20-2771(L)

21-6479(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Ridel Leopold CROSS, AKA Ridel L. CROSS,

Petitioner,

v.

Merrick B. GARLAND, United States Attorney General,

Respondent.

CONSENTED TO BRIEF OF THE NATIONAL IMMIGRATION LITIGATION ALLIANCE AND THE IMMIGRANT DEFENSE PROJECT AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

On Review from Decisions of the Board of Immigration Appeals

Kristin Macleod-Ball
Trina Realmuto
National Immigration Litigation Alliance
10 Griggs Terrace
Brookline, MA 02446
Phone: (617) 506-3646

Amelia Marritz
Andrew Wachtenheim
Immigrant Defense Project
P.O. Box 1765
New York, NY 10027
Phone: (212) 725-6422

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

I, Kristin Macleod-Ball, certify that Amici Curiae are non-profit organizations which do not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of their stock.

Dated: April 12, 2022

s/ *Kristin Macleod-Ball*
Kristin Macleod-Ball

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION AND STATEMENT OF AMICI CURIAE[1]

Amici Curiae the National Immigration Litigation Alliance (NILA) and the Immigrant Defense Project (IDP) proffer this brief in support of Petitioner Ridel Leopold Cross (Mr. Cross). This case concerns two decisions of the Board of Immigration Appeals (BIA or Board) denying two separate motions to reopen filed by Mr. Cross. Amici write to address several of the Board's errors requiring vacatur of the denial of the second motion to reopen, filed in October 2020 and denied by the BIA on July 30, 2021. Administrative Record (A.R.) at 3-6.[2]

In denying Mr. Cross's October 2020 statutory motion to reopen, the BIA erred in at least three ways. First, the Board denied the motion in an unwarranted exercise of discretion, finding that Mr. Cross was not entitled to reopening even if he established that he was not removable and complied with the statutory requirements for motions to reopen. But the statute does not provide the Board with this type of discretion to deny properly filed motions arguing that termination (or relief) is mandatory based on new and previously unavailable evidence.

---

[1] Pursuant to FRAP 29(a)(4)(E), no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

All parties consent to filing. FRAP 29(a)(2).

[2] All A.R. citation refer to the Administrative Record filed in case number 21-6479 at ACMS Dkt. 15.02.

Second, the Board erred in finding that Mr. Cross's motion was time and number barred, because the Board failed to consider that Mr. Cross warrants equitable tolling based on his diligence since this Court's decision *Jack v. Barr*, 966 F.3d 95 (2d Cir. 2020). Finally, the Board erred in finding that *Jack* was not material to Mr. Cross's case. This determination failed to address arguments in the motion, relied on charges not raised by the Department of Homeland Security (DHS), and, regardless, is legally incorrect. Thus, this Court must vacate the Board's decision and remand.[3]

NILA is a non-profit organization that seeks to realize systemic change in the immigrants' rights arena through federal court litigation and elevating the capacity of the immigration bar. IDP is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. Both organizations have a direct interest in ensuring that individuals are not deprived of their right to pursue reopening.

---

[3] Amici agree that the BIA erred by abusing any discretion afforded to it in denying the October 2020 statutory motion, in declining to reopen sua sponte, and in denying the July 2019 motion to reopen. However, those issues are outside the scope of this brief.

II. ARGUMENT

A. The Board Erred by Denying Reopening in an Exercise of Discretion.

In its July 30, 2021, decision, the Board held that, regardless of whether Mr. Cross complied with the statutory requirements for reopening and established that he was not removable, it would still deny the motion "in the exercise of discretion," based on factors that were not relevant to the removability determination. A.R. 5-6 (finding Mr. Cross did not show "he is deserving of reopening in the exercise of discretion," given past criminal convictions). In holding it had discretion, the Board relied on old Supreme Court precedent which interpreted a prior regulatory reopening process. *Id*. (citing *INS v. Doherty*, 502 U.S. 314 (1992)). This was error.

This Court cannot allow the Board to deny reopening to individuals who were never removable and who complied with the statutory requirements for reopening based on factors irrelevant to removability. Such a denial is contrary to the plain language and intent of the reopening statute—an issue not considered by the case on which the Board relied. The Court should remand with instructions to address the merits of Mr. Cross's motion.

1. Statutory Motions to Reopen Provide an Important Procedural Safeguard to Noncitizens.

Motions to reopen provide noncitizens with a crucial opportunity to present the BIA or an immigration court with new and previously unavailable evidence

and arguments. Through 8 U.S.C. § 1229a(c)(7), Congress provided noncitizens in removal proceedings with the statutory right to file one motion to reopen. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), in which Congress codified these motions, requests for reopening were regulatory in nature. *See* 8 C.F.R. § 3.2 (1997).

Courts since have recognized that *statutory* motions are an integral part of the removal scheme. Prior to codification, when reopening was authorized by regulation, it was a "disfavored" discretionary process. *Doherty*, 502 U.S. at 323. Codification, however, elevated the right to seek reopening to an integral mechanism to protect against unlawful removal orders. The Supreme Court repeatedly has held that statutory motions to reopen provide an "important safeguard" in removal proceedings and admonished against any interpretation of the motion to reopen statute that would "nullify a procedure so intrinsic a part of the legislative scheme." *Dada v. Mukasey*, 554 U.S. 1, 18-19 (2008) (quotation omitted); *see also id.* at 18 (describing "[t]he purpose of a motion to reopen" as "ensur[ing] a proper and lawful disposition" of removal proceedings); *Kucana v. Holder*, 558 U.S. 233, 242, 249-51 (2010) (protecting judicial review of motions to reopen in light of their importance); *Mata v. Lynch,* 576 U.S. 143, 145 (2015) (recognizing that each noncitizen ordered removed "'has a right to file one motion'

with the IJ or Board to 'reopen his or her removal proceedings'" (quoting *Dada*, 554 U.S. at 4-5)). Similarly, this Court has recognized that Congress made "important changes" to the motion to reopen process by codifying noncitizens' "right to file" such motions. *Luna v. Holder*, 637 F.3d 85, 95 (2d Cir. 2011) (quotation omitted); *see also id.* at 96 (noting that, since codification, courts "have treated statutory motions to reopen differently" from regulatory motions). Other courts have agreed. *See, e.g.*, *Perez Santana v. Holder*, 731 F.3d 50, 58, 59 (1st Cir. 2013) (noting that Congress "transform[ed]" the motion to reopen process and "took a significant degree of discretion out of the agency's hands and vested a statutory right in the noncitizen" (quotation omitted)).

2. Through Codification, Congress Divested the Board of Discretion to Deny Motions to Reopen Based on Lack of Removability That Comply with the Statutory Requirements.

Following Congress' decision to codify motions to reopen, courts must look to the plain language of the statute to determine whether the Board erred or exceeded its authority. Here, the plain language of the statute, as well as its legislative history, establish that the Board did so: it does not have discretionary authority to deny reopening where the statutory requirements are met and, as here, the merits of the motion do not involve an element of discretion. Here, whether an individual is removable under 8 U.S.C. § 1227(a)(2)(A)(iii), (a)(2)(B)(i), or (a)(2)(C) (i.e., whether the relevant conviction is an aggravated felony, controlled

substance offense, or firearms offense, respectively, or not) does not involve discretion. *Cf.* 8 U.S.C. § 1229a(c)(3)(A).

The plain language of the motion to reopen statute, 8 U.S.C. § 1229a(c)(7), supports this interpretation as it contains no authority for the Board to deny motions solely in an exercise of discretion. Where Congress intends for an agency to have discretion to make a type of determination, statutes clearly provide such authority.[4] Courts should "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," especially if "Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. ICE*, 543 U.S. 335, 341 (2005); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). Omission of language expressly granting the Board authority to deny motions in an exercise of discretion in 8 U.S.C. § 1229a(c)(7) is evidence of Congress' intent to foreclose such discretionary

[4] *See, e.g.*, 8 U.S.C. §§ 1182(d)(5)(A) (permitting the Attorney General to parole certain individuals into the United States, "in his discretion"), 1225(a)(4) ("[A noncitizen] applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States."), 1227(a)(7)(B) ("The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.").

denials.[5]

This interpretation is bolstered by the history of the reopening statute. As discussed *supra*, prior to their codification in IIRIRA, motions to reopen were authorized solely by regulation. These regulations expressly provided the agency with the discretionary authority to deny a meritorious motion to reopen. *See* 8 C.F.R. § 3.2 (1997). When Congress elevated motions to reopen to statutory mechanisms, it declined to incorporate a provision on agency discretion, even as it codified many other preexisting regulatory requirements. As the Third Circuit has recognized:

> "[W]hen Congress provides exceptions in a statute, . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." That inference is particularly strong when, as here, Congress specifically codified other regulatory limitations already in existence.

Prestol Espinal v. Att'y Gen., 653 F.3d 213, 222 (3d Cir. 2011) (quoting *United States v. Johnson*, 529 U.S. 53, 58 (2000)); *see also Perez Santana*, 731 F.3d at 58-

---

[5] When Congress created the motion to reopen statute, it addressed the topic for the first time, acting on a clean slate. Thus, it did not need to "explicitly abrogate every related policy put in place by an agency;" rather, the BIA should have "recalibrate[d its] regulations" in line with the new statutory scheme. *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012); *see also Pruidze v. Holder*, 632 F.3d 234, 240-41 (6th Cir. 2011). Thus, the doctrine that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change," doing so without revising or appealing the interpretation indicates Congress intends to maintain that interpretation, *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 846 (1986), is inapplicable.

59 (holding that "statutory changes are inconsistent with the notion that Congress simply intended to stay silent regarding" a substantial limit on motions to reopen). This Court already has found that Congress' similar failure to include another regulatory provision (8 C.F.R. § 1003.2(d)) when codifying the right to seek reopening indicated Congressional intent to reject a prior interpretation of that regulation. *See Luna*, 637 F.3d at 101 (noting that Congress "pointedly did not codify" the relevant regulation, unlike other limitations found in the regulations and noting that the Court "should refrain from reading [a] limitation into text where Congress has left it out").

In sum, where Congress elected *not* to provide the agency with unbridled discretion, the Board may not curtail the statutory right to seek reopening by replacing Congress' judgment with its own and assigning itself that discretion.

3. Neither Supreme Court nor Second Circuit Precedent Support the Board's Assertion of Discretionary Authority in This Case.

In determining that it had discretion to deny Mr. Cross's motion, the BIA relied on *INS v. Doherty*, 502 U.S. 314 (1992). A.R. 5-6. Significantly, that case is inapposite, because it assessed reopening under regulations in place before Congress codified the right to reopen. Neither that decision nor decisions of this Court permit the Board to deny reopening solely in an exercise of discretion in this case.

In *Doherty*, the Court addressed the bases for denying a motion to reopen

but its decision came before Congress created a statutory right to reopen. 502 U.S. at 322 ("There is no statutory provision for reopening of a deportation proceeding, and the authority for such motions derives solely from regulations promulgated by the Attorney General."). Thus, the Court only considered the requirements and limitations of the regulation, which was "couched solely in negative terms" and expressly granted the agency broad discretion. *Id*. at 322-23 (discussing 8 C.F.R. § 3.2). This stands in stark contrast to the motion to reopen statute, where Congress affirmatively elected not to include the language granting the Board such discretion.[6]

Moreover, *Doherty* did not involve the type of discretionary denial at issue here. In that case, the agency vacated a grant of a reopening based on the movant's failure to present new, material evidence and because the movant had previously withdrawn an application for the relief he sought. 502 U.S. at 321-22.[7] The case

---

[6] To the extent that the Supreme Court has more recently assumed that, post-IIRIRA, the BIA retained "broad discretion, conferred by the Attorney General, to grant or deny a motion to reopen," *Kucana*, 558 U.S. at 250 (quotation omitted), this assumption was dicta. *Accord Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (recognizing that stare decisis is not applicable unless an issue was "squarely addressed"); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[7] As Justice Scalia's concurrence in part noted, the portion of the decision which affirmed the denial based on the purported prior waiver of relief—rather than failure to comply with the motion requirements—was accepted by only two Justices. 502 U.S. at 334 (Scalia, J.).

did not address a motion to reopen based on a never adjudicated claim that termination is required because the individual is not removable at all.

This Court has cited *Doherty* for the proposition that the Board has broad discretion to deny motions to reopen. However, those cases do not address whether, post-codification, the Board actually possesses the discretion exercised in this case. They largely state that the Board has "broad discretion" to deny motions in the context of the standard of review for motions where *the merits* involved an element of discretion. *Cao v. Dep't of Justice*, 421 F.3d 149, 156 (2d Cir. 2005) (noting that the BIA can deny a regulatory motion to remand based on "a determination that even if the applicant were eligible, asylum would be denied in the exercise of discretion"); *Singh v. Mukasey*, 536 F.3d 149, 154-55 (2d Cir. 2008) (noting the Board can deny reopening "where the ultimate relief is discretionary" and "it would not grant the relief in the exercise of discretion"). In other cases, the Court only considered whether the BIA abused its discretion in applying the requirements for motions to reopen (i.e., presenting previously unavailable evidence). *See, e.g.*, *Alrefae v. Chertoff*, 471 F.3d 353, 361-63 (2d Cir. 2006) (vacating denial of motion where individual had made a prima facie case for relief and presented new, material evidence); *Maldonado v. Holder*, 763 F.3d 155, 164 (2d Cir. 2014) (affirming denial of motion based on lack of material and previously unavailable evidence). In contrast to those cases, the motion here is

based on lack of removability and complies with the reopening requirements. Thus, the Court's prior decisions do not bar granting Mr. Cross's petition for review on this basis. *Accord Brecht*, 507 U.S. at 630-31.

4. To the Extent Respondent Argues that 8 C.F.R. § 1003.2(a) Authorizes the Discretionary Denial in this Case, the Regulation Conflicts with the Statute.

To the extent that Respondent claims agency regulations purport to provide discretion beyond what Congress conferred by statute, those regulations conflict with the text and purpose of the motion to reopen statute. By regulation, "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section." 8 C.F.R. § 1003.2(a).

Application of that regulation to support the BIA's denial in this case conflicts with congressional intent to divest the agency of discretionary authority over statutory motions to reopen. *See* 8 U.S.C. § 1229a(c)(7) (not providing discretion to deny motions meeting the statutory requirements seeking reopening to apply for non-discretionary relief from removal). Thus, it is not entitled to deference pursuant to *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Because Congressional intent is clear from the plain language of the statute and using traditional tools of statutory interpretation, *see supra* Section II.A.2, that "unambiguously expressed intent of Congress" governs.

Id. at 842-43.[8]

Courts only consider whether an agency interpretation of a statute is reasonable if congressional intent is unclear. *Chevron*, 467 U.S. at 842-43. But even if the Court were to find that Congress had not unambiguously intended to remove agency discretion over statutory motions, such an interpretation of the regulation would not provide a reasonable construction of the statute. *See, e.g*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019). Permitting such denials of motions to reopen filed to pursue non-discretionary claims—such as termination for lack of removability—would eliminate the distinction in standards for regulatory and statutory motions to reopen. In addition to motions filed pursuant to 8 U.S.C. § 1229a(c)(7), a separate, regulatory process through which noncitizens can request reopening in the exercise of the agency's discretion continues to exist. *See* 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1) (providing separate regulatory authority for sua sponte reopening). Permitting the Board to utilize the same broad

---

[8] The interpretation of the statute in the unpublished BIA decision in Mr. Cross's case is not itself entitled to *Chevron* deference, regardless of any statutory ambiguity. To the extent the BIA implicitly interpreted the statute to permit the discretionary denial of a motion to reopen that complies with all statutory requirements and seeks termination, it is entitled to, at most, deference under *Skidmore v. Swift & Co.*, which applies deference in accordance with an agency decision's "power to persuade." 323 U.S. 134, 140 (1944). The relevant portion of the BIA's decision is brief and provides no explanation for interpreting the statutory text to permit its discretionary denial. *See, e.g.*, *Pierre v. Holder*, 588 F.3d 767, 772 (2d Cir. 2009) (declining to afford deference to unpublished BIA decision).

discretionary authority to adjudicate statutory and sua sponte motions to reopen would arbitrarily collapse these separate types of motions into a single opportunity to seek reopening wholly controlled by agency discretion. *Cf. Luna*, 637 F.3d at 96 (distinguishing between statutory and regulatory motions to reopen).

Furthermore, to the extent the regulation purports to permit the agency to discretionarily deny a motion to reopen permitted under the statute, it is an impermissible expansion of the agency's authority and, therefore, unreasonable. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *cf. Luna*, 637 F.3d at 100 (explaining that "the BIA may not contract the jurisdiction that Congress gave it" over motions to reopen); *Perez Santana*, 731 F.3d at 56 (rejecting theory that "the government possesses the discretion to impose other substantive limitations on a noncitizen's right to file a motion to reopen that lack any foundation in the statutory language"). By allowing denials of motions to reopen that make a prima facie case on the merits, the regulation would permit the Board to refuse to correct errors that affected whether the underlying proceedings were lawful and proper, even though that is the purpose of the motion to reopen process. *See Dada*, 554 U.S. at 18. Such an interpretation—permitting adjudication that runs contrary to the purposes of the statute—cannot be reasonable.

5. Mr. Cross's Motion Complied with the Statutory Requirements and Established that He Was Not Removable.

Mr. Cross complied with the requirements for a motion to reopen and conclusively established that he is not removable. At a minimum, the BIA failed to address Mr. Cross's arguments related to these issues. Thus, it erred by denying the motion in an extra-statutory exercise of discretion.

First, Mr. Cross presented new, previously unavailable and material arguments and evidence in support of his motion—that, pursuant to this Court's decision in *Jack v. Barr*, he was not removable. *See* A.R. 21-23. To the extent that the Board found otherwise, it failed to consider relevant arguments and relied on legal errors. *See infra* Section II.C.

Next, Mr. Cross complied with the statutory requirements for motions to reopen, including the time and number limitations because he established that equitable tolling was required. A.R 23-25. If a movant establishes that he qualifies for tolling, the motion to reopen is treated as statutorily compliant. *See Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011); *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011). To the extent the Board found otherwise, it failed to consider relevant arguments and relied on legal errors. *See infra* Section II.B.

Finally, Mr. Cross established that he is not removable—either as charged in the Notice to Appear (NTA) or otherwise. To the extent the Board found otherwise, it failed to provide any explanation and relied on legal errors. *See* Pet.

Br. 23-32; *see also infra* Section II.C.3. For these reasons, remand is required.

B. The Board Erred to the Extent that It Found Mr. Cross Did Not Warrant Equitable Tolling of the Motion to Reopen Deadline.

The Board also denied Mr. Cross's October 2020 motion to reopen "as time- and number-barred." A.R. 6. However, it did so without adequately considering Mr. Cross's argument that he was entitled to tolling of those limitations, which would have rendered his motion statutorily compliant. This error requires remand.

Mr. Cross argued that he was entitled to equitable tolling because this Court's decision in *Jack v. Barr*, 966 F.3d 95 (2d Cir. 2020), constituted an extraordinary circumstance and he "diligently filed the instant motion by submitting it to the BIA via overnight mail 82 days after" issuance of *Jack*. A.R. 23-25. Thus, he sought to have the motion treated as timely filed and not subject to the one-motion limit, pursuant to the statute. *See, e.g.*, *Ortega-Marroquin*, 640 F.3d at 819-20. The Board did not address this argument at all; this was impermissible.

The Board "must actually consider the evidence and argument that a party presents." *Yan Chen v. Gonzales*, 417 F.3d 268, 272 (2d Cir. 2005) (quotation omitted); *see also Ke Zhen Zhao v. Dep't of Justice*, 265 F.3d 83, 97 (2d Cir. 2001) ("[W]hen faced with a motion to reopen, the Board has an obligation to consider the record as a whole."); *Luna*, 637 F.3d at 102 ("[A] failure to consider facts relevant to the motion to reopen is, as a matter of law, reversible error."). Where,

as here, the BIA entirely fails to consider arguments put forth by a noncitizen presenting his case, it fails this basic test. *Yan Chen*, 417 F.3d at 275 (granting petition where BIA failed to consider country condition report); *Tian-Yong Chen v. INS*, 359 F.3d 121, 128-29 (2d Cir. 2004) (remanding where BIA and IJ failed to consider a "significant aspect" of petitioner's testimony).

Here, the Board entirely failed to consider—let alone analyze—the equitable tolling argument in Mr. Cross's motion. The Board's only discussion of tolling relates to the distinct tolling argument Mr. Cross put forth in his first motion to reopen. A.R. 5 ("We again determine that, on this record, the respondent has not demonstrated due diligence in seeking the vacatur."). However, that argument rested on entirely different grounds. A.R. 4 (noting that the first motion "argu[ed] that equitable tolling applied to his case based on the July 16, 2019, vacatur of his September 1999, conviction by the New York Supreme Court due to violation of his constitutional rights"). But this misses the point of the tolling argument actually before the Board *in the second motion*—that tolling was warranted due to the error corrected by this Court's decision in *Jack* and that Mr. Cross was diligent in pursuing the motion promptly after *Jack* was issued.

The BIA may not summarily deny Petitioner's request for equitable tolling and reconsideration without analysis. *Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992) (holding that "cursory, summary or conclusory statements from the

Board leave us to presume nothing other than an abuse of discretion"). Nor may the Board replace the argument that Mr. Cross actually made—that tolling is warranted based on this Court's decision in *Jack* and his diligence following that decision—with a separate argument that it would prefer to address—whether the tolling argument in a previous motion on separate grounds was sufficient. *Cf. Mata*, 576 U.S. at 149 (faulting a court for "'construe[ing]' [a motion to reopen] as something it was not" (quotations omitted)).

Where, as here, the Board offers only "cursory, summary, [and] conclusory statements" in response to an equitable tolling argument, a reviewing court would have to "scour the record" and look beyond the agency decision to affirm. *Anderson*, 953 F.2d at 806; *Song Jin Wu v. INS*, 436 F.3d 157, 164 (2d Cir. 2006). However, as the Supreme Court has held, "[i]f th[e] grounds [an agency invokes for its decision] are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Singh v. Dep't of Justice*, 461 F.3d 290, 294 n.3 (2d Cir. 2006) ("[W]e cannot, on appeal, substitute an argument . . . for those that the BIA actually gave to support the conclusion [petitioner] disputes on appeal."). Thus, remand to address the tolling argument is

appropriate.

Finally, even if the Board's cursory reference to its prior tolling decision on separate grounds were sufficient to meet its obligation to address the October 2020 tolling claim—which it was not—any tolling analysis in the decision is premised on legal error. As the Supreme Court has recognized, an individual is "entitled to equitable tolling," where he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quotation omitted). As to the diligence requirement, tolling is warranted if a noncitizen demonstrates "due diligence in pursuing the case *during the period the [noncitizen] seeks to toll*." *Iavorski v. INS*, 232 F.3d 124, 135 (2d Cir. 2000). Here, the BIA incorporated its diligence analysis from the first motion to reopen decision, which faulted Mr. Cross for waiting too long after the 1999 conviction to seek a vacatur. A.R. 5, 64. However, the amount of time between the conviction and the vacatur request is not relevant, because the conviction did not occur "during the period of time [Mr. Cross] seeks to toll." *Iavorski*, 232 F.3d at 135. Instead, the Board should have addressed the delay between the removal order and the filing of the motion to reopen. Remand is necessary to correct this error.

C. The Board Erred In Finding that Mr. Cross's Motion Did Not Present Material Evidence.

Finally, the Board found that Mr. Cross did not demonstrate that this Court's

decision in *Jack* was "material, such that it would change the outcome of the case." A.R. 5. Although this portion of the decision is not a model of clarity, the Board appears to find that the decision is immaterial based on its unsupported statement that "respondent remains subject to removal from this country on other independent grounds." *Id*. This too is error.

1. The Board Failed to Address Mr. Cross's Argument That He Is Not Removable.

By stating without explanation or support that Mr. Cross remained removable, despite his motion including arguments to the contrary, the BIA again failed in its obligation to consider the arguments presented to it. Here, Mr. Cross argued in his October 2020 motion that he was not removable. A.R. 21-23 (arguing that "*none* of Mr. Cross's convictions provide a basis for removal" (emphasis added)). The Board's unsupported statement he remains subject to removal cannot sufficiently address those arguments.

By failing to reference in any way the arguments that Mr. Cross made related to removability, the Board did not "actually consider the . . . argument that [Mr. Cross] present[ed]." *Yan Chen*, 417 F.3d at 272 (quotation omitted); *see also supra* 15-17. As a result, this Court is left with no meaningful way to address the legal basis for this finding. As a result, remand is necessary. *See, e.g.*, *Song Jin Wu*, 436 F.3d at 164 ("It is not the function of a reviewing court in an immigration case to scour the record to find reasons why a BIA decision should be affirmed.").

2. To the Extent It Found Mr. Cross Removable Based on a Conviction Under New York Penal Law § 220.09(1), the Board Erred by Considering Facts and Charges Outside the NTA.

Even if this Court were to consider the Board's unsupported statement that Mr. Cross remains removable as sufficient—which it is not—remand would be required. Such a finding would necessarily rely on facts and charges not included in the NTA. This is contrary to immigration courts' role in removal proceedings—to adjudicate removability based on allegations and charges brought against an individual by DHS.

The Board noted that, following the vacatur of the 1999 conviction, it was "replaced with a plea to the violation of N.Y. Penal Law section 220.09(1)." A.R. 5. However, as this necessarily occurred well after DHS issued and filed the NTA in this case, any removability charge based on that conviction was not before the BIA and thus, could not serve as a basis on which to find Mr. Cross removable. Nor did DHS seek to issue an amended NTA after Mr. Cross moved to reopen. It is axiomatic that the Board cannot find an individual removable based on an *uncharged* ground of removability, because both the INA and due process require notice of charges against an individual and a meaningful opportunity to dispute the charge. *See* 8 U.S.C. § 1229(a)(1); *Pierre*, 588 F.3d at 777 (holding that the Board may not "sua sponte invoke[]" an uncharged ground of removability). *Cf. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (finding due

process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). Thus, to the extent that the Board based its decision on a finding that the uncharged conviction under N.Y.P.L. § 220.09(1) rendered Mr. Cross removable, that finding was in error and requires vacatur. *See also* Pet. Br. 29-31.

3. To the Extent It Found Mr. Cross Removable Based on a Conviction Under N.Y.P.L. § 220.09(1), the Board Erred Because § 220.09(1) is Categorically Overbroad and Cannot Serve as a Removal Predicate Under 8 U.S.C. § 1227(A)(2)(B).[9]

To the extent that the Board considered the conviction under N.Y.P.L. § 220.09(1) as a basis for determining that Mr. Cross "remains subject to removal," A.R. 4, it erred by failing to address arguments presented to it and, further, by considering facts and charges outside of the NTA. However, even were this not the case, the Board's determination would be in error and require remand.

a. The strict categorical approach applies to this indivisible statute.

Under the categorical approach, a criminal conviction triggers immigration

[9] Because the conviction under N.Y.P.L § 220.39(1) was vacated and Mr. Cross subsequently pleaded guilty under N.Y.P.L. § 220.09(1), a drug possession offense, he is not removable under 8 U.S.C. § 1227(a)(2)(A)(iii) for conviction of a drug trafficking aggravated felony. *See Lopez v. Gonzales*, 549 U.S. 47 (2006). Therefore, the only remaining question is whether N.Y.P.L. § 220.09(1) is a controlled substance offense under 8 U.S.C. § 1227(A)(2)(B).

consequences only if the "statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding [offense]." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (quotations omitted). A drug statute is overbroad as to the federal definition, and thus not a categorical fit, where it criminalizes a substance not regulated under the Controlled Substances Act (CSA). *See Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017). While the categorical approach sometimes requires the application of a realistic probability test, *see e.g.*, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), that need is obviated where "the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition." *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (quotation omitted). That is the case here.

Where an overbroad statute is divisible as between the alternate means of violating the statute, adjudicators may apply the modified categorical approach which allows for a review of certain criminal case documents to determine which of the offenses in the statute is at issue. *Mathis v. United States*, 579 U.S. 500 (2016). However, this Court has already found New York's controlled substance statutes, which include N.Y.P.L. § 220.09(1), indivisible into separate offenses based on the substance involved. *Harbin*, 860 F.3d at 64-68. A review of N.Y.P.L. § 220.09(1), state court decisions, and pattern jury instructions confirms

indivisibility. *Id*. at 67 ("Several [state court] opinions state that different narcotic drugs do not create separate crimes under the statute, and that jurors need not agree as to the particular narcotic drug in question."); N.Y.P.L. § 220.09(1) (showing that possession of any narcotic is a class C felony); N.Y. Pattern Jury Instructions § 220.09(1) (permitting the state judge to "specify" multiple substances under a sole offense). Therefore, the particular narcotic allegedly involved is irrelevant in determining whether a conviction under N.Y.P.L. § 220.09(1) is a controlled substance offense.

b. N.Y.P.L. § 220.09(1) is overbroad because it punishes possession of several narcotic drugs not regulated by the Controlled Substances Act.

Here, N.Y.P.L. § 220.09(1) is overbroad because New York regulates (1) non-optical and non-geometric cocaine isomers and (2) thebaine-derived butorphanol, an opiate derivative, and the CSA does not.[10]

[10] New York's schedule is also overbroad because it regulates (1) all possible isomers of opiates and opium derivatives while the CSA regulates only the optical isomers, and (2) both optical and geometric isomers of 3-methylfentanyl while the CSA regulates only the optical isomers. *Compare* 21 U.S.C. § 802(14) (defining isomers as optical isomers except for Schedule I(c) and Schedule II(a)(4)); 21 U.S.C. § 812 (regulating hallucinogenic substances at Schedule I(C), coca leaves at Schedule II(a)(4), opiates at Schedule I(a), and opium derivatives at Schedule I(b)), *with* New York Public Health Law § 3306, Schedule I(b), I(c) (regulating opiates and opium derivatives and their isomers, without limitation); N.Y.P.H.L. § 3302 (not including a definition for "isomer"); N.Y.P.H.L. § 3306, Schedule I(b) (defining isomer to include optical and geometric isomers, for purposes of 3-methylfentanyl only).

i. New York regulates all cocaine isomers while the CSA regulates only optical and geometric isomers of cocaine.

New York's regulation of cocaine, a narcotic drug, is overbroad relative to the federal regulation because, whereas the CSA regulates only the optical and geometric isomers of cocaine, New York regulates all isomers of cocaine—i.e., the constitutional isomers, in addition to the optical and geometric stereoisomers.[11] *Compare* 21 U.S.C. § 802(17)(D) (defining "narcotic drug" to include "[c]ocaine, its salts, optical and geometric isomers, and salts of isomers[]"; 21 U.S.C. § 802(14) ("As used in schedule II(a)(4), the term 'isomer' means any optical or geometric isomer.") *with* N.Y.P.L. § 220.00(7) (including any "controlled substance listed in schedule . . . II(b) . . . [of the N.Y.P.H.L. § 3306] other than methadone" is a "narcotic drug"); N.Y.P.H.L. § 3306, Schedule II(b)(4) (regulating "cocaine . . ., [its] salts, isomers, and salts of isomers"); N.Y.P.H.L. § 3302 (definitional section of New York's controlled substances law not including a definition for "isomer"). This is relevant because a chemical substance, like the substances regulated by the CSA and New York state law, are defined by set molecular formulas, which include the presence of isomers. Thus, by its plain,

[11] "Isomers are molecules that share the same chemical formula but have their atoms connected differently, or arranged differently in space." *United States v. Phifer*, 909 F.3d 372, 376 (11th Cir. 2018) (quotation omitted). There are two fundamental classes of isomers: stereoisomers, which include optical and geometric isomers, and constitutional, which include positional isomers. *Id*. at 377.

statutory terms, New York's definition and regulation of "cocaine" is overbroad. *See also* Gregory B. Dudley, Ph.D., Expert Evaluation/Opinion Regarding Cocaine Isomers, *United States v. Baez-Medina*, No. 20-CR-24 (JGK), ECF No. 44-1 at 1-7 (S.D.N.Y. May 28, 2021) (finding the same, and referencing specific overbroad constitutional isomers such as scopolamine, a "medication used to treat motion sickness and postoperative nausea and vomiting"). Because New York's statute is overbroad on its face, no further realistic probability showing is required. *Hylton*, 897 F.3d at 63; *Jack*, 966 F.3d at 98.

Moreover, Congress is familiar with the various subtypes of isomers; its usage of different subtypes in the statute evidences that it intended to only include specific isomers in the CSA. In 21 U.S.C. § 802(14), for example, Congress specifies that, aside from limited exceptions, "isomer" should generally only mean "the optical isomer" throughout the CSA. For Schedule I(C), which applies to hallucinogenic substances,[12] however, "isomer" means "the optical, positional, or geometric isomer." 21 U.S.C. § 802(14). For Schedule II(a)(4)—the provision regulating cocaine—"isomer" means the "optical or geometric isomer." *Id*.

Conversely, New York expressly intended to regulate all isomers of cocaine. In 1978, the New York State Legislature added the relevant language regarding "cocaine . . . [its] salts, isomers, and salts of isomers," into the statutory section

12 *See* 21 U.S.C. § 812.

concerning coca-related substances. A.R. 66 (1978 N.Y. Laws, ch. 100). The bill's sponsor explained that, because of "the difficulty in distinguishing between isomers of cocaine," the amendment "would include *all* isomers of cocaine . . . in the schedule of controlled substances." A.R. 71 (Mem. in Support, 1978 N.Y. Laws, ch. 100) (emphasis added). The sponsor further stated this would resolve "the statutory loophole" created by the regulation of only certain isomers. *Id.*

ii. New York regulates thebaine-derived butorphanol, an opium derivative, while the CSA does not.

Similarly, whereas the federal schedules have explicitly excluded thebaine-derived butorphanol, an opium derivative, from regulation, New York law continues to regulate it. Both the federal and state schedules include a non-exhaustive list of regulated opiates but exclude several substances. 21 C.F.R. § 1308.12(b)(1); N.Y.P.H.L. § 3306, Schedule II(b)(1). The federal schedule specifically excepts thebaine-derived butorphanol, but the state schedule does not. The substance was excepted from federal regulation through passage of a final administrative rule. *See* Drug Enforcement Administration, Schedules of Controlled Substances: Removal of Thebaine-Derived Butorphanol from Schedule II, 57 Fed. Reg. 31126 (July 14, 1992).

c. District courts in this Circuit and the BIA support the conclusion that the statute is overbroad.

The plain language of the CSA and New York laws are supported by

decisions of district courts, the BIA, and immigration judges, which have all recently found that New York's definition of "narcotic drug" is overbroad.

Every New York district court to consider the issue has ruled as such. *See United States v. Swinton*, 495 F. Supp. 3d 197 (W.D.N.Y. 2020); *United States v. Fernandez-Taveras*, 511 F. Supp. 3d 367 (E.D.N.Y. 2021); *United States v. Gutierrez-Campos*, No. 21-CR-40 (JPC), 2022 WL 281582 (S.D.N.Y. Jan. 31, 2022); *United States v. Holmes*, No. 21-CR-147 (NGG), 2022 WL 1036631 (E.D.N.Y. Apr. 6, 2022); Sentencing Tr., *United States v. Ferrer*, No. 20-CR-650, ECF No. 25 at 45-6 (S.D.N.Y. July 21, 2021); Sentencing Tr., *United States v. Baez-Medina*, No. 20-CR-24 (JGK), ECF No. 50 at 6-11 (S.D.N.Y. July 1, 2021); Sentencing Tr., *United States v. Louissaint*, No. 20-CR-685 (PKC), ECF No. 35 at 9-26 (S.D.N.Y. Nov. 17, 2021); Sentencing Tr., *United States v. Simmons*, No. 20-CR-294 (PKC), ECF No. 43 at 6-7 (S.D.N.Y. Dec. 14, 2021).

Several recent unpublished BIA decisions also have found that (1) the N.Y.P.L. statutes relating to narcotic drugs are indivisible, (2) there exists some overbreadth, including of thebaine-derived butorphanol, and (3) the realistic probability test does not apply. *See, e.g. L-O-A-*, AXXX-XXX-729 (BIA Mar. 2, 2021);[13] *J-G-G-*, AXXX-XXX-687 (BIA Jan. 25, 2021); *A-T-A-*, AXXX-XXX-646

[13] All cited unpublished BIA and immigration judge decisions *available at* https://www.immigrantdefenseproject.org/briefs-and-decisions/.

(BIA Feb. 26, 2021); *W-S-W-*, AXXX-XXX-989 (BIA Apr. 15, 2021); *T-D-G-*, AXXX-XXX-300 (BIA Apr. 19, 2021); *T-A-B-O-*, AXXX-XXX-231 (BIA Aug. 31, 2021); *S-L-C-*, AXXX-XXX-605 (BIA Sept. 23, 2021). Several immigration judges also have found New York narcotics statutes to be indivisible and overbroad due to regulation of all isomers of cocaine. *See, e.g.*, Decision of IJ Alice Segal (N.Y. Imm. Ct. Dec. 1, 2021); Decision of IJ Margaret Kolbe (N.Y. Imm. Ct. Dec. 7, 2021); Decision of IJ Douglas Schoppert (N.Y. Imm. Ct. Aug. 13, 2020).

Thus, the BIA erred to the extent that relied on the conviction for N.Y.P.L. § 220.09(1) in holding, without explanation or analysis, that Mr. Cross remains subject to removal.

III. CONCLUSION

For the foregoing reasons, amici urge the Court to grant the petition and vacate the Board's decision denying the October 2020 motion to reopen.

Respectfully submitted,

s/ Kristin Macleod-Ball
Kristin Macleod-Ball
Trina Realmuto
National Immigration Litigation Alliance
10 Griggs Terrace
Brookline, MA 02446
Phone: (617) 506-3646
kristin@immigrationlitigation.org
trina@immigrationlitigation.org

Amelia Marritz
Andrew Wachtenheim
Immigrant Defense Project
P.O. Box 1765
New York, NY 10027
Phone: (212) 725-6421
amelia@immdefense.org
andrew@immdefense.org

Attorneys for Amici Curiae

Dated: April 12, 2022

CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 6,926 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: April 12, 2022

s/ *Kristin Macleod-Ball*
Kristin Macleod-Ball

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: April 12, 2022

s/ *Kristin Macleod-Ball*
Kristin Macleod-Ball