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**Committee Chair**

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**President & CEO**

Vanita Gupta

May 15, 2018

## Vote “No” on The FIRST STEP Act

Dear Representative,

On behalf of The Leadership Conference on Civil and Human Rights, and the ## undersigned organizations, we write to urge you to vote NO on The FIRST STEP Act (H.R.5682). While well intentioned, this bill takes a misguided approach to reforming our federal justice system. Without question, we appreciate the inclusion of some promising provisions to address some of the problems in the federal prison system,<sup>1</sup> however, the Bureau of Prisons (BOP) already has broad authority to make the majority of these changes through administrative action. In sum, this bill falls short on its promise to “meaningfully” tackle the problems in the federal justice system – racial disparities, draconian mandatory minimum sentences, persistent overcrowding, lack of rehabilitation, and the exorbitant costs of incarceration. Decisions we make now through this bill could have deep implications for our ability to impact the abiding and deepening harms that lead to mass incarceration.

As such, we continue to have several, grave concerns with The FIRST STEP Act, including:

- **The Dangerous “Risk Assessment System”:** The Act purports to offer people in prison the chance to “earn time credits” towards early release to pre-release custody—but by building and placing a “risk and needs assessment” algorithm in the hands of the Attorney General – one not required to be designed or tailored for the individuals it is meant to judge – we risk embedding deep racial and class bias into decisions that heavily impact the lives and futures of federal prisoners and their families.

Researchers have shown that risk assessment tools applied in sentencing decisions in Florida – meant to predict recidivism – were twice as likely to be wrong when evaluating Black people as White people.<sup>2</sup> One of the first independent studies analyzing the use of risk assessment in pretrial showed that decisionmakers using risk assessment tools – in this case, Kentucky judges – ignored their results over time, while also overseeing an increase in failures-to-appear at court and an increase in pretrial arrests.<sup>3</sup> A further recent analysis showed that risk assessment tools are as accurate as a prediction made by a random human selected over the Internet.<sup>4</sup>

We cannot introduce algorithmic risk assessment into the assignment of housing and release decisions or rehabilitative opportunities without sufficient transparency, independent testing for decarceral and anti-racist results prior to implementation, and regular effective oversight for not just what the tool purports to predict, but how decisionmakers in our prison system use it. The Act uses “risk assessments” in an untested manner.<sup>5</sup> It fails to ensure transparency, independent testing, or analysis of the proposed risk assessment system or its results prior to its adoption or

implementation. And again, it doesn't require the tool to be designed or tailored for the individuals it is meant to judge.

Without these things, and in the hands of the nation's most prominent proponent of a punishing, rather than a rehabilitative criminal justice system, "risk assessments" will further embed racism into the meting out of resources that could change prisoners' lives – like access to treatment, work, and most importantly, the ability to earn time off of a sentence.

- **The Overbroad List of Exclusions:** The majority of people in prison will eventually be released. Categorically excluding entire groups of people from receiving early-release credits<sup>6</sup> will undermine efforts to reduce prison overcrowding and improve public safety since such exclusions weaken the incentive to participate in recidivism-reduction programming. Furthermore, many of these exclusions, *such as those based on immigration-related offenses*,<sup>7</sup> could have a disproportionate impact on people of color.<sup>8</sup>
- **The Overbroad Discretion Provided to Attorney General Sessions:** The bill gives broad authority to the Attorney General and would rely upon implementation by this administration.<sup>9</sup> Despite assurances to the contrary, this administration has failed to take any active steps to improve the justice system, has dismantled existing protections, and has shown outright hostility to people of color and other historically marginalized communities.<sup>10</sup> Furthermore, Attorney General Jeff Sessions is a well-known, longtime opponent of sentencing and prison reform. It would be unwise and harmful to vest so much discretion in an Attorney General so hostile to meaningful justice reform.
- **The Misplaced Incentive System:** Effectively reducing recidivism requires targeting those most likely to reoffend with rehabilitative programming. Yet, under this bill, only "minimum" and "low-risk" prisoners would be able to redeem their earned time credits,<sup>11</sup> and they would earn more credits than prisoners categorized as "medium" or "high-risk."<sup>12</sup> Given that time credits would also be subject to denial by the BOP warden<sup>13</sup> and they are not real time off of a sentence but rather a flawed mechanism<sup>14</sup> to transition into a decreasing number of halfway houses<sup>15</sup> or to home confinement that is rarely used by BOP,<sup>16</sup> the bill is unlikely to provide the incentives that would meaningfully reduce recidivism.
- **Allows for the privatization of certain public functions and allows private entities to profit from incarceration.** The bill retains a provision that in order to expand programming and productive activities, the Attorney General shall develop policies for wardens of each BOP facility to enter into partnerships with private entities and industry-sponsored organizations.<sup>17</sup>
- **The Absence of Appropriations for Implementation:** The resources needed to expand programming authorized under the bill have not been – and may never be – appropriated. In fact, Congress could decide today, absent this legislation, that prison programming should be funded and increase the BOP's budget by \$50 million a year for the next five years. **Instead, the FY19 BOP budget calls for a reduction.**<sup>18</sup> Furthermore, the recidivism reduction programming that currently exists in the federal prison system is grossly underfunded and not enough to serve those currently incarcerated. Therefore, without any guarantees that the necessary funding will be

appropriated, this bill is an empty promise.

- **The Undetermined Human and Fiscal Impact:** It is unclear what the fiscal impact of this bill will be, given that the Congressional Budget Office has not released a score for the bill. Moreover, it is unclear what the human impact of this bill will be, given that neither the BOP nor the U.S. Sentencing Commission has produced updated estimates on the number of people projected to be impacted by the legislation. Proponents argue that at least 4,000 people will be impacted by the good time fix alone; however, relying on that number is misleading because it is based upon data that is over a decade old.<sup>19</sup> No hearings have been held and there is no CBO score available in order to explore these questions further.
- **The Omission of Sentencing Reform:** Sentencing reform and prison reform are both important, but one will not work without the other. Meaningful reform requires both. Furthermore, advancing prison reform as a stand-alone will undermine longstanding, bipartisan efforts in the Senate to advance a comprehensive justice reform package that includes sentencing reform.

Last week, we were joined by over 70 civil rights organizations in opposing this well-intentioned, but misguided legislation at the House Judiciary Committee markup.<sup>20</sup> Many of our concerns were also shared by the American Federation of Government Employees representing 33,000 federal correctional workers in the Bureau of Prisons,<sup>21</sup> as well as Representatives Lewis, Jackson Lee, and Senators Durbin, Booker, and Harris in a recent Dear Colleague letter.<sup>22</sup> While we appreciate the inclination to support legislation that endeavors to reform our prison system, we believe that this particular bill would do more harm than good and would have unintended consequences that ripple into the future.

Finally, if presented with one choice, “to take what we can get now,” then we must ensure that “what we get” will not perpetuate the existing harms of mass incarceration or give false hope to the men and women languishing in prison and the communities we represent. Our communities are being demonized and criminalized so we must stand firm to resist the lure of a compromise that is ultimately a false promise that may never be realized and isn’t in their best interests.

For the foregoing reasons, we urge you to vote “No” on the FIRST STEP Act and will be including your position on the bill in our voting scorecard for the 115th Congress. If you have any questions, please feel free to contact Sakira Cook, Senior Counsel at The Leadership Conference on Civil and Human Rights, at (202) 263-2894 or [cook@civilrights.org](mailto:cook@civilrights.org).

Sincerely,

The Leadership Conference on Civil and Human Rights  
334 East 92nd Street Tenant Association  
African American Ministers In Action  
American Civil Liberties Union  
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)  
American Federation of State, County, and Municipal Employees (AFACME)  
American Humanist Association

Arkansas United Community Coalition  
Asian Pacific American Labor Alliance  
Association of University Centers on Disabilities (AUCD)  
Autistic Self Advocacy Network  
Bazelon Center for Mental Health Law  
Bend the Arc Jewish Action  
Buried Alive Project  
Campaign for Youth Justice  
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities  
Center for Community Change Action  
Center for Responsible Lending  
Coalition for Humane Immigrant Rights (CHIRLA)  
Coalition of Black Trade Unionists  
Coalition on Human Needs  
Color of Change  
CURE (Citizens United for Rehabilitation of Errants)  
Defending Rights & Dissent  
Disability Rights Education & Defense Fund  
Drug Policy Alliance (DPA)  
Equal Justice Society  
Equal Rights Advocates  
Equality California  
Equity Matters  
Evangelical Lutheran Church in America  
Faith Action Network - Washington State  
Government Information Watch  
Harm Reduction Coalition  
Hip Hop Caucus  
Human Rights Watch  
Immigrant Legal Resource Center  
Indivisible  
Japanese American Citizens League  
Jewish Council for Public Affairs (JCPA)  
Justice Strategies  
JustLeadershipUSA  
Juvenile Law Center  
LatinoJustice PRLDEF  
Law Enforcement Action Partnership  
Let's Start, Inc.  
Mommieactivist and Sons  
MomsRising  
NAACP  
NAACP Legal Defense and Educational Fund, Inc.

National Association of Human Rights Workers  
National Association of Social Worker  
National Bar Association (NBA)  
National Black Justice Coalition  
National Center for Lesbian Rights  
National Coalition on Black Civic Participation  
National Council of Churches  
National Education Association  
National Employment Law Project  
National Hispanic Media Coalition  
National Immigrant Justice Center  
National Immigration Law Center  
National Immigration Project of the National Lawyers Guild  
National Juvenile Justice Network  
National LGBTQ Task Force Action Fund  
National Organization for Women  
National Organization of Black Law Enforcement Executives (NOBLE)  
National Religious Campaign Against Torture  
NETWORK Lobby for Catholic Social Justice  
Pennsylvania Immigration and Citizenship Coalition  
People For the American Way (PFAW)  
PFLAG National  
Prison Policy Initiative  
Safer Foundation  
Service Employees International Union (SEIU)  
Sikh American Legal Defense and Education Fund (SALDEF)  
Southern Poverty Law Center (SPLC)  
Students for Sensible Drug Policy  
The Decarceration Collective  
The National Council for Incarcerated and Formerly Incarcerated Women and Girls  
The United Church of Christ  
The United Methodist Church - General Board of Church and Society  
T'ruah: The Rabbinic Call for Human Rights  
UndocuBlack Network  
UnidosUS  
Union for Reform Judaism  
United Church of Christ, Justice and Local Church Ministries  
United Church of Christ, Justice and Witness Ministries  
United We Dream  
Washington Lawyers' Committee for Civil Rights & Urban Affairs  
We Got Us Now  
Woodhull Freedom Foundation  
World Without Genocide

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- <sup>1</sup> See, e.g., prohibitions on the shackling of pregnant women, a retroactive “good time” fix, reforms to the federal compassionate and elderly release programs, and an audit of the program several years after its implementation.
- <sup>2</sup> See Angwin, Julia, Larson, Jeff, Mattu, Surya and Kirchner, Lauren. “Machine Bias: There’s software used across the country to predict future criminals. And it’s biased against blacks.” *Pro Publica*. May 23, 2016. <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.
- <sup>3</sup> See Stevenson, Megan. “Assessing Risk Assessment in Action.” *Minnesota Law Review*, Forthcoming. March 18, 2018. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3016088](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016088)
- <sup>4</sup> See Dressel, Julia and Farid, Hany. “The accuracy, fairness, and limits of predicting recidivism.” *Science Advances*. January 17, 2018. <http://advances.sciencemag.org/content/4/1/eaao5580>
- <sup>5</sup> When risk and needs assessment evaluations are adopted, they are typically used by states to identify programming for people in prison, rather than to award time credits. See, e.g., Tex. Gov’t Code § 498.002 (classifying inmates’ “time-earning category” based on factors other than risk assessment); R.I. Gen. Laws § 42-56-24 (determining amount of sentence credit based on factors other than risk assessment); Okla. Stat. § 57-138 (same); N.C. Gen. Stat. § 15A-1340.18 (same); Ohio Rev. Code Ann. § 2967.193 (same)
- <sup>6</sup> See the 48 exclusions listed within The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(d)(4)(D) (2018). See also The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(d)(4)(B)(iii) (2018).
- <sup>7</sup> See, e.g., The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(d)(4)(B)(iii) (2018). See also The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(d)(4)(D)(xliv) (2018).
- <sup>8</sup> Over twelve thousand people are being held in federal prison for immigration offenses, according to most recent data from the Bureau of Prisons (BOP), and a total of 60,000 people are being detained because of an immigration offense by BOP, U.S. Marshalls, and Immigration and Customs Enforcement. *Tex. Gov’t Code § 498.002* “Offenses.” Bureau of Prisons. Accessed May 21, 2018. [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp). See also Wagner, Peter and Sawyer, Wendy. *Prison Policy Initiative*. “Mass Incarceration: The Whole Pie 2018.” March 14, 2018. <https://www.prisonpolicy.org/reports/pie2018.html>.
- <sup>9</sup> See, e.g., The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(g) (2018) (“the Attorney General shall monitor and assess the use of the [risk and needs assessment] System”). See also SEC. 102 (h)(5) (2018) (“the Attorney General shall develop policies for the warden of each prison of the Bureau of Prisons to enter into partnerships”). See also The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(a) (“In carrying out this subsection, the Attorney General may use existing risk and needs assessment tools, as appropriate”). See also The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(e) (2018) (“The Director of the Bureau of Prisons shall develop guidelines for the reduction of rewards and incentives earned under subsection (e) for prisoners who violate prison rules or evidence-based recidivism reduction program or productive activity rules” with a few limitations). In total, the term “Attorney General” appears 20 times in The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. (2018).
- <sup>10</sup> See “Without Justice: Trump’s Across-the-Board Assault on Civil and Human Rights.” *The Leadership Conference Education Fund*. Jan. 2018. <http://civilrightsdocs.info/pdf/monitor/Without-Justice-2018.pdf>.
- <sup>11</sup> See The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(d)(4)(C) (2018).
- <sup>12</sup> See The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(d)(4)(A)(ii) (2018).
- <sup>13</sup> See The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. SEC. 102 (b)(1)(B) (2018). See also The FIRST STEP Act, H.R. 5682, 115<sup>th</sup> Cong. § 3632(d)(4)(C) (2018).
- <sup>14</sup> See FIRST STEP Act, 115<sup>th</sup> Cong. § 404(a)(1)(A) (2018).
- <sup>15</sup> See Lynch, Sarah N. and Harte, Julia. “Exclusive: Trump Administration Reduces Support for Prisoner Halfway Houses.” *Reuters*. Oct. 13, 2017. <https://www.reuters.com/article/us-usa-justice-prisons-exclusive/exclusive-trump-administration-reduces-support-for-prisoner-halfway-houses-idUSKBN1C12ZA>.
- <sup>16</sup> See Office of Inspector General. (2016, November) Audit of Federal Bureau of Prisons’ Management of Inmate Placements in Residential Reentry Centers and Home Confinement. U.S. Department of Justice. Retrieved from <https://oig.justice.gov/reports/2016/a1701.pdf>.
- <sup>17</sup> See The FIRST STEP Act, § 3621 (h)(5)(C)(D) pgs.33 and 34 <file:///C:/Users/bulsb/Pictures/HR5682.pdf>
- <sup>18</sup> See “Federal Prison System (BOP): FY 2019 Budget Request At A Glance.” *Bureau of Prisons*. <https://www.justice.gov/jmd/page/file/1033161/download>.



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<sup>19</sup> See Dear Colleague Letter from Senator Durbin, Senator Harris, Senator Booker, Representative Jackson Lee, and Representative Lewis. Pg. 3. May 17, 2018. <https://www.politico.com/f/?id=00000163-6f9d-dbc0-a56b-efdd053a0001>.

<sup>20</sup> See Letter to Members of the House Judiciary Committee: Vote “No” on The FIRST STEP Act. The Leadership Conference on Civil and Human Rights. May 8, 2018. <http://civilrightsdocs.info/pdf/policy/letters/2018/not-retroactive-Sign-On-Letter-Oppose-First%20Step%20Act-5.8.18-FINAL.pdf>.

<sup>21</sup> See Letter to Chairman Grassley, Ranking Member Feinstein, Chairman Goodlatte, Ranking Member Nadler, and Senator Durbin. The American Federation of Government Employees, AFL-CIO, Council of Prison Locals. May 8, 2018. <https://www.afge.org/globalassets/documents/bop/first-step-letter-5-11-18.pdf>.

<sup>22</sup> See Dear Colleague Letter from Senator Durbin, Senator Harris, Senator Booker, Representative Jackson Lee, and Representative Lewis. May 17, 2018. <https://www.politico.com/f/?id=00000163-6f9d-dbc0-a56b-efdd053a0001>.