

United States Senate

WASHINGTON, DC 20510

April 13, 2021

President Joe Biden
The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

Dear President Biden,

We write to express our serious concerns with the Trump Administration’s misguided class-wide fentanyl scheduling order and to urge your Administration to pursue a public health response to our country’s fentanyl crisis.¹ You have committed to end mandatory minimums, eliminate racial disparities in the criminal-legal system, and ensure fair sentences. As members of Congress, we are eager to work with your Administration to achieve these goals.² However, the criminalization of all fentanyl analogues rejects these objectives and fails to provide our communities with the help and support needed to address the public health crisis. Instead, it revives the erroneous policies of the War on Drugs that funneled countless people, many living with addiction, into prison. Notably, the number of overdose deaths attributed to fentanyl and related substances has continued to rise since 2018 despite the temporary scheduling order.³ Your Administration should embrace the lessons of the past and prioritize evidence-based public health approaches to ending the fentanyl crisis that is devastating our communities.

Fentanyl use is a serious crisis, and combatting substance use—including the use of fentanyl—is an important priority. However, classifying all fentanyl analogues as Schedule I substances is not necessary to allow prosecutors to bring cases. Harmful fentanyl analogues are illegal without class-wide scheduling. The government can prosecute them using the Federal Analogue Act. The data bears this out. Between 2015 and 2019, prosecutions for federal fentanyl offenses increased by nearly 4,000%, and fentanyl-analogue prosecutions increased by 5,000%.⁴ From 2019 to 2020, most fentanyl-analogue prosecutions involved analogues that had been individually

¹ Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act, Pub. L. No. 116-114 (2020).

² See *The Biden Plan for Strengthening America’s Commitment to Justice*, BIDEN-HARRIS (2020), <https://joebiden.com/justice>.

³ Centers for Disease Control, Opioid Overdose: Fentanyl, <https://www.cdc.gov/drugoverdose/opioids/fentanyl.html#:~:text=Deaths%20involving%20illicitly%20manufactured%20fentanyl%20on%20the%20rise&text=Overdose%20deaths%20involving%20synthetic%20opioids%20were%20nearly%2012%20times%20higher,involving%20synthetic%20opioids%20in%202019> (last visited April 12, 2021); Press Release, Centers for Disease Control, Overdose Deaths Accelerating During COVID-19 (Dec. 17, 2020), <https://www.cdc.gov/media/releases/2020/p1218-overdose-deaths-covid-19.html>

⁴ U.S. SENTENCING COMM’N, FENTANYL AND FENTANYL ANALOGUES: FEDERAL TRENDS AND TRAFFICKING PATTERNS 24 (Jan. 2021), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

scheduled prior to class-wide scheduling.⁵ The federal government must be wary of expanding the reach of these penalties by adopting a policy explicitly designed to expedite drug prosecutions and increase penalties.

Classifying all fentanyl analogues as Schedule I substances will also perpetuate the racial disparities that exist throughout the criminal-legal system. Scheduling these substances would permanently expand the application of mandatory minimum sentences to the entire class of fentanyl-related compounds without considering the unique qualities of each analogue, including the potency and purity of a particular fentanyl-related substance. For example, just a trace amount of a fentanyl analogue in a mixture with a combined weight of 10 grams—10 paper clips—can trigger a five-year mandatory minimum, with no evidence needed that the seller had any knowledge that the substance contained fentanyl.⁶ People of color will disproportionately be subjected to these mandatory minimums. Data shows significant racial disparities in the prosecution of fentanyl cases, with people of color comprising almost 75% of those sentenced in 2019.⁷ This holds true for fentanyl analogues, for which 68% of those sentenced were people of color.⁸ In addition, more than half of all federal fentanyl-analogue prosecutions in 2019 involved a street-level seller or other minor role; only 10.3% of these cases were of individuals who had committed more serious offenses.⁹ At a time when communities of color have been disproportionately impacted by the COVID-19 pandemic, we must not exacerbate health inequities further by deploying the criminal-legal system against another public health crisis.¹⁰

Finally, class-wide scheduling impedes researchers' and scientists' ability to develop evidence-based, public health solutions needed to overcome the fentanyl crisis. In a July 2019 letter to the Department of Health and Human Services (HHS), bipartisan members of the Senate Judiciary Committee warned that the same barriers to research that scientists encounter when attempting to study Schedule I drugs would apply to substances added by a class-wide scheduling policy.¹¹ Senate Judiciary Committee members further warned that “the failure to engage necessary health experts vests far too much authority to a law-enforcement agency and may result in action that will deter valid, critical medical research aimed at responses to the opioid crisis, including efforts to identify antidotes to fentanyl-analogue overdoses and improved treatment outcomes.”¹² Similarly, in her January 2020 statement before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, Dr. Sandra Comer, the public policy officer for

⁵ See *id.* at 23 (“Most of the substances identified in the fiscal year 2019 sentencing documents as “fentanyl analogues” are substances listed in a schedule of the CSA before publication of the DEA’s [class-wide scheduling order.]”).

⁶ See generally BRIAN T. YEH, CONG. RESEARCH SERV., RL30722, DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS (2015), <https://fas.org/sgp/crs/misc/RL30722.pdf>.

⁷ See *id.* at 24.

⁸ *Id.*

⁹ *Id.* at 28 (summation of street-level dealer; courier/mule; renter/storer; enabler; and user/offender functions at 51.5%; summation of most serious functions, importer/high-level distributor and leader/organizer at 10.3%).

¹⁰ See *COVID-19 Racial and Ethnic Health Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html>.

¹¹ See Letter from Senators Richard J. Durbin, Michael S. Lee, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Mazie Hirono, Cory A. Booker & Kamala D. Harris to Alex M. Azar II, Sec’y, U.S. Dep’t of Health & Human Servs. (Jul. 10, 2019), <https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20DOJ%20HHS%207.10.pdf>.

¹² *Id.*

the College on Problems of Drug Dependence, strongly recommended that any legislation on scheduling synthetic opioids should involve HHS's science-based agencies, specifically the National Institute on Drug Abuse and the U.S. Food and Drug Administration.¹³ Recent research has confirmed that the class-wide scheduling action has improperly scheduled substances with therapeutic promise and low abuse potential.¹⁴ By continuing the categorization of all fentanyl analogues as Schedule I substances, the Administration would deter valid, critical medical research aimed at responses to the opioid crisis, including efforts to identify antidotes to fentanyl-analogue overdoses and improved treatment options.¹⁵

We are profoundly concerned about fentanyl-related deaths, and bold actions to end this national emergency are urgently needed. This will take a concerted effort by your Administration to develop and champion the public health solutions that communities so desperately need to defeat it. We look forward to working with you and your Administration to enact just and restorative policies that will meaningfully transform our response to drug use and save lives, and we encourage you to reconsider class-wide scheduling of fentanyl in favor of an equitable, public health-focused approach to the crisis.

Sincerely,



Cory A. Booker
United States Senator




Mazie K. Hirono
United States Senator



Sheldon Whitehouse
United States Senator



Edward J. Markey
United States Senator



Elizabeth Warren
United States Senator

¹³ See Statement of Professor Sandra D. Comer, Pub. Policy Officer, Coll. on Problems & Drug Dependence, Before the Subcomm. on Crime, Terrorism & Homeland Sec., H. Comm. on the Judiciary (Jan. 28, 2020), <https://docs.house.gov/meetings/JU/JU08/20200128/110392/HHRG-116-JU08-Wstate-ComerS-20200128.pdf>.

¹⁴ Comer, *supra* note 11.

¹⁵ Sandra D. Comer et al., *Potential Unintended Consequences of Class-Wide Drug Scheduling Based on Chemical Structure: A Cautionary Tale for Fentanyl-Related Compounds*, 221 DRUG & ALCOHOL DEPENDENCE 3 (2021), <https://www.sciencedirect.com/science/article/pii/S0376871621000259>.