December 11, 2019

The Honorable Lindsay Graham
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Graham and Ranking Member Feinstein:

The undersigned organizations write to reiterate our opposition to *S.1622 – the Stopping Overdoses of Fentanyl Analogues Act of 2019 (SOFA)* and similarly oppose other legislative efforts, such as through the appropriations process, to extend the "class-wide" emergency scheduling ban that S.1622 seeks to make permanent.[1] Rather than focusing resources on reducing overdose deaths from synthetic drugs, the bill would grant the Drug Enforcement Administration (DEA) broad authority within the scheduling process, increase sentences, and expose many more individuals to harsh penalties, including mandatory minimum sentences. SOFA's approach contradicts recent work to advance criminal justice reform and public health approaches to the overdose crisis.

The U.S. is in the midst of a deadly overdose crisis that has claimed thousands of lives each year. In the past few years, synthetic drugs such as fentanyl and their analogues have been responsible for overdose deaths in many parts of the country.[2] In the East Coast and Midwest, use of fentanyl and its variants has been especially dominant with users overdosing after heroin is mixed with fentanyl.[3]

In February 2018, the DEA – in conjunction with the Department of Health and Human Services (HHS)– used its emergency scheduling authority to include a list of specific fentanyl-related substances in Schedule I.[4] This "class-wide" emergency ban, effectively placed substances similar to fentanyl —*in existence or not*--in Schedule I. The "class-wide" ban means that any substance in the future deemed by the DEA (either prior to or after interdiction) to have been produced by certain modifications to the fentanyl structure would be included in Schedule I. In early 2020, this emergency authority runs out. DEA has not asked the relevant public health agencies, HHS and Food and Drug Administration (FDA), to determine if their scheduling action is medically and scientifically valid, so they are ineligible for a one-year extension to this timeline. As a result, the DEA has requested that Congress pass legislation, the *"Stopping Overdoses of Fentanyl Analogues (SOFA) Act*," to give the agency broad "class-wide" powers to

[1] https://www.congress.gov/bill/116th-congress/senate-bill/1622
[2] https://www.drugabuse.gov/related-topics/trends-statistics/infographics/fentanyl-other-synthetic-opioids-drug-overdose-deaths
[3] https://www.seattletimes.com/seattle-news/opioid-deaths-surge-in-midwest-and-east-while-west-sees-declines/
[4] https://www.dea.gov/press-releases/2018/02/07/us-drug-enforcement-administration-emergency-schedules-all-illicit

schedule all fentanyls, circumventing essential coordination with HHS (as is currently required under the Controlled Substances Act).[5]

Giving the DEA such sweeping powers has grave implications for the criminal justice system.[6] The DEA could place each substance it deems to meet the statutory criteria into the Schedule I category, regardless of whether or not the substance has similar effects to fentanyl, and reserves for itself the right to treat substances as Schedule 1 even if it has not specifically identified the substance prior to its interdiction.[7] There is no scientific basis for this approach, and no precedent for this sweeping grant of authority. Along with this decision comes harsh penalties such as mandatory minimums for anyone who sells substances.[8] Giving the DEA broad authority over scheduling will result in greater authority for the Department of Justice (DOJ) to increase prosecutions, depriving accused persons of the opportunity to mount a meaningful defense, and undercutting the goals of criminal justice reform.

The bill would also entail a huge increase in penalties by making substances currently prosecuted using the Analogue Act subject to Schedule 1 penalties. As an example, under the Analogue Act, possession with intent to distribute would generate a 20-year maximum sentence for a defendant.[9] Once the substance is classified as a Schedule 1 analogue of fentanyl, per S. 1622, a defendant with 100 grams or more of it would likely face a 10-year mandatory minimum sentence and a maximum of life in prison.[10] Evidence that the charged substance could have no effect on the human body would be irrelevant to the accused's defense.[11]

We believe the DOJ has misrepresented to lawmakers that if these synthetic substances are not scheduled or the scheduling runs out the drugs will become legal. In April 2019, a DEA spokesperson said, "...any fentanyl substances not already permanently placed in Schedule I or II would fall off the list and technically not be an illegal substance."[12] This statement is false. The emergency scheduling order notes that trafficking of fentanyl analogues is "actually illegal as persons who do so can be prosecuted using the controlled substance analogue provisions of the

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[5] https://www.judiciary.senate.gov/meetings/the-countdown-fentanyl-analogues-and-the-expiring-emergency-scheduling-order

[6] https://www.congress.gov/bill/115th-congress/house-bill/2851/text?format=txt

[7] *See* Department of Justice, Drug Enforcement Administration; Schedules of Controlled Substances: Temporary Placement of Fentanyl-Related Substances in Schedule I, 83 Fed. Reg. 25, 5,188 (Feb. 6, 2018) (codified at 21 CFR Part 1308) ("It bears emphasis, however, that even in the absence of a future publication by DEA specifically identifying such a substance, the substance is controlled by virtue of this temporary scheduling order if it falls within the definition of fentanyl-related substance.").

[8] https://fas.org/sgp/crs/misc/RL30722.pdf

[9] https://fas.org/sgp/crs/misc/RL30722.pdf

[10] Idem

[11] *See* 21 U.S.C. § 802(32)(A) (to prove that a substance is a controlled-substance analogue, the government must prove: 1) the chemical structure is substantially similar to the chemical structure of a controlled substance in Schedule I or II; 2) that the substance has a substantially similar stimulant, depressant, or hallucinogenic effect on the central nervous system as the analogous Schedule 1 substance, or 3) the person intends or represents that the substance would have a substantially similar effect on the central nervous system).

[12] https://tribunecontentagency.com/article/deas-plea-to-congress-permanently-ban-fentanyl-substances/

CSA."[13] Moreover, in a June 2019 Senate Judiciary hearing, DOJ and the DEA acknowledged in sworn testimony:

> In terms of investigations and prosecutions, if the temporary emergency scheduling order lapses without permanent scheduling, the Department would once again have to rely on the Analogue Act to bring fentanyl traffickers to justice. These cases require several elements of proof that are either presumed, or simply not relevant to routine controlled substance prosecutions. To prevail, the government must prove:
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> 1. that the substance involved in the case was intended for human consumption;
>
> 2. that the substance is a "controlled substance analogue," which in turn requires proof of the following "prongs":
>
> a. it has a substantially similar chemical structure as a Schedule I or II controlled substance – in this case fentanyl; and b. it either (i) has a substantially similar effect on the central nervous system (i.e., psychoactive effect) as a Schedule I or II controlled substance – in this case fentanyl – or (ii) in a particular case, was intended or represented as having such an effect. All of these elements must be proven to a jury beyond a reasonable doubt.[14]

Not only does the testimony clearly identify the legal standards by which fentanyl analogues would be evaluated, but these elements, which generally require the government to show that a substance actually has a psychoactive effect, are required by the Constitution's due process requirements. In any case, the testimony notes "…the government has a very good track record in Analogue Act prosecutions."[15] However, we are concerned that removing the need for these steps will increase prosecutorial power, enabling prosecutors to coerce more guilty pleas from defendants even if the substance is not in fact an analogue of fentanyl.

The expansion of the DEA's authority over fentanyl analogues would enable the DEA to decide which substance belongs in the statutory fentanyl class and therefore deem it to be immediately and permanently in schedule I. The DEA is a law enforcement agency that does not have the scientific or health expertise to schedule substances on its own. This is why HHS has always played an equal role in scheduling substances.

Indeed, in 2015, Congressman Charlie Dent (R-PA) introduced a bill containing DEA's list of synthetic drugs to place in schedule I.[16] The bill initially had more than 300 substances, but was reduced to 22 substances after HHS evaluated the wish list, determining that only 21 met the definition of a Schedule I substance, while the rest did not. Some of the substances that DEA wanted to schedule by way of the Dent bill were not even psychoactive.[17] This demonstrates the danger of allowing the DEA broad authority in proposing drugs for scheduling. The DEA could

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[13] *See* Department of Justice, Drug Enforcement Administration; Schedules of Controlled Substances: Temporary Placement of Fentanyl-Related Substances in Schedule I, 83 Fed. Reg. 25, 5,188 (Feb. 6, 2018) (codified at 21 CFR Part 1308).

[14] https://www.judiciary.senate.gov/imo/media/doc/Liskamm-Cherundolo%20Joint%20Testimony.pdf

[15] Idem

[16] https://www.congress.gov/bill/114th-congress/house-bill/3537

[17] idem

move to add substances that, although chemically similar to fentanyl, has no effect on the human body, thus exposing individuals to fentanyl analogue sentences for substances that are benign.

Another 2018 case illustrates a similar concern about giving the DEA broader control of scheduling. In this instance, DOJ tried to prevent a defendant from accessing a government chemist's testimony that said the substances the defendants were manufacturing were not analogues of controlled substances.[18]

DOJ already has broad prosecutorial power under current federal law and has aggressively used this power to prosecute cases involving fentanyl and its analogues to pursue very severe penalties. Indeed, under the Controlled Substances Act, 10 or more grams of a mixture or substance containing a detectable amount of an analogue of fentanyl will trigger a five-year mandatory minimum for possession with intent to distribute.[19] There are additional sentencing enhancements too. For example, the United States Sentencing Commission (USSC) revised its guidelines last year, following lobbying by DOJ, to allow sentencing enhancements for fentanyl and fentanyl analogues**,** with one of the enhancements equating to a 50 percent increase in an individual's sentence.[20] The Trump Administration reported in May that there has been a 40-fold increase in federal fentanyl-related prosecutions during the President's time in the White House.[21]

Finally, research on fentanyl prosecutions demonstrates a reason for concern. In January 2018, the USSC released data looking at individuals who were convicted as fentanyl drug traffickers in 2016.[22] The data indicate significant racial disparities in fentanyl sentencing with people of color comprising 75% of those prosecuted.[23] Moreover, only 15.7% of individuals report clear knowledge that they knew they were trafficking fentanyl, underlining *mens rea* concerns.[24] Of those sentenced, 25.5% were couriers/mules, and 23.5% were street-level dealers. Drug kingpins or leaders in the trade for whom harsh federal drug laws are purported to target comprise less than 16% of those convicted.[25] More recent data from the USSC confirms that these trends continue: in 2018, people of color comprised more than 77% of those prosecuted.[26] Of those sentenced, 15.3% received a decreased sentence for having a minor of minimal role in the

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[18] https://www.techdirt.com/articles/20180526/19435939923/court-says-govt-cant-claim-testimony-that-undermines-criminal-case-is-privileged-when-used-it-other-cases.shtml

[19] https://famm.org/wp-content/uploads/Reject-S.-2635-Fentanyl-Changes.pdf

[20] News Release: U.S. Sentencing Commission Unanimously Adopts ..." - U.S. Sentencing Commission. 12 Apr. 2018, https://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20180412_Press_Release.pdf. Accessed 26 Apr. 2019.

[21] https://www.whitehouse.gov/wp-content/uploads/2019/05/Opioid-Commission-Report-One-Year-Later-20190507.pdf

[22] "Public Data Briefing: Synthetic Drugs - United States Sentencing ...." https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf. Accessed 26 Apr. 2018.

[23] Idem

[24] Idem

[25] Idem

[26] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl_FY18.pdf

offense; and 24.6% were safety valve eligible—meaning they were low-level, with minimal criminal histories.

Giving the DEA broad "class-wide" powers to schedule fentanyl analogues without HHS oversight as proposed in S. 1622 could also undermine scientific research critical to finding solutions to the overdose crisis. In a July 2019 letter to 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' ban. 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."[27] S. 1622 would take away HHS oversight essential to excluding substances that should not be scheduled. Substances that have no psychoactive value but are important to research could be inadvertently added to Schedule I without proper HHS oversight, needlessly increasing both burdens to research and the net widening effect of criminalization.

We share your concern about fentanyl-related deaths, but this approach merely repeats the mistakes of the past by exacerbating our incarceration problem. We welcome continued dialogue with you and your staff about how to move forward on this important topic. However, we must reiterate our firm opposition to S. 1622 and similarly oppose other legislative efforts to extend the "class-wide" emergency scheduling ban that S. 1622 seeks to make permanent.

Sincerely,

American Civil Liberties Union
Drug Policy Alliance
FAMM
FedCURE
Federal Public and Community Defenders
Friends Committee on National Legislation
Human Rights Watch
The Leadership Conference on Civil and Human Rights
NAACP
National Association of Criminal Defense Lawyers (NACDL)
National Association of Social Workers
StoptheDrugWar.org
Students for Sensible Drug Policy
The Sentencing Project

CC: Majority Leader McConnell, Speaker Pelosi, Minority Leader Schumer, Minority Leader McCarthy, Senate Judiciary Committee Members, Senator Portman, Senator Manchin

[27] https://www.reuters.com/article/us-usa-congress-fentanyl-letter/lawmakers-seek-scientific-review-of-plan-to-tightly-regulate-all-fentanyl-copycats-idUSKCN1U62I7