

**Testimony of Patricia L. Richman  
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**April 14, 2021**

**U.S. House of Representatives Committee on Energy and Commerce  
Health Subcommittee Hearing**

***Hearing on “An Epidemic within a Pandemic: Understanding Substance  
Use and Misuse in America”***

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Chairwoman Eshoo, Ranking Member Guthrie, members of the Subcommittee, thank you for inviting me to participate in this important hearing. My name is Patricia Richman and I am National Sentencing Resource Counsel for the Federal Public and Community Defenders, based in the Office of the Federal Public Defender for the District of Arizona. At any given time, Federal Public and Community Defenders and other appointed counsel under the Criminal Justice Act represent 80 to 90 percent of all individuals in the federal criminal system because they cannot afford counsel.

**I. Introduction**

I focus my remarks today on one proposed response to soaring overdose deaths: the permanent or continued classwide scheduling of fentanyl analogues.<sup>1</sup> But first, I want to speak a little bit about where my perspective comes from.

I began my career as an Assistant Federal Public Defender in Baltimore, Maryland, where the scars of the war on drugs run deep.

For decades, Baltimore officials and law enforcement agencies have prioritized criminalization over a public health response to drugs. That approach has failed:

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<sup>1</sup> The Federal Public and Community Defenders have previously addressed the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on the fentanyl analogue classwide scheduling proposal; that testimony is still relevant to this issue and is incorporated into this statement. *Fentanyl Analogues: Perspectives on Classwide Scheduling*: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 116th Cong. 4 n.18 (Jan. 2020) (Testimony of Kevin L. Butler, Fed. Pub. Defender for the Northern District of Alabama,) (“Butler Test.”), <https://bit.ly/3dPqEYm>.

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Overdose deaths in the city are still sky high,<sup>2</sup> as is the racially disparate enforcement of drug laws. In 2016, the Department of Justice (“Department”) found that police in Baltimore have been arresting Black individuals at rates five times higher than for others and that the racial disparity “*is not attributable to any legitimate law enforcement objective.*”<sup>3</sup>

As a public defender in Baltimore, many of my clients were the casualties of harsh war-on-drugs enforcement policies as well as centuries of racial discrimination. As children, many of my clients grew up in communities where generations of excessive punishment for drug crimes had perpetuated an unbroken cycle of trauma and socioeconomic marginalization.<sup>4</sup> Despite facing these challenges, few of my clients received appropriate medical, mental health, or educational interventions during their childhood or adolescence. Instead, their first and only opportunities for treatment for psychiatric and substance use disorders was in the criminal legal system, and that treatment was often inconsistent and inadequate.<sup>5</sup> Today, many parts of Baltimore remain a “treatment desert,”<sup>6</sup> where huge economic and health

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<sup>2</sup> See Maryland Opioid Operational Command Center: 2020 Second Quarter Report. Apr. 1, 2020–Jun. 30, 2020, at 3 (Sept. 22, 2020) (“Maryland Second Quarter Report”) <https://bit.ly/3d5xeLm> (“According to preliminary data provided by the Vital Statistics Administration (VSA) of the Maryland Department of Health (MDH), there were significant increases in unintentional intoxication fatalities related to nearly all major drug categories in Maryland through the second calendar quarter of 2020.”).

<sup>3</sup> See United States Department of Justice Civil Rights Division, *Investigation of the Baltimore City Police Department* (Aug. 10, 2016) (“DOJ Report”), <https://bit.ly/3d6zzW4>. In 2019, Black people and people who identify as Hispanic made up 42 percent of Maryland’s population, but represented more than 83 percent of people sentenced in Maryland’s federal court. See Premal Dharia & C. Justin Brown, *Opinion: Maryland’s Senators Must Ensure Biden’s Judicial Nominees Embrace Reform*, Wash. Post (Feb. 9, 2021), <https://wapo.st/2Q5dFcR>.

<sup>4</sup> Many Baltimore neighborhoods have shorter life expectancies and experience poorer health conditions than “economically distressed cities in Nigeria, India, China and South Africa” and in 2015, Baltimore ranked in the top three cities with teens seeing the “highest prevalence of sexual violence, substance abuse, depression, and PTSD.” See Edwin Rios, *7 Charts Explaining Baltimore’s Economic and Racial Struggles*, Mother Jones (Mar. 20, 2017), <https://bit.ly/3t8vh6m>.

<sup>5</sup> See Meredith Cohn, *Maryland Made a Plan to Help People Leaving Prison get Drug Treatment—But it Never Used it*, Wash. Post (Mar. 11, 2019), <https://wapo.st/2POZg4M>.

<sup>6</sup> See Brian Mann, *Drug Overdose Deaths Surge Among Black Americans During Pandemic*, NPR (Mar. 3, 2021), <https://n.pr/3s5hl69>.

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disparities<sup>7</sup> leave substance use treatment often inaccessible to the city’s poor<sup>8</sup>—who are often Black and Brown residents—as overdose deaths remain high.<sup>9</sup>

The harmful policies first adopted in the war on drugs have failed not just in Baltimore, but across America. Tens of millions of Americans continue to struggle with substance-use disorder and its consequences.<sup>10</sup> Near-daily headlines reporting large scale seizures of a variety of drugs prove that our Nation’s choice to address drug dependence through sweeping law enforcement efforts, rather than public health responses, has failed to reduce demand.<sup>11</sup> Overdose deaths have surged during COVID-19, including new spikes in deaths involving cocaine, methamphetamine, and other psychostimulants.<sup>12</sup> The overdose crisis, which has run parallel to the war on drugs for the past three decades<sup>13</sup> is “the clearest indictment so far of the failure of prohibition to curb drug use.”<sup>14</sup>

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<sup>7</sup> See Jay A. Perman, MD, *The Greatest Gap: Health Inequity in Baltimore*, University of Maryland, Balt. (June 2016), <https://bit.ly/3wHplDw>.

<sup>8</sup> See German Lopez, *The Opioid Epidemic is Increasingly Killing Black Americans. Baltimore is Ground Zero*, Vox (Apr. 1, 2019), <https://bit.ly/3uHWAVx>.

<sup>9</sup> See *Maryland Second Quarter Report* at 3.

<sup>10</sup> Substance Abuse and Mental Health Services Administration, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health*, at 2 (2020), <https://bit.ly/2RvoZQp> (In 2019, approximately 20.4 million people aged 12 or older had a substance use disorder (SUD) related to their use of alcohol or illicit drugs in the past year).

<sup>11</sup> See, e.g., U.S. Customs and Border Control, *CBP Air and Marine Operations and Partners Seize Combined 4 Tons of Cocaine in Eastern Pacific* (Apr. 7, 2021), <https://bit.ly/327YXo6>; News Release, *Law Enforcement Seizures of Methamphetamine, Marijuana Rose During Pandemic*, National Institute on Drug Abuse (Mar. 2, 2021), <https://bit.ly/3wOCLxg>; U.S. Customs and Border Control, *Border Patrol Agents Seize Over 800 Pounds of Marijuana* (Apr. 6, 2021), <https://bit.ly/3dabduG>; Stella Chan & Amanda Jackson, *DEA Announces Biggest Domestic Seizure of Meth in Agency History*, CNN (Oct. 14, 2020), <https://cnn.it/3uFeSGO>.

<sup>12</sup> See Joan Stephenson, *CDC Warns of Surge in Drug Overdose Deaths During COVID-19*, JAMA Health Forum (Jan. 5, 2021), <https://bit.ly/3t6agt2>.

<sup>13</sup> See Hawre Jalal, et al., *Changing Dynamics of the Drug Overdose Epidemic in the United States from 1979 through 2016*, Science (Sept. 21, 2018), <https://bit.ly/3sani7l>.

<sup>14</sup> See *Controlled Substances: Federal Policies and Enforcement*: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 117th Cong. 2 (Mar. 2021) (Testimony of Katherine Neill Harris, Ph.D., Rice University’s Baker Institute for Public Policy), <https://bit.ly/3uGwxOF>.

## II. Classwide Scheduling of Fentanyl Analogues

I now turn to the principal topic of my testimony today: the permanent or continued classwide scheduling of fentanyl analogues is not the answer to the overdose crisis. Instead, it takes us backward by returning to the failed and unjust strategies of the drug war.

President Trump's Department of Justice ("Department") and Drug Enforcement Agency (DEA) administratively implemented classwide scheduling of fentanyl analogues in February 2018,<sup>15</sup> and in 2020, Congress extended that control until May 6, 2021.<sup>16</sup> There are many proposals to make this control permanent, including H.R. 1910, the "Federal Initiative to Guarantee Health by Targeting Fentanyl Act."<sup>17</sup> H.R. 1920 would amend the Controlled Substances Act by permanently placing an unknown number of "fentanyl-related substances" in Schedule I of the list of federally controlled substances, if their chemical structure has been modified in one (or more) of the five specific ways set forth in the bill.

Since 2015, fentanyl, fentanyl analogues, and other synthetic opioids have replaced heroin and crack as the face of drug misuse in our country.<sup>18</sup> Fentanyl is a potent, fast-acting, synthetic opioid. Fentanyl analogues are substances with chemical structures and effects substantially similar to fentanyl. Fentanyl and its analogues have increasingly emerged in the illegal drug market, most often added to heroin or sold in counterfeit opioid prescription pills.<sup>19</sup>

Classwide scheduling of fentanyl-related substances would "give the DEA broad and unilateral authority to place any existing or future substance it deems to have a certain chemical structure on Schedule I, the highest restriction, with no further

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<sup>15</sup> See, e.g., Schedules of Controlled Substances: Temporary Placement of Fentanyl-Related Substances in Schedule 1, 83 Fed. Reg. 5188, n.4 (Feb. 6, 2018) (*2018 Scheduling Order*).

<sup>16</sup> *Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act*, Pub. L. No. 116-114 (2020). The Trump Administration referred to fentanyl analogues as "fentanyl-related substances," and the terms have been used interchangeably.

<sup>17</sup> H.R. 1910, 117th Cong. (2021).

<sup>18</sup> See Daniel Ciccarone, *The Triple Wave Epidemic: Supply and Demand Drivers of the US Opioid Overdose Crisis*, Int'l. J. Drug Policy, at 2 (Sep. 2020), <https://bit.ly/3s13hQI> (*The Triple Wave Epidemic*); Drug Policy Alliance, *Criminal Justice Reform in the Fentanyl Era: One Step Forward, Two Steps Back*, at 6 (2020), <https://bit.ly/3g24LI1> (*One Step Forward*).

<sup>19</sup> *The Triple Wave Epidemic*, at 2; see also Centers for Disease Control and Prevention, *Synthetic Opioid Overdose Data*, (Mar. 19, 2020) <https://bit.ly/32e13Tn>.

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health or scientific justification required.”<sup>20</sup> This abdication of public health and science is unprecedented, and would harm public health, impede scientific research, and disproportionately harm communities of color. It would also set a dangerous precedent for our country’s approach to drug control.

Since the DEA administratively implemented the temporary classwide scheduling of fentanyl analogues in 2018:

- Overdose deaths related to synthetic opioids have continued to skyrocket: “deaths from synthetic opioids—the biggest killer—were up by 52% year-on-year in the 12 months to August [2020], the last month for which data are available.”<sup>21</sup> Fentanyl is now present in most heroin in the Midwest and Northeast and its prevalence is worsening in the Western part of the country.<sup>22</sup>
- Fentanyl analogue prosecutions have increased exponentially, despite little use of either the classwide control or the Controlled Substances Analogue Act by federal prosecutors. Between 2015 and 2019, prosecutions for federal fentanyl offenses increased by 3,592% and fentanyl-analogue prosecutions increased by 5,725%.<sup>23</sup>
- There are significant racial disparities in these prosecutions, with people of color comprising almost 75% of those sentenced in fentanyl cases in 2019.<sup>24</sup> This holds true for fentanyl analogues, for which 68% of those sentenced were people of color.<sup>25</sup>

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<sup>20</sup> See *Butler Test.* at 4.

<sup>21</sup> See The Economist, Daily Chart, *Opioid Deaths in America Reached New Highs in the Pandemic: Once a Problem Confined to the Eastern Part of the Country, Fentanyl has Spread West* (Mar. 30, 2021), <https://econ.st/32gJmmx>.

<sup>22</sup> See *id.*

<sup>23</sup> U.S. Sent. Comm’n, *Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns* (Jan. 2021), at 20 (“USSC Fentanyl Report”), <https://bit.ly/3daUMhI>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

- The Department has targeted minimally involved individuals and street level dealers in its fentanyl-analogue enforcement efforts, rather than kingpins, importers, or manufacturers.<sup>26</sup>
- Scientists and researchers have confirmed that the classwide scheduling would improperly criminalize helpful and harmless substances and negatively impact public health.<sup>27</sup>

***Classwide scheduling removes public health and science from drug control.***

The unprecedented and radical nature of the DEA’s placement of an entire class of drugs onto Schedule I bears emphasis,<sup>28</sup> particularly considering warnings from scientists that “class-wide banning based on chemical structure is likely to have unintended consequences including severely limiting biomedical research and, in the long term, adversely impacting public health.”<sup>29</sup>

Customarily, the Attorney General consults with the Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA),<sup>30</sup> to confirm a substance’s potential for abuse—and lack of therapeutic potential—before it is permanently placed in Schedule I.<sup>31</sup> But, in the case of the 2018 temporary scheduling order on fentanyl-related substances, rather than allow for the completion of scientifically and medically-based proceedings, the DEA and the Trump administration persuaded Congress to create an exception to the ordinary rule by enacting a bill to extend the temporary scheduling of fentanyl-related substances until May 6, 2021.<sup>32</sup>

This approach to drug classification is not supported by science. “[T]he main problem with class-wide bans is that potentially thousands of compounds are defined solely by their chemical structures without regard for their pharmacological

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<sup>26</sup> See *id.* at 28. 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 involved the most serious functions. *Id.*

<sup>27</sup> See, e.g., Dr. Sandra D. Comer *et. al.*, *Potential Unintended Consequences of Classwide Drug Scheduling Based on Chemical Structure: A Cautionary tale for Fentanyl-Related compounds*, Drug and Alcohol Dependence, 3 (2021), <https://bit.ly/2OF8no9> (*Unintended Consequences*).

<sup>28</sup> See Butler Test. at 15.

<sup>29</sup> *Unintended Consequences* at 3.

<sup>30</sup> See 21 U.S.C. § 811(b).

<sup>31</sup> See 21 U.S.C. § 811(h).

<sup>32</sup> See Pub. L. No. 116-114, 134 Stat. 103 (2020).

activity.”<sup>33</sup> As a result, classwide scheduling preemptively classifies an unknown number of similar substances with unknown effects, including harmless and therapeutic substances.<sup>34</sup> This is a flawed approach because knowledge of a drug’s chemical structure alone cannot predict how it will affect the human brain.<sup>35</sup> For example—loperamide (Imodium®) is an over-the-counter anti-diarrheal medication. Although it does not fall under the classwide scheduling order, Imodium® has a structure similar to fentanyl, and like fentanyl, *is* an agonist of the mu-opioid receptor. But unlike fentanyl, Imodium® does not get into the brain when it is taken as directed and would be misclassified if placed onto Schedule I.<sup>36</sup>

The relative potency of fentanyl and fentanyl analogues varies widely: “[s]ome analogues, like acetyl fentanyl, are less potent than fentanyl; others, like carfentanil, are many times more potent; and still others, like benzylfentanyl, are believed to be essentially biologically inactive.”<sup>37</sup> There are already examples of the classwide control’s overbreadth: scientific research has identified specific substances that meet the criteria for classwide control that have little to no pharmacological potential for abuse.<sup>38</sup> Under classwide control these would be controlled substances and criminal defendants could face draconian sentences if found in possession of such substances.

***Classwide Scheduling Results in Overcriminalization.*** Under the classwide control, any offense involving a fentanyl-related substance is subject to federal criminal prosecution, even if the substance in question has no potential for abuse. This approach would result in convictions for substances that may not even have a psychoactive effect similar to fentanyl. Data in a recent Sentencing Commission Report shows that these type of prosecutions are already occurring: after 2018, the

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<sup>33</sup> *Unintended Consequences* at 3.

<sup>34</sup> *Id.*

<sup>35</sup> See *Fentanyl Analogues: Perspectives on Classwide Scheduling*: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 116th Cong. 4 (Testimony of Dr. Sandra D. Comer, Professor of Neurobiology (in Psychiatry), Columbia University Irving Medical Center, New York State Psychiatric Institute) (Jan. 28, 2020), <https://bit.ly/3tkKd1r>.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> Kemp Chester, Assoc. Dir., Nat’l Heroin Coordination Grp., Off. of Nat’l Drug Control Pol’y, *Response to Questions for the Record Following Hearing Entitled, The Countdown: Fentanyl Analogues & the Expiring Emergency Scheduling Order to S. Comm. on the Judiciary* (June 4, 2019) at 3, <https://bit.ly/3s7BFcv>.

<sup>38</sup> *Unintended Consequences*, at 3.

government prosecuted cases involving benzyl fentanyl,<sup>39</sup> a substance the DEA has known to have no potential for abuse since at least 2010.<sup>40</sup> If classwide scheduling becomes permanent, prosecutors would have no obligation—and thus no incentive—to determine whether a substance has abuse potential. Nor would prosecutors be equipped to make such assessments, particularly for substances under classwide control, which would be scheduled without relevant scientific evidence. Moreover, because such substances are automatically in Schedule I, criminal defendants would have no ability to present evidence at trial showing that the substance has no potential for abuse; this evidence would be, in fact, irrelevant at trial.

***Classwide Scheduling is Unnecessary: Harmful Fentanyl Analogues are Illegal with or without Classwide Scheduling.*** The campaign in support of classwide scheduling has rested on the repeated—and false—claim that failure to enact classwide scheduling would *legalize* harmful fentanyl analogues. A recent press release from House Minority Leader Jim Jordan, and House Energy and Commerce Committee Ranking Member Cathy McMorris Rodgers (R-WA) claimed that “[i]f Congress doesn’t extend the fentanyl analogues ban by May 6, these extremely lethal drugs coming from China and also across our southern border will *essentially become street legal.*”<sup>41</sup> In 2020, while facing the possible expiration of the first temporary classwide scheduling of fentanyl analogues, former Attorney General William Barr wrote: “[T]he legal prohibitions on the various forms of fentanyl expire next month unless Congress reauthorizes them,” and that, without classwide scheduling, fentanyl analogues would become “newly legalized.”<sup>42</sup>

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<sup>39</sup> See USSC Fentanyl Report at 23.

<sup>40</sup> In 1985, the DEA temporarily placed benzyl fentanyl on Schedule I based on its structure, but later removed it from control after “further research found no evidence of abuse potential.” Drug Enf’t Admin. Correction of Code of Federal Regulations: *Removal of Temporary Listing of Benzylfentanyl and Thenylfentanyl as Controlled Substances*, 21 C.F.R. § 1308 (2010).. In 2019, DEA classified benzyl fentanyl as a “List I” chemical, meaning that it is an ingredient that can be used to create fentanyl analogues. See Drug Enf’t Admin., *Designation of Benzylfentanyl and 4-Anilinopiperidine, Precursor Chemicals Used in the Illicit Manufacture of Fentanyl, as List I Chemicals*, 85 Federal Register 73 at 20822-20829, (April 15, 2020), <https://bit.ly/3d9m1cD>. In contrast to Schedule I fentanyl analogues, the potential sentences for distribution of List I chemicals are largely capped at five years. See 21 U.S.C. § 841(f)(1) (“Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under title 18 or imprisoned not more than 5 years, or both.”)

<sup>41</sup> See Press Release: *Leaders Rodgers and Jordan Call for Extension of Emergency Scheduling of Fentanyl Analogues*, House Energy and Commerce Committee (Apr. 8, 2021), <https://bit.ly/2OFBl7f>.

<sup>42</sup> Barr, *supra* note 18; see also Drug Enforcement Administration (@DEAHQ), Twitter (Jan. 11, 2020, 3:28 PM), <https://twitter.com/DEAHQ/status/1216094432648409090> (“Without the emergency



These claims are not true.

With or without classwide scheduling, the Department is armed with powerful tools to successfully and aggressively prosecute cases involving fentanyl and its analogues. First, the Department can use its broad authorities under the Controlled Substances Act (CSA) to temporarily schedule—and then prosecute—fentanyl analogues on a substance-by-substance basis.<sup>43</sup> Second, the Department can use the Analogue Act to immediately prosecute new substances that have not been scheduled.<sup>44</sup> Crucially, and in contrast to classwide scheduling, both of these existing authorities include essential checks to confirm the accuracy of DEA’s designation of a substance as harmful.

First, the CSA. Many fentanyl analogues, such as carfentanil and acetyl fentanyl have already been scheduled on a substance-by-substance basis.<sup>45</sup> Fentanyl analogues that are scheduled controlled substances can be prosecuted as any other controlled substance would be prosecuted. The CSA also equips the DEA to swiftly add new substances to the schedule by providing it with temporary scheduling authority. Temporary designation can become permanent if the AG asks the Secretary of Health and Human Services (“Secretary”) to confirm the accuracy of the designation and the Secretary so confirms. From 2019 to 2020, most prosecutions for fentanyl analogues involved analogues that had been individually scheduled prior to class-wide scheduling.<sup>46</sup>

The second avenue that has been available to the Department since 1986 for the prosecution of unscheduled analogues—of fentanyl or any other Schedule I or II drug—is the Analogue Act. Congress passed the Analogue Act to criminalize the harmful unscheduled chemical variants of controlled substances “that otherwise would escape the reach of the drug laws.”<sup>47</sup> Under the Act, a “controlled substance

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scheduling of the entire class of fentanyl-related substances, all non-scheduled fentanyl substances will no longer be illegal. This scheduling expires in 26 days.”).

<sup>43</sup> See, e.g., 21 U.S.C. § 811.

<sup>44</sup> See 21 U.S.C. § 813.

<sup>45</sup> 21 C.F.R. § 1308.12 Schedule II (2019) (carfentanil); 21 C.F.R. § 1308.11 Schedule I (2019) (acetyl fentanyl).

<sup>46</sup> USSC Fentanyl Report at 23.

<sup>47</sup> *United States v. Hodge*, 321 F.3d 429, 437 (3d Cir. 2003) (quoting 131 Cong. Rec. 19114 (1985) (statement of Sen. Thurmond) (“This proposal will prevent underground chemists from producing dangerous designer drugs by slightly changing the chemical composition of existing illegal drugs.”); 131 Cong. Rec. 27311 (1985) (statement of Sen. D’Amato) (stating that the Analogue Act “closes the loophole in present law that allows the creation and distribution of deadly new drugs without

analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in Schedule I.”<sup>48</sup> Congress listened to and relied on evidence from experts when it properly defined a “controlled substance analogue” to require two things: first, a chemical structure which is substantially similar to a schedule I or II controlled substance, and second, a physiological effect on the central nervous system that is substantially similar to or greater than the effect of a schedule I or II controlled substance.<sup>49</sup>

It is this second prong—the proof of a substantially similar *effect*—that classwide scheduling erases. And requiring proof of this effect was something that Congress carefully considered when it enacted the Analogue Act. At that time, the Department argued for an approach that have required proof of only the first prong—a chemical structure similar to a Schedule I or II controlled substance. But Congress ultimately (and wisely) accepted the views of the American Chemical Society. The Society testified before the Senate Judiciary Committee that it “believe[d] it necessary to require that designer drugs meet both of these tests” – that the definition of controlled substance analogue must “be specifically designed to have . . . a chemical structure substantially similar to that of a controlled substance” and “a biological effect substantially similar to that of a controlled substance” – “in order to protect the legitimate production of drugs that are intended for human consumption and that have similar chemical structures to those of designed drugs, but that are designed to have the opposite or dissimilar biological effects,” such as naloxone and other analogs designed with the purpose of countering drug abuse.<sup>50</sup> So long as an unscheduled substance is proven to be a “controlled substance analogue,” it can be treated and prosecuted as if it was a schedule I controlled substance.

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violating Federal law”); 131 Cong. Rec. 32950 (1985) (statement of Rep. Lungren) (“The focus of this proposal is clearly to impact on the designer drug phenomena by making it illegal for the clandestine chemists to manufacture and distribute these substances.”).

<sup>48</sup> 21 U.S.C. § 813(a).

<sup>49</sup> 21 U.S.C. § 802(32)(A)(i)-(ii). Alternatively, the second requirement can be met “with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect of a controlled substance that is in schedule I or II.” *Id.* at 21 U.S.C. § 802(32)(A)(iii)

<sup>50</sup> *Controlled Substance Analogs Enforcement Act of 1985*: Hearing on S. 1437 before the S. Comm. on the Judiciary, 996th Cong. 79 (1985) (American Chemical Society Responses to Questions from Senator Biden); see also *United States v. Roberts*, No. 01 CR 410 RWS, 2001 WL 1646732, \*5 (S.D.N.Y. Dec. 17, 2001).

***The Department’s Criticisms of the Controlled Substance Analogue Act are Not Backed by Evidence.*** The Department has long complained that Analogue Act prosecutions for fentanyl analogues are unwieldy and unnecessarily resource-intensive, but these concerns lack factual support. The Department has not provided specific examples of fentanyl analogue cases where this has been borne out, and information provided by the Sentencing Commission identifies only five Analogue Act prosecutions involving fentanyl analogues in the past five years.<sup>51</sup> After repeated inquiries to the nationwide field of federal public and community defenders, I have been unable to identify any cases involving a resource-intensive “battle of the experts” over the identity of a purported fentanyl-related substance, nor have I identified examples where juries or courts reached different conclusions about whether a fentanyl-related substance was or was not an analogue.

A recent law enforcement letter<sup>52</sup> in support of classwide scheduling cites two Analogue Act cases—*U.S. v. Bays*<sup>53</sup> and *U.S. v. Gas Pipe, Inc.*<sup>54</sup>—for the proposition that the Analogue Act can improperly “produc[e] inconsistent jury verdicts, even for the same substance.” In *Bays* the jury convicted; in *Gas Pipe* it acquitted. Both cases involved a synthetic cannabinoid called XLR-11. But XLR-11 seems to have been a somewhat unique analogue: an entire division of DEA, the Office of Forensic Sciences, did not believe that XLR-11 was “substantially similar” to a Schedule I substance or the proper target of federal criminal prosecution. The jury in *Gas Pipe* heard this evidence, including testimony by two DEA employees from the Office of Forensic Science, and acquitted. It is not clear whether the *Bays* jury even heard this information, or if DEA’s internal disagreement was ever disclosed to the defense.<sup>55</sup> Importantly, in the end all drug trafficking charges were dropped in

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<sup>51</sup> See Email from ██████████ United States Sentencing Commission to Christine Leonard, Senior Counsel, United States House of Representatives, Committee on the Judiciary, *Re: Follow up data* (Feb. 10, 2021) (on file with author).

<sup>52</sup> See Letter to The Hon. Dick Durbin & The Hon Chuck Grassley (Mar. 17, 2021), <https://bit.ly/3s8WN2k>.

<sup>53</sup> *U.S. v. Bays, et al.*, 3:13-CR-357-B (N.D. Tx.)

<sup>54</sup> *U.S. v. Gas Pipe, Inc.*, 3:14-cr-298-M (N.D. Tex.-Dallas)

<sup>55</sup> The government inconsistently disclosed the disagreement among DEA chemists to individuals facing criminal prosecution for XLR-11. For example, in *United States v. Fedida*, Case No., 6:12-cr-00209-RBD-DAB (M.D. Fla. Jul. 11, 2013), the government did not disclose the conflicting opinions about XLR-11 to the defense before or at an evidentiary hearing. See Statement of Kevin L. Butler Before the U.S. Sentencing Comm’n, Washington, D.C., at 15-17 (Mar. 14, 2018), <https://bit.ly/3mFcSvf>. Nor did the DEA Section Chief of the Diversion Control Division (Terry Boos) disclose the dissenting opinion of the Office of Forensic Sciences when he testified that XLR-11 should be treated as a controlled substance analogue. *Id.*

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*Bays*; it does not appear that the jury was ever asked to decide whether XLR-11 was a controlled substance analogue.<sup>56</sup>

Overcoming an individual's presumption of innocence is not intended to be convenient for the government. Congress carefully designed the elements of the Analogue Act to secure convictions for dangerous novel substances while shielding harmless conduct from criminal sanctions. The government's own scientists disagreed about whether the substance in *Bays* and *Gas Pipe* was illegal. Rather than implicate the reasonableness of the Analogue Act, these cases demonstrate why Congress should not grant the Department and DEA unchecked discretion to determine the legality of substances.

***Classwide Scheduling Repeats the Mistakes of the Past.*** The political rhetoric that we hear today about fentanyl is familiar to anyone who has studied the history of the war on drugs. Nearly fifty years ago, President Nixon declared drug abuse as “America’s public enemy number one.”<sup>57</sup> “Fifteen years later, in May 1986, Ronald Reagan warned that “illegal drugs were every bit as much a threat to the United States as enemy planes and missiles.”<sup>58</sup> Congress responded, enacting sweeping legislation with severe penalties like the Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Act of 1986.<sup>59</sup> And a decade later, on the eve of his reelection, President Bill Clinton reported “we passed ‘three strikes and you’re out’ and the death penalty for drug kingpins and cop killers,” touting the accomplishments of the Violent Crime Control and Law Enforcement Act of 1994.<sup>60</sup> The laws from this era put in place harsh mandatory minimums for a variety of offenses, including drug offenses, and introduced the now-discredited 100-to-1 ratio between crack and powder cocaine.<sup>61</sup>

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<sup>56</sup> See Kevin Krause, *Synthetic Marijuana Prosecutions Get Mixed Results Due to Legal Complications*, Dallas News (Dec. 25, 2020), <https://bit.ly/3uGANxe>.

<sup>57</sup> Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control* (Jun. 17, 1971), <https://bit.ly/3t9mHUT>.

<sup>58</sup> *Remarks on Signing the Just Say No to Drugs Week Proclamation*, Ronald Reagan Presidential Library & Museum (May 20, 1986) <https://bit.ly/3t9HPKt>.

<sup>59</sup> See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (Oct. 12, 1984); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (Oct. 27, 1986).

<sup>60</sup> The President’s Radio Address, 32 Weekly Comp. Pres. Doc. 2282 (Nov. 2, 1996), <https://bit.ly/3uz5lf0>; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (Jan. 25, 1994).

<sup>61</sup> See Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 212 (2019) (Categorical

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What in 1971 was labeled “public enemy number one,” is now being described as “a tsunami” of “legalized poison.”<sup>62</sup> But while the rhetoric of today is the same as that of the past, we know our actions must be different. We have three decades of evidence proving that increasing sentences does not make communities safer and it does not drive down drug supply or demand.<sup>63</sup> A 2014 report commissioned by the Department “found that lengthy prison sentences are not the best way to deter crime,”<sup>64</sup> and data indicate that long sentences can actually be criminogenic and increase recidivism.<sup>65</sup> To avoid detection, users are less inclined to seek treatment and are instead more likely to engage in risky drug-use behaviors.<sup>66</sup>

Nor have these policies incapacitated high-level traffickers, “managers of drug enterprises,” and “king-pins.”<sup>67</sup> Out of all persons incarcerated for drug crimes in federal prison, only 14% are identified as the managers, leaders, and organizers Congress intended to capture.<sup>68</sup>

Because Congress legislated without evidence or the advice of experts, more than 2.2 million people are behind bars in America today and one in three adults possesses a criminal record.<sup>69</sup> We cannot repeat these mistakes. There is a growing, bipartisan consensus that the war on drugs has failed.<sup>70</sup> Those lessons apply to

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Mistakes); see also Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, Center for American Progress (May 10, 2019), <https://ampr.gs/3wNZv0r>.

<sup>62</sup> See Attorney General William P. Barr Delivers Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference, Dep’t of Justice (Aug. 12, 2019), <https://bit.ly/3wNuFoU> (“A tsunami built up and has been crashing over the country, bringing death and destruction.”).

<sup>63</sup> See, e.g., Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* 42-44 (2019) (*Prisoners of Politics*) (collecting studies); see also Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems* (Mar. 8, 2018), <https://bit.ly/3dVw8ks>; Drug Policy Alliance, *Rethinking the “Drug Dealer,”* 12-13 (2019), <https://bit.ly/2QjZG3a> (*Rethinking the Drug Dealer*); Letter from FreedomWorks, Prison Fellowship, R Street Institute, et al., to the Hons. Lindsey Graham & Dianne Feinstein, at 1 (Jul. 2, 2019), <https://bit.ly/2PXDBau>.

<sup>64</sup> *Prisoners of Politics*, at 43 (citing National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, ed. Jeremy Travis and Bruce Western (2014)).

<sup>65</sup> See *id.* at 44.

<sup>66</sup> See *Rethinking the Drug Dealer*, at 13.

<sup>67</sup> See e.g., *United States v. Dossie*, 851 F. Supp. 2d 478, 479-80 (E.D.N.Y. 2012) (collecting legislative history).

<sup>68</sup> See *Categorical Mistakes* at 217, n.138.

<sup>69</sup> See *Prisoners of Politics*, at 2.

<sup>70</sup> In 2010, Congress enacted the Fair Sentencing Act to reduce the unjust disparity between crack and cocaine from 100-to-1 to 18-to-1. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat 2372

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fentanyl and its analogues. Indeed, a 2019 Rand fentanyl study concluded that “[t]here is little reason to believe that tougher sentences, including drug-induced homicide laws for low-level retailers and easily replaced functionaries (e.g., couriers) will make a positive difference.”<sup>71</sup>

### III. Policy Recommendations

President Biden has pledged to embrace a public-health approach to drug policy,<sup>72</sup> to move away from the failed war on drugs by ending the use of mandatory minimums<sup>73</sup> and to eradicate racial inequities in the criminal justice system.<sup>74</sup> These principles should guide the Subcommittee’s deliberations about how to respond to the daunting challenge of the overdose crisis. It is time for the government to adjust its drug policy to prioritize evidence-based strategies to effectively fight this critical public health issue. The only way to stop the demand for drugs is through prevention and treatment. It goes without saying that we cannot incarcerate our way out of a public health crisis.

Several legislative proposals under consideration in the 117th Congress hold the potential to move drug policy in our country in the right direction, including:

- H.R. 955, the Medicaid Reentry Act of 2021. This bill provides a bridge for individuals reentering the community by providing health care 30 days prior to release and on reentry. Ninety-five percent of the more than 2 million adults who are incarcerated in the United States will be released and the transition back into the community is a critical period for those with mental illness and substance use disorder.<sup>75</sup> One study found that risk of a fatal

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(Aug. 3, 2010). Two years ago, Congress passed the First Step Act of 2018 with overwhelming bipartisan support, reducing sentences for certain drug offenses and making the Fair Sentencing Act of 2010 retroactive. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat 5194 (Dec. 21, 2018).

<sup>71</sup> See Bryce Pardo, et al., *The Future of Fentanyl and Other Synthetic Opioids*, Rand Corp. (2019), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR3100/RR3117/RAND\\_RR3117.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR3100/RR3117/RAND_RR3117.pdf).

<sup>72</sup> Exec. Off. of the President Off. of Nat’l Drug Control Pol’y, *The Biden-Harris Administration’s Statement of Drug Policy Priorities for Year One*, (April 1, 2021), <https://bit.ly/327EsYO>.

<sup>73</sup> Joe Biden, *The Biden Plan for Strengthening America’s Commitment to Justice*, <https://bit.ly/32l6Abb> (last visited April 12, 2021).

<sup>74</sup> Proclamation 10171, *A Proclamation on Second Chance Month, 2021*, 86 Fed. Reg. 64, 17689–90 (March 31, 2021), <https://bit.ly/328V8ze>.

<sup>75</sup> See Lakeesha Woods et. al., *The Role of Prevention in Promoting Continuity of Health Care in Prisoner Reentry Initiatives*, 103 Am. J. Pub. 830–8 (2013), <https://bit.ly/3mGuA1N>.

drug overdose is 129 times as high as it is for the general population during the two weeks after release.<sup>76</sup>

- H.R. 1384, the Mainstreaming Addiction Treatment Act of 2021. This bill eliminates the redundant “X-waiver” to prescribe buprenorphine for substance use disorder treatment. Buprenorphine is one of the three medications approved by the FDA to treat opioid use disorder and reduces mortality by up to fifty percent.<sup>77</sup>
- H.R. 2366, Support, Treatment, and Overdose Prevention of Fentanyl Act of 2021. This legislation proposes a comprehensive health- and evidence-based response to fentanyl and its analogues. Rather than turn to policing and incarceration, the STOP Fentanyl Act adopts an evidence-based response to the opioid crisis.
- H.R. 2379, the State Opioid Response Grant Reauthorization Act. This legislation reauthorizes State Opioid Responses (SOR) and Tribal Opioid Response (TOR) grants for five more years. These grants help states, tribal organizations, and other community stakeholders implement health and evidence-based responses to overdoses and opioid use disorder.

In addition to these proposals, the most important step that Congress and the Administration could take to remediate America’s harmful and ineffective drug policy would be to enact legislation to end mandatory minimums and apply those changes retroactively. Mandatory minimums have contributed to mass incarceration of Black and Brown communities, distorted the traditional role of the judge, and escalated prison costs. Any such sentencing reform legislation provisions must also ensure that the new law will be applied retroactively to those who have already been sentenced, and make the sentencing reforms enacted in the First Step Act of 2018 retroactive.

#### **IV. Conclusion**

Classwide scheduling would be a step backward and mark a return to the failed approaches of the war on drugs. The Department has used existing tools to successfully and aggressively prosecute harmful fentanyl analogue cases. Unlike classwide scheduling, those tools do not disrupt the balance between, on one hand,

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<sup>76</sup> See Ingrid A. Binswanger, et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 *New Eng. J. Med.* 157-65 (Jan. 11, 2007), <https://bit.ly/3uDbMTE>.

<sup>77</sup> Nat’l Acads. of Sci., Eng’g, and Med, *Medications for Opioid Use Disorder Save Lives* (2019), <https://bit.ly/3uJfWto>.

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enforcement, and on the other, science, prevention and public health. Again, I thank the Subcommittee and appreciate the invitation to share my perspective on this issue.