

October 18, 2016

The Honorable Tom Reed
U.S. House of Representatives
2437 Rayburn House Office Building
Washington, DC 20515

cc: Speaker Paul Ryan, Minority Leader Nancy Pelosi, Rep. Bob Goodlatte, Rep. John Conyers.

RE: Opposition to H.R. 6158, the HELP Act of 2016

Dear Rep. Reed,

On behalf of a coalition of groups working toward criminal justice reform, we write to respectfully express our opposition to your bill, H.R. 6158, the HELP Act of 2016. H.R. 6158 would expose individuals caught selling fentanyl or a substance containing fentanyl to mandatory life without parole or death penalty sentences. Such an approach would be a dramatic step in the wrong direction at a time when there is a bipartisan movement aimed at rolling back the harsh drug sentences created in 1986. H.R. 6158 would also exacerbate the opioid epidemic our country is currently undergoing. The bill is out of step with the times, science, data, and public opinion and doubles down on 30 years of ineffective drug policy, and we ask that it be revised.

We are not unaware of the growing challenges around fentanyl and heroin in many communities, with an increasing number of overdose deaths attributed to the presence of fentanyl.¹ But H.R. 6158 will not deter this drug's use. Fentanyl is a synthetic, rapid-acting opiate analgesic, commonly added to heroin to increase its potency. Because fentanyl is hundreds of times more powerful than heroin,² individuals high on the international supply chain of heroin trafficking are incentivized to strengthen a diluted product.³ The head of the DEA testified before the Senate in June 2016 that fentanyl was often added high up and early in the supply chain – in China and Mexico - long before drugs enter the United States.⁴ By the time the drugs make it to American streets and homes, street-level sellers and their buyers are unaware of the makeup of their product and its potency.⁵ H.R. 6158 lacks sufficient *mens rea* protections because it would punish people with mandatory life or death sentences for crimes they do not even know they are committing, because they do not know that fentanyl is in their drugs. For the same reason, H.R. 6158 will have no deterrent effect on the use or trafficking of fentanyl – if

¹ Donna Leinwand Leger, "DEA: Deaths from fentanyl-laced heroin surging," USA Today, last modified March 18, 2015, <http://www.usatoday.com/story/news/2015/03/18/surge-in-overdose-deaths-from-fentanyl/24957967>.

² Center for Disease Control and Prevention, "Fentanyl: Incapacitating Agent," last modified November 20, 2014, http://www.cdc.gov/niosh/ershdb/EmergencyResponseCard_29750022.html.

³ Fred Bever, "Illicit Version Of Painkiller Fentanyl Makes Heroin Deadlier," NPR, last modified August 26, 2015, <http://www.npr.org/sections/health-shots/2015/08/26/434618809/illicit-version-of-painkiller-fentanyl-makes-heroin-deadlier>.

⁴ Department of Justice, "Testimony of Chuck Rosenberg," <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Rosenberg%20Testimony.pdf>.

⁵ Barry Leonard, *National Drug Threat Assessment 2008* (Darby: Diane Publishing, 2009).

users and sellers don't know that fentanyl is in their drugs, the punishments for such drugs are irrelevant.

Furthermore, H.R. 6158 will apply to low-level offenders and addicts and produce unjust punishments that do not fit the offender or reduce drug trafficking. H.R. 6158 mandates life without parole or the death penalty for those trafficking in 100 grams or more of fentanyl or fentanyl-laced heroin when it can be linked to an overdose death. By focusing on quantity rather than role, H.R. 6158 risks impacting low-level drug users who pool their resources to sell drugs to fund their own use or those who are small-time couriers. The target may be kingpins, but history and U.S. Sentencing Commission data have shown that mandatory minimum drug sentences are applied mainly to low-level street users/sellers, not high-level suppliers.⁶ The Commission has found “that the quantity of drugs involved in an offense is not closely related to the offender’s function in the offense.”⁷ H.R.6158 will also not reduce drug trafficking because it would target low-level sellers and users who are easily replaced and whose incarceration has little to no impact on the drug trade.⁸

H.R. 6158 is unnecessary and will compound, not reduce, the inefficacy of existing laws. Since 1986, selling 100 grams or more of heroin has triggered a 5-year mandatory minimum. The same mandatory minimum applies to selling 40 grams of any substance containing even trace amounts of fentanyl or a mere 10 grams of any substance containing even trace amounts of an analogue of fentanyl. For 30 years, 10-year mandatory minimum sentences have applied to drug trafficking offenses involving one kilogram of heroin, 400 grams of any substance containing even trace amounts of fentanyl, or 40 grams of any substance containing even trace amounts of an analogue of fentanyl. For 30 years, there has been a 20-year mandatory minimum sentence for any fentanyl or heroin offense in which death or serious bodily injury results – a strict liability offense.⁹ These drug quantities and sentence lengths were chosen at random, without hearings or consultation with drug experts, in the heat of election-year battles in which people of both parties were trying to out-tough each other on drugs.¹⁰ These mandatory minimum sentences have existed and been enforced for 30 years, and they have done nothing to prevent or stop our current opioid problems in the U.S.

⁶ U.S. Sentencing Commission, Report to the Congress: Mandatory Minimum Penalties 171 (2011), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf.

⁷ *Id.* at 168.

⁸ Department of Justice, “Testimony of Chuck Rosenberg,” <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Rosenberg%20Testimony.pdf>.

⁹ “21 U.S. Code § 841 – Prohibited acts A,” Legal Information Institute, Cornell University Law School, <https://www.law.cornell.edu/uscode/text/21/841>.

¹⁰ See Kevin Ring and Eric Sterling, Ayotte Drug Amendment Will Repeat Mistakes of the Past, The Hill (June 7, 2016), <http://thehill.com/blogs/congress-blog/healthcare/282498-ayotte-drug-amendment-will-repeat-mistakes-of-past> (“Congress was driven by bare politics: the desire to appear to be responding harshly to a crisis. Why, for example, were the minimum prison sentences set at five and 10 years instead of two, four, or 6 years? Why five grams of meth instead of 25? The numbers were pulled out of the air. The quantities have been proven to create the wrong incentives at the Justice Department – a focus on low-level offenders, and the very long prison terms have swollen federal prisons to the breaking point and undermined their deterrence capacity.”).

Making mandatory minimum sentences harsher for opioid crimes lacking any *mens rea* standards will not make our opioid problems better. Instead, these lengthiest of punishments for strict liability offenses will lock up users, addicts, and low-level offenders at huge costs to taxpayers, without reducing drug use or addiction or making Americans safer. Cases with the death penalty are estimated to cost taxpayers \$1.26 million. Prisoners on death row cost taxpayers \$90,000 more each year than a non-death row prisoner.¹¹ Each year of incarceration in federal prison costs taxpayers over \$30,000 per prisoner,¹² with costs increasing astronomically from a population that is increasingly growing older, suffering illness, and eventually dying behind bars.¹³ More life sentences for the low-level drug offenders targeted by H.R. 6158 will only add to these costs. It would be wiser to devote those funds to implementing the provisions of the Comprehensive Addiction and Recover Act and focus federal dollars where they will actually make a difference.

We also have serious concerns about the constitutionality of the death penalty in the circumstances set forth in HR 6158. Because death is unique among punishments in its severity and irrevocability, the Supreme Court has limited the death penalty to “a narrow category of the most serious crimes” and to those offenders “most deserving of execution.” HR 6158 would be an unprecedented expansion of the use of the death penalty to the non-intentional death of a drug user. Further, H.R. 6158 raises significant federalism concerns, as it would dramatically expand the jurisdiction of the federal courts to new “capital” cases simply by virtue of the type of drug used by the victim before his or her death.

H.R. 6158 will lead to the incarceration of low-level distributors and individuals who struggle with addiction. In a time when nearly one in 100 Americans is incarcerated¹⁴ and populations of color continue to be disproportionately affected by convictions and harsh sentences,¹⁵ we must embrace a public-health approach to combatting the harmful effects of fentanyl and other opioids. For these reasons, we strongly urge you to reconsider or abandon H.R. 6158.

Please contact Michael Collins – mcollins@drugpolicy.org – if you have any questions.

Sincerely,

¹¹ <http://www.deathpenaltyinfo.org/costs-death-penalty>.

¹² 80 FR 12523 (Mar. 9, 2015), <https://www.federalregister.gov/documents/2015/03/09/2015-05437/annual-determination-of-average-cost-of-incarceration>.

¹³ U.S. Dep’t of Justice, Office of the Inspector General, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons 2-3, 10 (May 2015) (finding that inmates over age 50 are the fastest-growing demographic in federal prisons, due partly to lengthy mandatory drug sentences, and that such prisoners cost eight percent more per year to incarcerate than younger inmates, due mainly to medical costs), <https://oig.justice.gov/reports/2015/e1505.pdf>.

¹⁴ Adam Liptak, “1 in 100 U.S. Adults Behind Bars, New Study Says,” New York Times, Feb. 28, 2008, <http://www.nytimes.com/2008/02/28/us/28cnd-prison.html>.

¹⁵ “Racial Disparities in Sentencing,” ACLU, Oct. 27, 2014, https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

A New PATH (Parents for Addiction Treatment & Healing)

ACT UP Boston

AIDS United

Alliance for Positive Health

Alliance of Baptists

Baltimore Harm Reduction Coalition

Blacks in Law Enforcement of America

BOOM!Health (NY)

Boston Homeless Solidarity Committee

Broken No More

CAN-DO Foundation

Center for Living and Learning (CA)

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

Chicago Recovery Alliance

Church of Scientology National Affairs Office

Cincinnati Exchange Project

CURE (Citizens United for Rehabilitation of Errants)

#cut50

Death Penalty Focus

Drug Policy Alliance

Drug Policy Forum of California

Drug Policy Forum of Texas

Families Against Mandatory Minimums

Families for Justice as Healing

Families for Sensible Drug Policy

FedCURE

Federal Public and Community Defenders

Fellowship of Reconciliation

Friends Committee on National Legislation

Harm Reduction Action Center (CO)

Harm Reduction Coalition

Harm Reduction Michigan

Harm Reduction Services (CA)

HelpNotHandcuffs (NJ)

HIPS

Housing Works (NY)

Human Rights Defense Center

Humboldt Institute for Harm Reduction (CA)

Illinois Consortium on Drug Policy, Roosevelt University

Interfaith action for Human Rights

International Centre for Science in Drug Policy

Law Enforcement Against Prohibition

Lawyers' Committee for Civil Rights

The Leadership Conference on Civil and Human Rights

Lee's Rig Hub

Life for Pot

Michigan NORML

Moms United to End the War on Drugs

NAACP

NASTAD (National Alliance of State & Territorial AIDS Directors)

National Alliance for Medication Assisted Recovery

National Association of Criminal Defense Lawyers (NACDL)

National Association of Social Workers (NASW)

National Council for Incarcerated and Formerly Incarcerated Women and Girls (NCIFIWG)

National Council of Churches

National Council of Jewish Women

National Immigration Project

National LGBTQ Task Force Action Fund

National Organization for Women

National Viral Hepatitis Roundtable (NVHR)

Needle Exchange Emergency Distribution (NEED)

North Carolina Harm Reduction Coalition

One Million Americans, Ltd.

Orange County Needle Exchange Program (OCNEP) (CA)

People Against Injustice (CT)

Pico Network's LIVE FREE Campaign

PNNY Peer Network of New York

Prevention Point Pittsburgh

Project Inform

Protect Families First (RI)

Public Justice Center

Reentry Central

Rhode Island State Council of Churches

Safe Streets Arts Foundation (DC)

San Francisco Drug Users Union

San Francisco Safety and Wellness Coalition

Santa Fe Mountain Center

SIFMA now

Sonoran Prevention Works

Southern Tier AIDS Program

St. Ann's Corner of Harm Reduction (NY)

StoptheDrugWar.org

The Center for Harm Reduction Therapy (CA)

The Center for Law and Justice (NY)

The CHOW Project (HI)

The Constitution Project

The November Coalition

The Open Door, Inc

The Real Cost of Prisons Project

The Sentencing Project

The Student Coalition on Addiction

The United Methodist Church – General Board of Church and Society

Treatment Communities of America

Trinity United Church of Christ, Chicago

T'ruah: The Rabbinic Call for Human Rights

Union for Reform Judaism

Urban Survivors Union (CA, NC, WA)

Vocal New York