



August 24, 2021

The Honorable Merrick Garland
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland:

The 142 undersigned organizations write to urge the Biden administration to let the Trump administration's temporary "classwide" emergency scheduling of fentanyl-related substances expire on October 22, 2021. We also write to reiterate our request¹ to the administration that it engage more stakeholder feedback with the interagency working group that is studying this topic before it finalizes its recommendation to Congress on the classwide scheduling issue. Since the extension of the classwide policy in April 2021, our coalition has been granted just a half-hour "listening" session with some representatives from the interagency working group. That time did not allow a robust, two-way discussion on this complicated policy issue. The administration's policymaking process on this issue has largely occurred behind closed doors, and we deserve a government that is both transparent and responsive.

The classwide scheduling policy must expire. Classwide scheduling would exacerbate pretrial detention, mass incarceration, and racial disparities in the prison system, doubling down on a fear-based, enforcement-first response to a public health challenge. The policy could also lead to over-criminalization and prosecutorial misconduct. Under the classwide control, any offense involving a "fentanyl-related substance" is subject to federal criminal prosecution, even if the substance in question is helpful or has no potential for abuse. Failure to define with specificity through our laws what is or is not illegal will lead to miscarriages of justice. Take, for example, the case of Todd Coleman. Mr. Coleman was sentenced to a mandatory minimum of 10 years for selling 30 grams of cocaine — about 2 tablespoons — because a

¹ On Friday, July 16, 2021, individuals from some of our organizations met with staff from the Department of Justice (DOJ), including staff from the Office of the Attorney General, Office of the Deputy Attorney General, and the Drug Enforcement Administration to discuss the classwide scheduling policy. On July 20, 2021, we first made the request to the DOJ, via email communication, to meet with the interagency working group and contribute to the administration's policy proposal before it goes to Congress. We followed up on this request, via email, on July 30, 2021. On August 5, 2021, our coalition was granted a half-hour meeting with representatives from the interagency working group and the administration, including officials from the Office of National Drug Control Policy (ONDCP), DOJ, the White House Domestic Policy Counsel, and the White House Counsel's Office.

local lab said they were laced with three illegal fentanyl analogues.² But none of the substances were illegal fentanyl analogues, and one was a substance called “Benzyl Fentanyl” that the Drug Enforcement Administration has long known is not dangerous or illegal.

What is more, the classwide scheduling policy will fail to curb overdose rates in the United States. In the past few years, synthetic drugs such as fentanyl and its analogues have been responsible for overdose deaths in many parts of the country.³ These overdose deaths form a part of a broader wave of mortality associated with unemployment, alcohol poisoning and suicide, circumstances related to working class economic decline and mental health challenges.⁴ Focusing on drug interdiction does not address the root cause of these overdoses. Skyrocketing prosecutions and criminal penalties have done nothing to stem the tide of these deaths, or to reduce the supply of harmful substances in our country.⁵ Relying on jails to force individuals into painful, involuntary, and often unsafe withdrawal is not the solution. In fact, the classwide scheduling policy will hurt public health and scientific research aimed at finding solutions to the overdose crisis.⁶ Classwide scheduling allows for an overbroad classification of fentanyl analogues under Schedule 1, including those that may have medical or research value and could be critical to finding solutions to the overdose crisis.

Nor will classwide scheduling curtail the supply of fentanyl and its analogues. Despite repeated claims by law enforcement that the classwide ban has reduced the supply of fentanyl-related substances, the U.S. Government Accountability Office (GAO) could not evaluate this claim due to the short time the ban had been in place and various factors that could lead to a reduction of these substances. Because of those variables, the GAO did not draw causal conclusions related to classwide scheduling⁷ but noted that “the number of reports of all fentanyl analogues and other related compounds (e.g., precursors), including individually scheduled analogues, have *increased* since the implementation of class-wide scheduling.”⁸

² Schwartzapfel, Beth. “Biden could have taken the war on drugs down a notch. He didn’t.” *The Marshall Project*. June 16, 2021. <https://www.themarshallproject.org/2021/06/16/biden-could-have-taken-the-war-on-drugs-down-a-notch-he-didn-t>.

³ “Overdose Death Rates.” *National Inst. of Drug Abuse*. Last updated Jan. 29, 2021. <https://www.drugabuse.gov/drugtopics/trends-statistics/overdose-death-rates>.

⁴ Graham, Carol. “America’s crisis of despair: A federal task force for economic recovery and societal well-being.” *Brookings*. Feb. 10, 2021. <https://www.brookings.edu/research/americas-crisis-of-despair-a-federal-task-force-foreconomic-recovery-and-societal-well-being/>.

⁵ Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, Provisional Drug Overdose Death Counts, 12 Month-ending Provisional Number of Drug Overdose Deaths by Drug or Drug Class January 2015 through July 2020, Synthetic opioids excluding methadone (T40.4), <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>; Shover, Chelsea L., et al. “Steep increases in fentanyl-related mortality west of the Mississippi River: Recent evidence from county and state surveillance.” *Drug Alcohol Depend.* Nov. 1 2020. 216: 108314. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7521591>; Fang, Emily. “We are shipping to the U.S.: inside China’s online synthetic drug networks.” *National Public Radio*. Nov. 17, 2020. <https://www.npr.org/2020/11/17/916890880/we-are-shipping-to-the-u-s-china-s-fentanyl-sellers-find-new-routes-todrug-user>.

⁶ 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 The Hon. Alex M. Azar II, Secretary, U.S. Dep’t of Health and Human Services. Jul. 10, 2019. <https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20DOJ%20HHS%207.10.pdf>.

⁷ “GAO-21-301SU, Synthetic Opioids: Considerations for Class-wide Scheduling of Fentanyl-Related Substances.” *U.S. Gov’t Accountability Office*. April 2021. Pg. 31 n. 10. <https://www.gao.gov/products/gao-21-499>.

⁸ *Id.* at 52 n. 9.

Now, more than ever, policymakers must turn to evidence and science, not fear, to find answers. The federal government must not repeat the decades-old mistakes it made around crack-powder sentencing disparities, but rather it should follow the science and a public health strategy to address the overdose crisis. Enforcement-first responses to drug policy, including classwide drug scheduling of fentanyl analogues, have only entrenched racial disparities in the criminal legal system and locked in tougher sentences, without reducing overdose deaths.⁹ These responses deter scientific research and ignore the root causes of the overdose crisis, thwarting any meaningful public health solutions.¹⁰ The most effective ways to address the overdose crisis are evidence-based public health and harm reduction approaches. Such approaches are supported by nearly two-thirds of Americans, who believe drug use should be addressed as a public health issue and not as a criminal justice issue.¹¹

The Biden administration must seize this opportunity to take a new course on drug policy. It must not reverse the progress it has made on harm reduction and instead maintain its commitment to ending mandatory minimums and pushing forward policy that promotes racial equity. We welcome further dialogue with you and your staff about how to move forward on this important topic. However, we must reiterate our firm opposition to “classwide” emergency scheduling, whether temporary or permanent. We request as well that we be allowed to review and provide feedback on the administration’s proposal before it is distributed to Congress.

Thank you for your time and attention to this matter. Please contact Maritza Perez of the Drug Policy Alliance at mperez@drugpolicy.org, or Sakira Cook of The Leadership Conference on Civil and Human Rights at cook@civilrights.org for questions or concerns.

Sincerely,

A Little Piece Of Light
A New PATH (Parents for Addiction Treatment & Healing)
AIDS United
Alliance for Living
American Civil Liberties Union

⁹ Madden, G. J. “Ammunition for Fighting a Demand-Side War on Drugs: A Review of Contingency Management in Substance Abuse Treatment.” *J. Appl. Behav. Anal.* 2008. 41(4): 645-651; Centers for Disease Control and Prevention. “Provisional Drug Overdose Death Counts” Jul. 14, 2021. https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm#drug_specificity. An in-depth analysis of fentanyl analogue sentencing from the United States Sentencing Commission in fiscal year 2019 found that 70 percent of those sentenced for fentanyl analogues were Black or Latinx. U.S. Sentencing Commission. “Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns.” Jan. 2021. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

¹⁰ 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 The Hon. Alex M. Azar II, Secretary, U.S. Dep’t of Health and Human Services. Jul. 10, 2019.

<https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20DOJ%20HHS%207.10.pdf>; Collins, M., & Vakharia, S. “Criminal Justice Reform in the Fentanyl Era: One Step Forward, Two Steps Back.” *Drug Policy Alliance*. 2020. https://drugpolicy.org/sites/default/files/dpa-cj-reform-fentanyl-era-v.3_0.pdf.

¹¹ Franklin, D. “Overwhelming Majority Say War on Drugs Has Failed, Support New Approach.” *Drug Policy Alliance*. June 2, 2021. https://drugpolicy.org/sites/default/files/bpi-aclu_wod_public_release_memo_060221_updated_002_002.pdf.

AMERSA, Inc.
Arizona Recovers
Arkansas Community Organizations
Autistic Self Advocacy Network
Baltimore Harm Reduction Coalition
Being Alive - LA
Black and Pink Massachusetts
Black Led Organizing Collaborative
Brennan Center for Justice at NYU School of Law
Bright Heart Health
California Society of Addiction Medicine
CARMAhealth
Casa de Salud
Cascade AIDS Project
Center for Disability Rights
Center for Embodied Spirituality
Center for Living and Learning
Center for Optimal Living
Center for Popular Democracy
Central Texas Harm Reduction
Centro Latino Americano
Church of Scientology National Affairs Office
College & Community Fellowship
Community Alliance on Prisons
Community Catalyst
Community Health Project LA
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
CURE (Citizens United for Rehabilitation of Errants)
DanceSafe
De-escalate Ohio Now HeartbeatMovement Incorporated
Desiree Alliance
Dream Corps JUSTICE
Drug Policy Alliance
Drug Policy Forum of Hawaii
Due Process Institute
Elevyst
Exponents Inc.
EYEJ: Empowering Youth, Exploring Justice
Fair and Just Prosecution
Faith in Public Life
Federal Public and Community Defenders
Florida Harm Reduction Collective
Friends of Guest House
Friends of Safehouse
GLIDE
GoodWorks: North AL Harm Reduction

GRASP/Broken No More
Harm Reduction Action Center
Harm Reduction Ohio
Harm Reduction Sisters
Harm Reduction Therapy Center
Hawaii Health & Harm Reduction Center
Healing Equity and Liberation (HEAL) Organization
Health Equity Alliance
HealthRIGHT 360
Hep Free Hawaii
Hepatitis C Mentor And Support Group-HCMSG
HIPS
Hoosier Action
Housing Works
Human Rights Watch
IBW-ACTION
Idaho Harm Reduction Project
Jewish Council for Public Affairs
Justice Strategies
JustLeadershipUSA
LA Community Health Project
LatinoJustice PRLDEF
Law Enforcement Action Partnership
The Leadership Conference on Civil and Human Rights
Live4Lali
Maine Drug Policy Lab at Colby College
Maine People's Alliance
Martinez Harm Reduction Collective
Minneapolis Students for Sensible Drug Policy
Muid and Muid Associates
NASTAD
National Advocacy Center of the Sisters of the Good Shepherd
National Association of Criminal Defense Lawyers
National Association of Social Workers
National Council of Churches of Christ in the USA (NCC)
National Council on Alcoholism and Drug Dependence-Maryland
National Employment Law Project
National Harm Reduction Coalition
National Health Care for the Homeless Council
National Immigration Project (NIPNLG)
New Jersey Policy Perspective
NEXT Harm Reduction/NEXT Distro
Nurses for Responsible Healthcare
Ohio Families Unite Against Police Brutality
Ohio Transformation Fund
Ohio Women's Alliance

Open Aid Alliance
Oregon Working Families Party
P.A.I.N.
Partnership for Safety and Justice
Peer Network Of New York
People's Action
R Street Institute
Rights & Democracy New Hampshire
Rights & Democracy Vermont
River Valley Organizing / UnHarming Ohio
Showing Up for Racial Justice Ohio
Southern Poverty Law Center Action Fund
Southern Tier AIDS Program
Sponsors, Inc.
SSDP UC Berkeley
St. Ann's Corner of Harm Reduction
St. James Infirmary
StoptheDrugWar.org
Students for Sensible Drug Policy
Substance Use Policy, Education, and Recovery PAC
Texas Criminal Justice Coalition
The Levenson Foundation
The Mountain Center
The People's Harm Reduction Alliance
The Perfectly Flawed Foundation
The Sentencing Project
The Seven Challenges
The Taifa Group
Transgender Resource Center of New Mexico
Transitions Clinic Network
Truth Pharm
Tulane University
Tzedek Association
Unitarian Universalist Justice Ohio
Unity Fellowship of Christ Church NYC
Urban Survivors Union
Vera Institute of Justice
VICTA
Virginia Harm Reduction Coalition
Vivent Health
VOCAL-NY
VOCAL-WA
Washington Office on Latin America (WOLA)
Wilkes Recovery Revolution
WV Citizen Action