

United States Senate
WASHINGTON, DC 20510

June 28, 2022

Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, SW
Washington, DC 20201

Anne Milgram
Administrator
Drug Enforcement Administration
Department of Justice
8701 Morrisette Drive
Springfield, VA 22152

Dear Attorney General Garland, Secretary Becerra, and Administrator Milgram,

We write to express our serious concerns with the Administration's proposal to make the current temporary classwide scheduling of fentanyl-related substances (FRS or fentanyl analogues) permanent, without the scientific evaluation that the federal government has conducted for all other controlled substances since 1970. Our concerns were heightened by the Food and Drug Administration's (FDA) recent testimony before Congress that, as a result of classwide scheduling, a potential antidote and other harmless substances are improperly classified as Schedule I substances.

Permanent classwide scheduling would absolve the government of its statutory responsibility to determine a substance's potential for abuse or accepted medical use before placing it in a category of controlled substances, setting a troubling precedent for drug control. The proposal accepts that helpful, harmful, and harmless substances can be preemptively treated as equally harmful and disregards basic principles of evidence and pharmacology. It also seeks to create a system in which some individuals may be prosecuted and sentenced to prison for substances that turn out to be harmless, which invariably will disproportionately impact people of color.¹ In the midst of the worst overdose crisis our country has ever experienced, the failure to embrace an

¹ See U.S. Sent'g Comm'n, *Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns* 24 (Jan. 2021) (finding that in 2019, 68 percent of those sentenced for federal fentanyl analogue offenses were people of color), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

evidence-based approach by ignoring the scientific research currently required under the Controlled Substances Act (CSA) risks leaving potential antidotes to fentanyl addiction and overdoses undiscovered and unavailable.

Enacted in 1970, the CSA created five schedules for controlled substances. To schedule a substance, the Drug Enforcement Administration (DEA) must make a finding of the substance's potential for abuse and currently accepted medical use. Under 21 U.S.C. § 811(b), the Attorney General must request a scheduling recommendation from the Secretary of Health and Human Services (HHS) based on an eight-factor medical and scientific analysis.² Fentanyl, for example, is categorized as a Schedule II drug because it has a high potential for abuse, but also has some safe and accepted medical uses such as treating patients who have severe chronic pain or are recovering from surgery. Fentanyl analogues share the same chemical structure as fentanyl, but an individual substance may be more, less, or not dangerous, and could even have a medical use. It is impossible to know whether a substance is dangerous or has therapeutic value until it is studied.

Schedule I is reserved for the most dangerous substances that have no therapeutic use. Accordingly, offenses involving Schedule I drugs carry the most severe sentences. Schedule I drugs are also the most difficult for doctors and scientists to study. To study the substances, researchers must receive DEA approval and overcome other time-consuming protocols. Indeed, fentanyl (alongside cocaine and heroin) is categorized as a Schedule II drug, allowing scientists to more easily test and study it. Classwide scheduling of fentanyl analogues in Schedule I frustrates similar efforts.

In 2019, eight members of the Senate Judiciary Committee wrote then-Secretary of the Department of Health and Human Services Alex M. Azar to voice the concern that the DEA and Department of Justice (DOJ) “have not adequately consulted with public health agencies in connection with the DEA/DOJ’s recent request that Congress legislatively place all ‘fentanyl-related’ substances into Schedule I of the” CSA.³ In its response to the request for more information, HHS reported that “an evaluation for permanent scheduling of a class of substances, rather than specific substances, would not be feasible for the FDA to develop.”⁴ HHS also warned that the failure to test each substance could impede the development of treatments for opioid addiction and overdoses:

The chemical structures and pharmacological activity targeted by illicit opioid manufacturers overlap not only with illicit, potentially dangerous, Schedule I substances, but also with many molecules that *research may in the future demonstrate a potential for legitimate therapeutic uses. Research with fentanyl-related substances and other synthetic opioids may be important to the development of new and improved treatments for opioid addiction and overdose, chronic pain, and other neurologic and psychiatric conditions, as well as to understanding the effects these substances have on human health.*⁵

² 21 U.S.C. § 811(b).

³ Letter from Richard Durbin, et. al. to Alex M. Azar, Sec’y, U.S. Dept. of Health and Human Services, (Jul. 10, 2019), <https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20DOJ%20HHS%207.10.pdf>.

⁴ Dep’t of Health and Human Services, Letter to Senator Richard Durbin in Response to July 10, 2019 Letter, Oct. 31, 2019.

⁵ *Id.* (emphasis added).

Despite HHS's report that an evaluation would not be feasible, a few months later, on February 4, 2020, the DEA again asked HHS "to conduct an eight-factor analysis on the FRS class and make a scheduling recommendation for the class." HHS then, apparently, undertook that review, and ultimately concluded that a scheduling "finding is not possible for FRS as a class."⁶ HHS could not provide the finding for two reasons: first, because of the vast number of hypothetical fentanyl-related substances; second, because "among the individual FRS for which pharmacological activity has been studied, *FDA has identified examples of substances lacking in mu-opioid agonist activity*, the presumed pharmacology that would lead to opioid-related harms."⁷

To our knowledge, DEA has identified approximately 44 fentanyl-related substances. As of December 2, 2021, FDA had studied the pharmacology for about 25 of these substances and found that "among that group, there are members of that class, and one in particular that has no activity to turn on the opioid receptor . . . it looks like it would be the blocker of the mu opioid receptor in the way naloxone is a blocker of the mu opioid receptor."⁸ In other words, of the few fentanyl-related substances studied by FDA, one does not make a person "high" and could be a life-saving treatment. The Administration has neither released any information about the substances it has studied nor explained which steps it is taking under current law to reclassify the substances it has concluded should not be in Schedule I.

The permanent classwide scheduling of all fentanyl analogues without first conducting a scientific and medical evaluation—an evaluation that could lead to the discovery of a life-saving treatment—is contrary to evidence-based, public health solutions. It would be a disservice to the American public for Congress to preemptively criminalize a substance that might be the next naloxone.

Since 2018, fentanyl analogues have been classified as a class as a Schedule I drug on a temporary basis. Congress has extended temporary scheduling on several occasions with the most recent extension set to expire at the end of this year. Yet, according to provisional data from the Centers for Disease Control and Prevention, between 2020 and 2021 alone, U.S. overdose deaths involving synthetic opioids other than methadone increased 23 percent, from

⁶ *The Overdose Crisis: Interagency Proposal to Combat Illicit Fentanyl-Related Substances: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 117th Cong. 4 (2021) at 4 (statement of Douglas G. Throckmorton, M.D.) (Throckmorton Statement), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Throckmorton_HE_2021.12.02_0.pdf.

⁷ *Id.* (emphasis added); see also 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 at 3 (Jan. 28, 2020), <https://docs.house.gov/meetings/JU/JU08/20200128/110392/HHRG-116-JU08-Wstate-ComerS-20200128.pdf> (noting that recent research has confirmed that the classwide scheduling action has improperly scheduled substances with therapeutic promise and low abuse potential); Testimony of Kemp Chester, Sr. Advisor, Office of Nat'l Drug Control Pol'y, House Hearing on the Regulation of Fentanyl-Related Substances, Dec. 2, 2021, at 2:35:35, <https://www.c-span.org/video/?516433-1/house-hearing-regulation-fentanyl-related-substances> ("[W]e have gathered up an entire class of substances, uncreated, that within that class of substance, there may be substances that either have medical merit or are not the least bit harmful. They're not any more harmful than water.").

⁸ Testimony of Douglas C. Throckmorton, M.D., Food and Drug Admin, House Hearing on the Regulation of Fentanyl-Related Substances, Dec. 2, 2021, at 1:06:31, <https://www.c-span.org/video/?516433-1/house-hearing-regulation-fentanyl-related-substances>.

58,000 to 71,000.⁹ It is apparent that temporary scheduling has not proven to be an effective solution to the country's grim overdose crisis.

We ask that you provide the following information by two weeks from the date of the letter:

1. Data for all fentanyl-related substances that the DEA has identified, including whether the FDA has studied each individual substance.
2. Data on the pharmacological effect and epidemiological data for fentanyl-related substances that the FDA has studied.¹⁰
3. Documents relating to DEA's February 4, 2020 request that HHS conduct an eight-factor analysis on the FRS class and make a scheduling recommendation for the class, and FDA's conclusion that a schedule I "finding is not possible for a class" because:
 - a. the class is vast in the number of hypothetical covered substances;
 - b. data on the pharmacological effect and epidemiological data showing harms and overdose death are available for fewer than 30 FRS substances; and
 - c. among the individual fentanyl-related substances for which pharmacological activity has been studied, FDA has identified examples of substances lacking in mu-opioid agonist activity, the presumed pharmacology that would lead to opioid-related harms.¹¹
4. Documents relating to any steps that the FDA or DOJ has taken to deschedule or reschedule "substances lacking in mu-opioid agonist activity" using existing provisions of the CSA.¹²
5. Any scientific and medical evaluation prepared or obtained by the HHS or FDA for a fentanyl-related substance.
6. Names of all chemical, pharmacological, or epidemiological studies of any fentanyl-related substance that U.S. Customs and Border Protections, DEA, FDA, or any other law enforcement agency or public health component of the federal government have identified.

In the nearly three years since we first sounded the alarm about this issue, we know little more about the DEA's efforts to study and schedule identified fentanyl analogues. As members of Congress, we must find ways to confront the overdose crisis that continues to wreak havoc on so many of our communities.

⁹ *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 – But Are Still Up 15%*, Centers for Disease Control and Prevention (May 11, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.

¹⁰ See Throckmorton Statement at 4.

¹¹ *Id.*

¹² *Id.* at 4 & 7.

We are eager to work with the Administration to address these issues and find a path forward to effectively combat the fentanyl and fentanyl analogue problem. Please contact us should you have any questions and we look forward to receiving the information requested in a timely manner.

Sincerely,



Cory A. Booker
United States Senator



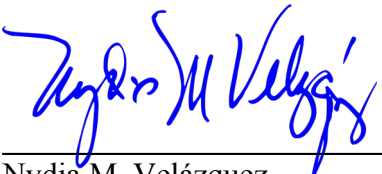
Tony Cárdenas
Member of Congress



Earl Blumenauer
Member of Congress



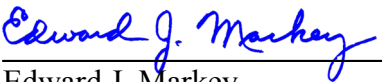
Yvette D. Clarke
Member of Congress




Nydia M. Velázquez
Member of Congress



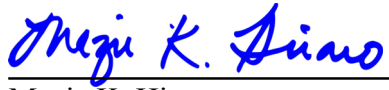
Bonnie Watson Coleman
Member of Congress



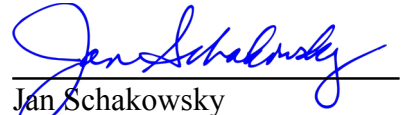
Edward J. Markey
United States Senator



Elizabeth Warren
United States Senator



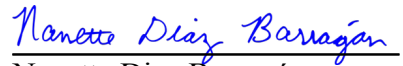
Mazie K. Hirono
United States Senator



Jan Schakowsky
Member of Congress



Bernard Sanders
United States Senator



Nanette Diaz Barragán
Member of Congress



Cori Bush
Member of Congress



Lisa Blunt Rochester
Member of Congress