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October 24, 2019

Chairwoman Karen Bass
Ranking Member John Ratcliffe
Subcommittee on Crime, Terrorism and Homeland Security
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Statement for the Record Regarding the Oversight of the Federal Bureau of Prisons and
the FIRST STEP Act Implementation

Dear Chairwoman Bass and Ranking Member Ratcliffe:

On behalf of The Leadership Conference on Civil and Human Rights (The Leadership Conference), a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, the American Civil Liberties Union (ACLU), an organization with more than 4 million members, activists, and supporter, advancing the promise of the Bill of Rights for all and The NAACP Legal Defense and Educational Fund (LDF), the country's premier legal organization fighting for racial justice, we submit this statement for the record regarding the implementation of the FIRST STEP Act of 2018.

On May 8, 2018, we urged the House Judiciary Committee to vote "No" on the FIRST STEP Act¹ because we feared the Act's lack of transformative "front end" reform would stall our justice system in the broken status quo.² Further, we criticized the bill for "using risk assessment tools in an unconventional manner [because they] are unreliable and exacerbate racial and socioeconomic disparities."³ We predicted that the law's risk assessment provisions would result in incarcerated people being unable to decrease their risk category in order to earn credits toward early release to a residential reentry center or a halfway house.⁴ After members of Congress made key changes to move the bill toward meaningful reform, we ultimately supported the legislation while continuing to articulate concerns regarding the use of a "risk and needs assessment tool." We submitted additional materials in April⁵ and June⁶ of 2019, detailing our outstanding concerns with the development and implementation of the new "risk and needs assessment" system as required by law. Now, nine months after the passage of the Act, we worry that these initial fears are substantiated. The development and implementation of the risk and needs assessment tool set forth in the July 19 report represents the Department of Justice's (DOJ) failure to adhere to the statute's requirements and threatens to significantly undermine the spirit of the law by indefinitely codifying our criminal legal system's existing racial and gender disparities.

While the FIRST STEP Act requires both risk and needs systems,⁷ to date, the DOJ has only released the risk system and asserted that the needs system is forthcoming. On July 19, 2019, National Institute of Justice (NIJ), a research arm of the DOJ's Office of Justice Programs published a report to accompany Attorney General William P. Barr's release of PATTERN.⁸ The report touts the tool's power to maximize the number of incarcerated people eligible to



earn credits toward early release, identify those qualified to participate in rehabilitative programming, and to ensure public safety. Academics and practitioners alike have serious doubts about the effectiveness, fairness, and ability of tools like PATTERN to assess risk.⁹ The American Bar Association (“ABA”) has identified areas requiring consideration or clarification to help ensure that PATTERN will produce accurate, individualized outcomes that remain racially, ethnically, and gender neutral.¹⁰ We share the ABA’s concerns and doubts raised by academics and practitioners. Below, we set forth a set of additional concerns about whether PATTERN fulfills any of the claims made by the NIJ.¹¹

The FIRST STEP Act has produced positive results like giving judges greater discretion to depart from mandatory minimum sentences, making the Fair Sentencing Act retroactive, reducing some mandatory minimum sentences for drug offenses, ending juvenile solitary confinement, expanding compassionate release, and increasing good conduct time credits to reduce sentence lengths for individuals currently incarcerated.¹² Since its passage, over 3,000 people have been released from prison early through good time credits, and the sentences for another 2,193 sentences of non-violent drug offenses have been

reduced.¹³ Additionally, 95 people have also received sentence reductions under the compassionate release program.¹⁴ Though this number represents an improvement over compassionate release grants in the prior year, the Bureau of Prisons can do much more to expand early release opportunities for people who are aging and sick in prison.

While it is true that the FIRST STEP Act has made some modest strides, in order to ensure that the legislation has the greatest positive impact, there is significantly more that DOJ and the Bureau of Prisons (BOP) must do to implement the bill in a manner consistent with the text of the statute and Congressional intent. Specifically, our coalition is concerned with the DOJ’s and BOP’s failure to 1) develop a new risk and needs assessment system that has been independently validated and does not have a disproportionately negative impact on people of color, and 2) implement new rehabilitative programming to successfully assist individuals in prison with reentry.

The Department’s New Risk and Needs Assessment System Does Meet Congressional Intent

Since the announcement of the development of the required risk and needs assessment system, we have been disappointed in the lack of transparency that both the Department of Justice and the Hudson Institute have demonstrated in regard to the development of this system as required by the FIRST STEP Act. To date, implementing the FIRST STEP Act has primarily been a closed-door process. Outside of the listening sessions and email inquiries we have received, justice reform stakeholders and the authentic engagement and centering of directly impacted people have not been thoroughly involved in the process. As a coalition, we have voiced these concerns in a [statement](#) for the record that we submitted to the National Institute of Justice (NIJ) on April 12th; a June 14th [letter](#) to the Hudson Institute and in September 3rd [comments](#) to the July 19, 2019 release of the FIRST STEP Act of 2018: Risk and Needs Assessment System report. We rearticulate these concerns below.

We urge Congress to use its oversight authority to ensure that neither the BOP security classification system nor the current version of Prisoner Assessment Tool Targeting Estimated Risk and Needs— better known by its acronym “PATTERN” is adopted as a substitute for the new Risk and Needs Assessment System required by the statute. Until the scoring adjustment and validation are complete, we ask that Congress direct the Department of Justice to suspend the use of PATTERN. We request that Congress



uses its power to mandate that agencies adjust the *risk score system* and secure *independent expert validation* before using PATTERN to assess those in federal prison.

PATTERN's origin in the Bureau Risk and Verification Observation - Recidivism tool ("BRAVO-R") merits more transparency. BRAVO-R is the system upon which PATTERN was adopted, however, remarkably little information is publicly available about the development, effectiveness, or accuracy of BRAVO-R. Congress should direct the Bureau of Prisons to complete a full evaluation of PATTERN and the process by which it was developed demands. The absence of such information frustrates efforts to properly evaluate PATTERN, raising significant questions about its utility. More can and must be done to make PATTERN's design, architecture, and training data open to independent research, review, testing, and validation.

The FIRST STEP Act mandates the BOP's use of a risk and needs assessment tool which uses both static and dynamic factors¹⁵ and other history information to assign a risk category of high, medium, low, or minimum probability of violent or nonviolent recidivism for incarcerated persons in federal detention.¹⁶ The NIJ created PATTERN to fulfill that mandate.¹⁷ Unfortunately, the NIJ's assertion that PATTERN makes greater use of dynamic factors rings hollow for several reasons. It is a claim undermined by the fact that static factors considered by PATTERN consistently outweigh the dynamic factors that inform one's PATTERN score. Moreover, to the extent an individual seeks to engage in behavior that would improve their risk category, the finite weight given to dynamic factors and the limited BOP programming available to do so frustrate the goals of the FIRST STEP Act. Finally, several concerns remain with the selection of particular dynamic factors included in the various PATTERN models.

PATTERN's predictive performance is biased across racial and ethnic classifications and ignores historical and enduring patterns of racial bias and discrimination that infect the data upon which PATTERN relies. Therefore, PATTERN is not an appropriate substitute for the risk and needs assessment tools required by the FIRST STEP Act because it is inherently racially biased. Studies have shown that these tools can produce results that are heavily biased against Black defendants and have a disparate negative impact on Black people because the factors considered, and the criminal justice data used by these systems are biased.¹⁸ Studies also show that Black people are more likely to be misclassified as high risk than White or Hispanic offenders.¹⁹ PATTERN categorizes Black and brown people as higher risk and as more violent, while the weighting of certain factors in PATTERN will lead to more favorable outcomes for white people, further exasperating the inequities that underlie the foundations of PATTERN. The current tools in place were not designed to identify the specific criminogenic needs of incarcerated individuals and heavily rely on static factors that would undermine the effectiveness of the system. The justification for the creation of these tools is to reduce discrimination in criminal justice decision-making, pretrial release decisions, sentencing, and parole. However, the use of these tools only worsens racial disparities and justify increased incarceration, both of which are counterproductive to The FIRST STEP Act's goal of decreasing mass incarceration.

PATTERN's heavy emphasis on criminal history disproportionately increases the risk scores of the poorest and the people of color in the federal prison population, making it *more difficult* for them to obtain early release. We urge the NIJ, the BOP, and the DOJ, to acknowledge and correct the racial and gender biases in PATTERN. In truth, the NIJ's claim that PATTERN is "unbiased across racial and ethnic classifications" is dependent on a constrained definition of racial bias as a statistical matter. We encourage the NIJ to consult with computer scientists and data scientists working on fairness, accountability, and transparency and to adopt their recommendations for equitable outcomes. Without



addressing this problem, the Department should not move forward with implementing PATTERN. We take issue with PATTERN because it replicates structural and racial biases currently in the criminal justice process. Extensive research has established that systematic biases operate at all points in the criminal justice process, from arrest decisions to bail determinations to the ultimate disposition of the case. There are fundamental flaws in PATTERN that require, at the very least, a significant overhaul of the tool or, a different approach altogether.

The Bureau of Prisons has failed to provide sufficient rehabilitative programming to assist with reentry.

Congress must ensure that The Bureau of Prisons immediately begins providing rehabilitative programming to individuals currently incarcerated to assist with successful reentry. The core intent of the FIRST STEP Act is to provide rehabilitative and re-entry programming, as well as residential re-entry centers (i.e. halfway houses) and home confinement. The developers of PATTERN commendably include a number of factors in the analysis, an effort which is aimed at enabling an individual to change his or her risk score by successfully completing substance abuse treatment, vocational training, and the like. However, the BOP does not currently provide minimally sufficient recidivism reduction programs, nor does it have sufficient halfway house capacity so that those released from prison can successfully transition to the community. There is limited availability of rehabilitative programming in the Bureau of Prisons. None of the Bureau's 102 federal detention facilities offers all 17 rehabilitative programs.²⁰ For example, the waiting list for the BOP's literacy program is 16,000 people.²¹ The process of awarding program placement to people in prison is not transparent, infused with too much discretion, and hampered by limitations on program availability to make participation a reliable measure of one's fitness for release.²² In the end, any positive reform contemplated by the FIRST STEP Act is contingent upon sufficient funding to expand and improve evidenced-based recidivism reduction programming, and the availability of halfway house placements and home confinement. We therefore urge BOP to begin rebuilding rehabilitative services now.

V. Conclusion

There is a need for public accountability, complete transparency, and the authentic engagement and centering of directly impacted people's experience and expertise. Therefore, Congress must ensure PATTERN is not adopted as a substitute for a new Risk and Needs Assessment System required by the FIRST STEP Act. We ask that Congress direct the Department of Justice to suspend the use of PATTERN and mandate that agencies adjust the *risk score system* and secure *independent expert validation* before using PATTERN to assess those in federal prison. Moreover, we urge Congress to use its oversight authority to ensure the Bureau of Prisons provide sufficient rehabilitative programming to assist individuals with reentry. If you have any questions, please contact Sakira Cook, Director, Justice Reform Program at cook@civilrights.org or (202) 263-2894.

Sincerely,

The Leadership Conference on Civil and Human Rights
American Civil Liberties Union
The NAACP Legal Defense and Educational Fund



¹ The Leadership Conference on Civil & Human Rights, Vote “No” on The FIRST STEP Act, May 8, 2018, <https://civilrights.org/resource/vote-no-first-step-act/>.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ Statement for the Record of The ACLU, Justice Roundtable, and The Leadership Conference in Response to Department of Justice (DOJ) April 3 and 5 Listening Sessions, Apr. 12, 2019, <https://civilrights.org/resource/statement-for-the-record-of-the-aclu-justice-roundtable-and-the-leadership-conference-in-response-to-department-of-justice-doj-april-3-and-5-listening-sessions/>

⁶ Response of the ACLU, Justice Roundtable, and The Leadership Conference to Hudson Institute’s Request for Supplemental Information, Jun. 14, 2019, <https://civilrights.org/resource/response-of-the-aclu-justice-roundtable-and-the-leadership-conference-to-hudson-institutes-request-for-supplemental-information/>

⁷ P. L. 115-391 (18 U.S.C.) § 3632(a)(3) and (5) (explaining that “the Attorney General, in consultation with the Independent Review Committee . . . shall develop and release publicly . . . a risk and needs assessment system . . . which shall be used to— . . . (3) determine the type and amount of evidence-based recidivism reduction programming that is appropriate for each prisoner and assign each prisoner to such programming accordingly, and based on the prisoner’s specific criminogenic needs, and in accordance with subsection (b). . . and (5) reassign the prisoner to appropriate evidence-based recidivism reduction programs or productive activities . . .”).

⁸ The National Institute of Justice (associated with the U.S. Dep’t of Justice’s Office of Justice Programs), The First Step Act of 2018: Risk and Needs Assessment System (Jul. 2019), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf [herein after NIJ Report].

⁹ See Brandon L. Garrett, Federal Criminal Risk Assessment, Cardozo L. Rev. Forthcoming 102, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3425183; Sharad Goel, Ravi Shroff, Jennifer L. Skeem and Christopher Slobogin, The Accuracy, Equity, and Jurisprudence of Criminal Risk Assessment, Dec. 26, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3306723; Laurel Eckhouse, Kristian Lum, Cynthia Conti-Cook, Julie Ciccolini, Layers of bias: A unified approach for understanding problem with risk assessment, Criminal Justice And Behavior, Nov. 23, 2018.

¹⁰ See also American Bar Association, Re: ABA Questions Regarding the Proposed Risk and Needs Assessment System, submitted on August 26, 2019.

¹¹ *Ibid.*

¹² American Bar Association. “FIRST STEP Act Already Shows Success” *Government and Legislative Work*. Aug. 15, 2019. https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/august_2010_WL/first_step_act_article/

¹³ *Ibid.*

¹⁴ Department of Justice Department of Justice Announces First Step Act Implementation Progress. Apr. 2019. <https://www.justice.gov/opa/pr/departments-justice-announces-first-step-act-implementation-progress>

¹⁵ By definition, the dynamic factors can change based on successful completion of the previously mentioned BOP’s rehabilitative programs.

¹⁶ 18 U.S.C. §3632(a)(4) “... the Independent Review Committee authorized by the First Step Act of 2018, shall develop and release publicly. . . a risk and needs assessment system . . . which shall be used to – reassess the recidivism risk of each prisoner periodically, based on factors including indicators of progress, and of regression, that are dynamic and that can reasonably be expected to change while in prison.”

¹⁷ NIJ Report at 26, 51 (2019).

¹⁸ See e.g. Skeem, J. & Lowenkamp, C. (2015). Risk, Race & Recidivism: Predictive Bias and Disparate Impact. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339.

¹⁹ Whiteacre, Kevin. “Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias”, 17 Crim. Just. Pol’y Rev. 330, 2006.; see also, Fennessy, Matthew & Huss, Matthew T., “Predicting Success in a Large Sample of Federal Pretrial Offenders: The Influence of Ethnicity”, 40 Crim. Just. & Behav. 40. Jan. 2013. 53.



²⁰ Federal Bureau of Prisons, Operations Memorandum, August 1, 2017, https://www.bop.gov/policy/om/001_2017.pdf

²¹ FY 2019 Performance Budget: Congressional Submission, United States Department of Justice Federal Prison System, available at: <https://www.justice.gov/jmd/page/file/1034421/download>

²² *See, e.g.*, Federal Bureau of Prisons, Federal Bureau of Prisons Education Program Assessment: Final Report 22 (Nov. 29, 2016) at 39 (finding with regard to BOP’s English-as-a-Second Language Program that “[t]he Admissions and Orientation interview is not a formal, standardized instrument or protocol” and that “[t]t is unclear how the interviewer determines an inmate’s English proficiency”).