

July 17, 2018

Hon. Mitch McConnell
U.S. Capitol Building, Room: S-230
Washington, DC 20510

Hon. Charles Schumer
Hart Senate Office Building, Room: 419
Constitution Ave. and 2nd St. NE
Washington, DC 20510

Re: FIRST STEP Act (S. 2795) & Sentencing Reform and Corrections Act (S. 1917)

Dear Leader McConnell and Senator Schumer:

On behalf of the National Center for Transgender Equality (NCTE), National Center for Lesbian Rights, and the undersigned organizations, we urge the Senate to pass comprehensive criminal justice reform legislation including reforms to federal sentencing laws.

Sentencing and prison reform are needed to achieve meaningful criminal justice reform

While prison reform is urgently needed, solely making back-end reforms, as proposed in the H.R. 5682 and S.2795, **Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (FIRST STEP Act)**, will not have a meaningful impact on our country's mass incarceration problem. According to the U.S. Sentencing Commission, mandatory minimum sentences are the leading contributor to our burgeoning federal prison population and the increased costs to our national budget.¹ In 2015, the average cost of incarceration for federal inmates was \$31,977.65.² Currently, there are more than 180,000 incarcerated people in federal prison, nearly half of whom are there for drug offenses (46.2 %).³ This means that taxpayers collectively pay over \$3 billion a year to incarcerate people with federal drug-related convictions. Despite the fact that 84% of Americans believe that some of the money spent on incarcerating low-level, non-violent drug offenders should instead be used to strengthen community correction programs,⁴ mandatory minimum sentences require judges to impose lengthy sentences for drug offenses.

¹ U.S. SENTENCING COMMISSION, *Changes in the Federal Criminal Justice System, Mandatory Minimum Penalties, and the Federal Prison Population*, in 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 63, 71–76, 81, 82–83 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_04.pdf.

² Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957 (July 19, 2016).

³ *Statistics*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited July 6, 2018).

⁴ Memorandum from Robert Blizzard, Public Opinion Strategies, National Polling Results (Jan. 25, 2018), available at <https://www.politico.com/f/?id=00000161-2ccc-da2c-a963-fff82be0001>.

Lesbian, gay, bisexual, transgender, transsexual, and queer (LGBTQ) people, especially those of color, are disproportionately incarcerated due to higher rates of poverty⁵ and to a history of anti-LGBTQ discrimination,⁶ including by law enforcement.⁷ For adults 40% of incarcerated women and 9% of incarcerated men are sexual minorities.⁸ Additionally, one in eight transgender people have been incarcerated; among transgender women, that number jumps to one in five.⁹ The rate of incarceration is higher for transgender people of color, with one in four trans Latinas and nearly half of Black trans people experiencing incarceration.¹⁰ In the last year, transgender people were incarcerated at twice the rate of the general population, with Black (9%) and American Indian (6%) transgender women being the most impacted.¹¹

Excessive sentences increase LGBTQ people's exposure to verbal, physical, and sexual harassment and abuse in incarceration. LGBTQ prisoners are significantly more likely to be sexually assaulted in prison, with 12% of gay and bisexual men¹² and one in five of transgender people reporting a sexual assault in a 2015 study¹³. In a 2015 survey of LGBTQ inmates, 85% of respondents had been placed in solitary confinement – many ostensibly for their own protection – and approximately half had spent two years or more in solitary.¹⁴ LGBTQ inmates - especially those who are transgender - are often denied needed medical care while incarcerated, including transition-related care, HIV-related care, and mental and behavioral health care.¹⁵ In the previous year, 37% of transgender people who were on hormone treatment were denied medication once incarcerated.¹⁶

Congress has a moral obligation to pass laws that will make our system more just so that people are not imprisoned arbitrarily and excessively. To achieve that goal, the Senate should advance

⁵ JODY MARKSAMER & HARPER JEAN TOBIN, *STANDING WITH LGBT PRISONERS: AN ADVOCATE'S GUIDE TO ENDING ABUSE AND COMBATING IMPRISONMENT 5* (National Center for Transgender Equality, 2013), http://www.transequality.org/sites/default/files/docs/resources/JailPrisons_Resource_FINAL.pdf; *see also* M.V. LEE, BADGETT, LAURA E. DURSO, & ALYSSA SCHNEEBBAUM, *NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* (Williams Institute, 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.

⁶ *See* AMNESTY INTERNATIONAL, USA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. (2005), *available at* <https://www.amnesty.org/en/documents/amr51/122/2005/en/>.

⁷ SANDY E. JAMES ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 184* (National Center for Transgender Equality, 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁸ Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. PUBLIC HEALTH TRANSGENDER HEALTH 234 (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Meyer_Final_Proofs.LGB_In_.pdf.

⁹ JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163* (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

¹⁰ *Id.*

¹¹ JAMES ET AL., *supra* note 7, at 194.

¹² ALLEN J. BECK ET AL., *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12* (Bureau of Justice Statistics, 2014), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

¹³ JAMES ET AL., *supra* note 12, at 195.

¹⁴ JASON LYDON ET AL., *COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY (2015)*, <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015..pdf>.

¹⁵ GRANT ET AL., *supra* note 10, at 169.

¹⁶ JAMES ET AL., *supra* note 7.

the bipartisan sentencing provisions that have already been negotiated in S.1917, Sentencing Reform and Corrections Act of 2017 (SRCA). SRCA offers the chance to begin making meaningful changes and moving towards a system that truly ensures equal justice for all. The bill reduces mandatory minimums for non-violent, low-level, and repeat drug crimes, which would significantly reduce the number of incarcerated LGBTQ people who serve long sentences, thereby, limiting the exposure of LGBTQ individuals to the widespread physical, sexual, and emotional violence in prisons.

The FIRST STEP Act's flaws could undermine the goals of reform

While we see several positive provisions in the FIRST STEP Act, they are not enough to overcome significant problems with the bill, and many could be adopted administratively by the Bureau of Prisons. Moreover, other provisions of the FIRST STEP Act are flawed and could undermine meaningful criminal justice reforms.

The FIRST STEP Act relies on "risk assessment" tools to categorize prisoners and authorizes significant power to the Attorney General for adopting and implementing these tools without adequate safeguards to ensure such decisions are statistically valid, fair, and subject to meaningful review. Without appropriate safeguards, such tools are extremely vulnerable to misuse and are highly likely to exacerbate the disparities experienced by people of color, low-income, and LGBTQ people.

Additionally, the FIRST STEP Act will not likely lead to more people being released earlier. First, the bill gives wardens significant discretion in determining whether an individual should be transferred into prerelease custody, again creating a high risk that subjective perceptions and biases will perpetuate existing disparities rather than redressing them. Second, it excludes people with a wide range of convictions. Third, the good time fix provision adds up to, at most, two months off a 10-year sentence or four months off a 20-year sentence that would only release a person into some form of prerelease custody (i.e. halfway house or home confinement). Even if someone qualifies for prerelease, it would depend on whether there is bed space. Unfortunately, the bill does not address the problem of insufficient beds at halfway houses. Likewise, the bill only authorizes new funding for the recidivism reduction programming or halfway houses but does not guarantee it which amounts to an empty promise.

Conclusion

For the Senate to retreat from SRCA, which is a meaningful reform bipartisan deal that was years in the making, would be a mistake. The FIRST STEP Act would not only be a missed opportunity for meaningful reform, it could set the goals of reform back. We should not lose ground on an issue that has enormous and ongoing costs for our communities. We owe it to the American people, including LGBTQ communities, to pass meaningful reform. Anything less is unacceptable.

Sincerely,

A Little Piece Of Light

ADAPT
AIDS Action Baltimore
AIDS Alabama
AIDS United
American Civil Liberties Union (ACLU)
Athlete Ally
Bailey House, Inc.
Bend the Arc Jewish Action
Black AIDS Institute
Black and Pink NYC
Conyers Foundation
Decarcerated Podcast
Equality California
Equality North Carolina
FORGE, Inc.
Global Justice Institute
Heartwood Meditation Support Program
HerDomain
Hispanic Health Network
Latino Commission on AIDS
Movement Advancement Project
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for Latinx with Disabilities
National Council on Independent Living (NCIL)
National Disability Rights Network
National Equality Action Team (NEAT)
National LGBTQ Task Force Action Fund
National Working Positive Coalition
Open Door Clinic of Greater Elgin
PFLAG National
Prevention Access Campaign
San Francisco AIDS Foundation
The National Religious Campaign Against Torture
Trans United
Transgender Law Center
Union for Reform Judaism
URGE: Unite for Reproductive & Gender Equity
Witness to Mass Incarceration

Cc: United States Senate