

January 27, 2020

**Speaker Nancy Pelosi House**

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**Minority Leader Kevin McCarthy**

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**House Majority Leader Steny Hoyer**

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**House Minority Whip Steve Scalise**

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On behalf of the undersigned organizations, we write to express our concern with the Senate-passed Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act (S. 3201), a bill to temporarily extend the Drug Enforcement Administration's "class-wide" emergency scheduling of fentanyl-related substances. The bill will expose more people to prosecutions seeking harsh mandatory minimum sentences.

While this measure is an improvement over a permanent approach, like the Stopping Overdoses of Fentanyl Analogues Act, it does not address the civil rights implications of the Drug Enforcement Administration's unprecedented placement of a potentially limitless number of substances on Schedule I.<sup>1</sup> We urge leaders in the House of Representatives to ensure that before an extension measure is enacted, the legislation precludes mandatory minimums and protects people with limited knowledge, responsibility, and authority in the importation of fentanyl analogues.

We urge the House to address the following issues as it considers S.3201:

- Substantial increases in the length of sentences and DOJ's intention to seek mandatory minimums in cases prosecuted under the authority of the class-wide ban. **Any extension of the class-wide ban should bar the use of mandatory minimum sentences in cases prosecuted under this authority.** Legislation introduced in the Senate by Senator Rob Portman and three other Senate colleagues attempts to do exactly this. The House should adopt this approach. It has been only a year since Congress and President Trump enacted the First Step Act, which eased the length of some drug sentences and reflected broad bipartisan recognition that mandatory minimum sentences are costly and counterproductive. Congress should not undermine this progress on sentencing reform.
- The directive to the Government Accountability Office to evaluate the class-wide scheduling does not incorporate an examination of the effectiveness of the class-wide approach in reducing overdose deaths from fentanyl and its analogues, reducing demand for and supply of these and other substances, or how this control will interdict and stop extraterritorial manufacturers and exporters, or domestic high-level importers. We are still rebuilding after a failed war on drugs that did not improve public safety, ameliorate the high rates of substance misuse in the United States, or reduce the

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<sup>1</sup> "Coalition Opposes S. 1622 Stopping Overdoses of Fentanyl Analogues Act (SOFA)," <https://www.hrw.org/news/2019/07/03/coalition-opposes-s1622-stopping-overdoses-fentanyl-analogues-act-sofa>

demand for or supply of harmful substances. In light of these failures, it is deeply troubling that Congress is considering measures that would expand the Department of Justice's authority to schedule and prosecute substances without analyzing if this measure—founded on the idea that incarceration is the answer to a drug epidemic—will somehow succeed where every similar prior measure has failed. **It is critical that any study evaluating the class-wide ban assess the impacts of this expanded authority on public safety, including overdose deaths and interdiction efforts.**

- Federal sentencing data shows that since 2014 the majority of those sentenced for fentanyl trafficking have been involved at the bottom of the distribution chain (such as street-level sellers and couriers/mules), and available data indicates that the vast majority of those prosecuted did not have clear knowledge that they were trafficking fentanyl.<sup>2</sup> Additionally, 2018 sentencing data reveals that 77% of individuals sentenced at the federal level for fentanyl trafficking are people of color,<sup>3</sup> showing that fentanyl enforcement is exacerbating racial disparities in the criminal justice system.<sup>4</sup> **Any extension of the class-wide ban should include an analysis of the impact of this expanded authority on the interdiction of high-level exporters, importers, and manufactures of fentanyl and its analogues.**

Congress must resist the appeal of simplistic solutions to complex problems and redouble its investment in public health approaches to reducing fentanyl overdose deaths and decreasing substance misuse rates. A punitive approach to addressing these public health concerns undermines evidence-based health approaches. We cannot allow enforcement-first rhetoric to divert our focus away from public health approaches that have been proven effective in reducing the harms associated with fentanyl and its analogues. Congress should prioritize removing barriers to medication-assisted forms of treatment, increasing access to overdose prevention tools like naloxone, and increasing investments in funding to help communities scale up access to treatment and harm reduction interventions that save lives and aid recovery.

Ultimately, we remain convinced that granting the Drug Enforcement Administration class-wide scheduling authority for fentanyl analogues will exacerbate already disturbing trends in federal drug prosecutions and incarceration levels and excise public health authorities from their critical role in promulgating drug policy. Congress made progress with its bipartisan passage of the First Step Act and we oppose efforts to undermine this reform.

We look forward to working with lawmakers on alternative approaches that would effectively address fentanyl overdoses and reduce the harms and unfairness of federal mandatory minimum sentences, and address our crises of overincarceration. If you have questions or

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<sup>2</sup> "Public Data Briefing: Synthetic Drugs" – United States Sentencing Commission, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018\\_synthetic-drugs.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf); [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl\\_FY18.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl_FY18.pdf)

<sup>3</sup> "Quick Facts: Fentanyl" – United States Sentencing Commission, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl\\_FY18.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl_FY18.pdf)

<sup>4</sup> "Criminal Justice Reform in the Fentanyl Era: One Step Forward, Two Steps Back," <http://www.drugpolicy.org/resource/criminal-justice-reform-fentanyl-era-one-step-forward-two-steps-back?spJobID=1682077373&spMailingID=41601505&spReportId=MTY4MjA3NzM3MwS2&spUserID=MTAwNjQyOTM2MDMzMAS2>

concerns, please contact Kara Gotsch at [kgotsch@sentencingproject.org](mailto:kgotsch@sentencingproject.org) or Grant Smith at [gsmith@drugpolicy.org](mailto:gsmith@drugpolicy.org).

Cc:

**House Judiciary Chairman Jerrold Nadler**  
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**Ranking Member Doug Collins**  
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**House Subcommittee on Crime, Terrorism, and Homeland Security Chair Karen Bass**  
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**House Committee on Energy & Commerce Chairman Frank Pallone**  
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**House Committee on Energy & Commerce Ranking Member Greg Walden**  
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Sincerely,

A New PATH (Parents for Addiction Treatment & Healing)

AIDS Alabama

Alliance for Positive Change, LES Harm Reduction Center

American Civil Liberties Union

Baltimore Harm Reduction Coalition

Broken No More

Charles Hamilton Houston Institute for Race and Justice at Harvard Law School

College and Community Fellowship

Colorado CURE

Congregation of Our Lady of the Good Shepherd, U.S. Provinces

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Friends of Recovery New York Dutchess  
Harm Reduction Coalition  
Health in Justice Action Lab at Northeastern University School of Law  
Human Rights Watch  
International CURE  
Iowa Justice Action Network/Catholic Charities  
Justice Arts Coalition  
Justice Roundtable  
LatinoJustice PRLDEF  
Law Enforcement Action Partnership  
Legal Action Center  
Life for Pot  
Multidisciplinary Association for Psychedelic Studies  
NAACP  
National Advocacy Center of the Sisters of the Good Shepherd  
National Association of Criminal Defense Lawyers  
National Association of Social Workers  
National Center for Lesbian Rights  
National Center for Transgender Equality  
National Juvenile Justice Network  
National LGBTQ Task Force Action Fund  
NETWORK Lobby for Catholic Social Justice  
Operation Restoration

Prevention Point Pittsburgh  
Protect Families First  
R Street Institute  
Reframe Health and Justice  
Research For A Safer New York  
Safe Streets Arts Foundation  
Safer Foundation  
StoptheDrugWar.org  
Students for Sensible Drug Policy  
Substance Use Policy, Education, and Recovery PAC  
Texas CURE  
The Center for HIV Law and Policy  
The Leadership Conference on Civil and Human Rights  
The Sentencing Project  
The Taifa Group  
The United Methodist Church - General Board of Church and Society  
Treatment Action Group  
Treatment Communities of America  
Trinity United Church of Christ, Chicago  
Truth Pharm  
Virginia CAN (Change Addiction Now)  
VOCAL-NY  
Witness to Mass Incarceration  
Women With A Vision