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June 1, 2023

The Honorable Chuck Schumer
Senate Majority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Senate Republican Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

Via Email and U.S. Mail

Re: Pass the HALT Fentanyl Act (H.R. 467/S.B. 1141)

Dear Majority Leader Schumer and Republican Leader McConnell:

The United States is experiencing a cataclysmic surge of overdose deaths due to the lethal amounts of fentanyl and fentanyl-related substances that cross the southwestern land border unimpeded. Each year, fentanyl and fentanyl analogues kill Americans at a rate that rivals World War II or the Civil War. Just last year, drug overdoses killed more than 100,000 Americans. Synthetic opioids like fentanyl caused 66% of those overdose deaths.¹ To ensure that law enforcement can continue to prosecute the sale and use of illicit fentanyl analogues, we the undersigned Attorneys General, as the chief legal officers of our respective States, write you to insist that you permanently schedule all current and future fentanyl analogues as Schedule I drugs

¹ U.S. Drug Enforcement Administration, *DEA Warns of Increase in Mass-Overdose Events Involving Deadly Fentanyl* (Apr. 6, 2022), <https://www.dea.gov/press-releases/2022/04/06/dea-warns-increase-mass-overdose-events-involving-deadly-fentanyl>.

by passing the HALT Fentanyl Act (H.R. 467/S.B. 1141) as soon as possible. The House of Representatives recently passed this bill with an overwhelming bipartisan majority. The Senate must do the same.

The cause of this fentanyl scourge is clear: Mexican drug cartels, including the Sinaloa Cartel and the Jalisco New Generation Cartel, import dangerous raw materials from China, use them to produce deadly synthetic opioids at low cost, and unlawfully transport those opioids across the U.S. border.² Between October 2021 and June 2022, U.S. Customs and Border Protection seized 8,425 pounds of cartel-smuggled fentanyl crossing into the United States.³ That is enough fentanyl to kill the entire population of the United States five times over.⁴

The federal government's response to this existential threat has been woefully deficient. As fentanyl has poured over the United States-Mexico border, the Department of Homeland Security chose to eliminate⁵ the very program designed to prevent transnational criminal organizations and gangs from exploiting migrants "to bring drugs, violence, and illicit goods into American communities."⁶ Indeed, the current Administration's abject refusal to secure our border—one of the basic duties of any government—is a direct cause of this crisis.

Even more fundamentally, however, the federal government has not equipped law enforcement with the tools needed to prosecute the sale and use of illicit fentanyl analogues. Controlled substances are divided into five schedules under the Controlled Substances Act based on whether they have a currently accepted medical use in treatment in the United States, their relative abuse potential, and their likelihood of causing dependence when abused.⁷ The Drug Enforcement Administration (DEA) has classified fentanyl itself as a Schedule II drug because of its high potential for abuse yet accepted medical use for the treatment of certain cancer patients.⁸ But fentanyl is only part of the problem: the federal government has not similarly addressed illicit fentanyl analogues, even though these analogues have no medical use and are more lethal than fentanyl, as evidenced by the higher rate of death and serious bodily injury resulting caused by their use.⁹

² U.S. Drug Enforcement Administration, *Fentanyl Deaths Climbing, DEA Washington Continues the Fight* (Feb. 16, 2022), <https://www.dea.gov/stories/2022/2022-02/2022-02-16/fentanyl-deaths-climbing-dea-washington-continues-fight>.

³ U.S. Attorney's Office Southern District of California, *Fentanyl Seizures at Border Continue to Spike, Making San Diego a National Epicenter for Fentanyl Trafficking; U.S. Attorney's Office Prioritizes Prosecutions and Prevention Programs* (Aug. 11, 2022), <https://www.justice.gov/usao-sdca/pr/fentanyl-seizures-border-continue-spike-making-san-diego-national-epicenter-fentanyl>.

⁴ U.S. Drug Enforcement Administration, *Facts about Fentanyl*, <https://www.dea.gov/resources/facts-about-fentanyl> (noting that one kilogram of fentanyl is enough to kill 500,000 people).

⁵ See U.S. Department of Homeland Security, *Migrant Protection Protocols (MPP) Termination Memo* (Oct. 29, 2021), <https://www.dhs.gov/archive/publication/mpp-policy-guidance>.

⁶ U.S. Department of Homeland Security, *Migrant Protection Protocols* (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

⁷ U.S. Department of Justice Drug Enforcement Administration Diversion Control Division, *Controlled Substances Schedules* (last accessed June 1, 2023), <https://www.deadiversion.usdoj.gov/schedules/>.

⁸ Chris Battiloro, *Fentanyl: How China's Pharmaceutical Loopholes are Fueling the United States' Opioid Crisis*, 46 *Syracuse J. Int'l. L. & Com.* 343, 370 (2019).

⁹ United States Sentencing Commission, *Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns* (Jan. 2021), at 5, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

Fentanyl was first synthesized in 1960 as a medicine for treating pain, and was approved by the U.S. Food and Drug Administration as an intravenous anesthetic in 1972.¹⁰ Fentanyl analogues—drugs that are developed to imitate fentanyl, but are not chemically identical—soon appeared.¹¹ Fentanyl analogues “quickly bec[a]me just as deadly” as fentanyl itself: “by the mid to late 1980s, over ten analogs were identified on the black market and were reported to be responsible for overdoses related to laced heroin.”¹²

Fentanyl analogues pose a unique enforcement problem: although fentanyl itself is a Schedule II drug, fentanyl analogues’ “chemical make-up, once easily altered, is no longer banned by law.”¹³ This “begins a game of cat and mouse: federal agents race to identify and ban the analogs while chemists continue to make new ones.”¹⁴ These unique characteristics made analogue-by-analogue remediation efforts impossible. For instance, DEA exercised its temporary scheduling authority under 21 U.S.C. § 811(h) to place temporarily into Schedule I dozens of synthetic drugs, several of which are fentanyl analogues.¹⁵ But, as Deputy Attorney General Rod J. Rosenstein explained, Chinese fentanyl distributors would “take advantage of the fact that the fentanyl molecule can be altered in numerous ways to create a fentanyl analogue that is not listed as illegal under U.S. [] law; when regulators are able to identify the new fentanyl and make it illegal, the distributors quickly switch to a new, unlisted fentanyl analogue.”¹⁶

Prosecution under the Analogue Act, 21 U.S.C. § 813, fared no better. The Analogue Act ostensibly provides that a controlled substance 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.”¹⁷ Although unlisted fentanyl analogues are arguably already banned under the Analogue Act, prosecution under that statute is difficult.¹⁸ In order to convict fentanyl-analogue traffickers, prosecutors must prove that the new analogue is “intended for human consumption” and “substantially similar” to an already listed substance.¹⁹ This often results in a legal dispute between conflicting scientific expert witnesses testifying to the chemical structure of the drugs in dispute.²⁰

Despite the decades-long proliferation of fentanyl analogues and the obvious problems with the then-current mechanisms for prosecution of fentanyl-analogue traffickers, it was not until 2018 that DEA classified fentanyl analogues as Schedule I drugs, and only then on a temporary

¹⁰ Agneta Hendershot, *Solving the Fentanyl Problem Beyond the Border: A Call for an International Solution*, 9 Penn St. J. L. & Int’l Aff. 216, 223 (2020).

¹¹ *Ibid.*

¹² *Ibid.* (quotation marks omitted).

¹³ *Ibid.* (quotation marks omitted).

¹⁴ *Ibid.* (quotation marks omitted).

¹⁵ Rachel L. Rothberg & Kate Stith, *Fentanyl: A Whole New World?*, 46 J. L. Med. & Ethics 314, 319 (2018).

¹⁶ U.S. Dep’t of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks on Enforcement Actions to Stop Deadly Fentanyl and Other Opiate Substances from Entering the United States* (Oct. 17, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-enforcement-actions-stop-deadly>.

¹⁷ 21 U.S.C. § 813.

¹⁸ Rothberg & Stith, *A Whole New World*, *supra* n.15, at 319; see also *McFadden v. United States*, 576 U.S. 186, 191–95 (2015) (describing a multi-pronged, complicated *mens rea* requirements for conviction).

¹⁹ 21 U.S.C. §§ 802(32), 813.

²⁰ Battiloro, *China’s Pharmaceutical Loopholes*, *supra* n.8, at 370.

basis.²¹ As that temporary scheduling came to an end, however, Congress failed to take the responsible course and schedule them permanently.²² Instead, fentanyl analogues' status as Schedule I drugs has become a political plaything in Congress and remains at the mercy of repeated temporary extensions, the most recent of which will expire at the end of 2024.²³ Some of these extensions were enacted mere days before the previous scheduling provision was set to expire.²⁴

Placing fentanyl analogues on Schedule I is the correct move, but it must be done *permanently*. Permanent scheduling allows the criminal prosecution of anyone caught possessing, distributing, or manufacturing illicit variations of the drug—"a task previously burdensome for prosecutors"—without the uncertainty of whether the temporary authorization will expire during the prosecution.²⁵ Permanently changing the scheduling of fentanyl analogues "would eliminate lengthy litigation and permit prosecutors to quickly remove those involved in the illicit narcotic market from the streets."²⁶ Such legislative action "would allow authorities to keep pace with clandestine labs attempting to bypass regulations by altering the chemical structures of controlled substances."²⁷

The fentanyl crisis has devastated many American communities, families, and lives, including those in our respective States. This national catastrophe requires a serious federal solution. Permanently scheduling fentanyl analogues as Schedule I drugs will allow the federal government to engage resources thus far underutilized in the fight against the fentanyl epidemic, putting drug cartels and traffickers on notice and saving American lives. We urge you to take up and pass the HALT Fentanyl Act as soon as possible.

Sincerely,



Jason S. Miyares
Attorney General of Virginia



Ashley Moody
Attorney General of Florida

²¹ Sarah N. Lynch, *U.S. lawmakers seek permanent ban on illicit types of fentanyl*, Reuters (Mar. 7, 2022), <https://www.reuters.com/world/us/us-lawmakers-seek-permanent-ban-illicit-types-fentanyl-2022-03-07/>.

²² See, e.g., National Association of Attorneys General, *Deadly Fentanyl Loophole Should be Closed by Passing Federal Legislation Endorsed by State and Territory Attorneys General* (Aug. 23, 2018), <https://www.naag.org/opioids/deadly-fentanyl-loophole-should-be-closed-by-passing-federal-legislation-endorsed-by-state-and-territory-attorneys-general-sofa-act/> (bipartisan group of 52 state and territory attorneys general urging Congress to permanently schedule fentanyl analogues).

²³ See Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act, Pub. L. No. 117-328 (2022).

²⁴ See, e.g., David Shortell, *Expiring tool to fight fentanyl saved in Senate but faces uncertain future in House* (Jan. 18, 2020), <https://www.cnn.com/2020/01/18/politics/fentanyl-analogue-scheduling-doj/index.html>.

²⁵ Battiloro, *China's Pharmaceutical Loopholes*, *supra* n.8, at 370.

²⁶ *Ibid.*

²⁷ *Ibid.*

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