

**REJECTING FENTANYL PENALTY INCREASES in S. 2635
and
UNDERSTANDING CURRENT PUNISHMENTS FOR FENTANYL**

S. 2635 would dramatically worsen mandatory minimum sentences for fentanyl and fentanyl analogue offenses. The bill should be opposed by any lawmaker who wants to stop America's opioid dependence and ensure that the addicted get the treatment they need. If passed by Congress, S. 2635 would incarcerate low-level drug users, addicted people, and small-quantity drug sellers for 5, 10, 20 years, or even life without parole for as little as 0.5, 2, 5, or 20 grams of any substance containing trace amounts of fentanyl or scheduled or unscheduled fentanyl analogues.

FAMM opposes S. 2635 and urges all members of Congress to vote “no” on this proposal.

The bill will not solve America's opioid crisis or deter the addition of fentanyl and fentanyl analogues to other drugs. The bill would

- Not reduce demand for or supply of dangerous opioids
- Increase prison populations and costs for taxpayers without increasing public safety
- Give drug users and those who are addicted to drugs unjust and ineffective prison terms that don't help them achieve sobriety
- Be a step backwards in America's public health approach to drug crime and to the growing bipartisan efforts to reform drug sentencing laws.

Below, we explain what S. 2635 would do and why it would not make Americans safer or solve America's opioid problems.

Mandatory minimum sentences did not prevent and are not stopping the opioid epidemic.

- Lengthy 5, 10, 20-year, and life without parole mandatory minimum sentences have existed for heroin, fentanyl, and fentanyl analogues since 1986.
- These mandatory sentences have not deterred drug use or drug importation, or reduced demand for or supply of drugs over the years that the opioid crisis has been building.
- Experts have found that making punishments harsher does not deter crime. Making it more likely that a person will be caught and swiftly punished, however, does.
- The money spent on the excessive sentences in S. 2635 would be better spent on drug abuse prevention and treatment to reduce demand, and better drug interdiction and international enforcement to increase the certainty of detecting and stopping the supply.
- Mandatory sentences have done nothing to prevent our current heroin and fentanyl problems. Making fentanyl sentences harsher will not make the opioid epidemic disappear, either.

Current mandatory minimums for fentanyl and fentanyl analogues are already triggered by even miniscule amounts of these drugs.

- Highly impure quantities of substances containing any amount of fentanyl or its analogues already carry stiff mandatory minimum sentences.

- Example: 399.9 grams of baking soda mixed with 0.1 grams of fentanyl requires a 10-year mandatory minimum term.
- Punishments are even more severe for analogues of fentanyl, even if the mixture carries only tiny amounts of the analogue drug.
 - Example: 99.99 grams of baking soda mixed with 0.01 grams of an analogue of fentanyl carries a 10-year mandatory minimum term.

Current mandatory minimums for fentanyl and fentanyl analogues already apply to low-level drug offenders, not kingpins and major manufacturers.

- The U.S. Sentencing Commission has repeatedly found that current mandatory minimum sentences apply mostly to those who play low-level roles in drug conspiracies, such as mules, couriers, or street-level sellers – and this holds true in fentanyl cases.¹
- It is true that a very small amount of fentanyl may prove fatal if misused. Nonetheless, the current fentanyl quantities do seem more reasonably targeted at mid-level or major dealers, manufacturers, or importers. These quantities should not be reduced.

S. 2635 would make the fentanyl and fentanyl analogue amounts so small that they would subject users and addicts to sentences that should be reserved for higher-level traffickers.

- Under S. 2635, a mere 0.5, 2, 5, or 20 grams of a mixture or substance containing fentanyl or an analogue of fentanyl would trigger the 5, 10, 20-year, or life without parole mandatory minimum terms.
- These tiny amounts are likely to be personal use and possession quantities, quantities shared among friends, or quantities sold to maintain a person’s own drug addiction.
- Miniscule drug quantities with trace amounts of fentanyl or fentanyl analogues would trigger unjustifiably long mandatory minimum prison terms:
 - Example: 0.49 grams of crack mixed with 0.01 grams of an analogue of fentanyl would trigger a 5-year mandatory minimum prison term.
 - Example: 1.99 grams of cocaine mixed with 0.01 grams of fentanyl would trigger a 5-year mandatory minimum prison term.
 - Example: 4.99 grams of marijuana sprayed with 0.01 grams of fentanyl would trigger a 10-year mandatory minimum prison term.

S. 2635 would punish tiny amounts of fentanyl more harshly than larger amounts of heroin, powder cocaine, crack cocaine, PCP, and methamphetamine.

- Example: 4.99 grams of baking soda mixed with 0.01 grams of an analogue of fentanyl would, under S. 2635, merit the same 10-year mandatory minimum sentence as
 - 50 grams of pure methamphetamine
 - 100 grams of pure PCP
 - 280 grams of pure crack cocaine
 - 5,000 grams of pure powder cocaine.

¹ U.S. Sentencing Comm’n, *Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids, and Fentanyl and Fentanyl Analogues Amendments* (Jan. 2018) (showing that a majority of defendants sentenced for fentanyl offenses are low-level dealers; of the 51 persons convicted of a fentanyl-related offense in FY 2016, 29 served “street-level dealer,” “courier/mule,” and “employee/worker” functions).

S. 2635 would punish those lacking *mens rea* and would not deter opioid offenders, because most drug users and sellers do not even know when their drugs include fentanyl or fentanyl analogues.

- Fentanyl is typically added as a booster to other kinds of drugs, like heroin, before it even enters the United States – by the time the drugs get to users or sellers, they do not usually even know fentanyl has been added to them. They may not intend to possess or sell fentanyl or fentanyl analogues.
- If people do not know whether drugs include fentanyl, harsher sentences for fentanyl will not deter them from using or selling those drugs.

WHAT S. 2635 WOULD DO

MANDATORY MINIMUM SENTENCE (18 U.S.C. § 841(b))	MANDATORY MINIMUM SENTENCE (18 U.S.C. § 960(b))	CURRENT FENTANYL AMOUNT	S. 2635 FENTANYL AMOUNT
<p>5 YEARS for possession with intent to distribute</p> <ul style="list-style-type: none"> - 10 YEARS if person has a prior drug conviction - 20 YEARS if death or serious bodily injury result from use of the drugs 	<p>5 YEARS for importation</p> <ul style="list-style-type: none"> - 10 YEARS if person has a prior drug conviction - 20 YEARS if death or serious bodily injury result from use of the drugs - LIFE WITHOUT PAROLE if person has prior drug conviction and death or serious bodily injury result from use of the drugs 	<p>40+ grams of a mixture or substance containing a detectable amount of fentanyl</p> <p>OR</p> <p>10+ grams of a mixture or substance containing a detectable amount of an analogue of fentanyl</p>	<p>2+ grams of a mixture or substance containing a detectable amount of fentanyl</p> <p>OR</p> <p>0.5+ grams of a mixture or substance containing a detectable amount of a scheduled or unscheduled analogue of fentanyl</p>
<p>10 YEARS for possession with intent to distribute</p> <ul style="list-style-type: none"> - 20 YEARS if person has a prior drug offense - 20 YEARS if death or serious bodily injury result from use of the drugs - LIFE WITHOUT PAROLE if person has 2 or more prior drug convictions 	<p>10 YEARS for importation</p> <ul style="list-style-type: none"> - 20 YEARS if person has prior drug offense - 20 YEARS if death or serious bodily injury result from use of the drugs - LIFE WITHOUT PAROLE if person has prior drug conviction and death or serious bodily injury result from use of the drugs 	<p>400+ grams of a mixture or substance containing a detectable amount of fentanyl</p> <p>OR</p> <p>100+ grams of a mixture or substance containing a detectable amount of an analogue of fentanyl</p>	<p>20+ grams of a mixture or substance containing a detectable amount of fentanyl</p> <p>OR</p> <p>5+ grams of a mixture or substance containing a detectable amount of a scheduled or unscheduled analogue of fentanyl</p>