Nathan Woodliff-Stanley, Executive Director
Mark Silverstein, Legal Director

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SENT VIA EMAIL:

Members of Denver City Council's Safety, Housing, Education & Homelessness Committee:

Paul Lopez, Chair - paul.lopez@denvergov.org;
Paul Kashmann, Vice-Chair - paul.kashmann@denvergov.org;
Kevin Flynn, Councilmember - kevin.flynn@denvergov.org;
Stacie Gilmore, Councilmember - stacie.gilmore@denvergov.org;
Robin Kniech, Councilmember - kniechatlarge@denvergov.org;
Wayne New, Councilmember - wayne.new@denvergov.org

Dear Members of Denver City Council's Safety, Housing, Education & Homelessness Committee:

On behalf of the American Civil Liberties Union of Colorado (ACLU), I write to address three issues with regard to the proposed "Sentencing Reform" ordinance: 1) the enhancement for "bias-motivated offenses; and 2) the sentences for offenses designated as "quality of life offenses," and 3) the missed opportunities and lack of data to justify the proposed changes.

Bias-motivated offenses

The ACLU supports carefully crafted laws that provide for a separate crime or increased punishment for crimes that are committed for the purpose of targeting persons because of their race, religion, gender, national origin, sexual orientation, or other group characteristics.

Nevertheless, the ACLU has always stood for rigorous protection of the First Amendment right of freedom of thought, freedom of opinion, and the right of association to further these freedoms. We oppose laws that punish the mere expression of thoughts, opinions, or beliefs, including expression with which we intensely disagree, such as racial supremacy or religious bigotry.

Laws that are aimed at punishing bias-motivated crimes must be narrowly drawn and drafted in a manner that prevents police and prosecutors from making constitutionally problematic inquiries into expression or beliefs that may establish the defendant's bias or hate but have no direct relationship to the criminal incident that is charged.

Detailed safeguards are necessary to assure that rights of expression and association are not infringed, that more severe punishment is not imposed simply because prosecutors disapprove of

the defendant's beliefs or expressions. The proposed sentencing enhancement for "bias-motivated offenses" fails to provide the necessary safeguards.

- The proposed definition of "bias-motivated offense" is not narrowly drawn. The provision should be limited to criminal conduct that involves harassment, physical injury, or threat of physical injury to the victim, or damage or threatened damage to the victim's property. Instead the provision can be charged to enhance the punishment for <u>any</u> offense anywhere in the Denver municipal code.

- The proposed definition of "bias motivation" is too vague and imprecise. It provides for enhanced punishment if the jury decides the offense was committed "in substantial part" because of the victim's protected group characteristic. The necessary precision and specificity requires that the prosecution prove that the defendant <u>intentionally selected the victim because of</u> the victim's actual or perceived race, religion, or other protected characteristic.

- Protection of First Amendment values prohibits enhanced punishment because of the defendant's constitutionally-protected expressions of belief or the defendant's associations. The prosecution must be prohibited from relying on evidence of opinion, beliefs, or associations unless that evidence is specifically and directly related to the crime charged. Similarly, mere expression of epithets, without additional evidence of specific intent to commit a bias-motivated offense, should be insufficient. The proposed ordinance fails to provide the necessary safeguards.

- In order to evaluate whether the "bias-motivated offense" enhancement is functioning in the manner intended and actually protecting its intended beneficiaries, the proposed ordinance should require the prosecutor's office to collect and publish comprehensive data on the implementation and enforcement "bias-motivated offense" enhancement. The proposed ordinance fails to require this necessary tool of accountability.

<u>Quality of life offenses</u>

In its preliminary legislative declarations, the proposed ordinance recognizes that certain "quality of life" offenses disproportionately impact vulnerable populations, and some of these offenses are grouped as Class 2 violations. In section 1-14(b)(1), the draft reduces the maximum jail sentence to 60 days, and it further specifies that "no person convicted of a class 2 offense shall be subject to any fine."

The prohibition of fines appears to be a well-meaning effort to ensure that persons experiencing homelessness and other deeply impoverished persons are not sentenced to fines they cannot pay. Nevertheless, the text poses too great a risk that municipal courts will read this provision as a presumption that jail is the appropriate punishment for such offenses as violating park curfew, camping, sitting on a public sidewalk, or public urination. The result will be to send more poor people who pose no threat to public safety to an already-overcrowded jail.

In far too many cases, prosecuting "quality of life" offenses serves to criminalize homelessness and poverty. While the ACLU applauds the drafters' willingness to abandon the current 365-day maximum sentence for these offenses, even the proposed 60-day maximum is too severe.

Instead, "quality of life" offenses should be non-jailable offenses or removed entirely from the criminal code and addressed as civil infractions. Even if Denver is unwilling to take such a step, surely Denver does not intend to instruct judges that jail is the presumptive and preferred penalty for these offenses that pose little or no threat to public safety.

In foreclosing the possibility of fines, section 14(b)(1) states vaguely that it does not limit "other sentencing options that are otherwise available to the court." It is not clear what other sentencing options the municipal code makes available. Like jail, a sentence to probation is excessive for such minor offenses, and both probation and useful public service require the defendant to pay fees.

If Denver is unwilling to remove jail as a sentence for "quality of life" offenses, then Denver should continue to allow judges to impose modest fines as an alternative to jail. Impoverished defendants who are unable to pay their fines may be sent to collections, but they cannot be sent to jail for inability to pay. Rather than adopting the current draft that prohibits fines and thus suggests that jail is the presumptive alternative, Denver could provide guidance to judges about imposing fines that are truly proportionate, both to the minor nature of the offense and to the defendant's ability to pay. For a very impoverished individual, a fine of ten or twenty dollars is akin to a fine of several hundred dollars for individuals with more financial resources.

Missed opportunities and lack of data to justify the proposed changes

Over the last several months, representatives of the ACLU participated in several meetings with City administration officials in which some portions of the proposed ordinance were addressed. The original goal of the proposed changes in sentencing was to eliminate the unintended immigration consequences posed by possible penalties as long as 365 days in jail. These immigration consequences can be eliminated by reducing the maximum penalties to 364 days or less. I must express my organization's disappointment with the administration's decision to retain the option to impose one-year sentences for class 1 offenses. Reducing that potential penalty by a single day could eliminate the collateral immigration consequences. By maintaining a potential one-year sentence, the Denver administration is intentionally choosing to maintain those immigration consequences. Why?

The proposed ordinance reduces the maximum penalty for most municipal offenses to 300 days in jail. Reducing the maximum penalty is a welcome step, but Denver risks missing an opportunity for a more substantial and needed reform of its sentencing policies. In many Colorado cities, the maximum sentence for an ordinance violation is 180 days. In some it is only 90 days. What is the rationale for keeping the maximum as high as 300 days?

It is also disappointing that the City administration is unable to provide data to justify its proposed changes. Does reducing the maximum sentence for "quality of life" offenses reduce the jail population? How often do judges impose the maximum jail sentence? How frequently do ordinance violations fit the facts of a class 1 offense? How will the proposed sentencing changes affect the jail population? Could more substantial changes achieve a dramatic reduction in the jail population without risking public safety?

It appears that the City administration is rushing to enact this ordinance. The City administration shared a draft for the first time on April 19 and then speeded it to this committee the very next week. Sentencing reform is important, sufficiently important that it is worth doing it right. This

ordinance is not ready. I hope the City Council will take the time to frame revisions and craft the necessary amendments.

Sincerely,

Mark Silverstein
Legal Director, ACLU of Colorado