**TEMPLATE BRIEF FOR REMOVAL PROCEEDINGS**

*Effective November 9, 2016, the definition of cannabis under California law is different and broader than its definition under federal law. Therefore, a California conviction for cannabis from on or after that date is arguably not a “controlled substance” conviction under immigration law. But no court has yet made such a finding regarding California offenses, although they have for other states’ cannabis offenses. Because there is not yet precedent, this argument is best used as a defense to removal. The following template brief lays out the argument for use in removal proceedings where the charge of removability or potential ineligibility for relief are based on a cannabis-related offense under any of the following California criminal codes:*

* Health & Safety Code § 11357
* Health & Safety Code § 11358
* Health & Safety Code § 11359
* Health & Safety Code § 11360
* Health & Safety Code § 11361
* Health & Safety Code § 11362.3

Attorney Name **NON-DETAINED/DETAINED**

Attorney Address

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Attorneys for [Respondent Name]

**U.S. Department of Justice**

**Executive office for immigration review**

**Immigration Court**

**[NAME OF CITY AND STATE HERE]**

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| In the Matter of  [Name of Client]  Respondent,  In **Removal** Proceedings. | )  )  )  )  )  )  ) | File Number: A XXX XXX XXX  Hon. [Name of Judge]  Next Hearing: [Include time and date of hearing] |

**MOTION TO [TERMINATE PROCEEDINGS/ MOTION TO DISMISS THE CONTROLLED SUBSTANCE CHARGE/MOTION TO DISMISS THE AGGRAVATED FELONY DRUG TRAFFICKING CHARGE] OR OPPOSITION TO DHS’S MOTION TO PRETERMIT]**

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**U.S. Department of Justice**

**Executive office for immigration review**

**Immigration Court**

**[NAME OF CITY AND STATE HERE]**

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| Matter of  [Name of Client]  Respondent. | )  )  )  )  )  )  ) | File # A XXX XXX XXX  In **Removal** Proceedings before  Hon. [Name of Judge]  Next Hearing: [Include time and date of hearing and whether it is a Master Calendar or an Individual] |

**MOTION TO [TERMINATE PROCEEDINGS/ MOTION TO DISMISS THE CONTROLLED SUBSTANCE CHARGE/MOTION TO DISMISS THE AGGRAVATED FELONY DRUG TRAFFICKING CHARGE/OPPOSITION TO DHS’S MOTION TO PRETERMIT]**

[NAME] (Respondent), by and through counsel, hereby moves to [terminate proceedings/dismiss the controlled substance charge/dismiss the aggravated felony drug trafficking charge OR opposes DHS’ motion to pretermit Respondent’s [name of application] application. DHS has charged \_\_\_\_\_\_\_, [a lawful permanent resident or whatever the person’s status] with [deportability under INA § 237(a)(2)(B)(i) (controlled substance offense)/INA § 237(a)(2)(A)(iii) (aggravated felony drug trafficking) / inadmissibility under INA § 212(a)(2)(A)(i)(II)]. See Exh. 1 (NTA). These charges stem from [one/two] alleged conviction[s] for violation of [Cal. Health & Safety Code § 11357/11358/11359/11360/11361/11362.3].

This Court must [terminate these proceeding/dismiss the charges/deny DHS’ motion to pretermit] because California’s definition of cannabis (effective November 9, 2016) is statutorily overbroad and does not match the federal statutory definition of cannabis. California’s definition of cannabis specifically includes “*all parts of the plant Cannabis sativa L., whether growing or not.*” while the federal definition of cannabis specifically excludes mature stalks. *See* Cal. Health & Safety Code § 11018; *compare with* 21 U.S.C. § 802(16). The State of California’s definition of cannabis is broader than the federal definition and includes all parts of the cannabis plant. Cal. Health & Safety Code § 11357/11358/11359/11360/11361/11362.3 is indivisible as to what part of the marijuana plant has been possessed, sold, cultivated, etc. Accordingly, there is no categorical match and [this case must be terminated/the controlled substance charge must be dismissed/the aggravated felony drug trafficking charge must be dismissed/this Court must deny DHS’s motion to pretermit Respondent’s application].

Respondent need not provide this Court with a case as evidence that the State of California applies Cal. Health & Safety Code § 11357/11358/11359/11360/11361/11362.3 to prosecute cannabis offenses that specifically include “mature stalks” because it is plain from the statutory definition itself. The Supreme Court has held that the categorical approach “requires more than the application of legal imagination to a state statute’s language.” *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Rather, “[i]t 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*.”* *Id.* But where “a state statute explicitly defines a crime more broadly than the generic definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.” *Chavez-Solis v. Lynch,* 803 F.3d 1004, 1009-10 (9th Cir. 2015) (internal quotation marks and citations omitted). The California statute explicitly defines cannabis more broadly than the federal statute. There is, therefore, a realistic probability that the state will apply Cal. Health & Safety Code § 11357/11358/11359/11360/11361/11362.3 to conduct that falls outside the generic definition of the crime.

1. **STATEMENT OF FACTS AND PROCEDURE**

[There is no need to go into any equities here. Simply outline the facts and procedure of the case (e.g. the date of the Respondent’s admission to the United States, the date they became an LPR, the date or dates of the conviction and charges. Include the date they were served with the NTA, and any prior immigration court proceedings]. For example:

Respondent, Gerard Depardieu, is a twenty-nine-year-old native and citizen of France. On or about August 17, 2013, he was admitted to the United States on an F-1 student visa. On or about May 15, 2019, he adjusted status to lawful permanent residence as the spouse of a U.S. citizen. On or about June 27, 2022, Respondent was placed in removal proceedings when he returned home from a trip to Greece and was charged as an arriving alien. Exh. 1 (NTA).

According to DHS’ submissions, on February 11, 2021, Respondent was convicted under [Cal. Health & Safety Code § 11357/11358/11359/11360, 11361,11362.3] in Santa Clara County. Exh. 2 (Conviction Documents). Respondent was sentenced to 30 days in jail and 3 years of probation. *Id.* Respondent successfully completed the terms of his sentence. *Id.* Based on this conviction, DHS charged Respondent with removability under INA § 212(a)(2)(A)(i)(II).

As a California cannabis conviction entered on or after November 9, 2016, this offense is statutorily overbroad and does not meet the federal definition of a cannabis conviction.

1. **LEGAL ARGUMENT**
2. **[Use this argument when the person is charged with the grounds of deportability OR WHERE A RETURNING LPR IS CHARGED WITH INADMISSIBILITY] DHS CANNOT MEET ITS BURDEN TO ESTABLISH THAT RESPONDENT HAS BEEN CONVICTED OF A CONTROLLED SUBSTANCE OFFENSE**

DHS will be unable to meet its burden of establishing by clear, convincing, and unequivocal evidence that Respondent is deportable from the United States. INA § 240(c)(3); [IF RESPONDENT IS AN LPR BEING CHARGED AS AN ARRIVING ALIEN UNDER THE GROUNDS OF INADMISSIBILITY, THEN ADD *MATTER OF RIVENS*, 25 I&N Dec. 623 (BIA 2011), WHICH HOLDS THAT DHS HAS THE BURDEN TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT INA § 101(A)(13) APPLIES WHERE THE PERMANENT RESIDENT IS BEING CHARGED AS AN ARRIVING ALIEN]. As DHS cannot meet its burden, this case must be terminated.

A.2. **[Use this argument when a non-lpr is alleged to be inadmissible and/or ineligible for relief] RESPONDENT IS ADMISSIBLE BECAUSE HIS CALIFORNIA CANNABIS CONVICTION DOES NOT MEET THE FEDERAL DEFINITION OF CANNABIS**

This Court should not pretermit a respondent’s application [for admission as the spouse of a U.S. citizen/ or application for cancellation of removal/ or other application for relief] where the respondent can establish by clear and convincing evidence that they are admissible to the United States. INA § 240(c)(2). Because this conviction does not make Respondent [inadmissible, or ineligible for cancellation of removal, or other application for relief], Respondent can meet this burden.

1. **A california cannabis conviction is categorically not a FEDERALLY controlled substance offense**

This Court must adjudicate whether a California cannabis conviction is a ground of [inadmissibility under INA § 212 or deportability under INA § 237] using the categorical approach. *Mellouli v. Lynch*, 575 U.S. 798 (2015). “If the categorical approach reveals that the elements of the state...crime are broader than the elements of the federal offense, then the state crime is not a categorical match.” *Romero-Millan v. Garland*, 46 F.4th 1032, 1041 (9th Cir. 2022) (internal quotation marks and citations omitted). The federal definition of cannabis includes all parts of the cannabis plant *except for mature stalks* and hemp. 21 U.S.C. § 802(16)(B) (emphasis added). The California definition of cannabis, effective on or after November 9, 2016, covers all parts of the plant, *including mature stalks*. Cal. Health & Safety Code § 11018.[[1]](#footnote-1) ; *compare with* 21 U.S.C. § 802(16).[[2]](#footnote-2) Accordingly, a California conviction for a cannabis offense entered on or after November 9, 2016, is categorically not a federally controlled substance offense.

The Eleventh Circuit has used this analysis in the context of a nearly identical state law in Florida. *Said v. Attorney General*, 28 F.4th 1328, 1333 (11th Cir. 2022) (“By the plain language of § 893.02(3), not all substances that it proscribes are federally controlled. Section 893.02(3) includes ‘all parts’ of the marijuana plant, while federal law does not. For instance, federal law does not include the mature stalks of the marijuana plant or fiber produced from such stalks. 21 U.S.C. § 802(16). This is a significant divergence, and on its own, is sufficient to establish a realistic probability of broader prosecution under Florida law.”)

1. Where Respondent’s Conviction was Entered on or After November 9, 2016, the State Conviction Does Not Meet the Federal Definition of a Controlled Substance Offense

At the time Respondent was arrested and convicted under H&S § \_\_\_\_\_, the State of California’s definition of cannabis included mature stalks. Courts must compare state and federal law as of the date of conviction. *Medina-Rodriguez v. Barr*, 979 F.3d 738, 748-49 (9th Cir. 2020) *quoted with approval Tellez-Ramirez v. Garland*, 87 F.4th 424, 428 n.1 (9th Cir. 2023). Respondent’s conviction was entered on \_\_\_\_\_\_. As of [PUT DATE OF CONVICTION HERE] the California definition of cannabis is statutorily overbroad and includes mature stalks. It is not a match to the federal definition of cannabis, which has excluded mature stalks since the enactment of the Controlled Substances Act in 1970.[[3]](#footnote-3)

1. There Is No Categorical Match Where a State Statute Expressly Defines a Crime More Broadly than the Federal Generic Definition of the Offense

There are two ways to meet the “realistic probability” test set forth by the Supreme Court in *Duenas-Alvarez, supra.* First, the noncitizen can point to an actual case where the state applied the statute in a nongeneric fashion. Second, the noncitizen can point to the statute itself. *Chavez Solis*, 803 F.3d at 1010. “[W]hen a state statute’s greater breadth is evident from its text, a petitioner need not point to an actual case applying the statute of conviction in a nongeneric manner.” *Ibid.* (internal quotation marks and citations omitted). Respondent has met the “realistic probability” test as it is evident from its text that California’s definition of cannabis includes mature stalks, while the federal definition of cannabis specifically excludes mature stalks.

The Board of Immigration Appeals (BIA or the Board) has held that if a state statute is overbroad, the respondent must still point to a case where the statute has been applied in the manner that the respondent advocates. However, the Board has held that this rule does not apply in circuits that have binding legal authority to the contrary. *Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 566 (BIA 2019). In the Ninth Circuit, a noncitizen can establish a “realistic probability” from the text of the statute alone. There is no need to point to a case. *See United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc), *abrogated on other grounds as recognized in United States v. Bautista*, 989 F.3d 698, 704 (9th Cir. 2021); *see also United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v. Stitt*, 586 U.S. 27, 31 (2018). Here the state statute includes mature stalks of the cannabis plant, while the federal statute omits mature stalks of the cannabis plants in their respective definitions. Accordingly, there is a “realistic probability” rather than merely a “theoretical possibility” that the California statute is overbroad.

**III. CONCLUSION**

California’s definition of cannabis is statutorily overbroad and is not a categorical match to the federal definition of cannabis. Accordingly, Respondent’s conviction for [Cal. Health & Safety Code § 11357/11358/11359/11360/11361/11362.3] is categorically not a [controlled substance offense/aggravated felony] as defined under INA § [237(a)(2)(B)/ 237(a)(2)(A)(iii)/212(a)(2)(A)(i)(II)]. [As DHS cannot meet its burden to establish removability by clear, convincing, and unequivocal evidence, this case must be terminated/ OR as Respondent has established that the underlying California conviction is not an offense that renders him/her/them inadmissible, this case must not be pretermitted/ OR as DHS cannot meet its burden to establish the charge of inadmissibility by clear and convincing evidence, this charge must be dismissed].

Respectfully submitted on the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 2024

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attorney Name Here, Esq.

Attorney for Respondent

**U.S. Department of Justice**

**Executive office for immigration review**

**Immigration Court**

**[City and State]**

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| Matter of  [Name of Respondent Here]  Respondent. | )  )  )  )  )  )  ) | **NON-DETAINED**  Case # [A Number Here]  In **Removal** Proceedings before  Hon. [Name of IJ Here]  [Individual or Master Calendar] Hearing: [Date Here] at [Time Here] |

**MOTION TO TERMINATE PROCEEDINGS**

**ORDER OF THE IMMIGRATION JUDGE**

Respondent’s Motion to Terminate Proceedings [With or Without Prejudice] is hereby **GRANTED/DENIED** because:

\_DHS does not oppose the motion.

\_The respondent does not oppose the motion.

\_A response to the motion has not been filed with the court.

\_Good cause has been established for the motion.

\_The court agrees with the reasons stated in the opposition to the motion.

\_The motion is untimely per \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

\_Other: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

**Deadlines**:

\_Application(s) for relief must be filed by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

\_Respondent must comply with biometrics instructions by \_\_\_\_\_\_\_.

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Hon. [Immigration Judge’s Name Here], Immigration Judge

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Certificate of Service**

This document was served by: [ ] Mail [ ] Personal Service

To: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien’s Atty/Rep [ ] DHS

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By: Court Staff\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Respondent’s Name Here]

[Respondent’s A Number Here]

**CERTIFICATE OF SERVICE**

I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, hereby certify that a copy of the Motion to Terminate Proceedings was served by U.S. Mail to the Office of Chief Counsel at P.O. Box 26449, San Francisco, CA 94126-6449, on the date set forth below.

Dated: Signed:

1. Cal. Health & Safety Code § 11018 provides as follows:

   Cannabis means all parts of the plant Cannabis sativa L., whether growing or not, the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, or preparation of the plant, its seeds or resin. It does not include either of the following: (a) Industrial hemp, as defined in Section 11018.5. (b) The weight of any other ingredient combined with cannabis to prepare topical or oral administrations, food, drink, or other product. [↑](#footnote-ref-1)
2. 21 U.S.C. § 802(16) provides as follows:

   (A) Subject to subparagraph (B), the terms "marihuana" and "marijuana" mean all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

   (B) *The terms "marihuana" and "marijuana" do not include*-

   (i) hemp, as defined in section 1639o of title 7; or

   (ii) *the mature stalks of such plant*, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. [Emphasis added]. [↑](#footnote-ref-2)
3. *See* Controlled Substances Act of 1970,Pub. L. 91-513 at 1244 (Oct. 27, 1970) § 102(15).On December 20, 2018, Congress amended the definition to additionally exclude hemp. Agriculture Improvement Act of 2018, Pub.L. No. 115-334, § 12619(a) (Dec. 20, 2018).  [↑](#footnote-ref-3)