

Written Statement of Angela Pacheco for the Hearing on H.R. 2851, the “Stop the Importation and Trafficking of Synthetic Analogues Act of 2017” By the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

**Tuesday, June 27, 2017, at 11:00 a.m.
2141 Rayburn House Office Building**

Mr. Chairman, Ranking Member Jackson Lee. Thank you for the opportunity to testify on this important issue. My name is Angela Pacheco and I served as the district attorney for the First Judicial District in northern New Mexico for seven years, retiring in December 2015. During my time in office, I worked in collaboration with colleagues from Homeland Security, DEA and US Attorney’s office to prosecute federal cases. I previously served as an assistant district attorney, deputy district attorney and supervisor of the Family Violence Unit of the First Judicial District, 1989-2000; worked as a litigation attorney for the state Risk Management Division, 2000-03; was assistant city attorney for the city of Santa Fe, 2003-06; was city attorney for the city of Española, 2006-08. Before receiving my law degree, I worked for 13 years as a social worker, investigating child abuse/neglect complaints, managing Title XX social services programs, and alcohol programs in New Mexico. I also, ran an adolescent drug/alcohol treatment program in northern New Mexico for three years. I am currently happily retired enjoying my new found freedom, yet remain involved with issues of great importance to me, as a commissioner on the New Mexico Sentencing Commission and a board member of Drug Policy Alliance.

Let me begin by saying that the idea behind this bill is laudable. It is true that many synthetic drugs that are substantially similar to drugs like fentanyl are entering our country and are behind a lot of the overdose deaths we see. The overdose crisis is a national tragedy. I have seen its devastating consequences in my home state and heard the anguished pleas for treatment by family members whose loved one is challenged by an opioid addiction. I have seen the death and destruction as I have travelled across the country. As public servants we are all committed to the health, welfare and safety of our communities. Members of Congress should be alarmed, Members of Congress should take action. But the problem with this bill, and the reason why I must respectfully oppose it, is that it takes a hammer approach to an issue that needs a scalpel.

It is important to understand the trajectory of the substances targeted in the bill. Fentanyl, and its synthetic derivatives, are often manufactured outside the U.S. Last June, the head of the DEA, Chuck Rosenberg, told the Senate Judiciary Committee that, “Illicit fentanyl, fentanyl derivatives, and their immediate precursors are often produced in China.”¹ They are often added to heroin high up the chain and then sold on the streets of the U.S. So what does that mean from a prosecutorial standpoint? It means that proposals like the ones contained in this bill to punish each and every drug seller, regardless of their role, for the sale of these synthetic drugs will be futile for two reasons: 1) Presumably the harsh sentences in the bill are supposed to deter drug sellers from selling these fentanyl derivatives, but how is a drug seller supposed to be deterred if they do not know what is in the substance they sell and believe it to simply be heroin? These drugs are manufactured outside the U.S. For most, they do not know what the composition and potency is of the drugs they sell by the time they arrive on the streets. 2) The bill has no *mens rea* requirement. *Mens rea* is a Latin legal term meaning you have to establish criminal intent before prosecuting. In essence, this bill creates a strict liability situation, where possession of heroin with a synthetic derivative results in an enhanced sentence. This bill would mean that individuals are exposed to additional lengthy sentences regardless of whether they knew or not that a drug they were selling contained these synthetic drugs.

A larger issue is that there has been broad recognition, both in Congress and across the country, that our federal sentencing guidelines for drugs is unjust and racially discriminatory.² Indeed, just a year and a half ago I was heartened to see this very Committee unanimously approve the Sentencing Reform Act of 2015, which dramatically reduced mandatory minimum sentences for drug offenses.³ This bill would be a setback to these moves. It even includes a new mandatory minimum sentences. It’s as if the mistakes of the past are resurfacing in the guise of a new piece of legislation.

As I mentioned, often these synthetic drugs are added to heroin, so federal prosecutors could add the penalties contained in this bill to the already stiff sentences individuals face for

¹Department of Justice, “Testimony of Chuck Rosenberg,” <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Rosenberg%20Testimony.pdf>.

²“Racial Disparities in Sentencing,” ACLU, Oct. 27, 2014, https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

³<https://www.congress.gov/bill/114th-congress/house-bill/3713>

selling heroin. Consequently, this bill risks exacerbating the incarceration crisis we face at the federal level. As you are aware, the new charging memo from Attorney General Jeff Sessions encourages federal prosecutors to charge as much as they can in drug cases. Similarly, there is a lot of political and media pressure on prosecutors on the state and federal level to do something to slow the opioid epidemic. Should this bill pass, we will likely see federal prosecutors charging individuals not simply for the sale of heroin, but also charging them if the heroin they sell contains the smallest trace of a synthetic drug. The end result will be more people in prison, for longer amounts of time, an increase in federal dollars spent, with no discernible benefit to the public.

Perhaps the most troubling aspect of this bill is the power it grants the Attorney General. Under current law, the Attorney General must work with public health officials at the Department of Health and Human Services to decide which drugs belong in which schedule and therefore which penalties apply.⁴ This bill completely circumvents the public health process, leaving the scheduling decision almost entirely in the hands of the Attorney General. Let me be clear – prosecutors and law enforcement should never be permitted to unilaterally decide which drugs should be made illegal. That is not our role. We are not public health experts, and we are not scientists. This bill doubles down on one of the key flaws of the Controlled Substances Act, by enabling a government agency, and individuals within it, to create law. Congress should make the laws. Agencies and law enforcement enforce the laws. Law enforcement – be they the Attorney General or a local police officer – should never be in a position to set penalties for drug offenses. We have separation of powers for good reason, and lawmakers should not cede their constitutional rights so easily.

We have made great strides as a country in how we treat drug use. Just last year, this Committee worked on the Comprehensive Addiction Recovery Act, a bill that was subsequently signed into law.⁵ The legislation recognizes that despite our country undergoing a very severe opioid epidemic, we need a public health approach. I was on the front line when this epidemic began. New Mexico's overdose rate has been one of the highest in the nation for over two decades. We have harsh sentences on the books already, at the state and federal level, and they

⁴ <https://www.deadiversion.usdoj.gov/schedules/>

⁵ <https://www.congress.gov/bill/114th-congress/senate-bill/524/text>

did nothing to stop our opioid epidemic. As a prosecutor, I would back tougher sentences for drugs if I thought it would stop all the deaths we are seeing from overdoses. But it won't. Our nations approach to drug related crimes and drug addiction has failed. Enhancing a drug sentence will ensure continued failure in managing an already out of control system to address the problem. The federal sentencing regime is broken. We should not be adding more drugs to this flawed system. And we certainly shouldn't be giving the Attorney General unchecked power on this issue. We need investments in public health. We need treatment. We need harm reduction. But fundamentally, we must learn from the mistakes of the past and avoid responding to these new challenges by continuing the failed policies of the war on drugs.

Thank you.