Christopher J. Hajec
Mark S. Venezia
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
(202) 232-5590
Attorneys for Amicus Curiae Federation for American Immigration Reform

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

Amicus Invitation No. 18-02-27 (Conviction for Possession of a Controlled Substance in Florida)	Case No.: Redacted

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

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I. INTEREST OF *AMICUS CURIAE*

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Attorney General on February 27, 2018, for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board of Immigration Appeals has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996) ("The Board acknowledges with appreciation the brief submitted by amicus curiae [FAIR].").

II. ISSUES PRESENTED

Supplemental briefing is provided herein on the following issues:

- In light of *Matter of L-G-H-*, 26 I&N Dec. 365 (BIA 2014), does Fla. Stat. § 893.13(6)(a) categorically define a violation "relating to" a controlled substance as provided in INA sections 212(a)(2)(A)(i)(II) and 237(a)(2)(B)(i), even though this Florida provision does not include knowledge of the illicit nature of a substance as an element of possession?
- Is the definition of cocaine provided in Fla. Stat. § 893.03(2)(a) coextensive with or broader than the one provided in the federal controlled substance schedules? More specifically, does Respondent's argument that "derivatives of cocaine" are included in the Florida schedule, but not in the Federal, show that the Florida definition is broader?

III. STATEMENT REGARDING THE FACTS

The *amicus* invitation stated that additional facts may be made available. Counsel for FAIR attempted to obtain such additional facts from counsel for respondent, Sui Chung, but could not reach her by phone, and did not receive a response to an email counsel for FAIR had sent her on March 12. While FAIR respects an attorney's duty to advocate for and protect his or her client, the need for an *amicus* to seek information from a respondent's attorney routinely has had the result that FAIR and other pro-enforcement *amici* that usually support the government have had far less information about a given case than have pro-respondent *amici*.

Although FAIR was eventually given the redacted decision that is on appeal in this case, it received it only in response to several Freedom of Information ("FOIA") requests made on March 14 and 15. Since the Executive Office of Immigration Review would only provide the decision by postal mail, a FOIA filer had to visit its office to obtain a copy. This visit did not occur until March 23, four business days before receipt of this brief is due. FAIR did not receive the decision by mail until March 27, two days before the due date for receipt. Thus, though FAIR now can obtain decisions through the FOIA process, the need to resort to that process greatly compresses the time counsel for FAIR have to draft a fact-specific brief that is more likely to be of help to the Board than a brief addressing only generalities.

The interest in having *amici* that support both sides is not served by these asymmetries in access to information and briefing time. Surely, justice would be better served by allowing on-line access to related IJ decisions for all potential *amici*.

IV. SUMMARY OF THE ARGUMENT

Fla. Stat. § 893.13(6)(a) categorically defines a violation "relating to" a controlled substance, even though the knowledge of the illicit nature of a controlled substance is not an

element of possession under that provision. The language of the Immigration and Nationality Act ("INA") puts no limits on the scope of state statutes covered, except that the specific controlled substance must be "as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)."

In *Matter of L-G-H-*, 26 I&N Dec. 365 (BIA 2014), this Board ruled that Fla. Stat. § 893.13(1)(a)(1), which prohibits illicit trafficking in controlled substances, categorically defines an INA violation, even though the knowledge of the illicit nature of a controlled substance is not an element of that Florida crime. The same reasoning implies that Fla. Stat. § 893.13(6)(a), defining possession of a controlled substance, is a categorically defined crime even though knowledge of the illicit nature of a controlled substance is not among its elements.

Respondent argued below that the Florida statute includes all "derivatives of cocaine and ecgonine," whereas the federal controlled substances schedule does not. The federal schedule does, however, include all derivatives of ecgonine, and ecgonine is very similar to cocaine. Respondent did not show below that Florida ever has applied its statute to any derivative of ecgonine that is not also a derivative of cocaine, and he is unlikely to be able to do so here. Thus, Respondent did not meet, and is unlikely to meet, his burden of showing a realistic probability that the Florida schedule is broader than the federal.

V. ARGUMENT

A. *Fla. Stat. § 893.13(6)(a) categorically defines a violation "relating to" a controlled substance.*

Florida's drug possession offense, Fla. Stat. § 893.13(6)(a), provides that "[a] person may not be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner…" Knowledge of the illicit nature of the controlled substance is not an element of this or any drug offense in Florida. Fla. Stat. § 893.101

("The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter.").

Sections 212(a)(2)(A)(i)(II) and 237(a)(2)(B)(i) of the INA make aliens inadmissible and deportable, respectively, for controlled substance crimes. These two sections contrast with the aggravated-felony and crimes-involving-moral-turpitude sections of the INA, because they both define a controlled substance crime as a "violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." There is nothing in the text to suggest even a minimal *mens rea* element in a controlled substance crime.

This Board ruled in *Matter of L-G-H-* that the element of "guilty knowledge" (that is, knowledge of the illicit nature of a controlled substance) was missing from both the federal and Florida illicit trafficking felonies. *L-G-H,* 26 I&N Dec. at 367-369. In so deciding, this Board cited statutory and case law to the effect that guilty knowledge is not, *per se*, an element of federal controlled substance crimes. *Id.* at 369-70. This Board explained that federal crimes relating to public welfare can be crimes with strict liability, thus lacking guilty knowledge as an element, and pointed out that such crimes have withstood challenges questioning their due process legitimacy. *Id.* By the same token, controlled substance criminal laws, such as Fla. Stat. § 893.13(6)(a), can define violations "relating to" a controlled substance as provided in §§ 212(a)(2)(A)(i)(II) and 237(a)(2)(B)(i) of the INA, even if they lack the *mens rea* element of guilty knowledge.

Indeed, the U.S. Court of Appeals for the Eleventh Circuit has affirmed that § 893.13(6)(a) defines a violation of a controlled substance crime under the INA:

> Any alien convicted of … [a] violation of any law or regulation of a State … relating to a controlled substance is inadmissible and, therefore, removable. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) …
>
> Under Florida law, it is unlawful for any person to be in actual or constructive possession of cocaine, a controlled substance. Fla. Stat. §§ 893.13(6)(a), 893.03(2)(a)4. Possession of cocaine qualifies as an offense relating to a controlled substance.

Martinez v. United States AG, 577 F. App'x 969, 971 (11th Cir. 2014) (citing *Fernandez-Bernal v. Att'y Gen*., 257 F.3d 1304, 1309 (11th Cir. 2001)).

As both *L-G-H-* and *Martinez* were decided after the passage of § 893.101, the status of § 893.13(6)(a) as categorically defining a violation "relating to" a controlled substance as provided in the INA is on firm ground.

B. *Respondent failed to show that the Florida schedule's list of cocaine variants is broader than the federal schedule's.*

Respondent has the burden of showing that he is eligible for cancellation of removal, Opinion Below at 6-7, and thus has the burden of showing that the Florida schedule is broader than the federal schedule in its listing of cocaine-like substances. He did not meet this burden below, and is very unlikely to be able to do so here.

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the Supreme Court held that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language." The Court explained:

> It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Id. By this standard, Respondent must show not merely a theoretical possibility that Florida would apply its statute to a substance not on the federal schedule, but that it has actually done so.

Florida's list of cocaine-like substances is relatively simple, containing "[c]ocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine." Fla. Stat. § 893.03h. The federal list is wordier:

> (C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed, (D) Cocaine, its salts, optical and geometric isomers, and salts of isomers, (E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers, (F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

21 U.S.C. § 802. *See also* 21 U.S.C. § 812(a)(4) (repeating this list). At the minimum, these schedules overlap very closely.

Nevertheless, Respondent argued below that, in the court's words, "since the federal CSA schedule doesn't include **compounds, derivatives or preparations** of cocaine or ecgonine and the Florida controlled substance list does, the Florida statute is broader than the federal schedule." Opinion Below at 5 (emphasis in original). The court then showed that the federal schedule in fact does include compounds and preparations of cocaine. *Id.* Indeed, the court might have gone further, for the federal schedule also lists "ecgonine [and] its derivatives . . ." 21 U.S.C. §§ 801(17)(E), 812(a)(4). Thus, in order to show that, under the *Duenas-Alvarez* standard, the federal schedule is broader, Respondent must show that Florida has applied its statute to derivatives of cocaine that are not also derivatives of ecgonine. He did not make this showing below, and is most unlikely to be able to make it here, if only because cocaine and ecgonine are very similar compounds, and are both precursors and derivatives of each other.[1]

[1] "Ecgonine (tropane derivative) is a tropane alkaloid found naturally in coca leaves. It has a close structural relation to cocaine: it is both a metabolite and a precursor, and as such, it is a controlled substance in many jurisdictions, as are some substances which can be used as precursors to ecgonine itself." https://en.wikipedia.org/wiki/Ecgonine. "In

Thus, as far as Respondent can show, any greater breadth in the Florida schedule is merely theoretical.

VI. CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

Christopher J. Hajec
Mark S. Venezia
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
Email: litigation@irli.org

chemistry, a derivative is a compound that is derived from a similar compound by a chemical reaction." https://en.wikipedia.org/wiki/Derivative_(chemistry). "In chemistry, a precursor is a compound that participates in a chemical reaction that produces another compound." https://en.wikipedia.org/wiki/Precursor_(chemistry).