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NON–DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

IN THE MATTER OF:	§
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HAI GUANG TAN,	§
A035-591-734,	§ IN REMOVAL PROCEEDINGS
	§ October 16, 2017 at 8:30AM
	§ Honorable Judge Joren LYONS
Respondent	§

RESPONDENT'S BRIEF IN RESPONSE TO *ORDER OF THE IMMIGRATION JUDGE* (MARCH 08, 2017), ADDRESSING SCIENTER AND RULE OF LENITY

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I. INTRODUCTION

NOW INTO COURT, through undersigned Counsel, comes Mr. Hai Guang Tan, Respondent in the above–numbered and entitled removal proceedings, respectfully offering this brief addressing the issue of scienter and the rule of lenity, in response to an *Order of the Immigration Judge,* issued on March 8, 2017, the date of the respondent's last hearing. In that *Order,* the Honorable Judge provided an overview of the issue and concluded by stating, "the question is whether the state statute's requirement that the offender 'knowingly

permit' another person to conduct drug activity in a building under his management or control differs materially from the federal requirement that the offender 'intentionally permit' another person to use the property knowing that it would be used for purposes of drug activity." This brief responds to the Honorable Judge's concerns.

The respondent emphatically maintains that the aggravated felony charge of removal: cannot be lawfully sustained based on arguments already advanced by the respondent and also addressed here; the rule of lenity obliges the Honorable Judge to conclude the charge is not sustainable, even where there is a proverbial tie between the interpretations urged by both parties; the Department has repeatedly neglected to address the issue on the merits with any substance or depth; and the issue was never properly raised by the Department in the first instance. The respondent also asserts that removability for violation of a law "relating to a controlled substance" under 8 U.S.C. §1227(a)(2)(B)(i) is contrary to law because under any reasonable, plain reading of the statute of conviction, it simply does not "relat[e] to a controlled substance" but in fact, relates to ownership or control, under a broad variety of legal theories or constructs of such control, of a "building, room, space, or enclosure" where another individual (not the respondent or the defendant in the proceeding), whose connection to the matter *does* relate to a controlled substance. The respondent is incontestably eligible for cancellation of removal for lawful permanent residents and the respondent urges the Court to make that finding.

II. LEGAL ANALYSIS

A. According to the relevant case law previously cited by this Court and fundamental rules of statutory construction, the *mens rea* applicable to the federal statute is more specific than the state statute and, therefore, the state conviction cannot be categorically construed as an aggravated felony.

1. The language of the statutes and the punishment associated with each signifies that the federal crime is more specific and targets a more culpable class of criminal activity (*i.e.*, a more "aggravated" crime) than the state statute.

Mr. Tan was convicted in San Mateo County, California, on or February 7, 2012, for a violation of *California Health & Safety Code §11366.5(a)*. This code provision is violated by "[a]ny person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who *knowingly* rents, leases, or makes available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution" (*emphasis added*).

The apparent federal analog of this statute is *21 U.S.C. §856(a)(2)*. Indeed, this Court noted that the language of *California Health and Safety Code §11366.5(a)* "closely tracks" that of *21 U.S.C. §856(a)(2)*, which penalizes those who "manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and *knowingly and intentionally* rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance" (*emphasis added*).

As this Court correctly observed, despite their similarities, the statutes are materially different: "[t]he state statute requires a mens rea of 'knowingly,' while the federal statute requires a mens rea of 'knowingly and intentionally.'" This means that whereas the federal statute requires a showing that the defendant both *knows and intends* for the building that he or she rents be used "for the purpose for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance," the state statute requires only that the defendant have *knowledge* that the building be for such purposes. There is a manifest difference in the culpability of an individual who, for example, rents an apartment to a tenant knowing that the tenant will be using it to manufacture, store, or sell narcotics versus the property owner who does so, with not only the *knowledge*, but also the *intent*, that the apartment will be used in such a way.

The crime committed by the property owner in the first scenario is decidedly less culpable than the one committed by the property owner in the second scenario. The first property owner would rent to the tenant irrespective of whether or not the tenant intended to use the apartment for the sale of narcotics, while the second property owner, because he or she intends for the apartment to be used for narcotics storage, would only rent to such a tenant who carried out that goal. Another apparent distinction can be illustrated by a hypothetical scenario in which a property owner rents to a tenant, later discovers that the tenant is using the property for an illicit purpose related to controlled substances, and continues renting to the tenant. A statute like California's that only criminalizes acts done "knowingly" would apply to this conduct; however, because there is no

manifest intention on the part of the property owner for the apartment to be used for the manufacture, storage or sale of controlled substances, the conduct would arguably not be covered by the federal statute, which requires knowledge and intent. Thus, the language of the statutes reveals that the federal statute is more specific and targets a more culpable class of criminals than the state statute. In other words, the federal statute describes an aggravated felony, and the state statute does not.

This distinction is further supported by the comparative severity of the sentences imposed under the federal and state statutes. A violation of *21 U.S.C. §856(a)* carries a penalty of up to 20 years of imprisonment. *21 U.S.C. §856(b)*. The severity of this sentence suggests a comparably serious crime. *See* Michael E. Rayfield, *Pure Consumption Cases under the Federal "Crackhouse" Statute*, 75 U. Chi. L. Rev. 1805, 1808. ("This provision imposes higher penalties than other drug possession statutes,16 suggesting that Congress intended the statute to criminalize a unique kind of conduct.") By contrast, the state statute—punishable either as a misdemeanor or a felony with a maximum of three years to be served in the county jail—is far less draconian. *Cal. Health & Safety Code §11366.5(a); Cal. Pen. Code §1170(h)*. The disparity in the two potential sentences is massive, reinforcing the conclusion that the crime punished by the federal statute is more specific, and more "aggravated," than the crime covered by the state statute.

2. Two unpublished Ninth Circuit memorandum opinions specifically address this issue and conclude that the state offense is not categorically an aggravated felony.

Before the last hearing, this Court directed the parties to address two unpublished Ninth Circuit memorandum opinions, both of which are directly on point and fully support Mr. Tan's position. In *Eudave-Mendez v. Keisler*, the Ninth Circuit compared the same statutes at issue in the present case and concluded that "the BIA erred in holding that [a] conviction for violating Cal. Health & Safety Code §11366.5(a) was categorically an 'aggravated felony,' as defined in 8 U.S.C. §1101(a)(43)(B), because all behavior prohibited by section 11366.5(a) would also have constituted a violation of 21 U.S.C. §856(a)(2)." *Eudave-Mendez v. Keisler*, 249 Fed. Appx. 617 (9th Cir. 2007) (*unpublished memorandum*).

The Ninth Circuit observed the similarity between the state and federal statutes but also correctly recognized that "they differ in one important respect: the mens rea requirement for section 11366.5(a) is only 'knowingly,' while for §856(a)(2) it is 'knowingly and intentionally." *Id*. Therefore, the Court continued, a conviction for violation of §11366.5(a) "does not fall categorically within 21 U.S.C. §856(a)(2), and thus cannot constitute an 'aggravated felony' on the basis of being a 'drug trafficking crime,' 18 U.S.C. §924(c)(2)." *Id*. In reaching that conclusion, the court expressly rejected the government's argument that the word "intentionally" did not meaningfully alter the federal statute: "Although the Government urges us to ignore part of the explicit mens rea

requirement of § 856(a)(2), we cannot read 'intentionally' out of the statute." (*Id*. at 619.)

The Ninth Circuit reiterated this same position in a 2009 unpublished memorandum opinion in *Garcia v. Holder*, 360 Fed. Appx. 907 (9th Cir. 2009) (*unpublished memorandum*). Applying the same reasoning to the same statutes, in that case, the court reached the identical conclusion: "Second, although 21 U.S.C. § 856(a)(2) and section 11366.5 are similar, they differ in that the mens rea requirement for the former is 'knowingly and intentionally' while the mens rea requirement for the latter is only 'knowingly.' We cannot read the explicit mens rea requirement of 'intentionally' out of the statute." (*Id*. at 909.)

Though these opinions are unpublished, their reasoning is cogent and persuasive and offers the most robust guidance for this Court in resolving the present case. This Court should adhere to the guidance provided by the Ninth Circuit in the two decisions discussed above.

3. Fundamental rules of statutory construction command the conclusion that Health and Safety Code section 11355.6(a) is not categorically an aggravated felony.

As is the norm in analyzing statutes under the categorical analysis, we begin first with the language in the statutes and ignore any factual matters. In any discussion pertaining to interpretation of text, the starting point must always be the language itself. *See, e.g., Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) ("The starting point in every case involving construction of a statute is the language itself."); and *T.S. v. Board of Education,* 10 F.3d 87 (2d Cir. 1993) ("Plain meaning is ordinarily our guide to the meaning of a…term.").

The text here is crystal clear and the two scienter requirements are palpably, discernibly, materially different.

That the Legislature intended the phrase "knowingly and intentionally" to signify a more specific mental state than "knowingly" is apparent when comparing the language in *§856(a)(1)* to that of *§856(a)(2)*. These subsections of *§856* describe related but distinct offenses, with the former requiring a showing that the defendant acted "knowingly" while the latter, the statute at issue in the present case, necessitates proof that the defendant acted "knowingly and intentionally." The juxtaposition of the two mental states in adjacent subdivisions of the same statute makes it clear that the Legislature intended the word "intentionally" to have meaning in this context. The Legislature's inclusion of the word "intentionally" in one of the subdivision and not the other was deliberate and, as such, should be honored. Moreover, ""it is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 928-929, (9th Cir. 2004) (*quoting TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) and *Duncan v. Walker,* 533 U.S. 167, 174 (2001)).

Equally compelling is the Legislature's use of the disjunctive phrase "knowingly or intentionally" in other sections of Title 21. *See, e.g., 21 U.S.C. § 841(a)* ("(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person *knowingly or intentionally*--(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a

controlled substance; or(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.")(*emphasis added*); *21 U.S.C. §844(a)* (repeatedly employing the phrase "*knowingly or intentionally*" with respect to various drug possession offenses). The use of the disjunctive "or" in these statutes stands in contrast to both the conjunctive structure of §856(a)(2) and the use of the word "knowingly," by itself, in §856(a)(1).

The different manners in which Congress drafted the mens rea requirements for these statutes reinforces the conclusion, recognized by the Ninth Circuit in the cases discussed above, that the phrase "knowingly and intentionally" means something more than "knowingly." *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

4. <u>As exemplified by the Model Penal Code, the words "knowingly" and "intentionally" are commonly interpreted to have different meanings when used to describe the mental states required for criminal acts</u>.

The Model Penal Code ("MPC") provisions related to *mens rea* offer insight into the legal interpretations applied to the words "knowingly" and "intentionally," clarifying the distinction between them. Under the MPC, there are four different levels of *mens rea*: purposely (or intentionally), knowingly, recklessly, and negligently. MPC §§2.02(2)(a) (purposely), (b) (knowingly), (c) (recklessly), and (d) (negligently). To act "purposely," or intentionally, is to have

the "conscious object to engage in conduct of that nature or to cause such a result." MPC §2.02(2)(a)(i). To act "knowingly," on the other hand, is to be "aware that his conduct is of that nature," or to be "aware that it is practically certain that his conduct will cause such a result." MPC §2.02(b)(i) and (ii).

Thus, under the purposely (or intentionally) *mens rea*, the defendant acts intending for, or hoping that, a certain result will follow. A defendant acts knowingly if he is practically certain that his conduct will cause a specific result, but not necessarily intending to cause the result. The "purposely," or intentionally *mens rea* bears a higher, or more egregious standard than that of "knowingly." As an example, if person A plants a bomb in a car intending to kill person B, but does so knowing that another individual may be accompanying person B in the car, we can say that A acted intentionally, or with the purpose of, killing B; however, A only acted knowingly with respect to any other passengers because, while it was not his intent to kill them, he acted with knowledge that, if they were present, A's actions would result in their deaths.

B. <u>To the extent any ambiguity remains, the rule of lenity should apply to tip the scales in Mr. Tan's favor</u>.

Mr. Hai Guang Tan is a citizen of the People's Republic of China and a long-term lawful permanent resident; indeed, he has been a permanent resident since April 19, 1981, a period of nearly 36-years. Consequently, all other matters being equal (something the respondent contests, as he manifestly asserts he has already established his offense is not an aggravated felony), the Court must construe any ambiguity in the statute of conviction in his favor. *See, e.g., Moncrieffe v. Holder*, 133 S.Ct. 1678, 1693 (2013) ("And we err on the side of

underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor"); *Leocal v. Ashcroft*, 125 S. Ct. 377, 384 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *U.S. v. Miranda-Lopez,* 532 F.3d 1034, 1040 (9th Cir. 2008) ("The 'longstanding' rule of lenity requires us to resolve any ambiguity in the scope of a criminal statute in favor of the defendant."); and *Matter of Oppedisano,* 26 I&N Dec. 202, 207 (BIA 2013) ("Th[e] rule [of lenity]…provides that ambiguities in statutes must be construed in an alien's favor…").

Whether viewed from the plain text of the statutes or whether analyzed further as to what they actually mean or signify individually, it is clear that they are materially different. It is also important to reiterate the cardinal rule of statutory construction that requires courts to give effect to every term or phrase in a statute. *See, e.g., United States v. Menasche,* 348 U.S. 528, 539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'…rather than to emasculate an entire section" (*internal citations omitted*)). Here, we cannot simply ignore the fact that the federal statute has both "knowingly and intentionally" in the statute; to pretend that "knowingly and intentionally" is the same as "knowingly" is to read "intentionally" out of the statute entirely. And under the rule of lenity, even if they are essentially treated the same, that is to say, in the event of a tie, the respondent is entitled to the benefit of the doubt, and he should nevertheless be deemed eligible for cancellation of removal and the aggravated felony issue dismissed further from the proceedings. We pray that the

Honorable Judge agree with this sound approach and conclude the respondent is eligible for cancellation relief.

IV. CONCLUSION

WHEREFORE, in light of the preceding arguments and precedent, the respondent respectfully urges the Honorable Judge to properly conclude that the offense does not constitute an aggravated felony and that the respondent is therefore eligible for cancellation of removal for lawful permanent residents pursuant to 8 U.S.C. §1229b(a), *et seq*. We appreciate the Court's time and consideration of this intricate legal issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven F. Gruel, hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN RESPONSE TO *ORDER OF THE IMMIGRATION JUDGE* (MARCH 08, 2017), ADDRESSING SCIENTER AND RULE OF LENITY was served on this _____ day of April 2017:

By First Class Mail on:

- Department of Homeland Security
  Immigration and Customs Enforcement
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_____
STEVEN F. GRUEL
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