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To: Chair Scheible, Vice Chair Harris, and the Senate Judiciary Committee  
From: Erica P. Roth, Government Affairs Liaison and Deputy Public Defender  
Re: Statement in Opposition of S.B.35 and S.B.343

## I. BACKGROUND

In 1973, the Federal Government declared its “War on Drugs.” By the 1980’s, public hysteria regarding the use of crack cocaine permeated the news media. Newspapers, magazines, and television networks regularly carried lurid stories about a new “plague” of drug use, stating an “epidemic was spreading rapidly from cities to the suburbs and was destroying American society.”<sup>1</sup>

By 1986, Congress passed the bipartisan Anti-Drug Abuse Act, establishing, for the first time, mandatory minimum sentences triggered by specific quantities of cocaine. Congress also established much tougher sentences for crack cocaine offenses compared to powder cocaine cases. Specifically, distribution of just 5 grams of crack carried a minimum five-year federal prison sentence, while distribution of 500 grams of powder cocaine – 100 times the amount of crack cocaine – carried the same sentence.<sup>2</sup>

What followed is undisputed. The War on Drugs caused soaring arrests of individuals struggling with substance use disorder and increased racial disparities among arrestees. Data shows that in the 1970s, African Americans were twice as likely as white Americans to be arrested for drug-related offenses. By the 1980’s, that disparity had widened: African Americans were arrested on drug related offenses at five-times the rate of white Americans. *Id.* Importantly, the marked racial disparities in drug arrests did not reflect racial differences in violations of drug laws prohibiting possession and sale of illicit drugs. Statistical as well as anecdotal evidence indicate drug possession and drug sales cut across all racial, socio-economic, and geographic lines. *Id.*

The War on Drugs destroyed communities not only through mass incarceration but also through loss of life. Make no mistake: punishing drug use leads to more overdose-related deaths because

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<sup>1</sup> Craig Reinerman and Harry G. Levine. *Crack in America: Demon Drugs and Social Justice*. Berkeley: University of California Press, 1997.

<sup>2</sup> See U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 102-103 (2002) [hereinafter 2002 USSC REPORT].

the “fear of legal repercussion is a well-established barrier to calling 911 to get medical assistance for an overdose.”<sup>3</sup> After decades of tough-on-crime approaches to substance-use disorders, overdose deaths remain at all-time highs. Evidence-based research has definitively proven that criminalizing drug users does not lead to a reduction in drug use but rather an increase in unnecessary loss of life and economic and social disruptions through mass incarceration policies.<sup>4</sup>

## II. S.B.35 & S.B.343

In 2023, S.B.35 and S.B.343 are declaring the same state of emergency the War on Drugs did in 1973, only this time in relation to a much deadlier drug: fentanyl. Like crack cocaine-related legislation in the 1980s and 90s, these bills will trigger mandatory minimum sentences for the simple possession of any substance containing a trace amount of fentanyl. This not only will have generational impacts on our prison population, but also will increase overdose deaths. To put it simply, **this bill will kill**.

To be clear, fentanyl is dangerous, and efforts can and should be made to address importing and trafficking of fentanyl.<sup>5</sup> The Center for Disease Control (CDC) states that fentanyl is up to 50 times stronger than heroin, and fentanyl and other synthetic opioids are the most common drugs involved in overdose deaths. Over 150 people die every day from overdoses related to synthetic opioids like fentanyl. According to the CDC, the increase in deaths is a result of “many people [being] unaware that their drugs are laced with fentanyl.”<sup>6</sup>

Due to its potency compared to other illicit substances, particularly other opioid-based ones, the initial reaction to increase penalties for trafficking of fentanyl is understandable. Yet the bills are aiming at low-hanging fruit. S.B.35 and S.B.343 do not address the trafficking, sale or manufacturing of fentanyl that is cut and laced into the drug supply. Instead, these bills seek to impose draconian penalties on the individual users who buy fentanyl-laced substances for personal use or otherwise intend to possess a different substance.

In large part, the issue lies in our state’s sub-par testing capabilities. Unlike the federal government, Nevada’s laboratory testing capacities, which use qualitative and not quantitative testing, are not robust enough to provide necessary evidence to target fentanyl traffickers and not users under the proposed bill language. In practice, laboratories can determine if a drug sample contains fentanyl; however, the testing system cannot extrapolate the percentage of fentanyl

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<sup>3</sup> Wagner, K. D., et. al. (2019). Post-overdose interventions triggered by calling 911: Centering the perspectives of people who use drugs (PWUDs). *PLOS ONE*, 14(10), e0223823

<sup>4</sup> America's Opioid Ecosystem How Leveraging System Interactions Can Help Curb Addiction, Overdose, and Other Harms: Rand Corporation, [Bradley D. Stein](#), [Beau Kilmer](#), [Jirka Taylor](#), [Mary E. Vaiana](#), 2023

<sup>6</sup><https://www.cdc.gov/stopoverdose/fentanyl/index>.

compared to the primary drug intended to be possessed. In practice, an individual who possesses four sugar packets worth of cocaine laced with fentanyl, regardless of the trace amount, will now be subject to penalties intended for drug traffickers of fentanyl. This is true whether a person intended to possess fentanyl, or more likely, intended to possess a different substance and had no knowledge that substance contained fentanyl.

Moreover, S.B.35 and S.B.343 fail to address the public health crisis that stems from the opioid epidemic. This crisis requires supportive services for our community members grappling with substance use disorder, including access to Narcan and fentanyl testing strips, substance-abuse treatment, and wrap-around services, all of which are proven to keep our communities safer. The cost of these proposals will be born, either through incarceration and loss of life, or through evidence-based solutions.

### III. SOLUTION

Experts across the political spectrum are urging lawmakers to take a holistic approach that centers people who use opioids and their families when crafting legislation to combat synthetic opioids like fentanyl.<sup>7</sup> In a 600-page report issued by the RAND Corporation in 2023, experts issued key findings to support evidence-based policy approaches to the opioid crisis by acknowledging and addressing the ecosystem of drug use. Importantly, the recommendations *did not* include increasing penalties for possession of opioids. To the contrary, experts urged the reduction of penalties for possessing drugs to limit barriers to treatment, services, housing, and comprehensive support.<sup>8</sup>

When looking at penalties, it is also imperative that we hold accountable those who are truly responsible for trafficking in illicit fentanyl.<sup>9</sup> To accomplish this, law enforcement must focus on uncompounded or pure substances, which narrows the focus to those bad actors at the top of the distribution chain, not low-level users.

### IV. CONCLUSION

Increasing penalties for possession of fentanyl is yet another iteration of the drug war's ineffective and punitive strategies. To prevent overdoses and protect our communities, this body must invest in public health solutions to mitigate the harms of illicit fentanyl, provide funding for

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<sup>7</sup> <https://www.rand.org/blog/articles/2023/03/opioids-are-hurting-too-many-of-us-we-need-a-new-approach.html>

<sup>8</sup> America's Opioid Ecosystem How Leveraging System Interactions Can Help Curb Addiction, Overdose, and Other Harms: Rand Corporation, [Bradley D. Stein](#), [Beau Kilmer](#), [Jirka Taylor](#), [Mary E. Vaiana](#), 2023

<sup>9</sup> For example, the Executive Director of the San Jose Police Officers Association has been charged with attempting to import illegal fentanyl from overseas. She now faces up to 20 years in prison under current laws. <https://www.kron4.com/news/bay-area/san-jose-police-union-executive-fired-for-drug-smuggling-scandal/>

research, and offer alternative strategies to simultaneously address the opioid epidemic while preventing backsliding on criminal justice reform. Both the moral and economic cost is too high.

Preventing overdose deaths and treating addiction are matters of public health—not prisons. Lawmakers should follow the guidance of public health experts. Both history and contemporary research make one thing clear: increasing penalties for possession of drugs does not make our communities safer. In fact, it has the opposite effect.