

April 20, 2021

VOTE “NO” ON H.R. 2630, EXTENDING THE TEMPORARY EMERGENCY SCHEDULING OF FENTANYL ANALOGUES ACT

Dear Members of Congress,

On behalf of the American Civil Liberties Union (ACLU), and our more than 8 million members, supporters, and activists, we write to express our opposition to H.R. 2630, Extending the Temporary Emergency Scheduling of Fentanyl Analogues Act. This bill will extend the Trump administration’s temporary “class-wide” emergency scheduling of fentanyl-related substances, which is set to expire in May 2021. Any extension of this policy would exacerbate the racially disparate impacts of the war on drugs at a time when the public is demanding a reckoning with racial injustice.



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Deborah N. Archer
President

Anthony D. Romero
Executive Director

We urge you to vote “NO” on H.R. 2630, Extending the Temporary Emergency Scheduling of Fentanyl Analogues Act. The ACLU plans to score this vote.

In 2018, the Trump administration implemented the class-wide scheduling of fentanyl analogues, placing all fentanyl analogues on Schedule I of the Controlled Substances Act. Under this temporary scheduling policy, the Department of Justice (DOJ) sidestepped the established process for consulting with the Department of Health and Human Services and the Food and Drug Administration to confirm a substance’s potential for abuse. As a result, the mandatory minimum sentencing laws enacted by Congress in the 1980s are now being applied to the newly-scheduled class of fentanyl-related compounds, *without having to prove the substance in question has potential for abuse*.

Class-wide scheduling has proven to disparately impact Black and brown people. Between 2015 and 2019, prosecutions for federal fentanyl offenses increased by nearly 4,000%, and fentanyl-analogue prosecutions spiked by 5,000%.¹ Almost 75% of those sentenced in fentanyl cases in 2019 were people of color,² and nearly 68% of those sentenced for fentanyl analogues were people of color.³ As is typical of the drug war, the mandatory minimum sentences in fentanyl analogue cases are not reserved for high-level traffickers, the people for whom Congress created those harsh sentences. In fact, more than half of all federal fentanyl-analogue prosecutions in 2019 involved a

¹ U.S. Sent. Comm’n, *Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns* (Jan. 2021), at 24, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

² See *id.*

street-level seller or other minor role; only 10.3% of these cases involved the most serious functions, such as importing or leading distribution of the substance.⁴

To be clear, harmful fentanyl analogues are illegal and subject to federal prosecution without class-wide scheduling. Fentanyl analogue cases can be prosecuted under the Controlled Substances Act and the Analogue Act, but that would require expert testimony to prove the substance in question is substantially similar to fentanyl in its chemical structure and pharmacological effects. Although that requires additional legwork, DOJ concedes it has a “very good track record in Analogue Act prosecutions.”⁶

Fifty years into the war on drugs, it is past time to embrace public health solutions to fentanyl and its analogues, rather than outdated policies that have failed to curb demand. Any extension of the class-wide scheduling of fentanyl analogues is a continuation of the drug war and will only deepen racial injustice, shatter neighborhoods, and separate families, all without evidence it will improve public safety. The ACLU strongly urges you to vote “NO” on H.R. 2630, Extending the Temporary Emergency Scheduling of Fentanyl Analogues Act.

Please feel free to contact senior policy counsel Aamra Ahmad (aahmad@aclu.org) with any questions.

Sincerely,



Ronald Newman
National Political Director



Aamra Ahmad
Senior Policy Counsel

³ *Id.*

⁴ *Id.*, at 28.

⁵ See Dep’t of Justice, *U.S. Attorney Scott Brady Statement on Expiration of Fentanyl Analogue Emergency Scheduling* (Jan. 29, 2020) (“The emergency scheduling—limited to a two-year period—also made the fentanyl analogues subject to still statutory mandatory minimum sentences.”).

⁶ Statement of Amanda Liskamm, Office of the Deputy Attorney General, Dep’t of Justice, and, Greg Cherundolo, Office of Global Enforcement, Drug Enforcement Administration, Senate Judiciary Committee Hearing, “The Countdown: Fentanyl Analogues & the Expiring Emergency Scheduling Order,” at 5 (June 4, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Liskamm-Cherundolo%20Joint%20Testimony.pdf>.