

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

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

The Honorable Jerrold Nadler
Chairman
Committee of the Judiciary
2132 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee of the Judiciary
2056 Rayburn House Office Building
Washington, DC 20515

April 19, 2021

Dear Chairmen Durbin and Nadler, and Ranking Members Grassley and Jordan:

According to the most recent provisional data from the Centers for Disease Control, more than 88,000 Americans lost their lives to a drug overdose in the 12 months ending August 1, 2020. This death toll represents the highest number of drug overdoses ever and is nearly as many Americans who died in the Korean and Vietnam Wars combined. This surge in deaths is disproportionately driven by fentanyl and fentanyl variants, which are especially deadly synthetic opioids. Only two milligrams of fentanyl are enough to cause a fatal overdose, and the fentanyl variants are up to 5,000 times more lethal than heroin and up to 150 times more lethal than fentanyl itself. These fentanyl variants account for 59 percent of all overdose deaths. That is over 135 deaths every day from synthetic opioids alone, or approximately one fentanyl-related death every 10 minutes.

As you are aware, in February 2018, DEA used its emergency scheduling powers to ban all fentanyl-related substances, preventing traffickers from exploiting legal loopholes to evade punishment and poison communities. Further, to confront the problem at its source, the U.S. Government engaged with China on controlling fentanyl and fentanyl precursors. On May 1, 2019, China permanently placed controls on fentanyl-related substances as a class.

We have observed encouraging results following both bans and this scheduling order has served as a critical tool to deter traffickers from pumping these deadly substances into the country. Since class-wide scheduling of fentanyl-related substances went into effect in February 2018 in the U.S., there has been an almost 90% decline in total encounters of fentanyl-related substances. Following the implementation of China's permanent controls, there was a measurable decrease in seizures of fentanyl coming directly from China. Additionally, since class-wide scheduling went into effect in February 2018, the number of new fentanyl analogues identified fell sharply from 32 substances (between 2016 and January 2018) to 12 (between February 2018 and July 2020). The scheduling of fentanyl-related substances has proven to be indispensable in fighting the opioid epidemic by limiting the availability of fentanyl to drug traffickers and, in so doing, vulnerable end users.

By law, DEA's ban could only last for two years, so in January of 2020, Congress passed the Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act. This extended the ban until May 6, 2021. Now, the nation once again needs Congressional action before we lose this critical weapon against these ruthless traffickers. Should Congress fail to act by May 6, 2021, drug traffickers stand ready to flood the United States with what would be essentially legalized poison. Without this critical tool, law enforcement's ability to seize these substances at the border, and their ability to intercept and stop traffickers from circulating these substances in our communities will stop. If class-wide scheduling is allowed to expire, we anticipate production of fentanyl-related substances will return to their pre-control levels. For example, if we saw levels return to only 50% of the 2017 seizure levels – that would translate to over 29 million deadly dosage units. We will be in a position where China (at our urging) will be doing more to stop these deadly poisons from coming into our country, than the United States is doing – and we are the country with sky rocketing overdose deaths.

We understand that there is criticism of class-wide scheduling in that critics believe it will expand the application of mandatory minimum sentences. These concerns are unfounded. Prior to class-wide scheduling, federal courts applied mandatory minimum sentences to unscheduled fentanyl analogues prosecuted under the Analogue Act. Should class-wide scheduling lapse, this will not remove mandatory minimum penalties for traffickers who peddle these deadly substances and cause untold deaths. Rather, prosecutors can still proceed under the cumbersome Analogue Act which requires an enormous amount of time and resources. Further, since class-wide scheduling went into effect in February 2018, the Department of Justice has prosecuted only eight (8) cases under it – a mere drop in the bucket compared to the number of drug trafficking cases the Department prosecutes on a yearly basis. Thus, this tool has not dramatically expanded the number of cases involving mandatory minimum sentences. Instead, we are seeing the real deterrent effect the scheduling order has had as the decline in proliferation has resulted in a decline in cases.

Without Congressional action, we lose this critical tool in our fight to end the opioid crisis and to lower the skyrocketing overdose deaths in this country. Given the staggering overdose death numbers, we cannot cede ground in our fight to stop the illicit supply – a first year drug priority of this Administration. Congress must act to avoid the most significant drug threat of our Generation.

Sincerely,

Former U.S. Attorneys in the following districts:

Kurt Alme
District of Montana

David Anderson
Northern District of California

John Anderson
District of New Mexico

Michael Bailey
District of Arizona

John Bash
Western District of Texas

Scott Blader
Western District of Wisconsin

Scott Brady
Western District of Pennsylvania

Craig Carpentio
District of New Jersey

Don Cochran
Middle District of Tennessee

Peter Deegan
Northern District of Iowa

Richard Donoghue
Eastern District of New York

D. Michael Dunavant
Western District of Tennessee

Halsey Frank
District of Maine

Brandon Fremin
Middle District of Louisiana

Nick Hanna
Central District of California

John Huber
District of Utah

Michael Hurst
Southern District of Mississippi

Jeff Jensen
Eastern District of Missouri

Matthew Krueger
Eastern District of Wisconsin

Matthew Martin
Middle District of North Carolina

William McSwain
Eastern District of Pennsylvania

Robert Brewer
Southern District of California

Bobby Christine
Southern District of Georgia

Stephen Cox
Eastern District of Texas

David DeVillers
Southern District of Ohio

Seth DuCharme
Eastern District of New York

Jason Dunn
District of Colorado

David Freed
Middle District of Pennsylvania

Timothy Garrison
Western District of Missouri

Robert Higdon
Eastern District of North Carolina

Robert Hur
District of Maryland

William Hyslop
Eastern District of Washington

Mark Klassen
District of Wyoming

Erica MacDonald
District of Minnesota

Peter McCoy
District of South Carolina

John Milhiser
Central District of Illinois

Joshua Minkler
Southern District of Indiana

Richard Moore
Southern District of Alabama

Brian Moran
Western District of Washington

Erin Nealy Cox
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Christina Nolan
District of Vermont

Doug Overbey
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B.J. Pak
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Ron Parsons
District of South Dakota

Ryan Patrick
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Charles Peeler
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William Powell
Northern District of West Virginia

Matthew Schneider
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Bryan Schroder
District of Alaska

McGregor Scott
Eastern District of California

Timothy Shea
District of Columbia

Trent Shores
Northern District of Oklahoma

Jay Town
Northern District of Alabama

Aaron Weisman
District of Rhode Island

Billy Williams
District of Oregon

cc: The Honorable Merrick Garland, Attorney General, U.S. Department of Justice
Mr. Darrell C. Evans, Acting Administrator, Drug Enforcement Administration
Ms. Regina LaBelle, Acting Director, Office of National Drug Control Policy
Senate Committee on Health, Education, Labor and Pensions
House Committee on Energy and Commerce