

MEMORANDUM

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FROM¹: The National LGBT/Criminal Justice Working Group
RE: Criminal Justice Policy Recommendations for the First 100 Days of the
Next Presidential Administration
DATE: December 21, 2020

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CRIMINAL JUSTICE POLICY:

Recommendations for Action
from LGBT and HIV Advocates for the First
100 Days of the Next Presidential
Administration

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INTRODUCTION

This memorandum outlines key issues, guiding principles, opportunities for action and specific policy recommendations for the incoming administration that would reduce the unique harms of the US criminal legal system experienced by lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and people living with HIV (PLHIV) or at risk of acquiring HIV.

The memorandum was produced by members of the Federal LGBT/HIV Criminal Justice Policy Working Group (hereafter the Working Group), a network of organizations and individual stakeholders² working to change the U.S. criminal justice system through research, education, and federal policy advocacy. Members of the Working Group have testified before commissions; successfully presented recommendations to the Justice Department and the President's Task Force on 21st Century Policing; initiated high-level engagement with the Federal Bureau of Prisons to change treatment of transgender prisoners; and to reduce the use of solitary confinement. The Working Group submitted recommendations on LGBTI inclusive and supportive sexual healthcare and sexual health literacy programs in prisons and detention centers; developed recommendations and a consensus statement to address criminal justice issues in the NHAS 2020 Strategy and Action Plan; met with the Office of National AIDS Policy (ONAP) to secure a response to the criminalization of PLHIV; and organized the first ever White House briefing on LGBT and HIV criminal justice issues with the White House and DOJ officials, formerly incarcerated LGBT people and PLHIV, and advocates. Legislative and policy priorities include the End Racial Profiling Act, the reauthorization of the Juvenile Justice and Delinquency

² The Working Group is composed of members from the following organizations: American Civil Liberties Union, AIDS United, Black & Pink, Black and Pink Massachusetts, Center for American Progress, Center for Constitutional Rights, Center for HIV Law & Policy, Human Rights Campaign, Immigration Equality, Just Detention International, Lambda Legal, Movement Advancement Project, National Center for Lesbian Rights, National Center for Transgender Equality, NAACP Legal Defense Fund, National Association of Criminal Defense Attorneys, National LGBTQ Task Force, Positive Women's Network -USA, Pride at Work, Reframe Health & Justice, SERO Project, Sex Offense Litigation & Policy Resource Center, Southern Poverty Law Center, Sylvia Rivera Law Project, The Vaid Group, The Williams Institute, Transcending Barriers-Atlanta, Transgender Law Center, Vera Institute of Justice, Witness to Mass Incarceration. Listed organizations are only for identification purposes. Being listed above does not signal an endorsement of every recommendation in this memo.

Prevention Act, inclusion of provisions that address sexual orientation and gender identity in all relevant criminal justice bills, challenging criminalization of LGB youth and adults and transgender and gender-nonconforming people, reduction in use of incarceration and increase in the use of alternatives, support for prisoner re-entry programs, reduction in use of solitary confinement, reduction in use of detention for lesbian, gay, bisexual and transgender immigrants, and elimination of HIV criminalization statutes.

Recognizing that the vast majority of LGBTQ people and PLHIV who are adversely affected by the criminal legal system are people and/or low income, the Working Group is committed to approaching issues of policing, punishment, and criminalization through a racial, economic, and reproductive justice framework.

The memorandum is organized in two sections. The first provides a statement of the issues, notes progress made during the Obama Administration and setbacks during the Trump Administration, and details recommendations for action by issue area for the forty-sixth presidential administration. The second section organizes these same recommendations arranged according to the relevant federal agency, appointments, and budget requests. Finally, we present priority recommendations to implement during the first 100 days.

This non-exhaustive list of policy recommendations is intended to serve as a starting point for deeper discussions between the incoming administration and members of the Working Group.

The Working Group's members are available to serve as resources and offer expertise on issues relating to policing, prosecution, and punishment as they uniquely impact LGBTQ people and PLHIV. We look forward to further engagement with the transition team and key officials responsible for criminal justice policy in the new administration.

BACKGROUND: THE CRIMINAL LEGAL SYSTEM & LGBTQ PEOPLE & PEOPLE LIVING WITH HIV

There is bipartisan consensus that wholesale reform of the U.S. criminal system is needed. In the middle of the COVID-19 crisis, millions of Americans responded to the police killings of George Floyd, Breonna Taylor, and Tony McDade by demonstrating against the ongoing crisis of police violence against black people. The existence of pervasive racial profiling; an epidemic of police killings of Black people, Indigenous people, and other people of color; and dramatic racial disparities in prosecution and punishment are now beyond dispute. Unsurprisingly, criminalization has proven to be ineffective in addressing the conditions and crises of drug addiction, mental illness, poverty, and homelessness. Each of these issues is the domain of treatment and education, not police, courts, or prisons. Public health research has shown the value of education, treatment, and healthcare in improving these conditions--which

criminalization and detention fail to deliver. Harsh school discipline policies, enforced by increasing numbers of police in schools, and criminalization of youth through enforcement of status offenses have shown themselves to be counterproductive and destructive. Intensified immigration enforcement at the border and in the interior have resulted in gross violations of the human rights of immigrants and inhumane conditions of immigration detention, and an increase in deaths of people crossing the border. The costs of the criminal legal system and immigration detention system have spiraled out of control. Evidence now exists to show that support and assistance can provide a path forward for formerly incarcerated people who face incredible challenges simply trying to rebuild their lives upon reentry.

Among the many population groups that pay an especially high price for the failures of the U.S. criminal legal system are LGBTQ people. In fact, LGBTQ people and PLHIV (especially LGBTQ people of color and people of color living with HIV) are significantly overrepresented in all aspects of the penal system, from policing, to adjudication, to incarceration. Yet their experiences are often overlooked, and little headway has been made in dismantling the cycles of criminalization that perpetuate poor life outcomes and push already vulnerable populations to the margins of society.

As outlined in the comprehensive report, *A Roadmap for Change: Federal Policy Recommendations Addressing the Criminalization of LGBT People and People Living with HIV* (Columbia Law School 2014), justice continues to be elusive and conditional for LGBT people and PLHIV due to a range of unequal laws and policies that dehumanize, victimize, and criminalize these populations, even as attitudes toward and acceptance of LGBT people have reached an all-time high.

The disproportionate numbers of LGBTQ people of color and people of color living with HIV at every stage of the criminal system can best be understood in the larger context of widespread and continuing discrimination in employment, education, social services, healthcare, and responses to violence. Far too often, families reject LGBT youth at a young age, triggering a lifetime of economic and social instability. Even LGBTQ youth with supportive families often find themselves living outside of a family home due to familial poverty or deportation. Family rejection and homelessness are top predictors that a young person will come into contact with the criminal legal system because of police targeting of homeless and low-income communities. LGBTQ youth are also often targeted by police for engaging in underground economies--such as drug sales, sex work, and other criminalized activity--literally just to survive.

Schools can also play a critical role in pushing LGBTQ youth, and particularly LGBTQ youth of color, onto the streets, from hostile school climates that leave LGBTQ youth feeling unsafe, to harsh school discipline policies that perpetuate a school-to-prison pipeline.

The policing of gender and sexuality, often operating within the larger context of racial profiling and targeting of homeless and low-income communities, pervades law enforcement and the operation of courts and the penal system, disproportionately affecting LGBTQ people of color. LGBTQ people, particularly transgender women, LGBTQ people of color, and/or LGBT youth of color, are persistently profiled as being engaged in prostitution, public lewdness, or other sexual offenses. Police in many jurisdictions use possession or presence of condoms as evidence supporting arrests for prostitution-related offenses. Policing tactics that hyper-sexualize LGBTQ people, and presume guilt or dishonesty based on sexual orientation or gender identity, are frequently deployed by law enforcement.

It is important to note that the profiling, arrests, and incarceration of LGBTQ people and PLHIV are not simply a response to greater incidences of illicit behavior within the community. Deep-seated homophobia and transphobia, as well as stereotypes about race and gender, all manifest in biased policing practices that presume LGBTQ people and PLHIV, especially those of color, are inherently guilty or deserving of victimization.

LGBTQ people and PLHIV are often targets, enduring high levels of violence and harassment at the hands of both law enforcement and civilians. Transgender people of color in particular are three times more likely to be victims of harassment and assault than cisgender people.³ Yet, according to the National Coalition of Anti-Violence Programs, significant numbers of survivors who report the violence to police experience police misconduct in return. Under these conditions, many people are afraid of the police and have nowhere to turn for help when they are victimized.

In recent years, LGBTQ equality has gained momentum, but justice remains unevenly distributed and incomplete. Even where it exists, legal equality has not yet translated to lived equality for enough LGBTQ people, especially poor people and people of color. Moreover, there is still little justice for LGBTQ people who remain significantly vulnerable because of unfair criminal legal policies and practices. Significant policy reforms are needed to reduce and ultimately eliminate the harms of the criminal legal system across the board, and as they particularly affect LGBTQ people and PLHIV.

EXECUTIVE SUMMARY

This memorandum outlines, in detail, the problems facing LGBTQ people and PLHIV at various intersections of criminal legal, juvenile justice, and immigration systems. It further explains how

³ Cisgender is a term that describes people who persistently identify with the gender identity that corresponds with their assigned sex at birth based on their genitalia. (Whereas transgender, intersex, and nonbinary people's gender identities do not correspond with their sex assigned at birth.)

the incoming administration can act in each of these arenas to affect meaningful change for LGBTQ people and PLHIV.

Nine key topic areas organize the discussion. We progress from one policy area to another by following the cycle of the criminal legal system--from policing to incarceration through to reentry:

Policing & Law Enforcement

In this section we outline policy reforms that the Department of Justice and other federal government agencies could make to reduce discriminatory profiling and policing, verbal, physical, and sexual violence, unlawful searches, false arrests and discriminatory targeting of LGBTQ people and PLHIV. One key reform will be putting an end to the use of condom possession as evidence of intent to engage in prostitution-related offenses or lewd conduct. We also offer recommendations to facilitate the implementation of the Prison Rape Elimination Act (PREA) regulations in police lock-ups, and to increase safety for LGBTQ individuals in police custody.

Immigration Detention

Here we provide recommendations to Immigration and Customs Enforcement and the Department of Homeland Security to reduce exclusion, profiling, detention, and deportation of LGBTQ and PLHIV immigrants; to address conditions of confinement and denial of access to essential general and sexual healthcare services in immigrant detention centers; to ensure adoption of policies within ICE and the Department of Homeland Security to ensure the rights, health, and safety of LGBTQ people, PLHIV, and people facing other serious chronic health needs; and to address administrative discretion regarding applicability of prior criminal convictions in immigration hearings.

Sex Worker Rights

Due to widespread family rejection and discrimination in schools, employment, housing, family courts, social services, medical care, immigration benefits, and the criminal legal system, LGBT youth and adults are disproportionately involved in the sex trades to meet their basic needs. Law enforcement-based responses to sex work further increase social and economic marginalization and can increase vulnerability to human trafficking, despite the claim that this is what is being combatted. In this section we provide recommendations to the Departments of Defense and Health and Human Services and address why resources currently directed to law enforcement-based responses could be better utilized by meeting the basic needs identified by sex workers.

HIV In the Criminal Legal System

Here we outline federal agency action that is needed to advance reform of the laws and law enforcement practices around the country that criminalize PLHIV's consensual sex, and their perceived or alleged exposure, transmission, or nondisclosure of HIV to others. We outline

actions that the Department of Justice, Centers for Disease Control, Department of Defense, and Bureau of Prisons should take to destigmatize HIV and to provide the leadership and initiatives necessary to ensure that state and federal policies reflect current science and treatment/prevention options.

Corrections Reform

In this section we outline reforms the Department of Justice and Bureau of Prisons must make to address harms experienced by incarcerated LGBTQ people and PLHIV, including protecting the civil rights of people in BOP custody, effectively implementing policies related to transgender safety and health care, and providing sexual health literacy programs for prisoners.

Juvenile Justice

LGBTQ youth, particularly youth of color, are overrepresented and underserved in the juvenile justice system. Here we offer concrete steps that the Department of Justice, Office of Justice Programs, and Office of Juvenile Justice and Delinquency Prevention can take to ensure that all youth--including those who are LGBTQ--are safe from harassment, discrimination, and violence in detention settings.

Formerly Incarcerated Persons

This section was compiled by formerly incarcerated members of the working group. It addresses in a unique and concentrated way the issues experienced by LGBTQ people of color before, during, and after a stint of incarceration. It contains recommendations to various federal agencies and the President, including requests for clemency and pardons for certain offenses, recommendations to sentencing commissions, the Bureau of Prisons, and to Congress.

Reentry

The next administration has a tremendous opportunity to incorporate the needs of LGBTQ individuals returning home from prison into broader efforts geared toward returning community members. In this section we outline recommendations to the Department of Justice, Bureau of Prisons, and the Office of the President to improve access to reentry services and accurate identity documents, and to create accessible reentry resources.

Poverty

LGBTQ people and PLHIV experience high rates of family and community rejection, lower levels of education, and higher rates of homelessness and poverty than straight people. In this section we identify the consequences of criminalization these populations currently face and key policy reforms that could be taken up by various federal agencies to address poverty and income disparities experienced by LGBTQ people and PLHIV that drive them into the criminal legal system. Together, these represent essential steps towards reducing the criminalization of LGBTQ people and PLHIV.

Sex Offense Policy

The incoming administration has the opportunity to reverse the dangerous course this country has taken by relying on ineffective and counterproductive sex offender registries, often to the detriment of LGBTQ people, PLHIV, and other stigmatized groups. Here we outline steps the Department of Justice can take to begin to reduce the harm of current sex offender registration policies on LGBTQ people and PLHIV.

CONSENT DECREES

One critical area to be addressed is the Trump Administration's utter inaction with regard to federal consent decrees on policing and racial discrimination. As the 2020 BLACK LIVES MATTER uprisings have amply demonstrated, racial injustice is alive and well in America, and most critically in our policing system. Despite this, the Trump Administration has taken no action on the 14 consent decrees and several more investigations that were in progress during the Obama Administration.⁴ The Administration's stated reason was a discomfort with using the federal government to change state and local police department policies.⁵ However, this argument is erroneous as a matter of law and policy. The federal government has a long tradition of advancing civil rights and racial justice over the objections of states, beginning with the passage of the 13th, 14th, and 15th Amendments to the U.S. constitution, and continuing through such landmark civil rights victories as the 1965 Civil Rights Act. Consent decrees fall under the ambit of the 1994 Law Enforcement Misconduct Act,⁶ which clearly contemplates intervention by the federal government into any "pattern or practice of conduct by law enforcement ... that deprives persons of rights, privileges, or immunities" granted to them by the Constitution or Federal law. The purpose of consent decrees and related investigations are to clarify the precise extent of injustice incorporated into police departments, and to create sustainable, measurable pathways for change. It is clear that local governments and police departments are incapable of implementing these policies across the board. The consent decree remedy was specifically created so that there would be federal government recourse for citizens experiencing oppressive and discriminatory policing.

One of our core demands is opening or re-opening consent decree investigations for all major city police departments, as well as for Immigration and Customs Enforcement, including but not limited to Ferguson, St. Louis, Cleveland, Baltimore, Chicago, Philadelphia, and Minneapolis police departments. Such investigations must, at minimum, address constitutional and federal

⁴ Ed Pilkington. 7 Jun 2020. *Trump's Scrapping of Obama-Era Reforms Hinders Police Reform*. The Guardian. <https://www.theguardian.com/us-news/2020/jun/07/police-consent-decrees-trump-administration-oversight>. Accessed 15 Dec 2020.

⁵ Jefferson Sessions, Former U.S. Attorney General. 7 Nov 2018. *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities*. Office of the Attorney General. <https://www.justice.gov/opa/press-release/file/1109681/download>. Accessed 15 Dec 2020.

⁶ 42 U.S.C. § 14141. <https://www.justice.gov/crt/law-enforcement-misconduct-statute-42-usc-14141>.

law violations due to racial discrimination in policing, criminalization of poverty, and discrimination against LGBTQ people and PLHIV.

FEDERAL GRANTEEES & THE 2007 OLC MEMO

Additionally, we call for rescinding the Office of Legal Counsel's (OLC) June 29, 2007 Memorandum, Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act (OLC Memo). The OLC Memo has a large impact on government grants, which are a primary means of ensuring criminal justice reform efforts at state and local levels (including but not limited to inclusive diversion services, community corrections, alternatives to detention, juvenile justice systems, and reentry services). We are concerned that anything short of rescinding the memo will foster practices that deter those working to address harms inflicted based on sexual orientation, gender identity, and HIV status.

The OLC Memo errs as a matter of law in its conclusion that the Religious Freedom Restoration Act of 1993 (RFRA) provides a blanket override of a statutory nondiscrimination provision. RFRA was not intended to create blanket exemptions to laws that protect against discrimination.⁷ The OLC Memo relies on flawed legal analysis and wrongly asserts that RFRA is "reasonably construed to require" a federal agency to categorically exempt a religiously affiliated organization from a grant program's explicit statutory nondiscrimination provision. Worse, this highly erroneous legal conclusion was adopted and extended to many other areas of nondiscrimination law by the Trump administration. Under his administration, federal departments including Housing and Urban Development, Education, and Health and Human Services were given broad license to discriminate in providing services to LGBTQ individuals.⁸ On December 7, 2020, the Trump Department of Labor issued a final rule allowing religious contractors "license to discriminate" against LGBTQ individuals,⁹ in an attempt to avoid the implications of *Bostock v. Clayton County, Georgia*, 590 U.S. ___ (June 15 2020), which held that an employer who fires someone merely for their LGBT status violates Title VII of the Civil Rights Act.¹⁰ Flouting the law, the Trump

⁷ Religious Freedom Restoration Act of 1993 (RFRA), Pub.L. 103-141, Nov. 16, 1993, 107 Stat. 1488.

⁸ Department of Housing and Urban Development. Proposed Rule. *Revised Requirements Under Community Planning and Development Housing Programs*. 24 CFR 5. 22 May 2019. <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>. (Allowing homeless shelters to decline to provide service to transgender people). Cory Turner and Anya Kamenetz. 12 Feb 2018. *The Education Department Says It Won't Act On Transgender Student Bathroom Access*. NPR. <https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access>. Accessed 17 Dec 2020.; Daniel Reynolds. 1 Nov 2019. *Trump Admin to Allow LGBTQ Discrimination in Adoption, Health Care*. Advocate.

⁹ Office of Federal Contract Compliance Programs, *OFCCP Publishes Religious Exemption Final Rule*. Final Rule 508c, to be published at 41 CFR Part 60-1.

¹⁰ Slip Opinion, https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf. Accessed 15 Dec 2020.

Administration has broadly declined to enforce nondiscrimination provisions on behalf of LGBTQ individuals, particularly where discrimination is religiously motivated.¹¹

Action to withdraw the OLC memo follows on from a report delivered to President Obama in 2016 from his own U.S. Commission on Civil Rights.¹² The report clarifies and confirms that religious exemption claims under RFRA should not trump protections against discrimination. Withdrawing the OLC memo now would allow the next administration to start with a clean slate in light of more recent court decisions¹³ and the Section 1557 rulemaking of May 2016.¹⁴ Unfortunately this rule was narrowed by a Trump administration guidance to exclude discrimination based on transgender status. The incoming administration should issue new guidance clarifying that all statutes that bar discrimination based on sex by definition include discrimination based on transgender status and sexual orientation.

The OLC Memo's broad and erroneous interpretation of RFRA has far-reaching consequences for LGBTQ people and PLHIV in the criminal legal system. Some have cited the OLC Memo in arguing that RFRA should broadly exempt religiously affiliated contractors--which would include diversion and re-entry program providers--from the nondiscrimination requirements in Executive Order 11246.¹⁵ Some are trying to extend the memo's reach beyond the context of hiring: several grantees and contractors have cited the OLC Memo to support their arguments that the government should create a blanket exemption that would allow them to refuse to provide services or referrals required under those funding agreements, specifically in the context of medical care for unaccompanied immigrant children who have suffered sexual abuse. The Trump Administration has expanded this much further, giving wide license for public agencies and private businesses to discriminate against LGBTQ individuals, including but not limited to in the provision of housing, education, and medical care. LGBTQ youth and adults already experience higher rates of detention in the juvenile justice, criminal legal, and immigration detention systems because of the paucity of alternatives to detention programs and supportive services in their communities. RFRA and other claims of religious freedom should not be permitted to exempt existing services from hiring LGBTQ people who are critical to ensuring

¹¹ See, generally: Human Rights Campaign. "Trump's Timeline of Hate." <https://www.hrc.org/resources/trumps-timeline-of-hate#june-18-2019-september-19-2019>. Accessed 15 Dec 2020.

¹² U.S. Commission on Civil Rights. Sept 2016. *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*. <http://www.usccr.gov/pubs/peaceful-coexistence-09-07-16.pdf>. Accessed 14 Dec 2020.

¹³ See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 194 L. Ed. 2d 696 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding for-profit corporations to be exempt from a law--the HHS contraceptives mandate--its owners religiously object to if there is a less restrictive means of furthering the law's interest, according to the provisions of RFRA).

¹⁴ Department of Health and Human Services. *Summary: Final Rule Implementing Section 1557 of the Affordable Care Act*. 2016. <http://hhs.gov/sites/default/files/2016-06-07-section-1557-final-rule-summary-508.pdf>. Accessed 14 Dec 2020.

¹⁵ Exec. Order No. 1246, 3 C.F.R. (1965). Print.

LGBTQ inclusive and appropriate services, and certainly should not be used as a shield to deny LGBTQ people access to services that would otherwise be available to them as alternatives to incarceration.

In fact, in 2010 the Office of Civil Rights (OCR) authored a “compliance review” memo to the state agency responsible for distribution of federal juvenile justice funding, concerning the practices of the Iowa Department of Human Rights Division of Criminal and Juvenile Justice Planning.¹⁶ The memo, in no uncertain terms, states that Iowa is expected to enforce civil rights assurances connected to receipt of federal money and ensure that its sub-grantees receive training regarding compliance.¹⁷ It specifically mentions that faith-based providers are expected to fully comply with all civil rights laws, including Title IX.¹⁸

Furthermore, the incoming administration must promulgate rules at all levels of the federal government explicitly clarifying that actual or stated religious belief does not justify discrimination. The Supreme Court ruled in *Bob Jones University v. United States*, 461 U.S. 547 (1983) that organizations cannot claim religion as a basis for racial discrimination. This Administration has a unique opportunity to clarify that claiming a First Amendment or RFRA free exercise right to be homophobic or transphobic is similar to claiming a religious right to be racist. RFRA does not categorically override statutory protections against religiously-motivated discrimination. Nor does it create an absolute free exercise right--without regard to countervailing compelling interests--to receive government grants without complying with applicable regulations that protect taxpayers and participants in federally funded programs. We accordingly request that the OLC memo be rescinded.

RECOMMENDATIONS FOR THE FIRST 100 DAYS OF THE NEW ADMINISTRATION

- Reduce the population of people living in BOP facilities who are medically vulnerable to COVID-19. Broadly implement policies to reduce the number of incarcerated people in prisons and take public health measures to ensure their safety. This should include but not be limited to provision of PPE to all individuals held in federal detention facilities.
- Review and grant clemency petitions for individuals medically vulnerable to COVID-19.

¹⁶ Department of Justice. 13 Sept 2010. *Compliance Review of Iowa Department of Human Rights, Division of Criminal and Juvenile Justice Planning (09-OCR-0085)*. Office of Justice Programs. <http://ojp.gov/about/ocr/pdfs/IA-09-OCR-0085.pdf>. Accessed 14 Dec 2020.

¹⁷ *Id.* (“Recipients of federal financial assistance from the OJP are responsible for certifying that contractors and subrecipients under DOJ grant programs comply with applicable federal civil rights laws.”)

¹⁸ *Id.* Again, the incoming administration must once again clarify that Title IX prohibits discrimination on the basis of gender identity, gender presentation, and sexual orientation.

- Reinvigorate the use of consent decrees to provide oversight, and recommend and enforce mandatory changes and benchmarks for police departments that have violated people's constitutional rights.
- Encourage Congress to introduce and pass the BREATHE Act, and codify a Bivens right of action against federal law enforcement officers, and to prohibit the use of qualified immunity defenses to usher in an era of meaningful police accountability and oversight.
- DOJ should issue additional guidance to establish a necessary use of force standard that allows police use of force only as a last resort, binding on all law enforcement agencies that are federal grantees.
- Require all Federal Departments to adopt a policy barring sexual contact while operating under color of law.
- Rescind Executive Orders 13774, 13776, and 13896, which aggrandized law enforcement power without meaningful oversight, and withdraw all reports and recommendations issued by the President's Commission on Law Enforcement and the Administration of Justice.
- Rescind Executive Order 13950, and require mandatory anti-bias training requirements for federal, state, and local law enforcement, as a condition of receiving DOJ grants and funds. Federal grants should also be conditioned on law enforcement agencies adopting and enforcing anti-profiling and nondiscrimination provisions inclusive of sexual orientation and gender identity — and develop strategies for enforcing these grant conditions.
- By Executive Order, immediately rescind 287(g) agreements, the Criminal Alien Program, and the Priority Enforcement Program, and uncouple immigration enforcement from local law enforcement by terminating use of local police forces to enforce civil immigration laws through detention, notification, and transfer requests, and by removing civil immigration information from FBI databases.
- Issue an Executive Order requiring the Department of Defense and all branches of the armed services to review and modernize current policies on prosecutions based on HIV and consensual adult sex. Issue a moratorium on any such prosecutions pending completion of this review and related proposals for modernizing of current policies and practices.
- Create by Executive Order an Office for National Reentry Policy, and a corollary National Advisory Committee on Reentry under the Federal Advisory Committee Act.
- Rescind National Security Presidential Directive 22.
- DOJ should use powers granted by the Civil Rights of Institutionalized Persons Act (CRIPA) to monitor the constitutional rights of incarcerated persons during the COVID-19 public health emergency.
- Reissue the DOJ's recommendations on restrictive housing as binding regulations applicable to the BOP and prisons and jails across the country, pursuant to PREA or as a condition of federal funding.

- Reinstate the BOP's Obama-era Program Statement on housing placements and health care access for transgender people in custody, to ensure that transgender people's healthcare needs are met, and that transgender people are housed in facilities consistent with their gender identity.
- The Office of Justice Programs (OJP) should issue guidance clarifying that the statutory prohibition on sex discrimination at 42 U.S.C. § 3789d(c) also prohibits discrimination on the basis of sexual orientation, gender identity, or gender expression (SOGIE). Several other federal agencies issued formal rules and informal guidance during the Obama Administration clarifying that sex discrimination encompasses discrimination based on SOGIE, including: The Department of Housing and Urban Development (HUD), the Department of Health and Human Services (HHS), DOJ, and ED. Such guidances must be reinstated or reaffirmed in light of their abandonment during the Trump Administration.
- Rescind the Department of Housing and Urban Development (HUD)'s Rule, *Making Admission on Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, RIN 2506-AC53, Docket No. FR 6152-P-01, to combat street homelessness among transgender people and quality of life arrests. Re-implement the Equal Access Rule as originally implemented by the Obama Administration.
- Rescind and immediately cease enforcement of HHS's Section 1557 rulemaking, RIN 0945-AA11, which retracts comprehensive anti-discrimination protections from transgender people seeking healthcare services.
- Rescind and immediately cease enforcement of HHS's newly-adopted rule RIN 0991-AC13, *Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities*, which authorizes discrimination against LGBTQ+ people by federally-funded entities and grantees.
- Rescind and immediately cease enforcement of the Anti-Prostitution Loyalty Oath (HHS).
- ICE should cease detaining LGBTQ and other vulnerable immigrants in all but the most extraordinary cases. Detention should always be a last resort for vulnerable populations.
- Rescind and immediately cease enforcement of the DOJ and DHS's newly-adopted Rule RIN 1615-AC42/1125-AA94, *Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review*, which puts asylum and lawful immigration status out of the reach for many survivors of gender-based violence and persecution.
- Declare an immediate moratorium on deportations. End expedited removal.
- Rescind the October 21, 2020 DOJ DHS final rule on "Procedures for Asylum and Bars to Asylum Eligibility" which disproportionately impacts the ability of LGBTQ people to obtain protections.
- Rescind the EOIR and USCIS "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" final rules which essentially eliminate asylum protections.

- Ensure immigrants are not held in CBP custody for longer than 48 hours, expand availability of medical screenings and emergency medical care, implement training on recognizing medical distress for all CBP officers and Border Patrol agents.
- Institute a pilot project to create LGBTQ/HIV-specific reentry services in three communities with a high need for directed services.
- Expand upon efforts to vigorously combat the criminalization of homelessness, in collaboration with DOJ and HUD, through grant criteria, litigation, and dialogue with local officials, and disseminating information about the harms of and alternatives to criminalization.
- DOJ should issue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances.
- DOJ should intervene in litigation challenging anti-homeless ordinances.
- DOJ should incorporate investigation of civil rights abuses of homeless people as a standard practice in federal pattern-and-practice investigations.
- DOJ should include provisions addressing discriminatory policing of homeless people in federal consent decrees.
- Additionally, United States Attorneys should deprioritize enforcement of laws that criminalize sex work and homelessness-related criminal laws.
- DOJ should direct states to undergo bail reform by issuing guidance to ensure that people are not incarcerated solely because they cannot afford bail, and should eliminate cash bail without imposing onerous conditions.
- Support reauthorization of the Ryan White CARE Act, including a requirement that state grantees certify that they have repealed, or have a plan in place to repeal, state laws that stigmatize PLHIV, discourage HIV testing and engagement in care, or otherwise undermine HIV prevention and care strategies

1.

POLICING & LAW ENFORCEMENT

Widespread incidents of police brutality and the senseless police lynching of George Floyd has brought unprecedented national attention to police profiling, misconduct and abuse nationwide. However, the police profiling and harassment of LGBTQ people—particularly LGBTQ people of color, transgender and gender-nonconforming people, and youth—remains largely unaddressed, despite being an “ongoing and pervasive problem.”¹⁹

Studies have repeatedly shown that LGBTQ people experience staggering amounts of gender-based discrimination at the hands of law enforcement—including violence, harassment, profiling, sexual abuse, and physical assault.²⁰ The most frequent targets of this police abuse are LGBTQ people of color, LGBTQ youth, and LGBTQ people living in poverty.²¹ LGBTQ people of color are

¹⁹ Mallory, Christy et al. March 2015. *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*. <https://williamsinstitute.law.ucla.edu/publications/lgbt-discrim-law-enforcement/>. Accessed 2 Dec 2020.

²⁰ *Id.* (reporting nearly 50% of LGBTQ+ surveyed had abusive experiences with police or felt uncomfortable seeking their assistance). See also Lambda Legal. 2014. *Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security*. <https://www.lambdalegal.org/protected-and-served> (reporting more than 25% of respondents experienced abuse or harassment). Accessed 29 Nov 2020; Goldberg, Naomi et al. *Police and the Criminalization of LGBT People*. In *The Cambridge Handbook of Policing in the United States*. T. Lave & E. Miller (Eds.), pp. 374-391. Cambridge University Press (noting further disparities along racial lines).

²¹ Lambda Legal. 2014. *Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security*. <https://www.lambdalegal.org/protected-and-served>. Accessed 18 Dec 2020.

also five times more likely to be asked about their immigration status by law enforcement than white survey respondents.²²

In the absence of clear policies governing assessment of gender during arrest, processing, and protecting LGBTQ people in police custody, LGBTQ people experience unlawful, unnecessary and humiliating searches to assign gender, homophobic and transphobic discrimination and abuse, and unsafe placement in the custody of local law enforcement, including in police lock-ups.²³ Public health is harmed as police routinely confiscate condoms and cite them as evidence of intent to engage in prostitution-related offenses.²⁴ Additionally, LGBTQ survivors of domestic violence who reach out to the police for help are frequently arrested along with their abusive partners.²⁵ A 2014 report on intimate partner violence between LGBTQ people and PLHIV and their partners found that 57% of respondent survivors of intimate partner violence survivors who called the police experienced police misconduct, including being unjustly arrested.²⁶

Studies have also shown that sexual harassment and misconduct by law enforcement occurs with alarming frequency, and that LGBTQ people and women of color are particularly vulnerable.²⁷ A survey of LGBTQ youth in New Orleans found that 59% of trans youth surveyed had been asked

²² *Id.*

²³ National Prison Rape Elimination Commission. 2011. http://static.nicic.gov/UserShared/2013-03-29_nprec_finalreport.pdf. *National Prison Rape Elimination Commission Report*. Accessed 6 Nov 2020; Joey L. Mogul, Andrea J. Ritchie and Kay Whitlock. 2011. *Queer (In)Justice: The Criminalization of LGBT People in the United States.*; Alex Coolman, Lamar Glover, Kara Gotsch. 2005. *Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners.* <http://www.ncdsv.org/images/stillindanger.pdf>. Accessed 3 Dec 2020.

²⁴ Human Rights Watch. 2012. *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities.* http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf. Accessed 3 Dec 2020.

²⁵ National Coalition of Anti-Violence Programs. 2014. *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2014.* https://avp.org/wp-content/uploads/2017/04/2014_IPV_Report_Final_w-Bookmarks_10_28.pdf. Accessed 29 Nov 2020.

²⁶ Amnesty International. 2005. *Stonewalled: Police Abuse and Misconduct Against LGBT People in the United States.* Amnesty International. <https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf>. Accessed 18 Dec 2020. (documenting multiple patterns of police profiling, misconduct and violence against LGBT people across the country).

²⁷ Philip M. Stinson,, John Liederbach, Steven L.Brewer, and Brooke E.Mathna. 2014. *Police sexual misconduct: A national scale study of arrested officers.* Criminal Justice Faculty Publications. https://scholarworks.bgsu.edu/crim_just_pub/30; Lambda Legal, *Supra* note 20; International Association of Chiefs of Police, *supra*, note 23; Jaime M. Grant, Ph.D., Lisa A. Mottet, J.D., Justin Tanis, D.Min., with Jack Harrison, Jody L. Herman, Ph.D., and Mara Keisling. 2011. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey.* https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. Accessed 29 Nov 2020; Michelle Fine, Nick Freudenberg, Yasser Payne, Tiffany Perkins, Kersha Smith, and Katya Wanzer. 2003. *Anything can happen with police around: Urban youth evaluate strategies of surveillance in public places.* *Journal of Social Issues*, vol. 59, pp. 141-58; Kraska, P. B., and V. E. Kappeler. 1995. *To serve and pursue: Exploring police sexual violence against women.* *Justice Quarterly*, Vol. 12, pp. 85-112.

for a sexual favor by the police in New Orleans, along with 12% of cisgender LGBTQ youth.²⁸ LGBTQ youth in a New York City survey were more than twice as likely to report sexual contact with police in the past six months, compared to non-LGBTQ youth.²⁹ Among respondent Latina transgender women in Los Angeles County, 24% report being sexually assaulted by law enforcement.³⁰

Yet the vast majority of departments have no policies or training in place explicitly addressing this issue.³¹

PROGRESS DURING THE OBAMA ADMINISTRATION

During the Obama Administration, the DOJ took meaningful steps to curtail discriminatory and abusive policing practices. For example, the DOJ:

- Commenced investigations and consent decrees with the New Orleans, Puerto Rico, Albuquerque, Cleveland and Baltimore police departments that specifically address the experiences of LGBTQ residents of those cities and mandate adoption of departmental policies that address routine violations of LGBTQ people's rights by law enforcement;
- Issued recommendations specific to the experiences of LGBTQ people, including police sexual misconduct and citation of possession of condoms as evidence of prostitution-related offenses in the Final Report of the President's Task Force on 21st Century Policing;
- Issued guidance on Gender Bias in Policing that specifically addresses discrimination against LGBTQ people in the context of police responses to violence, as well as sexual violence against members of the public by on-duty law enforcement officers;
- Issued Prison Rape Elimination Act guidance clarifying that holding transgender individuals according to gender identity does not violate requirements to place based on sex;

²⁸ BreakOUT! 2014. *We Deserve Better: A Report on Policing in New Orleans By and For Queer and Trans Youth of Color*.

<https://static1.squarespace.com/static/58ba8c479f7456dff8fb4e29/t/5ad61be22b6a2806771bb448/1523981349224/WE+DESERVE+BETTER+REPORT.pdf>. Accessed 18 Dec 2020.

²⁹ Brett G. Stoudt, Michelle Fine, and Madeline Fox. 2011. *Growing Up Policed in the Age of Aggressive Policing Policies*. CUNY Academic Works. https://academicworks.cuny.edu/gc_pubs/588/. Accessed 18 Dec 2020.

³⁰ *Id.*

³¹ Stinson, et al. *supra*, note 26; International Association of Chiefs of Police. *Addressing Sexual Offenses and Misconduct by Law Enforcement Officers: An Executive Guide*. 2011. <https://www.theiacp.org/resources/document/addressing-sexual-offenses-and-misconduct-by-law-enforcement-executive-guide>; Cato Institute. 2010. *National Police Misconduct Reporting Project Annual Report*. <https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf>. Accessed 29 Nov 2020; Dawn Irlbeck, and Samuel Walker. *Police Sexual Abuse of Teenage Girls: A 2003 Update on 'Driving While Female*. Department of Criminal Justice, Police Professionalism Initiative, 2003, University of Nebraska at Omaha. <https://samuelwalker.net/wp-content/uploads/2010/06/dwf2003.pdf>. Accessed 29 Nov 2020.

- Held a convening on Gender, Sexuality, and 21st Century Policing bringing together advocates and law enforcement to discuss best practices hosted by Community Oriented Policing Services (COPS); and
- Advanced the Reauthorization of the Violence Against Women Act (VAWA) in a manner that is inclusive of LGBTQ survivors of interpersonal violence.

SETBACKS DURING THE TRUMP ADMINISTRATION

Under the Trump administration, many of the Obama Administration's achievements were targeted and dismantled. For instance, the DOJ stopped issuing and enforcing consent decrees, and abandoned police oversight and accountability initiatives nationwide.³² The Trump administration deployed federal law enforcement officers as an urban militia force to beat back peaceful racial justice protesters.³³

The Trump administration also issued a series of edicts and executive orders that directly harm LGBTQ people, including rules that authorize recipients of federal funds to discriminate against LGBTQ+ people, and allow transgender people to be turned away from homeless shelters and denied healthcare services during a global pandemic.³⁴ The Trump administration has also taken steps to prohibit anti-bias training for law enforcement officers, and broaden law enforcement power without meaningful oversight or safeguards.³⁵

³² See, e.g. Faturechi, Robert. 29 Sept 2020. *The Obama Justice Department Had a Plan to Hold Police Accountable for Abuses. The Trump DOJ Has Undermined It*. ProPublica. <https://www.propublica.org/article/the-obama-justice-department-had-a-plan-to-hold-police-accountable-for-abuses-the-trump-doj-has-undermined-it>. Ryan C. Barber. 8 June 2020. *'Diminished to the Point of Extinction': Trump DOJ's Retreat From Police Investigations Draws New Scrutiny*. National Law Journal. <https://www.law.com/nationallawjournal/2020/06/08/diminished-to-the-point-of-extinction-trump-dojs-retreat-from-police-investigations-draws-new-scrutiny/>. Accessed 2 Dec 2020.

³³ Katie Rogers. 1 June 2020. *Protesters Dispersed With Tear Gas So Trump Could Pose at Church*. NY Times. <https://www.nytimes.com/2020/06/01/us/politics/trump-st-johns-church-bible.html>. Accessed 2 Dec 2020.; Reuters Staff. 20 Jul. 2020. *Trump Plans to Send Federal Law Enforcement Personnel to Democratic-led U.S. Cities*. <https://www.reuters.com/article/us-global-race-protests-trump/trump-plans-to-send-federal-law-enforcement-personnel-to-democratic-led-u-s-cities-idUSKCN24L1ZN>. Accessed 8 Dec. 2020; Associated Press. 22 Aug 2020. *Portland Protest Turns Violent as Federal Police Clear Plaza*. <https://www.nbcnews.com/news/us-news/portland-protest-turns-violent-federal-police-clear-plaza-n1237784>. Accessed 8 Dec. 2020.

³⁴ Center for Constitutional Rights. 23 Sept 2020. *Advocacy with U.S. Government in Support of LGBTQIA+ Rights and Gender Justice*. <https://ccrjustice.org/advocacy-us-government-support-lgbtqia-rights-and-gender-justice>. Accessed 2 Dec 2020; Hailey Fuchs. 13 Oct 2020. *Trump Attack on Diversity Training Has a Quick and Chilling Effect*. NY Times. <https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html>. Accessed 2 Dec 2020.

³⁵ National LGBTQ Task Force. 9 Feb 2017. *Donald Trump Signs Harmful Police Enforcement Executive Orders*. <https://www.thetaskforce.org/donald-trump-signs-harmful-police-enforcement-executive-orders/>. Accessed 2 Dec 2020.

RECOMMENDED POLICY PRIORITIES & OPPORTUNITIES FOR ACTION

The incoming administration has a tremendous opportunity to undo the harm of the last administration, and build on the groundwork laid by Obama and continue to integrate the experiences, concerns and voices of LGBTQ people within broader discussions and policy initiatives focused on policing and safety.

As urgent priorities, the Biden Administration should:

- Resume oversight of police departments nationwide and conduct pattern-and-practice investigations that explicitly address the abuse of LGBTQ people by law enforcement, and enter into consent decrees to ensure enforcement;
- Develop and issue model policies and implementation strategies governing police interactions with LGBTQ people;
- Implement the recommendations of the President’s Task Force on 21st Century Policing, and facilitate memoranda of understanding (MOUs) between school administrators and law enforcement agencies to address concerns of LGBTQ students by specifically ensuring as follows:
 - Selection, employment, training, and oversight of school-based security personnel should be LGBTQ-inclusive (e.g., ensuring that police in schools are trained to address disproportionate adverse treatment of gender-nonconforming girls), and competency should be assessed and required;
 - Cross-training shall be mandated for school and security staff regarding the needs of LGBTQ youth; preventing and addressing bullying related to actual or perceived sexual orientation or gender identity; cultural competency and implicit bias; and de-escalation, conflict resolution and restorative practices;
 - Citations, court referrals, and arrests shall not be imposed for most behavioral infractions, including violations of dress codes (which may not impose gender disparities);
 - Police shall not search students to assign, assess or purportedly confirm gender; and
 - Student sexual orientation and gender identity shall not be unnecessarily disclosed to parents/guardians, who are notified when students are ticketed or arrested and allowed to be present when a student is questioned;
- Rescind Executive Orders 13774, 13776, and 13896, which aggrandized law enforcement power without meaningful oversight, and withdraw all reports and recommendations issued by the President’s Commission on Law Enforcement and the Administration of Justice;
- Rescind Executive Order 13950, and require mandatory anti-bias training requirements for federal, state, and local law enforcement, as a condition of receiving DOJ grants and funds. Federal grants should also be conditioned on law enforcement agencies adopting and enforcing anti-profiling and nondiscrimination provisions inclusive of sexual

orientation and gender identity — and develop strategies for enforcing these grant conditions;

- Rescind and immediately cease enforcement of RIN 1105-AB58, Equal Participation of Faith-Based Organizations in Federal Agency’s Programs and Activities: Implementation of Executive Order 13831” the DOJ’s newly-adopted rule authorizing discrimination against LGBTQ+ people by federally-funded entities, including corrections and law enforcement agencies;
- Rescind the Department of Housing and Urban Development (HUD)’s Rule, RIN 2506-AC53, Docket No. FR 6152-P-01: Making Admission on Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, to combat street homelessness among transgender people and quality of life arrests;
- Issue an Executive Order immediately rescinding 287(g) agreements, the Criminal Alien Program, and the Priority Enforcement Program, and completely uncouple immigration enforcement from local law enforcement by terminating policies that call for mandatory cooperation with ICE as a condition of receiving federal funds, or use local police officers to enforce civil immigration laws.
- Ensure nationwide compliance with the Prison Rape Elimination Act through audits and enforcement actions, and promulgate additional guidance to address sexual abuse and harassment beyond the prison setting, such as in police holding cells;
- Encourage Congress to introduce and pass the BREATHE Act,³⁶ and codify a Bivens right of action for federal law enforcement officers, and prohibit the use the qualified immunity defenses for law enforcement officers to usher in an era of meaningful police accountability and oversight;
- Issue additional guidance to establish a necessary use of force standard that allows police use of force only as a last resort, binding on all law enforcement agencies that are federal grantees; and
- Mandate that state and federal law enforcement agencies collect and analyze data on stops, searches, arrests, and uses of force, including demographic information such as race; and make all data and analysis public.

We also encourage the incoming administration to implement recommendations of the President’s Task Force on federal data collection on LGBTQ people’s experiences of police contacts and of police sexual misconduct. Such data would provide critical information to guide action in the years ahead and to encourage local civilian oversight agencies to document, analyze, and publicize LGBTQ people’s experiences of policing.

³⁶ Johnson, Derrick and Gina Clayton-Johnson. 30 Sept. 2020. *The BREATHE Act is the policy change America needs*. CNN. <https://www.cnn.com/2020/09/30/opinions/breathe-act-policy-police-violence-johnson-clayton/index.html>. Accessed 2 Dec 2020.

However, we strongly caution the incoming administration against collection of information on actual or perceived sexual orientation or gender identity by law enforcement officers regarding individuals subjected to stops, searches, arrest, excessive force, or injury. In a context where bias still exists and LGBTQ-specific laws preventing discrimination do not exist in the majority of states and at the federal level, such data collection will perpetrate many of the very harms we seek to prevent in terms of police interactions with LGBTQ people, by creating opportunities for—or legitimating invasive questioning, scrutiny, potential harassment and violence by—law enforcement officers as they collect this information.

We are also concerned about the potential consequences of creation of a government record of an individual's actual or perceived sexual orientation and gender identity without the individual's full and informed consent, and without respecting individual self-determination. Such a record would follow them in subsequent police interactions, and potentially in interactions with other systems such as employment, family court, and others who might have access to arrest and/or criminal records.

Members of the Working Group stand ready to elaborate on these ideas with incoming staff.

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2.

IMMIGRATION DETENTION

Record numbers of people have died in immigration detention over the past four years, including two transgender women seeking asylum, Johana Medina Leon and Roxsana Hernandez. The negligent withholding of medical care that contributed to these devastating deaths is sadly the norm in immigration detention, as evidenced by numerous complaints and even reports by the agency's own watchdogs.³⁷ Furthermore, ICE's own inspection mechanisms have been found inadequate and the agency is unwilling to hold its contractors accountable for complying with basic health and safety standards.³⁸ In addition to failing to support the health of people in its custody, ICE has also failed to keep LGBTQ people safe. In violation of its own policies, it routinely places transgender people in solitary confinement for prolonged periods of time and LGBTQ people in immigration detention are ninety-seven times more likely to report being sexually victimized than non-LGBTQ people. In addition to warehousing people in inhumane conditions, DHS criminalizes immigrants in its enforcement of immigration laws.

³⁷ Staff Report, Committee on Oversight Reform and Subcommittee on Civil Rights and Civil Liberties. Sept 2020. *The Trump Administration's Mistreatment of Detained Immigrants: Deaths and Deficient Medical Care by For-Profit Detention Contractors*. <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf>. Accessed 17 Dec 2020.

³⁸ Department of Homeland Security, Office of the Inspector General. 26 June 2018. *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*. OIG-18-67. <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>. Accessed 17 Dec 2020.

RECOMMENDATIONS

The past four years built on the previous administration’s oversized detention and deportation apparatus and inflicted significant harm on immigrants, and LGBTQ immigrants in particular. We call on the administration to address this through the following mechanisms:

Office of the President

- Push for repeal of the Illegal Immigration Reform and Immigrant Responsibility Act, which has only served to undermine due process protections and criminalize immigrants.
- End expedited removal.

Department of Homeland Security

- Declare an immediate moratorium on deportations.
- End the use of contract detention.
- Significantly reduce the size of immigration detention.
- Require any jurisdiction receiving anti-trafficking money to create a policy barring law enforcement from undercover work as clients during investigations.
- Conduct research, including stakeholder meetings, on recommendations and best practices for creating non-law enforcement-based reporting bodies for addressing sexual violence perpetrated by law enforcement.
- Rescind the October 21, 2020 DOJ DHS final rule on “Procedures for Asylum and Bars to Asylum Eligibility” which disproportionately impacts the ability of LGBTQ people to obtain protections.
- Rescind the EOIR and USCIS “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review” final rules which essentially eliminate asylum protections.
- Issue a directive that requires DHS components to fully cooperate with the Office for Civil Rights and Civil Liberties.
- Issue guidance prohibiting the use of criminal convictions related to trafficking to disqualify people from immigration benefits.
- Adequately fund and ensure language access.

Immigration & Customs Enforcement (ICE)

- End the detention of LGBTQ people and people living with HIV. Ending the detention of transgender people is an urgent and immediate priority.
- Prioritize and expand the use of community-based alternatives to detention. Ensure these are an alternative to detention and not release. Ensure these are centered around case management that is holistic and based on individualized assessments.
- End the use of solitary confinement, both under the pretext of individual safety and as a punitive measure.

- Eliminate barriers to accessing counsel.
- Prohibit enforcement actions against U visa applicants.

Customs & Border Patrol (CBP)

- End metering, which traps LGBTQ asylum seekers in Mexico.
- Ensure immigrants are not held in CBP custody for longer than 48 hours, expand availability of medical screenings and emergency medical care, implement training on recognizing medical distress for all CBP officers and Border Patrol agents.

U.S. Citizenship & Immigration Services (USCIS)

- Rescind fee increases, particularly the unconscionable fee for applying for asylum
- Direct asylum officers to not just make credible-fear determinations at the border but affirmative asylum grants at the border, where appropriate.
- Rescind changes to Refugee, Asylum and International Operations lesson plans that raise standards for credible fear reviews and reinstate the LGBTQ asylum training as well as expand the training for CBP and ICE officers as well as immigration judges.

Department of Justice

- Criminal convictions that are a result of human trafficking must no longer be used against survivors in immigration proceedings or immigration applications. These conviction(s) will no longer be seen as a conviction in immigration court or applications. They will no longer be considered a particularly serious crime, crime involving moral turpitude or an aggravated felony.

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3.

SEX WORKER RIGHTS

Sex work is an issue which sits at the intersection of economic survival and criminalization. The LGBTQ community is disproportionately impacted by the criminalization and policing of sex trades. In the United States, numerous factors from economic instability, institutional discrimination and lack of support services and familial rejection lead many LGBTQ people to rely on informal and criminalized economies like sex work to meet their basic survival needs. For instance, a national survey of the transgender community reported that 12% had, at some point, engaged in some form of sex work.³⁹ When broken down by race, trans individuals of color had even higher rates of participation, with 23% of Latinx respondents and 42% of Black respondents having participated in the sex trade. One study notes that homeless LGBTQ youth were seven times more likely to trade sex for a place to stay compared to their heterosexual, cisgender peers.⁴⁰

The LGBTQ community also faces a disproportionate level of policing for prostitution-related crimes, meaning higher rates of isolation, trauma from increased arrests, and the long-lasting

³⁹ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. Dec 2016. *The Report of the 2015 U.S. Transgender Survey*. National Center for Transgender Equality. <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. Accessed 18 Dec 2020.

⁴⁰ Freeman, Lance, and Darrick Hamilton. 2008. *A Count of Homeless Youth in New York City*. 2007. New York: Empire State Coalition of Youth and Family Services.

consequences of an arrest record. Transgender women across the country report frequent profiling and harassment under laws that prohibit loitering for the purposes of prostitution.⁴¹ LGBTQ youth are also highly policed under these laws, as well as many other “quality-of-life” crimes.⁴² Others most impacted among LGBTQ people include people of color, gender variant and intersex people, and all people who face discrimination and systematic oppression based on race, gender, dis/ability, educational background, and/or immigration status.

RECOMMENDATIONS

WHITE HOUSE PRIORITIES

The incoming administration must immediately rescind National Security Presidential Directive 22 (NS PD 22), which states “[t]he United States Government opposes prostitution and any related activities . . . The United States Government’s position is that these activities should not be regulated as a legitimate form of work for any human being.” This statement falsely conflates all sex work with human trafficking and explicitly demeans the sex trade. This directive creates barriers to ever recognizing the dignity of people who trade sex or the importance of sex workers as stakeholders in the fight against trafficking.

GOVERNMENT-WIDE POLICIES

Sex workers have reported for decades that during investigations for prostitution-related crimes and trafficking into the sex trade law enforcement officers have been engaged in sexual contact that is then used as evidence for arrest and prosecution. This is an egregious form of state-sanctioned sexual violence. It also consistently meets the legal definition of entrapment.⁴³ We call on the administration to address this through the following mechanisms:

- Require all federal Departments to adopt a policy barring sexual contact while operating under color of law;
- Request a report from the Government Accountability Office (GAO) on the policies regarding sexual contact for all jurisdictions and departments receiving federal funding;
- Prioritize funding from the COPS Office to jurisdictions which have the most stringent policies on sexual contact, including for implementation, training, and evaluation;

⁴¹ *Supra*, note 25.

⁴² Meredith Dank, Lilly Yu, Jennifer Yahner, Elizabeth Pelletier, Mitchyll Mora, Brendan Conner. Sept 2015. *Locked in: Interactions with the Criminal Justice and Child Welfare Systems for LGBTQ Youth, YMSM and YWSW who Engage in Survival Sex*. Urban Institute. <http://streetwiseandsafe.org/wpcontent/uploads/2015/09/Locked-In-FINAL-REPORT.pdf>. Accessed 18 Dec 2020.

⁴³ U.S. Dep’t of Justice. 22 Jan 2020. *Criminal Resource Manual, CRM 645 “Entrapment-Elements.”* <https://www.justice.gov/archives/jm/criminal-resource-manual-645-entrapment-elements>. Accessed 8 Dec 2020.

- Require any jurisdiction receiving anti-trafficking money to create a policy barring law enforcement from undercover work as clients during investigations; and,
- Conduct research, including stakeholder meetings, on recommendations and best practices for creating non-law enforcement-based reporting bodies for addressing sexual violence perpetrated by law enforcement.

DEPARTMENT OF JUSTICE

The administration should request that the Department of Justice conduct an extensive evaluation on the impact of anti-trafficking efforts conducted as part of “Operation Cross Country.” These annual sting operations engaged federal and local agencies from 2003 – 2018 through policing of the sex trade. We request that the administration assess its effectiveness in addressing human trafficking in the sex trade and its collateral impacts on the sex trade more broadly to the best of their ability through the following metrics. While this cannot give a holistic picture of the ramifications, it begins the necessary evaluation of the effectiveness of its tactics, which continue to be replicated in federal, state and local efforts. The Department should evaluate and publicize:

- the number of prosecutions under 18 US 1591, 1590, and 1589 which directly resulted from Operation Cross Country efforts;
- the number and disaggregation of all prostitution-related charges that resulted from these operations and the disposition of those cases. This is including but not limited to soliciting, patronizing, brothel-keeping, pimping and pandering, and/or equivalent statutes;
- the gender and racial breakdowns of the individuals charged with prostitution-related crimes;
- the number of additional charges outside of prostitution-related charges;⁴⁴
- the number of minors and adults identified who meet the legal standard of a victim of human trafficking;
- the number of individuals placed in deportation proceedings either as a result of a prostitution-related arrest and/or in spite of being identified as a trafficking victim;
- how long-term success of identified survivors is assessed;
- and disclosure of the annual budget for Operation Cross Country, including both direct federal expenditures and state/local funding received as a result of participation with these efforts.

⁴⁴ It is not uncommon to receive multiple disparate charges stemming from a single prostitution arrest.

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4.

HIV IN THE CRIMINAL LEGAL SYSTEM

Despite dramatic advances in HIV treatment and prevention over the last decade, many criminal legal policies affecting people living with HIV (PLHIV) or believed to be living with HIV remain rooted in inaccurate, dated, or fear-based misperceptions of the transmission routes, risks and treatment realities of HIV. For most with access to effective treatment, HIV is now a chronic manageable medical condition and those living with it largely enjoy healthy lives and a normal lifespan.⁴⁵

⁴⁵ Hasina Samji, Angela Cescon, Robert S. Hogg, Sharada P. Modur, Keri N. Althoff, Kate Buchacz, Ann N. Burchell, Mardge Cohen, Kelly A. Gebo, M. John Gill, Amy Justice, Gregory Kirk, Marina B. Klein, P. Todd Korthuis, Jeff Martin, Sonia Napravnik, Sean B. Rourke, Timothy R. Sterling, Michael J. Silverberg, Stephen Deeks, Lisa P. Jacobson, Ronald J. Bosch, Mari M. Kitahata, James J. Goedert, Richard Moore, Stephen J. Gange. 2013. *Closing the Gap: Increases in Life Expectancy among Treated HIV-Positive Individuals in the United States and Canada*. <https://pubmed.ncbi.nlm.nih.gov/24367482/#:~:text=Conclusions%3A%20A%2020%2Dyear%2Dgroup%2C%20and%20CD4%20count%20remain>. Accessed 18 Dec 2020.

HIV status is criminalized at the federal government level, in 32 states and two territories⁴⁶—making felonies of conduct that either is legal (consensual sex, organ

donation) or is otherwise rarely prosecuted (spitting at someone) solely for people who have been diagnosed with HIV. Only a few statutes require any evidence of intent to transmit HIV, let alone intent to do harm, and those that do typically treat the very act of sex as evidence of such intent. Almost all HIV-specific laws and prosecutions effectively criminalize a PLHIV's inability to prove disclosure of HIV status prior to sex. At least nine states attach sex offender status to a conviction for such failure to prove disclosure and/or for perceived or possible HIV exposure or transmission. Sex workers arrested for solicitation often find themselves facing felony prosecution or sentence enhancement if they are also a person living with HIV, even if the only charge is an offer to have sex (solicitation).

A number of states use assaults, attempted murder, reckless endangerment and other general criminal law provisions to target PLHIV, most frequently when former partners accuse them of non-disclosure, or to prosecute individuals in crisis following interactions with law enforcement or emergency response personnel. PLHIV in an acute state of mental illness encounter arrest and felony prosecution rather than compassionate intervention for defensive behavior such as spitting that poses no transmission risk and is likely a symptom of their mental illness.⁴⁷

While understanding of HIV transmission's routes and risks have been well understood in the scientific community for many years, the passage and prosecution of HIV criminal laws have been a product of widespread misunderstanding about HIV. As understanding of HIV's routes, relative risks and current treatment realities increases, support for criminalization of HIV declined.

All available data force the conclusion that these laws have no positive impact on people's tendency to have safer sex or to disclose their HIV status, or on transmission rates in states that have these laws.⁴⁸ Consequently, numerous medical, mental, and public health professionals have called for their reform.

⁴⁶ The Center for HIV Law and Policy. 2020. *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*. 3rd ed. <https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20the%20U.S.%20A%20Source%20book%20on%20State%20Fed%20HIV%20Criminal%20Law%20and%20Practice%20050520.pdf> (full memo), <https://www.hivlawandpolicy.org/sites/default/files/U.S.%20HIV%20Laws%20and%20Prosecutorial%20Tools%2C%20CHLP%20%282020%29.pdf> (factsheet). Accessed 17 Dec. 2020.

⁴⁷ See e.g., Juwan J. Holmes. 17 Jul 2020. *Florida Man Charged with 'Criminal Transmission of HIV' After He Spit on a Paramedic*. LGBTQ Nation. <https://www.lgbtqnation.com/2020/07/florida-man-charged-criminal-transmission-hiv-spit-paramedic/>. Accessed 17 Dec 2020.; Patrick Saunders. 3 Sept 2019. *HIV-Positive Man's Arrest for Spitting Called 'Plain and Simple Discrimination'*. Project Q Atlanta. <https://www.projectq.us/hiv-positive-arrest-for-spitting-called-plain-discrimination/#>. Accessed 17 Dec 2020.

⁴⁸ Carol L. Galletly, JD, PhD, Laura R. Glasman, PhD, Steven D. Pinkerton, PhD, and Wayne DiFranceisco. Nov 2012. *New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and*

Additionally, laws that criminalize the possession of sterile syringes increase infectious disease transmission risk among people who inject drugs, including transgender people who use street hormones. In some jurisdictions, condom possession is used as evidence of prostitution or solicitation,⁴⁹ decreasing the likelihood that individuals will carry condoms while increasing the risk of sexually transmitted infection (STI) transmission.

Once involved in the criminal legal system, PLHIV and those at higher risk of acquiring HIV lack the services and support they need, both during incarceration and upon reentry. Access to appropriate and adequate medical care, including mental health treatment, coupled with widespread sexual health literacy programs, is crucial to ensuring that people who are incarcerated and those who are returning to their communities have the tools they need to protect themselves and reduce transmission of HIV and other serious STIs.

EFFORTS DURING THE OBAMA ADMINISTRATION

- In 2010, the Obama Administration published the National HIV/AIDS Strategy (NHAS) for the United States,⁵⁰ calling upon “state legislatures to consider reviewing HIV-specific criminal statutes to ensure that they are consistent with current knowledge of HIV transmission and support public health approaches to preventing and treating HIV.”⁵¹ The Administration also directed the BOP and CDC to expand access to HIV/STI screening, and

Sexual Seropositive Status Disclosure Behaviors of Persons Living with HIV. American Journal of Public Health. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3477954/>. Accessed 18 Dec 2020; Carol L. Galletly, Steven D. Pinkerton, and Wayne DiFranceisco. 1 Feb 2013. *A Quantitative Study of Michigan’s Criminal HIV Exposure Law*. AIDS Care. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3428201/>. Accessed 18 Dec 2020; Scott Burris, Leo Beletsky, Joseph Burleson, Patricia Case, and Zita Lazzarini. Jan 2007. *Do Criminal Laws Influence HIV Risk Behavior: An Empirical Trial*. The Center for HIV Law and Policy. <https://www.hivlawandpolicy.org/sites/default/files/Do%20Crim.%20Laws%20Influe.%20Risk.pdf>. Accessed 18 Dec 2020; National Association of County & City Health Officials. 13 Nov 2013. *Statement of Policy Opposing Stigma and Discrimination Against Persons with Communicable Diseases*. <https://www.naccho.org/uploads/downloadable-resources/Policy-and-Advocacy/13-11-Opposing-Stigma-and-Discrimination-against-Persons-with-Communicable-Diseases-2.pdf>. Accessed 17 Dec 2020; American Psychology Association. Feb 2016. *Resolution Opposing HIV Criminalization*. <https://www.apa.org/about/policy/resolution-opposing-hiv-criminalization.pdf>. Accessed 17 Dec 2020; Association of Nurses in AIDS Care. Nov 2014. *Position Statement: HIV Criminalization Laws and Policies Promote Discrimination and Must Be Reformed*. https://www.nursesinaidscare.org/files/2020%20Attachments/ANAC_PS_Criminalization_December22014_FinalforANAC.pdf. Accessed 17 Dec 2020; Positive Justice Project. 2012. *Consensus Statement on the Criminalization of HIV in the United States*. <https://www.hivlawandpolicy.org/resources/positive-justice-project-consensus-statement-criminalization-hiv-united-states-positive>. Accessed 17 Dec 2020.

⁴⁹ Please see “Sex Worker Rights,” *supra* Part 3 for more on this issue.

⁵⁰ Office of the President of the United States. National HIV/AIDS Strategy. July 2010. <https://obamawhitehouse.archives.gov/sites/default/files/uploads/NHAS.pdf>. Accessed 17 Dec 2020.

⁵¹ *Id.*

to promote risk reduction interventions and HIV-related case management for prisoner reentry; while directing DOJ and HHS to provide technical assistance resources to States considering changes to HIV criminal statutes in order to align laws and policies with public health principles.”

- In 2013, the Administration’s Working Group on the Intersection of HIV/AIDS, Violence against Women and Girls and Gender-related Health Disparities published a report⁵² recognizing the danger posed by state HIV criminal laws to those living with intimate partner violence.
- In 2013, The Presidential Advisory Council on HIV/AIDS (PACHA) passed the Resolution on Ending Federal and State HIV-Specific Criminal Laws,⁵³ concluding that current criminal laws require modernization to eliminate HIV-specific statutes or application of general criminal law that treats HIV status or the use of condoms or other measures to prevent HIV transmission, as the basis for criminal prosecution or sentence enhancement
- In 2014, CDC and the Department of Justice Civil Rights Division co- authored an article examining HIV-specific criminal laws⁵⁴ and the DOJ published the Best Practices Guide to Reform HIV-specific Criminal Laws to Align with Scientifically Supported Factors.⁵⁵
- ● In 2015, the White House released the National HIV/AIDS Strategy for the United States: Updated to 2020,⁵⁶ calling on CDC and DOJ to “monitor state HIV-specific criminal statutes and develop a fact sheet that cited the most current science, current information on state statutes, and the potential impact on HIV outcomes.

SETBACKS DURING THE TRUMP ADMINISTRATION

- In 2017, then Director of ONAP, Amy Lansky, resigned from her position. President Trump never appointed a new Director, essentially shuttering ONAP.
- In 2017, six members of PACHA publically resigned from their positions because President Trump had, “no strategy to address the on-going HIV/AIDS epidemic, [sought] zero input from experts to formulate HIV policy, and—most concerning—pushes legislation that will

⁵² Interagency Federal Working Group. Sept 2013. *Addressing the Intersection of HIV/AIDS, Violence Against Women and Girls, and Gender-related Health Disparities*. https://files.hiv.gov/s3fs-public/vaw_master_report.pdf. Accessed 17 Dec 2020.

⁵³ Presidential Advisory Council on HIV/AIDS (PACHA). 2013. *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments*. <https://files.hiv.gov/s3fs-public/feb-2013-criminalization-resolution.pdf>. Accessed 17 Dec 2020.

⁵⁴ Department of Health and Human Services, Office of the Assistant Secretary for Health, Office on Women’s Health. 2016. *HIV Prevention Toolkit: A Gender-Responsive Approach*. <https://www.hiv.gov/sites/default/files/owh-gender-responsive-hiv-prevention-toolkit.pdf>. Accessed 17 Dec 2020.

⁵⁵ U.S. Department of Justice. 2014. *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors*. <https://files.hiv.gov/s3fs-public/doj-hiv-criminal-law-best-practices-guide.pdf>. Accessed 18 Dec 2020.

⁵⁶ Office of The President of the United States. July 2015, updated to 2020. *National HIV/AIDS Strategy for the United States*. <https://files.hiv.gov/s3fs-public/nhas-update.pdf>. Accessed 17 Dec 2020.

harm people living with HIV....”⁵⁷ President Trump fired the remaining members later that year and left PACHA unfilled until 2018.⁵⁸

- In 2019, President Trump announced the Ending the HIV Epidemic: A Plan For America (EHE plan), with the goal of reducing new HIV transmissions by 90% by 2030.⁵⁹ The EHE plan does not address HIV criminalization as a factor contributing to the epidemic.
- In 2020, the Department of Justice signaled its intent to criminally prosecute individuals based upon their COVID-19 status.⁶⁰ We recognize the differences between transmission, treatment, and prevention of COVID-19 and HIV; however, it is concerning for the Department of Justice to direct attorneys to use criminalization as a response to a public health issue.
- In 2020, the Administration published the Draft National HIV/AIDS Strategy 2021-2025 for the United States,⁶¹ recognizing, “HIV-specific criminal laws perpetuate HIV-related stigma and discrimination”⁶² and stating that efforts to reform all state federal HIV criminalization laws must be, “scientifically based and reflect well-tested and effective public health strategies....”⁶³ Under the National HIV/AIDS Strategy Updated to 2020 the policy and action section focused on “reduc[ing] stigma and eliminat[ing] discrimination associated with HIV status”. Under Trump’s Administration, the national strategy rolled back its approach to HIV criminalization, as it did not refer to the terminology directly and instead focused on alternative areas such as how “HIV-related stigma can be confounded with or made more complicated by stigma related to substance use, mental health, sexual orientation, gender identity, race/ethnicity, or sex work”.⁶⁴ The recommended actions under the updated to 2020 strategy included, in 3.C.2, “Strengthen enforcement of civil rights laws and assist States in protecting people living with HIV from violence, retaliation, and discrimination associated with HIV status”. The Department of Justice and federal agencies were recommended to prioritize enforcement of Federal antidiscrimination laws that protect people based on HIV status and to proactively outreach to localities around

⁵⁷ Scott A. Schoettes, former PACHA member. 16 June 2017. *Trump Doesn’t Care About HIV. We’re Outta Here*. Newsweek. <https://www.newsweek.com/trump-doesnt-care-about-hiv-were-outta-here-626285>. Accessed 17 Dec 2020.

⁵⁸ Ben Guarino. 29 Dec. 2017. *Trump Administration Fires All Members of HIV/AIDS Advisory Council*. The Washington Post. <http://washingtonpost.com/news/to-your-health/wp/2017/12/29/trump-administration-fires-all-members-of-hiv-aids-advisory-council/>. Accessed 17 Dec 2020.

⁵⁹ Centers for Disease Control & Prevention. Feb 2020. *Ending the HIV Epidemic*. <https://www.cdc.gov/endhiv/about.html>. Accessed 17 Dec. 2020.

⁶⁰ Office of the Deputy Attorney General, Department of Justice. 24 March 2020. *Department of Justice Enforcement Actions Related to COVID-19*. <https://www.justice.gov/file/1262771/download>. Accessed 17 Dec 2020.

⁶¹ NHAS. *Developing the HIV National Strategic Plan For 2021-2025*. <https://www.hiv.gov/federal-response/national-hiv-aids-strategy/developing-the-next-nhas>. Accessed 17 Dec. 2020.

⁶² Department of Health and Human Services. 23 Nov 2020. *Draft HIV National Strategic Plan for the United States: A Roadmap to End the Epidemic 2021-2025*. <https://files.hiv.gov/s3fs-public/HIV-NSP.pdf>. Accessed 17 Dec 2020.

⁶³ Id.

⁶⁴ *Supra*, note 55.

the country where discrimination, blatant or subtle, may exist against people living with HIV. This channeling away from directly focusing on HIV criminalization laws is backpedaling from the Obama Administration recommendations for states to tackle HIV criminalization as a key policy issue.

OPPORTUNITIES FOR ACTION

There has been unmistakable progress over the past eight years. However, it is equally clear that many of the commitments and directives that promised real improvements in the criminal justice system's treatment of PLHIV have been ignored, diluted or have failed to materialize.

The next administration should engage in concrete, time-specific follow-through on all the commitments to specific actions contained in PACHA's resolution and in the original and updated NHAS to reform HIV laws and prosecution policies at the state level and in the armed forces.

The Biden-Harris team should have a keen focus on HIV criminalization as an issue for the Department of Health and Human Services, Centers for Disease Control and Prevention, Health and Resources Services Administration, Office of National AIDS Policy, and other federal agencies such as the Department of Justice to take key policy recommendations to bestow upon state governments to tackle and act on modernizing or repealing HIV criminal statutes within their state laws, if applicable if they still exist. Under the draft HIV National Strategic Plan for 2021-2025 the objective 3.1 under "Reduce HIV-Related Stigma" HHS states that "Agreement on the need to reform HIV criminalization laws is increasing". This is a step in the right direction and this draft strategy will soon become the new standard for HIV strategy for HHS and its agencies. It is within the due diligence of the Biden-Harris administration to take a keen look at this strategy and make more direct implications and recommendations on ending HIV criminalization or increased modernization efforts to update these state criminal statutes to match the updated CDC guidelines and recommendations on HIV transmission and HIV criminal laws.

The United States response to HIV/AIDS under the current Ending the HIV Epidemic National Initiative has steadfastly brought attention to many policy-related areas that need consistent and heightened attention by the Biden-Harris administration. The unruly matter of HIV criminalization needs to be addressed at the federal level and the statement needs to be succinct and clear from cabinet-level health officials that "HIV is not a crime," and that this conclusion is backed by science. Americans must understand that a person's HIV status is not a punishable crime and state government officials need to begin prioritizing modernizing/repealing HIV criminal statutes in their upcoming legislative sessions. In order to end the HIV-epidemic the Biden-Harris administration must set a clear precedent – we will not lead with draconian laws that do not align with the science that we know and trust. We will lead with the knowledge

provided in the over 30 years of HIV scientific research and data that laws incriminating HIV status must be changed. This administration will make its efforts to ensure this is communicated.

The President's Advisory Council on HIV/AIDS (PACHA) must be amplified to take direct action on policy related to HIV/AIDS. This includes HIV criminalization as a committee-level special focus area to ensure the messaging is clear that HIV is not a crime and that in order to reduce HIV-related stigma we must work with state governments to modernize or repeal their HIV-specific criminal statutes. PACHA is the applicable federal body to advise the Biden-Harris administration on this issue alongside the Office of National AIDS Policy (ONAP).

Additionally, in order to reduce over-incarceration and the risk of HIV and STI transmission, DOJ should work with community stakeholders, including sex workers, people who use drugs, PLHIV, people living with Hepatitis C, and/or networks of and advocates for these stakeholders, and with national criminal justice organizations, such as the National Association of Criminal Defense Attorneys and the Association of Prosecuting Attorneys to develop national guidelines on (a) the use of condoms and other disease prevention mechanisms as evidence of criminal intent or criminal conduct, and (b) meaningful access to sterilized syringes.

POLICY RECOMMENDATIONS FOR THE FIRST YEAR

- DOJ and/or Centers for Disease Control (CDC) should develop a plan and timeline for meaningful follow-up to the 2014 Civil Rights Division's (CRD) Technical Assistance Guidance Best Practices Guide, including creating incentives for reform of discriminatory disease-specific laws through offers of technical assistance, HIV prevention grants and law enforcement grants, and other mechanisms, as well as an update to the guidance addressing states that inappropriately prosecute PLHIV using general criminal laws and that create sentencing enhancements for sex workers living with HIV.
- The Administration should support reauthorization of the Ryan White CARE Act with inclusion of a requirement that state grantees certify that they have repealed, or have a plan in place to repeal, state laws that stigmatize PLHIV²⁰, that may discourage HIV testing and engagement in care, or that otherwise undermine HIV testing, prevention and care strategies.
- The Administration should, by Executive Order, require the Department of Defense and all branches of the armed services to review and modernize current HIV-related policies, in particular prosecutions based on HIV status and consensual adult sex, and issue a moratorium on any such prosecutions pending completion of a review and development of related proposals for modernization of current policies and practices.
- BOP should create a toolkit for reentry counselors outlining the specific needs of PLHIV who are returning to their communities, with particular attention to housing and health care programs.

- BOP must publish a notice of rulemaking to amend 28 CFR §541.62 and rescind the associated Program Statement 5214.04: Procedures for Handling of HIV Positive Inmates who Pose Danger to Others as part of its solitary confinement policy reform efforts.
- For meaningful syringe access, the Administration should request \$15 million in new federal spending dedicated to syringe services programs and support removing all restrictions on use of federal funds - including for the purchase of syringes—in the Fiscal Year 2021 Budget.

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5.

CORRECTIONS REFORM

Across the United States, LGBTQ people and people living with HIV/AIDS—particularly people of color—are disproportionately impacted by mass incarceration, due to the operation of the *discrimination-to-incarceration pipeline*.⁶⁵ A shocking 47% of Black transgender people, and more than one out of five (21%) transgender women of all ethnicities, are incarcerated during their lifetimes.⁶⁶ Likewise, the percentage of people living with HIV in prisons and jails nationwide is five times greater than the percentage in the general population.⁶⁷

LGBTQ people and/or people living with HIV in prisons and jails across the United States face significant threats to their dignity and safety. Research studies have repeatedly shown that LGBTQ people in custody stand an enormous risk of sexual abuse in jails and prisons.⁶⁸ Nearly

⁶⁵ Chinyere Ezie and Richard Saenz. Nov 2020. *Abuse and Neglect of Transgender People in Prisons and Jails: A Lawyer's Perspective*. Practising Law Institute. <https://bit.ly/transrightsPLI>; Lucy Muirhead. 15 May 2018. *Eight Things You Should Know About Trump's Reversal of Transgender Prison Rights*. The Century Foundation. <https://tcf.org/content/commentary/eight-things-know-trumps-reversal-transgender-prison-rights/>.

⁶⁶ Ezie and Saenz, *Supra*, note 65 (noting that approximately 20% of youth in juvenile facilities identify as LGBTQ+).

⁶⁷ Centers for Disease Control. 22 July 2015. *HIV Among Incarcerated Populations*. <http://www.cdc.gov/hiv/group/correctional.html>. Accessed 3 Dec 2020.

⁶⁸ See, e.g., Black & Pink. Oct 2015. *Coming Out of Concrete Closets*. <https://www.blackandpink.org/wp-content/uploads/2020/03/Coming-Out-of-Concrete-Closets-incorporated-102115.pdf>; Movement Advancement Project & Center for American Progress. August 2016. *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color*. <https://www.lgbtmap.org/policy-and-issue-analysis/criminal-justice-poc>; Grant et al., *Supra*, note 26.

40% of incarcerated transgender people have been sexually assaulted in custody—a rate that is exponentially (i.e. ten times) higher than the broader prison population—due to housing decisions that typically thrust transgender women into men’s prisons.⁶⁹ Lesbian, gay, and bisexual people also experience elevated rates of abuse and attacks as well. Yet, instead of taking meaningful steps to keep LGBTQ people safe, prison officials often resort to throwing people into long-term solitary confinement allegedly “for their protection”—cutting them off from prison programs and recreation, and inevitably jeopardizing their mental health and wellbeing.⁷⁰

Adding depth to this research, Black and Pink, a nationwide network of LGBTQ prisoners, surveyed over 1,100 of its members and found that 85% of respondents spent time in solitary confinement, with more than 40% spending two or more years in solitary. Survey respondents identifying as Black, Latina/o, mixed-race, or Native American were also twice as likely to spend time in solitary confinement as respondents identifying as white.⁷¹ The Black and Pink survey also confirmed that LGBTQ people in custody face a high incidence of sexual abuse and assault, and noted the pernicious role played by prison officials and guards.⁷² According to the survey, 76% of the LGBTQ people who experienced sexual assault in custody were attacked after facility staff intentionally placed them at risk.⁷³

LGBTQ people in prisons and jails also face tremendous roadblocks when trying to access medically necessary care, with more than 40% of transgender people being denied one or more forms of gender-affirming healthcare.⁷⁴

PROGRESS DURING OBAMA ADMINISTRATION

- The Obama Administration took important steps to address the horrific pattern of abuse that LGBTQ people face in state and federal custody. For instance, the Administration:
- Enacted National Prison Rape Elimination Act (PREA) Standards that directed prisons and detention centers at the federal, state, and local levels to take affirmative steps to protect

⁶⁹ Ezie and Saenz, *Supra*, note 65; Allen J. Beck, Ph.D., Bureau of Justice Statistics, Marcus Berzofsky, DrPH, Rachel Caspar, Christopher Krebs, PhD. December 2014. *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*. https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf. Accessed 3 Dec 2020.

⁷⁰ Black and Pink, *Supra*, note 68; JayneLeonard. 6 Aug 2020. *What are the effects of solitary confinement on health?* Medical News Today. <https://www.medicalnewstoday.com/articles/solitary-confinement-effects>. Accessed 3 Dec 2020.

⁷¹ Black and Pink, *supra* note 68.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See, e.g., *Id.* Ezie & Saenz, *supra* note 65.

LGBTQ+ and intersex people from sexual abuse, and special procedures related to housing and searches of people who are transgender or intersex;⁷⁵

- Banned the use of private prisons at the federal level;
- Issued a Program Statement mandating that transgender people incarcerated by the Bureau of Prisons receive gender dysphoria treatment in federal custody, and be housed in facilities according to their gender where appropriate for their health and safety;
- Released guidance on how prisons, jails, and lockups can comply with PREA when it comes to the housing and placement of transgender people in custody, and encouraging the adoption of new policies and practices;⁷⁶
- Released LGBTQ-inclusive recommendations for reform of restrictive housing (solitary confinement), to decrease the negative health consequences that result from use of protective custody and isolation;⁷⁷
- Engaged in oversight of state and local Departments of Correction, and pursued meaningful reforms in prisons and jails;
- Issued a precedent-setting Statement of Interest in *Diamond v. Owens*, affirming that transgender people in custody nationwide are entitled to gender affirming healthcare such as hormone therapy;⁷⁸ and
- Commenced investigations against Alabama, Georgia, and Pennsylvania under the Civil Rights of Institutionalized Persons Act (CRIPA), concerning the systemic violation of the constitutional rights of LGBTQ people in their custody.

SETBACKS DURING THE TRUMP ADMINISTRATION

Under the Trump Administration, the DOJ wholly abdicated its oversight of the Bureau of Prisons (BOP) and stopped taking action to protect LGBTQ+ people from abuse and neglect in prisons and jails. The DOJ's CRIPA investigations into the treatment of LGBTQ people in the Georgia Department of Corrections and other jurisdictions have also stalled, even though federal oversight remains desperately needed.⁷⁹

⁷⁵ *Electronic Code of Federal Regulations (e-CFR) Title 28. Judicial Administration Chapter I. DEPARTMENT OF JUSTICE Part 115. 2012. Prison Rape Elimination Act National Standards.* <https://www.law.cornell.edu/cfr/text/28/part-115>. Accessed 18 Dec 2020.

⁷⁶ National PREA Resource Center. 24 Mar 2016. *Frequently asked questions.* <http://www.prearesourcecenter.org/node/3927>. Accessed 3 Dec 2020.

⁷⁷ Department of Justice. Jan 2017. *Report and Recommendations Concerning the Use of Restrictive Housing, Final Report at 102.* <https://www.justice.gov/archives/dag/file/815551/download>. Accessed 3 Dec 2020.

⁷⁸ U.S. Department of Justice. 3 April 2015. *Justice Department Files Brief to Address Health Care for Prisoners Suffering from Gender Dysphoria.* <https://www.justice.gov/opa/pr/justice-department-files-brief-address-health-care-prisoners-suffering-gender-dysphoria>. Accessed 3 Dec 2020.

⁷⁹ Note: At the time of writing, these investigations technically remain "open." There has just been no forward movement with respect to findings, or attempted enforcement actions.

The DOJ renewed its backing and support of privately-run prisons—abandoning the moratorium adopted by the Obama Administration. The BOP also cynically revoked its promise to provide safe and appropriate housing placements to transgender people in federal custody.⁸⁰

RECOMMENDED POLICY PRIORITIES & OPPORTUNITIES FOR ACTION⁸¹

The incoming administration has an unprecedented opportunity to stop the abuse and neglect of LGBTQ people in custody. Reforms to date have not resulted in nearly enough improvements in the day-to-day life of people who are LGBTQ and/or living with HIV in our jails and prisons. Moreover, the single biggest barrier to improving conditions of confinement for people who are LGBTQ and/or living with HIV is a lack of political prioritization.

As an urgent priority, the incoming administration should:

- Rescind and immediately cease enforcement of RIN 1105-AB58, *Equal Participation of Faith-Based Organizations in Federal Agencies' Programs And Activities: Implementation of Executive Order 13831*" the DOJ's newly-adopted rule authorizing discrimination against LGBTQ+ people by federally-funded entities and grantees, including corrections and law enforcement agencies;
- Reissue the DOJ's recommendations on restrictive housing as binding regulations applicable to the BOP and prisons and jails across the country, pursuant to PREA or as a condition of federal funding;
- Issue findings on DOJ's CRIPA investigation into the Georgia Department of Corrections and other jurisdictions, utilizing consent decrees se necessary to afford broad relief for constitutional violations in systems throughout the country;
- File statements of interest or amicus briefs in cases addressing the healthcare and safety needs of incarcerated transgender people, affirming that healthcare beyond hormone therapy should be provided where needed, and that transgender women should be considered for placement in women's facilities.
- Bestow the Civil Rights office at the Bureau of Prisons (BOP) with a broad mandate to enforce and protect the rights of incarcerated LGBTQ people across the country, with clear plans for corrective action for non-compliant facilities;
- Immediately halt the use of private contractors in federal prisons and immigrant detention facilities;
- Reinstate the BOP's Obama-era Program Statement on housing placements and health care access for transgender people in custody, to ensure that transgender people's

⁸⁰ Chase Strangio, and Amy Fetting. May 25, 2018. *The Trump Administration Is Attacking Trans People in Federal Prison*. American Civil Liberties Union. <https://www.aclu.org/blog/lgbt-rights/criminal-justice-reform-lgbt-people/trump-administration-attacking-trans-people>. Accessed 3 Dec 2020.

⁸¹ Because juveniles face additional unique problems that must be separately addressed, the following section addresses the path ahead for reform for system-involved LGBTQ youth and young people living with HIV.

healthcare needs are met, and that transgender people are housed in facilities consistent with their gender identity wherever appropriate for safety, regardless of surgery status;

- Amend Program Statements 6190.04: Infectious Disease Management and 6031.04: Patient Care to conform to modern-day professional and community standards;
- Develop and implement a system-wide program for promoting comprehensive trauma-informed mental health services and sexual health literacy, to increase the wellbeing of incarcerated people and prepare them better for reentry;
- Ensure that the DOJ Special Litigation Section has sufficient staffing and resources to broaden its nationwide investigations and enforcement of the rights of incarcerated people who are LGBTQ and/or living with HIV;
- Encourage Congress to introduce and pass the BREATHE Act, and codify a bivens right of action against federal law enforcement officers, and to prohibit the use of qualified immunity defenses to usher in an era of meaningful police accountability and oversight.

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6.

JUVENILE JUSTICE

America incarcerates youth at a higher rate than any other nation in the world.⁸² While this is true for all people, it is especially true of youth that criminal behavior is a greater indicator of the individual's life circumstances than intrinsically culpable nature. We are currently going through a youth mental health crisis, with already rising youth depression and anxiety⁸³ skyrocketing during the COVID-19 pandemic.⁸⁴

Oftentimes, poor mental health in youth translates to school discipline and justice involvement, particularly for LGBT youth, youth of color, and disabled youth.⁸⁵ Youth are often criminalized

⁸² Wendy Sawyer. 19 Dec 2019. *Youth Confinement: The Whole Pie 2019*. Prison Policy Initiative. <https://www.prisonpolicy.org/reports/youth2019.html> Accessed 10 Dec 2020.

⁸³ Centers for Disease Control and Prevention. 15 June 2020. *Facts About Mental Disorders in U.S. Children*. <https://www.cdc.gov/childrensmentalhealth/data.html>. Accessed 10 Dec 2020.

⁸⁴ Maria Elizabeth Loades, Eleanor Chatburn, Nina Higson-Sweeney, Shirley Reynolds, Roz Shafran, Amberly Brigden, Catherine Linney, Megan Niamh McManus, Catherine Borwick, and Esther Crawley. 3 June 2020. *Rapid Systemic Review: The Impact of Social Isolation and Loneliness on the Mental Health of Children and Adolescents in the Context of COVID-19*. Journal of the American Academy of Child & Adolescent Psychiatry. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7267797/>; Max Margolius, Alicia Doyle Lynch, Elizabeth Pufall Jones, and Michelle Hynes. 2020. *The State of Young People During COVID-19: Findings from a Nationally Representative Survey of High School Youth*. America's Promise Alliance. https://www.americaspromise.org/sites/default/files/d8/YouthDuringCOVID_FINAL%20%281%29.pdf. Accessed 10 Dec 2020.

⁸⁵ Amir Whitaker, Sylvia Torres-Guillén, Michelle Morton, Harold Jordan, Stefanie Coyle, Angela Mann, and Wei-Ling Sun. 2018. *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students*. ACLU. https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf; Shannon Snapp, Jennifer M. Hoenig, Amanda Fields, and Stephen T. Russell. 2015. *Messy, Butch, and Queer: LGBTQ Youth and the School-to-Prison Pipeline*. Journal Of Adolescent Research. <https://journals.sagepub.com/doi/abs/10.1177/0743558414557625?journalCode=jara>. Accessed 18 Dec 2020.

for behavior that is merely “acting out” mental health issues or normal childhood play.⁸⁶ Gay youth, in particularly girls, are at higher risk for police stops than straight-identified youths.⁸⁷ Further, LGBTQ youth are often punished for public displays of affection and violating gender norms.⁸⁸ When school “zero-tolerance” policies intersect with youth being bullied for gender-nonconforming behavior, LGBT youth can find themselves suspended, expelled, or criminalized for standing up for themselves.⁸⁹

LGBTQ youth, particularly youth of color, are overrepresented and underserved in the juvenile justice system. Despite making up only 5-7% of the general population, LGBTQ and gender-nonconforming youth make up 20% of youth in the juvenile justice system.⁹⁰ Once in the juvenile justice system, LGBTQ youth experience harassment, discrimination, and violence at higher rates than their non-LGBTQ peers.⁹¹

PROGRESS DURING OBAMA ADMINISTRATION

- The Office of Juvenile Justice and Delinquency Prevention (OJJDP) held a listening session called “Creating and Sustaining Fair and Beneficial Environments for LGBTQ Youth” on November 6-7, 2014 and published a report describing the information, perspectives, and ideas shared therein;⁹²
- The Department of Justice (DOJ) and Department of Education (ED) released joint guidance on Title IX’s applicability to transgender students in schools;⁹³

⁸⁶ Students have been criminally charged with “indecent exposure” (wearing saggy pants), “felony forgery” (buying lunch with a fake \$10 bill), “petit larceny” (taking a milk carton), “drug possession” (carrying a maple leaf), “assault” (throwing paper airplane/baby carrot/skittles), “weapons possession” (science fair volcanoes) and “terroristic threats” (8 year old with disability threatening teacher). Megan French-Marcelin and Sarah Hinger. 2017. *Bullies in Blue: The Origins and Consequences of School Policing*. ACLU.

https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf.

⁸⁷ Kathryn Himmelstein and Hannah Brückner. 12 Sep 2010. *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*. American Academy of Pediatrics.

<http://pediatrics.org/cgi/doi/10.1542/peds.2009-2306>. Accessed 10 Dec 2020.

⁸⁸ Snapp et al. *Supra*, note 85.

⁸⁹ *Id.*

⁹⁰ Unjust, *Supra*, note 68; Shannan Wilber. 2015. *A Guide to Juvenile Detention Reform: Lesbian, Gay Bisexual and Transgender Youth in the Juvenile Justice System*. <http://aecf.org/m/resourcedoc/AECF-lesbiangaybisexualandtransgenderyouthinjj-2015.pdf>. Accessed 10 Dec 2020.

⁹¹ Wilber, *Supra*, note 90, pgs. 12-13.

⁹² Office of Juvenile Justice and Delinquency Prevention. 2016. *OJJDP Listening Session Report: Creating and Sustaining Fair and Beneficial Environments for LGBTQ Youth*. <http://ojjdp.gov/pubs/245321.pdf>. Accessed 10 Dec 2020.

⁹³ Department of Justice and Department of Education. 13 May 2016. *Dear Colleague Letter on Transgender Students*. <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. Accessed 10 Dec 2020. See *infra* note 15.

- OJJDP formed the Federal Advisory Committee on Juvenile Justice and established a subcommittee focused on LGBTQ issues;
- OJJDP released multiple mentoring solicitations encouraging applicants to submit designs that specifically included LGBTQ youth in their programming;⁹⁴ and
- OJJDP offered the first “Train the Trainer” session for juvenile justice professionals.⁹⁵

SETBACKS DURING TRUMP ADMINISTRATION

In general, throughout the Trump administration, protections for LGBTQ individuals and PLHIV have been dramatically rolled back. Many of the changes listed above that took place during the Obama administration have since been reversed. Early in 2017, the Trump Administration revoked an Obama-era guidance allowing transgender students to use gender-appropriate school bathrooms and changing facilities.⁹⁶ Later, the Department of Education went a step further, announcing that they would no longer enforce Title IX in school sexual harassment cases, which disproportionately affects LGBTQ students.⁹⁷ The Departments of Health and Human Services, as well as Housing and Urban Development reversed Obama-era policies, declaring that transgender people would be classified according to their assigned sex at birth rather than their identification in matters of housing and medicine.⁹⁸ The Trump administration also deprioritized data collection on LGBTQ folks, including for the national senior survey and the census, skewing population data and setting back progress to collect information and provide services to the LGBTQ community.⁹⁹ The Trump administration also pursued broad policies to undermine the fight against homophobic and transphobic discrimination, issuing a “religious liberty guidance”

⁹⁴ Office of Juvenile Justice and Delinquency Prevention. 2016. *How OJJDP is Meeting the Needs of At-Risk and Justice-Involved LGBTQI-GNC Youth*. http://www.ojjdp.gov/newsletter/250148/sf_2.html. Accessed 10 Dec 2020.

⁹⁵ Office of Juvenile Justice and Delinquency Prevention, *Supra*, note 94.

⁹⁶ Mark Hensch. 22 Feb 2017. *Trump Administration Withdraws Protection for Transgender Students*. The Hill. <https://thehill.com/homenews/administration/320744-trump-administration-withdraws-protections-for-transgender-students>. Accessed 11 Dec 2020.

⁹⁷ Nick Morrow. 7 Sept 2017. *Secretary of Education Betsy DeVos Rolling Back Sexual Assault Protections*. Human Rights Campaign. <https://www.hrc.org/news/secretary-of-education-betsy-devos-rolling-back-sexual-assault-protections>. Accessed 11 Dec 2020.

⁹⁸ Paige Winfield Cunningham. 13 June 2020. *HUD To Change Transgender Rules for Single-Sex Homeless Shelters*. The Washington Post.

⁹⁹ Elliott Kozuch. 20 March 2017. *HRC Calls on Trump Admin. To Reinstate Sexual Orientation Question in National Senior Survey*. Human Rights Campaign. <https://www.hrc.org/news/hrc-calls-on-trump-admin-to-reinstate-sexual-orientation-question>. Accessed 11 Dec 2020.; HRC Staff. 29 March 2017. *Trump Administration Eliminates LGBTQ Data Collection from Census*. Human Rights Campaign. <https://www.hrc.org/news/trump-administration-eliminates-lgbtq-data-collection-from-census>. Accessed 11 Dec 2020.

that gives businesses and services (including hospitals and homeless shelters) the right to discriminate against LGBTQ individuals based on actual or stated religious beliefs.¹⁰⁰

The Trump Administration has negatively affected the lives of LGBTQ individuals in more ways than can be listed here,¹⁰¹ including by its blatant disregard for administrative procedure.¹⁰² The Trump administration has also targeted PLHIV, including by inaction¹⁰³ and by removing anti-retroviral medication from medicare coverage.¹⁰⁴ All of these policies, particularly the ones regarding education, healthcare, and housing, disproportionately affect LGBTQ youth. LGBTQ youth are uniquely vulnerable in that they may not have supportive home environments. It is imperative, therefore, that they have supportive school environments where they will be safe from harassment and discrimination. Additionally, LGBTQ youth must have access to competent, gender-appropriate medical care and housing in the event that they need it. Otherwise, LGBTQ youths' risk factors for justice involvement will continue to balloon.

Based on the foregoing, the incoming administration must at minimum reverse all of the above policies to ensure safe, supportive environments for LGBTQ youth in general, so that they can have greater opportunities in life and reduce their chances of becoming justice-involved.

OPPORTUNITIES FOR ACTION

The incoming administration has an opportunity to act on the listening session recommendations made during the Obama Administration¹⁰⁵ to improve outcomes for LGBTQ youth in the juvenile justice system, and to ensure LGBTQ youth receive appropriate educational support and services in the community in order to both prevent and limit contact with the criminal legal system, and to protect their rights if they enter it.

To achieve these goals, the Attorney General must ensure the inclusion of LGBTQ youth in all juvenile justice reforms. To that end, DOJ must coordinate internally, among the various DOJ sections. For instance, DOJ Civil Rights and Special Litigation sections should ensure inclusion of

¹⁰⁰ Julie Moreau. 10 April 2018. *Trump Administration's Religious Liberty Guidance a 'License to Discriminate,' Report Says*. NBC News. <https://www.nbcnews.com/feature/nbc-out/trump-administration-s-religious-liberty-guidance-license-discriminate-report-says-n864176>. Accessed 11 Dec 2020.

¹⁰¹ For a more exhaustive list, see: Human Rights Campaign. "Trump's Timeline of Hate." <https://www.hrc.org/resources/trumps-timeline-of-hate>.

¹⁰² Robin Knauer Maril. 2017. *Trump's Administrative Abuse and the LGBTQ Community*. Human Rights Campaign Foundation. <https://assets2.hrc.org/files/assets/resources/HRC-Trump-Administrative-Abuse-Sept2017.pdf>. Accessed 11 Dec 2020.

¹⁰³ Scott A. Schoettes, former member of Presidential Advisory Council on HIV/AIDS. 16 June 2017. *Trump Doesn't Care About HIV. We're Outta Here*. Newsweek.

¹⁰⁴ AIDS United. 18 Jan. 2019. *Trump Administration Proposal Would Remove Protections for HIV Meds*. POZ.com. <https://www.poz.com/blog/trump-administration-proposal-remove-protections-hiv-meds>. Accessed 11 Dec 2020.

¹⁰⁵ OJJDP Listening Session Report, *supra* note 93.

LGBTQ youth and questions about their experiences in all their investigations into juvenile justice facilities and systems and related documents, such as Statements of Interest. The Bureau of Justice Statistics, OJJDP, and the Department of Education’s National Center for Education Statistics should fund research on LGBTQ youth in the juvenile justice system and include LGBTQ youth in school-to-prison pipeline research and recommendations.

In the first 100 days, the incoming administration can take five key steps toward addressing LGBTQ youth who are involved or at risk of involvement in the juvenile justice system.

POLICY RECOMMENDATIONS FOR THE FIRST 100 DAYS

- The Office of Justice Programs (OJP) should issue guidance clarifying that the statutory prohibition on sex discrimination at 42 U.S.C. § 3789d(c) also prohibits discrimination on the basis of sexual orientation, gender identity, or gender expression (SOGIE). Several other federal agencies issued formal rules and informal guidance during the Obama Administration clarifying that sex discrimination encompasses discrimination based on SOGIE, including: The Department of Housing and Urban Development (HUD),¹⁰⁶ the Department of Health and Human Services (HHS),¹⁰⁷ DOJ,¹⁰⁸ and ED.¹⁰⁹ Such guidances must be reinstated or reaffirmed in light of their abandonment during the Trump Administration;
- Pursue and implement federal guidance preempting discrimination against LGBTQ youths in terms of criminalization and punishment. In particular, the Departments of Education and Justice should issue rules banning discriminatory application of charges like “public indecency” and “lewd conduct” to LGBTQ youths for conduct that would not be deemed disruptive by heterosexual and gender-conforming students;¹¹⁰
- OJJDP should ensure LGBTQ youth are housed safely in the juvenile justice system and should issue guidance that causes juvenile justice facilities to:
 - Classify and house all youth consistent with their gender identity, as the youth defines it, true to the intent of Prison Rape Elimination Act (PREA) guidelines;
 - Refrain from holding LGBTQ youth in isolation as a means of protection absent serious short-term safety concerns;

¹⁰⁶ Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64, 763 (Sept. 21, 2016) (codified at 24 C.F.R. pt. 5); Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662 (Feb. 3, 2012) (codified at 24 C.F.R. pts. 5 et al.). Withdrawn.

¹⁰⁷ Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31, 376 (May 18, 2016) (codified at 45 C.F.R. pt. 92). Withdrawn.

¹⁰⁸ Dear Colleague, *supra* note 95. Withdrawn.

¹⁰⁹ *Id.*

¹¹⁰ For more on this, please review Snapp et al., *Supra* note 86.

- In case of serious short-term safety concerns, establish narrow guidelines on the use of isolation and an absolute limit to its duration that takes into account the extremely harmful effects of isolation on youths;¹¹¹ and
- Ensure all youth are provided LGBTQ-affirming, comprehensive, and medically accurate sexual healthcare, including mental health and transition-related medical services, as well as LGBTQ-affirming comprehensive, and medically accurate sexual health literacy programming, including SOGIE-related instruction;
- OJJDP and DOJ should ensure juvenile justice staff have adequate training to respond to the unique needs of LGBTQ youth by:
 - Notifying states and localities that funding is available to support training for increasing their competency to serve system-involved LGBTQ youth and
 - Providing information to states and localities about training opportunities and resources for juvenile professionals that include the unique, societal, familial, and developmental challenges confronting LGBTQ youth and the relevance of these issues to court proceedings;
- OJJDP should increase the amount of funding available in its discretionary grants program for states and localities to shift resources away from detention and incarceration in favor of effective community-based alternatives that can competently serve LGBTQ youth of color; and
- OJJDP should issue guidance clarifying that, as a condition of receipt of federal grants, participating states agree to prohibit the use of conversion therapy by juvenile justice agencies, personnel, contractors or other individuals who have direct contact with juveniles. For these purposes, conversion therapy is defined as any efforts, formal or informal, to change a young person's sexual orientation, gender identity, or gender expression.¹¹²

¹¹¹ ACLU. 6 June 2013. *No Child Left Alone: Campaign to Stop the Solitary Confinement of Youth in Adult Jails and Prisons*. <https://www.aclu.org/other/kids-are-different-briefing-paper>. Accessed 10 Dec 2020. See also Loades et al, *Supra* note 85.

¹¹² Conversion therapy is highly ineffective and dangerous. It is impossible to change a person's sexual orientation or gender identity, and many youths exposed to conversion therapy report increased depression, suicidality, social isolation, and decreased capacity for intimacy. Conversion therapy also exposes youths to opportunities for abuse. See, The Public Policy Research Portal. Dec 2017. *What Does the Scholarly Research Say About Whether Conversion Therapy Can Alter Sexual Orientation Without Causing Harm?* Cornell University. <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-whether-conversion-therapy-can-alter-sexual-orientation-without-causing-harm/>. Accessed 11 Dec 2020.

7.

FORMERLY INCARCERATED PERSONS

The Formerly Incarcerated Persons (FIP) group is composed of formerly incarcerated LGBTQ people from across the nation, the majority of whom are black or people of color. Our group is the crown jewel of the National LGBT / HIV Criminal Justice Working Group. Our members are policy experts, public speakers, and activists who are concerned about the ways LGBTQ people and those living with HIV are criminalized in the United States. Through our lived experience and work in our communities, we bring a wealth of knowledge to improve public safety while decreasing our reliance on the criminal legal system.

Discrimination and the subsequent incarceration of LGBTQ people are inextricably linked, which is most apparent among our transgender family. Transgender people are more likely to face discrimination in employment, housing, and healthcare. Moreover, fifty-seven percent of transgender people have experienced rejection from their family, leaving very few options for

survival.¹¹³ These vulnerabilities make transgender people the most targeted among the LGBTQ community in both policing and prisons. The criminalization of sex work, HIV criminalization, and use of bathroom criminalization legislation are examples of laws that disproportionately impact transgender people.¹¹⁴ As a result of these harmful and discriminatory policies and practices, 21 percent of transgender women report spending time in prison or jail, and 16 percent of all transgender and gender-nonconforming people said the same.¹¹⁵

Lesbian, gay, and bi-sexual people are nearly three times more likely to be incarcerated than the general population.¹¹⁶ While incarcerated, lesbian, gay, and bi-sexual people are more likely to be placed in solitary confinement¹¹⁷, nearly 30% for lesbian, gay, and bi-sexual prisoners compared to 18% for heterosexual prisoners. Further, LGBTQ people are six times more likely to experience sexual violence while in custody compared to non-LGBTQ people.¹¹⁸ This is particularly true for transgender women¹¹⁹ who are almost ten times more likely to experience the same. Finally, upon release from incarceration, LGBTQ people often find it difficult to access meaningful and affirming re-entry services including employment, healthcare and housing.

Under the Trump Administration, HUD modified their own 2015 Equal Access Rule so that biological sex would be a determinative factor in enrolling a transgender person into their programs, including homeless shelters.¹²⁰ For those experiencing homelessness or re-entering the community from incarceration, this rule diminishes their chances of success, including a safe place to sleep and avoiding interaction with the criminal legal system. In fact, according to the 2015 U.S. Survey of Transgender People,¹²¹ those who reported being homeless were also more likely to be arrested during the same period. This is disproportionately true for Black and Indigenous people.¹²²

¹¹³ Movement Advancement Project and Center for American Progress. May 2016. *Unjust: How the Broken Criminal Justice System Fails Transgender People*. <https://www.lgbtmap.org/file/lgbt-criminal-justice-trans.pdf>. Accessed 9 Dec 2020.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Ilan H. Myer, Andrew R. Flores, Lara Stemple, Adam P. Romero, Bianca D.M. Wilson, Jody L. Herman. February 2017. *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012*. <https://williamsinstitute.law.ucla.edu/publications/incarceration-sexual-minorities-us/>. Accessed 9 Dec 2020.

¹¹⁷ Bureau of Justice Statistics. October 2015. *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-2012*. https://www.bjs.gov/content/pub/pdf/urhuspj1112_sum.pdf. Accessed 9 Dec 2020.

¹¹⁸ Lydon et al., *Supra* note 69

¹¹⁹ James et al., *Supra* note 39; Lydon et al., *Supra* note 69.

¹²⁰ Department of Urban Housing and Development. 3 Feb 2012. *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*. 24 CFR Part 5. <https://www.hud.gov/sites/dfiles/PIH/documents/ProposedModificationRule.pdf>.

¹²¹ Herman et al., *Supra* note 39.

¹²² *Id.*

What little progress trans prisoners had gained was set back by the Trump Administration. On January 18, 2017 the Obama Administration created the Transgender Offender Manual,¹²³ which provided guidance on the treatment and housing of transgender people in the Bureau of Prisons. Section 5 of the original manual provided for initial assignment in a gender appropriate facility based on gender identity. The Trump Administration issued Change Notice 5200.04 CN-1¹²⁴ which substituted “gender identity” for “biological sex”. This policy directly undermines the best interests of transgender people because it discourages the BOP from housing transgender people in a facility that conforms with their gender identity. This continues to expose transgender people, in particular transgender women who are housed in men’s facilities, to significantly higher rates of abuse and violence.

Clemency and pardons are an additional avenue to decarcerate facilities that hold people vulnerable to COVID-19, including people living with HIV and those over 50 years of age. We hope this administration will pay particular attention to clemency and pardon petitions from transgender people, LGBTQ people, and people of color. In particular during the ongoing COVID-19 crisis, the administration should consider releasing all immunocompromised or elderly prisoners who are adjudicated to not be a danger to the community. Holding immunocompromised people prisoner considering the sheer scale of prison COVID outbreaks¹²⁵ amounts to an extralegal death sentence.

We respectfully request the Biden-Harris Administration create a diverse criminal justice task force composed of formerly incarcerated persons, criminal justice experts, and community-based organizations that work with currently or formerly incarcerated persons. Such a task force should be responsible for providing recommendations to this Administration. This taskforce should share their expertise, identify harmful policies that should be changed, and suggest new policies

¹²³ Thomas R. Kane, Acting Director, Federal Bureau of Prisons. 18 Jan 2017. *Transgender Offender Manual*. Number 5200.04. <https://www.bop.gov/policy/progstat/5200.04.pdf>. Accessed 9 Dec 2020.

¹²⁴ Mark S. Inch, Director, Federal Bureau of Prisons. 11 May 2018. *Transgender Offender Manual*. Change Notice 5200.04 CN-1. <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>. Accessed 9 Dec 2020.

¹²⁵ Perry Vandell. 8 Dec 2020. *More than Half of Inmates In Yuma Prison Unit Test Positive for COVID-19*. Arizona Republic. <https://www.azcentral.com/story/news/local/arizona-breaking/2020/12/08/majority-inmates-yuma-prison-unit-test-positive-covid-19/6501718002/>; Andrew Blake. 8 Dec 2020. *UN Torture Expert Calls for Assange Release from London Prison Amid COVID-19 Outbreak*. The Washington Times. <https://www.washingtontimes.com/news/2020/dec/8/un-torture-experts-calls-for-uk-to-release-julian-/>; KDKA-TV News Staff. 8 Dec 2020. *Westmoreland County Prison Dealing with Massive COVID-19 Outbreak*. CBS Pittsburgh. <https://www.msn.com/en-us/news/crime/westmoreland-county-prison-dealing-with-massive-covid-19-outbreak/ar-BB1bKi9I>; Robert Harding. 1 Dec 2020. *Second COVID-19 Outbreak at NY State Prison in Cayuga County*. Auburn Pub. https://auburnpub.com/news/local/second-covid-19-outbreak-at-ny-state-prison-in-cayuga-county/article_96ff9631-750f-5b0b-85f0-45c17217c983.html; Katrine Pross. 11 Nov 2020. *Is it A Death Sentence Being Here? COVID-19 Sweeps Through Stillwater Prison*. Twin Cities Pioneer. Press. <https://www.twincities.com/2020/11/29/is-it-a-death-sentence-being-here-coronavirus-outbreak-sweeps-through-stillwater-prison/>. All links accessed 9 Dec 2020.

that would reduce incarceration, improve conditions of confinement, and increase the likelihood of success for those reentering the community.

We request the proposed criminal justice taskforce be funded to assist participants in transportation and lodging should there be in-person meetings. This would ensure that the least-resourced individuals would be able to participate at the same level as well-resourced individuals.

The following recommendations aim to move the United States away from punitive models of justice, reverse harmful Trump Administration policies, and to build restorative and life-affirming forms of justice without sacrificing public safety.

Executive Orders

- The Office of the President should create a criminal justice taskforce to pursue progressive policy goals related to the criminal legal system.

Presidential Budget

- Consider re-allocating funding from law enforcement to invest in under-resourced communities with housing, education, healthcare and a living wage.

Clemency and Pardons

- Review and grant clemency petitions for
- Individuals medically vulnerable to COVID-19
- Black, brown, indigenous and people of color
- Transgender and LGBTQ people

Agency Recommendations

- The Department of Justice (DOJ) should review and revise regulations under the Prison Rape Elimination Act (PREA).
- The DOJ should implement a moratorium on all death penalty executions.
- The DOJ should use its powers under the Civil Rights of Institutionalized Persons Act (CRIPA) to monitor the constitutional rights of incarcerated persons during the COVID-19 public health emergency.

United States Sentencing Commission

- Appoint progressive minded individuals with an interest in reducing the scope and intensity of criminal sentences.

Bureau of Prisons

- Reduce the population of people living in the BOP who are medically vulnerable to COVID-19. Broadly implement policies to reduce the number of incarcerated people in prisons and take public health measures to ensure their safety. This should include but not be limited to provision of PPE to all individuals held in federal detention facilities.
- Re-implement Obama Administration guidelines on the treatment of transgender people in BOP custody. In particular, transgender people should be housed according to their gender identity rather than their assigned sex at birth, where it is safe to do so. Nonbinary and gender-nonconforming folks should be able to self-determine which facilities are most appropriate for their safety and well-being.

Department of Housing & Urban Development

- Re-implement the Equal Access Rule as originally implemented by the Obama Administration.

Congressional Recommendations

- Reduce and eliminate the use of solitary confinement. In particular, prisons and jails should be given education and training on how to keep LGBTQ prisoners safe in accordance with PREA, so that “protective” solitary confinement will be a last resort.
- End the criminalization of HIV
- Legalize the use and sale of marijuana. Retroactively dismiss criminal convictions for the possession and sale of marijuana.
- Increase accountability and oversight of law enforcement.
- Ensure the civil rights of LGBTQ+ people are strengthened and expanded.
- Reform criminal sentencing, prisons, and re-entry of prisoners.

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8.

REENTRY

LGBTQ+ people and PLHIV have distinct needs throughout the reentry process, including healthcare access; obtaining accurate identity documents; an understanding of state laws (or lack thereof) prohibiting discrimination based on sexual orientation and gender identity; and more.¹²⁶ Reentry programming and preparation in prisons and jails varies widely by facility, but in almost all instances such programs lack information about issues specific to the LGBTQ community. The Bureau of Prisons (BOP) has a unique role in empowering incarcerated people to break free of the cycle of incarceration, release, and re-incarceration. BOP provides education, training, resources, and life skills to people who are currently incarcerated to prepare them to return to their communities and to reduce the incidence of recidivism. The Bureau also has oversight, through contract evaluation measures, over residential reentry centers located in communities nationwide. However, placements in community corrections facilities are rarely made with concerns about sexual orientation, gender identity, or related services in mind. Similarly, community corrections facilities generally lack specific programming for members of the LGBTQ community or the cultural competency to integrate LGBTQ concerns into their existing service models.

As an example, transgender people often lack identification documents consistent with their gender identity. Each state has a different policy on how to change one's gender marker on birth certificates and other forms of ID. Some states require an invasive array of surgeries regardless of whether they are necessary for the individual trans person, and many states never allow individuals to change their gender markers.¹²⁷ Recently, many states have considered legislation

¹²⁶ *Unjust*, *Supra* note 69.

¹²⁷ Lambda Legal. 17 Sept 2018. *Changing Birth Certificate Sex Designations: State-by-State Guidelines*. <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations>. Accessed 9 Dec 2020.

that would impose civil or criminal penalties on transgender or gender nonconforming individuals who use bathrooms or other facilities inconsistent with the sex on their birth certificate.¹²⁸ In combination, the difficulty of changing gender markers and such bathroom bills, if passed, would explicitly criminalize being a transgender person.

Efforts to secure employment can also be frequently stymied by lack of consistent identification. Transgender people experience three times the rate of unemployment of the general U.S. population.¹²⁹ Trans employees also frequently face high rates of employment discrimination and harassment due to their gender identity or expression.¹³⁰ Inconsistent ID exacerbates this problem by “outing” trans people to their employers without their consent. This contributes to the cycle of recidivism by forcing trans people to engage in sex work or other underground economies to survive.

In the absence of legal protections against discrimination, LGBTQ people and people living with HIV (PLHIV) experience high rates of housing discrimination.¹³¹ In this context, LGBTQ people often require tailored assistance in finding a job placement or a place to live. These concerns arise in the context of community corrections facilities (CCCs), but are also common in the context of community supervision. Community supervision officers may not be aware of the services LGBTQ supervisees need, and may not know what service providers (especially for services like physical and mental healthcare) have LGBTQ cultural competency.¹³²

If reentry planning, community supervision, and reentry programs are informed by the particular needs of clients who are most vulnerable, services and support for all affected people will improve. The following recommendations are just a few of the concrete ways that the new administration can improve services for LGBTQ people who are returning to their communities after incarceration.

PROGRESS DURING OBAMA ADMINISTRATION

- BOP included a number of LGBTQ/HIV resources in its Community Resource Database;
- BOP created an LGBTQ toolkit for employees who assist incarcerated people with reentry planning;

¹²⁸ Joellen Kralik. 24 Oct 2019. “Bathroom Bill” Legislative Tracking. National Conference of State Legislatures. <https://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>. Accessed 19 Dec 2020.

¹²⁹ James, et al., *Supra* note 39.

¹³⁰ *Id.*

¹³¹ Adam P. Romero, Shoshana K. Goldberg and Luis A. Vasquez. April 2020. *LGBT People and Housing Affordability, Discrimination, and Homelessness*. UCLA Williams Institute. <https://williamsinstitute.law.ucla.edu/publications/lgbt-housing-instability/>. Accessed 9 Dec 2020.

¹³² *Unjust, Supra* note 69.

- HUD issued Guidance on Application of the Fair Housing Act Standards to Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions; and
- OPM issued a proposed rule that would ensure that applicants with a criminal history have a fair shot to compete for federal jobs by effectively “banning the box” for a significant number of positions.

SETBACKS DURING TRUMP ADMINISTRATION

During the early period of the Trump administration, all references to LGBTQ people were removed from federal government sites.¹³³ This was part of a larger trend of federal-government sanctioned discrimination against LGBTQ individuals.¹³⁴ The Trump administration reversed non-discrimination protections for trans people in health care,¹³⁵ contributing to the cycle of poor mental health and homelessness that trans people experience.¹³⁶ Once unhoused, Trump administration rules allow shelters to force transgender people into gender-inappropriate facilities.¹³⁷ The Trump administration also failed to take action against the ongoing HIV epidemic, even withdrawing funding for Medicaid, which PLHIV rely on at disproportionate rates.¹³⁸

People reentering society after a period of incarceration already struggle to attain housing, employment, and healthcare. These are the very things that are necessary to allow people to “get back on their feet” after prison or jail time. Otherwise, they will be forced into cycles of re-incarceration by their poverty.¹³⁹ At an absolute minimum, the new administration must reverse all policies imposed by the Trump administration that exacerbate discrimination in housing, healthcare, and employment against LGBT people and PLHIV. More broadly, the incoming

¹³³ Mary Emily O’Hara. 24 Jan 2017. *Trump Administration Removes LGBTQ Content from Federal Websites*. NBC News. <https://www.nbcnews.com/feature/nbc-out/trump-administration-removes-lgbtq-content-federal-websites-n711416>. Accessed 9 Dec 2020.

¹³⁴ For all anti-LGBT policies passed during the Trump administration, see: Human Rights Campaign, *Supra* note 11.

¹³⁵ Ariana Eunjung Cha. 12 June 2020. *Trump Administration Removes Non-Discrimination Protections for Transgender People in Health Care*. The Washington Post. <https://www.washingtonpost.com/health/2020/06/12/trump-transgender-protections/>. Accessed 9 Dec. 2020.

¹³⁶ Herman et al., *Supra* note 39.

¹³⁷ Paige Winfield Cunningham, *Supra* note 99.

¹³⁸ Scott A Schoettes. 16 June 2017. *Trump Doesn’t Care About HIV. We’re Outta Here*. Newsweek. <https://www.newsweek.com/trump-doesnt-care-about-hiv-were-outta-here-626285>. Accessed 9 Dec 2020.

¹³⁹ Taylor L. Hall, Nikki R. Wooten, Lena M. Lundgren. Jan-Mar. 2016. *Post Incarceration Policies and Prisoner Reentry: Implications for Policies and Programs Aimed at Reducing Recidivism and Policy*. 20:1 Journal of Poverty.; Ben Struhl. 5 May 2017. *Stopping the Revolving Door: What We Know--And Still Need to Learn--About Reducing Recidivism in the United States*. Poverty Action Lab. <https://www.povertyactionlab.org/blog/5-5-17/stopping-revolving-door-what-we-know-and-still-need-learn-about-reducing-recidivism>. Accessed 9 Dec 2020.

administration should promulgate policies that guarantee housing, medical care, and employment opportunities for all.

OPPORTUNITIES FOR ACTION

The next administration has a tremendous opportunity to incorporate the needs of LGBTQ individuals returning home from incarceration into broader efforts geared toward returning community members. It can begin by convening a Federal Advisory Committee (FACA) on Reentry under FACA with members from the law enforcement, community correctional centers (CCC), and advocacy communities to advise the administration on how best to meet the needs of people who are returning to their communities after incarceration. In the meantime, the Bureau of Prisons (BOP) must ensure that people in protective custody, which disproportionately includes LGBTQ people, are able to participate in reentry programs. Additionally, the next administration may take the following steps within the first hundred days to address issues faced by re-entering LGBTQ people:

- Reinstitute all federal government rules, policies, and guidances listed above under “Progress During the Obama Administration;”
- As part of its effort to improve access to ID documents for people returning to their communities, DOJ should explicitly issue explicit guidance to facilities on how to assist transgender people in accessing ID that matches their gender;
- DOJ should institute a pilot project to create LGBTQ/HIV-specific reentry services in one to three communities with a high need for directed services;
- DOJ (National Institute of Corrections - NIC) and the PREA Resource Center should collaborate to ensure that PREA is being effectively implemented in Community Corrections facilities, and that all other relevant statutory and regulatory provisions are being followed by issuing LGBTQ-inclusive compliance guidance to all CCC’s and ensuring that all contracts with CCCs include comprehensive nondiscrimination provisions;
- The president should, by Executive Order, create an Office for National Reentry Policy, and a corollary National Advisory Committee on Reentry under the Federal Advisory Committee Act; and
- The Bureau of Prisons (BOP) must work with LGBTQ advocates to build and update its Community Resource Database and other national reentry resource tools. As a part of that process, BOP and advocates should determine how best to access and indicate whether a resource is safe and affirming to LGBTQ people, and how to identify resources that are tailored to meet the needs of LGBTQ people.

In sum, poverty-conscious reentry services are necessary to serve the primary needs of many formerly incarcerated people, including formerly incarcerated LGBTQ folks and PLHIV. Also, because poverty is certainly a driver of incarceration, competent reentry services that

acknowledge financial instability facing many formerly incarcerated LGBTQ people can prevent return to the criminal legal system. Therefore, in the next section our policy recommendations recognize poverty as a driver and a consequence of system involvement.

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9.

CRIMINALIZATION OF POVERTY

When it comes to LGBTQ people, especially Black people, Indigenous people, and other people of color; the likelihood of experiencing poverty is significantly influenced by discrimination and contact with the criminal punishment system. Research from the Williams Institute indicates that LGBTQ people experience poverty at a rate of 21.6%, while the rate for cisgender straight people is 15.7%.¹⁴⁰ 12% of transgender people report a household income of less than \$10,000 annually, a rate three times higher than the general population in the same income bracket.¹⁴¹ 36% of respondents in a national survey of currently incarcerated people reported being unemployed prior to incarceration and 20% reported housing instability.¹⁴²

Income and housing instability result in increased police abuse and profiling of LGBTQ people. This increased targeting of LGBTQ people, especially trans women of color, results from engaging in underground economies, such as sex work and drug use to survive, and rampant police bias against transgender people. In a 2015 survey of transgender people, 19% reported doing some type of sex work for food, money, or a place to sleep.¹⁴³ In a 2011 survey of transgender people, of those engaged in sex work, 69% had experienced a negative job outcome such as being fired

¹⁴⁰ M.V. Lee Badgett, Laura E. Durso, Alyssa Schneebaum. June 2013. *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*. Williams Institute. <https://williamsinstitute.law.ucla.edu/publications/lgb-patterns-of-poverty/>. Accessed 19 Dec 2020.

¹⁴¹ James, et al., *Supra* note 39, pg. 140.

¹⁴² Lydon et al., *Supra* note 69.

¹⁴³ James, et al., *Supra* note 39, pg. 162..

or denied a job because of being transgender, nearly half (48%) had experienced homelessness, and nearly a third (31%) lived on less than \$10,000 a year.¹⁴⁴ Transgender people engage in sex work at a rate ten times that of cisgender women.

In a 2015 survey of transgender people throughout the United States, 58% of respondents reporting police interaction experienced mistreatment and 20% reported verbal harassment. Among LGBTQ identified people in prisons and jails surveyed by Black and Pink, 39% of LGBTQ individuals reported trading sex for survival and over half reported selling drugs for money.¹⁴⁵ Coupled with pervasive discrimination, these factors contribute to LGBTQ people being three times as likely to experience incarceration than heterosexual people.

Seventy-four percent of respondents lack the economic means to secure bail so they are forced to either accept a guilty plea to avoid incarceration or they remain inside.¹⁴⁶ Once incarcerated, LGBTQ people experience disproportionate sexual violence and discrimination. Gay and bisexual men are more than six times as likely to be sexually assaulted than straight men.¹⁴⁷ Incarcerated transgender people are nearly ten times more likely to experience sexual assault, with about 40% reporting a sexual assault.¹⁴⁸

In addition, many incarcerated LGBTQ people must often choose between medical care, purchasing toiletries, or contact with loved ones due to a lack of available funds. 43% of incarcerated respondents were prevented from accessing necessary health care due to medical fees.¹⁴⁹ Trans people, in particular, face challenges with access to adequate care inside. Trans women are frequently placed in men's facilities, and trans men in women facilities, placing them at a risk for their safety among other concerns. Placing trans people in facilities incongruent with their gender identity presents challenges with accessing personal hygiene products, such as tampons; gender specific clothing, such as bras; and medical care, such as hormone therapy. Many of these individuals would have had access to these products prior to incarceration, and

¹⁴⁴ Erin Fitzgerald, Sarah Elspeth Patterson, Darby Hickey, Cherno Biko, and Harper Jean Tobin. Dec 2015. *Meaningful Work: Transgender Experiences in the Sex Trade 5 (2015)*. Best Practices Policy, Red Umbrella Project and National Center for Transgender Equal. https://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf. Accessed 15 Dec 2020.

¹⁴⁵ Lydon et al., *Supra* note 69, pg. 3.

¹⁴⁶ *Id.* pg. 24.

¹⁴⁷ Ilan H. Meyer, PhD, Andrew R. Flores, PhD, Lara Stemple, JD, Adam P. Romero, JD, Bianca D. M. Wilson, PhD, and Jody L. Herman, PhD. Feb 2017. *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012*. 107 *American Journal of Public Health* 267, 271. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227944/pdf/AJPH.2016.303576.pdf>. Accessed 15 Dec 2020.

¹⁴⁸ National Center for Transgender Equality. Oct 2018. *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*. <https://transequality.org/transpeoplebehindbars>. Accessed 15 Dec 2020.

¹⁴⁹ Lydon et al., *Supra* note 69, pg. 46.

losing access results in severe negative mental health impacts. Regaining access to these products is challenging given the gendered nature of carceral facilities.

Poverty and incarceration create and reinforce a perpetual cycle of disadvantage. This enduring cycle impedes access to employment by reducing income potential and creating economic insecurity through criminal debt; preventing access to public benefits and destabilizing the communities that formerly incarcerated people return home to. Enacting policies to reduce poverty and allow for increased access to stable housing and employment, education and job training opportunities, adequate housing, and harm reduction strategies would also reduce the rates of LGBTQ policing and criminalization. In fact, poverty rates would have decreased by 20%, between 1980 and 2004, if not for mass incarceration.¹⁵⁰

RECOMMENDATIONS

REFORM & ACCOUNTABILITY IN POLICING

- Divest from policing, incarceration, and anti-immigrant enforcement. Far too often, federal dollars are also used to increase the policing and imprisoning of communities of color, which exacerbates the violence Black and brown LGBTQ people regularly experience by the criminal legal system. The White House should prioritize investing new funding into domestic programs, including community-based programs and services to address the needs of LGBTQ people and families with low incomes. Within domestic spending, the White House should deprioritize spending on anti-immigrant enforcement, policing, and incarceration.
- Require comprehensive SOGIE¹⁵¹ training for law enforcement agencies. Congress should condition federal grant-making to law enforcement agencies through The Office of Community Oriented Policing Services (COPS Office) on adoption and enforcement of anti-profiling and nondiscrimination provisions inclusive of sexual orientation and gender identity, and upon strategies for enforcing these grant conditions.
- Employ consent decrees for police departments nationwide. The Trump Administration has not issued a consent decree since 2016. DOJ should reinvigorate the use of consent decrees to provide oversight, and recommend and enforce mandatory changes and benchmarks for police departments that have violated people's constitutional rights. They should prohibit discrimination in policing and meaningfully hold officers who violate these laws accountable.

¹⁵⁰ Robert DeFina and Lance Hannon. 12 Feb 2009. *The Impact of Mass Incarceration on Poverty*. *Crime & Delinquency*. 2013;59(4):562-586.

¹⁵¹ SOGIE stands for Sexual Orientation, Gender Identity, & Gender Expression.

ADDRESS EFFECTS OF MASS INCARCERATION

- Establish oversight board for Federal Bureau of Prisons (BOP). Congress should create an independent bipartisan board to oversee and advise the BOP. This board shall be composed of criminal justice stakeholders, including community organizations. The board will be granted the authority to review and evaluate *all* BOP policies, procedures, and practices.
- Issue Federal Bureau of Prisons guidance on placement of incarcerated transgender people. The Department of Justice, Bureau of Prisons should update the Transgender Offender Manual to eliminate the changes made by the Federal Bureau of Prisons on May 11, 2018 that added the word “necessary” without further explanation, and that impose “biological sex” for determining initial housing designations.¹⁵²
- Expand Prison Rape Elimination Act (PREA) regulations. Congress should expand the Prison Rape Elimination Act (PREA) mandates/audits to police lockups and expand regulations beyond brick-and-mortar facilities to other places of detention, such as law enforcement vehicles.

ELIMINATE THE CRIMINALIZATION OF POVERTY

- Stop the criminalization of poverty and its related arrests. People with limited to no income often turn to underground economies to afford housing, mental health services, or harm reduction services. As a result, many of these people are frequently arrested on charges related to homelessness, sex work, and drug use. Unable to afford bail or the fines or fees related to their arrest, they often are remanded to incarceration.
- Congress should eliminate mandatory minimum sentencing laws for all drug-related crimes.
- Congress should leverage funding for HUD to discourage state and local governments from policing and criminalizing activities such as begging, sitting, or lying on sidewalks, loitering, and so-called vagrancy laws.
- Redirect federal funds allocated for jail/prison expansion to community-based housing, harm reduction, and mental health services.
- Support sex workers. In 2018, Congress passed the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). The law expanded criminal and civil liability for online platforms for content related to sex trafficking and prostitution. Consequently, platforms removed online spaces that sex workers used for work. Without these spaces, sex workers are forced to street-based sex work, which is more dangerous and provides less economic stability for sex workers and their families. Congress should pass the “SESTA and FOSTA Examination of Secondary Effects for Sex Workers Study Act (“SAFE SEX Workers Study Act”) to study the impact of losing access to internet platforms on the health and safety of sex workers.

¹⁵² Mark S. Inch, Director Federal Bureau of Prisons. 11 May 2018. *Transgender Offender Manual*. U.S. Department of Justice. <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>. Accessed 15 Dec 2020.

- Support access to healthcare for incarcerated people. End the “inmate exclusion policy” that prohibits currently incarcerated people from accessing Medicaid. Abolish all fees for doctor visits and over-the-counter medication.
- Reduce communications fees. Incentivize state and local jurisdictions to subsidize the cost of phone calls and emails so currently incarcerated people can remain connected to their community.
- Restore Pell Grants for currently incarcerated people. Congress should restore Pell Grants to currently incarcerated people, including those individuals in civil commitment facilities, and fully fund educational opportunities, including obtaining a GED or college degree and access to vocational training.
- Ease and expedite access to social safety net programs for people with criminal convictions. Certain criminal convictions prohibit some people from receiving social safety net benefits. Congress should end all bans on access to SNAP, welfare, and other social safety net benefits for all people with criminal convictions.
- Expand public housing access. Congress should increase resources available for housing assistance and support for low-income individuals and families. HUD should provide stable funding for and expand access to safe and affordable housing for all people, including those with criminal records.
- End the regulations on felon association. Formerly incarcerated people rely on those who have also experienced the harms of the system to provide mentorship and guidance when navigating the process of reintegrating with their communities. End the restriction that prohibits formerly incarcerated people from associating with one another while under community supervision.
- Eliminate sex offense registries. Congress should eliminate sex offense registries by repealing the Adam Walsh Act and other post-conviction penalties that create barriers to reentry for people with sex offense convictions. Limitations placed on those on the registry cause significant economic hardship on them and their families¹⁵³ and are not effective tools for preventing and addressing sexual harm.¹⁵⁴ Data also indicates that men of color¹⁵⁵ and LGBTQ people¹⁵⁶ are disproportionately impacted by these laws.

¹⁵³ Jason Rydberg. 2018. *Employment and Housing Challenges Experienced by Sex Offenders during Reentry on Parole*. Corrections, 3:1, 15-37. Accessed 15 Dec 2020.

¹⁵⁴ Elizabeth J. Letourneau, Ph.D., Jill S. Levenson, Ph.D., Dipankar Bandyopadhyay, Ph.D., Debajyoti Sinha, Ph.D., Kevin S. Armstrong. Sept 2010. *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women*. Accessed 15 Dec 2020..

¹⁵⁵ Trevor Hoppe. 27 December 2018. *Punishing Sex: Sex Offenders and the Missing Punitive Turn in Sexuality Studies*. Law & Social Inquiry, 41(3), 573-594. Accessed 15 Dec. 2020.

¹⁵⁶ National Center for Lesbian Rights and Black and Pink. 2019. *On the Margins: LGBTQ People and Sex Offense Registry Reform*. <http://www.nclrights.org/wp-content/uploads/2019/08/On-The-Margins.pdf>. Accessed 15 Dec 2020.

- Absent the repeal of AWA, DOJ should limit information collection on those convicted of qualifying sex offenses to information mandated by Congress, and it should rescind its policy requiring retroactive application of AWA.

ENSURE SAFETY OF LGBTQ NON-CITIZENS

- Protect immigrant detainees. Congress should restore discretion to immigration judges so they can consider a wider range of factors that may warrant a person not being removed. Congress should ban the federal government from using for-profit companies to run immigration detention facilities and alternatives to detention. Congress should end contracts with any facility that creates unsafe conditions for detainees. Congress should also pass the Dignity for Detained Immigrants Act, which protects LGBTQ people from arbitrary detention and violence within facilities and ensures their right to seek protection within the United States.
- Issue ICE guidance seeking community placement for transgender non-citizens in custody. Transgender people should not be held in ICE custody. ICE has demonstrated repeatedly that they are unable to house transgender people safely and the Department of Homeland Security should consider other alternatives. LGBTQ immigrants are 97 times more likely to be sexually assaulted in detention and at least two transgender women have died in ICE custody.¹⁵⁷
- Rescind and immediately cease enforcement of the DOJ and DHS's newly-adopted Rule RIN 1615-AC42/1125-AA94, Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review, which puts asylum and lawful immigration status out of the reach for many survivors of gender-based violence and persecution.

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¹⁵⁷ Congressman Mike Quigley. 14 Jan 2020. *Quigley Leads House Letter Calling for End to Transgender Migrant Detention*. <https://quigley.house.gov/media-center/press-releases/quigley-leads-house-letter-calling-end-transgender-migrant-detention>. Accessed 15 Dec 2020.

10.

SEX OFFENSE POLICY

The United States is in an important moment of reflection with regard to the country's responses to harm, crime and violence. Concurrently with the Black Lives Matter movement and efforts to dismantle systemic barriers to true community safety, the #MeToo movement is empowering survivors and calling for better systems to prevent and address sexual harassment and violence. The recommendations in this section seek to bring together the insights of these two movements. By doing so, we can promote racial justice and gender equity and move beyond ineffective and harmful carceral approaches to addressing sexual harm and abuse and find solutions that promote safety and stability for survivors and all communities.

In 2006, President Bush signed the Sex Offender Registration Act (SORNA), or Title I of the Adam Walsh Child Protection and Safety Act (AWA), into law. AWA sets the national standards for sex offense registration and community notification systems (SORNS), which aim to track and monitor community members with certain sex offense convictions. AWA requires states to categorize people in one of three tiers based solely on the offense for which they were convicted. People are classified in states where they live, work, and attend school under either a Tier I, II, or III category. Currently, every state, DC, the five principal U.S. territories, and certain Indigenous nations maintain SORNS. Non-AWA compliant states partially lose federal funding if they have

not substantially implemented the standards. After 14 years, 32 states have elected to not comply with the AWA's mandates for substantial compliance.¹⁵⁸

SORNS are predominantly based on state law with many states going far beyond the minimum federal AWA requirements. SORNS often mandate broad public notification, based on the misperception -- refuted by even the government's own data¹⁵⁹ -- that people with past convictions with sex offenses are likely to commit additional crimes. These broad systems of notification produce shame and may actually undermine community safety by making it impossible for people who have been held accountable for a crime to live law-abiding and productive lives.¹⁶⁰ Many states compound that harm by adding restrictions, such as indefinite post-sentence civil confinement, residency limitations that effectively ban people from entire cities and towns, internet restrictions, and frequent and sometimes intrusive law enforcement visits. While typically associated with probation or parole, these restrictions are often applied to those on the registry long after the sentence is complete. Family members suffer additional harms, including harassment, violence, ostracism, shaming, and job insecurity, due to their relationship with a person on the registry.

These harms are amplified in communities of color due to racist patterns of enforcement. States disproportionately require Black, Native American, and Hispanic men to register. For example, one study found that Black men are required to register more than twice as often as white men (501 versus 238 per 100,000 adults).¹⁶¹ A different study also found that Black men are disproportionately categorized into higher "risk" tiers than their white counterparts, which can mean lengthier periods of registration and more onerous registration requirements.¹⁶²

¹⁵⁸ National Center for Missing and Exploited Children. 4 December 2018. *Map of Registered Sex Offenders in the United States*. http://www.missingkids.com/content/dam/pdfs/SOR%20Map%20with%20Explanation_10_2018.pdf. Accessed 26 Feb 2019.

¹⁵⁹ Roger Pryzbylski. July 2015. *Adult Chapter 5: Adult Sex Offender Recidivism*. U.S. DOJ Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART"). <https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism>. Accessed 8 Dec 2020; Christopher Lobanov-Rostovsky. July 2015. *Juvenile Chapter 3: Recidivism of Juveniles Who Commit Sexual Offenses*. U.S. DOJ SMART. <https://smart.ojp.gov/somapi/chapter-3-recidivism-juveniles-who-commit-sexual-offenses>. Accessed 8 Dec 2020.

¹⁶⁰ Studies of recidivism show that people convicted of sex offenses are much more likely to be re-convicted of non-sexual crimes, indicating a push toward criminality from conviction and reporting. See Pryzbylski, *Supra* note 160.

¹⁶¹ Trevor Hoppe. 2016. *Punishing Sex: Sex Offenders and the Missing Punitive Turn in Sexuality Studies*. *Law & Social Inquiry* Vol. 41, pg. 573-594. Accessed 8 Dec 2020; Alissa R. Ackerman and Meghan Sacks. 2017. *Disproportionate Minority Presence on U.S. Sex Offender Registries*. Center on Juvenile and Criminal Justice. <https://narsol.org/wp-content/uploads/2020/06/Disproportionate-Minority-Presence-on-U.S.-Sex-Offender-Registries.pdf>

¹⁶² Bobbie Ticknor and Jessica J. Warner. 6 July 2018. *Evaluating the Accuracy of SORNA: Testing for Classification Errors and Racial Bias*. *Criminal Justice Policy Review*. <https://journals.sagepub.com/doi/abs/10.1177/0887403418786548>. Accessed 19 Dec 2020.

Both in the past and present, sex crime laws have been enforced discriminatorily against LGBTQ people and people who engage in same-sex sexual conduct or gender nonconforming behaviors. LGBTQ youth of color are more likely to be pushed into the child welfare and juvenile justice system due to discrimination, family rejection, and homelessness. Placement into these systems means LGBTQ youth of color are subjected to higher levels of scrutiny and mandatory reporting even for normative sexual behavior.¹⁶³ Studies have found that support is higher for juvenile registration for LGBTQ youth than non-LGBTQ youth, and LGBTQ youth are more likely to be charged and adjudicated for sex crimes.¹⁶⁴ Police continue to profile transgender women of color as sex workers, and conduct undercover stings specifically targeting sex in places like parks where men seek sex with other men.¹⁶⁵ In some states, people convicted of HIV-related sex crimes have to register as sex offenders¹⁶⁶, and in states such as Louisiana, one's status as a person on the registry appears in bold red letters on one's ID.¹⁶⁷ In Mississippi, officials are currently requiring individuals convicted under anti-sodomy laws to register despite the Supreme Court's ruling in 2003 that such laws are unconstitutional.¹⁶⁸ A recent report found that men who have sex with men face much higher rates of indefinite civil detention under state "sexually violent predators" laws as compared to their heterosexual counterparts--revealing a

¹⁶³ Malik Pickett, Emily Satifka, and Riya Saha Shah, and Vic Wiener. 2020. *Labeled for Life: A review of Youth Sex Offender Registration Laws*. Juvenile Law Center. <https://jlc.org/sites/default/files/attachments/2020-08/Labeled%20for%20Life%20August%202020.pdf>. Accessed 8 Dec 2020.

¹⁶⁴ Alexei Koseff. 1 Sept. 2020. *California bill eliminating sex offender list inequity toward LGBTQ people passes*. San Francisco Chronicle <https://www.sfchronicle.com/politics/article/California-bill-eliminating-sex-offender-list-15529263.php>. Accessed 8 Dec 2020.

¹⁶⁵ Stephanie Clifford. 25 Aug 2015. *7 Charged With Promoting Prostitution by Working on Rentboy.Com, an Escort Website*. New York Times. <http://www.nytimes.com/2015/08/26/nyregion/7-charged-with-promoting-prostitution-by-working-on-rentboycom-an-escort-website.html>. Accessed 17 Dec 2020; Ginia Bellafante. 30 Sept 2016. *Poor, Transgender and Dressed for Arrest*. New York Times. <http://www.nytimes.com/2016/10/02/nyregion/poor-transgender-and-dressed-for-arrest.html>. Accessed 17 Dec 2020; Casey Quinlan. 16 Aug 2019. *Police posed as queer men during sting operation at Washington, D.C. park*. ThinkProgress. <https://archive.thinkprogress.org/lawyers-police-posed-as-queer-men-during-sting-operation-at-washington-d-c-park-563f2413f3b4/>. Accessed 17 Dec 2020.

¹⁶⁶ National Center for Lesbian Rights, Black and Pink, and SORA. August 2019. *Adam Walsh Child Protection & Safety Act and HIV Criminalization*. http://nclrights.org/wp-content/uploads/2019/08/AWA_HIV.pdf. Accessed 17 Dec 2020.

¹⁶⁷ The SERO Project. 12 Jan 2015. *SERO Stories - Robert Suttle*. <https://www.seroproject.com/videos/sero-stories-robert-suttle/>. Accessed Dec 17 2020.

¹⁶⁸ Jeff Amy. 11 May 2018. *Some people to be removed from Mississippi sex offender list*. <https://apnews.com/c62dd46f550b44929ad8de7b67a44ea5/Some-people-to-be-removed-from-Mississippi-sex-offender-list>. Accessed 17 Dec 2020.

clear bias in state sex offense policy that results in disproportionately harsh punishment of gay conduct.¹⁶⁹

We must take a different approach to addressing sexual harm in our communities. We need to end expensive and ineffective punitive approaches that do little to prevent sexual harm, hold people accountable for the harm they have caused, or enable healing. This shift includes ending ineffective and harmful registries and notification systems and repealing the Adam Walsh Act and investing in prevention. As we build a more effective and humanistic approach, the federal government can take initial steps to reduce the size and impact of sex offense registries.

AGENCY RECOMMENDATIONS

- The Department of Justice (DOJ) should promulgate regulations ending the retroactive application of the Adam Walsh Act (AWA).
- DOJ should limit registration information to only the information required by Congress.
- The DOJ Civil Rights Division should file statements of interest or amicus briefs to address the unconstitutionality of the severe collateral consequences affecting persons convicted of sexual offenses, as well as the unconstitutionality of convictions and registration requirements under state sodomy or “unnatural intercourse” laws.
- DOJ should prioritize research on the effectiveness of SORNS, especially as compared to alternative approaches to reducing and preventing sexual violence. Research should also examine whether marginalized people, including communities of color and LGBTQ individuals, are being unfairly targeted, prosecuted, and convicted of sex offenses. DOJ should also prioritize research that studies the compounding effects of the various restrictions placed on registered sex offenders affecting their ability to reintegrate into society, and the impact on recidivism.
- Absent the repeal of the AWA by Congress, DOJ should implement a policy stating the agency will not prosecute individuals for failure to register in cases in which a person had no specific intent to avoid compliance with registration laws.
- If the SORNA rule proposed by the DOJ on August, 13, 2020¹⁷⁰ is passed before the incoming administration takes office, to repeal it.

¹⁶⁹ Trevor Hoppe, Ilan H. Meyer, Scott De Orio, Stefan Vogler, Megan Armstrong. Oct 2020. *Civil Commitment of Sex Offenders in the United States: Are Black and LGBTQ Communities Disproportionately Impacted?* Williams Institute. <https://williamsinstitute.law.ucla.edu/publications/civil-commitment-us/>. Accessed 17 Dec 2020.

¹⁷⁰ US Department of Justice. 13 Aug 2020. *Registration Requirements Under the Sex Offender Registration and Notification Act*. 83 FR 49332. <https://www.federalregister.gov/documents/2020/08/13/2020-15804/registration-requirements-under-the-sex-offender-registration-and-notification-act>. Accessed 14 Dec 2020.

APPOINTMENTS

- As DOJ continues to implement the Adam Walsh Act under the leadership of the SMART Office, the administration should prioritize appointing a director who understands how the enforcement and prosecution of sex crimes affects LGBTQ communities of color and who supports evidence-based approaches to preventing and redressing sexual violence and child sexual abuse.

CONGRESSIONAL RECOMMENDATIONS

- Congress should end federal civil commitment because of the flawed science on which civil commitment is based. If Congress chooses to continue with its civil commitment system, it should take steps to ensure that individuals receive adequate due process, specifically:
 - Once an individual is civilly committed, the statute should make clear that the individual has, as a matter of right, a hearing every six months if they choose to seek one. Currently, under 18 U.S.C. Section 4247(h), an individual can request a hearing every 180 days, but nothing in the statute requires the courts to grant the motion. The government routinely opposes requests for hearing under Section 4247(h). Section 4247(h) should be amended to read that upon request, the courts shall hold review hearings every 180 days.
 - Once an individual is civilly committed, the government should retain the burden of proving at review hearings that the person remains sexually dangerous. Currently, Section 4248(e) sets the burden of proof as preponderance of the evidence and is silent as to which party bears the burden. Section 4248(e) should be amended to require that the government continue to have the burden to prove by clear and convincing evidence at review hearings that the person remains sexually dangerous and that civil commitment continues to be required.
 - Section 4247(b) provides that an individual certified as sexually dangerous can request the court to appoint an additional examiner to evaluate them. This statute should make clear that the individual and their defense attorney can prepare ex parte with the examiner, which is routinely disallowed by the district courts and undercuts individuals' ability to prepare a defense.
- Congress passed International Megan's Law (IML) in 2016 with the intent of preventing transnational child exploitation. The law established an unprecedented system of international travel notification for persons with certain sex-related criminal records, including the branding of U.S. passports. As permitted by law, the Departments of State and Homeland Security should collaborate to narrowly tailor the implementation of IML by studying the efficacy of the current one-size-fits-all approach and prioritizing finite

federal resources on those persons who have been previously convicted of the specific targeted behaviors abroad.

ISSUE-SPECIFIC CONTACTS

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CONCLUSION

2020 has been a year of crisis and awakening for all Americans. Between the pandemic, the destabilization of democracy, and shockingly blatant police brutality and abuse, we have seen that our society needs significant reorganization to provide its promise of “liberty and justice for all.” We have seen the brutalization of our impoverished and unhoused populations in the name of “public health,”¹⁷¹ and the utter lack of regard by police agencies for human life, rights, or dignity. We have seen a record-shattering number of deaths of trans people of color,¹⁷² open police warfare on the population,¹⁷³ and children held in cages for the mere fact of their skin color and citizenship.¹⁷⁴ Meanwhile, prisoners across the country live in fear that their sentences will only end with their deaths, with nearly 250,000 COVID cases reported in prisons as of Dec. 8, 2020.¹⁷⁵ Over 1,657 people who were not sentenced to death have died in prison during 2020 due to poor COVID precautions and lack of hygiene, in every state except Maine, Nevada, New Hampshire, Rhode Island, Vermont, and Wyoming.¹⁷⁶

¹⁷¹ Molly Bohannon, Katie Surma, Austin Fast, Nino Abaladze, Megan Lupo, Jamie Fields, and Sanjana Garg. 24 Aug. 2020. *COVID-19 is ‘A Crisis Within A Crisis’ For Homeless People*. ABC News. <https://abcnews.go.com/Health/wireStory/covid-19-crisis-crisis-homeless-people-72574565>. Accessed 15 Dec 2020.

¹⁷² Harmeet Kaur. 8 Oct 2020. *The Killing of a Black Transgender Woman Means this Year is Tied as the Deadliest On Record for Transgender Americans, Rights Group Says*. CNN. <https://www.cnn.com/2020/10/08/us/felycya-harris-transgender-deaths-2020-trnd/index.html>. Accessed 15 Dec 2020.; Madeleine Roberts. 9 Dec 2020. *HRC Mourns Kimberly Fial, White Transgender Woman Killed in California*. Human Rights Campaign. <https://www.hrc.org/news/hrc-mourns-kimberly-fial-white-transgender-woman-killed-in-california>. Accessed 15 Dec 2020. (Now up to at least 40 murders).

¹⁷³ See, e.g., The Associated Press. 22 Aug 2020. *Portland Protest Turns Violent As Police Clear Federal Plaza*. NBC News. <https://www.nbcnews.com/news/us-news/portland-protest-turns-violent-federal-police-clear-plaza-n1237784>. Accessed 15 Dec 2020.

¹⁷⁴ Jasmine Aguilera. 27 July 2020. *Family Separation 2.0: Parents in ICE Detention Have to Decide Whether to Keep their Children or Release Them To Sponsors*. TIME. <https://time.com/5866659/ice-parents-children-detention-coronavirus-release/>. Accessed 15 Dec 2020.

¹⁷⁵ The Marshall Project. 11 Dec 2020. “A State By State Look at Coronavirus In Prisons.” <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>. Accessed 15 Dec 2020.

¹⁷⁶ Id.

One benefit of this year has been the awakening of American public consciousness. This summer, despite stay-at-home orders, millions of people took to the streets to assert that black death will no longer be a matter of police prerogative. The public has seen the injustice of the criminal legal system in staggering numbers:

- Most Americans want some change to policing or law enforcement. 55% of Americans say they want major change to policing and law enforcement, or to redesign it completely. Only 7% of Americans think the policing system works as-is.¹⁷⁷
- Most Americans say that police racism is a serious problem in their community (58%).¹⁷⁸ These results are even more dramatic when disaggregated by race, with 87% of Black Americans reporting that the U.S. criminal legal system discriminates against Black people.¹⁷⁹
- Despite the fact that almost no police officers lose their jobs after committing excessive force, only 4% of Americans favor keeping police officers on duty who have been found to have used excessive force. Among all political affiliations, majorities support requiring officers to undergo racial bias training and de-escalation training to avoid the use of force.¹⁸⁰
- Most Americans think many police officers are unqualified for their jobs. 60% of Americans support requiring all police officers to reapply for their jobs with demonstrated deescalation and anti-racist qualifications.¹⁸¹
- In response to state budget shortfalls due to COVID, most Americans said their biggest priorities for state funding were healthcare and public services (43%), emergency aid for families (13%), education (11%), and infrastructure (5%). Few said law enforcement budgets should be prioritized (18%) and even fewer prioritized prisons and jails (2%).¹⁸²
- When asked what investments should be prioritized for public safety, 45% of voters said mental health crisis response and treatment, 40% said job training and placement for reentering incarcerated people, 33% said community-based violence prevention, 31%

¹⁷⁷ Chris Jackson, Mallory Newall, and Kate Silverstein. 29 June 2020. *America's Hidden Common Ground on Police Reform and Racism in the United States*. Public Agenda. <https://www.publicagenda.org/wp-content/uploads/2020/06/HCG-Race-and-Police-Reform-Memo-Topline.pdf>. Accessed 15 Dec 2020.

¹⁷⁸ Id.

¹⁷⁹ Drew Desilver, Michael Lipka, and Dalia Fahmy. 3 June 2020. *10 Things We Know About Race and Policing in the U.S.* Pew Research Center. <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/>. Accessed 15 Dec 2020.

¹⁸⁰ Jackson et al, *Supra* note 178

¹⁸¹ Id.

¹⁸² Alliance for Safety and Justice. Sept 2020. *Toward Shared Safety: The First-Ever National Survey of America's Safety Gaps*. <https://allianceforsafetyandjustice.org/wp-content/uploads/2020/09/NatlSafetyGaps-Report-PREVIEW-20200908-1751.pdf>. Accessed 15 Dec 2020.

wanted trauma recovery and other victims' services, and only 16% prioritized prisons and jails as part of public safety.¹⁸³

- 79% of voters support expanding the 911 system so that mental health and substance abuse issues are directed to mental health professionals rather than police.¹⁸⁴ Further, 58% support shifting funds from police to community organizations that use relevant experts to address domestic violence, de-escalation, mental health, and violence interruption.¹⁸⁵
- In general, Americans support expanding alternatives to incarceration, automatic clearing of convictions, lifting bans on emergency aid/assistance/food stamps for formerly incarcerated people, expanding victim services, and increasing community-based violence prevention over and above expanding police and prisons.¹⁸⁶
- Americans believe in broad decarceration. 71% say it is important to reduce the prison population. 68% of Americans said they would be more likely to vote for candidates supporting decarceration and using the savings to invest in drug treatment and mental health programs, including 65% of Trump voters. 71% of Americans agree that incarceration is counterproductive to public safety, stating that "sending someone to prison for a long sentence increases the chances that [they] will commit another crime when they get out because prison doesn't do a good job of rehabilitating problems like drug addiction and mental illness." This included 68% of Republicans and 65% of Trump voters surveyed.¹⁸⁷

Based on these numbers and public action throughout this year, it is clear that there is broad support for reexamining whether prisons and the criminal legal system are effective at addressing the underlying causes of crime and helping individuals turn their lives around. Millions turned out this year under the banner of "defund the police," demanding the money be reinvested in social services to pull more people out of criminalization and policing pipelines.

America has led the world in incarceration, police murders, and police shootings for many decades.¹⁸⁸ Now, following the leadership of our modern civil rights movement, we have a unique opportunity to set a new lead: fastest decarceration. We stand behind broad public calls for decarceration, disarming and defunding police, abolishing militarized immigration

¹⁸³ Id.

¹⁸⁴ Id.

¹⁸⁵ Id.

¹⁸⁶ Id.

¹⁸⁷ Benenson Strategy Group. 5-11 Oct 2017. *Smart Justice Campaign Polling on Americans' Attitudes on Criminal Justice*. ACLU. <https://www.aclu.org/report/smart-justice-campaign-polling-americans-attitudes-criminal-justice>. Accessed 15 Dec 2020.

¹⁸⁸ Rob Picheta and Henrik Pettersson. 8 Jun 2020. *American Police Shoot, Kill and Imprison More People than Other Developed Countries. Here's the Data*. CNN. <https://www.cnn.com/2020/06/08/us/us-police-floyd-protests-country-comparisons-intl/index.html>. Accessed 15 Dec 2020.

enforcement, and redirecting resources into social services, medicare for all, and free university tuition. These resources combat the twin ills of poverty and alienation far more effectively than gendarmes with guns and prison cells.

As the American people and their elected leaders continue to discuss these issues, it is crucial to consider the experiences of LGBTQ people within populations disproportionately affected by the criminal legal system, including people of color, youth, and people with disabilities. As we have described in this report, LGBTQ youth and adults face unique challenges that disproportionately increase their likelihood of run-ins with law enforcement. They also are overrepresented in correctional and detention facilities, often are treated violently and unfairly while in detention, and face unique challenges rebuilding their lives after serving time.

Addressing the harms of America's criminal legal system means addressing them for everybody, including LGBTQ people across the nation, requiring us to think more broadly about what we can do at all levels to reduce discrimination and increase opportunity and equality--so that LGBTQ people of color, and other frequently marginalized populations can live more safely, securely, and successfully.

APPENDIX I: APPOINTMENTS

ADMINISTRATOR OF OJJDP

The administrator of OJJDP is a critical position. The next appointment, which does not require Congressional approval, should be made in a timely manner, and the new administration should nominate someone who:

- Recognizes the unique vulnerability of LGBTQ youth in conflict with the law;
- Has demonstrated commitment to treating LGBTQ youth fairly and respectfully; and
- Has demonstrated commitment to diverting all youth, including those who are LGBTQ, from the system whenever possible.

ASSISTANT ATTORNEYS GENERAL OF CIVIL RIGHTS & JUSTICE PROGRAMS

- The administration will also need to nominate strong candidates as Assistant Attorneys General of Civil Rights and Justice Programs. These two positions are central to any DOJ that wants to effectively use its authority and grants programs to reform our vast state and local criminal legal infrastructure.

DEPUTY ATTORNEY GENERAL

- While the selection of a principled, human rights-focused Attorney General will be vital to this effort, so will the appointment of a Deputy Attorney General with a

record of real reform. In less than two years, Deputy Attorney General Yates has taken significant steps toward improving the Bureau of Prisons and state and local system. Anyone nominated as the next DAG would do well to build on her efforts.

DIRECTOR OF THE OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTRERING, & TRACKING (SMART) – DEPARTMENT OF JUSTICE

- As DOJ continues to implement the Adam Walsh Act under the leadership of the SMART office, the next appointee should be someone who understands how the LGBTQ community and racial and ethnic minorities are impacted by the enforcement and prosecution of sex crimes. Additionally, the next director should have an understanding of evidence-based approaches to preventing and redressing sexual violence.

LEGAL SERVICES CORPORATION BOARD MEMBERS

- LSC board appointments should include individuals with background in meeting the legal needs of underserved communities, including LGBTQ people, non-native English speakers, Indigenous people, and persons with disabilities.

UNITED STATES SENTENCING COMMISSION

- Appoint progressive minded individuals with an interest in reducing the scope and intensity of criminal sentences.

APPENDIX II: AGENCY RECOMMENDATIONS

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

- Rescind and immediately cease enforcement of HHS’s Section 1557 rulemaking, RIN 0945-AA11, which retracts comprehensive anti-discrimination protections from transgender people seeking healthcare services.
- Rescind and immediately cease enforcement of HHS’s newly-adopted rule RIN 0991-AC13, *Equal Participation of Faith-Based Organizations in the Federal Agencies’ Programs and Activities*, which authorizes discrimination against LGBTQ+ people by federally-funded entities and grantees.
- Rescind and immediately cease enforcement of the Anti-Prostitution Loyalty Oath (HHS).
- Issue Guidance on the Anti-Prostitution Loyalty Oath.
- End the “inmate exclusion policy” that prohibits currently incarcerated people from accessing Medicaid. Abolish all fees for doctor visits and over-the-counter medication.
- Department of Justice (DOJ) and/or Centers for Disease Control (CDC) should develop a plan and timeline for meaningful follow-up to the 2014 Civil Rights Division (CRD) Technical Assistance Guidance Best Practices Guide to Reform HIV-Specific Criminal Laws to align with Scientifically Supported Factors (Best Practices Guide), including incentives for reform of discriminatory disease-specific laws through offers of technical assistance, HIV prevention grants and law enforcement grants, and other mechanisms, as well as an update to the guidance address states that prosecute individuals with HIV using general criminal laws and that create sentencing enhancements for sex workers living with HIV.

CENTERS FOR DISEASE CONTROL & PREVENTION

- DOJ and/or Centers for Disease Control (CDC) should develop a plan and timeline for meaningful follow-up to the 2014 Civil Rights Division's (CRD) Technical Assistance Guidance Best Practices Guide, including creating incentives for reform of discriminatory disease-specific laws through offers of technical assistance, HIV prevention grants and law enforcement grants, and other mechanisms, as well as an update to the guidance addressing states that inappropriately prosecute PLHIV using general criminal laws and that create sentencing enhancements for sex workers living with HIV.

DEPARTMENT OF HOMELAND SECURITY (DHS)

- Issue ICE guidance seeking community placement for transgender non-citizens in custody. Immediately cease detention of transgender immigrants, particularly those who have stated intentions to apply for asylum.
- Rescind and immediately cease enforcement of the DOJ and DHS's newly-adopted Rule RIN 1615-AC42/1125-AA94, *Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review*, which puts asylum and lawful immigration status out of the reach for many survivors of gender-based violence and persecution.
- Increase DHS's budget requests for community-based alternatives to detention and direct Immigration and Customs Enforcement to increase its reliance on these programs.
- The DHS should end its contracts with private prison companies and adopt a policy of no new contracts with private prisons.
- Secure GAO report on impact and effectiveness of raids conducted for the purpose of identifying immigrant trafficking victims.
- Declare an immediate moratorium on deportations.
- End the use of contract detention.
- Significantly reduce the size of immigration detention.
- Require any jurisdiction receiving anti-trafficking money to create a policy barring law enforcement from undercover work as clients during investigations.
- Conduct research, including stakeholder meetings, on recommendations and best practices for creating non-law enforcement-based reporting bodies for addressing sexual violence perpetrated by law enforcement.
- Rescind the October 21, 2020 DOJ DHS final rule on "Procedures for Asylum and Bars to Asylum Eligibility" which disproportionately impacts the ability of LGBTQ people to obtain protections.
- Rescind the EOIR and USCIS "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" final rules which essentially eliminate asylum protections.

- Issue a directive that requires DHS components to fully cooperate with the Office for Civil Rights and Civil Liberties.
- Issue guidance prohibiting the use of criminal convictions related to trafficking to disqualify people from immigration benefits.
- Adequately fund and ensure language access.
- Departments of State and Homeland Security should collaborate to narrowly tailor the implementation of International Megan’s Law by studying the efficacy of the current one-size-fits-all approach and prioritizing finite federal resources on those persons who have been previously convicted of the specific targeted behaviors abroad.

IMMIGRATION & CUSTOMS ENFORCEMENT (ICE)

- ICE should cease detaining LGBTQ and other vulnerable immigrants in all but the most extraordinary cases. Detention should always be a last resort for vulnerable populations.
- ICE should cancel the Alvarado/Santa Ana pilot programs, which purport to create facilities to house transgender women.
- The Executive Office for Immigration Review should require that all new immigration judges receive training similar to those for asylum officers and implement annual, ongoing trainings in addition to the initial training.
- End the detention of LGBTQ people and people living with HIV. Ending the detention of transgender people is an urgent and immediate priority.
- Prioritize and expand the use of community-based alternatives to detention. Ensure these are an alternative to detention and not release. Ensure these are centered around case management that is holistic and based on individualized assessments.
- End the use of solitary confinement, both under the pretext of individual safety and as a punitive measure.
- Eliminate barriers to accessing counsel.
- Prohibit enforcement actions against U visa applicants.

CUSTOMS & BORDER PATROL

- End metering, which traps LGBTQ asylum seekers in Mexico.
- Ensure immigrants are not held in CBP custody for longer than 48 hours, expand availability of medical screenings and emergency medical care, implement training on recognizing medical distress for all CBP officers and Border Patrol agents.

U.S. CITIZENSHIP & IMMIGRATION SERVICES (USCIS)

- Rescind fee increases, particularly the unconscionable fee for applying for asylum
- Direct asylum officers to not just make credible-fear determinations at the border but affirmative asylum grants at the border, where appropriate.
- Rescind changes to Refugee, Asylum and International Operations lesson plans that raise standards for credible fear reviews and reinstate the LGBTQ asylum training as well as expand the training for CBP and ICE officers as well as immigration judges.

DEPARTMENT OF HOUSING & URBAN DEVELOPMENT (HUD)

- Rescind the Department of Housing and Urban Development (HUD)'s Rule, Making Admission on Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, RIN 2506-AC53, Docket No. FR 6152-P-01, to combat street homelessness among transgender people and quality of life arrests.
- Re-implement the Equal Access Rule as originally implemented by the Obama Administration.
- Provide stable funding for and expand access to safe and affordable housing for all people, including those with criminal records.
- The Office of Community Planning and Development should prioritize grant funding for communities working to ensure safe and affirming spaces for LGBTQ people in homeless shelters, programs, and services; communities working on coordinated entry systems; and communities working to serve people returning after a period of incarceration.

DEPARTMENT OF STATE

- The Departments of State and Homeland Security should collaborate to narrowly tailor the implementation of International Megan's Law by studying the efficacy of the current one-size-fits-all approach and prioritizing finite federal resources on those persons who have been previously convicted of the specific targeted behaviors abroad.

DEPARTMENT OF JUSTICE (DOJ)

- Reinvigorate the use of consent decrees to provide oversight, and recommend and enforce mandatory changes and benchmarks for police departments that have violated people's constitutional rights.
- Prohibit discrimination in policing and meaningfully hold officers who violate these laws accountable.

- Issue additional guidance to establish a necessary use of force standard that allows police use of force only as a last resort, binding on all law enforcement agencies that are federal grantees.
- Use powers granted by the Civil Rights of Institutionalized Persons Act (CRIPA) to monitor the constitutional rights of incarcerated persons during the COVID-19 public health emergency.
- Rescind and immediately cease enforcement of the DOJ's newly-adopted Rule RIN 1105-AB58, *Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities*, which authorizes discrimination against LGBTQ+ people by federally-funded entities and grantees, including corrections and law enforcement agencies.
- The Office of Justice Programs (OJP) should issue guidance clarifying that the statutory prohibition on sex discrimination at 42 U.S.C. § 3789d(c) also prohibits discrimination on the basis of sexual orientation, gender identity, or gender expression (SOGIE). Several other federal agencies issued formal rules and informal guidance during the Obama Administration clarifying that sex discrimination encompasses discrimination based on SOGIE, including: The Department of Housing and Urban Development (HUD), the Department of Health and Human Services (HHS), DOJ, and ED. Such guidances must be reinstated or reaffirmed in light of their abandonment during the Trump Administration.
- Issue rules banning discriminatory application of charges like "public indecency" and "lewd conduct" to LGBTQ youths for conduct that would not be deemed disruptive by heterosexual and gender-conforming students.
- Reissue the DOJ's recommendations on restrictive housing as binding regulations applicable to the BOP and prisons and jails across the country, pursuant to PREA or as a condition of federal funding.
- Issue findings on the DOJ's CRIPA investigation into the Georgia Department of Corrections and other jurisdictions, utilizing consent decrees as necessary to afford broad relief for constitutional violations in systems throughout the country.
- Ensure that the DOJ Special Litigation Section has sufficient staffing and resources to broaden its nationwide investigations and enforcement of the rights of incarcerated people who are LGBTQ and/or living with HIV.
- Develop and issue model policies and implementation strategies governing police interactions with LGBTQ people;
- Implement the recommendations of the President's Task Force on 21st Century Policing, and facilitate memoranda of understanding (MOUs) between school administrators and law enforcement agencies to address concerns of LGBTQ students.
- Issue a memorandum clarifying that alternative custodial options such as electronic monitoring fulfill the custody requirements for people subject to mandatory detention under 8 U.S.C. 1226(c).
- DOJ (National Institute of Corrections - NIC) and the PREA Resource Center should collaborate to ensure that PREA is being effectively implemented in community

corrections facilities (CCCs), and that all other relevant statutory and regulatory provisions are being followed by issuing LGBTQ-inclusive compliance guidance to all CCC's and ensuring that all contracts with CCCs include comprehensive nondiscrimination provisions.

- Institute a pilot project to create LGBTQ/HIV-specific reentry services in three communities with a high need for directed services.
- DOJ and/or Centers for Disease Control (CDC) should develop a plan and timeline for meaningful follow-up to the 2014 Civil Rights Division's (CRD) Technical Assistance Guidance Best Practices Guide, including creating incentives for reform of discriminatory disease-specific laws through offers of technical assistance, HIV prevention grants and law enforcement grants, and other mechanisms, as well as an update to the guidance addressing states that inappropriately prosecute PLHIV using general criminal laws and that create sentencing enhancements for sex workers living with HIV.
- Explicitly issue provisions that permit transgender people to access ID that matches their gender, to improve access to ID documents for people returning to their communities. Further, issue guidance to facilities on how to assist transgender people in accessing ID that matches their gender.
- Expand upon efforts to vigorously combat the criminalization of homelessness, in collaboration with HUD, through grant criteria, litigation, and dialogue with local officials, and disseminating information about the harms of and alternatives to criminalization.
 - DOJ should issue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances.
 - DOJ should intervene in litigation challenging anti-homeless ordinances.
 - DOJ should incorporate investigation of civil rights abuses of homeless people as a standard practice in federal pattern-and-practice investigations.
 - DOJ should include provisions addressing discriminatory policing of homeless people in federal consent decrees.
 - Additionally, United States Attorneys should deprioritize enforcement of laws that criminalize sex work and homelessness-related criminal laws.
- Require training for staff at all US Attorneys Offices on implicit bias, sexual orientation and gender identity discrimination, as well as the disproportionate impact of HIV criminalization laws on LGBTQ communities.
- DOJ should direct states to undergo bail reform by issuing guidance to ensure that people are not incarcerated solely because they cannot afford bail, and should eliminate cash bail without imposing onerous conditions.
- Issue guidance to field offices and other administrative bodies regarding prosecution of third parties involved in sex work to deprioritize efforts to close internet-based third-party advertisers and instead approach these operators as important resources to connect with populations that may not feel comfortable seeking out law enforcement to report victimization.

- File statements of interest or amicus briefs in cases addressing the healthcare and safety needs of incarcerated transgender people, affirming that healthcare beyond hormone therapy should be provided where needed, and that transgender women should be considered for placement in women’s facilities.
- File statements of interest or amicus briefs to address the constitutionality of the severe collateral consequences affecting persons convicted of sexual offenses, as well as the constitutionality of convictions and registration requirements under state sodomy or “unnatural intercourse” laws.
- Limit information collection on those convicted of qualifying sex offenses to information mandated by Congress under the Adam Walsh Act (AWA).
- Rescind the policy requiring retroactive application of AWA.
- Prioritize research on the effectiveness of sex offender registration and notification systems (SORNS), especially as compared to alternative approaches to reducing and preventing sexual violence. Research should also examine whether marginalized people, including communities of color and LGBTQ individuals, are being unfairly targeted, prosecuted, and convicted of sex offenses. DOJ should also prioritize research that studies the compounding effects of the various restrictions placed on registered sex offenders affecting their ability to reintegrate into society, and the impact on recidivism.
- Absent the repeal of the AWA by Congress, DOJ should implement a policy stating the agency will not prosecute individuals for failure to register in cases in which a person had no specific intent to avoid compliance with registration laws.
- If the SORNA rule proposed by the DOJ on August, 13, 2020 is passed before the incoming administration takes office, to repeal it.
- Arrange a meeting with advocates to discuss its implementation plans for International Megan’s Law (Pub L. 114-119), in coordination with the Department of Homeland Security and the State Department.
- Ensure juvenile justice staff have adequate training to respond to the unique needs of LGBTQ youth by (1) notifying states and localities that funding is available to support training for increasing their competency to serve system-involved LGBTQ youth and (2) providing information to states and localities about training opportunities and resources for juvenile professionals that include the unique societal, familial, and developmental challenges confronting LGBTQ youth and the relevance of these issues to court proceedings.
- Cease making cooperation with ICE a mandatory condition of law enforcement grant programs.
- Criminal convictions that are a result of human trafficking must no longer be used against survivors in immigration proceedings or immigration applications. These conviction(s) will no longer be seen as a conviction in immigration court or applications. They will no longer be considered a particularly serious crime, crime involving moral turpitude or an aggravated felony.

- Require any jurisdiction receiving anti-trafficking money to create a policy barring law enforcement from undercover work as clients during investigations; and,
- Conduct research, including stakeholder meetings, on recommendations and best practices for creating non-law enforcement-based reporting bodies for addressing sexual violence perpetrated by law enforcement.
- Conduct an extensive evaluation on the impact of anti-trafficking efforts conducted as part of “Operation Cross Country.” Specifically, we request the Department assess the program’s effectiveness in addressing human trafficking in the sex trade and its collateral impacts on the sex trade more broadly, through the following metrics:
 - the number of prosecutions under 18 US 1591, 1590, and 1589 which directly resulted from Operation Cross Country efforts;
 - the number and disaggregation of all prostitution-related charges that resulted from these operations and the disposition of those cases. This is including but not limited to soliciting, patronizing, brothel-keeping, pimping and pandering, and/or equivalent statutes;
 - the gender and racial breakdowns of the individuals charged with prostitution-related crimes;
 - the number of additional charges outside of prostitution-related charges;
 - the number of minors and adults identified who meet the legal standard of a victim of human trafficking;
 - the number of individuals placed in deportation proceedings either as a result of a prostitution-related arrest and/or in spite of being identified as a trafficking victim;
 - how long-term success of identified survivors is assessed;
 - and disclosure of the annual budget for Operation Cross Country, including both direct federal expenditures and state/local funding received as a result of participation with these efforts.
- Mandate that state and federal law enforcement agencies collect and analyze data on stops, searches, arrests, and uses of force, including demographic information such as race; and make all data and analysis public.

BUREAU OF PRISONS (BOP) — DEPARTMENT OF JUSTICE

- Reduce the population of people living in BOP facilities who are medically vulnerable to COVID-19. Broadly implement policies to reduce the number of incarcerated people in prisons and take public health measures to ensure their safety. This should include but not be limited to provision of PPE to all individuals held in federal detention facilities.
- Ensure nationwide compliance with the Prison Rape Elimination Act through audits and enforcement actions, and promulgate additional guidance to address sexual abuse and harassment beyond the prison setting, such as in police holding cells.

- Bestow the Civil Rights office at the Bureau of Prisons (BOP) with a broad mandate to enforce and protect the rights of incarcerated LGBTQ people across the country, with clear plans for corrective action for non-compliant facilities.
- Reinstate the BOP's Obama-era Program Statement on housing placements and health care access for transgender people in custody, to ensure that transgender people's healthcare needs are met, and that transgender people are housed in facilities consistent with their gender identity wherever appropriate for safety, regardless of surgery status. Nonbinary and gender-nonconforming folks should be able to self-determine which facilities are most appropriate for their safety and well-being.
- Update the Transgender Offender Manual to eliminate the changes made by the Federal Bureau of Prisons on May 11, 2018 that added the word "necessary" without further explanation, and that impose "biological sex" for determining initial housing designations.
- Adopt the DOJ's recommendations on restrictive housing without delay and then implement and track them in every facility.
- Ensure that people in protective custody, which disproportionately includes LGBTQ people, are able to participate in reentry programs
- Immediately halt the use of private contractors in federal prisons and immigrant detention facilities.
- Create a toolkit for reentry counselors outlining the specific needs of PLHIV who are returning to their communities.
- Amend 28 CFR §549.62 and rescind Program Statement 5214.04: Procedures for Handling of HIV Positive Inmates who Pose Danger to Others as part of solitary confinement policy reform efforts.
- Build and update the Community Resource Database and other national reentry resource tools. As a part of that process, BOP and advocates should determine how best to signal whether a resource is safe and affirming to LGBTQ people, and how to identify resources that are tailored to meet the needs of LGBTQ people.
- Amend Program Statements 6190.04: Infectious Disease Management and 6031.04: Patient Care to conform to modern-day professional and community standards so that it can create and implement a system-wide program for promoting comprehensive sexual health literacy based on best practices.

COMMUNITY ORIENTED POLICING SERVICES (COPS) – DEPARTMENT OF JUSTICE

- Implement President's Task Force on 21st Century Policing recommendations of particular concern to LGBTQ people, including:
- Issue model policies on police sexual misconduct, interactions with LGBTQ people and prohibition against using of possession or presence of condoms as evidence of intent to engage in prostitution-related offenses.

- Uncouple immigration enforcement from local law enforcement, terminate the use of the state and local criminal legal system, including through detention, notification, and transfer requests, to enforce civil immigration laws and removal of immigration information from FBI databases.
- Issue guidance on MOUs with school resource officers.
- Issue guidance to local law enforcement on stop, search, and seizure procedures, including consent searches and officer identification.
- Condition federal grant-making to law enforcement agencies through COPS on adoption and enforcement of anti-profiling and nondiscrimination provisions inclusive of sexual orientation and gender identity, and upon strategies for enforcing these grant conditions.
- Continue to pursue proactive pattern-and-practice investigations and consent decrees that are comprehensive and address officer sexual misconduct, as well as mistreatment of LGBTQ people in the sex trades.
- Expand PREA mandate/audits to police lockups and expand regulations beyond brick-and-mortar facilities to other places of detention such as police cars.
- Prioritize funding from the COPS Office to jurisdictions which have the most stringent policies on sexual contact while operating under color of law, including for implementation, training, and evaluation

OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION (OJJDP) – DEPARTMENT OF JUSTICE

- Issue guidance (through OJP) clarifying that the statutory prohibition on sex discrimination at 42 U.S.C. § 3789d(c) also prohibits discrimination on the basis of SOGIE.
- Issue rules banning discriminatory application of charges like “public indecency” and “lewd conduct” to LGBTQ youths for conduct that would not be deemed disruptive by heterosexual and gender-conforming students
- Issue guidance to ensure that juvenile justice facilities (1) classify and house all youth consistent with their gender identity, as the youth defines it, true to the intent of Prison Rape Elimination Act (PREA) guidelines; (2) refrain from holding LGBTQ youth in isolation as a means of protection absent serious short term safety concerns; and (3) ensure all youth are provided LGBTQ-affirming, comprehensive, and medically accurate sexual healthcare, including mental health and transition-related medical services, as well as LGBTQ-affirming, comprehensive, and medically accurate sexual health literacy programming, including SOGIE-related instruction.
- Ensure juvenile justice staff have adequate training to respond to the unique needs of LGBTQ youth by (1) notifying states and localities that funding is available to support training for increasing their competency to serve system-involved LGBTQ youth and (2) providing information to states and localities about training opportunities and resources for juvenile professionals that include the unique societal, familial, and developmental

challenges confronting LGBTQ youth and the relevance of these issues to court proceedings.

- Increase the amount of funding available in its discretionary grants program for states and localities to shift resources away from detention and incarceration in favor of effective community-based alternatives that can competently serve LGBTQ youth of color.
- Issue guidance clarifying that, as a condition of receipt of formula grants, participating states agree to prohibit the use of conversion therapy by juvenile justice agencies, personnel, contractors or other individuals who have direct contact with juveniles.

OFFICE FOR VICTIMS OF CRIME – DEPARTMENT OF JUSTICE

- The Office of Victims Services (OVC) should begin to collect data from service providers to assess the effectiveness and impact of raids and sting operations, in terms of effectively identifying trafficking survivors; impact on survivors and community members who are targeted; long-term outcomes for survivors identified through raids versus survivors identified through other mechanisms; and unintended consequences, including community impact, immigration consequences for those not identified as trafficking victims, and the impact on service provision after a raid occurs.

DEPARTMENT OF LABOR (DOL)

- Rescind and immediately cease enforcement of DOL's newly-adopted rule RIN 1291-AA41, *Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities*, which authorizes discrimination against LGBTQ+ people by federally-funded entities and grantees.
- Provide grants through the Reentry Employment Opportunities (REO) program, for projects that provide services for lesbian, gay, bisexual and transgender formerly incarcerated individuals.
- Prioritize LGBTQ formerly incarcerated individuals as a special population.

OFFICE OF THE PRESIDENT OF THE UNITED STATES

- Create a criminal justice task force to pursue progressive policy goals related to the criminal legal system.
- Convene a Federal Advisory Committee (FACA) on Reentry under FACA with members from the law enforcement, community correctional centers (CCC), and advocacy communities to advise the administration on how best to meet the needs of people who are returning to their communities after incarceration.

- Encourage Congress to introduce and pass the BREATHE Act, and codify a Bivens right of action against federal law enforcement officers, and to prohibit the use of qualified immunity defenses to usher in an era of meaningful police accountability and oversight.
- Support reauthorization of the Ryan White CARE Act, including a requirement that state grantees certify that they have repealed, or have a plan in place to repeal, state laws that stigmatize PLHIV, discourage HIV testing and engagement in care, or otherwise undermine HIV prevention and care strategies.
- Push for repeal of the Illegal Immigration Reform and Immigrant Responsibility Act, which has only served to undermine due process protections and criminalize immigrants.
- End expedited removal.
- Rescind National Security Presidential Directive 22 (NS PD 22), which states “[t]he United States Government opposes prostitution and any related activities . . . The United States Government’s position is that these activities should not be regulated as a legitimate form of work for any human being.”
- Require all federal Departments to adopt a policy barring sexual contact while operating under color of law.
- Request a report from the Government Accountability Office (GAO) on the policies regarding sexual contact for all jurisdictions and departments receiving federal funding.
- Rescind Executive Orders 13774, 13776, and 13896, which aggrandized law enforcement power without meaningful oversight, and withdraw all reports and recommendations issued by the President’s Commission on Law Enforcement and the Administration of Justice.
- Rescind Executive Order 13950, and require mandatory anti-bias training requirements for federal, state, and local law enforcement, as a condition of receiving DOJ grants and funds. Federal grants should also be conditioned on law enforcement agencies adopting and enforcing anti-profiling and nondiscrimination provisions inclusive of sexual orientation and gender identity — and develop strategies for enforcing these grant conditions.
- By Executive Order immediately rescind 287(g) agreements, the Criminal Alien Program, and the Priority Enforcement Program, and uncouple immigration enforcement from local law enforcement by terminating use of local police forces to enforce civil immigration laws through detention, notification, and transfer requests, and by removing civil immigration information from FBI databases.
- Issue an Executive Order requiring the Department of Defense and all branches of the armed services to review and modernize current policies on prosecutions based on HIV and consensual adult sex. Issue a moratorium on any such prosecutions pending completion of this review and related proposals for modernizing of current policies and practices.
- Create by Executive Order an Office for National Reentry Policy, and a corollary National Advisory Committee on Reentry under the Federal Advisory Committee Act.

- Act on the listening session recommendations made during the Obama Administration to improve outcomes for LGBTQ youth in the juvenile justice system, and to ensure LGBTQ youth receive appropriate educational support and services in the community in order to both prevent and limit contact with the criminal legal system, and to protect their rights if they enter it.
- Re-allocate funding in the presidential budget from law enforcement to invest in under-resourced communities with housing, education, healthcare and a living wage.
- Review and grant clemency petitions for individuals medically vulnerable to COVID-19, Black, Indigenous and other racialized people, and transgender and LGBTQ people

CONGRESSIONAL RECOMMENDATIONS

- Introduce and pass the BREATHE Act, and codify a Bivens right of action against federal law enforcement officers, and to prohibit the use of qualified immunity defenses to usher in an era of meaningful police accountability and oversight.
- Expand the Prison Rape Elimination Act (PREA) mandates/audits to police lockups and expand regulations beyond brick-and-mortar facilities to other places of detention, such as law enforcement vehicles.
- Reauthorize the Ryan White CARE Act, including a requirement that state grantees certify that they have repealed, or have a plan in place to repeal, state laws that stigmatize PLHIV, discourage HIV testing and engagement in care, or otherwise undermine HIV prevention and care strategies.
- Pass the “SESTA and FOSTA Examination of Secondary Effects for Sex Workers Study Act (“SAFE SEX Workers Study Act”) to study the impact of losing access to internet platforms on the health and safety of sex workers.
- Repeal the Illegal Immigration Reform and Immigrant Responsibility Act.
- Repeal the Adam Walsh Act and other post-conviction penalties that create barriers to reentry for people with sex offense convictions.
- Condition federal grant-making to law enforcement agencies through The Office of Community Oriented Policing Services (COPS Office) on adoption and enforcement of anti-profiling and nondiscrimination provisions inclusive of sexual orientation and gender identity, and upon strategies for enforcing these grant conditions.
- Create an independent bipartisan board to oversee and advise the BOP. This board shall be composed of criminal justice stakeholders, including community organizations. The board will be granted the authority to review and evaluate all BOP policies, procedures, and practices.
- Restore discretion to immigration judges so they can consider a wider range of factors that may warrant a person not being removed.
- Ban the federal government from using for-profit companies to run immigration detention facilities and alternatives to detention.

- End contracts with any facility that creates unsafe conditions for detainees.
- Pass the Dignity for Detained Immigrants Act, which protects LGBTQ people from arbitrary detention and violence within facilities and ensures their right to seek protection within the United States.
- Reduce and eliminate the use of solitary confinement. In particular, prisons and jails should be given education and training on how to keep LGBTQ prisoners safe in accordance with PREA, so that “protective” solitary confinement will be a last resort.
- Leverage funding for HUD to discourage state and local governments from policing and criminalizing activities such as begging, sitting, or lying on sidewalks, loitering, and so-called vagrancy laws.
- Restore Pell Grants to currently incarcerated people.
- End all bans on access to SNAP, welfare, Medicaid, and other social safety net benefits for all people with criminal convictions
- End the criminalization of HIV.
- Eliminate mandatory minimum sentencing laws for all drug-related crimes.
- Legalize the use and sale of marijuana. Retroactively dismiss criminal convictions for the possession and sale of marijuana.
- Increase accountability and oversight of law enforcement.
- Ensure the civil rights of LGBTQ+ people are strengthened and expanded.
- Reform criminal sentencing, prisons, and re-entry of prisoners.
- Increase resources available for housing assistance and support for low-income individuals and families.
- End federal civil commitment because of the flawed science on which civil commitment is based. If Congress chooses to continue with its civil commitment system, it should take steps to ensure that individuals receive adequate due process, specifically:
 - Once an individual is civilly committed, the statute should make clear that the individual has, as a matter of right, a hearing every six months if they choose to seek one. Currently, under 18 U.S.C. Section 4247(h), an individual can request a hearing every 180 days, but nothing in the statute requires the courts to grant the motion. The government routinely opposes requests for hearing under Section 4247(h). Section 4247(h) should be amended to read that upon request, the courts shall hold review hearings every 180 days.
 - Once an individual is civilly committed, the government should retain the burden of proving at review hearings that the person remains sexually dangerous. Currently, Section 4248(e) sets the burden of proof as preponderance of the evidence and is silent as to which party bears the burden. Section 4248(e) should be amended to require that the government continue to have the burden to prove by clear and convincing evidence at review hearings that the person remains sexually dangerous and that civil commitment continues to be required.

- Section 4247(b) provides that an individual certified as sexually dangerous can request the court to appoint an additional examiner to evaluate them. This statute should make clear that the individual and their defense attorney can prepare ex parte with the examiner, which is routinely disallowed by the district courts and undercuts individuals' ability to prepare a defense.

APPENDIX III: FISCAL YEAR 2022 BUDGET RECOMMENDATIONS

We recommend the Biden-Harris Administration:

- Re-allocate funding in the presidential budget from law enforcement to invest in under-resourced communities with housing, education, healthcare and a living wage.
- Increase Department of Homeland Security's budget for community-based alternatives to detention and direct Immigration and Customs Enforcement to increase its reliance on these programs.
- Eliminate the federal bed quota mandate for immigration detention.
- Request \$15 million in new federal spending dedicated to syringe services programs and support removing all restrictions on use of federal funds - including for the purchase of syringes.
- Increase funding for the Legal Services Corporation as well as federal, state, and local public defender services to expand access to legal assistance for low-income individuals.
- Provide stable funding for and expand access to safe and affordable housing for all people, including those with criminal records. In particular, prioritize funding for communities working to ensure safe and affirming spaces for LGBTQ people in homeless shelters, programs, and services; communities working on coordinated entry systems; and communities working to serve people returning after a period of incarceration.
- Increase the amount of funding available for states and localities to shift resources away from detention and incarceration in favor of effective community-based alternatives that can competently serve LGBTQ youth of color.