

July 2, 2019

The Honorable Lindsey Graham  
Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Dianne Feinstein  
Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, DC 20510

cc: Members of the Senate Judiciary Committee and Senator Johnson

Dear Chairman Graham and Ranking Member Feinstein:

We, the undersigned coalition of conservative groups, write to express our opposition to the Stopping Overdoses of Fentanyl Analogues Act (SOFA), S.1622.<sup>1</sup> The United States' opioid epidemic is real and overdoses are increasing year after year. Synthetic opioids such as fentanyl have played a crucial role in this increase. But unfortunately, S.1622 will do nothing to fix this.

If enacted, S.1622 would broadly expand penalties for drug offenses, concentrate power within the Department of Justice, punish people who lack criminal intent, and overcriminalize certain behavior. The legislation attempts to address the very real problem of synthetic opioid overdoses in the United States, but we believe that its methods are misguided. Instead of punishing people who use drugs and low-level dealers, legislation should focus on expanding treatment opportunities and targeting the international drug trade.

Harsh penalties do not deter people with substance use disorders from using drugs. People use drugs because they have a chemical dependence and often feel that they will not be caught. Believing that harsh penalties will deter drug use misunderstands addiction. Since the 1980s, we have had tough penalties for heroin use and distribution, yet heroin consumption has actually increased.

Today, heroin use and overdoses are at an all-time high. Just as harsh heroin laws did not deter heroin use, harsh synthetic opioid laws will not stop synthetic opioid use. Instead of prison, treatment will better address the underlying issues that fuel the opioid epidemic.

Moreover, this legislation would concentrate power within one federal agency: the Department of Justice. Under S.1622, the Department would have the unilateral power to add substances to the federal schedule and pursue harsh penalties. While the Department of Justice is usually required to consult with the Department of Health and Human Services before scheduling a chemical substance, this newfound power would enable the Department of Justice to

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<https://www.congress.gov/bill/116th-congress/senate-bill/1622?q=%7B%22search%22%3A%5B%22Stopping+Overdoses+of+Fentanyl+Analogues+Act%22%5D%7D&s=1&r=2>

singlehandedly determine which substances are acceptable for private citizens to consume and which merit stiff penalties.

We believe that this is gross federal overreach. Congress, our elected legislature charged with passing laws and creating the federal criminal code, should not devolve the power to enact new criminal punishments to a federal agency. It has been well-documented that federal agencies create laws that lead to overcriminalization; this bill would take us further down this problematic path.

But even if the Department of Justice was not granted broad power to schedule chemical substances in this act, we still oppose the expansion of penalties for synthetic drugs, as it punishes individuals who lack criminal intent. According Chuck Rosenberg, the former head of the Drug Enforcement Agency (DEA), “fentanyl, fentanyl derivatives, and their immediate precursors are often produced in China”<sup>2</sup> and mixed with heroin before being shipped into the United States. By the time low-level dealers acquire the drug, they often do not know that it contains fentanyl.

The customers who buy these drugs are likewise oblivious to the true content of their purchase, and in many cases would not purchase it if it contained fentanyl or a fentanyl analogue. We believe that any criminal offense should require a culpable mental state. Nevertheless, S.1622 would enact harsh penalties while ignoring the defendant’s *mens rea*.

Traditionally, DOJ is required to prove in court that a substance is similar enough to fentanyl that it would merit prosecution under the Analogue Act.<sup>3</sup> Passage of SOFA would enable the DEA to decide what is a fentanyl analogue and therefore which substances merit harsh penalties. It would eliminate this due process measure, increasing prosecutorial power in these cases, and enabling the government to coerce guilty pleas from defendants even if the substance bears no similarity to fentanyl.

While discussing the opioid epidemic and synthetic opioid penalties, we believe that it is important to consider the potential costs to taxpayers. If S.1622 passes, taxpayers would be forced to pay for the increased prison population and the law enforcement and criminal justice fees that accompany increases in arrests and prison sentences. History has shown us that harsh drug penalties do not deter drug use, and with more people in jail, many communities will be robbed of productive citizens. Instead, we ask that you consider remedies that will address the opioid epidemic while enabling people with substance use disorders to live healthy, productive lives.

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<sup>2</sup> <https://www.congress.gov/crec/2018/06/15/modified/CREC-2018-06-15-pt1-PgH5204-6.htm>

<sup>3</sup> <https://www.judiciary.senate.gov/imo/media/doc/Liskamm-Cherundolo%20Joint%20Testimony.pdf>

In the recent past, this Committee seemed to be making progress towards an improved federal criminal justice system. The bipartisan First Step Act reduced harsh mandatory minimums for many drug crimes. We believe that this Committee should continue its work with criminal justice reform, not revert to ineffective and harsh drug laws. We ask that instead of expanding penalties against people suffering from substance use disorders, that this Committee consider legislation that will allow people with substance use disorders to become productive citizens, not expensive inmates.

Sincerely,

Jason Pye, Vice President of Legislative Affairs  
FreedomWorks

Mark Holden, Board Member  
Americans for Prosperity

Craig DeRoche, Senior Vice President, Advocacy & Public Policy  
Prison Fellowship

David Williams, President  
Taxpayers Protection Alliance

Arthur Rizer, Director, Criminal Justice & Civil Liberties  
R Street Institute