

March 19, 2024

**SAMPLE BRIEFING ARGUING THAT CONVICTIONS UNDER NYPL § 220.39(1) ARE NOT CRIMES INVOLVING MORAL TURPITUDE**

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**Introduction**

The Board of Immigration Appeals (BIA) has found a conviction for sale of a controlled substance under New York Penal Law (N.Y.P.L.) § 220.39 to be a crime involving moral turpitude (CIMT). *See Matter of J.M. Acosta*, 27 I&N Dec. 420, 423 (BIA 2018). The BIA also has held that the federal offense of possession of a controlled substance with the intent to distribute, 21 U.S.C. § 841(a)(1), is a CIMT. *See* *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). The Second Circuit Court of Appeals has upheld the BIA’s conclusion that a conviction under Connecticut General Statutes § 21a-277(a)(1) for possession with intent to sell narcotics is CIMT, *see* *Mota v. Barr*, 971 F.3d 96 (2d Cir. 2020), but it has not decided whether N.Y.P.L. § 220.39 is a CIMT. However, recent case law recognizing the overbreadth of New York’s controlled substance schedules, as well as changing societal mores regarding drugs, indicate that *J.M. Acosta* is outdated and should be overturned with respect to its CIMT holding. Furthermore, New York’s mens rea and actus reus requirements for conviction for drug sale under § 220.39(1) should not satisfy the elements of the generic CIMT definition. It appears that in deciding *J.M. Acosta*, the BIA did not consider or decide these features of § 220.39, as is argued and explained further in this sample briefing.

The following sample briefing argues that conviction under N.Y.P.L. § 220.39(1) should not be a CIMT because the minimum conduct required for conviction falls outside of the generic definition of a CIMT. It also argues that *J.M. Acosta* must be overturned because it misapplied the categorical approach and is out of step with recent changes in the law and contemporary societal mores.

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**Sample Briefing**

**Factual Background**

[INSERT RELEVANT FACTUAL BACKGROUND]

**Statement of the Issues Presented for Review**

Whether conviction under NYPL § 220.39(1) constitutes a crime involving moral turpitude within the meaning of INA § 212(a)(2)(A)(i)(I) and § 237(a)(2)(A)(i).

**Standard of Review**

The BIA reviews questions of law, including questions of statutory interpretation, *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

**Summary of Argument**

A conviction under NYPL § 220.39(1) is categorically not a CIMT. The minimum conduct necessary for conviction under section 220.39(1) does not require evil intent because the statute criminalizes offers to gift tiny amounts of controlled substances to another, without knowledge that the substances are illegal. New York’s drug schedules are also categorically broader than the federal drug schedules, meaning one may be convicted for violating section 220.39(1) for conduct that is not illegal under federal law. The overbreadth of New York law further indicates that section 220.39(1) does not satisfy the generic elements of a CIMT. The Board should fully consider the minimum criminal conduct necessary for conviction under section 220.39(1), changes in Second Circuit law, and the paradigmatic shift in society’s response to drug use, and revisit its contrary precedent in *Matter of J.M. Acosta*, 27 I&N Dec. 420, 423 (BIA 2018), by holding that conviction under section 220.39(1) is categorically not a CIMT.

**Argument**

1. **A Conviction Under NYPL** § **220.39(1) Is Not Categorically a CIMT Because the Minimum Conduct Includes Offers to Gift Small Quantities of Substances that Are Legal Under Federal Law.**

Conviction under NYPL § 220.39(1) cannot be a categorical crime involving moral turpitude (CIMT) because the minimum conduct necessary for conviction is categorically broader than the generic definition of a CIMT.

Under NYPL § 220.39(1), “A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells . . . a narcotic drug.” Under the statute, the term “sell” means “to sell, exchange, give or dispose of to another, or to offer or agree to do the same.” NYPL § 220.00(1); *see also Pascual v. Holder*, 707 F.3d 403, 405 (2d Cir. 2013), *abrogated on other grounds by United States v. Minter*, 80 F.4th 406 (2d Cir. 2023). The term “narcotic drug” means “any controlled substance listed in schedule I(b), I(c), II(b) or II(c) [in N.Y. Pub. Health L. § 3306] other than methadone.” NYPL § 220.00(7); *see also Minter*, 80 F.4th at 410; *United States v. Gibson*, 55 F.4th 153, 156 (2d Cir. 2023), *adhered to on reh’g*, 60 F.4th 720, 723 (2d Cir. 2023) (per curiam). The term “‘Unlawfully’ means in violation of [N.Y. Pub. Heath L. § 3306.].” NYPL § 220.00(2). Thus, by clear state statute, the minimum conduct—or least of the acts criminalized—under section 220.39(1) is the gifting, offering to gift, or agreeing to gift a tiny quantity of a substance that is legal under federal law. This conduct is not a CIMT.

Under the Board’s precedents, a CIMT must be “inherently base, vile, or depraved, and contrary to the accepted rules of morality and duties owed between persons or to society in general.” *Matter of Silva Trevino III*, 26 I&N Dec. 826, 833 (BIA 2016); *see also Mendez v. Barr*, 960 F.3d 80, 84 (2d Cir. 2020). The elements of the crime must be “per se morally reprehensible and intrinsically wrong, or malum in se.” *Matter of Serna*, 20 I&N Dec. 579, 582 (BIA 1992). In conducting the CIMT analysis, the Board emphasizes that “the offender’s evil intent, or corruption of the mind” is decisive. *Id.* at 581; *see also Mendez*, 960 F.3d at 84 (“The courts, as well as the BIA itself, have repeatedly made clear that the indispensable component of a CIMT is evil intent, which means a specific mental purpose that is inherently base, vile, or depraved.” (cleaned up).Courts apply the categorical approach to determine if “the intrinsic nature of the offense” satisfies the elements of a CIMT, “look[ing] only to the minimum criminal conduct necessary to satisfy the essential elements of the crime.” *Mendez*, 960 F.3d at 84(cleaned up).[[1]](#footnote-1) “To qualify, the crime ‘must by definition, and in all instances, contain each of those elements that constitute a CIMT.’” *Id*. (quoting *Gill v. I.N.S*, 420 F.3d 82, 89 (2d Cir. 2005)).

The minimum conduct required for conviction under NYPL § 220.39(1) does not meet this standard because it is categorically broader than the CIMT definition in three distinct ways. First, New York uses an extremely broad legal definition of the term “sell,” which encompasses offers to gift another person any quantity of a covered substance; no remuneration is required, and no minimum quantity is required. *See* *People v. Lam Lek Chong*, 45 N.Y.2d 64, 72 (N.Y. 1978) (“Under New York law a person may be found guilty of selling drugs when he gives them to another even though he has received nothing in return.”). Second, New York does not require that a person know that the substance they are gifting or otherwise distributing is illegal. *See People v. Georgens*, 484 N.Y.S.2d 657, 658 (N.Y. App. Div. 1985). Third, New York’s drug schedules include multiple substances that are legal under federal law and are innocuous. The minimum conduct criminalized by this statute simply does not meet the BIA’s standard of inherently base, vile, or depraved conduct, and the offense does not require the evil intent necessary for a CIMT. *See Silva Trevino III*, 26 I&N Dec. at 833; *Mendez*, 960 F.3d at 84 (observing that evil intent is “the indispensable component of a CIMT”); *see also Mellouli v. Lynch*, 575 U.S. 798, 805 (2015) (looking to “the least of the acts criminalized under the state law” to determine whether a state conviction triggered one of the INA’s removability provisions (cleaned up)).

1. An offer to gift a small amount of a controlled substance is not inherently base, vile, or depraved and cannot support a finding of evil intent

The minimum conduct for conviction under NYPL § 220.39(1) is for gifting tiny amounts of a substance without any remuneration. To prove sale, the prosecution need not establish any minimum quantity, any receipt of payment, or even actual transfer of the substance. Under the categorical approach, this offense cannot be a CIMT because the elements of the offense do not categorically require inherently reprehensible conduct or “evil intent,” meaning “a specific mental purpose that is inherently base, vile, or depraved.” *Mendez*, 960 F.3d at 84.

Unlike other provisions of NYPL § 220, conviction for “sale” under section 220.39(1) does not require proof of a minimum amount of the controlled substance. *Compare* NYPL § 220.39(1) (regulating any quantity of a covered substance) *with* NYPL § 220.41(1) (regulating “one-half ounce or more” of a covered substance). Conviction for “sale” under section 220.39(1) also does not require remuneration. This is because NYPL § 220.00(1) defines the term “sell” in extremely broad terms, as meaning “to sell, exchange, give or dispose of to another, or to offer or agree to do the same.”[[2]](#footnote-2) New York courts confirm that under “New York law a person may be found guilty of selling drugs when he gives them to another even though he has received nothing in return.” *Lam Lek Chong*, 45 N.Y.2d at 72 (clarifying the agency defense to criminal liability for sale of controlled substance); *Starling*, 85 N.Y.2d at 514 (N.Y. 1995) (“The statutory definition . . . conspicuously excludes any requirement that the transfer be commercial in nature or conducted for a particular type of benefit or underlying purpose.”). Thus, a person may be convicted for selling a controlled substance by merely sharing a small amount of it with another person for nothing in exchange. This expansive actus reus requirement encompasses far more conduct than the federal statute at issue in *Khourn*, for example, and does not categorically require evil intent.

The minimum conduct required for conviction under section 220.39(1), an offer to gift any quantity of a controlled substance to another, makes clear that convictions under this provision cannot be considered CIMTs under the categorical approach. This minimum conduct does not cause the individual or societal harm contemplated by *J.M.* *Acosta* and *Khourn*, 21 I&N Dec. at 1046. *See* Section II, *infra*.

1. Knowledge of the illegality of a substance is not an element of NYPL § 220.39(1).

Conviction under NYPL § 220.39(1) does not require knowledge that the substance in question is one of the hundreds of controlled substances under New York law. *See* N.Y. Pub. Health L. § 3306. The mens rea required for this offense falls well below the “evil intent” that is required for a CIMT under BIA precedent.

Section 220.39(1)’s mens rea requirement covers any person who “knowingly and unlawfully” sells narcotic drugs as defined by New York law, but it does not require the prosecution to prove that the individual knew the substance was classified as a narcotic. *See Georgens*, 107 A.D.2d at 820–21 (stating that the “People were not required to prove that defendant knew his activities were unlawful”); 64 N.Y. Prac. Criminal Law § 26:19 Sale––Proof of Knowledge (4th ed.) (explaining that conviction for criminal sale of a controlled substance requires that the defendant know what he is selling, but “the defendant need not know it was illegal to sell the substance”); *see also* NYPL § 15.20(2) (limiting the validity of mistake of law defenses to several exceptions). Thus, one may be convicted for sharing a controlled substance under section 220.39(1) by wrongly believing that a substance is legal. *See, e.g.*, *Georgens*, 107 A.D.2d 820, 820–21 (upholding defendant’s conviction for possession with intent to sell psilocybin despite his mistaken belief that psilocybin was not a controlled substance).

New York’s pattern jury instructions further indicate that the legal classification of a narcotic is a separate element from section 220.39(1)’s knowledge requirement:

A person KNOWINGLY sells (specify) when that person is aware that he or she is selling a substance which contains (specify).

A person UNLAWFULLY sells (specify) when that person has no legal right to sell it. Under our law, with certain exceptions not applicable here, a person has no legal right to sell (specify).

N.Y. Crim. Jury Instr. 2d Penal Law § 220.39(1), *available at* https://www.nycourts.gov/judges/cji/2-PenalLaw/220/220-39%281%29.pdf. These instructions make clear that knowledge of a substance’s legal classification is not an element of section 220.39(1), meaning that one may be convicted under the statute for unlawfully selling a substance without knowing that the substance is illegal. The text, New York case law, and pattern jury instructions confirm that New York authorizes conviction under section 220.39(1) where the defendant mistakenly believes that the substance he offered to share was legal.

The lack of a knowledge requirement as to New York’s legal characterization of a controlled substance establishes that conviction does not require evil intent. A CIMT must be “per se morally reprehensible and intrinsically wrong or *malum in se*[.]” *Mendez*, 960 F.3d at 84 (quoting *Rodriguez v. Gonzalez*, 451 F.3d 60, 63 (2d Cir. 2006)). However, many controlled substances are not self-evidently reprehensible, either to possess or to share. The defendant in *Georgens*, for example, grew mushrooms from a kit that he had ordered from a magazine and had received through the United States mail. *Georgens*, 107 A.D.2d at 820. Although the defendant knew the mushrooms contained psilocybin, he mistakenly believed that psilocybin was legal because of the circumstances of the purchase and the New York appellate court upheld his attempted sale conviction despite his misunderstanding of the law. *Id.* Though mistake of law generally is not a defense to criminal conviction, such a mistake negates the far more demanding CIMT requirement that an offense demonstrate “a specific mental purpose that is inherently base, vile, or depraved.” *Mendez*, 960 F.3d at 84; *see Singh v. Attorney General*, No. 22-1045, 2023 WL 5291786, at \*3 (3d Cir. Aug. 17, 2023) (finding petitioner’s conviction for possession with intent to distribute synthetic marijuana was not a CIMT because it was “[o]ften perceived as legal” and “[i]ts level of social acceptance was such that it was commonly sold at gas stations and convenience stores”). Furthermore, rapidly changing contemporary norms around psilocybin provide even less notice that the substance is controlled, particularly where it has been decriminalized or legalized at the state level. *See* Will Feuer, “Oregon becomes first state to legalize magic mushrooms as more states ease drug laws in ‘psychedelic renaissance,’” CNBC, Health and Science (Nov. 6, 2020), *available at* <https://www.cnbc.com/2020/11/04/oregon-becomes-first-state-to-legalize-magic-mushrooms-as-more-states-ease-drug-laws.html> (last visited February 7, 2024).

1. New York’s controlled substance schedules are categorically overbroad and encompass innocuous drugs like scopolamine and naloxegol, which are legal under federal law and in much of the United States.

Offers to transfer a substance that falls within New York’s definition of a narcotic drug are not categorically *malum in se* for CIMT purposes. New York controls numerous substances as “narcotic drugs” that are not controlled by the federal government. *See Minter*, 80 F.4th at 411; *Gibson,* 60 F.4th at 723.[[3]](#footnote-3) Some of these substances, such as scopolamine and naloxegol, are widely available treatments for common medical conditions. As a result, the elements of section 220.39(1) simply do not require evil intent sufficient to satisfy the definition of CIMT. An offer to transfer an innocuous substance that is legal under federal law—without knowledge that the substance is illegal and without any remuneration, as discussed above—clearly lacks the evil intent that is “determinative of whether a crime involves moral turpitude.” *Serna*, 20 I&N Dec. at 581–85 (finding possession of an altered immigration document with knowledge that it was altered was not a CIMT because “such knowledge is not necessarily equated with the intention to use the document”).

The Second Circuit has held that NYPL § 220.39(1) controls more narcotics than the federal government, because New York’s definition of cocaine is categorically overbroad. *See Minter*,80 F.4th at 407. The court compared cocaine isomers in New York’s controlled substance schedules with the federal Controlled Substances Act (CSA) to determine whether Minter’s prior conviction triggered a sentence enhancement under the Armed Career Criminal Act (ACCA). *Id*. The court noted that the New York Legislature expanded the state’s definition of cocaine in 1978 to simplify the prosecution of cocaine offenses. *Id.* at 411–12 (explaining that “standard laboratory tests did not distinguish between [natural cocaine and its isomers]” in 1978, and the statute was amended to “close that statutory loophole by including all isomers of cocaine and ecgonine in the schedule of controlled substances” (cleaned up)). As a result, New York controls *all* cocaine isomers.[[4]](#footnote-4) *See* N.Y. Pub. Health L. § 3306 Schedule II(b)(4). This definition includes positional cocaine isomers, which account for “at least 12,271 substances.” *United States v. Boyce*, No. 21-CR-777 (LJL), 2022 WL 2159890, at \*4 (S.D.N.Y. June 15, 2022). By contrast, federal law only controls geometric and optical isomers of cocaine. *See* 21 C.F.R. § 1300.01(b) (2023); *Minter*, 80 F.4th at 410 (“New York law criminalizes conduct—specifically conduct involving cocaine isomers other than optical or geometric isomers—that the CSA does not.”); *United States v. Chaires*, 88 F.4th 172, 178 (2d Cir. 2023) (finding “section 220.39(1) sweeps more broadly than its federal analog and cannot serve as a controlled substance offense”). The overbreadth of New York’s cocaine definition means that New York controls positional cocaine isomers, which are not controlled by federal law. *See Minter*, 80 F.4th at 411–12.

New York’s inclusion of positional isomers of cocaine in its schedules of controlled substances indicates that convictions under NYPL § 220.39(1) are not categorically *malum in se*. NYPL § 220.00(7) defines narcotic drugs as “any controlled substance listed on schedule (I)(b), (I)(c), (II)(b), or (II)(c).” The narcotics covered by section 220.39(1) include Schedule II substances that “may have generally-accepted or restricted medical value.” Donnino, Practice Commentary, McKinney’s Cons. Laws of NY, Penal Law § 220 (commenting on the rationale for the different schedules of controlled substances). Positional isomers of cocaine include substances that are not inherently harmful and are widely available for purchase with a doctor’s prescription. For example, scopolamine—a positional isomer of cocaine[[5]](#footnote-5)—is a safe, FDA-approved drug sold at pharmacies throughout New York as an anti-nausea medication and is not a federally controlled substance. *See* Food and Drug Administration, Prescribing Information, Transderm Scōp (scopolamine) transdermal system patch, p. 6, *available at* <https://www.accessdata.fda.gov/drugsatfda_docs/label/2013/017874s038lbl.pdf>. Even under the Board’s own rationale in *Matter of Khourn*, there is no evidence that scopolamine, for example, or other positional isomers of cocaine demonstrate the addictive characteristics that the BIA relied on when it characterized federal sale of controlled substances as “murder on the installment plan.” 21 I&N Dec. at 1046. In fact, medical professionals tout its medical benefits and desirability:

[T]he cultivation and production of scopolamine is of major economic interest due to its miscellaneous pharmaceutical applications. Indeed, global demand for this compound is increasing. Moreover, scopolamine is one of the Essential Medicines of the World Health Organization (WHO).

Kathrin Laura Kohnen-Johannsen and Oliver Kayser, “Tropane Alkaloids: Chemistry, Pharmacology, Biosynthesis and Production,” 24 *molecules* 796, p. 2 (2019). Though one may be convicted under section 220.39(1) for offering to share a scopolamine patch, this conduct clearly is not “inherently reprehensible” and falls outside the scope of a CIMT. *See Mendez*, 960 F.3d at 84.

The same can be said about the anti-constipation drug naloxegol, controlled under N.Y. Pub. Health L. § 3306 Schedule II(b) as an “opium alkaloid derivative.” *Gibson*, 55 F.4th at 156. In *Gibson*, the Second Circuit similarly compared New York’s drug schedules to the federal CSA to determine whether a conviction under NYPL § 220.39(1) qualified as a predicate offense for a career offender sentencing enhancement under the federal sentencing guidelines. *See Gibson*, 55 F.4th at 155. The court held that convictions under NYPL § 220.39(1) could not qualify as predicate offenses because the federal government descheduled naloxegol in 2015, prior to the underlying criminal conduct and sentencing, while New York continued to classify naloxegol as an opium derivative. *Id.* at 157. Like scopolamine, naloxegol is a non-addictive substance, and it is widely used to treat the effects of opioid induced constipation. It is also plainly within the scope of New York’s Schedule II(b), because it is an opium alkaloid derivative. *Gibson*, 60 F.4th at 723.

The overbreadth of New York’s narcotic drug definition, coupled with the elements of NYPL § 220.39(1), make clear that New York convictions for sale of a controlled substance are categorically not CIMTs. The minimum conduct necessary for conviction under section 220.39(1) includes offers to gift small amounts of innocuous substances that are legal under federal law, without knowledge that the substance is among the thousands of substances on the New York Schedules. Such convictions cannot be CIMTs because they do not require “evil intent” and are consistent with “accepted rules of morality and the duties owed between persons or to society in general.” *Mendez*, 960 F.3d at 84.

1. ***Matter of J.M. Acosta* Should be Revisited and Overturned.**

The Board is free to revisit its contrary precedent in *J.M.* *Acosta* , which found NYPL § 220.39(1) to be a CIMT. 27 I&N Dec. at 423. *J.M. Acosta* rests on a flawed application of the categorical approach and did not consider key arguments presented in this brief, and the decision has been substantially undermined by *Minter* and *Gibson*’s regarding the overbreadth of New York’s controlled substance schedules and the statutory term, “narcotic.” Moreover, the reasoning underlying *J.M. Acosta* must be revisited due to substantial evidence of shifting societal norms in the United States concerning controlled substance use, as consideration of social norms is a critical component of the CIMT analysis. The Board should overrule *J.M. Acosta* and should find that conviction under NYPL § 220.39(1) is categorically not a CIMT.

* 1. *J.M. Acosta*’s Failure to Conduct Proper Minimum Conduct Analysis Is Inconsistent with the Categorical Approach and the Structure of the INA.

*J.M. Acosta* merits revision for several reasons. In *J.M. Acosta*, the Board failed to conduct the minimum conduct analysis that is required by the categorical approach, erroneously found federal law entirely irrelevant to the CIMT analysis, and thereby incorrectly concluded that NYPL § 220.39(1) is a CIMT. Since *J.M. Acosta*, the reasoning underlying the Board’s holding has been seriously undermined by *Minter*. For these reasons, the Board should revisit and overrule *J.M. Acosta* to correctly apply the categorical approach and hold that the minimum conduct criminalized by section 220.39(1) does not meet the Board’s standard for CIMT.

In *J.M. Acosta*, the Board dismissed the ordinary application of the categorical approach’s minimum conduct test, instead stating, “It is the respondent’s act of attempting to sell a controlled substance that is morally turpitudinous, not the specific drug involved.” *J.M. Acosta*, 27 I&N Dec. at 423. The Board further found that “[i]t is not necessary to compare a Federal statute to the respondent’s statute of conviction” because the federal CSA is “not controlling for purposes of determining whether a crime involves moral turpitude.” *Id.*

*J.M. Acosta* departed from the proper application of the categorical approach by failing to identify the “minimum criminal conduct necessary to satisfy the elements” of section 220.39(1). *Mendez*, 960 F.3d at 84. The federal government’s choice to exclude substances from federal controlled substance schedules should be given significant weight in the application of the categorical approach to state drug distribution offenses for purposes of the CIMT analysis, which is a federal law standard. It is unreasonable for the Board to take the position that offering to share small quantities of a substance is turpitudinous and within the generic definition of a federal offense, when the Board’s parent agency (the Department of Justice) does not criminalize these same substances. *Cf. Esquivel Quintana v. Session*, 581 U.S. 385, 393 (2017) (finding a “related federal statute” germane to identifying the scope of an INA generic definition). In deciding that conviction under section 220.39(1) categorically involves moral turpitude, *J.M.* *Acosta* did not address that section 220.39(1) includes substances that are legal under federal law.

Instead, the Board relied on *Matter of* *Khourn* for its conclusion that drug distribution offenses categorically require evil intent. *See J.M. Acosta*, 27 I&N Dec. at 423 (citing *Khourn*, 21 I&N Dec. at 1047). However, *Khourn* is critically distinct. The conviction at issue in *Khourn* was a *federal* drug conviction, where purportedly there was no divergence between federally regulated substances and the substances covered by the noncitizen’s federal statute of conviction. Conviction under section 220.39(1) is different from *Khourn* because section 220.39(1) includes conduct that is legal under federal law.

In *Khourn*, the Board held that a federal conviction for distribution of a controlled substance under 21 U.S.C. § 841(a)(1) is a CIMT. The Board held that “evil intent is inherent in the crime of distribution of a controlled substance under 21 U.S.C. § 841(a)(1).” *Khourn*, 21 I&N Dec. at 1047. The Board gave considerable weight to Congress’s intent in codifying the federal controlled substance trafficking statute. *See id.* at 1046. The differences between NYPL § 220.39(1) and a federal drug statute such as 21 U.S.C. § 841 are significant and critical. Section 841 criminalizes distribution of substances the federal government has made illegal, while NYPL § 220.39(1) reaches a different and more expansive set of substances. New York’s section 220.39(1) reaches conduct as innocuous as an offer to gift a substance that is legal under federal law to a friend to assist with nausea. By contrast, Supreme Court Justice and former federal prosecutor Samuel Alito recently stated during an oral argument that *ten kilograms* was the “minimum for prosecuting” a federal drug offense, and even that wasn’t considered a significant quantity. Tr. of Oral Arg., *Brown/Jackson v. United States*, No. 22-6389/22-6640, at 40 (Nov. 27, 2023) *available at* <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-6389_8n59.pdf>.

*J.M. Acosta* also should be revisited and overturned because its reasoning is contrary to the structure of the INA and provisions that surround the CIMT provisions. *Cf. Esquivel-Quintana*, 581 U.S. at 393-94 (finding structure of INA and surrounding INA provisions important to the interpretation of an INA generic definition). Congress has created a comprehensive statutory regime for attaching immigration consequences to drug-related conduct and convictions. Sections 212(a)(1)(A)(iv) and 237(a)(2)(B)(ii) of the INA render noncitizens inadmissible and deportable for being “a drug abuser or addict.” Section 212(a)(2)(A)(i)(II) renders a noncitizen inadmissible for “a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to” a federally controlled substance. Section 237(a)(2)(B)(i) renders a noncitizen deportable for having been convicted of any law or regulation relating to a federally controlled substance. Section 212(a)(2)(C) renders any noncitizen inadmissible if a “consular officer or the Attorney General knows or has reason to believe” the noncitizen is engaged in trafficking, aiding in trafficking, or endeavoring to assist in trafficking federally controlled substances. Sections 237(a)(2)(A)(iii) and 101(a)(43)(B) render a noncitizen deportable for having a conviction for an aggravated felony defined as illicit trafficking in a federally controlled substance. Together, these statutory provisions affect almost any noncitizen who has engaged in or has been convicted of drug-related conduct. These statutory provisions create removability, relief ineligibility, naturalization ineligibility, and ineligibility for asylum and withholding of removal. Given that these provisions are both specific and numerous, they convey Congress’s unambiguous attempt to address drug offenses exclusively through these provisions, rather than to bootstrap drug convictions into removability provisions that contain no express mention of drugs or controlled substances whatsoever. *See Kucana v. Holder*, 558 U.S. 233, 249 (2010) (“[W]here 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.”).

* 1. The BIA is permitted to overrule *J.M Acosta* and find that NYPL § 220.39(1) is not a CIMT

The Board is free to revisit and overrule *J.M.* *Acosta*’s holding that conviction under NYPL § 220.39(1) is categorically a CIMT. In *J.M. Acosta*, the Board did not consider the arguments raised herein that conviction under NYPL § 220.39(1) cannot be a CIMT because it does not require remuneration, any minimum quantity of substance, or knowledge of the legal classification of the underlying substance. *See supra*, Section I.A.[[6]](#footnote-6) Furthermore, none of the Board’s precedents considered substantial evidence of changing contemporary norms that is highly relevant to the CIMT definition. *See* Section III, *infra*. Nor is there any Second Circuit precedent regarding section 220.39(1) as a CIMT. The BIA must revisit and overrule its precedents in recognition of the fact that NYPL § 220.39(1) criminalizes conduct that does not require either the conduct or evil intent necessary for a CIMT.

The Board is free to revisit and overrule *J.M. Acosta* because conviction under section 220.39(1) is categorically not for a CIMT for the reasons explained herein. *See supra* Section I. None of these arguments were addressed in *J.M. Acosta* or any other Board precedent. Stare decisis is not binding on subsequent agency adjudications as to issues not “squarely addressed” in a prior decision. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *see also Sec. of Labor v. Sharon & Walter Construction, Inc.*, 23 O.S.H. Cas. (BNA) 1286 n. 8 (O.S.H.R.C. 2010).

Additionally, there is ample precedent and authority for the Board to reverse prior precedent. *See, e.g.*, *Matter of M-E-V-G*, 26 I&N Dec. 227, 234 (BIA 2014) (modifying requirement of “social visibility,” as articulated in several Board precedents, to mean “social distinction” and to clarify that INA § 101(a)(42)(A) does not require literal visibility to prove “membership in a particular social group” for asylum); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining agencies may change policy if “the new policy is permissible under the statute, there are good reasons for it, and the agency *believes*it to be better” (cleaned up)). This includes authority to overrule a prior decision interpreting a provision of the INA. *See, e.g.*, *Matter of Diaz-Lizarraga*, 26 I&N 847, 852 (BIA 2016) (revisiting Board’s precedent as to which types of theft offenses amount to CIMT and creating a new definition that includes theft offenses with less than the intent to permanently deprive an owner of property).

Finally, there is no Second Circuit authority finding section 220.39(1) to be categorically a CIMT. The court’s most recent precedent on a related question, *Mota v. Barr*, 971 F.3d 96 (2d Cir. 2020), is inapposite because the court examined a different state statute with distinct elements. The conviction in *Mota* was under Connecticut General Statutes (CGS) § 21a-277(a)(1). *Mota*, 971 F.3d at 98. The court held that the noncitizen’s convictions were CIMTs because CGS § 21a-277(a)(1) requires “intent to sell or dispense” a controlled substance and “invariably involve[s] vile, reprehensible conduct” because “evil intent is inherent in the illegal distribution of drugs” under BIA precedent. *Mota*, 971 F.3dat 100 (cleaned up). The elements of CGS § 21a-277(a)(1) are materially different from the elements of NYPL § 220.39(1). Conviction under CGS § 21a-277(a)(1) requires “actual or constructive possession of a narcotic substance[,]” *Mota*, 971 F.3d at 99, whereas NYPL § 220.39(1) does not require even constructive possession. *See, e.g.*, *People v. White*, 172 A.D.2d 790, 790 (App. Div. 1991) (noting possession is not an element of NYPL § 220.39(1)); *People v. Samuels*, 99 N.Y.2d 20, 24 (N.Y. 2002) (affirming conviction on an “offer to sell” theory, despite police officers’ failure to recover physical evidence of drug trafficking in defendant’s possession.). CGS § 21a-277(a)(1) has a minimum quantity requirement, while NYPL § 220.39(1) includes *any* quantity of *any* substance on the narcotics list. *See* *Mota*, 971 F.3d at 101; *State v. Billie*, 2 A.3d 1034, 1043 (Conn. App. Ct. 2010) (stating that for CGS § 21a-277(a), quantity of narcotics is probative of whether defendant had intent to sell). Since *Mota* reviewed a different drug distribution statute with elements that are substantially different from those of NYPL § 220.39(1), *Mota* does not address whether section 220.39(1) is a CIMT. The Second Circuit in *Mota* also was not evaluating a conviction that covered substances that are legal under federal law. *See supra*, Section I.C. No other precedential Second Circuit decision squarely addresses this question, and the Board is free to address it on the merits. *See Brecht*, 507 U.S. at 630–31.

The Supreme Court has recognized that an agency “is free within the limits of reasoned interpretation to change course if it adequately justifies the change.” *Nat’l Cable & Telecomms. A’ssn v. Brand X Internet Services*, 545 U.S. at 1001. *See also* *Encino Motor Cars, LLC. v. Navarro*, 579 U.S. 211, 221 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”). The Board is thus permitted to overrule its prior decisions and frequently has done so in response to intervening changes in case law and contemporary norms. *See, e.g.*, *Diaz-Lizarraga*, 26 I&N Dec. at 851.

The Board should overrule *J.M. Acosta* and hold that conviction under NYPL § 220.39(1) is categorically not a CIMT.

* 1. *J.M. Acosta* does not account for paradigmatic shifts in contemporary social norms

The BIA’s legal standard for evaluating controlled substance offenses should be revised in accordance with decades of research and vastly improved societal understanding of drug use. The generic definition of a CIMT incorporates contemporary norms because the conduct in question must be “contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Silva Trevino III*, 26 I&N Dec. at 833. For this reason, the BIA has recognized a need to “update [their] existing jurisprudence” where contemporary norms deviated from a prior rule for CIMT categorizations. *Diaz-Lizarraga*, 26 I&N Dec. at 851–52 (expanding types of theft offenses that constitute CIMTs to accommodate “new economic and social realities,” as well as corresponding changes to state law and the model penal code). In the past two decades, lawmakers and public officials have implemented a paradigmatic shift toward a public health approach to drug use, which places less emphasis on the moral culpability of those who may be struggling with addiction in favor of more effective treatment options. This change in contemporary norms indicates that the Board must now revise its prior rule with respect to convictions under NYPL § 220.39(1) because they encompass conduct that does not categorically require moral turpitude.

Contemporary norms have been a decisive feature of CIMT analysis for almost a century. *See, e.g.*, *U.S. ex. rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929) (holding illegal sale of alcohol was not a CIMT); *cf. United States v. Francioso*, 164 F.2d 163, 163 (2d Cir. 1947) (relying on “commonly accepted mores” used to analyze CIMTs to consider whether petitioner could demonstrate “good moral character” for naturalization). Consideration of contemporary norms was especially prominent in cases where violation of laws concerning the prohibition of alcohol were alleged to be CIMTs. *See Iorio*, 34 F.2d at 921. In *Iorio*, the Second Circuit held that the noncitizen’s admission that “he had regularly engaged in the illicit sale of alcohol” did not amount to a CIMT barring him from admission. *Id*. Writing for the panel majority, Judge Learned Hand observed that the CIMT determination “is impossible to decide at all without some estimate, necessarily based on conjecture, as to what people generally feel.” *Id*. Illicit alcohol sales could not be CIMTs because the court could not “say that among the commonly accepted mores the sale or possession of liquor as yet occupies so grave a place” and “large numbers of persons, otherwise reputable, do not think it so, rightly or wrongly.” *Id.* More recently, courts have considered common perceptions of a substance’s legality and representative polling of public attitudes towards controlled substances to ascertain contemporary mores. *See Singh*, 2023 WL 5291786 at \*3 (accepting “increasing societal acceptance of marijuana and the legal confusion surrounding its synthetic counterparts” as grounds to find that the noncitizen’s conviction for possession with intent to distribute synthetic marijuana was not a CIMT); *Walcott v. Garland*, 21 F.4th 590, 600 n.10 (9th Cir. 2021) (finding polling data “objectively show society’s changing moral standards regarding the possession and use of marijuana” and holding conviction for offering to transport for sale a very small amount of marijuana is not a CIMT).

The Board’s precedents clearly permit revisions in accordance with changes in contemporary norms. The Board has long recognized that the legal definition of moral turpitude incorporates contemporary norms that are subject to change. *See, e.g.*, *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1192 (BIA 1999) (stating “the nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views in society”); *Matter of G—*, 1 I&N Dec. 59, 61 (BIA 1941) (noting that “[moral turpitude] is a vague term, its meaning depending, to some extent, upon the state of public morals”). For decades prior to the Board’s 2016 decision in *Diaz-Lizarraga*, the Board “held that a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to *permanently* deprive an owner of property,” as compared to “de minimis takings in which the owner’s property rights are compromised little, if at all.” 26 I&N Dec. at 849-50 (citing *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973)). In *Diaz-Lizarraga*, the Board changed its generic definition of a CIMT theft offense by substantially collapsing the previous distinction between temporary and permanent deprivations. The Board reasoned that “new economic and social realities” led lawmakers and judges “to recognize that many temporary takings are as culpable as permanent ones[,]” and that consequently many states had revised their definitions of theft offenses to include temporary and permanent deprivations. *Id.*

The Board should now revise its holding in *J.M.* *Acosta* to account for the “paradigmatic shift” in the way the public has come to view drug use. James F. Anderson et. al., *Paradigm Shift in Responding to Drug Users and Addicts: From a Criminal Justice to a Public Health Approach*, 5 Int. J. of Soc. Sci. Stud. 5, at 1 (May 2017). *J.M.* *Acosta* relied on an outdated understanding of drug abuse as a moral failing, rooted in the norms and policies associated with the “War on Drugs” during the 1980s and 90s. *See* Anderson, *supra*, at 4 criticizing the drug war for viewing “the issues of crime, crack cocaine, and community fear” “as criminal justice matters” addressed through “expanded use of police and other criminal justice interventions”); *Khourn*, 21 I&N Dec. at 1046 (cleaned up) (citing to congressional legislative history from 1956 that stated there are “few criminal acts that are more reprehensible than the act of abetting drug addiction by engaging in the illicit narcotic and marihuana traffic”). By contrast, decades of public opinion polling reveal that clear majorities “describe drug abuse as a medical problem that should be handled mainly through counseling and treatment (63 percent) rather than a serious crime that should be handled mainly by the courts and prison system (31 percent).” Peter D. Hart Research Assocs., *Changing Public Attitudes Toward the Criminal Justice System*, The Open Society Institute, at 5 (2002); *see also* Anderson, *supra*, at 6 (collecting polling data). More recent polling indicates that support for a public health approach to drug abuse has translated to majority support for “eliminating criminal penalties for drug possession[,] reinvesting drug enforcement resources into treatment and addiction services, repealing mandatory minimum sentences for drug crimes[, and] commuting or reducing the sentences of people incarcerated for drugs.” Bully Pulpit Interactive, *American Attitudes on the War on Drugs*, The American Civil Liberties Union, at 2 (2021) *available at* <https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs> (last visited February 9, 2024).

The Board’s broad characterization of controlled substance distribution offenses has not kept pace with the overwhelming societal embrace of the public health approach to drug abuse. Lawmakers at every level of government have begun implementing a policy of “harm reduction” rather than criminalization. *See, e.g.*,Jeffrey A. Singer, *Harm Reduction: Shifting from a War on Drugs to a War on Drug-Related Deaths*, The CATO Institute, Policy Analysis 858, at 3 (2018) (describing a “range of public health options” that characterize the harm reduction approach, including “medication assisted treatment, needle exchange programs, safe injection sites, heroin-assisted treatment, deregulation of overdose treatments like naloxone, and decriminalization of cannabis (marijuana)”). Forty states now offer syringe exchange programs, which are “community-based programs that provide access to sterile needles and syringes, facilitate safe disposal of used syringes, and provide and link to other important services and programs.” Syringe Services Programs (SSPs) FAQ, Centers for Disease Control and Prevention, *available at* <https://www.cdc.gov/ssp/syringe-services-programs-faq.html> (last visited January 26, 2024); State Health Facts, Sterile Syringe Exchange Program, Kaiser Family Foundation, *available at* [syringe-exchange-programs](https://www.kff.org/hivaids/state-indicator/syringe-exchange-programs/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D) (last visited January 26, 2024). The growing popularity of syringe exchange programs accompanies other nationwide harm reduction measures, such as test strips allowing drug users to test a substance for the presence of contamination. Matthew Choi, “Texans in Congress lead bipartisan efforts to allow fentanyl test strips,” The Texas Tribune (July 27, 2023) *available at* <https://www.texastribune.org/2023/07/27/congress-fentanyl-test-strips-texans/> (last visited March 19, 2024). New York City has also pioneered the use of two supervised consumption sites aiming “to keep users from dying, with trained personnel providing syringes and other sterile equipment for using drugs and working to reverse overdoses on the spot.” Noah Weiland, *Biden’s Drug Czar Is Leading the Charge for a ‘Harm Reduction’ Approach*, The New York Times, *available at* [biden-drug-czar-rahul-gupta.html](https://www.nytimes.com/2022/07/26/us/politics/biden-drug-czar-rahul-gupta.html) (last visited January 26, 2024).

In fact, the federal government has taken the lead on implementing this revised public health approach. The government published a comprehensive statement of its drug control priorities in 2022, which are explicitly grounded in harm reduction principles. *See National Drug Control Strategy*, The White House Executive Office of the President: Office of National Drug Control Policy, pp. 30–32 (2022). The Department of Justice (DOJ) is currently “evaluating supervised consumption sites, including discussions with state and local regulators about appropriate guardrails for such sites, as part of an overall approach to harm reduction and public safety.” Jennifer Peltz and Michael Balsamo, *Justice Dept. signals it may allow safe injection sites*, Assoc. Press, (Feb. 8, 2022) *available at* [business-health-new-york-c4e6d999583d7b7abce2189fba095011](https://apnews.com/article/business-health-new-york-c4e6d999583d7b7abce2189fba095011) (last visited January 26, 2024). Complementing this effort, the National Institutes of Health are providing millions of dollars in funding to study New York City’s safe injection site and other harm reduction measures. Carla K. Johnson, *US backs study of safe injection sites, overdose prevention*, Assoc. Press, (May 8, 2023), *available at* [safe-injection-sites-opioids-overdose-addiction-d9bcca2500044bfc28f54330bb719ffd](https://apnews.com/article/safe-injection-sites-opioids-overdose-addiction-d9bcca2500044bfc28f54330bb719ffd) (last visited January 26, 2024). These reforms are components of the federal government’s strategy “to usher in a new era of drug policy centered on individuals and communities.” *National Drug Control Strategy*, at 5. The BIA must revise *J.M. Acosta* in accordance with these paradigmatic changes in contemporary norms, as the decision is far out of step with prevailing attitudes toward drug offenses and nationwide policies aiming to better address drug use as an epidemic.[[7]](#footnote-7)

**CONCLUSION**

For the forgoing reasons, the Board should revisit *J.M. Acosta*, and correctly hold that conviction under NYPL § 220.39(1) is categorically not a CIMT.

1. The Board recognizes that realistic probability is not part of the CIMT analysis where “controlling circuit law expressly dictates otherwise.” *Silva Trevino III*, 26 I&N at 832. The Second Circuit only considers realistic probability “as a backstop when a statute has indeterminate reach, and where minimum conduct analysis invites improbable hypotheticals.” *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018). Realistic probability is irrelevant to analyzing convictions under NYPL § 220.39(1) because the statute is facially overbroad. *See Minter*, 80 F.4th at 411; *Gibson,* 60 F.4th at 723. [↑](#footnote-ref-1)
2. The New York Court of Appeals has observed that the New York Legislature clearly intended to “include any form of transfer of a controlled substance from one person to another.” *People v. Starling*, 85 N.Y.2d at 514 (N.Y. 1995) (cleaned up). [↑](#footnote-ref-2)
3. New York’s controlled substance schedules regulate additional substances that are not illegal under federal law and are innocuous. *See, e.g. Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017) (regulating possession and sale of human chorionic gonadotropin, a pregnancy hormone sometimes used by athletes). [↑](#footnote-ref-3)
4. Schedule II(b)(4) encompasses “[c]oca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances including cocaine and ecgonine, their salts, isomers, and salts of isomers” as Schedule II narcotics. N.Y. Pub. Health L. § 3306 Schedule II(b)(4). [↑](#footnote-ref-4)
5. *See* Dr. Gregory B. Dudley Decl., *United States v. Gutierrez-Campos*, No. 21 Cr. 40 (JPC), 2022 WL 281582 (S.D.N.Y. 2022). Federal prosecutors in the Department of Justice have also taken the position that scopolamine is a positional isomer of cocaine. *See United States v. Boyce*, 2022 WL 2159890, at \*4. [↑](#footnote-ref-5)
6. The Second Circuit’s finding with respect to a remuneration argument in *Mota v. Barr*, 971 F.3d 96 (2d Cir. 2020), is not dispositive of this question because *Mota* addressed a Connecticut statute with elements that substantially differ from NYPL § 220.39(1). *See* Section II.B, *infra*. [↑](#footnote-ref-6)
7. Indeed, a standard that categorically assigns “evil intent” to drug distribution offenses may exacerbate the stigma that cities, states, and the federal government seek to combat in their efforts to save lives. *See, e.g.,* Stigma and Discrimination, National Institute on Drug Abuse, *available at* https://nida.nih.gov/research-topics/stigma-discrimination#language (last visited January 26, 2024). [↑](#footnote-ref-7)