IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re Seizure of funds on deposit at Ameriprise Group in accounts 072372469001, 16791187001, and 167911890001, at Pershing Investment in account 3FB300824, at Morgan Keegan/Raymond James in account number 32772063, and at Capital One Bank in account number 8077989170

Case No. 8:12-MJ-1457 TGW

TIMOTHY HUMMEL,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

MEMORANDUM OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF MOVANT

Amicus Curiae National Association of Criminal Defense Lawyers submits this memorandum addressing the constitutionality of 21 U.S.C. § 813 and its accompanying definitional statute 21 U.S.C. § 802(32)(A)(i). As applied to the substances at issue here--UR-144 and XLR-11--these provisions present both dangers of a vague statute: they do not give persons of ordinary intelligence fair notice that the substances are prohibited as controlled substance analogues, and they afford the government standardless and arbitrary enforcement powers. The Court should hold the statutes void for vagueness as applied. *See United States v. Forbes*, 806 F. Supp. 232 (D. Colo. 1992).

ARGUMENT

I. VOID FOR VAGUENESS: THE GOVERNING PRINCIPLES.

The Fifth Amendment Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see, e.g., United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002). This void-for-vagueness doctrine has two components: providing fair warning to potential violators and cabining the discretion of the police, prosecutors, and juries. "Except where First Amendment rights are involved, vagueness challenges must be evaluated in light of the facts of the case at hand." *Id*.

The fair warning component of the vagueness standard focuses on fairness to the targeted individual. It is a bedrock principle of criminal law that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). To meet this standard, a statute must provide "an ascertainable standard of guilt." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). The fair warning principle ensures that a person can "conform [his] conduct to law . . . by reading the *face* of a statute--not by having to appeal to outside legal materials." *Sabetti*

v. DiPaolo, 16 F.3d 16, 17 (1st Cir. 1994) (emphasis in original; quotation omitted) (Breyer, J.).

The prosecutorial discretion component of the vagueness doctrine focuses on a separate interest: the systemic importance of clearly drawn criminal statutes as a means of preventing the government from targeting and convicting individuals arbitrarily. Thus, even if a statute provides fair warning, it may nonetheless be impermissibly vague if it fails adequately to restrain official discretion. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 462 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). In that case, the statute violates due process "not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide law enforcement officers." *Morales*, 527 U.S. at 72 (Breyer, J., concurring) (quotation omitted).

II. 21 U.S.C. § 813 IS VOID FOR VAGUENESS AS APPLIED TO THE SUBSTANCES AT ISSUE HERE.

Under these principles, 21 U.S.C. § 813 and its accompanying definitional statute, 21 U.S.C. § 802(32)(A), do not satisfy the requirements of due process here. The first prong of the definition of "controlled substance analogue" requires that the "chemical structure" of the substance be "substantially similar to the chemical structure of" a scheduled drug. *Id*. § 802(32)(A)(i). As applied to UR-144 and XLR-11, the "substantially similar" provision neither establishes an "ascertainable standard of guilt," *Cohen Grocery*, 255 U.S. at 89, nor

provides "sufficient minimal standards to guide law enforcement officers," *Morales*, 527 U.S. at 72 (Breyer, J., concurring) (quotation omitted).

The absence of an "ascertainable standard of guilt" is apparent from the record. At the hearing, experts from diverse academic and forensic settings deplored the vacuity of the "substantially similar" standard. T. 27, 34 (Ms. Reinhold: "[W]e have no guidelines. There's no scientific method. There is no set of rules as to what constitutes similarity or what it means to be 'substantial' versus 'just similar.'"), 56-57, 82 (Dr. Stouch: "substantially similar" standard is "essentially nonsense" in the field of chemistry), 194-97 (Dr. Doering: "substantially similar" standard is "uninterpretable"), 209-10 (Dr. Verbeck: "substantially similar" not defined). To the extent these experts could make sense of the standard, they concluded that UR-144 and XLR-11 do not have a "chemical structure" that is "substantially similar" to JWH-18. T. 42, 44 (Ms. Reinhold), 57-59 (Dr. Stouch), 94-96 (Ms. Harris), 115, 132-33 (Mr. Morris), 166-67, 170 (Dr. DeCaprio), 205-06 (Dr. Verbeck).

Dr. Boos of the DEA was the only witness who purported both to make sense of the standard and to find UR-144 and XLR-11 "substantially similar" to JWH-18. But Dr. Boos conceded that there is no consensus in the scientific community concerning his methodology. T. 251. He struggled to articulate an intelligible principle for determining if the chemical structure of two substances is substantially similar. He asserted that substances are "substantially similar" if they are part of the same "structural class." T. 252. But in the next breath he acknowledged that some members of a "structural class" (aminoalkylindoles) may not be "substantially similar" to others:

> Q. So some aminoalkylindoles may be substantially similar in chemical structure to JWH-018 and some may not be?

A. Or they may be analogues of JWH-200, which is an aminoalkylindole.

Q. Is the answer to my question yes?

A. That all of them are?

Q. No. That some of them may not be?

A. Some of them may not be. They would require an evaluation.

Q. All right. So some aminoalkylindoles may be prohibited under prong one as substantially similar and some may not be?

A. That is correct.

Q. So the fact that these things are part of the aminoalkylindole class does not answer the question as to whether or not they are substantially similar in chemical structure, correct?

A. It does not, but it puts them in their proper place in categorization of what they are.

T. 253-54.

Dr. Boos' equivocal phrasing of his "substantial similarity" opinion reflects the flimsy methodology on which it rests: "My opinion is that they're not that dissimilar, that there's enough of a conserved structure within these two substances, that's why they're part of the same structural class, that they're substantially similar in structure. We've just substituted outring structures. . . . My experience in drug synthesis tells me that this is not that significant of a change." T. 230. "Not that dissimilar," "enough of a conserved structure," and "not that significant of a change" do not constitute the "ascertainable standard of guilt" that due process requires.

Nor does the "substantially similar" provision, as applied here, adequately cabin the discretion of the DEA, the prosecutors, and jurors. The vague statutory language leaves the government free to determine secretly that a substance is substantially similar to a scheduled

drug and then pick and choose at will among those distributing the substance for targeting and prosecution. That is exactly what the government did here. Dr. Boos of the DEA determined secretly in April and May 2012 that UR-144 and XLR-11 are substantially similar to JWH-18. The DEA gave no public notice of those determinations. T. 254-57. It did not have them peer-reviewed by independent scientists. But it used those secret determinations to target Mr. Hummel and Mr. Fedida, while leaving other sellers of UR-144 and XLR-11 free to remain in business.

The DEA's reaction to the repeated invitations to join the advisory committee for the evaluation of controlled substance analogues speaks volumes. Lindsay Reinhold is the chair of the advisory committee. T. 49. As Ms. Reinhold testified, the committee's primary goal is "to develop a scientific method that has acceptance criteria in order to evaluate chemicals that are not technically controlled but could be considered analogues." T. 28. The committee contacted three persons at the DEA and its affiliate, SWIS Drug, to elicit DEA participation. It was turned down. In Ms. Reinhold's words, "[W]e have continued to try to get them to participate and have been turned down each time, being told that it's not in their best interest." T. 48. It is not in the DEA's "best interest" to "develop a scientific method that has acceptance criteria" because the statute, as it stands now, gives the agency nearly unfettered discretion to interpret the "substantially similar" standard as it wishes and in secret.

Previous cases addressing the vagueness of §§ 813 and 802(32)(A) underscore the statutes' unconstitutionality here. *Forbes* involved the substance AET, which the government alleged was substantially similar to scheduled drugs DMT and DET. In that case, as here, the

defense presented highly credentialed experts who testified that AET was not "substantially similar" to DMT or DET. The government called a DEA chemist who said that it was, although a second DEA chemist disagreed. *Forbes*, 806 F. Supp. at 233-34. In light of this disagreement among the experts, the district court found it "undisputed that there is no scientific consensus whether AET has a chemical structure that is substantially similar to DMT or DET." *Id*. at 237. The court added: "The scientific community cannot even agree on a methodology to use to determine structural similarity. Thus, unlike the meaning of cocaine base or the boundaries of a military reservation, a defendant cannot determine in advance of his contemplated conduct whether AET is or is not substantially similar to a controlled substance." *Id*. Based on this absence of fair notice and the danger of arbitrary enforcement, the court held that statute unconstitutionally vague. *See id*. at 238-39.

Here, as in *Forbes*, there is no consensus in the scientific community, either as to methodology (as Dr. Boos conceded, T. 251) or as to the core question of whether UR-144 and XLR-11 are substantially similar to JWH-18.[1] Under the analysis that Judge Babcock followed, this Court should hold §§ 813 and 802(32)(A) void for vagueness as applied here.

The district court and appellate decisions in *United States v. Roberts*, 2002 U.S. Dist. LEXIS 16778 (S.D.N.Y. Sept. 9, 2002), *vacated*, 363 F.3d 118 (2d Cir. 2004), are also illuminating. *Roberts* turned on the constitutionality of §§ 813 and 802(32)(A) as applied to 1, 4-butanediol, which the government alleged was "substantially similar" to the scheduled drug GHB. Based on dueling scientific testimony, the district court found the statutes void

[1] The absence of a scientific consensus distinguishes this case from *United States v. Carlson*, 87 F.3d 440 (11th Cir. 1996), in which the court found "no disagreement in the scientific evidence that MDMA [the asserted analogue] is substantially similar to MDA [the scheduled drug]." *Id*. at 443 n.3.

for vagueness as applied. *See* 2002 U.S. Dist. LEXIS 16778 at *18-*19. The court of appeals vacated the district court decision, but only because of the confluence of two circumstances: a "visual similarity between the two-dimensional diagrams of 1, 4 butanediol and GHB--which differ from each other by only two atoms," and the fact that "1, 4 butanediol is metabolized into GHB after ingestion." 363 F.3d at 124; *see Fisher*, 289 F.3d at 1338-39 ("substantially similar" not vague as applied to GBL, because GBL metabolizes into GBH after ingestion). The *Roberts* court concluded: "Given the combination of GHB's cognizable similarity to 1, 4-butanediol prior to ingestion and its metabolization into that controlled substance after ingestion, the classification of 1, 4-butanediol is clearly mandated by the Act's language, and remains so regardless of the differences of view among the experts." 363 F.3d at 127; *see also United States v. Washam*, 312 F.3d 926, 931-33 (8th Cir. 2002) (holding statute constitutional as applied to 1, 4-butanediol in part because of metabolization after ingestion).

Here, in contrast to *Roberts*, UR-144 and XLR-11 are not merely two atoms different than JWH-18; in the words of Dr. Stouch, "over half the molecule" is different. T. 66; *see* T. 44 (Ms. Reinhold: "half the molecule" is different). And there is no evidence that UR-144 and XLR-11 metabolize into JWH-18 after ingestion. This case has the same sharp dispute and lack of consensus among the experts as in *Roberts*, but neither of the features that, in combination, saved the "substantially similar" standard there.

CONCLUSION

For these reasons, the Court should hold that 21 U.S.C. §§ 813 and 802(32)(A) are void for vagueness as applied to UR-144 and XLR-11.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 11, 2013, a copy of the foregoing has been served by email to:

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