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April 13, 2018

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
United States House of Representatives

The Honorable Jerrold Nadler
Ranking Member, Committee on the Judiciary
United States House of Representatives

cc: Members of the House Judiciary Committee

Concerns about H.R. 3356, the Prison Reform and Redemption Act

Dear Chairman Goodlatte and Ranking Member Nadler:

On behalf of The Leadership Conference on Civil and Human Rights and the 63 undersigned organizations, we write to express our concerns about the Prison Reform and Redemption Act (H.R. 3356), and more generally about our opposition to efforts to pass prison reform (or “back-end” reform) legislation without including sentencing reform (or “front-end” reform). Across the country, states that have enacted legislation containing both front and back end reforms have reduced rates of incarceration and crime.¹ Any legislation that addresses only back end reforms is doomed to fail in achieving these goals. Without changes to sentencing laws that eliminate mandatory minimums, restore judicial discretion, reduce the national prison population, and mitigate disparate impacts on communities of color, H.R. 3356 alone will have little impact.

Moreover, proposals referred to by the White House and others as “prison reform,” including the Prison Reform and Redemption Act of 2017 and S.1994, the CORRECTIONS Act, would do little to reform prisons or the federal justice system. H.R.3356 would allow people to participate in reentry and rehabilitation programs and earn time credits that would permit them to serve the end of their prison sentence in home confinement, halfway houses or community supervision. However, currently there are not enough of these programs available in the Federal Bureau of Prisons (BOP) to serve those currently in prisons. Furthermore, BOP more recently has reduced the number of residential reentry centers it contracts with to provide halfway house programming.

In addition, many people would not be eligible to earn credits by participating in rehabilitation or reentry programs merely based on their criminal convictions. Even if a person is deemed eligible to participate in Bureau of Prisons programming based on the required risk assessment evaluation, after participating in programming, the BOP warden could determine a person is “more likely than not to recidivate” and be denied their time credits. The federal criminal justice system is deeply flawed and needs to adopt a top to bottom over haul. The Prison Reform and Redemption Act alone does not come close to achieving the desperately needed reforms to create a fair and just system.

H.R. 3356 is Unlikely to Achieve Meaningful Prison Reform.

H.R. 3356 would arbitrarily exclude far too many people in federal prisons from receiving time credits from participating in the recidivism reduction programs authorized by the bill. The long list of exclusions sweeps in, for example, those convicted of certain immigration offenses and drug offenses.² Because immigration and drug offenses account for 53.3 percent of the total federal prison population,³ a significant portion of the federal prison population could be excluded from programming that would reduce recidivism and ease reentry. Furthermore, these exclusions could also have a disparate impact on racial minorities, since the majority of those held in federal prison for immigration and drug offenses are people of color.⁴ Any reforms enacted by Congress should impact a significant number of people in federal prison and reduce racial disparities or they will have little effect on the fiscal and human costs of federal prison.

Moreover, the purported incentives towards rehabilitation are not real or meaningful. H.R. 3356's earned time credits are not real time off a sentence, but more time in a halfway house, home confinement, or community supervision.⁵ This is inadequate. Limited space in halfway houses already reduces the amount of time individuals can spend in halfway houses. Recent closures of residential reentry centers have further exacerbated the problem, making it unlikely that people will be able to use all the "time" they earn under the bill.⁶ Additionally, home confinement is rarely used by the Bureau of Prisons⁷ and there are limits on the amount of community supervision that can be used to make up the difference.⁸ For the incentive structure to be real, earned time credits must equate to an actual reduction in sentence to encourage individuals to engage in rehabilitative programming. Such a real incentive structure would result in fiscal savings. For example, if only one in nine individuals earned 60 days of credit in a year, \$100 million in savings would be realized.

Finally, the bill does not include any funding for the recidivism reduction programming it seeks to expand, already grossly underfunded. While the bill does authorize some additional funding,⁹ there is currently no guarantee that such funding will ever actually be appropriated. Any positive reform contemplated by H.R. 3356 would rely upon recidivism reduction programming in prison and post-release that simply does not exist nor is there sufficient funding to create. The bill, as drafted, is therefore an empty promise, unlikely to achieve meaningful prison reform and unlikely to reduce crime or rates of mass incarceration.

H.R. 3356 Provides No Incentive to Those Most in Need of Rehabilitative Programming.

H.R. 3356 would also create a process to redeem credits that is overly burdensome and might dissuade the participation of those who would otherwise be eligible. Individuals seeking to redeem the time credits they've earned by completing programming would need to secure a recommendation of prerelease from the warden or BOP director¹⁰ and judicial approval of the recommendation.¹¹ A process that is so burdensome and dependent on bureaucratic discretion may not incentivize many individuals to participate. Instead, good time credits should vest at the end of each year, which will enable BOP to adjust sentences automatically and incentivize participation in recidivism reduction programs. In particular, we recommend that individuals should be eligible to earn five days of good time credit for every 30 days of programming completed, vesting at the end of each year. Good time credits that lead to actual sentence reductions –

earlier release from confinement altogether – are powerful incentives for participation and meaningful rewards for individuals committed to their personal rehabilitation and reentry.¹² Automatic adjustments would eliminate delays in prerelease, decrease court costs, and allow BOP and courts to focus their time elsewhere.

One important aspect of the Prison Reform and Redemption Act is that it relies on the use of a profile-based algorithmic risk assessment evaluation. H.R. 3356 would adapt the Federal Post Conviction Risk Assessment Tool (PCRA), developed by the Administrative Office of the United States Courts, to create the instrument that would be used to categorize federal prisoners as low, medium, or high risk of recidivating. However, assessment instruments like the one proposed by this bill can be expensive to design, implement, and validate. Moreover, H.R. 3356 fails to mandate the implementation of safeguards that are necessary whenever such tools are used. For example, the bill does not require that the risk and needs assessment tool be statistically validated on a regular basis to ensure validity over time, nor does it require that these tools be validated by an independent authority that has no stake in the outcome of each validation analysis. It is also absolutely vital that algorithmic-based tools, if they are used at all, are designed and calibrated with input from the community and those who would be impacted by their use, rather than input from Administration officials alone. Finally, any use of a risk and needs assessment tool must establish a mechanism by which every assessed individual has a meaningful opportunity to review and challenge their designation as high, medium, or low risk.

H.R. 3356 Uses Risk Assessment Tools in an Unconventional Manner, and These Assessment Tools are Often Unreliable and Exacerbate Racial and Socioeconomic Disparities.

Using a risk assessment system to determine time credits is novel and untested. State correctional systems typically award time credits based on performance and/or disciplinary record, not a risk assessment. Research shows that risk assessments often do not accurately predict risk. One study showed that only 52 percent of those assessed as moderate or high risk by risk assessment tools went on to commit any offense, meaning that almost half of all persons classified as moderate or high risk were actually low risk. Another study found that risk assessments were no better at predicting recidivism than regular human beings provided with the same information.¹³ Generally, states use risk and needs assessment evaluations to identify programming for people in prison and do not use these tools to award time credits.¹⁴

In addition, risk assessments often heavily rely on static factors (those that cannot change) such as criminal history, family members' criminal history, and the community in which a person lived before entering the criminal justice system. Given that communities of color are persistently over-policed across the nation and that a person's "criminal" history need not include any actual criminal convictions, consideration of these factors will likely bias the results against persons of color. Dynamic factors (those that can change over time) such as work history, family ties, and pro-social networks are nearly impossible to change while in prison and therefore make it very difficult for a person to lower their risk score during incarceration. Therefore, H.R. 3356 will result in a large number of people in prison unable to earn early release credits from programming by decreasing their risk category. Rehabilitative programs in prison should use a needs-based assessment to identify the criminogenic needs of each individual and develop a program of interventions to address those needs to lower the individual's risk of recidivating.

Finally, relying on a risk assessment tool for earning time credits could amplify racial disparities and perpetuate other injustices in the criminal justice system. Studies have shown that these tools can produce results that are heavily biased against Black defendants and have a disparate negative impact on African Americans.¹⁵ Risk assessments rely on static factors, including criminal history and age at the time of the offense, and dynamic factors, including work history and educational achievement. Both static and dynamic factors tend to correlate with socioeconomic class and race, and studies show that African Americans are more likely to be misclassified as high risk than White or Hispanic offenders. Therefore, although risk assessments may seem objective or neutral, the data driving many predictive algorithms is profoundly limited and biased. Furthermore, decades of criminology research has shown that such data primarily documents the behavior and decisions of police officers and prosecutors, rather than the individuals or groups that the data is claiming to describe.

H.R. 3356 Omits Key Prison Reforms such as a “Good Time” Credit Fix.

Expand Time Credits for Good Behavior

The federal prison system’s method of calculating earned credit reduces a prisoner’s sentence to a maximum credit of 47 days per year – below the 54 days that Congress intended. This decision results in unnecessary increases in time served by prisoners, at significant cost. By clarifying the statutory language, Congress could save an estimated \$41 million in the first year alone. Congress should also quickly implement a new good time credit that can be earned for successful participation in recidivism-reducing programs, such as education or occupational programming.

Conclusion

It is important to note that while reforms to address back-end drivers of our prison system are needed, they cannot function as a substitute for front-end sentencing reform. Only front-end reforms have the power to significantly stem the tide of incarceration, reduce the exorbitant cost of the prison system, and give redress to those inside who are serving sentences that are disproportionate to the severity of the offense. Any approach that does not include sentencing reform will be insufficient to meet the challenges we face. Our continued progress toward meeting the economic and societal challenges posed by the current system and establishing a fair and more just system depends on a comprehensive approach to reform.

It is up to Congress to continue to advance front end and back end reform designed to improve both federal sentencing laws and the functioning of the federal prison system. If Congress is serious about addressing meaningful prison reform, it will pass legislation that would deal with the conditions of confinement such as reducing the use of solitary confinement, providing adequate medical care to prisoners, and addressing exorbitant prison phone rates. While we share the goal of reforming the federal prison system, the provisions of this bill, as written, do not promise real prison reform. 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, or Jesselyn McCurdy, Deputy Director of

the American Civil Liberties Union Washington Legislative Office, at (202) 675-2307 or jmccurdy@aclu.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
American Civil Liberties Union
African American Ministers in Action
American Federation of Labor-Congress of Industrial Organizations
American Humanist Association
Asian Pacific American Labor Alliance
Autistic Self Advocacy Network
Bend the Arc Jewish Action
Buried Alive Project
Campaign for Youth Justice
CANDO Foundation
Center for Responsible Lending
Coalition on Human Needs
CURE (Citizens United for Rehabilitation of Errants)
Defending Rights & Dissent
Drug Policy Alliance
Equal Justice Society
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
Justice Strategies
JustLeadershipUSA
Law Enforcement Action Partnership
Life for Pot
MomsRising
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Action Network
National Association of Social Worker
National Black Justice Coalition
National Center for Lesbian Rights
National Coalition on Black Civic Participation

National Council of Churches
National Employment Law Project
National Hispanic Media Coalition
National Immigration Law Center
National Juvenile Justice Network
National LGBTQ Task Force Action Fund
National Organization for Women
National Religious Campaign Against Torture
NETWORK Lobby for Catholic Social Justice
People For the American Way
PFLAG National
Prison Policy Initiative
Safer Foundation
Service Employees International Union (SEIU)
Sikh American Legal Defense and Education Fund
Students for Sensible Drug Policy
T'ruah: The Rabbinic Call for Human Rights
The Decarceration Collective
The National Council for Incarcerated and Formerly Incarcerated Women and Girls
The United Methodist Church - General Board of Church and Society
UnidosUS
Union for Reform Judaism
United Church of Christ
United Church of Christ, Justice and Witness Ministries
Washington Lawyers' Committee for Civil Rights & Urban Affairs
We Got Us Now
334 East 92nd Street Tenant Association

¹ See "Most States Cut Imprisonment and Crime." The Pew Charitable Trusts. Nov. 10, 2014. <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/imprisonment-and-crime>.

² See H.R. 3356. 115th Cong. § 102(e)(2)(C)(xi), (xlii), (xlivi), (xlviii) (2017).

³ See "Offenses." *Federal Bureau of Prisons*. Last Updated Feb. 24, 2018. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

⁴ See Taxy, Sam et. Al. "Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data." *Bureau of Justice Statistics*. Oct. 2015. <https://www.bjs.gov/content/pub/pdf/dofp12.pdf>. See also Carson, E. Ann. "Prisoners in 2016." *Bureau of Justice Statistics*. Jan. 2018. <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

⁵ See H.R. 3356, 115th Cong. § 105(b) (2017).

⁶ 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>.

⁷ 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>.

⁸ Only low-risk individuals would qualify for home confinement. See H.R. 3356, 115th Cong. § 102(e) (2017).

⁹ H.R. 3356, 115th Cong., § 107(a) (2017).

¹⁰ See H.R. 3356. 115th Cong. § 105(g)(2)(A) (2017).

¹¹ See H.R. 3356, 115th Cong. § 105(g)(2)(C)(i) (2017).

¹² For example, participation in the BOP's residential drug abuse program (RDAP) results in a one-year sentence reduction and has had as many as 7,000 people on its waiting list. See American Bar Association. (n.d.). *Residential Drug Abuse Program*

(RDAP). Retrieved from https://www.americanbar.org/content/dam/aba/administrative/individual_rights/Ch_3-RDAP.authcheckdam.pdf.

¹³ See Walrath, Rowan. “Software Used to Make “Life-Altering” Decisions Is No Better Than Random People at Predicting Recidivism.” *Mother Jones*. Jan. 2018. <https://www.motherjones.com/crime-justice/2018/01/compas-software-racial-bias-inaccurate-predicting-recidivism/>

¹⁴ 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)

¹⁵ See, e.g., Skeem, J. & Lowenkamp, C. (2015). Risk, Race & Recidivism: Predictive Bias and Disparate Impact. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339.