

Written Testimony Against HB 406
Submitted to the House Judiciary, Rules and Administration Committee
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Chairman Skaug, and House Judiciary, Rules and Administration Committee Members,

The ACLU of Idaho stands in firm opposition of HB 406.

While this written testimony will argue against the strategies of HB 406 in combatting fentanyl addictions and deaths, we will first acknowledge the tremendous loss that many Idaho families have experienced due to fentanyl use. Addiction is incredibly complex. Addiction is devastating for individuals caught in it. And addiction is devastating to the loved ones, including lawmakers, who watch loved ones struggle and, sometimes, die, from addiction.

The fentanyl problem is real. The HB 406 one-note solution of incarceration with ever escalating sentence lengths does not fix the fentanyl problem. Evidence-based and successful approaches to fentanyl exposure and addiction include increasing the accessibility of fentanyl testing strips, the accessibility of Naloxone, increasing harm-reduction policing, expansion of evidence-based pharmacological treatments, and stigma reduction messaging emphasizing fentanyl risk. *Colleen Barry PhD, MPP (2018) [Fentanyl and the Evolving Opioid Epidemic, Psychiatric Services Vol. 69, Issue 1.](#)*

Instead of improving Idahoans' chances of surviving fentanyl:

HB 406 won't achieve drug control.

Researchers have demonstrated that blanket solutions to drug control, such as mandatory minimums, are *the least effective policy solution* to drug use. *Caulkins, J.P. Are mandatory minimum drug sentences cost effective? Research brief, RAND Corporation. Accessed online. https://www.rand.org/pubs/research_briefs/RB6003.html* In fact, the mandatory minimums provisioned by HB 406 are unjustifiable, based on cost-effectiveness, to reduce drug consumption and crime. Partly, this inefficacy of HB 406 is because it will undoubtedly lead to more incarceration. And incarceration is incredibly expensive. Idaho spends over \$22,000 per incarcerated person – roughly \$209 million per year. *The United States Department of Justice, National Institute of Corrections. Idaho 2019. Accessed online. <https://nicic.gov/state-statistics/2019/idaho-2019>*

Crucially, the bill will not deter drug use. In fact, there is no statistically significant link between state-level drug-related imprisonment rates and state-level drug-related problems such as overdose deaths, arrests, and self-reported drug use. *More imprisonment does not reduce state drug problems. Issue brief, Pew Charitable Trusts. March 8, 2018. Accessed online. <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>* To be clear, this bill will not achieve

Idaho's drug control objectives. It will not reduce drug consumption or deaths, nor improve or achieve public health standards. It will not save lives.

The removal of intent to distribute from trafficking places sentencing power in the hands of individual arresting officers rather than Judges, or even prosecutors.

By tying sentencing outcomes to quantities, HB 406 erases the important roles of prosecutors and judges. Prosecutors and judges are meant to look at the totality of the circumstances of every particular defendant and place each case in the context of precedent. They are meant to weigh the elements of culpability. HB 406 erases their roles and ties their hands. We should not be placing more power in the hands of arresting officers rather than judges.

HB 406's "drug induced homicide" erases criminal intent—mens rea—an indispensable due process protection in homicide law.

Drug induced homicide statutes do not require mens rea (criminal intent) for the homicide, thus operating as strict liability crimes. "Legislatures enjoy expansive freedom to determine . . . the extent to which moral culpability should be a prerequisite to conviction . . . Even so, enacting laws that impose harsh penalties but contain no minimum mens rea requirements runs counter to what is widely considered to be the very foundation of American criminal jurisprudence. Mens rea is often regarded as 'the measuring rod for our system of criminal responsibility,' essential to imposing liability for causing death." Kaitlin Phillips (2020) Duke Law School. [From Overdose to Crime Scene: The Incompatibility of Drug-Induced Homicide Statutes with Due Process](#). Vol. 70.659.

HB 406 will lead to more disproportionate enforcement of severe drug penalties against Idaho's Black and Brown communities.

National statistics demonstrate unequal application of criminal statutes based on race. "Black and white Americans use illicit drugs at roughly similar rates, but about one in four people arrested for drug law violations are Black, although Black people make up 14% of the U.S. population." *One in Five: Disparities in Crime and Policing*. By Nazgol Ghandnoosh, Ph.D. and Celeste Barry, November 2, 2023, citing: *Federal Bureau of Investigation*. (2019). *Crime in the United States 2019*; *U.S. Census Bureau*. (2021). *State and County QuickFacts*; *Substance Abuse and Mental Health Services Administration (SAMHSA)*. (2023). *Results from the 2021 National Survey on Drug Use and Health*; *Miech, R., Johnston, L., O'Malley, P., Bachman, J., Schulenberg, J., & Patrick, M.* (2022). *Monitoring the Future: National survey results on drug use, 1975-2021*. *The University of Michigan Institute for Social Research*. Idaho statistics mirror national ones, with greater proportionalities of Latinx community members arrested and jailed than white communities. *Chantal DeMill* (2016), [Latinos and the Idaho Criminal Justice System 2005 – 2014](#), *Idaho State Police*. Adding a sweeping new set of penalties that require no proof of criminal intent will amplify the disparate outcomes that Idaho criminal justice systems already produce.

We urge you reject HB 406 as it is not a solution for Idahoans, it will not achieve Idaho's drug control objectives. It will not reduce drug consumption or deaths, nor improve or achieve public health standards. It will not save lives.

Respectfully,
Julianne Donnelly Tzul
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