project, *Report to the United Nations on Racial Disparities in the US Criminal Justice System* (Washington, DC: The Sentencing Project, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (accessed July 25, 2022).

⁶⁰ The Death Penalty Information Center, *The Death Penalty in 2021: Year End Report* (Washington, DC: The Death Penalty Information Center, 2021), <https://reports.deathpenaltyinfo.org/year-end/YearEndReport2021.pdf>, p.12.

exonerated since 1972—1 for every 8.3 people executed.⁶¹ In fact, both death-row exonerees in 2021 were Black men imprisoned in Mississippi for nearly three decades because of false forensic testimony.⁶²

Mass incarceration harms not only those incarcerated, disproportionately people of color, but entire communities. About half of adults in the US have had an immediate family member incarcerated in jail or prison.⁶³ Black people are 50 percent more likely to have experienced familial incarceration than whites, and they are three times as likely to have had a family member incarcerated for a year or longer.⁶⁴ Research also shows that nearly half of incarcerated people in state prisons and almost 60 percent in federal prisons are parents with minor children,⁶⁵ and Black children are six times more likely than their white peers to have had a parent behind bars.⁶⁶

One of the most damaging aspects of mass incarceration in the United States is the harm caused to incarcerated people by dangerous and degrading conditions in prisons, jails, and other places of detention. Practices such as solitary confinement,⁶⁷ denial of adequate medical and mental healthcare,⁶⁸ and sexual and other violence⁶⁹ cause lasting injury, and

⁶¹ Ibid., p. 16.

⁶² Ibid., pp. 16-18.

⁶³ FWD.us, *Every Second: The Impact of the Incarceration Crisis on America's Families* (Washington, DC: FWD.us, 2018), <https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf> (accessed July 22, 2022), p. 13.

⁶⁴ Ibid., p. 17.

⁶⁵ US Department of Justice, Bureau of Justice Statistics, "Parents in Prison and Their Minor Children," March 2021, <https://bjs.ojp.gov/content/pub/pdf/pptmcspi16st.pdf> (accessed July 22, 2022), p.1.

⁶⁶ Leila Morsy and Richard Rothstein, "How does our Discriminatory Criminal Justice System Affect Children?" Economic Policy Institute, December 21, 2016, <https://www.epi.org/publication/how-does-our-discriminatory-criminal-justice-system-affect-children-black-children-are-six-times-as-likely-as-white-children-to-have-a-parent-whos-been-incarcerated/> (accessed July 22, 2022).

⁶⁷ Tiana Herring, "The research is clear: Solitary confinement causes long-lasting harm," post to "Prison Policy Initiative Blog" (blog), Prison Policy Initiative, December 8, 2020, https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/ (accessed July 20, 2022).

⁶⁸ Jimmy Jenkins, "'Plainly grossly inadequate': Arizona prison health care system ruled unconstitutional," *Arizona Republic*, June 30, 2022, <https://www.azcentral.com/story/news/local/arizona/2022/06/30/federal-court-rules-arizona-prison-health-care-system-unconstitutional/7505909001/> (accessed July 20, 2022).

⁶⁹ Christie Thompson, "How the newest federal prison became one of the deadliest," *National Public Radio*, May 31, 2022, <https://www.npr.org/2022/05/31/1100954134/federal-prison-deaths-usp-thomson-illinois-prison#:~:text=Rex%20Arbogast%2FAP,The%20ofederal%20prison%20complex%20in%20Thomson%2C%20Ill.%2C%20where%20Bobby,at%20the%20prison%20since%202020> (accessed July 25, 2022).

sometimes death, to those exposed to them. Because of space limitations, this report does not discuss these conditions of confinement in detail, but they are an inseparable element of the harm caused by mass incarceration.

To address the discriminatory impact of mass incarceration, the US should:

- Reduce the role of police in addressing societal problems (including homelessness, mental health, and poverty) and invest instead in community-based non-carceral solutions to such societal problems.
- Abolish the death penalty and consider the elimination of life, and virtual life, sentences; eliminate sentence enhancements and minimum-time-served requirements; and expand access to early-release mechanisms such as good-time credits, parole, and clemency. These legal changes should be extended to offenses classified as violent and applied retroactively.
- Invest in crime prevention programs and alternatives to incarceration including community-based crisis intervention services that are trauma-informed, culturally competent, and do not exclude offenses classified as violent.
- Record, maintain, track, and publicly disseminate data on convictions, sentencing, and incarceration including racial and ethnic demographics.

Youth/Juvenile Justice

The ICERD requires States to “pay the greatest attention possible with a view to ensuring that [children from racial minorities] benefit from the special regime to which they are entitled in relation to the execution of sentences.”⁷⁰ Other prominent human rights bodies have reinforced this message. The Committee on the Rights of the Child (CRC) has stated that “particular attention must be paid to de facto discrimination and [racial] disparities”⁷¹ and urged states to provide “appropriate support and assistance” to reintegrate young

⁷⁰ CERD, “Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System,” General Recommendation 31, A/60/18 (2005), <https://www.refworld.org/docid/48abd56dd.html> (accessed July 21, 2022), para. 41.

⁷¹ United Nations Committee on the Rights of the Child (CRC), General Comment No. 24, Children’s Rights in Juvenile Justice, U.N. Doc. CRC/C/GC/24 (2019), <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf> (accessed July 21, 2022), para. 8.

people who commit crimes.⁷² In its most recent recommendations to the US, the CERD urged the US to intensify efforts to address the “school-to-prison pipeline,” ensure that young people are not placed in adult criminal settings, and abolish life-without-parole sentences for people under eighteen.⁷³

Racial inequities pervade every stage of the juvenile legal system. Black and brown young people are more likely than their white peers to be stopped and harassed by the police.⁷⁴ This increases the likelihood of future arrest: Black young people who come into contact with the police by eighth grade have eleven times greater odds of being arrested in young adulthood.⁷⁵ Once arrested, Black young people are four times as likely to be detained as white young people.⁷⁶ Black young people comprise just fifteen percent of the US youth population, but forty-one percent of those confined in juvenile facilities.⁷⁷ Black children are also disproportionately likely to be charged as adults.⁷⁸ Indeed, eighty percent of young people serving life sentences are children of color, and more than fifty percent are Black.⁷⁹ The traumas of incarceration—which are especially acute for children in adult

⁷² Ibid., para. 9. Additionally, the Inter-American Court of Human Rights (IACHR) has held that life sentences violate children’s human rights. Inter-American Court of Human Rights, *Mendoza et. al. Case*, Judgement of May 14, 2013, Inter-Am. Ct. H.R., (Ser. C) No. 260 (2013), https://www.corteidh.or.cr/docs/casos/articulos/seriec_260_ing.pdf (accessed July 22, 2022).

⁷³ CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014, para. 20.

⁷⁴ Anne McGlynn-Wright, et al., “The Usual, Racialized Suspects: The Consequence of Police Contacts with Black and White Youth on Adult Arrest,” *Social Problems* 69, no. 2 (2020), pp. 299-315, accessed July 22, 2022, doi: 10.1093/socpro/spaa042.

⁷⁵ Ibid., p. 310.

⁷⁶ The Sentencing Project, “Black Disparities in Youth Incarceration. Racial Disparities Persist but Fall from All-Time High,” July 2021, <https://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf> (accessed July 22, 2022).

⁷⁷ Ibid.

⁷⁸ See, e.g., Joshua Vaughn, “Young, Black and Charged as Adults,” *Crime Report*, November 30, 2018, <https://thecrimereport.org/2018/11/30/young-black-and-charged-as-adults/> (accessed July 21, 2022); Kenneth J. Cooper, “Despite law on racial disparities, black teens are overly tried as adults,” *St. Louis Beacon*, May 10, 2011, <https://news.stlpublicradio.org/government-politics-issues/2019-03-12/despite-law-on-racial-disparities-black-teens-are-overly-tried-as-adults> (accessed July 21, 2022); Sarah Gonzalez, “Kids in Prison: Getting Tried as an Adult Depends on Skin Color,” *WNYC*, October 10, 2016, <https://www.wnyc.org/story/black-kids-more-likely-be-tried-adults-cant-be-explained/> (accessed July 21, 2022).

⁷⁹ The Sentencing Project, “Youth Sentenced to Life Imprisonment,” October 8, 2019, <https://www.sentencingproject.org/publications/youth-sentenced-life-imprisonment/> (accessed July 22, 2022); Human Rights Watch and American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and*

prisons and include sexual abuse, solitary confinement, and death by suicide—therefore fall too often on children of color, especially Black youth.⁸⁰

To address the discriminatory impact of policies criminalizing youth:

- Provide supportive services for and investment in child-centered, trauma informed youth programs, education, and mental health care.
- Refrain from prosecuting children in adult court, utilizing incarceration as a last resort after other interventions have been tried, and instead treat them as children, with a focus on opportunities for education, healing, and healthy development instead of punishment.

Criminalization of Poverty – Homelessness, Bail, Fines, and Fees

Beyond the general requirement that “all public authorities and public institutions, national and local” eschew racial discrimination,⁸¹ the ICERD contains provisions that bear specifically on homelessness and poverty. Article 5(e) of the Convention addresses discrimination in protections against unemployment and the provision of social security and social services.⁸² Additionally, Article 5(f) articulates a “right of access to any place or service intended for use by the general public.”⁸³ In 2014, the CERD expressed concern over the “high number of homeless persons, who are disproportionately from racial and ethnic minorities,” and the “criminalization of homelessness through laws that prohibit activities such as loitering, camping, begging and lying down in public spaces.”⁸⁴ The

Prisons Across the United States (New York: Human Rights Watch, 2012), <https://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf>.

⁸⁰ Joshua Vaughn, “Young, Black and Charged as Adults,” *Crime Report*, November 30, 2018, <https://thecrimereport.org/2018/11/30/young-black-and-charged-as-adults/> (accessed July 21, 2022); Maddy Troilo, “Locking up youth with adults: An update,” post to “Prison Policy Initiative Blog” (blog), Prison Policy Initiative, February 27, 2018, <https://www.prisonpolicy.org/blog/2018/02/27/youth/> (accessed July 21, 2022).

⁸¹ ICERD, art. 2.

⁸² ICERD, art. 5(e).

⁸³ These include transport, hotels, restaurants, cafes, theaters, and parks. ICERD, art. 5(f).

⁸⁴ CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” 2001, para. 12; CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014.

Committee recommended abolishing laws criminalizing homelessness, and “intensify[ing] efforts to find solutions for the homeless, in accordance with human rights standards.”⁸⁵

Although the US has previously acknowledged the CERD’s concerns,⁸⁶ the criminalization of homelessness remains a pressing social problem across the United States—and one that continues to burden people of color disproportionately. In 2020, there were an estimated 580,000 unhoused people in the United States, 39 percent of whom were Black, despite only being 12 percent of the US total population.⁸⁷ Fifty-three percent of unhoused families with children were Black. Native American, Native Hawaiian, and Pacific Islander people made up 1 percent of the US population, but 5 percent of the unhoused.⁸⁸ Many localities persist in criminalizing the presence of homeless persons in public places⁸⁹—in essence, punishing people for lacking a home by prohibiting sleeping outside, loitering, or requesting assistance from others.⁹⁰ For instance, in one town near Los Angeles, California, only 1.3 percent of the population is homeless, but that group received a staggering 26% of all citations issued in the town by the Los Angeles Sheriff’s Department.⁹¹ Zealous targeting of homeless populations essentially for being homeless inexorably feeds a vicious cycle of escalating enforcement, generating misdemeanors, warrants, unpayable

⁸⁵ CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014, para. 45-46.

⁸⁶ CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” 2001, para. 12; CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014.

⁸⁷ Meghan Henry et. Al., *The 2020 Annual Homeless Assessment Report (AHAR) to Congress* (Washington, DC: The US Department of Housing and Urban Development, 2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf> (accessed July 20, 2022).

⁸⁸ Ibid.

⁸⁹ See UN General Assembly, Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, Philip Alston, visit to the United States of America, A/HRC/38/33/Add.1, May 4, 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/125/30/PDF/G1812530.pdf?OpenElement> (accessed July 22, 2022), para. 44; Madeleine Bailey, Erica Crew, and Madz Reeve, *No Access to Justice: Breaking the Cycle of Homelessness and Jail* (New York: Vera Institute of Justice, 2020), <https://www.vera.org/downloads/publications/no-access-to-justice.pdf> (accessed July 21, 2022), pp. 2-4.

⁹⁰ Bailey, Crew, and Reeve, *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, pp. 2-4.

⁹¹ Eve Garrow and Tiffany Bailey, *Banished & Abandoned in Lancaster* (California: American Civil Liberties Union of Southern California, 2021), https://www.aclusocal.org/sites/default/files/banished_and_abandoned_in_lancaster_-_aclu_social_report_-_feb_2021.pdf (accessed July 22, 2022), p.19.

finances, and incarceration.⁹² The criminalization of homelessness now includes arrests, citations, and forced banishment of people through encampment clearances and property destruction by sanitation workers and police.⁹³ In cities like Los Angeles as well as elsewhere in the US, a long history of racial discrimination in housing, lending, employment, policing, and other factors (government policies like “urban renewal” and freeway construction included) have led to high levels of Black homelessness.⁹⁴

Poverty implicates issues of concern to CERD outside the context of homelessness as well. The US has conceded that, within the criminal legal system, some rights are contingent upon ability to pay. Although variation occurs across US states, the US has noted that “persons with felony convictions may ... have to pay any outstanding fees, fines, or restitution before [voting] rights are restored” upon release from incarceration.⁹⁵ While this statement indicates some recognition of the problem, the federal government’s current actions are inadequate to remedy the immense harm to poor individuals stemming from the criminal legal system, a system that keeps the already marginalized in poverty.⁹⁶ In its most recent response to the CERD, the US fails to address the crushing effects of fines and fees accompanying low-level infractions, the accumulation of which affect the poorest in society, who pay the vast majority of these penalties.⁹⁷ A study in Tulsa, Oklahoma found that Black residents were disproportionately subject to county-based warrants that are

⁹² UN General Assembly, “Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, Philip Alston, visit to the United States of America,” May 4, 2018, para. 45; Bailey, Crew, and Reeve, *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, pp. 6-11.

⁹³ Sara Rankin, “Hiding Homelessness: The Transcarceration of Homelessness,” *California Law Review* forthcoming (2020): accessed July 22, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3499195; Chris Herring, “Complaint-Oriented Policing: Regulating Homelessness in Public Space,” *American Sociological Review*, 84 no. 5 (2019): pp. 769-800, accessed July 21, 2022, doi: 10.1177/0003122419872671; Ananya Roy, Terra Graziani, and Pamela Stephens, “Unhousing the Poor: Interlocking Regimes of Racialized Policing” (paper presented at Roundtable on the Future of Justice Policy, NY, New York, August, 2020), <https://squareonejustice.org/wp-content/uploads/2020/08/Ananya-Roy-et-al-Unhousing-the-Poor-1.pdf> (accessed July 22, 2022).

⁹⁴ Los Angeles Homeless Services Authority, *Report and Recommendations of the Ad Hoc Committee on Black People Experiencing Homelessness* (California: Los Angeles Homeless Authority, 2018), <https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness> (accessed July 15, 2022).

⁹⁵ Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, December 20, 2021, para. 43; Bailey, Crew, and Reeve, *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, pp. 2-4.

⁹⁶ See UN General Assembly, “Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, Philip Alston, visit to the United States of America,” May 4, 2018, para. 47.

⁹⁷ *Ibid.*, para. 48.

often issued for minor infractions such as failure to pay court costs, fines, and fees.⁹⁸ The threat of rearrest for one's inability to afford mounting debt keeps people in a cycle of incarceration and forces families to decide between paying fines and fees and purchasing necessities such as diapers and formula for their children.⁹⁹ Mothers are separated for lengthy periods of time from their children as a result of being held in custody, sometimes lengthened due to the fines and fees.¹⁰⁰

Furthermore, pretrial incarceration, often ordered by judges setting unaffordable money bail, disproportionately harms low-income and low-wealth people of color. In the case of bail, wealthy defendants are more able to secure their freedom while poor ones are forced to remain incarcerated, affecting their livelihoods and family ties.¹⁰¹ Pretrial incarceration leads to increased likelihood of convictions and harsher sentences.¹⁰² People held in jail pretrial are pressured to plead guilty to secure their release, regardless of their actual guilt or innocence.¹⁰³ Additionally, pretrial incarceration can result in even more fines and fees, as some jails bill detained people for each day of their detention.¹⁰⁴ These inequalities have troubling racial implications, as Black people are 2.5 times more likely than white people to live in poverty and face much higher arrest rates.¹⁰⁵

⁹⁸ Human Rights Watch, *Get on the Ground!: Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma* (New York: Human Rights Watch, 2019), <https://www.hrw.org/report/2019/09/12/get-ground-policing-poverty-and-racial-inequality-tulsa-oklahoma/case-study-us>.

⁹⁹ Human Rights Watch and American Civil Liberties Union, *You Miss So Much When You're Gone: The Lasting Harm of Jailing Mothers Before Trial in Oklahoma* (New York: Human Rights Watch, 2018), <https://www.hrw.org/report/2018/09/26/you-miss-so-much-when-youre-gone/lasting-harm-jailing-mothers-trial-oklahoma>.

¹⁰⁰ Human Rights Watch and American Civil Liberties Union, *You Miss So Much When You're Gone*.

¹⁰¹ "Judges have increasingly set large bail amounts, which means that wealthy defendants can secure their freedom while poor defendants are likely to stay in jail, with severe consequences such as loss of jobs, disruption of childcare, inability to pay rent and deeper destitution." Ibid.

¹⁰² Ibid.; Paul Heaton, Sandra Mayson and Megan Stevenson, "Downstream Consequences of Misdemeanor Pretrial Detention," *Stanford Law Review* 69, (2017), <https://www.stanfordlawreview.org/print/article/the-downstream-consequences-of-misdemeanor-pretrial-detention/> (accessed July 25, 2022).

¹⁰³ Human Rights Watch, *Not in it For Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People* (New York: Human Rights Watch, 2017) <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>.

¹⁰⁴ Human Rights Watch and American Civil Liberties Union, *You Miss So Much When You're Gone*.

¹⁰⁵ Black people earn 82.5 cents for every dollar earned by their white counterparts. United Nations General Assembly, "Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, Philip Alston, visit to the United States of America," May 4, 2018, para. 54.

To address the criminalization of poverty, US states should:

- Stop criminalizing homelessness and its inevitable consequences, which only further serves to penalize disadvantaged individuals already suffering from inadequate allocation of governmental resources.
- Reduce the circumstances in which courts can order pretrial incarceration, through bail setting or other means, only to those in which there is strong evidence of imminent harm if a person is released pretrial, and only following a rigorous hearing to evaluate that evidence.
- Invest in pretrial services programs providing court date reminders, transportation, and other support to ensure court appearances.
- Drastically reduce the number and amounts of fines and fees in the US criminal legal system. Further, establish national standards for criminal-legal system debt, including guidelines on ability- to- pay determinations and collection practices.

Probation and Parole

Probation and parole are portrayed as alternatives to incarceration, but in reality they drive high numbers of people—particularly Black and brown people—into jail and prison.¹⁰⁶ About 4 million people in the US are on probation or parole,¹⁰⁷ and nearly half of all state prison admissions stem from violations of the conditions of probation or parole.¹⁰⁸ Black people are 4.15 times more likely to be under supervision than white people, and remain on supervision longer than similarly situated whites.¹⁰⁹

¹⁰⁶ Human Rights Watch and American Civil Liberties Union, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (New York: Human Rights Watch, 2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states>; pp. 41-53; Human Rights Watch, *Set up to Fail: The Impact of Offender-Funded Private Probation on the Poor* (New York: Human Rights Watch, 2018), <https://www.hrw.org/report/2018/02/21/set-fail/impact-offender-funded-private-probation-poor>.

¹⁰⁷ Danielle Kaeble, “Probation and Parole in the United States, 2020,” US Department of Justice, Bureau of Justice Statistics, December 2021, <https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf> (accessed July 22, 2022), p. 1.

¹⁰⁸ Council of State Governments (CSG) Justice Center, “Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets,” June 18, 2019, <https://csgjusticecenter.org/publications/confined-costly/> (accessed July 22, 2022).

¹⁰⁹ Kendra Bradner and Vincent Schiraldi, *Racial Inequities in New York Parole Supervision* (New York: Columbia University Justice Lab, 2020), <https://justicelab.columbia.edu/sites/default/files/content/NY%20Parole%20Racial%20Inequities.pdf>, (accessed July 20, 2022), p. 4.

Black people are also more likely to be incarcerated for supervision violations. Due to generations of structural racism, Black and brown people are less likely to have resources, such as housing, wealth, reliable transportation, and jobs, that make it feasible to complete the onerous requirements of supervision.¹¹⁰ Meanwhile, they are disproportionately stopped, searched, and arrested by police—making them more likely to be incarcerated for probation or parole violations.¹¹¹ And some supervision conditions—such as requirements to stay away from people with felony records—disproportionately burden Black men, one in three of whom have a felony conviction.¹¹²

To address racial disparities in probation and parole, US authorities should:

- Drastically reduce the use of supervision sentences for youth and adults and instead utilize real alternatives to incarceration.
- Where supervision is used, shorten supervision periods, narrowly tailor conditions, and stop incarcerating people for violations that would not otherwise be a crime.

Reentry Issues – Impact of Criminal Records on Housing and Unemployment

The ICERD requires States to take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms,”¹¹³ including the right to work and the right to housing.¹¹⁴ The Committee has raised concerns about persistent housing and employment racial disparities in the US.¹¹⁵

¹¹⁰ Human Rights Watch and American Civil Liberties Union, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (New York: Human Rights Watch, 2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states>; Bradner and Schiraldi, *Racial Inequities in New York Parole Supervision*.

¹¹¹ Bradner and Schiraldi, *Racial Inequities in New York Parole Supervision*.

¹¹² *Ibid.*, p. 5.

¹¹³ ICERD, art. 2(2).

¹¹⁴ ICERD, art. (5).

¹¹⁵ CERD, “Report of the Committee on the Elimination of Racial Discrimination, Fifty-eighth session, (March 6-23, 2001), and Fifty-ninth session, (July 30-August 17, 2001),” October 30, 2021, para. 398; CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014, para. 13.

The United States imposes more than 48,000 legal restrictions on people with criminal records—barring them from work, housing, jobs, and civic engagement.¹¹⁶ These barriers disproportionately impact Black and brown people, who are more likely to have criminal records¹¹⁷ and to face discrimination when attempting to access housing and employment.¹¹⁸ Sixty-four percent of unemployed men in their thirties have criminal records, and Black men are almost twice as likely as white men to be unemployed.¹¹⁹

Additionally, the high rate at which the US subjects Black people to correctional control results in their underrepresentation in the US electorate, as many US jurisdictions deny voting rights to people on probation and parole, and nearly all deny those rights to people in prison.¹²⁰

¹¹⁶ Katti Gray, “How ‘Collateral Consequences’ Complicate Life After Prison,” *Crime Report*, February 6, 2017, <https://thecrimereport.org/2017/02/06/how-collateral-consequences-can-still-hurt-after-prison/> (accessed July 21, 2022).

¹¹⁷ Bruce Western and Catherine Sirois, “Racialized Re-Entry: Labor Market Inequality After Incarceration,” *Social Forces* 97, no. 4 (2018), pp. 1517–1542, <https://www.russellsage.org/sites/default/files/Western-Sirois-2019%5B1%5D.pdf> (accessed July 22, 2022); Annelies Goger, David J. Harding, and Howard Henderson “Prisoner Reentry,” in *A Better Path Forward for Criminal Justice A Report by the Brookings-AEI Working Group on Criminal Justice Reform*, ed. Rashawn Ray and Brent Orrell (Washington, DC: American Enterprise Institute and Brookings Institute, 2021), <https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-prisoner-reentry/> (accessed July 22, 2022); Monica L. Ricci and Carolyn McNamara Barry, “Challenges of Reentering Society for Incarcerated African-American Men,” *Modern Psychological Studies* 17, no. 1 (2011) pp. 13-20, <https://scholar.utc.edu/cgi/viewcontent.cgi?article=1194&context=mps> (accessed July 22, 2022).

¹¹⁸ *Ibid.*; Jerusalem Demsas, “Black and Hispanic renters experience discrimination in almost every major American city,” *Vox*, December 7, 2021, <https://www.vox.com/22815563/rental-housing-market-racism-discrimination> (accessed July 21, 2022); Janice Gassam Asare, “How Systemic Racism is Baked Into the Fabric of American Housing,” *Forbes*, February 1, 2022, <https://www.forbes.com/sites/janicegassam/2022/02/01/how-systemic-racism-is-baked-into-the-fabric-of-american-housing/?sh=35e9b401430f> (accessed July 21, 2022).

¹¹⁹ Shawn Bushway et al., “Barred from employment: more than half of unemployed men in their 30s had a criminal history of arrest,” *Science Advances* 8, no. 7 (2022), accessed July 20, 2022, doi: 10.1126/sciadv.abj6992; see also Jaboa Lake, “Preventing and Removing Barriers to Housing Security for People With Criminal Convictions,” Center for American Progress, April 14, 2021, <https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions/#:~:text=Another%20study%20of%20community%20members,people%20who%20have%20not%20been> (accessed July 21, 2022). These inequities deepen already stark differences between Black, Latinx and white communities. Terry-Ann Craigie, Ames Grawert, and Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality* (New York: The Brennan Center, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal> (accessed July 22, 2022).

¹²⁰ Jean Chung, “Voting Rights in the Era of Mass Incarceration: A Primer,” The Sentencing Project, July 2021, <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> (accessed July 22, 2022).

To address racial discrimination in re-entry, US jurisdictions should:

- Repeal US laws allowing and facilitating discrimination and/or exclusions based solely on an individual’s arrest or conviction, including restrictions or exclusions from employment, housing, access to social benefits, and voting.

Racist Drug Laws and Racism in Public Health Approaches

The ICERD guarantees the right to equal treatment generally and, under Article 2(c), requires States Parties to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations that have the effect of creating or perpetuating racial discrimination wherever it exists.”¹²¹ In its General Recommendation XXXI, the CERD recommended that States “pay the greatest attention” to “proportionately higher crime rates attributed to persons belonging to [racial minorities], particularly as regards petty street crime and offenses related to drugs” as an indication of the “non-integration of such persons into society.”¹²² Additionally, the Joint United Nations Programme on HIV/AIDS (UNAIDS) has called for the “decriminalization of drug possession for personal use” and the “elimination of stigma and discrimination against people who use drugs.”¹²³ In its 2014 concluding observations to the US, the CERD expressed concern over “the application of mandatory minimum drug-offense sentencing policies” that exacerbate racial disparities in the criminal legal system.¹²⁴ Additionally, the UN Special Rapporteur on extreme poverty and human rights highlighted the “confused and counterproductive drug policies” in the US in his 2018 country report. The report described how, in the context of drug addiction in the US, the “main responses have been punitive,” rather than the appropriate response of “increased funding and improved access to vital care and support.”¹²⁵ The report further suggested that this “urge to punish” has “racial

¹²¹ ICERD, art. 2(c).

¹²² CERD, “Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System,” General Recommendation No. 31, A/60/18 (2005), para. 1(d).

¹²³ United Nations AIDS, “On International Drug Users’ Day, UNAIDS calls for action against the criminalization of people who use drugs and for community-led harm reduction programmes,” United Nations press release, November 1, 2021, https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2021/november/20211101_international-drug-users-day (accessed July 22, 2022).

¹²⁴ CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014, para. 20.

¹²⁵ UN General Assembly, “Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, Philip Alston, visit to the United States of America,” May 4, 2018, para. 65-66.

undertones,” noting the disparities in sentencing between Black users of crack cocaine and white users of opioids.¹²⁶ Similarly, the UN Working Group of Experts on People of African Descent has urged the US to amend any judicial policies that disproportionately target Black people, stating that “the war on drugs has operated more effectively as a system of racial control than as a mechanism for combating the use or trafficking of narcotics.”¹²⁷

In its 2021 report to the CERD, the US pointed to the 2018 enactment of the First Step Act, a law that reduced racial disparities in sentences for certain drug crimes.¹²⁸ While these reforms are helpful, they do not do nearly enough to remedy past discriminatory treatment or change laws, policies and practices in ways that would prevent it in the future.

Nearly 400,000 people are in prison for drug crimes.¹²⁹ The vast majority of individuals incarcerated in federal prison are there on a drug charge,¹³⁰ and by some estimates, nearly eighty percent of people in federal prison for drug offenses are Black or Latinx.¹³¹ Though Black and white people use drugs at similar rates,¹³² Black people are imprisoned for drug crimes at five times the rate of white people.¹³³ “Black people [a]re arrested at over three

¹²⁶ *Ibid.*, para. 66.

¹²⁷ “Drug laws must be amended to ‘combat racial discrimination’, UN expert says,” *United Nations News*, March 14, 2019, <https://news.un.org/en/story/2019/03/1034721> (accessed July 22, 2022). In addition, the UN High Commissioner for Human Rights condemned systemic racism and police killings in the “context of the ‘war on drugs,’” calling on states to undertake a “systemic response” to dismantling racism. See United Nations Human Rights Office of the High Commissioner, “New report calls for transformative action for racial justice,” United Nations press release, June 28, 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/HC-report-systemic-racism.aspx> (accessed July 22, 2022).

¹²⁸ Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, December 20, 2021, para. 114. See also, Congressional Resource Service, *The First Step Act of 2018: An Overview* (Washington, DC: Congressional Research Service, 2019), <https://crsreports.congress.gov/product/pdf/R/R45558> (Accessed July 22, 2022) (explaining the First Step Act).

¹²⁹ Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2022* (Massachusetts: Prison Policy Initiative, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> (accessed July 5, 2022).

¹³⁰ Federal Bureau of Prisons, “Offenses,” February 26, 2022, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (accessed July 22, 2022).

¹³¹ Drug Policy Alliance (DPA), “Race and the Drug War,” undated, <https://drugpolicy.org/issues/race-and-drug-war> (accessed July 21, 2022).

¹³² Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States* (New York: Human Rights Watch, 2016), <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>, p. 6.

¹³³ William J. Sabol, Thaddeus L. Johnson and Alexander Caccavale, *Trends in Correctional Control by Race and Sex* (Washington, DC: Council on Criminal Justice, 2020), <https://counciloncj.org/wp-content/uploads/2021/09/Trends-in-Correctional-Control-FINAL.pdf> (accessed Jul 20, 2022).

times the rate of white people, and up to eight times as often in some states,” for marijuana offenses.¹³⁴ Additionally, police have targeted Black people specifically for federal prosecution, because “federal drug laws carry harsher punishment—including mandatory minimum sentences—than charges brought in state court.”¹³⁵ Though some authorities have begun to embrace a less punitive, more health-based approach to substance use disorders, this shift is still far too limited, and only began to take place after years of especially harsh treatment of Black people as part of the War on Drugs amidst an opioid crisis associated primarily with white people.¹³⁶ Further, drug arrests—the vast majority for possession—remain the leading cause of arrest in the US.¹³⁷

Black people have in fact been hit the hardest by the opioid crisis in recent years, one that has only worsened since the Covid-19 pandemic began. One study shows a thirty-eight percent increase in overdoses among Black people between 2018 and 2019 across four states.¹³⁸ Additionally, some states have responded to the opioid crisis by passing drug-induced homicide laws, which seek to charge people with murder for selling drugs that may have led to an overdose. Such laws can result in the disproportionate prosecution of Black and Latinx people—providing another basis for subjecting individuals of color to lengthy prison terms for drug-related offenses.¹³⁹

¹³⁴ Ezekiel Edwards et. al., *The Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (New York: American Civil Liberties Union, 2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf (accessed July 22, 2022), p. 10.

¹³⁵ Ezekiel Edwards and Shilpi Agarwal, “Racist Drug Laws Lead to Racist Enforcement in Cities Across the Country”, American Civil Liberties Union, February 21, 2020, <https://www.aclu.org/news/criminal-law-reform/racist-drug-laws-lead-to-racist-enforcement-in-cities-across-the-country/> (accessed July 22, 2022).

¹³⁶ “Racial Double Standard in Drug Laws Persist Today,” Equal Justice Initiative news release, December 9, 2019, <https://eji.org/news/racial-double-standard-in-drug-laws-persists-today/> (accessed July 22, 2022).

¹³⁷ Pew Charitable Trusts, “Drug Arrests Stayed High Even as Imprisonment Fell from 2009 to 2019,” February 15, 2022, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019> (accessed July 5, 2022).

¹³⁸ “Disparities in opioid overdose deaths continue to worsen for Black people, study suggests,” National Institute on Drug Abuse news release, September 9, 2021, <https://nida.nih.gov/news-events/news-releases/2021/09/disparities-in-opioid-overdose-deaths-continue-to-worsen-for-black-people-study-suggests> (accessed July 22, 2022).

¹³⁹ Drug Policy Alliance (DPA), “An Overdose Death is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane” (New York: Drug Policy Alliance, 2017), https://drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_o.pdf (accessed July 22, 2022), p. 3.

To make drug policy more rights-respecting, the US should:

- Eliminate mandatory minimum sentences for drug offenses and repeal drug-induced homicide laws.
- End sentencing disparities between crack cocaine and powder cocaine offenses.
- Decriminalize possession of drugs for personal use.
- Enact laws or otherwise encourage processes to review and clear past drug convictions, including a process to expunge convictions for marijuana sales as marijuana is legalized for sale and a means to invest resources obtained from marijuana licensing to communities most harmed by past prohibitions on marijuana.
- Invest in treatment and harm-reduction programs to provide trauma-informed and culturally competent support to people living with substance use disorders.

Prison Labor

ICERD Article 5 includes the rights to work, free choice of employment, just and favorable conditions of work, equal pay for equal work, and just and favorable remuneration.¹⁴⁰ Further, the guidelines for prison labor set out in the UN Standard Minimum Rules for the Treatment of Prisoners (the "Rules") prohibit work "of an afflictive nature," require permitting incarcerated people to "choose the type of work they wish to perform," and mandate that such labor be supplemented with vocational training.¹⁴¹ The Rules also state that the "precautions laid down to protect the safety and health of free workmen shall be equally observed in [correctional] institutions," and that "[p]rovision shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favorable than those extended by law to free workmen."¹⁴²

¹⁴⁰ ICERD, art. 5(e)(i).

¹⁴¹ UN Office on Drugs and Crime (UNODC), "The United Nations Standard Minimum Rules for the Treatment of Prisoners" (Vienna: UN Office on Drugs and Crime, 2015), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf (accessed July 22, 2022), p. 29.

¹⁴² *Ibid.*, p. 22.

Almost one million people are currently working while confined in US prisons.¹⁴³ They often work in grueling and degrading conditions for little to no pay—often pennies on the hour—and under threat of punishment (including solitary confinement) for refusing to work.¹⁴⁴ US law explicitly excludes incarcerated workers from the most basic workplace safety guarantees, including the constitutional prohibition against involuntary servitude.¹⁴⁵ The US prison labor system involves present-day involuntary servitude. Prison labor is also a legacy of slavery, and racial inequities persist today.¹⁴⁶ Black people are disproportionately incarcerated and thus overrepresented among those working in prison.¹⁴⁷ Black people also work lower-wage and unpaid agriculture and maintenance jobs at a disproportionate rate in prison, while a higher proportion of white people work in higher-paying prison-industries jobs.¹⁴⁸ Indeed, across the deep south, agricultural workers, largely Black, pick and harvest crops in prisons located on the sites of former slave plantations.¹⁴⁹

¹⁴³ ACLU and Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor: Exploitation of Incarcerated Workers* (New York: American Civil Liberties Union, 2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf (accessed July 20, 2022), p. 24.

¹⁴⁴ ACLU and Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor*; Wendy Sawyer, “How Much Do Incarcerated People Earn in Each State?,” Prison Policy Initiative, April 10, 2017, <https://www.prisonpolicy.org/blog/2017/04/10/wages/> (accessed July 22, 2022); “Dirty Jobs: Grime Is No Bad Thing,” *Angolite*, March/April 2017; Samar Ahmad, “The Shadow Workforce: Prison Labor and International Trade,” *Harvard International Review*, October 26, 2020, <https://hir.harvard.edu/the-shadow-workforce-prison-labor-and-international-trade/> (accessed July 22, 2022); Whitney Bennis, “American Slavery, Reinvented,” *Atlantic*, September 21, 2015, <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> (accessed July 22, 2022).

¹⁴⁵ ACLU and Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor*, p. 61; Ahmad, “The Shadow Workforce.” The US Supreme Court has held that incarcerated people do not have a First Amendment right to form a prison union. See *Jones v. N. Carolina Prisoners’ Lab. Union, Inc.*, 433 U.S. 119 (1977). Stephen Woolpert, “Prisoner’s Unions, Inmate Militancy, and Correctional Policymaking,” *Federal Probation* 42, no. 2 (1978): p.40, accessed July 28, 2022 <https://www.ojp.gov/ncjrs/virtual-library/abstracts/prisoners-unions-inmate-militancy-and-correctional-policymaking>.

¹⁴⁶ ACLU and Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor*, p. 25; Genevieve LeBaron, “Rethinking Prison Labor: Social Discipline and the State in Historical Perspective,” *Journal of Labor and Society* 15 (2012):, pp. 327, 333, accessed July 22, 2022, doi: 10.1111/j.1743-4580.2012.00397.x.

¹⁴⁷ ACLU and Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor*, p. 25; The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparities in State Prisons* (Washington, DC: The Sentencing Project, 2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>, p. 6.

¹⁴⁸ ACLU and Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor*, p. 51-53; Courtney A. Crittenden, Barbara A. Koons-Witt, and Robert J. Kaminski, “Being Assigned Work in Prison: Do Gender and Race Matter?,” *Feminist Criminology* 1, no. 23 (2016): accessed July 22, 2022, https://www.researchgate.net/publication/308104933_Being_Assigned_Work_in_Prison_Do_Gender_and_Race_Matter.

¹⁴⁹ ACLU and Global Human Rights Clinic of the University of Chicago Law School, *Captive Labor*, p. 36.

To eliminate racial inequities in prison labor, the US should:

- Abolish the Thirteenth Amendment's exclusion that allows forced labor as a punishment for a crime.
- Ensure that all work in prisons is fully voluntary by eliminating any laws and policies enabling forced labor and that punish incarcerated people who are unable or unwilling to work.
- Adopt legislation and regulations providing incarcerated workers in all prisons with the same labor protections afforded to other US workers including minimum wage, overtime pay, health and safety standards, unionization and collective bargaining, and protection from discrimination and retaliation.
- Initiate oversight investigations into federal and state prisons to eliminate forced labor of incarcerated people and discriminatory pay, allocation of work assignments, conditions, and related practices.

Racial Discrimination and Excessive Force by Law Enforcement Officials

Racially-Disparate Policing and Enforcement Practices

Article 5(b) of the ICERD requires States Parties to ensure equity in the right to be free from “violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”¹⁵⁰ Accordingly, the CERD has called on States Parties to improve the training of their law enforcement officials, and it has long expressed concern about police profiling, bias and brutality (as well as attendant impunity) that disproportionately harms people of color in the United States.¹⁵¹ The Committee even issued an Early Warning and Urgent Action Procedures Resolution after the police murder of George Floyd sparked unprecedented protests against police violence in 2020.¹⁵²

Despite warnings from the Committee and other international human rights bodies,¹⁵³ US police agencies have failed to meet their obligations under the ICERD. The US has discussed bringing federal lawsuits against problematic police agencies¹⁵⁴ and proposed some federal legislation that may (if passed) help to address some of these issues,¹⁵⁵ but

¹⁵⁰ ICERD, art. 5(b).

¹⁵¹ CERD, “Training of Law Enforcement Officials in the Protection of Human Rights at para. 3.” General Recommendation No. 13 (1993), <https://www.ohchr.org/en/resources/educators/human-rights-education-training/b-general-recommendation-xiii-training-law-enforcement-officials-protection-human-rights-1993> (accessed July 22, 2022); CERD, “Preventing and Combating Racial Profiling by Law Enforcement Officials,” General Recommendation No. 36, CERD/C/GC/36 (2020), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/CERD_C_GC_36_9291_E.pdf (accessed July 22, 2022); CERD, “Report of the Committee on the Elimination of Racial Discrimination, Fifty-eighth session, (March 6-23, 2001), and Fifty-ninth session, (July 30-August 17, 2001),” October 30, 2021; CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014, para. 17(b).

¹⁵² CERD, “Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures Statement 1 (2020) United States of America, Advanced Unedited Version,” June 12, 2020.

¹⁵³ Human Rights Watch, “*Kettling* Protesters in the Bronx: Systemic Police Brutality and Its Costs in the United States (New York: Human Rights Watch, 2020), <https://www.hrw.org/report/2020/09/30/kettling-protesters-bronx/systemic-police-brutality-and-its-costs-united-states>, pp. 9-10.

¹⁵⁴ CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014, para. 15; CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” 2001; CERD, “Report of the Committee on the Elimination of Racial Discrimination, Fifty-eighth session, (March 6-23, 2001), and Fifty-ninth session, (July 30-August 17, 2001),” October 30, 2021, para. 395.

¹⁵⁵ Brennan Center for Justice, “The Biden Administration’s Opportunity for Change,” January 19, 2021, <https://www.brennancenter.org/our-work/policy-solutions/biden-administrations-opportunity-change> (accessed July 22, 2022).

legislation failed in the US Senate, and the executive order President Biden passed in response does not go nearly far enough to save lives.¹⁵⁶

People of color continue to bear the brunt of aggressive and discriminatory policing. Estimates attribute over 1,000 killings per year to the police,¹⁵⁷ and new research suggests that more than half of police killings are not reflected in official statistics.¹⁵⁸ Police also continue to kill Native Americans, Latinxs and Black people at significantly higher rates—as much as 350% more frequently—than white people.¹⁵⁹ Even greater racial disparities attend nonfatal uses of force by police,¹⁶⁰ and police likewise target people of color (especially Black people) for stops and arrests at much higher rates than white people.¹⁶¹ The goal of limiting police violence in the US is linked to the need to correct imbalances between investment in services that directly address societal problems such as substance use disorders or poverty and investment in policing.¹⁶²

¹⁵⁶ Felicia Sonmez & Mike DeBonis, “No deal on bill to overhaul policing in aftermath of protests over killing of Black Americans,” *Washington Post*, September 22, 2021, https://www.washingtonpost.com/powerpost/policing-george-floyd-congress-legislation/2021/09/22/36324a34-1bc9-11ec-a99a-5fea2b2da34b_story.html (accessed July 5, 2022); Rachel Elsenberg, et al., “The Biden Administration’s Executive Order on Policing is a Foundation to Build Upon,” American Civil Liberties Union & Center for American Progress, June 1, 2022, <https://www.aclu.org/news/criminal-law-reform/the-biden-administrations-executive-order-on-policing-is-a-foundation-to-build-upon> (accessed July 5, 2022).

¹⁵⁷ Marisa Iati, “Fatal Police Shootings in 2021 Set Record Since the Post Began Tracking, Despite Public Outcry,” *Washington Post*, February 9, 2022, <https://www.washingtonpost.com/investigations/2022/02/09/fatal-police-shootings-record-2021/>.

¹⁵⁸ Tim Arango & Shaila Dawn, “More than Half of Police Killings are Mislabeled, New Study Says,” *New York Times*, September 30, 2021, <https://www.nytimes.com/2021/09/30/us/police-killings-undercounted-study.html> (accessed July 25, 2022).

¹⁵⁹ *Ibid.*

¹⁶⁰ John Shjarback and Justin Nix, “Guest Post: We’ve been underestimating racial disparities in police use of lethal force, Fatal police shootings in 2021 set record since The Post began tracking, despite public outcry,” *Washington Post*, November 11, 2021, <https://www.washingtonpost.com/crime-law/2021/11/11/non-fatal-police-shootings-disparities-data/> (accessed July 22, 2022) (Discerning significant racial disparities in nonfatal police shootings and extrapolating from those numbers to rates among fatal police shootings.); Richard A. Opiel Jr. and Lazaro Gamio, “Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites,” *New York Times*, June 30, 2020, <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html> (accessed July 22, 2022).

¹⁶¹ American Civil Liberties Union Analytics & American Civil Liberties Union of DC, “Racial Disparities in Stops by the Metropolitan Police Department: 2020 Data Update,” March 11, 2021, <https://www.acludc.org/en/publications/racial-disparities-stops-metropolitan-police-department-2020-data-update> (accessed July 22, 2022).

¹⁶² Human Rights Watch, *A Roadmap for Reimagining Public Safety in the United States* (New York: Human Rights Watch, 2020), https://www.hrw.org/sites/default/files/media_2020/08/A%20Roadmap%20for%20Re-imagining%20Public%20Safety%20in%20the%20United%20States.pdf.

These substantial, persistent imbalances notwithstanding, impunity for abuse remains a widespread problem.¹⁶³ There are over 18,000 policing agencies across the US,¹⁶⁴ but the US Department of Justice opened only 70 civil investigations into police departments for the possible violation of civilians' rights between 1994 and January 2020.¹⁶⁵ More broadly, police rarely face prosecution or other legal consequences after engaging in brutality.¹⁶⁶ Additionally, much of the data needed to discern the extent of police compliance with the ICERD remain undisclosed.¹⁶⁷ For instance, federal efforts to create a use-of-force database for police have faltered due to widespread noncooperation from police departments—though President Biden's executive order on policing aims to address this problem.¹⁶⁸ In many US states, the disciplinary records of abusive officers are also largely hidden from the public,¹⁶⁹ and civil society groups and universities have had to take it upon themselves to cobble together a national database on police stops of civilians.¹⁷⁰

To address excessive use of force in law enforcement, the US should:

- Prohibit police from enforcing a range of non-serious offenses, including issuing fines and making arrests for non-dangerous behaviors, thus eliminating many of the unnecessary interactions between the police and community members that have led to so much violence and so many deaths.

¹⁶³ CERD, "Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America," August 29, 2014, para. 17; CERD, "Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America," 2001; CERD, "Report of the Committee on the Elimination of Racial Discrimination, Fifty-eighth session, (March 6-23, 2001), and Fifty-ninth session, (July 30-August 17, 2001)," October 30, 2021, para. 395.

¹⁶⁴ Duren Banks et al., "National Sources of Law Enforcement Employment Data," United States Department of Justice, Bureau of Justice Statistics, April 2016, <https://www.bjs.gov/content/pub/pdf/nslead.pdf> (accessed July 22, 2022).

¹⁶⁵ UN General Assembly, "Report of the Working Group on the Universal Periodic Review: United States of America," A/HRC/46/15, December 15, 2020, <https://undocs.org/en/A/HRC/46/15> (accessed July 20, 2022), para. 7.

¹⁶⁶ Amelia Thomson-DeVeaux, Nathaniel Rakich and Likhitha Butchireddygar, "Why it's So Rare for Police Officers to Face Legal Consequences," *FiveThirtyEight*, June 4, 2020, <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/> (accessed July 22, 2022).

¹⁶⁷ See American Civil Liberties Union, "Written Submission of the ACLU to the International Independent Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement," June 10, 2022, <https://www.aclu.org/hearing-statement/aclu-submission-un-lack-data-collection-policing-us> (accessed July 20, 2022).

¹⁶⁸ Tom Jackman, "FBI May Shut Down Police Use-of-Force Database Due to Lack of Participation," *Washington Post*, December 9, 2021, <https://www.washingtonpost.com/crime-law/2021/12/09/fbi-police-shooting-data/> (accessed July 22, 2022).

¹⁶⁹ "If a Police Officer in Your Community has a History of Misconduct, Can You Find Out About It?," *WNYC*, October 2015, <https://project.wnyc.org/disciplinary-records/> (accessed July 22, 2022).

¹⁷⁰ "The Stanford Open Policing Project," Stanford University, 2001, <https://openpolicing.stanford.edu> (accessed July 22, 2022).

- Invest in communities to prioritize health and quality of life over law enforcement and surveillance.
- Implement enforceable legal constraints so that there will be only rare instances in which police officers can legally use force against community members;
- Create independent oversight structures with robust enforcement and subpoena powers that ensure that when officers use force in violation of the law, policies, or training, they are held accountable.

Racial Bias and Abuse by Law Enforcement in Immigration Control

ICERD's prohibition of discrimination, including in Article 5(b) also bears on law enforcement at the US border and in interior immigration enforcement.¹⁷¹ The CERD has recommended that “all officials dealing with non-citizens receive special training, including training in human rights,” to combat ill-treatment and discrimination against non-citizens by police and law enforcement agencies.¹⁷² In its 2008 concluding observations to the US, the CERD expressed concern over the excessive use of force against migrants, recommending that the US establish “adequate systems for monitoring police abuses” and develop “further training opportunities for law enforcement officials.”¹⁷³ In 2014, the Committee went further, reiterating concern about “increased use of racial profiling” by law enforcement to determine immigration status and recommending an end to specified immigration enforcement programs,¹⁷⁴ including the Secure

¹⁷¹ICERD, art. 5(b).

¹⁷²CERD, General Recommendation No. 30, Discrimination Against Non-Citizens, CERD/C/64/Misc.11/rev.3 (2004), https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CERD_GC_30_2004_EN.pdf (accessed July 22, 2022) para. 21. Additionally, the OHCHR has issued guidelines prohibiting the “excessive use of force and dangerous border control practices, such as water-hosing and use of dogs against migrants.” See UN High Commissioner for Human Rights, “Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations,” A/HRC/37/34/Add.1, February 7, 2018, <https://digitallibrary.un.org/record/1472491?ln=en> (accessed July 22, 2022).

¹⁷³CERD, “Consideration of reports submitted by States parties under article 9 of the Convention: concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America,” CERD/C/USA/CO/6, February 2008, <http://hrlibrary.umn.edu/CERDConcludingComments2008.pdf> (accessed July 22, 2022), para. 25.

¹⁷⁴CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” August 29, 2014, para. 18; CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” 2001; CERD, “Report of the Committee on the Elimination of Racial Discrimination, Fifty-eighth session, (March 6-23, 2001), and Fifty-ninth session, (July 30-August 17, 2001),” October 30, 2021, para. 395.

Communities program¹⁷⁵ and the INA § 287(g) program.¹⁷⁶ The United States replied that Department of Homeland Security (DHS) policy prohibits racial profiling and that it issued new use of force policies and training.¹⁷⁷

Despite these policies and purported reforms, US Customs and Border Patrol (CBP) and Immigration and Customs Enforcement (ICE) officers continue to commit acts of violence and other serious abuses against migrants. Internal DHS reports revealed testimony regarding “over 160 cases of misconduct and abuse of asylum applicants,” including physical and sexual abuse.¹⁷⁸ Reports and statements from former CBP agents illustrate a departmental reluctance to “hold agents and others within the agency accountable.”¹⁷⁹ Further, reports and images emerged in 2021 of “horse-mounted agents maneuvering their horses in a menacing way toward migrants, wielding lariats [whips], and using derogatory and xenophobic language” against primarily Haitian migrants, “including families with small children.”¹⁸⁰ ACLU tracking has documented at least 230 fatal encounters with CBP

¹⁷⁵ In jurisdictions where S-Comm is authorized, “any time an individual is arrested and booked into local jail for any reason, his or her fingerprints are electronically run through ICE’s immigration database.” The program causes “widespread unlawful detention without criminal charges or a hearing” by targeting immigrants at the time of arrest, not conviction and it “ensnares huge numbers of low-level offenders and non-criminals,” fueling mass deportations. “Secure Communities (“S-Comm”),” American Civil Liberties Union, undated, <https://www.aclu.org/other/secure-communities-s-comm> (accessed July 22, 2022).

¹⁷⁶ The 287(g) program allows “state and local agencies to act as immigration enforcement agents” through agreements with ICE. The agreements are designed to “extend the reach” of deportation procedures by “getting localities to do ICE’s work at their own expense,” and has led to “racial profiling, civil rights violations, isolation of immigrant communities, and family separation.” “National Map of 287(g) Agreements,” Immigrant Legal Resource Center, December 6, 2021, <https://www.ilrc.org/national-map-287g-agreements> (accessed July 20, 2022).

¹⁷⁷ Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, December 20, 2021, para. 19. It noted that DHS and CBP issued new department-wide policies on use of force in 2018 and 2014, respectively, and that CBP “redesigned its basic training curriculum” and established a Law Enforcement Safety and Compliance Directorate to evaluate the use of force policy procedures, provide training on proper techniques and tactics, and mandate de-escalation training. *Ibid.*, para. 79.

¹⁷⁸ These instances included a CBP officer, in 2018, hitting an asylum applicant so hard he was “knocked unconscious and suffered brain swelling.” In another instance, a CBP officer “forced a girl to undress” and sexually assaulted her. Human Rights Watch, *They Treat You Like You Are Worthless: Internal DHS Reports of Abuses by US Border Officials* (New York: Human Rights Watch, 2021), [https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials#/.](https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials#/)

¹⁷⁹ *Ibid.*

¹⁸⁰ Letter from American Civil Liberties Union of Texas, to Troy Miller, Acting Commissioner, US Department of Homeland Security and US Customs and Border Security, and Joseph V. Cuffari, Inspector General, US Department of Homeland Security, September 21, 2021, https://www.aclutx.org/sites/default/files/aclu_tx_cbp_oig_letter_re_border_patrol_in_del_rio.pdf (accessed July 21, 2022).

since the agency was created.¹⁸¹ Finally, while President Biden’s administration has attempted to limit deportations of people from the interior of the United States through an initial moratorium on deportations and subsequent “enforcement priorities” memos,¹⁸² it has maintained programs that facilitate racial profiling in immigration enforcement such as the 287(g) program, Operation Stonegarden and the Secure Communities program, the 287(g) program is still widespread across the country. Through these programs, the Biden administration is partnering with xenophobic, anti-immigrant law enforcement agencies across the countries, including those with extensive records of civil rights violations.¹⁸³

To address racial discrimination by law enforcement in border control and interior immigration enforcement:

- Federal, state, and local authorities should reduce their reliance on policing agencies and instead adopt a humanitarian approach to border reception and regulation, ensuring for example the primacy of human dignity, due process, family unity, non-discrimination, and the right to seek asylum.
- The US should immediately review, investigate, and remedy all internal and external allegations of abuse by government officials at the border or in an immigration detention facility and initiate an investigation of a pattern and practice of rights violations by CBP. In addition, the US government should immediately end immigration detention that is unnecessary or prolonged with the aim to gradually abolish immigration detention and should close any immigration detention facility in which persistent abuses are committed.¹⁸⁴

¹⁸¹ “CBP Fatal Encounter Tracker”, American Civil Liberties Union of Texas, July 7, 2022, <https://www.aclutx.org/en/cbp-fatal-encounters-tracker> (accessed July 22, 2022).

¹⁸² Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01768/revision-of-civil-immigration-enforcement-policies-and-priorities> (accessed July 22, 2022) (Repealing Trump-era executive order that restarted the S-Comm program); See Exec. Order 13768, 82 Fed. Reg. 8799, (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states> (accessed July 22, 2022).

¹⁸³ See American Civil Liberties Union, *License to Abuse: How ICE’s 287(G) Program Empowers Racist Sheriffs* (New York: ACLU, 2022), <https://www.aclu.org/report/license-abuse-how-ices-287g-program-empowers-racist-sheriffs?redirect=sheriffs-report> (accessed July 19, 2022); Immigrant Legal Resource Center, National Map of 287(g) Agreements (December 6, 2021), <https://www.ilrc.org/national-map-287g-agreements>. See also US Immigration and Customs Enforcement (ICE), Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, <https://www.ice.gov/identify-and-arrest/287g> (accessed July 19, 2022).

¹⁸⁴ See Letter from American Civil Liberties Union, to Alejandro Mayorkas, Secretary of Homeland Security, April 28, 2021, <https://www.aclu.org/letter/letter-dhs-secretary-mayorkas-regarding-ice-detention> (accessed July 19, 2022).

- The US should end immigration programs that facilitate racial profiling, including the 287(g), Operation Stonegarden, and Secure Communities programs.

Racial Discrimination in the Regulation and Enforcement of Migration and Refugee Laws

ICERD protects non-citizens against discrimination on the basis of race, colour, descent, and national or ethnic origin, *regardless of whether they are lawfully admitted to the territory of a State Party*. The text of the Convention does not explicitly prohibit differential treatment on the basis of citizenship, but the CERD has clearly stated that, “differential treatment on the basis of citizenship or immigration status will constitute discrimination” under the Convention “if the criteria for such differentiation . . . are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”¹⁸⁵ Article 5 of ICERD further binds parties to eliminate discrimination and guarantee equality before the law in relation to several rights fundamental to non-citizens, including the right to equal treatment before tribunals, the right to freedom of movement within the borders of a state, and the right to leave any country, including one’s own.¹⁸⁶ Article 6 additionally requires States Parties to “assure to everyone within their jurisdiction effective protection and remedies” for instances of discrimination; this extends to non-citizens as well as citizens.¹⁸⁷

The United States has long acknowledged that “discrimination against immigrants” is one of the principal causative factors of the “subtle and elusive” forms of discrimination that “persist[s] in American society.”¹⁸⁸ Indeed, the United States’ combined first, second, and third report noted that there is a long history of “discriminatory provisions in US

¹⁸⁵ CERD, General Comment No. 14, Discrimination Against Non-Citizens, (2004), <https://www.refworld.org/docid/45139e084.html> (accessed July 29). The United States noted that the “The United States strongly shares the Committee’s view that citizens and noncitizens alike should enjoy protection of their human rights and fundamental freedoms” and therefore “prioritizes elimination of racial discrimination against all individuals, both citizens and noncitizens alike.” See CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports,” August 29, 2014, paras. 12-14.

¹⁸⁶ ICERD, art. 5. The CERD committee has noted that some of the rights enumerated in Article 5 are limited to citizens but has noted that “States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.” CERD, General Comment No. 14, Discrimination Against Non-Citizens, (2004), para. 3.

¹⁸⁷ ICERD, art. 6.

¹⁸⁸ Government of the United States, Initial, Second, and Third Periodic Report to the Committee on the Elimination of Racial Discrimination, October 10, 2000, para. 71.

immigration law and policy,” dating to the 19th century.¹⁸⁹ Notwithstanding the passage of anti-discrimination laws protecting non-citizens in and since 1965, the government has confirmed that “recent immigrants often encounter discrimination in employment, education, and housing as a result of persistent racism and xenophobia.”¹⁹⁰ According to the United States, discrimination against non-citizens has not meaningfully abated or diminished since it became a party to ICERD; indeed, in its combined fourth, fifth, and sixth periodic reports, the United States noted an “increase in bias crimes and related discriminatory actions against persons perceived to be Muslim, or of Arab, Middle Eastern, or South Asian descent.”¹⁹¹ In its most recent report, the United States highlighted an additional threat from violent domestic extremists driven by “long-standing racial and ethnic tension, including opposition to immigration.”¹⁹²

The CERD has made a series of recommendations about how the United States should more effectively protect non-citizens from discrimination. In 2014, the Committee called on the United States to ensure that the rights of non-citizens, “are fully guaranteed in law and in practice,” including by “abolishing ‘Operation Streamline’ [a program of mass criminal prosecution of migrants for unauthorized entry and reentry] and dealing with any breaches of immigration law through [a] civil, rather than criminal immigration system”; undertaking “thorough and individualized assessment concerning detention and deportation and guaranteeing access to legal representation in all immigration-related matters”;¹⁹³ reviewing “laws and regulations in order to protect migrant workers from exploitative and abusive working conditions”; and ratifying several International Labor Organization

¹⁸⁹ *Ibid.*, para. 13.

¹⁹⁰ *Ibid.*

¹⁹¹ Government of the United States, Sixth Periodic Report to the Committee on the Elimination of Racial Discrimination, CERD/C/USA/6, October 24, 2007, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2f6&Lang=en (accessed July 29, 2022), para. 54.

¹⁹² Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, December 20, 2021, para. 23.

¹⁹³ The CERD has recommended that States Parties “ensure the security of non-citizens, in particular with regard to arbitrary detention,” and additionally ensure that “conditions in centres for refugees and asylum-seekers meet international standards.” CERD, General Recommendation No. 30, Discrimination Against Non-Citizens, August 5, 2004, para. 19; CERD, “Training of Law Enforcement Officials in the Protection of Human Rights at para. 3.” General Recommendation No.13, (1993), <https://www.ohchr.org/en/resources/educators/human-rights-education-training/b-general-recommendation-xiii-training-law-enforcement-officials-protection-human-rights-1993> (accessed July 22, 2022); CERD, “Preventing and Combating Racial Profiling by Law Enforcement Officials,” General Recommendation No. 36, CERD/C/GC/36 (2020).

conventions.¹⁹⁴ As set out below, the US has failed to implement these recommendations and has both failed to protect migrants from prohibited discrimination and actively contributed to worsening of the discriminatory situation since last undergoing CERD review.

Multiple United States federal district courts have recently deemed the racist, xenophobic history of the US criminal reentry statute (one of two laws used in Operation Streamline) as relevant in analyzing the statute's application; one judge dismissed criminal charges based on a finding that the law was originally "enacted with discriminatory purpose"—indeed, would not have been enacted absent racial animus—and "has a disparate impact on Latinx persons."¹⁹⁵ Despite the CERD's recommendation that the US regulate migration exclusively as a civil and not a criminal matter, the United States continues to prosecute criminal entry and reentry crimes under these laws.¹⁹⁶

Naked xenophobia has been a major factor in US immigration policy since the last CERD review of the United States. Most significantly, former President Donald Trump actively promoted discrimination against migrants through a range of changes to US immigration law and policy, a number of which President Biden continues to enforce.¹⁹⁷ Ongoing and increased discriminatory treatment of non-citizens have taken the form of efforts to restrict access to the United States; disparate treatment of migrants in the custody of US

¹⁹⁴ CERD, "Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America," CERD/C/USA/CO/7-9, August 29, 2014, para. 18.

¹⁹⁵ See *United States v. Machic-Xiap*, Case No. 3:19-cr-407-SI (D. Or. 2021), <https://s3.documentcloud.org/documents/21034657/simonmachicxiaopinion.pdf> (accessed July 20, 2022) (refusing to dismiss but crediting showing of racial animus underlying enactment of applicable criminal statute); *United States v. Carrillo-Lopez*, Case No. 3:20-cr-00026-MMD-WGC (D. Nev. 2021), https://webshare.law.ucla.edu/CILP/Nevada_order_granting-Carrillo-Lopez.pdf (accessed July 20, 2022). See also Brief for Professors Lyttle Hernandez, Ngai and Eagly as Amici Curiae in *United States v. Palomar-Santiago* on Writ of Certiorari, Case No. 20-437 (2021), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/20-437_Amici_Brief.pdf (accessed July 20, 2022). This is the statute underlying mass prosecutions instituted under the Operation Streamline criticized by the CERD.

¹⁹⁶ Human Rights Watch, *Turning Migrants Into Criminals: the Harmful Impact of US Border Prosecutions* (New York: Human Rights Watch, 2013), <https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions>.

¹⁹⁷ See, e.g., Jayashri Srikantiah and Shirin Sinnar, "White Nationalism as Immigration Policy," *Stanford Law Review* 71 (2019): 197, accessed July 21, 2022, <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-Stan.-L.-Rev.-Srikantiah-Sinnar.pdf> ("The President's statements and policies suggest that he views US national identity in racial terms and seeks to preserve the nation's predominantly white identity.").

immigration authorities and in conferring immigration benefits; and the mistreatment of non-citizens by US state and local governmental authorities.

Workplace protections under international human rights law apply to all workers, regardless of citizenship status. However, fear of retaliation, including deportation, causes many workers who are unauthorized, who have family members who are undocumented, or otherwise have tentative immigration status to hesitate to speak up in the workplace or report abusive employers and working conditions.¹⁹⁸ These fears therefore have a massive impact on Black and brown workers' rights to fair pay and decent work conditions to the right to organize.

To address racial discrimination against migrants, the US should:

- Conduct a thorough review of all current immigration laws to determine racial or discriminatory motivations or effects. Repeal or reform immigration laws enacted to effectuate racial animus or those with a racially discriminatory impact.¹⁹⁹
- Establish a mechanism providing full and effective reparation, proportional to the gravity of the violation and the harm suffered, to those who were subjected to discriminatory expulsion, family separation, prosecution and imprisonment, arbitrary detention, detention in inhumane conditions or other rights violations as a result of the racially discriminatory impact of US immigration laws.

Restrictions on Entry and Access to Territory

In the reporting period there have been three particularly significant policies imposing discriminatory restrictions on entry and access to territory. First, the “discriminatory bans” (often called the “Muslim bans”) on entry to the United States that first targeted “primarily

¹⁹⁸ Letter from Human Rights Watch, to Eva Millona, Assistant Secretary for Partnership and Engagement, Department of Homeland Security et al., November 19, 2021, <https://www.hrw.org/news/2021/11/19/letter-public-officials-dhs-statement-worksite-enforcement> (accessed July 29, 2021).

¹⁹⁹ Letter from Cori Bush, Representative, House of Representatives et al. to Joseph R. Biden, President, United States, February 16, 2022, https://www.booker.senate.gov/imo/media/doc/booker_bush_lead_colleagues_in_urging_president_biden_to_reverse_in_humane_immigration_policies_negatively_impacting_black_migrants.pdf (accessed July 19, 2022).

Muslim countries”²⁰⁰ and then “African countries.”²⁰¹ In January 2021, the United States officially acknowledged that there were “discriminatory bans” on entry to the United States, which had been implemented by former President Trump and rescinded by President Biden. Commentators have pointed to the way in which anti-Muslim animus long operated as a form of racial discrimination in the US immigration system, prior to these bans on entry.²⁰² While the current administration rescinded the “discriminatory bans,” the administration has failed to adequately remedy past discriminatory exclusions implemented under the policy and the ongoing consequences of the discriminatory order for migrants currently seeking to enter the US.²⁰³

Second, the “migrant protection protocols” (MPP) (also known as “Remain in Mexico”) policy forces migrants and asylum-seekers attempting to enter the United States at the US-Mexico land border to remain outside the US until an administrative proceeding is held to consider their status.²⁰⁴ This results in harm in Mexico, heightened risk of refoulement to the country of origin and inadequate access to administrative proceedings including

²⁰⁰ “President Biden Removed the Muslim Ban but he Didn’t Fix the Harm,” International Refugee Assistance Project press release, April 7, 2022, <https://refugeerights.org/news-resources/president-biden-removed-the-muslim-ban-but-he-didnt-fix-the-harm-irap-files-lawsuit-on-behalf-of-separated-somali-refugee-family> (accessed July 21, 2022).

²⁰¹ The White House, “Proclamation on Ending Discriminatory Bans on Entry to the United States,” January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/> (accessed July 19, 2022).

²⁰² See, e.g., Zainab Ramahi, “The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future,” *California Law Review* 108 (2020): 557, accessed July 21, 2022, https://29qish1qx5q2k5d7b491joo-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/5-Ramahi_Muslim-Ban-Cases.pdf; Sahar Aziz, “The Muslim Ban Exposes the Racialization of Religion in America,” post to “UC Press” (blog), University of California Press, May 27, 2021, <https://www.ucpress.edu/blog/56304/the-muslim-ban-exposes-the-racialization-of-religion-in-america/> (accessed July 20, 2022).

²⁰³ *Mohamud et al. v. Department of Homeland Security et al.*, Case No. 3:22-cv-195 (Complaint), <https://refugeerights.org/wp-content/uploads/2022/04/ECF-001-Complaint.pdf> (accessed July 20, 2022); Letter from Mark Pocan, Representative, House of Representatives et al. to Antony Blinken, Secretary, US Department of State and Alejandro Mayorkas, Secretary, US Department of Homeland Security and Ur M. Jaddou, Director, US Citizenship and Immigration Services, April 7, 2022, <https://pocan.house.gov/sites/pocan.house.gov/files/documents/Muslim%20Ban%20Letter%20Final.pdf> (accessed July 20, 2022) (noting that, “refugees who were in the final stages of resettlement when the Muslim Ban was issued continue to be banned from the United States.”).

²⁰⁴ See Physicians for Human Rights, *Forced Into Danger* (Boston: PHR, 2021), https://phr.org/wp-content/uploads/2021/01/PHR-Report-Forced-into-Danger_Human-Rights-Violations-and-MPP-January-2021.pdf (accessed July 20, 2022); “Delivered to Danger,” Human Rights First campaign webpage, February 19, 2021, <https://www.humanrightsfirst.org/campaign/remain-mexico> (accessed July 20, 2022); “Remain in Mexico: Overview and Resources,” Human Rights Watch news release, February 7, 2022, <https://www.hrw.org/news/2022/02/07/remain-mexico-overview-and-resources>.

asylum hearings (in fact, in many instances, rulings by US immigration authorities occur in absentia, resulting in a denial of due process rights).²⁰⁵ The MPP mostly affects those nationalities that Mexico refused to permit the US to expel under Title 42 (see below), including Central Americans, Cubans, Ecuadorians, and Venezuelans. Additionally, human rights reporting has established that migrants subjected to this policy face discriminatory treatment in Mexico.²⁰⁶ This includes, for example, indigenous migrants who do not speak Spanish as their primary language and face mistreatment in Mexico.²⁰⁷ While the Biden administration attempted to end this policy, a lawsuit brought by conservative governors in Texas and Mississippi forced the administration to reinstate it.²⁰⁸ On June 30, 2022, the US Supreme Court—which did not review how the program exposed migrants to discrimination—held that the Biden Administration is able to end the program.²⁰⁹

The third discriminatory policy involves the expulsion of asylum-seekers who approach the southern land border under a dated public health directive codified at Title 42 of the US Code. Title 42, when applied in this manner, conflicts with the right to seek asylum set out in Title 8; nonetheless the government continues to use this public health law to expel

²⁰⁵ “Q & A on the Trump Administration’s Remain in Mexico Program,” Human Rights Watch news release, January 29, 2020, <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program>; “Remain in Mexico Harms Children, Families,” Human Rights Watch news release, January 6, 2021, <https://www.hrw.org/news/2021/01/06/us-remain-mexico-harms-children-families>; “Mexico Abuses Against Asylum Seekers at the US Border,” Human Rights Watch news release, March 5, 2021, <https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border>; “Remain in Mexico Program is Harming Children,” Human Rights Watch news release, February 12, 2020, <https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children>; Human Rights Watch, *We Can’t Help You Here: US Returns Asylum Seekers to Mexico* (New York: Human Rights Watch, 2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>; “LGBT Asylum Seekers in Danger at the Border,” Human Rights Watch news release, May 31, 2022, <https://www.hrw.org/news/2022/05/31/us-lgbt-asylum-seekers-danger-border>.

²⁰⁶ The Committee has noted the prevalence of discrimination, including against migrants, in Mexico. CERD, “Concluding observations on the combined eighteenth to twenty-first periodic reports of Mexico,” CERD/C/MEX/CO/18-21, 2019, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/MEX/CO/18-21&Lang=En (accessed July 21, 2022); Black Alliance for Just Immigration, “*There is a Target on Us*” – *The Impact of Mexico’s Anti-Black Racism on African Migrants at Mexico’s Southern Border* (Brooklyn: BAIJ, 2021), <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf> (accessed July 21, 2022).

²⁰⁷ Human Rights Watch, *Like I’m Drowning: Children and Families Sent to Harm by the US ‘Remain in Mexico’ Program* (New York: Human Rights Watch, 2021), <https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program>; Human Rights First, “Inhumane Again,” 2021, <https://www.humanrightsfirst.org/sites/default/files/Inhumane%20Again-%20Remain%20in%20Mexico%20Rollout%20Confirms%20Endemic%20Flaws%20of%20Unfixable%20Policy.pdf> (accessed July 26, 2022).

²⁰⁸ *Biden v. Texas*, Case No. 597 US ___ (2022), https://www.supremecourt.gov/opinions/21pdf/21-954_7l48.pdf.

²⁰⁹ *Ibid.*

asylum-seekers.²¹⁰ The United States has carried out over 1.2 million expulsions under Title 42, a practice that has disproportionately impacted Black, Indigenous, and Latinx asylum-seekers, particularly from Central America, Africa, and Haiti as these migrants typically cannot access visas to enter the US via air travel).²¹¹ In one high-profile instance, after a large number of Haitian asylum-seekers arrived in Del Rio, Texas in September 2021, the Biden administration sent a series of Title 42 expulsion flights to Haiti, exposing well over 10,000 asylum-seekers to conditions the US government previously recognized as being too dangerous and precarious for safe return.²¹² In 2021, CBP officers were videotaped whipping Haitian asylum-seekers from horseback.²¹³ The use of Title 42 denies vast numbers of asylum-seekers arriving at the border the opportunity to demonstrate their claim of persecution and/or challenge their refoulement.²¹⁴ Title 42 expulsions stand in

²¹⁰ “US: Title 42 Policy to Expel Migrants at the Border,” Human Rights Watch news release, April 8, 2021, <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border>.

²¹¹ See United States Customs and Border Protection, “Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions 2021,” July 15, 2022, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (accessed July 20, 2022). The Committee against Torture, which provides authoritative interpretation of the CAT, is clear that the duty not to return applies “equally” in cases where a government “is unable to prevent” acts of severe abuse committed by nonstate actors. Moreover, Haitians, Nicaraguans, Mexicans, and other asylum-seekers expelled by the United States to their home countries under Title 42 have consistently reported that they have been denied the opportunity to raise their fears of persecution or torture prior to their return. There is overwhelming evidence that the United States is failing to provide even the unduly restrictive so-called “shout test” to migrants under Title 42 (i.e., a chance for a referral if a migrant makes a “spontaneous and reasonably believable claim” that they fear being tortured). As of November 2021, only 3,217 migrants were referred for screening out of 1,163,000 border expulsions under Title 42 since March 2020; and of these, only 272 passed their initial screening interviews.

²¹² Tweet of Camilo Montoya-Galvez (@camiloreports), “New numbers: Yesterday, the U.S. expelled 726 Haitians, including 358 parents and children processed as families — the highest single-day tally during the”, Twitter, September 30, 2021, 11:43am, <https://twitter.com/camiloreports/status/1443602446677389313> (accessed July 20, 2022) (5,358 Haitians have been expelled since September 19, according to the latest US DHS data); United States Federal Register, “Designation of Haiti or Temporary Protected States,” August 3, 2021, <https://www.federalregister.gov/documents/2021/08/03/2021-16481/designation-of-haiti-for-temporary-protected-status> (accessed July 21, 2022); Chandelis Duster and Etant Dupain “Special envoy for Haiti resigns citing ‘inhumane’ US decision to deport thousands of Haitians from US border,” *CNN*, September 23, 2021, <https://www.cnn.com/2021/09/23/politics/daniel-foote-haiti/index.html> (accessed July 29, 2022). Former US Special Envoy Daniel Foote has called Haiti a highly dangerous “collapsed state” that may have the highest kidnapping rate in the world.

²¹³ AJ McDougall, “Border Patrol Agent on Horseback Filmed Whipping Haitian Asylum Seekers,” *Daily Beast*, September 20, 2021, <https://www.thedailybeast.com/us-border-patrol-agent-filmed-whipping-charging-on-horseback-at-haitian-asylum-seekers-on-rio-grande> (accessed July 21, 2022).

²¹⁴ Former US State Department Legal Advisor Harold Koh pointed out that the US applies Title 42 to individuals “to whom our legal obligations under the Refugee treaties and parallel statutes have undeniably attached,” but provides no affirmative screening for an individual’s fear of persecution. That omission “inevitably create[s] an unacceptably high risk that a great many people deserving of asylum will instead likely be returned to countries where they fear persecution, death, or torture.” The Title 42 policies thus “violate our legal obligation not to expel or return (“refouler”) individuals”— “especially migrants

stark contrast to the actions the Biden administration has taken to grant exemptions to the application of Title 42 for the (primarily white) people fleeing from Ukraine.²¹⁵ Aspects of Title 42 are being litigated in various cases and the US Court of Appeals for the District of Columbia Circuit has held that aspects of the policy are likely unlawful, although not on the basis of disparate or discriminatory impact.²¹⁶

To address discriminatory restrictions on entry and access to territory, the US should:

- Ensure non-discriminatory access to US territory and to individual status determination procedures run by US officials with trauma-informed training in US asylum law and whose mission is humanitarian and not focused on border security.
- Repeal and replace orders, statutes, and regulations that have been used to exclude and/or expel migrants and asylum-seekers in a discriminatory manner.
- Publicly track and report data demonstrating the effect of border policies by race and ethnicity.

Border Enforcement, Detention, and the Granting of Immigration Benefits

In addition to border policies seeking to prevent migrants and asylum-seekers from ever setting foot in the United States, US immigration enforcement at the border and in the interior of the US has a disparate impact on the basis of race. This is caused in part by the failure of US constitutional interpretation to prohibit racial profiling in immigration enforcement and the continued reliance on racial profiling in border and national security enforcement.²¹⁷ It is also the product of the intersection between structural discrimination

fleeing from Haiti.” Letter from Harold Koh, Legal Advisor, US Department of State, October 2, 2021, <https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddb3ae0000> (accessed July 26, 2022).

²¹⁵ Jasmine Aguilera, “Where Migrants Suffered Matters at the US-Mexico Border,” *TIME*, April 13, 2022, <https://time.com/6166535/ukrainians-mexico-border-title-42/> (accessed July 21, 2022); Clara Long and Ari Sawyer (Human Rights Watch), “US is Playing Politics with Migrant Lives,” Op-ed, *Bangor Daily News*, May 1, 2022, <https://www.hrw.org/news/2022/05/01/us-playing-politics-migrant-lives> (accessed July 26, 2022).

²¹⁶ *Huisha-Huisha v. Mayorkas*, Case No. 1:21-cv-00100 (2022), <https://www.aclu.org/legal-document/huisha-huisha-v-mayorkas-appeals-court-decision> (accessed July 21, 2022).

²¹⁷ See Devon W. Carbado and Cheryl I. Harris, “Undocumented Criminal Procedure,” *UCLA Law Review* 58, no. 1543 (2011): accessed July 28, 2022, <https://www.uclalawreview.org/undocumented-criminal-procedure/>; Matt Apuzo and Michael Schmidt, “US to Continue Racial, Ethnic Profiling in Border Policy,” *New York Times*, December 6, 2014, <https://www.nytimes.com/2014/12/06/us/politics/obama-to-impose-racial-profiling-curbs-with-exceptions.html> (accessed

in the US criminal legal system and deportation law. One recent study, reviewing over 13,000 stops by law enforcement officials in the US State of Michigan, found clear evidence that CBP uses “racial profiling to target immigrants from Latin America and other people of color.”²¹⁸ As Arnulfo Gomez described in relation to one such stop, “there was no reason for us to have been pulled over just because of the color of our skin. Everything that happened to us was wrong. We were being targeted just because we are Hispanic.”²¹⁹

Another recent study found that Black immigrants are more likely to be detained in connection with criminal convictions than the immigration population overall and ultimately more likely to be removed due to a criminal conviction, often despite having lived in the United States for long periods and having strong community ties.²²⁰ Evidence demonstrates that the United States consistently returns Black and Latinx migrants to countries where they are at risk.²²¹

Once apprehended, asylum-seekers and other migrants are subjected to prolonged and arbitrary immigration detention, often in abusive conditions and without adequate health care. Most migrants are also forced to navigate civil proceedings related to their status without legal representation. The United States operates the largest immigration detention system in the world. On a given day, tens of thousands of immigrants are detained on the

July 21, 2022). United States Department of Homeland Security, “Fact Sheet: U.S. Department of Justice Racial Profiling Guidance,” December 2014, <https://www.dhs.gov/news/2014/12/08/fact-sheet-us-department-justice-racial-profiling-guidance> (accessed July 21, 2022).

²¹⁸ American Civil Liberties Union of Michigan, “The Border’s Long Shadow: How Border Patrol Uses Racial Profiling and Local and State Police to Instill Fear in Michigan’s Immigrant Communities,” March 25, 2021, <https://www.aclumich.org/en/publications/borders-long-shadow> (accessed July 22, 2022). See also Walter Ewing, “The Legacy of Racism within the Border Patrol,” American Immigration Council, 2021, <https://www.americanimmigrationcouncil.org/research/legacy-racism-within-us-border-patrol> (accessed July 21, 2022).

²¹⁹ “Mr. Gomez’s statement of being racially profiled by Border Patrol,” March 23, 2021, video clip, YouTube, <https://www.youtube.com/watch?v=xuVKC7oBOUo> (accessed July 21, 2022).

²²⁰ New York University Law School Immigrant Rights Clinic & Black Alliance for Just Immigration, *The State of Black Immigrants* (Brooklyn: BAJI, 2020), <https://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf> (accessed July 21, 2022), p. 4.

²²¹ Human Rights Watch has documented such cases in Honduras, El Salvador, Mexico, and Haiti. In February 2022, Human Rights Watch reported on the cases of Cameroonian asylum-seekers who were deported by the US to face arbitrary arrest and detention, rape, torture, and other abuse. Human Rights Watch, *How Can You Throw Us Back: Asylum Seekers Abused in the US and Deported to Harm in Cameroon* (New York: Human Rights Watch, 2022), <https://www.hrw.org/report/2022/02/10/how-can-you-throw-us-back/asylum-seekers-abused-us-and-deported-harm-cameroon>.

basis of their status as a migrant.²²² US law mandates detention in many cases.²²³ Myriad reports have documented the abysmal conditions to which immigration detainees are subjected.²²⁴ Many detention facilities are operated by private corporations under contracts with the US government; approximately 80 percent of immigrant detainees are held in detention facilities owned or operated by private prison companies.²²⁵ Research has shown that failures by ICE aggravated the risk of Covid-19 infections and that ICE transfers of detainees without prior testing effectively amplified contagion.²²⁶ Detainees who have protested unsafe living conditions, including through the use of hunger strikes, have been subjected to retaliation, violence, and involuntary medical procedures, including force feeding and forced urinary catheterization.²²⁷ While the US does not

²²² Emily Ryo and Ian Peacock, “A National Study of Immigration Detention in the United States,” *Southern California Law Review* 92 (2018): accessed July 28, 2022, https://southerncalifornialawreview.com/wp-content/uploads/2019/11/92_1_1.pdf; Emily Kassie, “Detained,” Marshall Project, 2019, <https://www.themarshallproject.org/2019/09/24/detained> (accessed July 21, 2022).

²²³ Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, December 20, 2021, para. 88.

²²⁴ Human Rights Watch, *Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention* (New York: Human Rights Watch, 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>; Human Rights Watch, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention* (New York: Human Rights Watch, 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration>. American Civil Liberties Union, Human Rights Watch, and National Immigrant Justice Center, *Justice-Free Zones: Immigration Detention Under the Trump Administration* (New York: ACLU, 2020), <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration> (accessed July 29, 2022) (providing a comprehensive examination of changes to the immigration detention system under the Trump administration).

²²⁵ Eunice Cho, “More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration,” American Civil Liberties Union, October 5, 2021, <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration> (accessed July 21, 2022).

²²⁶ See, e.g., American Civil Liberties Union, Human Rights Watch, and National Immigrant Justice Center, *Justice-Free Zones: Immigration Detention Under the Trump Administration* (New York: ACLU, 2020), <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration> (accessed July 29, 2022), p. 4 (“unsanitary living conditions, many of which contained beds, dining, and restroom facilities for up to nearly 100 people all in one room”); see also Brennan Center for Justice, “Immigration Detention and Covid-19,” January 7, 2022, <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19> (accessed July 21, 2022); University of California Los Angeles Law School, “ICE Scorecard,” UCLA Law COVID Behind Bars Data Project, 2022, <https://uclacovidbehindbars.org/ice/#scorecard> (accessed July 21, 2022); William Lopez et al., “Preventing the Spread of COVID-19 in Immigration Detention Requires the Release of Detainees,” *American Journal of Public Health* 111 (2021): pp. 110-115, accessed July 21, 2022, doi: abs/10.2105/AJPH.2020.305968.

²²⁷ For example, one detainee who began a hunger strike was locked in a freezing cold room, force-fed through a tube against his will, and transferred between three different facilities. Other hunger strikers have been subjected to solitary confinement, forced urinary catheterization, and psychological coercion including denying basic privileges. American Civil Liberties Union and Physicians for Human Rights, *Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in US Immigration Detention* (New York: ACLU, 2021), <https://www.aclu.org/report/report-behind-closed-doors-abuse-retaliation-against-hunger-strikers-us-immigration-detention> (accessed July 20, 2022), pp. 7-8.

adequately make available relevant data disaggregated by race or ethnicity, Black and brown migrants are disparately impacted by the harms of immigration detention. While Black immigrants make up only 4.8% of detained immigrants facing deportation before the Executive Office for Immigration Review (EOIR), they make up 17.4% of detained immigrants facing deportation before the EOIR on criminal grounds.²²⁸ Data shows that ICE disproportionately places Black migrants in solitary confinement and subjects them to disproportionately long periods in detention.²²⁹

The US represented to CERD that it had made changes in response to the Committee’s 2014 recommendations regarding legal counsel and individualized status assessments, noting that ICE hired a “Legal Access Coordinator” who seeks to “enhance detained individuals’ access” to legal counsel.²³⁰ The US, however, continues to constrain access to legal counsel for detained migrants, requiring them to “secure legal representation at their own expense, find pro bono representation,” or navigate the system alone.²³¹ Moreover, a recent report found that ICE systematically restricts the most basic modes of communication, such as in-person legal visits, telephones, and legal mail, that detained people need to use to connect with legal counsel.²³² The vast majority of detained immigrants are without counsel.²³³ This is problematic not only because those detained are disproportionately Black and brown, but also because detained immigrants who have

²²⁸ New York University Law School Immigrant Rights Clinic & Black Alliance for Just Immigration, *The State of Black Immigrants* (Brooklyn: BAJI, 2020), <https://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf> (accessed July 21, 2022), p. 28; Letter from Cori Bush, Representative, House of Representatives et al., February 16, 2022.

²²⁹ Tulane University Law School, *No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana* (New Orleans: TULS, 2021), <https://law.tulane.edu/sites/law.tulane.edu/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf> (accessed July 20, 2022); Konrad Franco et al., “Punishing Status and the Punishment Status Quo,” *Punishment & Society* 4 (2020), accessed July 21, 2022, <https://osf.io/preprints/socarxiv/zdy7f/>.

²³⁰ Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, December 20, 2021, para. 89.

²³¹ American Civil Liberties Union, Human Rights Watch, and National Immigrant Justice Center, *Justice-Free Zones: Immigration Detention Under the Trump Administration* (New York: ACLU, 2020), <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration> (accessed July 29, 2022), p. 20.

²³² American Civil Liberties Union, *No Fighting Chance: ICE’s Denial of Access to Counsel in U.S. Immigration Detention Facilities* (New York: ACLU, 2022), <https://www.aclu.org/report/no-fighting-chance-ices-denial-access-counsel-us-immigration-detention-centers> (accessed July 21, 2022).

²³³ Some experts estimate that 86 percent of detained immigrants go through proceedings without counsel. See Ingrid V. Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review* 164 (2015): accessed July 21, 2022, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review.

lawyers obtain relief from removal at a rate of more than ten times higher than those who do not.²³⁴ Calls for universal representation have pointed out that provision of counsel can help eliminate bias and discrimination in the allocation of legal services.²³⁵

ICERD’s mandate that States Parties “take effective measures” to ensure that their policies accord with the treaty cannot be accomplished without accurate data. Unfortunately, the US government does not publish or collect adequate data about border deaths, distress calls, and other border enforcement actions, nor about immigration enforcement, detention, use of force incidents, removals, or DHS civil rights and civil liberties complaints or investigations. Such information should be collected and disaggregated by race, ethnicity, nationality, immigration status, gender, age, disability, and other criteria.

To address discrimination in border and immigration enforcement, the US should:

- Revise guidance on the use of racial profiling by federal law enforcement to eliminate the existing border and national security loopholes and prohibit discrimination based on actual or perceived race, ethnicity, religion, nationality, and English proficiency.
- Gradually abolish immigration detention.
- Repeal laws mandating detention and invest in community-based social services as alternatives to detention without furthering surveillance of immigrants as an alternative to detention.
- Establish, by statute or regulation, binding minimum standards for conditions of detention.
- Establish, by statute or regulation, access to government-provided counsel for all migrants in proceedings regarding their status as a migrant, and ensure timely and confidential access to in-person, telephone, and video conferencing as well as legal mail in detention.
- Publicly track and report data demonstrating the effect of immigration enforcement and benefits policies by race, ethnicity, and other disaggregated bases.

²³⁴American Civil Liberties Union, Human Rights Watch, and National Immigrant Justice Center, *Justice-Free Zones: Immigration Detention Under the Trump Administration* (New York: ACLU, 2020), <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration> (accessed July 29, 2022), p. 20.

²³⁵ See, e.g., Annie Chen, “Universal Representation Advances Racial Equity for Immigrants Facing Deportation,” Vera Institute for Justice news release, October 15, 2020, <https://www.vera.org/news/universal-representation-advances-racial-equity-for-immigrants-facing-deportation> (accessed July 28, 2022).

- Prioritize and facilitate country visits by the UN Special Rapporteur on the human rights of migrants and provide unimpeded access to all places of detention.

Actions by State and Local Governments

Currently, one of the most high-profile areas of concern is immigration enforcement by certain US state and local governments.²³⁶ In Texas, for example, the state governor claimed that the state is under threat from migrants “from countries you haven’t even heard of before” and has repeatedly used the rhetoric of “invasion.”²³⁷ The state’s Operation Lone Star, just one part of anti-immigrant actions taken by the state, has aggressively used selective enforcement of the misdemeanor offense of criminal trespass to justify the arrest and detention of thousands of alleged migrants in a newly created segregated criminal legal system with separate dockets, public defender assignments, jails, and booking facilities.²³⁸ As of March 2022, Texas had deployed state troopers and mass-mobilized members of the National Guard, who made at least 208,000 arrests.²³⁹ Affidavits of arresting officers reveal that arrests are based on racial and national origin profiling, repeatedly describing those arrested as “Hispanic” and “undocumented.”²⁴⁰

²³⁶ See Karla McKanders, “Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws,” *Harvard Journal of Racial & Ethnic Justice* 26 (2010): 163-210, accessed July 21, 2022, <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2014&context=faculty-publications> (theorizing that state and local anti-immigrant laws lead to the segregation, exclusion, and degradation of Latinx people from society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second class citizenship.).

²³⁷ Letter from Katheryn Huddleston, Staff Attorney, American Civil Liberties Union et al., to Merrick Garland, Attorney General, US Department of Justice et al., December 15, 2021, https://www.aclutx.org/sites/default/files/field_documents/ols_trespass_arrest_title_vi_complaint.pdf (accessed July 21, 2022). See also Lomi Kriel and Perla Trevizo, “Reality Check: 7 Times Texas Leaders Misled the Public About Operation Lonestar,” *Marshall Project*, April 27, 2022, <https://www.themarshallproject.org/2022/04/27/reality-check-seven-times-texas-leaders-misled-the-public-about-operation-lone-star> (accessed July 21, 2022); J. David Goodman and Edgar Sandoval, “Abbott Threatens to Declare an ‘Invasion’ as Migrant Numbers Climb,” *New York Times*, April 30, 2022, <https://www.nytimes.com/2022/04/30/us/texas-border-abbott.html> (accessed July 21, 2022).

²³⁸ Letter from Katheryn Huddleston, Staff Attorney, American Civil Liberties Union et al., December 15, 2021; See also, “Inside Operation Lone Star,” *New York Times*, May 19, 2022, <https://www.nytimes.com/2022/05/19/podcasts/the-daily/texas-mexico-border-greg-abbott.html> (accessed July 21, 2022); Letter from Raquel Aldana, Professor of Law, UC Davis School of Law et al., to Merrick Garland, Attorney General, US Department of Justice et al., January 21, 2022, <https://www.americanbar.org/content/dam/aba/administrative/crsj/webinar/february-2022/law-professor-letter-operation-lone-star.pdf> (accessed July 21, 2022).

²³⁹ Emily Hernandez, “What is Operation Lone Star?,” *Texas Tribune*, March 30, 2022, <https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained/> (accessed July 21, 2022).

²⁴⁰ Letter from Katheryn Huddleston, Staff Attorney, American Civil Liberties Union et al., December 15, 2021, pp. 12, 22.

These criminal proceedings have resulted in prolonged detention in egregious conditions; many cases have been dismissed for lack of probable cause.²⁴¹ Most recently, in an aggressive escalation of these policies, the state of Texas announced it would return those suspected of being migrants to the border, raising a host of legal concerns.²⁴²

To address racial discrimination at the border, US jurisdictions should:

- Expand the federal investigation into discriminatory treatment of non-citizens under Operation Lone Star to encompass Texas' new EO authorizing state law enforcement officials target, arrest, and detain suspected migrants and transport them to the US-Mexico border.
- Issue guidance from DHS to its components affirming a policy of non-cooperation between DHS and the Operation Lone Star trespass arrest program.
- Take all measures, including litigation, to compel Texas to end Operation Lone Star and other discriminatory abuse of migrants.
- Immediately end federal funding for the agencies and counties engaged in the abusive Operation Lone Star border initiative, even as the Justice Department conducts an inquiry into the operation.

²⁴¹ Ibid.; Letter from Katheryn Huddleston, Staff Attorney, American Civil Liberties Union et al., to Merrick Garland, Attorney General, US Department of Justice et al., February 23, 2022, https://www.aclutx.org/sites/default/files/operation_lone_star_title_vi_supplemental_complaint.pdf (accessed July 21, 2022); Letter from Katheryn Huddleston, Staff Attorney, American Civil Liberties Union et al., to Merrick Garland, Attorney General, US Department of Justice et al., April 7, 2022, https://www.aclutx.org/sites/default/files/ols_supplemental_complaint_4.7.22.pdf (accessed July 21, 2022).

²⁴² "US: End Texas Assault on Migrants; Cut Funds," Human Rights Watch news release, July 11, 2022, <https://www.hrw.org/news/2022/07/11/us-end-texas-assault-migrants-cut-funds>.

Racial Discrimination in Public Services and Social Protection

Article 5 of ICERD provides that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone” to economic and social rights, including protection against unemployment, the right to medical care, social security, social services, and education, and just conditions of work and equal pay for equal work. Article 2 of ICERD further requires concrete state action to eliminate disparities in economic rights. However, racial minorities in the United States continue to suffer a lack of economic security compared to their white counterparts.

The median wealth of white households in the United States is significantly higher than that of Black, Indigenous, or Latinx households. This so-called racial wealth gap²⁴³ has grown since the country ratified ICERD, and the median wealth of white households is now at least ten-times that of the median Black household.²⁴⁴ A disproportionate share of people who are Black, Indigenous, Latinx, or immigrants live under the poverty line. The poverty rates of Black and Latinx people are twice as high than among white people.²⁴⁵

US Census Bureau data from²⁴⁶ September 2021 found that some 19 million adults lived in households with insufficient food and 11.9 million adults were behind on rent.²⁴⁷ According to data from the US Department of Agriculture, 19.1% of Black households and 15.6% of

²⁴³ Kimberly Amadeo, “Racial Wealth Gap: Statistics, Causes, How to Close it,” *Balance*, January 20, 2022, <https://www.thebalance.com/racial-wealth-gap-in-united-states-4169678> (accessed July 21, 2022).

²⁴⁴ Nora Cahill and William Gale, “Narrowing the Racial Wealth Gap using EITC and CTC,” Brookings Institute, February 2, 2022, <https://www.brookings.edu/blog/how-we-rise/2022/02/02/narrowing-the-racial-wealth-gap-using-the-eitc-and-ctc/> (accessed July 21, 2022).

²⁴⁵ Areeba Haider and Lorena Roque, “New Poverty and Food Insecurity Data Illustrate Persistent Racial Inequalities,” Center for American Progress, September 29, 2021, <https://www.americanprogress.org/article/new-poverty-food-insecurity-data-illustrate-persistent-racial-inequities/> (accessed July 21, 2022).

²⁴⁶ United States Census Bureau, “Household Pulse Survey: Measuring Social and Economic Impacts During the Coronavirus Pandemic,” June 1, 2022, <https://www.census.gov/programs-surveys/household-pulse-survey.html> (accessed July 21, 2022).

²⁴⁷ Erik Gartland, “Millions Still Months Behind on Rent After Eviction Moratorium Ends,” Center for Budget and Policy Priorities, September 24, 2021, <https://www.cbpp.org/blog/millions-still-months-behind-on-rent-after-eviction-moratorium-ends> (accessed July 21, 2022).

Hispanic households experienced food insecurity in 2019, compared to 7.9% of white Americans.²⁴⁸

The Covid-19 pandemic has only deepened these sharp disparities. The impacts of the pandemic and the economic fallout have been widespread, but remain particularly prevalent among Blacks, Latinx, and other people of color.²⁴⁹ Gaps in preparedness and response to the Covid-19 pandemic have disproportionately negatively burdened people of color,²⁵⁰ which has deepened existing racial injustices in health care,²⁵¹ housing,²⁵² employment,²⁵³ education,²⁵⁴ and wealth accumulation.²⁵⁵

Over the course of the pandemic, poverty fell overall due in part to the stimulus checks and unemployment benefits received by many.²⁵⁶ But the little progress made toward economic

²⁴⁸ Christina Silver, “Food Insecurity In The U.S. By The Numbers,” *National Public Radio*, September 27, 2020, <https://www.npr.org/2020/09/27/912486921/food-insecurity-in-the-u-s-by-the-numbers> (accessed July 21, 2022).

²⁴⁹ United States Census Bureau, “Income and Poverty in the United States: 2020,” September 2021, <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf> (accessed July 21, 2022).

²⁵⁰ “Human Rights Watch Testimony to US House of Representatives Ways and Means Committee,” Human Rights Watch written testimony to US House of Representatives Ways and Means Committee, June 10, 2020, <https://www.hrw.org/news/2020/06/10/human-rights-watch-testimony-us-house-representatives-ways-and-means-committee>.

²⁵¹ Ayana Bird, “COVID-19 Made It Impossible to Ignore Racial Disparities in Health Care. Here’s What’s Needed for Equity,” *Health*, March 1, 2021, <https://www.health.com/condition/infectious-diseases/coronavirus/covid-racial-disparities> (accessed July 21, 2022).

²⁵² Michal Grinstein-Weiss and Yung Chun, “Housing inequality gets worse as the COVID-19 pandemic is prolonged,” Brookings Institute, December 18, 2020, <https://www.brookings.edu/blog/up-front/2020/12/18/housing-inequality-gets-worse-as-the-covid-19-pandemic-is-prolonged/> (accessed July 21, 2022).

²⁵³ Ella Koeze, “A Year Later, Who Is Back and Who Is Not?,” *New York Times*, March 9, 2021, <https://www.nytimes.com/interactive/2021/03/09/business/economy/covid-employment-demographics.html> (accessed July 21, 2022).

²⁵⁴ Emma Dorn et al., “COVID-19 and learning loss- disparities grow and students need help,” McKinsey & Co., December 8, 2020, <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help> (accessed July 21, 2022).

²⁵⁵ Christian E. Weller and Richard Figueroa, “Wealth Matters: The Black-White Wealth Gap Before and During the Pandemic,” Center for American Progress, July 28, 2021, <https://www.americanprogress.org/article/wealth-matters-black-white-wealth-gap-pandemic/> (accessed July 21, 2022).

²⁵⁶ Heather Long and Amy Goldstein, “Poverty fell overall in 2020 as a result of massive stimulus checks and unemployment aid, Census Bureau says,” *Washington Post*, September 14, 2021, <https://www.washingtonpost.com/business/2021/09/14/us-census-poverty-health-insurance-2020/> (accessed July 21, 2022).

parity over the last year has stalled, as relief measures²⁵⁷ implemented in response to Covid-19 have been reduced, ended, or struck down by the courts. Today, the Black-white wealth gap²⁵⁸ is as big as it was in 1968.²⁵⁹

While the US has acknowledged these disparities, it has admitted to CERD that it has failed to invest sufficient resources to address them, leading to the persistence of deeply discriminatory health care, inadequate social safety nets, and segregated communities and schools.

Public Health during the Covid-19 Pandemic

Article 5 of ICERD provides that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms” in the right to “public health” and “medical care”²⁶⁰ and provide equal access to healthcare services.²⁶¹ CERD has specifically mandated that states address the disproportionate impact of the Covid-19 pandemic on racial minorities.²⁶² Where there are persistent disparities, ICERD requires states to affirmatively adopt measures to address them.

The Committee has expressed concern over the failure of the US to address racial disparities in access to affordable health care, as many states have opted out of the Medicaid expansion program, excluding substantial numbers of racial minorities. In addition, the Committee expressed concern that many states have explicitly excluded

²⁵⁷ Lena Simet and Amos Toh (Human Rights Watch), “Safety Net Needs More Than Stimulus Checks,” Op-ed, *Progressive Magazine*, June 23, 2021, <https://www.hrw.org/news/2021/06/23/safety-net-needs-more-stimulus-checks>.

²⁵⁸ Christian E. Weller and Richard Figueroa, “Wealth Matters: The Black-White Wealth Gap Before and During the Pandemic,” Center for American Progress, July 28, 2021, <https://www.americanprogress.org/article/wealth-matters-black-white-wealth-gap-pandemic/> (accessed July 21, 2022).

²⁵⁹ Heather Long and Andrew Van Dam, “The black-white economic divide is as wide as it was in 1968,” *Washington Post*, June 4, 2020, <https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/> (accessed July 21, 2022).

²⁶⁰ ICERD, art. 5; Brian D. Smedley et al., ed., “Unequal Treatment: Confronting Racial and Ethnic Disparities in Healthcare,” *National Academies Press* (2003): accessed July 21, 2022, doi: 10.17226/12875.

²⁶¹ ICERD, art. 5.

²⁶² Prevention of Racial Discrimination, Including Early Warning, and Urgent Action Procedures, Statement 3: Statement on the coronavirus (COVID-19) pandemic and its implications under the International Convention on the Elimination of All Forms of Racial Discrimination, August 4-7, 2020, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_SWA_9234_E.pdf (accessed July 21, 2022).

migrants from health care.²⁶³ In 2014, it recommended that the US “take concrete measures” to ensure individuals, “in particular racial and ethnic minorities who reside in states that have opted out of” the Affordable Care Act (ACA) and migrants have “access to affordable and adequate health-care services.”²⁶⁴ CERD has recommended that the US eliminate steep racial disparities in sexual and reproductive health, collect data, and improve monitoring and accountability systems.²⁶⁵ In the context of the Covid-19 pandemic, CERD has made clear that States are obligated to “ensure equal access” to medical care.²⁶⁶

Black, Latinx, and Indigenous communities continue to suffer profound disparities in rates of chronic health conditions, health outcomes, and access to quality health care.²⁶⁷ For example, these communities are disproportionately impacted both by diabetes and its negative health outcomes, and are especially vulnerable to the harmful human rights impact of insulin prices in the US.²⁶⁸ The Covid-19 pandemic has deepened existing racial

²⁶³ The committee expressed particular concern about the exclusion of undocumented immigrants and their children from the Affordable Care Act. CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports,” August 29, 2014, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf (accessed July 21, 2022), para. 15.

²⁶⁴ Ibid. Additionally, it highlighted “high levels of poverty and inadequate access to health care and education for migrant workers” as a central theme of its 2014 review. CERD, “List of themes in relation to the combined seventh to ninth periodic reports of United States of America,” CERD/C/USA/Q/7-9, July 7, 2014, para. 4.

²⁶⁵ Ibid.

²⁶⁶ CERD, 101st - 103rd Session, “Report on the Committee on the Elimination of Racial Discrimination,” A/76/18, 2021, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/243/15/PDF/G2124315.pdf?OpenElement> (accessed July 21, 2022).

²⁶⁷ Connor Maxwell and Sofia Carratala, “Health Disparities by Race and Ethnicity,” Center for American Progress, May 7, 2020, <https://www.americanprogress.org/article/health-disparities-race-ethnicity/> (accessed July 21, 2022).

²⁶⁸ Human Rights Watch, *If I’m out of Insulin, I’m Going to Die: United States’ Lack of Regulation Fuels Crisis of Unaffordable Insulin* (New York: Human Rights Watch, 2022), <https://www.hrw.org/report/2022/04/12/if-im-out-insulin-im-going-die/united-states-lack-regulation-fuels-crisis>.

injustices in health care²⁶⁹: minorities are more likely to suffer severe illness and die from Covid-19²⁷⁰ and face barriers to vaccine access.²⁷¹

Black people suffer from particularly acute racial disparities in maternal mortality and cervical cancer rates.²⁷² The maternal mortality rate for Black women is three times higher than white women and rose further between 2019 and 2020, driven by significant increases in the maternal mortality rate of Black and Latinx women.²⁷³ These deaths, and those from cervical cancer, are preventable. Indeed, in 2020, 194 countries committed to eliminating cervical cancer globally.²⁷⁴ In the US, Black women are more likely than white women to have never been screened for cervical cancer, are diagnosed at a later stage, and have lower survival rates.²⁷⁵ In the state of Alabama, Black women are nearly twice as likely to die of cervical cancer as white women.²⁷⁶

²⁶⁹ Ibid.; Ayana Bird, “COVID-19 Made It Impossible to Ignore Racial Disparities in Health Care. Here's What's Needed for Equity,” *Health*, March 1, 2021, <https://www.health.com/condition/infectious-diseases/coronavirus/covid-racial-disparities> (accessed July 21, 2022).

²⁷⁰ “US: Covid-19 Disparities Reflect Structural Racism, Abuses,” Human Rights Watch written testimony to US House of Representatives Ways and Means Committee, June 10, 2020, <https://www.hrw.org/news/2020/06/10/us-covid-19-disparities-reflect-structural-racism-abuses>.

²⁷¹ Nambi Ndugga, “Latest Data on COVID-19 Vaccinations by Race/Ethnicity,” Kaiser Family Foundation, April 7, 2022, <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-by-race-ethnicity/> (accessed July 21, 2022). Black people are more likely to suffer from pre-existing health conditions that increase the mortality rate of COVID-19. Rashawn Ray, “Why are Blacks dying at higher rates from COVID-19?,” Brookings Institute, April 9, 2020, <https://www.brookings.edu/blog/fixgov/2020/04/09/why-are-blacks-dying-at-higher-rates-from-covid-19/> (accessed July 21, 2022).

²⁷² Human Rights Watch, *We Need Access: Ending Preventable Deaths from Cervical Cancer in Rural Georgia* (New York: Human Rights Watch, 2022), <https://www.hrw.org/report/2022/01/20/we-need-access/ending-preventable-deaths-cervical-cancer-rural-georgia>. In 2021, an estimated 4,290 women in the United States died from cervical cancer, including disproportionately high numbers of Black women.

²⁷³ Donna L. Hoyert, “Maternal Mortality Rates in the United States, 2020,” Centers for Disease Control and Prevention, February 2020, <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm> (accessed July 21, 2022); Population Reference Bureau, “Black Women Over Three Times More Likely to Die in Pregnancy, Postpartum than White Women, New Research Finds,” December 6, 2021, <https://www.prb.org/resources/black-women-over-three-times-more-likely-to-die-in-pregnancy-postpartum-than-white-women-new-research-finds/> (accessed July 21, 2022).

²⁷⁴ World Health Organization, “A cervical cancer-free future: First-ever global commitment to eliminate a cancer”, November 17, 2020, <https://www.who.int/news/item/17-11-2020-a-cervical-cancer-free-future-first-ever-global-commitment-to-eliminate-a-cancer> (accessed July 21, 2022).

²⁷⁵ Human Rights Watch, *We Need Access*.

²⁷⁶ Human Rights Watch, *It Should Not Happen: Alabama's Failure to Prevent Cervical Cancer Death in the Black Belt* (New York: Human Rights Watch, 2018), <https://www.hrw.org/report/2018/11/29/it-should-not-happen/alabamas-failure-prevent-cervical-cancer-death-black-belt>.

Given this crisis in maternal mortality and access to care for people of color, the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization* to overturn the constitutional right to access an abortion in *Roe v. Wade* and related decisions will have a particularly profound and deadly impact on people of color.²⁷⁷ Black people have higher-risk pregnancies, are more than four times as likely to have had abortions as white pregnant people, are more likely to miscarry or have stillbirths compared to white pregnant people,²⁷⁸ and are more likely to live in states that restrict abortions.²⁷⁹

Migrants also suffer from acute health disparities, and some have no access to health care at all. Although some local policies provide undocumented immigrants with health care,²⁸⁰ the federal government continues to prevent undocumented and some legal immigrants from enrolling in ACA coverage and Medicaid.²⁸¹ The lack of access to adequate health care has exacerbated the effects of Covid-19 for immigrants, particularly undocumented populations in frontline jobs.²⁸²

State and federal prisons have failed to offer adequate health protection generally, and specifically against Covid-19. Covid-19 incidence and mortality rates were consistently

²⁷⁷ *Dobbs v. Jackson Women's Health Organization*, Case No. 19-1392 (June 24, 2022); *Roe v. Wade*, Case No. 410 U.S. 113 (1973). Jessica Arons, "With Roe Overturned, What Comes Next for Abortion Rights?," American Civil Liberties Union news release, June 24, 2022, <https://www.aclu.org/news/reproductive-freedom/what-comes-next-abortion-rights-supreme-court> (accessed July 21, 2022).

²⁷⁸ Fabiola Cineas, "Black women will suffer the most without Roe," *Vox*, June 29, 2022, <https://www.vox.com/2022/6/29/23187002/black-women-abortion-access-roe> (accessed July 21, 2022); Karen Attiah, "As abortion rights collapse, Black and Brown women will suffer most," *Washington Post*, July 1, 2022, <https://www.washingtonpost.com/opinions/2022/07/01/abortion-rights-loss-black-hispanic-women-suffer-most/> (accessed July 21, 2022).

²⁷⁹ *Ibid.*

²⁸⁰ In addition, in 2016, multiple federal agencies sent a joint letter to local agencies clarifying that immigration status is not a bar to providing certain services to protect the life or safety of individuals, including emergency shelter, community food banks, and medical and public health services. See Letter from Loretta E. Lynch, Attorney General, US Department of Justice, Sylvia M. Burwell, Secretary, US Department of Health and Human Services, Julián Castro, Secretary, US Department of Housing and Urban Development, to Recipients of Federal Financial Assistance, August 5, 2016, <https://www.hhs.gov/sites/default/files/Joint-Letter-August-2016.pdf> (accessed July 21, 2022).

²⁸¹ Louise Norris, "How immigrants can obtain health coverage," *Healthinsurance.org*, June 17, 2022, <https://www.healthinsurance.org/obamacare/how-immigrants-are-getting-health-coverage/#:~:text=Although%20the%20ACA%20provides%20benefits> (accessed July 21, 2022). Federal and state policies drive these disparities.

²⁸² See Luz M. Garcia, "COVID-19 pandemic: The impact on undocumented US families," *Medical News Today*, October 21, 2021, <https://www.medicalnewstoday.com/articles/covid-19-pandemic-the-impact-on-undocumented-us-families> (accessed July 21, 2022).

higher among the prison population than the overall US population in the first year of the pandemic, and the cumulative toll of Covid-19 has been several times greater among the prison population than the overall US population.²⁸³ The US's response continues to be inadequate; in immigration detention centers, COVID-19 infections have increased by more than 940 percent since January 2022, while ICE has only administered booster shots to 671 of the 22,000 people in ICE detention.²⁸⁴ Given the rapid spread of the virus behind bars, and the racially disproportionate prison population, Black and Latinx people have been particularly vulnerable.²⁸⁵ By May 2020, Black people accounted for 60% of Covid-19 deaths in the New York State prison system, despite comprising 48% of detainees.²⁸⁶

To eliminate racial disparities in public health, the US should:

- Improve the affordability and availability of health insurance for low- and middle-income earners. In particular, consider legislation to expand coverage for existing social protection programs like Medicaid and Medicare. In the absence of such legislation, Congress should take appropriate short-term remedial measures.
- Support community health workers and community-based approaches to reproductive health care that address healthcare access and the social determinants of health.

²⁸³ Neal Marquez et al., "COVID-19 Incidence and Mortality in federal and State Prisons Compared With the US Population, April 5, 2020, to April 3, 2021," *Jama Network* 326 (2021): 1865-1867, accessed July 21, 2022, https://jamanetwork.com/journals/jama/fullarticle/2784944?guestAccessKey=181638dd-e392-4de3-b5d2-ed11e01ee834&utm_source=twitter&utm_medium=social_jama&utm_term=5894518147&utm_campaign=article_alert&linkId=139429349.

²⁸⁴ "ACLU Sues on Behalf of Medically Vulnerable People Denied Covid-19 Booster Shots in Immigration Detention," American Civil Liberties Union press release, January 31, 2022, <https://www.aclu.org/press-releases/aclu-sues-behalf-medically-vulnerable-people-denied-covid-19-booster-shots> (accessed July 26, 2022).

²⁸⁵ Nikki Zinzuwadia, "Racial Disparities in Jails and Prisons: Covid-19's Impact on the Black Community," American Civil Liberties Union of West Virginia, June 12, 2020, <https://www.acluww.org/en/news/racial-disparities-jails-and-prisons-covid-19s-impact-black-community> (accessed July 21, 2022). In the US, Black people are imprisoned at six times the rate of white people, and Latinx people are imprisoned at three times the rate of white people; Black people make up 13% of the US population but 33% of the prison and jail population, while Latinx make up 18% of the US population and 23% of the prison population. FWD.us, "Racial Disparities in Incarceration and Coronavirus," 2020, https://www.fwd.us/wp-content/uploads/2020/04/CovidDecarceration_V3.pdf (accessed July 21, 2022).

²⁸⁶ In September 2021, Black people in Texas prisons were dying at a rate 1.6 times higher than their white counterparts. University of California Los Angeles Law School, "Study: Hispanic People in Texas Prisons Dying of COVID-19 at Rate Double Their White Peers, Black People Dying at Rate 1.6 Times," UCLA Law Covid Behind Bars Data Project, September 29, 2021, <https://uclacovidbehindbars.org/Texas-prison-deaths-racial-disparities> (accessed July 21, 2022); Vera Institute, "Incarceration Trends in New York," December 2019, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-new-york.pdf> (accessed July 21, 2022).

- Establish inclusivity policies that: support linguistic and racial diversity, including in federally qualified health clinics; and acknowledge, confront, and seek to remedy historic and current experiences of racial discrimination in public health, including by creating an official, confidential, and accessible complaint mechanism for patients who use federally qualified health facilities.

Inadequate Social Safety Net

ICERD requires states to guarantee the rights to social security and social services without distinction as to race,²⁸⁷ and the Committee has made clear that States are obligated to eliminate all forms of racial inequities, whether intentional or not.²⁸⁸ Despite these protections, Black and Latinx people continue to face underinvestment in social protection, which has contributed to profound disparities in poverty and economic security. While, in the past, America’s public benefits system helped reduce and prevent poverty and racial disparities by providing basic economic, food, childcare, and housing support, thereby preventing the intergenerational transmission of poverty, it has weakened substantially over the past decades.²⁸⁹

The inadequate support system has been driven by racial animus,²⁹⁰ community violence,²⁹¹ and discriminatory government policies based on racist stereotypes²⁹² as well

²⁸⁷ ICERD, art 5. In addition, under ICERD article 2(i)(c), states are required to review national and local policies and amend and nullify any laws and regulations that have the effect of creating or perpetuating racial discrimination.

²⁸⁸ CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports,” August 29, 2014, para. 5.

²⁸⁹ Alexandra Gaines, Bradley Hardy, and Justin Schweitzer, “How Weak Safety Net Policies Exacerbate Regional and Racial Inequality,” Center for American Progress, September 22, 2021, <https://www.americanprogress.org/article/weak-safety-net-policies-exacerbate-regional-racial-inequality/> (accessed July 21, 2022). The social safety net system consists of welfare programs, including the Supplemental Nutrition Assistance Program (SNAP) and Unemployment Insurance, which provide public benefits to people who meet certain income thresholds and requirements. Id.

²⁹⁰ Angelo Guo, “Addressing Structural Racism in Social Impact: Lessons from the Social Safety Net,” Georgetown University Beeck Center, August 28, 2020, <https://beeckcenter.georgetown.edu/addressing-structural-racism-in-social-impact-lessons-from-the-social-safety-net/> (accessed July 21, 2022).

²⁹¹ Jhacova Williams, Trevon Logan, and Bradley Hardy, “The Persistence of Historical Racial Violence and Political Suppression: Implications for Contemporary Regional Inequality,” *ANNALS of the American Academy of Political Science* 694 (2021): p. 92-107, accessed July 21, 2022, doi: 10.1177/000271622110116298.

²⁹² Madison Allen, “Racism in Public Benefit Programs: Where Do We Go from Here?,” The Center for Law and Social Policy blog post, July 23, 2020, <https://www.clasp.org/blog/racism-public-benefit-programs-where-do-we-go-here/> (accessed July 21, 2022).

as federal delegation to states.²⁹³ Although most safety net programs are federally funded, state control over program design, rules, and benefit levels has resulted in inconsistent protection and racial inequalities. Similar to problematic aspects of the Medicaid provision,²⁹⁴ US regions with larger populations of color have weaker safety nets and higher rates of economic hardship.²⁹⁵ For example, workers of color have higher unemployment rates and also are more likely to reside in states with weaker unemployment insurance systems and other safety net programs.²⁹⁶

The Covid-19 pandemic exacerbated the economic disparities and underlying conditions driving these inequalities, as Black and Latinx communities have experienced more job losses (and ensuing loss of health insurance), higher rates of infection and mortality, and greater likelihood of evictions and hunger than their white counterparts.²⁹⁷ Similarly, women are disproportionately impacted by the economic fallout of Covid-19²⁹⁸ For example, 40.8 percent of Black, non-Hispanic women and 44.6 percent of Latinas faced housing insecurity in mid-July 2020 compared to 15.4 percent of white, non-Hispanic men.

²⁹³ Alexandra Gaines, Bradley Hardy, and Justin Schweitzer, “How Weak Safety Net Policies Exacerbate Regional and Racial Inequality,” Center for American Progress, September 22, 2021, <https://www.americanprogress.org/article/weak-safety-net-policies-exacerbate-regional-racial-inequality/> (accessed July 21, 2022).

²⁹⁴ CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports,” August 29, 2014, para. 5.

²⁹⁵ Alexandra Gaines, Bradley Hardy, and Justin Schweitzer, “How Weak Safety Net Policies Exacerbate Regional and Racial Inequality,” Center for American Progress, September 22, 2021, <https://www.americanprogress.org/article/weak-safety-net-policies-exacerbate-regional-racial-inequality/> (accessed July 21, 2022).

²⁹⁶ *Ibid.*

²⁹⁷ Areeba Haider and Lorena Roque, “New Poverty and Food Insecurity Data Illustrate Persistent Racial Inequalities,” Center for American Progress, September 29, 2021, <https://www.americanprogress.org/article/new-poverty-food-insecurity-data-illustrate-persistent-racial-inequities/> (accessed July 21, 2022); Pramod Acharya, “COVID-19 has plunged more people of color into food insecurity,” *Counter*, September 8, 2020, <https://thecounter.org/covid-19-people-of-color-food-insecurity> (accessed July 21, 2022); Sophia Wedeen, “Black and Hispanic Renters Face Greatest Threat of Eviction in Pandemic,” Joint Center for Housing Studies of Harvard University, January 11, 2021, <https://www.jchs.harvard.edu/blog/black-and-hispanic-renters-face-greatest-threat-eviction-pandemic> (accessed July 21, 2022). Jobs in low-paying industries—disproportionately held by people of color—decreased more than twice as much as jobs in medium-wage industries and nearly four times in high-wage industries. Elise Gould and Valerie Wilson, “Black workers face two of the most lethal preexisting conditions for coronavirus racism and economic inequality,” Economic Policy Institute, June 1, 2020, <https://www.epi.org/publication/black-workers-covid/> (accessed July 21, 2022); Danilo Trisi and Matt Saenz, “Economic Security Programs reduce Overall Poverty, Racial and Ethnic Inequalities,” Center on Budget and Policy Priorities, July 1, 2021, <https://www.cbpp.org/research/poverty-and-inequality/economic-security-programs-reduce-overall-poverty-racial-and-ethnic> (accessed July 21, 2022).

²⁹⁸ Jasmine Tucker and Claire Ewing-Nelson, “COVID-19 Is Making Women’s Economic Situation Even Worse,” National Women’s Law Center, September 2020, <https://nwlc.org/wp-content/uploads/2020/09/PulsedataFS-1.pdf> (accessed July 21, 2022).

These rates were higher for households with children (45.2 percent for Black, non-Hispanic women with children and 48.8 percent for Latinas with children). In addition, in April 2020, less than half of the adult Black population was employed and the Black and white unemployment gap widened to 5.3 percentage points.²⁹⁹ Only 36 percent of households earning under \$50,000 that lost jobs received unemployment benefits.³⁰⁰ Women, especially women of color, have disproportionately suffered from pandemic job losses.³⁰¹ As of late 2020, Black women’s employment fell 18.2 percent from its peak compared with 16.7 percent for white women. In September 2020, white women’s employment recovered while Black women’s employment remained low. Latina women have also experienced dramatic employment and labor force declines.

Although the US issued stimulus checks and other relief, these measures could not repair the social safety net shredded by decades of budget cuts and draconian rules.³⁰² In addition, there were racial disparities in the provision of the Coronavirus Aid Relief, and Economic Security (CARES) Act economic impact payments.³⁰³ Undocumented immigrants were also largely left without relief during the pandemic as they and other immigrants were ineligible for pandemic-related stimulus checks, temporary family assistance (TANF), and

²⁹⁹ Angelo Guo, “Addressing Structural Racism in Social Impact: Lessons from the Social Safety Net,” Georgetown University Beec Center, August 28, 2020, <https://beeccenter.georgetown.edu/addressing-structural-racism-in-social-impact-lessons-from-the-social-safety-net/> (accessed July 21, 2022).

³⁰⁰ Lena Simet and Amos Toh (Human Rights Watch), “Safety Net Needs More Than Stimulus Checks,” Op-ed, *Progressive Magazine*, June 23, 2021, <https://www.hrw.org/news/2021/06/23/safety-net-needs-more-stimulus-checks>. Workers struggled to even access unemployment benefits because of stringent eligibility requirements and inaccessible state agencies. Id.

³⁰¹ Michael Madowitz, “The Shambolic Response to the Public Health and Economic Crisis Has Women on the Brink as the Job Recovery Stalls,” Center for American Progress, October 22, 2020, <https://www.americanprogress.org/article/shambolic-response-public-health-economic-crisis-women-brink-job-recovery-stalls/> (accessed July 21, 2022).

³⁰² The use of these checks showed the depths of racial disparities: 88 percent of Black adults relied on the payments for at least one of four basic necessities versus 66 percent of white adults. Lena Simet and Amos Toh (Human Rights Watch), “Safety Net Needs More Than Stimulus Checks,” Op-ed, *Progressive Magazine*, June 23, 2021, <https://www.hrw.org/news/2021/06/23/safety-net-needs-more-stimulus-checks>.

³⁰³ Ibid. According to one survey, while 74 percent of whites received the May 2020 Economic Impact payment, 67 percent of Blacks and 64 percent of Hispanics received payments and only 54 percent Hispanics adults in families with non-citizens. Janet Holtzblatt and Michael Karpman, “Who Did Not Get the Economic Impact Payments by Mid-to-Late May, and Why?,” Urban Institute, July 2020, https://www.urban.org/sites/default/files/publication/102565/who-did-not-get-the-economic-impact-payments-by-mid-to-late-may-and-why_o.pdf (July 21, 2022).

food stamps.³⁰⁴ Many immigrants eligible for unemployment relief were effectively denied relief because many states failed to translate application forms and other essential documents.³⁰⁵ Child poverty increased by 41 percent within a month after the US let its expanded child tax credit expire at the end of 2021, pushing 3.7 million more children into poverty. Black and Latinx children experienced the highest percentage point increases in poverty, 5.9 percent and 7.1 percent respectively.³⁰⁶

Without effective social safety nets, families are also at risk of lengthy separation. Nationally, more than 75 percent of child welfare cases involve neglect, which occurs when a parent or caregiver fails to provide adequate food, clothing, shelter, or supervision to a child.³⁰⁷ Instead of assisting families by providing cash, food, housing, or childcare assistance, the US child welfare system uses indicators of poverty as bases for removing children from families while subsidizing and incentivizing foster care and adoption under the pretext of acting in the child’s best interest. Due to systemic racism and other factors, this disproportionately impacts families of color.

To eliminate racial discrimination in the social safety net, the US should:

- Increase benefit levels for social assistance and social insurance programs, including cash or in-kind assistance, including relevant tax credits like the Earned Income Tax Credit and Child Tax Credit, to ensure benefit adequacy, and consider adopting a universal income security program, such as a universal basic income.
- Create federal standards optimizing eligibility for safety net programs. Where existing means-tested social assistance and insurance programs are not expanded

³⁰⁴ “COVID-19 and Undocumented Workers,” Open Society Foundations, July 2021,

<https://www.opensocietyfoundations.org/explainers/covid-19-and-undocumented-workers>. Eventually California passed a modest relief bill, as did New York – more than a year after the pandemic began.

³⁰⁵ Travis Lavenski, “Exploring Barriers to Unemployment for Limited English Proficiency Claimants,” post to “On Labor” (blog), December 15, 2021, <https://onlabor.org/exploring-barriers-to-unemployment-for-limited-english-proficiency-claimants/#:~:text=There%20are%20existing%20Federal%20laws,from%20engaging%20in%20language%20discrimination> (accessed July 21, 2022).

³⁰⁶ “3.7 million more children in poverty in Jan 2022 without monthly Child Tax Credit,” Center on Poverty and Social Policy at Columbia University, February 17, 2022, <https://www.povertycenter.columbia.edu/news-internal/monthly-poverty-january-2022> (accessed July 21, 2022).

³⁰⁷ United States Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau, National Child Abuse and Neglect Data System (NCANDS) Child File, FFY 2000–2019, <https://www.acf.hhs.gov/cb/training-technical-assistance/ncands-child-file-codebook> (accessed July 29, 2022).

universally, improve their eligibility requirements and accessibility. Means-tested programs should not include eligibility requirements that can unfairly exclude those in need, such as strict asset tests, or certain behavioral requirements like drug tests or work requirements.

- Review and amend the current models used to create the annual Federal Poverty Guidelines to ensure that they are effectively capturing populations facing poverty.
- Eliminate all benefit eligibility criteria for social protection programs tied to immigration status or criminal history.
- Desist from using indicators of poverty as a basis for child removals, prolonged family separation, and termination of parental rights.
- Create a federally funded system for paid family and medical leave.
- Enforce Title VI of the Civil Rights Act against agencies that do not provide language access services or discriminate in the provision of benefits to minorities.

US Education Policy

Article 2(2) of ICERD provides that States Parties shall take “special and concrete measures to ensure the adequate development and protection of certain racial groups ... , for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”³⁰⁸ Quality education is central to the enjoyment of basic rights such as job procurement and political participation.³⁰⁹ The CERD has underscored that barriers in education “results in the transmission of poverty from generation to generation” for people of African descent.³¹⁰

Discrimination and segregation in the education sector remain rampant across the US, driving inequality in education and in life opportunities.³¹¹ Although the population is

³⁰⁸ ICERD, art. 2(2).

³⁰⁹ *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, Case No. 347 U.S. 483, 493 (1954) (Describing education as important for individual economic achievement as well as “the very foundation of good citizenship,” a predicate for performing “our most basic public responsibilities,” and “a principle instrument in awakening the child to cultural values”); see also *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, Case No. 141 S. Ct. 238, 2046 (2021) (“America’s public schools are the nurseries of democracy”).

³¹⁰ CERD, “Racial Discrimination Against People of African Descent,” General Comment No. 34, CERD/C/GC/34 (2011), para. 6.

³¹¹ Emma Garcia, “Schools are still segregated, and black children are paying a price,” Economic Policy Institute, February 12, 2020, <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/> (accessed July 21, 2022).

increasingly diverse, racial segregation in US schools is higher now than it has been in decades.³¹² Majority-minority schools continue to be underfunded and fail to provide adequate educational opportunities to minority students.³¹³ US schools are primarily funded by neighborhood-specific property taxes, meaning that schools in poorer neighborhoods generate and receive less funding and resources than those in wealthier neighborhoods with higher property values.³¹⁴ Racial disparities in education's connection to US property tax policies built in part on racial discrimination, racial segregation, and the legacies of slavery has been widely recognized, including by some US courts.³¹⁵ Poor conditions in these schools—such as “missing or unqualified teachers, physically dangerous facilities, and inadequate books and materials”—correlate with lower student performance and low literacy rates, hampering minority individuals' ability to participate equally in democratic society.³¹⁶

In its 2008 and 2014 concluding observations addressed to the US, the CERD expressed concern about racial segregation in public schools, finding that prohibition of the use of race-conscious measures as a tool to promote integration inhibited progress.³¹⁷ The Committee found that students from racial and ethnic minorities attend segregated schools with unequal facilities, noting that even when students of color attend racially

³¹² Erica Frankenberg et al., *Harming our Common Future: America's Segregated Schools 65 Years After Brown* (Los Angeles: University of California Los Angeles Civil Rights Project, 2019), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf> (accessed July 21, 2022); Erica Frankenberg, “What school segregation looks like in the US today, in 4 charts,” *Chicago Reporter*, July 26, 2019, <https://www.chicagoreporter.com/what-school-segregation-looks-like-in-the-us-today-in-4-charts/> (accessed July 21, 2022). According to a 2016 study, the typical white student attends a school that is 69% white. Conversely, more than 40% of Black and Latinx students “attend intensely segregated schools where at least 9 in 10 students are people of color.”

³¹³ The Century Foundation, *Closing America's Education Funding Gaps* (New York: TCF, 2020), <https://tcf.org/content/report/closing-americas-education-funding/?agreed=1&agreed=1&session=1> (accessed July 21, 2022).

³¹⁴ Laura Meckler, “Report finds \$23 billion racial funding gap for schools,” *Washington Post*, February 26, 2019, https://www.washingtonpost.com/local/education/report-finds-23-billion-racial-funding-gap-for-schools/2019/02/25/d562b704-3915-11e9-a06c-3ec8ed509d15_story.html (accessed July 21, 2022).

³¹⁵ Human Rights Watch, *It Should Not Happen: Alabama's Failure to Prevent Cervical Cancer Death in the Black Belt* (New York: Human Rights Watch, 2018), <https://www.hrw.org/report/2018/11/29/it-should-not-happen/alabamas-failure-prevent-cervical-cancer-death-black-belt>. See also *Knight and Sims v. State of Alabama*, Case No. 458 F.Supp.2d 1273 (N.D. Ala. 2004), *aff'd*, Case No. 476 F.3d 1219 (11th Cir.), *cert denied*, Case No. 127 S.Ct. 3014 (2007).

³¹⁶ See plaintiff's submission of evidence in *Gary B. v. Whitmer*, Case No. 957 F.3d 616 (6th Cir. 2020), *reh'g en banc granted*, opinion vacated, Case No. 958 F.3d 1216 (6th Cir. 2020).

³¹⁷ *Ibid.*, para. 17.

diverse schools, they are often relegated to “single race” classes, denied access to advanced courses, and unfairly disciplined.³¹⁸ The Committee recommended that the US undertake a study to examine the reasons underlying de facto racial segregation, and “adopt all appropriate measures” to reduce the achievement gap between white and Black students “by improving the quality of education provided to [Black] students.”³¹⁹ In 2014, the Committee recommended that the US intensify its efforts to ensure equal access to education by taking measures including developing a concrete plan with goals and timelines to address racial segregation in schools and neighborhoods, and increasing federal funding for programs promoting racially integrated learning environments for students.³²⁰

In its 2021 report to the CERD, the US made a number of claims regarding its efforts to promote diversity and equal opportunity in education,³²¹ including 2021 American Rescue Plan’s funding³²² and other legislation,³²³ as well as efforts by the Justice Department Civil Rights Division³²⁴ and the Department of Education (DOE).³²⁵ Nonetheless, the racial disparities in educational opportunities among students resulting from ongoing ICERD violations remain persistently and disturbingly high.

The CERD has recommended that measures be taken to reduce the school dropout and suspension rates for children of African descent.³²⁶ In its 2008 concluding observations, the Committee highlighted racial disparities in suspension and expulsion rates as

³¹⁸ CERD, “Concluding Observations for the United States of America,” CERD/C/USA/CO/6, May 8, 2008, <https://www.ohchr.org/en/documents/concluding-observations/cerdcusaco6-concluding-observations> (accessed July 28, 2022), para. 14.

³¹⁹ *Ibid.*, para. 34.

³²⁰ The Committee also recommended reauthorizing the Elementary and Secondary Education Act with provisions that support solutions to address school segregation and strengthen measures to close the educational achievement gap. *Id.*

³²¹ Government of the United States, Combined Tenth to Twelfth Periodic Report to the Committee on the Elimination of Racial Discrimination, December 20, 2021, para. 14.

³²² *Ibid.*, para. 55.

³²³ The 2019 FUTURE Act, which aimed to provide funding for minority serving institutions; the 2015 Every Student Succeeds Act (ESSA), which aimed to “identify schools for comprehensive or targeted support and improvement” and “address factors that contribute to the education achievement gap.” *Ibid.*, paras. 57, 59.

³²⁴ *Ibid.*

³²⁵ *Ibid.*, para. 66.

³²⁶ CERD, Concluding Observations for the United States of America, May 2008, at para. 64.

exacerbating high dropout rates, as well as high rates of referrals of minority youth to the justice system.³²⁷ The Committee expressed particular concern about school districts' use of "zero tolerance" school discipline policies and recommended that districts review these policies and seriously consider limiting suspensions and expulsions to the most serious cases of school misconduct, and recommended special training for school officers.³²⁸

Nevertheless, disproportionate numbers of students of color continue to enter the criminal legal system. Schools with high populations of racial minority students have higher rates of suspension and expulsion, and students of color are more likely to be arrested as adults.³²⁹ In addition, students of color face discriminatory discipline and criminalization.³³⁰ Black students are punished more frequently and harshly in all categories of school discipline, even though many schools have removed the term "zero tolerance" from their policies, driven in part by differential treatment and support at school by race.³³¹ A June 2021 report from the US Department of Education found that Black students are removed from school by being suspended or expelled (long term removal), and are referred to law enforcement at rates that are more than twice their share of enrollment.³³² Students of color are more likely to go to a school with a law enforcement

³²⁷ Ibid.

³²⁸ Ibid., para. 34.

³²⁹ Lauren Camera, "Study Confirms School-to-Prison Pipeline," *U.S. News*, July 27, 2021, <https://www.usnews.com/news/education-news/articles/2021-07-27/study-confirms-school-to-prison-pipeline> (accessed July 21, 2022).

³³⁰ Harold Jordan and Gadah Makoshi, "Student Arrests in Allegheny County Schools: The Need for Transparency and Accountability," American Civil Liberties Union of Pennsylvania, January 2022, <https://www.endzerotolerance.org/student-arrest-report> (accessed July 21, 2022).

³³¹ American Civil Liberties Union, *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students* (New York: ACLU, 2019), <https://www.aclu.org/report/cops-and-no-counselors> (accessed July 21, 2022); United States Department of Education Office of Civil Rights, "An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-18 School Year," June 2021, <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf> (accessed July 21, 2022). A 2020 study found that differential treatment and support at school accounted for 46 percent of the Black/white gap in suspension/expulsion, while differences in behavior accounted for 9 percent of the gap. Jayanthi Owens and Sara McLanahan, "Unpacking the Drivers of Racial Disparities in School Suspension and Expulsion," *Social Forces* 98 (2020): pp. 1548-77, accessed July 21, 2022, doi:10.1093/sf/soz095; American Civil Liberties Union, "ACLU Comment on School Climate and Discipline," July 23, 2021, <https://www.aclu.org/letter/aclu-comment-school-climate-and-discipline> (accessed July 21, 2022).

³³² United States Department of Education Office of Civil Rights, "An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-18 School Year," June 2021, <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf> (accessed July 21, 2022). Black students made up 15.1 percent of total enrollment, but 28.7 percent of all students referred to law enforcement and 31.6 percent of all students arrested at school or during a school-related activity. Id.

officer, more likely to be referred to law enforcement, and more likely to be arrested at school.³³³ In addition, students who attend schools with high percentages of Black students and students from low-income families are more likely face security measures like metal detectors, random “contraband” sweeps, security guards, and security cameras, even when controlling for the level of misconduct in schools or violence in school neighborhoods.³³⁴

Article 7 of ICERD requires states to adopt immediate and effective measures, specifically in teaching, education, culture, and information, to promote tolerance and combat prejudice against national, racial, and ethnic groups. To combat prejudice and intolerance, the CERD has urged States to develop campaigns to educate the public about the history and culture of people of African descent and the importance of building an inclusive society.³³⁵ The Committee has also urged affirmative efforts to ensure that textbooks contain “chapters about the history and cultures of peoples of African descent,” and to “encourage and support the publication and distribution of books and other print materials, as well as the broadcasting of television and radio programs about their history and cultures.”³³⁶

The US has failed to implement these recommendations.³³⁷ There are no federal requirements or standards for teaching the history or racial discrimination in the US or

³³³ American Civil Liberties Union, *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students* (New York: ACLU, 2019), <https://www.aclu.org/report/cops-and-no-counselors> (accessed July 21, 2022).

³³⁴ *Ibid.*

³³⁵ CERD, “Racial Discrimination Against People of African Descent,” General Comment No. 34, CERD/C/GC/34 (2011), paras. 32 and 61. The Committee has recommended that State Parties review all language in textbooks, eliminating stereotypes and demeaning images, and replacing them with images of dignity and equality of all human beings.

³³⁶ *Ibid.*, para. 66. Furthermore, the UNESCO Convention Against Discrimination in Education, ratified by the United States, provides that “education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.” Convention against Discrimination in Education, adopted December 14, 1960, 492 U.N.T.S. 93, entered into force May 22, 1962, <https://adsdatabase.ohchr.org/IssueLibrary/UNESCO%20Convention%20against%20Discrimination%20in%20Education.pdf> (accessed July 28, 2022).

³³⁷ LaGarrett J. King, “The Status of Black History in US Schools and Society, National Council for Social Studies,” National Council for Social Studies, 2017, https://www.socialstudies.org/system/files/publications/articles/se_810117014.pdf (accessed July 21, 2022). See also Christina J. Cavallaro et al., “Combating Racial Inequity Through Local Historical Analysis: A Community-Informed Social Studies Unit,” *Social Studies* 110 (2019): pp. 17-32, accessed July 21, 2022, https://www.academia.edu/79825808/Combating_Racial_Inequity_Through_Local_Historical_Analysis_A_Community_Infor

about the history and cultures of Black Americans and other people of color, and only a handful of states mandate that such history be taught.³³⁸ Even where mandates exist, each US state may teach in a way that leads to historical inaccuracies.³³⁹ In the absence of any federal mandate, multiple states have introduced and enacted laws prohibiting schools from teaching about the reality of racism by banning “divisive concepts relating to race, racism and other topics.”³⁴⁰ Learning Black history is beneficial to all students: While enhancing the self-esteem of Black students, it conveys historical realities to all students and encourages empathy, understanding, and efforts to avoid repeating the racist violence of the past.³⁴¹ Further, denying the historical and contemporary realities of racial

med_Social_Studies_Unit (noting that the impact of historical Black men from infamous lawsuits “is largely forgotten because it is not included in textbooks or school curriculums”); Noreen Naseem Rodríguez, “‘Caught Between Two Worlds’: Asian American Elementary Teachers’ Enactment of Asian American History,” *Educational Studies*, 55:2 (2019): pp. 214-240, accessed July 21, 2022, doi: 10.1080/00131946.2018.1467320 (“The invisibility of the Asian American experience in school curriculum sends a message that Asian Americans are not legitimate members of the nation and have little place in the country’s history” (citation omitted)).

³³⁸ Natalie Colarossi, “The US still does a wretched job of teaching Black history. An expert in African American history education explains how to fix it,” *Insider*, June 27, 2020, <https://www.insider.com/how-to-improve-how-black-history-is-taught-in-schools-2020-6> (accessed July 21, 2022); Mark Carter, Alex Rate, and Samantha Kelly, “Montana is Failing its Constitutional Promise to Teach Native American History,” American Civil Liberties Union, July 21, 2021, <https://www.aclu.org/news/racial-justice/montana-is-failing-its-constitutional-promise-to-teach-native-american-history> (accessed July 21, 2022); Population Bureau Survey, “Why Teach Asian American History,” March 11, 2022, <https://www.pbs.org/education/blog/why-teach-asian-american-history> (accessed July 21, 2022); Population Bureau Survey, “Elevating Hispanic/Latinx History All Year,” October 8, 2020, <https://www.pbs.org/education/blog/elevating-hispanic-latinx-history-all-year> (accessed July 21, 2022); Angela Valenzuela, Nolan L. Cabrera, and Stephen Pitti, “The Numbers Won’t Speak for Themselves,” *Inside Higher Ed*, September, 12, 2017, <https://www.insidehighered.com/views/2017/09/12/legal-case-about-mexican-american-studies-demonstrates-why-scholars-must-be> (accessed July 21, 2022).

³³⁹ Striking disparities are seen across states in the way US history is taught. For example, a 2020 investigation found that “seven states do not directly mention slavery in their state standards and eight states do not mention the civil rights movement. Only two states mention white supremacy, while 16 states list states’ rights as a cause of the Civil War.” Jericka Duncan et al., “50 States, 50 Different Ways of Teaching America’s Past,” *CBS News*, February 19, 2020, <https://www.cbsnews.com/news/us-history-how-teaching-americas-past-varies-across-the-country/> (accessed July 21, 2022) (“[T]here are no national social studies standards to mandate what topics or historical figures students must learn about.”). See also Sheldon M. Stern and Jeremy A. Stern, “The State of U.S. History Standards,” Thomas B. Fordham Institute, February 16, 2011, <https://fordhaminstitute.org/national/research/state-state-us-history-standards-2011> (accessed July 21, 2022) (describing state history education standards as a continuum ranging from “impressively comprehensive to uselessly vapid,” in some cases resulting in states “present[ing] misleading or inaccurate content”).

³⁴⁰ See “Defending Our Right to Learn,” American Civil Liberties Union news release, March 10, 2022, <https://www.aclu.org/news/free-speech/defending-our-right-to-learn> (accessed July 21, 2022); Jonathan Friedman and James Tager, “Educational Gag Orders,” Pen America, 2021, https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf (accessed July 21, 2022).

³⁴¹ Norman E. Hodges, “Why Black History?,” *Internationales Jahrbuch für Geschichts- und Geographie-Unterricht* 13 (1970/71): pp. 223-227, accessed July 21, 2022, <https://www.jstor.org/stable/43053782>; see also Keisha Larry Burns, “The Effect of Opportunity Gaps,” (Ed.D. diss., University of Southern California, August 2018), <https://www.proquest.com/openview/6de701982fd4cd36a7bbfc54314c4547/1?pq-origsite=gscholar&cbl=18750> (accessed

discrimination impedes not only justice and accountability for historic wrongs, but the eradication of persisting structures of racial inequality that is the core purpose of ICERD.

To address discrimination in the US education system, the US should:

- Invest in underfunded schools to equalize public school funding throughout the US and continue to provide increased supplemental nutrition benefits for families with children during summer months when free or reduced-price school meals are not available.
- Expand access to free, quality pre-primary education.
- Expand the benefits of Pell Grants for low- and middle-income tertiary education students.
- Adopt a federal national standard mandating the teaching of the colonization, including forced displacement, dispossession, and mass killings of Indigenous peoples; the history of slavery, Jim Crow laws, lynchings, redlining, and segregation; civil rights movements; and other racial justice civil and labor rights movements.
- The Justice Department and Education Department should enforce Title VI and relevant statutes to ensure non-discrimination in the implementation of such a national standard, and in particular, prohibit school districts or states from banning Critical Race Theory or from teaching about other forms of racial discrimination.

July 29, 2022) (explaining how a social studies teacher “challenged . . . students to interact with the curriculum by intersecting race, culture, and power,” which makes learning “personalized and engaging . . . allowing [all] students to learn more easily and thoroughly”); see also See also Christina J. Cavallaro et al., “Combating Racial Inequity Through Local Historical Analysis: A Community-Informed Social Studies Unit,” *Social Studies* 110 (2019): pp. 17-32, accessed July 21, 2022, https://www.academia.edu/79825808/Combating_Racial_Inequity_Through_Local_Historical_Analysis_A_Community_Informed_Social_Studies_Unit (accessed July 21, 2022) (“Attention to these past local events can serve as important present-day reminders to students of the avenues available to them in the face of discrimination and the role of their communities in the Civil Rights Movement.”).

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Annex: Racial Equity Measures Recommended to the Executive Branch of the United States to Implement the International Convention on the Elimination of All Forms of Racial Discrimination

July 14, 2022

Introduction

As a party to the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), the United States is obligated to report on a regular basis to the Committee on the Elimination of Racial Discrimination (“CERD” or “Committee”). Each reporting cycle generates voluminous submissions to the Committee. In addition to the government’s submissions defending its implementation of the treaty, concerned civil society groups routinely provide shadow reports highlighting gaps in compliance and the most important steps they believe the US should take to improve its domestic implementation of the ICERD.

Civil society recommendations often focus on the most powerful or sweeping measures the US could take to ameliorate racial inequities, such as the enactment of federal legislation, the adoption of new policies across the numerous and relatively independent smaller jurisdictions of the US federal system, and the allocation of significant funding for initiatives and programs. Such recommendations are important because they highlight particularly effective potential measures. In the federalist system, however, neither the federal government nor executive branch alone has the authority to compel action at the local level without specific authorization—for this reason, when ratifying ICERD, the US undertook to take “appropriate measures” to ensure compliance at all levels of US government.³⁴² These broad recommendations can thus be especially difficult to implement politically and practically. They may require high levels of coordination among

³⁴²“U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02,” University of Minnesota Human Rights Library, June 24, 1994, <http://hrlibrary.umn.edu/usdocs/racialres.html> (accessed July 26, 2022).

branches of the federal government, or between federal and state authorities. They frequently require the cooperation of officials outside the executive branch of the federal government. These measures are significant, though, because actions by state and local officials can put the US in breach of its international treaty obligations just as they can ensure compliance. The United States executive branch is thus accountable for the full breadth of ICERD compliance when it represents the United States before the United Nations.

This Annex details additional, tangible, and more readily attainable steps the US executive branch can take on its own to improve US performance under the ICERD—steps entirely within the purview of the executive branch, and endorsed by Human Rights Watch and the American Civil Liberties Union. In ratifying the ICERD, the US committed to implementing the treaty’s provisions through federal action “to the extent that it exercises jurisdiction over the matters covered therein.”³⁴³ The executive branch of the US federal government sets policies and procedures across a wide range of areas relevant to ICERD compliance, rendering executive action essential to the effective implementation of the treaty. The US recognizes this; it routinely cites executive action to demonstrate its compliance efforts.³⁴⁴

In fact, the importance of executive action for treaty compliance has increased over the last twenty-five years. In 1998, the Clinton Administration issued an executive order committing to uphold US human rights obligations. Shortly after taking office, President Joseph Biden issued his own executive order expressing a strong commitment to reducing racial inequities in the United States (though not mentioning US human rights

³⁴³ Ibid. “U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01,” University of Minnesota Human Rights Library, April 2, 1992, <http://hrlibrary.umn.edu/usdocs/civilres.html> (accessed July 26, 2022), sec. II(5); “Executive Order 13107: Implementation of Human Rights Treaties,” Intelligence Resource Program, December 10, 1998, <https://irp.fas.org/offdocs/eo13107.htm> (accessed July 26, 2022). While the federal government doesn’t have general authority to compel local governments to take action, it has limited authority under federal laws to enforce civil rights, including when local governments receive federal funding. See, e.g., 42 U.S.C. § 2000d; 34 U.S.C. § 12601.

³⁴⁴ See e.g., “Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination,” US Department of State press release, June 4, 2021, <https://www.state.gov/periodic-report-of-the-united-states-of-america-to-the-united-nations-committee-on-the-elimination-of-racial-discrimination/> (accessed July 26, 2022)(highlighting for the CERD a series of Biden administration executive orders, presidential memoranda, and federal agency programs and initiatives bearing on U.S. ICERD compliance); Government of the United States, Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination, June 12, 2013, https://2009-2017.state.gov/j/drl/rls/cerd_report/210605.htm (accessed July 26, 2022)(highlighting for the CERD federal agency programs and enforcement actions, among other measures).

obligations). As our shadow report documents, the United States continues to fall short of its ICERD obligations—and therefore its executive commitments as well. As a matter of domestic law, the executive branch has not just the obligation but also the unilateral power to realize its stated commitment to racial equity through the steps suggested below.

This memorandum identifies three broad categories of recommendations aimed at harmonizing the US’s domestic efforts to promote racial equity with its obligations under the ICERD.

- 1) The first set of recommendations would improve the capacity of the US to report its progress under the ICERD to the Committee in compliance with the treaty.
- 2) The second set articulates a series of principles derived from the ICERD that should permeate the executive branch’s racial justice work.
- 3) The third set comprises suggestions directed to specific federal agencies, all of which report directly to President Biden.

I. Improving the US’s Capacity to Report its ICERD Progress to the Committee

The Biden Administration has taken commendable steps to make racial equality a policy priority. It has issued a series of executive orders aimed at promoting racial justice in important spheres of governmental policy such as immigration,³⁴⁵ voting rights,³⁴⁶ policing,³⁴⁷ and access to health care.³⁴⁸ It has also targeted racial inequality directly through Executive Order 13985, setting the stage for greater coordination within the federal government to realize these priorities.³⁴⁹ For instance, the administration has empowered

³⁴⁵ Exec. Order No. 14074, 86 Fed. Reg 32945 (May 25, 2021), <https://www.federalregister.gov/documents/2022/05/31/2022-11810/advancing-effective-accountable-policing-and-criminal-justice-practices-to-enhance-public-trust-and> (accessed July 28, 2022).

³⁴⁶ United States Federal Register, “Promoting Access to Voting,” March 7, 2021, <https://www.federalregister.gov/documents/2021/03/10/2021-05087/promoting-access-to-voting> (accessed July 21, 2022).

³⁴⁷ Exec. Order No. 14074, 86 Fed. Reg 32945 (May 25, 2021).

³⁴⁸ United States Federal Register, “Ensuring an Equitable Pandemic Response and Recovery,” January 21, 2021, <https://www.federalregister.gov/documents/2021/01/26/2021-01852/ensuring-an-equitable-pandemic-response-and-recovery> (accessed July 21, 2022).

³⁴⁹ Exec. Order No. 13985, 86 Fed. Reg 7009 (January 21, 2021).

the Domestic Policy Council (“DPC”) to “coordinate efforts to embed equity principles, policies, and approaches across the federal government,” including through collaboration with the National Security Council (“NSC”) and the National Economic Council (“NEC”).³⁵⁰ Similarly, it has tasked the Office of Management and Budget (“OMB”) —operating in conjunction with the heads of federal agencies—to study “whether agency policies or actions create or exacerbate barriers to full and equal participation” in society.³⁵¹ Yet none of these actions directly address the US’s human rights obligations, suggesting the Biden Administration is unaware of the manifest connections between its recent commitments to promote racial equity and its standing treaty obligations.

Harmonizing these ongoing federal efforts with US obligations under the ICERD is the next—and long overdue—step in achieving the government’s stated objectives and improving US compliance with the treaty. Critically, ICERD provides the legal standards necessary for achieving equity by requiring the United States to take effective and affirmative measures to prohibit and eliminate all forms of racial discrimination, including practices and legislation that are discriminatory in effect, even if not by design.³⁵² Accordingly, the US should explicitly align its ongoing federal efforts to promote racial justice with its international obligations under ICERD by taking the following steps:

- 1) Modify the executive orders establishing the DPC,³⁵³ the NEC,³⁵⁴ the Council on Environmental Quality (“CEQ”)—as well as the executive orders setting out the responsibilities of NSC³⁵⁵ and OMB directorates—to explicitly charge these bodies with ensuring compliance with the ICERD and other human rights treaty and customary international law obligations. In particular, the NSC and DPC should

³⁵⁰ *Ibid.*, sec. III.

³⁵¹ *Ibid.*, sec. IV.

³⁵² CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” 59th Session, A/56/18, December 21, 1965, para. 393.

³⁵³ United States Federal Register, “Establishment of the Domestic Policy Council,” August 19, 1993, <https://www.archives.gov/files/federal-register/executive-orders/pdf/12859.pdf> (accessed July 21, 2022).

³⁵⁴ United States Federal Register, “Establishment of the Domestic Policy Council,” August 19, 1993, <https://www.govinfo.gov/content/pkg/WCPD-1993-02-01/pdf/WCPD-1993-02-01-Pg95.pdf> (accessed July 21, 2022).

³⁵⁵ The White House, “National Security Council,” <https://www.whitehouse.gov/nsc/> (accessed July 21, 2022); The White House, “Memorandum on Renewing the National Security Council System,” February 4, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/04/memorandum-renewing-the-national-security-council-system/> (accessed July 21, 2022).

share responsibility for overall federal executive branch coordination of domestic implementation of international human rights obligations.

- 2) Modify and revitalize application of EO 13107 (Implementation of Human Rights Treaties) to specifically require agency heads to name a deputy secretary-level appointee charged with 1) coordinating compliance with ICERD and other US human rights treaty and customary international law obligations and 2) contributing to Department of State reporting.
- 3) Update Executive Order 13985 to create a formal interagency process for overseeing ICERD compliance, including ICERD-related data gathering, analysis, and reporting, as well as the management of ICERD submissions and responses, and the designation of a contact officer for ICERD compliance.
 - a) This process should include the preparation of an annual Equity Assessment report to the President on discriminatory and inequitable effects of federal and state policies.
 - b) This more integrated and comprehensive process for tracking ICERD compliance should facilitate more regular and frequent reporting to the Committee, demonstrating US leadership in its commitment to realizing racial justice and informing the public of its progress including rapid responses to the CERD's communications under the Early Warning and Urgent procedures.
 - c) The interagency ICERD process should include, at a minimum, semiannual meetings of the principals—relevant cabinet officials and the heads of executive agencies—chaired by the head of the DPC, NSC, CEQ, OMB, and NEC to maintain continuity and facilitate progress toward racial justice.
 - d) The DPC should direct each agency to establish a point person responsible for managing ICERD implementation within each agency's mandate to come into compliance with EO 13107.
 - e) The DPC and/or agency point persons should regularly communicate guidance on obligations under the ICERD to the attorneys general of all fifty US states as well as relevant authorities in US territories.³⁵⁶

³⁵⁶ In addition, the US should respect its obligation under ICERD Article 15 not to undermine the right to self-determination of such territories.

- f) This process should direct DOS to facilitate all country visits by UN HRC Special Procedures, including but not limited to those focused on racial justice, and direct agencies to facilitate access to the greatest degree possible.
 - g) The initial equity review should be completed within one year of the US appearance before ICERD.
 - h) Such a process should be reproduced for other US international human rights treaty and customary law obligations.
- 4) Modify EO 12866 (Regulatory Planning and Review) to direct the OMB/Office of Information and Regulatory Affairs (OIRA) to ensure agencies take ICERD (and US obligations under other human rights treaties) into account in the regulatory process. Before proceeding with rulemaking, require agency heads and OIRA to make a specific finding that proposed regulation is unlikely to put the US in breach of its human rights treaty obligations.
 - 5) Modify EO 12250 (Leadership and Coordination of Nondiscrimination Laws) to add ICERD to the relevant sources of non-discrimination obligations applicable to the implementation and enforcement of federal non-discrimination law.
 - 6) Adopt a new Executive Order that parallels EO 13985, creating a process by which the NSC tasks all federal agencies involved in foreign policy programming, funding, or implementation to ensure their actions do not contribute to racial discrimination or inequities.

II. Relying on ICERD Principles to Guide Agency Action on Racial Equity

US federal government agencies need not wait for action by the President to begin operationalizing the Biden Administration’s racial justice initiatives in a manner consistent with the ICERD. Both the ICERD and the Committee’s recommendations provide clear and compelling guidance that each agency can incorporate into ongoing efforts to implement Executive Order 13895. For instance:

- 1) Executive Order 13895 seeks to “advance equity across the Federal Government,”³⁵⁷ in the form of “consistent and systematic fair, just, and impartial

³⁵⁷ Exec. Order No. 13985, 86 Fed. Reg 7009 (January 21, 2021), sec. 1.

- treatment of all individuals.”³⁵⁸ Even where not constitutionally required, agencies should interpret this injunction in line with the dictates of the ICERD, which covers intentional treatment based on animus as well as indirect and structural discrimination leading to disparate racial impacts and inequitable life outcomes.³⁵⁹ Agencies can establish this broader definition, for example, as a threshold for agency action, such as the launch of an investigation into discrimination.
- 2) Agencies should leverage existing legal authority to the maximum extent possible to establish temporary protective measures to remedy past discrimination—whether linked to slavery or to other discrimination prohibited by the ICERD.³⁶⁰
 - 3) Agencies should provide effective protection against—and remedies for—discrimination prohibited by ICERD, even when not constitutionally required such as taking “positive measures” to remedy ongoing or past discrimination.³⁶¹
 - 4) Agencies should commit to incorporating and actively engaging communities impacted by inequity and discrimination prohibited by ICERD in all aspects of anti-discrimination and equity work.³⁶²

³⁵⁸ *Ibid.*, sec. 2.

³⁵⁹ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, entered into force January 4, 1969, art. 1(1), <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cerd.pdf> (defining “discrimination” for the purposes of the ICERD to encompass conduct that has either the purpose or the effect of generating racial inequality); CERD, “The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination,” General Recommendation No. 32, CERD/C/GC/32 (2009), para. 7.

³⁶⁰ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, entered into force January 4, 1969, art. 2(2), <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cerd.pdf> (directing States parties “to take special and concrete measures” of a temporary nature to facilitate “equal enjoyment” of rights and freedoms); CERD, “The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination,” General Recommendation No. 32, CERD/C/GC/32 (2009), para. 7 (elaborating on the concept of special measures).

³⁶¹ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, entered into force January 4, 1969, art. 6, <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cerd.pdf>.

³⁶² CERD, “The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination,” General Recommendation No. 32, CERD/C/GC/32 (2009), para. 18 (encouraging States parties to consult with affected communities before implementing special measures for their benefit). Executive Order 13895 laudably embraces this principle. Exec. Order No. 13985, 86 Fed. Reg 7009 (January 21, 2021), sec. 8.

- 5) Agencies should mandate the collection, aggregation, and public reporting of data necessary to identify and evaluate inequities.³⁶³
- 6) Agencies should implement ICERD compliance and impact assessments to evaluate disparate racial impact under ICERD standards before undertaking any significant agency action and before proposing or supporting legislative change. Agencies should also implement periodic, global ICERD compliance and impact assessments to ensure that, collectively, their policies and procedures remain properly calibrated to the ICERD over time.

III. Specific Agency Recommendations

The foregoing guidelines provide a touchstone for meaningful implementation of the equity plans developed by federal agencies and departments under Executive Order 13895. Beyond relying on these principles to guide the pursuit of racial justice, the US government should, at minimum, take the following discrete measures to improve its performance under the ICERD:³⁶⁴

To the President and the Executive Office of the President:

- Sign legislation or issue an executive order establishing a federal commission to study and develop proposals for reparations for slavery and its legacies.
- Adopt policies to support full Medicaid expansion under the Affordable Care Act (“ACA”) in all fifty US states.
- Establish the White House Office of Sexual and Reproductive Health and Wellbeing (OSRHW), under the Domestic Policy Council, to promote sexual and reproductive health and well-being through a human rights, reproductive justice, and racial equity framework.
- Establish a Commission by executive order to (1) study the need to abolish the Thirteenth Amendment’s exclusion allowing forced labor as punishment for a crime

³⁶³ CERD, “Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System,” General Recommendation No. 31, A/60/18 (2005).

³⁶⁴ The recommendations offered in this section are not intended to be exhaustive. These and other agencies could adopt numerous other measures to improve US compliance with the ICERD.

and to (2) bring federal and state prison labor programs in line with ICERD to address the widespread problem of prison labor abuses in the US.³⁶⁵

- Where existing means-tested social assistance and insurance programs administered by the federal government are not expanded universally, improve their eligibility requirements and accessibility. For example, programs relying on income-based limits should be reviewed and amended to effectively capture the populations with needs for such social services, and should not create hard cutoffs after a threshold. These programs should also be readily accessible to the targeted populations and all decisions regarding eligibility should be based on objective criteria. Means-tested programs should not utilize eligibility requirements that can unfairly exclude those in need, such as strict asset tests, or certain behavioral requirements like drug tests or work requirements.
- Commission a study to explore a federally guaranteed income providing unconditional universal cash payments, and to fund state programs to do the same.
- Create a commission to establish how federal minimum benefit levels would impact national racial disparities in benefit levels, and support initiatives and laws that line up with the findings

To the Department of Justice (“DOJ”):

- The DOJ’s equity action plan should be revised to commit to further, sweeping reform of law enforcement practices, including and building upon President Biden’s Executive Order on Policing—such as promoting the nationwide reduction of reliance on police forces and the use of alternatives to policing and criminalization—rather than celebrating minor changes in policy that preceded its

³⁶⁵ Nearly two-thirds of incarcerated people report working behind bars, or roughly 800,000 incarcerated workers in federal and state prisons, and US law explicitly excludes these workers from standard workplace protections against labor exploitation and abuse. More than three-quarters of incarcerated workers surveyed by the ACLU report facing punishment—such as solitary confinement, denial of sentence reductions, or loss of family visitation—if they decline or are unable to work. American Civil Liberties Union and University of Chicago Global Human Rights Clinic, “Captive Labor: Exploitation of Incarcerated Workers,” June 15, 2022, https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf (accessed July 22, 2022).

action plan and that leave the underlying racial inequities in police violence untouched.³⁶⁶

- Because they feed into the racial inequities that pervade the American criminal legal system,³⁶⁷ DOJ should end programs that permit, encourage, or fund police departments' use of traffic stops for general crime-control purposes, including the Data-Driven Approaches to Crime & Traffic Safety program and related grants.
- Through the Bureau of Justice Assistance, make technical assistance and resources available to state and local court systems to end user-funded criminal legal systems.
- Condition any federal funding to law enforcement agencies on their enforcing a ban on racial profiling and on their documenting, collecting, and publicly sharing data on pedestrian and traffic stops, arrests, and searches, broken down by race, ethnicity, gender, and location. The DOJ should designate funds for such data collection if needed.³⁶⁸
- Establish guidance on optimal structures for effective police accountability boards and condition funding on state and local government establishment of such boards. Ensure that such boards have independence from the executive branch, genuine investigatory authority that includes subpoena power, and independent disciplinary authority.
- Provide grants to state and local governments that undertake to reform their criminal legal systems by creating robust early warning and accountability systems holding police officers accountable for misconduct, including unconstitutional stops, searches, arrests, raids, violence, and other forms of discriminatory policing and unlawful tactic that disproportionately impact people of color.

³⁶⁶ United States Department of Justice, "Equity Action Plan Summary," 2021, <https://www.whitehouse.gov/wp-content/uploads/2022/04/DOJ-EO13985-equity-summary.pdf> (accessed July 21, 2022), p. 6-7; Rachel Eisenberg, et al., "The Biden Administration's Executive Order on Policing is a Foundation to Build Upon," American Civil Liberties Union and Center for American Progress news release, June 1, 2022, <https://www.aclu.org/news/criminal-law-reform/the-biden-administrations-executive-order-on-policing-is-a-foundation-to-build-upon> (accessed July 21, 2022); Exec. Order No. 14074, 86 Fed. Reg 32945 (May 25, 2021). While President Biden signed an Executive Order on Policing in May 2022. At present, none of the DOJ's "new strategies to advance equity" involve further reform of law enforcement.

³⁶⁷ Stanford Open Policing Project, "Findings," 2021, <https://openpolicing.stanford.edu/findings/> (accessed July 21, 2022).

³⁶⁸ President Biden's May 2022 Executive Order on Policing aims to enhance such data collection. See Exec. Order No. 14074, 86 Fed. Reg 32945 (May 25, 2021).

- Provide grants to state and local governments that invest in pretrial services programs and undertake to reduce the circumstances in which courts can order pretrial incarceration, only to those in which there is strong evidence of imminent harm if a person is released pretrial, and only following a rigorous hearing to evaluate that evidence.
- Reduce the circumstances in which courts can order pretrial incarceration, though bail setting or other means, only to those in which there is strong evidence of imminent harm if a person is released pretrial, and only following a rigorous hearing to evaluate that evidence.
- Amend the Justice Manual to decline to ever exercise federal authority to certify a juvenile for prosecution in federal criminal proceedings. Expand grantmaking efforts by the Office of Juvenile Justice and Delinquency Prevention to compel states and localities to similarly end the prosecution of children in adult court.
- Pilot a program that awards grants to local governments for reducing their police budgets on the condition that the grants go toward funding alternatives to policing and criminalization. This should also include specific attention to the criminalization of homelessness and its inevitable consequences.
- Absent specific, extenuating circumstances, instruct federal prosecutors to:
 - Cease bringing charges that will result in the imposition of a mandatory minimum sentence, which are abused by prosecutors in the plea negotiation process and limit judicial discretion.
 - Decline to prosecute personal drug possession or use, including as a violation of probation, supervised release, or pre-trial release.
 - Presumptively decline to seek pre-trial detention.
 - Presumptively seek non-incarceration sentences. Where prosecutors seek probation or supervised release terms, request the shortest term and the least restrictive conditions possible.
 - Decline to seek life, or effective-life, sentences for people who committed crimes as children.
- Formally recommend to the President the commutation of all federal death sentences.
- Formally recommend to the President the issuance of mass, categorical clemency grants to people serving unjust and excessive sentences, including offenses—such

as crack-cocaine offenses or based upon the career offender guideline—that have marked racial disparities. Such categorical use of commutation powers should create a presumption of release for people who fit the recommended criteria, with the burden shifting to the government to prove why a person’s sentence should not be commuted.

- Modify Justice Manual Section 8-2.000 to incorporate a section on ICERD enforcement within the DOJ, including but not limited to enforcement under 8 U.S.C. 1324b.
- Modify 2014 DOJ Guidance on the use of race, ethnicity, gender, national origin, religion, sexual orientation, and gender identity to eliminate border and national security exceptions to racial profiling.
- Reference ICERD in investigations as well as in litigation to which the federal government is a party, such as by specifying that a practice violates ICERD even if it may not be the position of the federal government that a practice is unconstitutional under current precedent.³⁶⁹
- Modify the DOJ Civil Rights Manual to include a section on ICERD enforcement in external civil rights complaints.

To the Department of Justice Civil Rights Division:

- Proactively and rigorously utilize authority under Title VI to challenge race and language access discrimination in state and local agencies, including those that administer social services and public benefits.
- Increase affirmative and complaint-based investigations into discrimination in public education, housing, credit, and employment challenging practices that have a disproportionate impact on people of color.

³⁶⁹ For example, the US could reference the ICERD as follows: “The United States has determined that the practices at issue here implicate US international law obligations under the Convention on the Elimination of All Forms of Racial Discrimination, which the US has signed and ratified. In particular, these practices are inconsistent with the Convention’s requirement that states parties work to eliminate racial discrimination and guarantee the right of equal treatment before all state organs administering justice. Although it is not self-executing, and therefore does not provide a rule of decision for US courts, the treaty imposes binding obligations on the United States of America under international law. The Constitution and laws of the United States that apply to the instant case should, therefore, be interpreted in a manner consistent with the treaty to avoid putting the United States in breach of those obligations.”

- Initiate investigations into local and state jails and prisons to eliminate forced labor of incarcerated people, as well as discriminatory pay, work assignments, conditions and related practices that violate federal disability laws and Title VI of the Civil Rights Act, and other conditions and practices that violate federal law.
- Investigate systemic abuses under 34 U.S.C. § 12601, both proactively and in response to complaints.
- Identify directly impacted communities and independent community organizational stakeholders and engage with them meaningfully about every aspect of Title VI and § 12601 investigations, including in the formal or informal resolution of any complaint.
- Publicize data on internal and external requests for interventions under § 12601 and Title VI, actions taken, and outcomes.
- Include in appropriations requests substantially expanded resources for human and civil rights compliance, particularly in the Civil Rights Division.

To the Bureau of Prisons:

- Ensure that all work in prisons is fully voluntary by eliminating any rules, policies, and procedures enabling forced labor or imposing disciplinary measures for work-related infractions such as refusal to work or failure to complete work in a satisfactory manner.
- Adopt policies protecting against arbitrary decision-making in work assignments with a right to review; and guaranteeing all workers' rights, including fair wages (guaranteeing the higher of federal or state minimum wage), fair treatment (including non-discrimination), workplace safety and health, and fair conditions of work for people engaged in prison labor.
- Expand and invest in prison work programs that provide incarcerated workers with marketable skills and training that will help them to find employment after release. Programs should provide opportunities for advancement, certifications of completed training, certifications of work performance achievements, and employment-based recommendation letters from supervisors. Programs should provide vocational training in professions that are forecast for job growth.

- Eliminate solitary confinement as defined by the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), except in the limited circumstances permitted by those Rules.
- File motions for compassionate release whenever the criteria—interpreted broadly—are satisfied, and document and report requests for compassionate release that are denied.
- Ensure that COVID-19 mitigation measures in Bureau facilities comply with Centers for Disease Control and Prevention Guidance for Correctional and Detention Facilities, and that incarcerated people have access to treatment for COVID-19 infection that is comparable to that available in the community.

To the Department of Homeland Security:

- Amend the DHS equity action plan to reflect a commitment to protecting communities of color from all violence—including police violence—rather than limiting DHS’s commitment to preventing violence committed by extremists “meant to intimidate or coerce them.”³⁷⁰
- Rather than fund studies aimed at bolstering the failed model of policing prevalent throughout the United States,³⁷¹ direct funds toward the implementation of ICERD, including through study of alternatives to criminalization and policing, such as public health approaches to substance use disorders focusing on harm reduction and evidence-based treatment; pre-arrest diversion programs; alternatives to pre-trial and pre-supervision revocation detention; structures to allow for increased police accountability; and alternatives to police enforcement of traffic violations.
- Direct an end to immigration programs that facilitate racial profiling, including 287(g), Operation Stonegarden and the Secure Communities Program.
- Appoint an expert body to develop a report to the Secretary—and to advise DHS generally—on the history of racism and xenophobia in the adoption and enforcement of US immigration law and policy. The report should also propose

³⁷⁰United States Department of Justice, “Equity Action Plan Summary,” 2021, <https://www.whitehouse.gov/wp-content/uploads/2022/04/DOJ-EO13985-equity-summary.pdf> (accessed July 21, 2022), p. 1.

³⁷¹United States Department of Homeland Security, “DHS Conducts Simulation Experiment to Study Law Enforcement Use of Force, Inform Best Practices for 21st Century Policing,” April 22, 2021, <https://www.dhs.gov/news/2021/04/22/dhs-conducts-simulation-experiment-study-law-enforcement-use-force-inform-best> (accessed July 21, 2022).

remedies, including as to which statutes, regulations and orders should be repealed and replaced because of the discriminatory effect they have had.

- Appoint an expert body to recommend the creation of a mechanism providing full and effective reparation, proportional to the gravity of the violation and the harm suffered, to those subjected to family separation, arbitrary and inhumane detention, discriminatory expulsion, prosecution, or harm as a result of such laws.
- Establish that the prohibition on discrimination articulated in the *Guidelines for the Enforcement of Civil Immigration Law* supersedes legacy 2014 guidelines for use of race and eliminates the border exception to racial profiling.
- Track and make publicly available data regarding the effect of enforcement of immigration law, broken down by race, ethnicity, gender, location, and other disaggregated bases.
- Establish a presumption that there is a reasonable cause to believe (i.e., grounds for initiating an investigation) that there is a pattern or practice of discrimination on the basis of race, color, or national origin and/or that a program has an adverse impact on individuals who are distinguishable on the basis of race, color or national origin when disaggregated data shows *de facto* differential enjoyment of program access on the basis of such grounds.
- Issue guidance stipulating that analysis of non-discrimination obligations, including under Title VI, needs to take ICERD duties into account.
- Issue regulations establishing a new agency process for evaluating whether a contemplated agency action or program will have a significant adverse impact on rights. This process could take the form of a threshold assessment tool like current DHS practice under the Privacy Act, or a self-assessment like those performed under Section 504 of the Rehabilitation Act. Charge the Office of Civil Rights and Civil Liberties, pursuant to the authority implicit in 6 U.S.C. 345, with providing technical assistance similar to that provided under Rehabilitation Act Section 504.
- Establish a Chief Counsel in the Office of Civil Rights and Civil Liberties— independent of DHS general counsel—and incorporate evaluation of ICERD compliance in the Chief Counsel’s job duties.
- To better effectuate the work of the position anticipated in 6 U.S.C. 113, add coordinating ICERD (and other human rights treaty) compliance in the job duties of the head of the Office of Civil Rights and Civil Liberties.

- Include in appropriations requests substantially expanded resources for human rights compliance, particularly in the DHS Office of Civil Rights and Civil Liberties.
- End immigration programs that facilitate racial profiling, including the 287(g) and Secure Communities programs.
- Immediately release all individuals arrested in worksite raids who are currently detained, and terminate any outstanding removal proceedings.
- Collaborate with the DOJ to ensure that individuals arrested during worksite raids are no longer subject to criminal prosecution for immigration-related charges, such as unlawful reentry or document fraud, arising from their arrest.
- Closely monitor the implementation of Homeland Security Secretary Alejandro N. Mayorkas' September 30 and October 30, 2021 guidance documents, establishing protective processes to ensure that potential mitigating factors, including those stemming from a noncitizen's exercise of workplace rights, their status as a victim of workplace exploitation, and their connections and contributions to the US, are properly identified and assessed.
- To reflect Secretary Mayorkas' current enforcement and deconfliction priorities, revise the December 7, 2011 Memorandum of Understanding between DHS and DOL, and its 2016 addendum, to include EEOC and NLRB.
- Immediately initiate an investigation and commit to remedy all sustained outstanding internal and external allegations of abuse by government officials at the border and immigration detention facilities.
- Immediately direct ICE to end immigration detention that is unnecessary or prolonged with the aim to gradually abolish immigration detention and to close any immigration detention facility in which persistent abuses are committed.
- Direct ICE to invest in community-based social services as alternatives to detention and avoid surveillance of immigrants as an alternative to detention.
- Direct ICE to initiate rulemaking to establish binding minimum standards for conditions of immigration detention. Such regulations should provide for timely, free, and confidential access to counsel via in-person visitation, telephone, video conferencing, and mail to all immigrant detainees.
- Expand grantmaking efforts to dramatically expand access to counsel for all migrants in proceedings regarding their status as a migrant.

- Direct ICE to prohibit the use of solitary confinement in immigration detention, including the use of medical isolation for retaliatory purposes, administrative segregation, and disciplinary segregation.
- Institute a directive on the treatment of hunger strikers in immigration detention to ensure appropriate and ethical standards of care.
- Issue guidance to DHS components affirming a policy of non-cooperation between DHS and discriminatory state enforcement programs, such as the Operation Lone Star trespass arrest program.

To the Department of Transportation:

- End programs, such as the Data-Driven Approaches to Crime and Traffic Safety (DDACTS) Program, that permit police departments to use traffic stops for general crime-control purposes.

To the Department of Housing and Urban Development:

- Because they disproportionately serve to exclude people of color from public housing,³⁷² eliminate all restrictions to public and Section 8 housing based on criminal convictions of residents or their family members.
- Monitor denials of Section 8 housing and other public housing to ensure that they are not arbitrary, that they are based on reasonable and individualized determinations of risk, and that they do not have a disproportionate and unjustifiable impact on applicants from racial and ethnic minorities.
- Require public housing authorities and other relevant entities to compile and make public on an annual basis the number of applications made for public housing and Section 8 housing, the number of applicants denied based on criminal history, the number of those denied who appeal, and the number of those challenging their denials who prevail following administrative hearings.
- Increase affirmative and complaint-based investigations into housing entities that engage in discrimination, and develop remedies that provide for increased resources to eliminate housing disparities.

³⁷² See subsection titled “Reentry Issues – Impact of Criminal Records on Housing and Unemployment,” above.

To the Department of Health and Human Services:

- Collect, track, and analyze disaggregated socio-demographic data on the ethno-racial background of recipients across every public benefit and health program. Include data regarding delays and denials by race, ethnicity, and individuals with limited English proficiency.
- Identify states and programs with statistically significant racial disparities in delays, denials, and barriers to access and aggressively enforce Title VI and other civil rights statutes to bring states into compliance with anti-discrimination requirements.
- Require all states to conduct and submit a full audit of racial, ethnic, and language-based disparities in delays, denials, and financial levels of distribution of all benefits programs, and mandate that every state undertake an analysis and resolution plan to determine the source of the disparities and correct them.
- Create universal federal standards for administering all safety-net benefits to reduce racial disparities, discrimination, and barriers to access.
- Expand eligibility and outreach for safety-net programs and ease onerous administrative burdens so that all individuals and families who need the aid receive it.
- Eliminate all benefit eligibility criteria tied to immigration status and ineligibility linked to a person's criminal record.
- Prevent conditions or circumstances related to poverty from serving as the basis for child removals and the termination of parental rights.
- Reject all state measures that impose work requirements for Medicaid or benefits eligibility.
- Guide states to ensure that National Breast and Cervical Cancer Early Detection Program (NBCCEDP) funds support community-based healthcare workers serving Black women.
- Review and amend the current models used to create the annual Federal Poverty Guidelines to ensure that they are effectively capturing populations facing poverty.

- Improve oversight, establish incentives, and take other necessary steps to ensure compliance with human rights obligations at the state and local level, including but not limited to:
 - Eliminate means testing to the extent permitted by law.
 - Increase benefit levels, particularly in the form of direct cash assistance.
 - Eliminate all benefit eligibility criteria tied to immigration status or a person’s criminal record to the extent permitted by law.
- Help fund the creation of open-source, next-generation Covid-19 vaccines by making grants to and placing orders with the World Health Organization’s mRNA Covid-19 Vaccine Technology Transfer Hub in South Africa and help facilitate the creation of other mRNA production facilities throughout the world, especially low-and-middle-income countries, while including contractual requirements that technologies developed by one hub are shared freely with others and that funding for these hubs does not have intellectual property restrictions attached.
- Require transparency in medical technology, research and development costs, clinical trial costs, cost of manufacturing, pricing, background intellectual property, trial protocols, and supply and pricing agreements.

To the US Centers for Disease Control and Prevention:

- Recommend that colposcopy, diagnostic testing for cervical cancer and precancerous lesions, and early interventions like excisional and ablative treatments, all of which help prevent cervical cancer, be included as preventive care under the ACA’s essential health benefits mandate. These measures would reduce the deep disparities in preventative tactics and fatalities as Black women are more likely than white women to have never been screened for cervical cancer, are diagnosed at a later stage, and have lower survival rates.³⁷³
- Review and adjust the current methodology for cervical cancer data analysis to ensure that it accurately reflects rates of cervical cancer incidence and mortality. The review should consider whether including women with hysterectomies in the

³⁷³ Human Rights Watch, *We Need Access: Ending Preventable Deaths from Cervical Cancer in Rural Georgia* (New York: Human Rights Watch, 2022), <https://www.hrw.org/report/2022/01/20/we-need-access/ending-preventable-deaths-cervical-cancer-rural-georgia>.

at-risk population artificially lowers reporting on racial disparities in cervical cancer rates.

- Develop and publicize a strategic plan with clear benchmarks for how the Centers for Disease Control and Prevention will operationalize its commitment to fund health programs addressing health inequities rooted in racism. Direct more funding to community-based projects including the Social Determinants of Health Accelerator Plans and Social Determinants of Health Community Pilots, and regularly report on outcomes of funded projects.

To the Department of Education:

- Review, analyze and make public data on racial disparities in school suspensions, achievement, and graduation; and aggressively undertake Title VI investigation of and enforcement actions against school districts and regions with the sharpest disparities. Remedy such disparities, working with local parent and community organizations.
- To address Title VI violations, create and fund block grants to eliminate racial disparities in school funding.
- Adopt a federal national curricular requirement mandating that every school teach the history of colonization including forced displacement, dispossession and mass killings of Indigenous peoples, history of slavery, Jim Crow laws, lynchings, redlining, and segregation, the civil rights movement, and other racial justice, civil, and labor rights movements, and condition federal funding on the implementation of such a requirement.
- The Justice Department and Education Department should together enforce Title VI and relevant statutes to ensure non-discrimination in the implementation of such a national standard, and in particular prohibiting school districts or states from banning ethnic studies or from teaching about other forms of racial discrimination.
- Create guidelines urging the removal of Police and School Resource Officers who criminalize student behavior in a racially disparate manner, and condition federal funding on the removal of such officers.

To the Department of Labor:

- Increase enforcement efforts and penalties for minimum wage and workplace safety violations, as well as violations of workers' rights to organize and join unions, to address the steep racial disparities in pay and working conditions.
- Require state and federal labor agencies to annually record and report all wage and hour violations, investigations into violations, and resolution, aggregated by race, ethnicity, and immigration status, and make such data public.
- Issue a regulation granting the Occupational Safety and Health Administration ("OSHA") jurisdiction over the labor conditions of all workers incarcerated in federal, state, and local prisons.
- Initiate rulemaking or, at a minimum, issue guidance to establish authoritatively that the Fair Labor Standards Act (FLSA) applies to all incarcerated workers. As a part of this process, update the Field Operations Handbook to clarify that all incarcerated workers are employees for FLSA purposes.
- Investigate wage and hour violations related to incarcerated work and bring enforcement actions to ensure compliance with the FLSA.
- Increase investigations and unannounced inspections of worker health and safety conditions and increase penalties for employers that maintain abusive working conditions.
- Allocate sufficient resources to the Department of Labor's OSHA to fulfill its mandate to assure safe and healthful working conditions through meaningful and effective inspections and oversight of establishments across industries in the United States.
- Initiate a rulemaking process to update the list of hazardous occupations off limits to children under 16 working in agriculture, and publicly endorse and work to enact legislation championed by Representative Lucille Roybal-Allard in the House of Representatives to update the Fair Labor Standards Act to give child farmworkers the same protections as children working in all other sectors, limiting their hours and raising the minimum age to begin work.
- Launch a new effort to research and collect data on child labor in agriculture in the US, including how climate change might be heightening health risks for child farmworkers, in partnership with other government agencies experienced in collecting, analyzing, and reporting on data related to child labor in the US, such as the Government Accountability Office (GAO), which published a 2018 report on children working in the US, and work-related deaths and injuries among children, and the National Institute for Occupational Safety and Health. Ensure a broad

range of stakeholders, including farmworker children and youth and their families, workers' rights organizations, educators, researchers, and others have an opportunity to provide meaningful input to the process.

- Rigorously enforce existing child labor laws and regularly publish updated enforcement statistics, disaggregated by agricultural and non-agricultural work.

To The National Labor Relations Board:

- Declare that incarcerated people are employees who are eligible to join a union.

To the Equal Employment Opportunity Commission:

- Formally issue EEOC guidance and update the Compliance Manual to direct consideration of US obligations under ICERD and other international human rights treaty and customary law obligations in investigations and enforcement actions.
- Reinstate and enforce mandatory compliance with employment equity and non-discrimination principles for all federal contractors and recipients of federal funds.
- Publicly report the number of complaints filed and investigations opened by race, ethnicity, immigration status, and industry. Additionally, report the outcome of each investigation, and provide explanations for uninvestigated complaints.

To the US Trade Representative:

- Pledge not to use the World Trade Organization dispute resolution mechanisms, other international trade and investment agreements, or any other means to stop or dissuade countries from producing, distributing, purchasing, or using medical goods made by alternative producers to control the spread of Covid-19. This includes not listing governments that use flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to protect public health on the "Priority Watch List" of its Special 301 Report on Intellectual Property Rights.

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RACIAL DISCRIMINATION IN THE UNITED STATES

Human Rights Watch / ACLU joint submission regarding the United States' record under the International Convention on the Elimination of All Forms of Racial Discrimination

It has been nearly 30 years since the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Yet progress towards compliance remains elusive—indeed, grossly inadequate—in numerous key areas including reparative justice; discrimination in the US criminal legal system; use of force by law enforcement officials; discrimination in the regulation and enforcement of migration control; and stark disparities in the areas of economic opportunity, education, and health care. Racism and xenophobia persist as powerful and pervasive forces in American society. The ICERD is an important part of the solution: to confront these global problems effectively, the US needs to confront discrimination head on and proactively and swiftly engage in efforts to meet its international obligations. This report and its detailed appendix offer an initial roadmap for the US government to fulfill its obligations under the treaty.

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