UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1283

Mohamed Abdelrhman DAOUD,
Petitioner,

v.

William P. BARR, Attorney General,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE BOARD OF IMMIGRATION APPEALS
Agency No. A079-818-142

CONSENTED TO BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Trina Realmuto, attorney for amici curiae certify that the American Immigration Council and the Harvard Immigration and Refugee Clinical Program, Harvard Law School, are non-profit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

DATED: July 5, 2019

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I. INTRODUCTION[1]

Amici curiae the American Immigration Council (Council) and the Harvard Immigration and Refugee Clinical Program proffer this brief to assist the Court in reviewing the Board of Immigration Appeals' (BIA or Board) decision affirming the immigration judge's denial of Petitioner Mohamed Abdelrhman Daoud's (Mr. Daoud) statutory motions to reopen and reconsider pursuant to 8 U.S.C. § 1229a(c)(6) and (7). Amici address two of the critical errors the Board made in this case.

First, the Board erroneously affirmed without discussion the Immigration Judge's (IJ) conclusion that Mr. Daoud had not filed timely statutory motions and specifically concluded that the departure bar regulation at 8 C.F.R. § 1003.23(b)(1) precluded consideration of the motion to reopen. *See* Administrative Record (A.R.) at 1-9. The BIA did so without any analysis of whether the motion to reopen and motion to reconsider deadlines should be equitably tolled and without any mention, let alone analysis, of prima facie evidence supporting tolling that was presented with the motion. These errors were critical because statutory motions to reopen are

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amici curiae, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

not subject to the departure bar, *see Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013), and, where equitable tolling applies, a motion filed after the deadline is treated as a statutory motion.

In all other circuits, IJs and the BIA are duty bound to analyze whether the motion filing deadlines should be equitably tolled under binding circuit law. *See Reyes Mata v. Lynch*, 135 S. Ct. 2150, 2154 n.1 (2015). Although this circuit has yet to issue a precedent decision squarely addressing whether these deadlines are subject to equitable tolling, it has recognized that, if the deadline is tolled, then the motion should be treated as a statutory motion. *Bolieiro v. Holder*, 731 F.3d 32, 39 (1st Cir. 2013).

As such, the Court should remand to the Board to consider the critical question of whether Mr. Daoud's motion to reopen merits equitable tolling and, therefore, is not subject to the departure bar. Similarly, the Court should instruct the Board to consider whether Mr. Daoud's motion to reconsider should be considered timely under equitable tolling principles.

Second, the Board determined that, regardless of Mr. Daoud's compliance with the statutory requirements for filing a motion to reopen set forth in 8 U.S.C. § 1229a(c)(7), it would deny his motion in the exercise of discretion, even though the motion sought reopening to afford Mr. Daoud an opportunity to apply for non-discretionary relief. This is impermissible under the motion to reopen statute,

which contains no language providing the agency with discretion over non-discretionary matters. This Court should reverse that portion of the decision and direct that, on remand, the Board should address the merits of Mr. Daoud's persecution claims.

II. STATEMENT OF AMICI

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants.

The Harvard Immigration and Refugee Clinical Program includes Harvard Law School faculty and staff who have published numerous articles and reports that have been cited frequently by international and domestic tribunals, including the U.S. Supreme Court. The Program's Director authors the leading treatise on U.S. refugee law, *Law of Asylum in the United States*. Additionally, the clinics in the program have extensive experience directly representing noncitizens seeking refugee status and other forms of immigration protection in the United States and representing individuals with criminal convictions seeking to reopen prior removal proceedings or contesting their removal orders at the appellate level.

Both entities have a direct interest in ensuring that noncitizens are not prevented from exercising their statutory right to seek reopening of prior removal

orders.

III. ARGUMENT

A. The Board Erroneously Treated Mr. Daoud's Motion to Reopen as an Untimely and Therefore Subject to the Departure Bar Regulation Without Considering His Equitable Tolling Claim to Determine the Critical Issue of Whether It Must Be Treated as a Timely Filed Statutory Motion

In December 2015, Mr. Daoud filed a motion to reopen and a motion to reconsider. A.R. 324. The motion to reopen was not filed within 90 days of entry of the final administrative removal order against him, as required by the general motion to reopen statute. *See* 8 U.S.C. § 1229a(c)(7)(C)(i). Importantly, Mr. Daoud argued that the Board nevertheless should treat the motion as a timely-filed statutory motion for two independent reasons: (1) because the motion was predicated on changed country conditions and therefore excused from the 90-day deadline under 8 U.S.C. § 1229a(c)(7)(C)(ii); and (2) in the alternative, because he merited equitable tolling of the 90-day filing deadline. A.R. 336-339. The Board entirely failed to address the equitable tolling argument and simply concluded the motion was untimely and, therefore, subject to the departure bar. A.R. 4-8. The Board's failure to address the tolling argument was legal error, and this Court must remand to allow the Board the opportunity to do so.[2]

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[2] Amici support Mr. Daoud's alternative argument that his motion is not subject to the 90-day deadline or the departure bar because it is filed pursuant to 8

1. As This Court Already Has Held, the Departure Bar Does Not Apply to Statutory Motions to Reopen

A motion to reopen is a timely filed, statutory motion if either (1) it is filed within the 90-day statutory deadline under 8 U.S.C. § 1229a(c)(7)(C)(i); or (2) as discussed below, if the 90-day deadline merits equitable tolling. The departure bar regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), which purport to bar reopening after a noncitizen has departed the country, do not apply to timely filed, statutory motions. *Perez Santana v. Holder*, 731 F.3d 50, 51 (1st Cir. 2013). In *Perez Santana*, this Court expressly held "that the post-departure bar cannot be used to abrogate a noncitizen's statutory right to file a motion to reopen." *Id.* at 61.[3]

In contrast, if an individual moves for reopening under 8 U.S.C. § 1229a(c)(7)(C)(i) after the 90-day deadline, and the deadline is not tolled, the agency only may adjudicate it pursuant to its *sua sponte* reopening authority at 8 C.F.R. §§ 1003.2(a) or 1003.23(b)(1).[4]

U.S.C. § 1229a(c)(7)(C)(ii), *see* Pet. Br. 18-26, but that argument is beyond the scope of this brief.

[3] The language of the departure bar in 8 C.F.R. § 1003.23(b)(1), governing motions to reopen before immigration judges and at issue here, is identical to the language of the departure bar in 8 C.F.R. § 1003.2(d), governing motions to reopen filed with the Board of Immigration Appeals which was at issue in *Perez Santana*. 731 F.3d at 53-54.

[4] The IJ or the BIA may reopen proceedings *sua sponte* "at any time." *See* 8 C.F.R. §§ 1003.23(b)(1) (immigration court); 1003.2(a) (Board of Immigration Appeals). This Court has expressly left open the question of whether the departure

2. If the 90-Day Deadline Is Tolled, the Motion Is Treated as a Timely Statutory Motion Filed Pursuant to 8 U.S.C. § 1229a(c)(7)(C)(i)

As noted above, motions to reopen are treated as timely filed pursuant to 8 U.S.C. § 1229a(c)(7)(C)(i) if the movant establishes that he merits equitable tolling of the filing deadline. *See Lugo-Resendez v. Lynch*, 831 F.3d 337, 342-43 (5th Cir. 2016) (holding that a motion to which equitable tolling applies constitutes a statutory motion not subject to the departure bar); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 819 (8th Cir. 2011) ("To fall within the scope of the motion-to-reopen statute, [a petitioner] must show that the filing deadline is subject to equitable tolling, thereby excusing its lateness."); *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011) ("If [a noncitizen] qualifies for equitable tolling of the time and/or numerical limitations on a motion to reopen, the motion is treated as if it were the one the [noncitizen] is statutorily entitled to file.").

Although this Court has declined to decide whether the motion to reopen deadline is subject to tolling, it has noted that "every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions

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bar regulations applies to regulatory motions filed beyond the 90-day deadline. In *Perez Santana*, the Court "decline[d] to address" the government's request that the Court "limit [its] holding to . . . only timely, first motions to reopen" because there was no dispute that Perez Santana had met those requirements and so it was unnecessary for the resolution of his petition for review. 731 F.3d at 61. Likewise, it would be premature for this Court to reach this issue in this case where the Board entirely failed to consider whether the 90-day deadline merited equitable tolling.

to reopen." *Bolieiro*, 731 F.3d at 39 n.7; *accord Reyes Mata*, 135 S. Ct. at 2154 n.1 (noting that all circuits to consider the question have found the motion to reopen deadline may be tolled but that the First Circuit has yet to answer the question). And, in *Bolieiro*, the Court recognized that "by contending that equitable tolling should excuse the untimeliness of [his] motion," a noncitizen is pursuing his "*statutory* right to file a motion to reopen, not the agency's sua sponte authority to reopen proceedings." *Bolieiro*, 731 F.3d at 39; *see also Perez Santana*, 731 F.3d at 59 (observing that by codifying the motion to reopen Congress "took a significant degree of discretion out of the agency's hands and vested a statutory right in the noncitizen").

Thus, as sister circuits have held and this Court has acknowledged, if a movant establishes entitlement to tolling of the 90-day deadline, the agency must treat the motion as statutory in nature, and thus, not subject to the departure bar.

3. Remand is Necessary Because the Board Erroneously Failed to Consider Mr. Daoud's Equitable Tolling Argument

Mr. Daoud argued, and submitted evidence in support of his argument, that the 90-day deadline for filing a motion should be equitably tolled and, as such, not subject to the departure bar regulation. A.R. 336-39 (arguing that Mr. Daoud is entitled to tolling of the filing deadlines due to his mental illness and his detention and torture following his removal); A.R. 372-75, 385-402, 481-91, 1189-1456 (evidence of Mr. Daoud's mental illness and his detention and torture immediately

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following his removal to Sudan). The Board erred by entirely failing to address Mr. Daoud's equitable tolling argument and ignoring the evidence he submitted in support. But for this failure, the agency would not have applied the departure bar. Instead, it would have reached the merits of the tolling claim Mr. Daoud presented and, potentially, the merits of his motion.[5]

When a Board decision "ignore[s a noncitizen's] argument" and "arguably applicable law," it "cross[es] the line from merely deficient to plainly arbitrary." *Romer v. Holder*, 663 F.3d 40, 43 (1st Cir. 2011). While the Board need not address every claim in excruciating detail, it "cannot turn a blind eye to salient facts" or critical legal arguments. *Sihotang v. Sessions*, 900 F.3d 46, 51 (1st Cir. 2018); *see also Yan Chen v. Gonzales*, 417 F.3d 268, 272 (2d Cir. 2005) ("The BIA . . . must actually consider the evidence and argument that a party presents.") (internal quotation omitted); *Mohideen v. Gonzales*, 416 F.3d 567, 571 (7th Cir. 2005) ("Although the BIA may have some reason for discounting the . . . record evidence, it is not sufficient simply to ignore it when announcing a conclusion. [The petitioner] is entitled to a reasoned analysis that engages the evidence he presented . . . .") (citations omitted).

[5] The Board only considered Mr. Daoud's separate argument that the motion was not subject to the departure bar because it was timely filed pursuant to 8 U.S.C. § 1229a(c)(7)(C)(ii) (permitting reopening at any time based on changed country conditions).

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This obligation to consider all relevant arguments and facts is necessary to ensure that federal courts can review the BIA's decisions. *See, e.g.*, *Onwuamaegbu v. Gonzales*, 470 F.3d 405, 412 (1st Cir. 2006) ("[I]t is extremely problematic for appeals courts to assess an exercise of the BIA's discretion absent a reasonably clear signal as to the precise rationale for its exercise of discretion."); *Song Jin Wu v. INS*, 436 F.3d 157, 164 (2d Cir. 2006) ("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."); *Dulane v. INS*, 46 F.3d 988, 994 (10th Cir. 1995) (requiring the Board to "articulate its reasons for denying relief sufficiently for us, as the reviewing court, to be able to see that the Board considered all the relevant factors") (internal quotation omitted). The total failure to resolve a threshold issue clearly presented and supported by evidence "leave[s] [this Court] to presume nothing other than an abuse of discretion." *Onwuamaegbu*, 470 F.3d at 412 (internal quotation omitted).

Where, as here, the Board entirely fails to address an argument and supporting evidence, the Court must remand to allow the agency to consider it in the first instance. *See*, *e.g.*, *Bolieiro*, 731 F.3d at 39-40 (remanding to the agency with instructions to consider petitioner's equitable tolling argument in the first instance); *Romer*, 663 F.3d at 43 (remanding to "consider whether equitable tolling is available to [petitioner] on his motion to reopen"); *Aponte v. Holder*, 610 F.3d 1,

5 (1st Cir. 2010) (ordering remand where "the BIA failed to engage in any meaningful analysis" of petitioner's argument and evidence that she did not receive notice of the Board's briefing schedule); *cf. Velerio-Ramirez v. Lynch*, 808 F.3d 111, 118 (1st Cir. 2015) (remanding for the Board to consider for the first time the correct legal standard governing a "particularly serious crime" designation).[6]

But for its failure to address an entire claim presented in Mr. Daoud's motion, the agency would not have prematurely applied the departure bar. Therefore, this Court should remand the case to the agency to address the merits of the tolling claim—and, if the deadline is tolled, the merits of Mr. Daoud's motion—in the first instance.

4. On Remand, the Board Should Assess Mr. Daoud's Equitable Tolling Argument Under a Circumstance-Specific Approach

If this Court remands for the BIA to adjudicate the merits of Mr. Daoud's equitable tolling argument, it should instruct the Board to apply "long-settled equitable tolling principles," *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012), to analyze the tolling argument under a circumstance-specific

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[6] This is true whether the federal court would affirm or deny the underlying agency decision. *See Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("If 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.").

approach.

An individual is "entitled to equitable tolling" where extraordinary circumstances prevent him or her from timely filing and the individual pursued reopening with "reasonable diligence," but not "maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 649, 653 (2010) (internal quotations omitted); *see also Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014); *Credit Suisse Sec. (USA) LLC*, 566 U.S. at 227; *Ramos-Martinez v. United States*, 638 F.3d 315, 323-24 (1st Cir. 2011). Consistent with principles of equity, the Board should apply this standard using a circumstance-specific approach that takes into account the unique situation of the litigant. *See id*. at 324 (observing that "both 'extraordinary circumstances' and 'reasonable diligence' depend on the totality of the circumstances" and that reasonable diligence "does not demand a showing that the petitioner left no stone unturned").

The Board must take special care when assessing equitable tolling claims in immigration cases, as courts have recognized:

> [T]he BIA should give due consideration to the reality that many departed [noncitizens] are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions.

Lugo-Resendez, 831 F.3d at 345. Immigration cases often involve individuals without formal education, without knowledge of substantive immigration law or

the procedural mechanisms for raising claims, who are often pro se, and who face a language barrier. *See, e.g.*, *Pervaiz v. Gonzales*, 405 F.3d 488, 491 (7th Cir. 2005) (noting that noncitizens in removal proceedings may "have more than the average difficulty in negotiating the shoals of American law"). These concerns are heightened where, as here, the noncitizen suffers from debilitating mental illness. *See Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010) (holding that "mental illness can constitute an extraordinary circumstance" justifying tolling). As Justice Sotomayor aptly stated:

> [W]ith respect to remedial statutes designed to protect the rights of unsophisticated claimants, agencies (and reviewing courts) may best honor congressional intent by presuming that statutory deadlines for administrative appeals are subject to equitable tolling, just as courts presume comparable judicial deadlines under such statutes may be tolled.

Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 163 (2013) (Sotomayor, J., concurring) (citation omitted).

The motion to reopen statute is precisely this type of remedial scheme: designed to protect noncitizens and "to ensure a proper and lawful disposition" of removal proceedings. *Dada v. Mukasey*, 554 U.S. 1, 18 (2008). As such, tolling claims made by these "unsophisticated claimants" must be assessed in a circumstance-specific manner that comports with the principles of equity and the purpose of the motion to reopen statute. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 163 (Sotomayor, J., concurring). Accordingly, the Board must factor in significant

obstacles to timely reopening, including, for example, individuals who are seeking reopening from outside the country, detained, or suffering from mental illness.

B. The Board Erred in Denying Mr. Daoud's Motion to Reconsider as Untimely Without Considering His Equitable Tolling Argument

For the reasons discussed above, *supra* at Section III.A.3-4, the Board similarly erred in treating Mr. Daoud's motion to reconsider as untimely without considering his equitable tolling claim. The Board cannot ignore this threshold question when evaluating Mr. Daoud's motion to reconsider. *See Romer*, 663 F.3d at 43. Remand is therefore necessary to permit the Board to consider Mr. Daoud's equitable tolling argument and evidence in the first instance. *See Bolieiro*, 731 F.3d at 39-40; *Romer*, 663 F.3d at 43; *see also INS v. Ventura*, 537 U.S. 12, 16 (2002) (finding that, where the agency has not yet ruled on an issue in the first instance, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation") (internal quotation omitted). On remand, the Board should evaluate Mr. Daoud's equitable tolling claims under the approach discussed in Section III.A.4.

C. The Board Erred by Denying Mr. Daoud's Motion to Reopen, in the Alternative, in the Exercise of Discretion

The Board also held that, regardless of whether Mr. Daoud complied with the statutory requirements for motions to reopen and established a prima facie case for eligibility for non-discretionary relief, at a minimum for protection under the

United Nations Convention Against Torture (CAT), it would still "deny the motion in the exercise of discretion" based on factors that it lacked authority to consider. A.R. 8. This was error.

Specifically, the Board here held that it would deny the motion in its discretion even if Mr. Daoud "were correct in interpreting the statute here to permit a motion to reopen based on changed country conditions," A.R. 8, i.e. even if the motion was treated as timely filed pursuant to the statute, not subject to the departure bar, and justified, in part based on non-discretionary relief from removal. The Board found that it could deny the motion in the exercise of discretion because Mr. Daoud is outside of the country, was ordered removed several years ago, and has previous criminal convictions. *Id*. This would, in essence, allow the Board to deny the motion in an exercise of discretion based on procedural bars that it had determined *did not apply*—the departure bar and the statutory deadline for filing—and factors that are not determinative for eligibility for non-discretionary forms of relief.

Denying a motion to reopen that complies with all procedural requirements and corrects an unlawful or improper removal order by relying on new and previously unavailable evidence is contrary to the plain language and intent of the motion to reopen statute. The Court should reverse and remand to allow the Board to address the merits of, and any outstanding procedural issues with, Mr. Daoud's

motion pursuant to 8 U.S.C. § 1229a(c)(7).

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 previously unavailable evidence, information, and arguments after they have been ordered removed. 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(c)(2) (1997).

Courts have recognized that *statutory* motions are an integral part of the removal scheme Congress enacted. When reopening was authorized only by regulation, the Supreme Court indicated that it was a "disfavored" discretionary process. *INS v. Doherty*, 502 U.S. 314, 323 (1992). Significantly, however, since Congress codified the right to seek reopening, it has become an integral vehicle 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*, 554 U.S. at 18-19 (internal quotation omitted); *see also id.* at 18

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(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); *Reyes Mata,* 135 S. Ct. at 2153 (quoting *Dada*, 554 U.S. at 4-5, to recognize that each noncitizen ordered removed "'has *a right* to file one motion' with the IJ or Board to 'reopen his or her removal proceedings'") (emphasis added). Similarly, this Court recognized that the motion to reopen process was "'transform[ed]'" when it became statutory. *Perez Santana*, 731 F.3d at 58 (quoting *Dada*, 554 U.S. at 14); *see also id.* at 59 (noting that Congress "took a significant degree of discretion out of the agency's hands and vested a statutory right in the noncitizen.").

2. When Congress Created the Statutory Right to Reopen, It Divested the Board of Discretion to Deny Motions Based on Eligibility for Mandatory Relief That Comply with the Statutory Requirements

The plain language of the motion to reopen statute, as well as its legislative history, establish that the Board does not have discretionary authority to refuse to reopen, including where, as here, an individual meets the statutory requirements for the motion and the underlying relief sought is mandatory. That is, just as an adjudicator has no discretion to deny CAT protection to a noncitizen who establishes that it is more likely than not that he or she will be tortured, the BIA has no discretion to deny reopening to a movant who establishes that the motion

meets the statutory requirements and that he is prima facie eligible for such protection. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242, 112 Stat 2681 (Oct. 21, 1998) (implementing the Convention Against Torture (CAT)); 8 C.F.R. §§ 1208.16(d)(1) (stating that "withholding . . . of removal shall be granted" once CAT eligibility is established); 1208.17(a) (requiring that CAT eligible noncitizen "shall be granted deferral of removal").

The plain language of the motion to reopen statute, 8 U.S.C. § 1229a(c)(7), supports this interpretation. The statute contains no authority for the Board to deny motions solely in an exercise of discretion, including based on factors that are not relevant to the reopening analysis. Rather, it provides a variety of requirements—for example, a noncitizen is entitled to file only one motion to reopen, that in many circumstances, the motion must be filed within 90 days of a final order of removal, and that the motion must contain new evidence. But it does not authorize the Board to deny a meritorious motion that complies with these requirements in an exercise of unbridled discretion let alone to exercise discretion over whether to reopen for protection that Congress expressly provided is non-discretionary. *See* FARRA, § 2242(a) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being

subjected to torture . . . ."). *Accord* 8 U.S.C. § 1231(b)(3) (finding that "the Attorney General may not remove" a noncitizen to a country where he or she is eligible for withholding of removal).

Where Congress intends for an agency to have discretion to make a type of determination, statutes clearly provide such authority.[7] 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 denials.

This interpretation is bolstered by the history of the reopening statute. As discussed *supra*, prior to their codification in IIRIRA, motions to reopen were

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[7] *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.").

authorized solely by regulation. These regulations expressly provided the agency with the authority to deny a meritorious motion to reopen in an exercise of discretion. *See* 8 C.F.R. § 3.2 (1997). When Congress elevated motions to reopen to statutory vehicles, 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)). 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.[8]

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[8] This Court has found that Congress' similar failure to include another regulatory provision (the departure bar to reopening discussed *supra* at Section III.A.1) when codifying the right to seek reopening indicated Congressional intent to reject the prior regulatory bar. *See Perez Santana*, 731 F.3d at 58-59 (holding that "statutory changes are inconsistent with the notion that Congress simply intended to stay silent regarding" a substantial limit on motions to reopen).

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

To the extent that agency regulations and court decisions purport to provide the agency with discretion beyond what Congress conferred by statute, those regulations and decisions conflict with the text and purpose of the motion to reopen statute. The regulations and cases are not owed deference, are inapposite, and/or are, in relevant part, dicta.

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). The regulation, however, 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 a valid interpretation of the statute 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* at Section III.C.2, that "unambiguously expressed intent of Congress" governs. *Chevron*, 467 U.S. at 842-43; *Succar v. Ashcroft*, 394 F.3d 8, 22 (1st Cir. 2005) (requiring courts to look to not only at "the most natural

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reading of the language" but also "the consistency of the 'interpretive clues' Congress provided" to determine if statutes are ambiguous) (internal quotation omitted); *see also Perez Santana*, 731 F.3d at 57-58 (rejecting attempt to characterize silence in the motion to reopen statute as ambiguous Congressional intent); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) ("*Chevron* does not require Congress to explicitly delineate everything an agency cannot do before we may conclude that Congress has directly spoken to the issue.").[9]

Courts only consider whether an agency interpretation is a reasonable construction of a statute 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, the regulation does not provide a reasonable construction of the statute. As Mr. Daoud has argued,

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[9] The interpretation of the statute in the unpublished BIA decision in Mr. Daoud's case is not itself entitled to *Chevron* deference, regardless of the statute's ambiguity. To the extent that the BIA in this case implicitly interpreted the statute to permit the discretionary denial of a motion to reopen that complies with all statutory requirements and seeks mandatory relief, it is entitled to, at most, deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which applies deference in accordance with an agency decision's "power to persuade." *Id.* at 140; *see also Neang Chea Taing v. Napolitano*, 567 F.3d 19, 30 & n.13 (1st Cir. 2009) (declining to apply *Chevron* or *Skidmore* deference to non-precedential decision). The relevant portion of the BIA's decision is brief, does not rely on 8 C.F.R. § 1003.2(a) or *any* authority, and provides no explanation of how the statutory text could be interpreted to permit its discretionary denial.

permitting such denials of motions to reopen filed to pursue non-discretionary claims would improperly collapse review of such claims, and eliminate the role of motions to reopen as a threshold screening mechanism for meritorious claims. *See* Pet. Br. at 33-36. Additionally, it 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* motions to reopen and reconsider). Permitting the Board to utilize the same broad 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. Bolieiro*, 731 F.3d at 39 (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. Perez Santana*,

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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 for non-discretionary relief or lack of removability, 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; *see also Aponte*, 610 F.3d at 5 (noting that "[t]he motion to reopen . . . serv[es] to ensure that [noncitizens get] a fair chance to have their claims heard") (quoting *Kucana*, 558 U.S. at 248) (second alteration in original)). Such an interpretation—permitting adjudication that runs contrary to the purposes of the statute—cannot be reasonable. *See Succar*, 394 F.3d at 34 (finding regulation inconsistent with unambiguous meaning of a statute where its effect "will predictably be to re-institute the very problems which Congress attempted to eliminate" through the statute).

Decisions by the Supreme Court and this Court referring to the discretionary nature the motion to reopen process also do not justify the BIA's holding in this case. Several Supreme Court cases that emphasize the discretionary nature of reopening decisions in fact pre-date the codification (without discretionary language) of the right to seek reopening and thus are inapposite to discussion of

statutory motions to reopen. *See, e.g.*, *INS v. Abudu*, 485 U.S. 94, 104 (1988).[10] Furthermore, discussion of the Board's ability to deny motions to reopen in the exercise of discretion generally concerns cases where an individual seeks reopening to apply for discretionary relief that the Board determines he or she would not be granted in reopened proceedings. *Id.*; *see also Smith v. Holder*, 627 F.3d 427, 433-434 (1st Cir. 2010); *Matter of Coelho*, 20 I&N Dec. 464, 472-73 (BIA 1992). These determinations are inapposite to the relevant question here; i.e., whether the Board can deny a motion to reopen that is statutorily compliant based on factors that have nothing do with whether the individual is removable and/or has demonstrated prima facie eligibility for mandatory relief. In these cases, exercising discretionary factors that go beyond the legal determinations relevant to the motion to reopen analysis undermines congressional intent in designating the underlying relief sought as nondiscretionary.

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[10] As Mr. Daoud's brief notes, *see* Pet. Br. at 31 n.11, 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 (quoting 8 C.F.R. § 1003.2(a)); *see also Bead v. Holder*, 703 F.3d 591, 593 (1st Cir. 2013); *Gyamfi v. Whitaker*, 913 F.3d 168, 172 (1st Cir. 2019), this assumption was not necessary to the relevant holding and was not the subject of briefing or argument, and so should be treated as 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" in the prior decision); *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.").

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* * * *

In this case, the Board found that it would deny Mr. Daoud's motion to reopen in an exercise of discretion, regardless of whether it was considered timely or permissible under the departure bar regulation. A.R. 8. Furthermore, it made this decision without addressing the merits of underlying claims that had no discretionary component—both that Mr. Daoud was improperly charged with an aggravated felony and that he was entitled to withholding of removal and CAT protection. *See id*. The factors upon which the discretionary denial appears to rest are neither relevant to nor determinative of Mr. Daoud's removability or his eligibility for non-discretionary relief. This was an impermissible exercise of discretion not authorized by the motion to reopen statute.

IV. CONCLUSION

The Court should grant the petition for review, vacate the Board's decision, and remand this case.

Respectfully submitted,

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Dated: July 5, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and 29(a)(5), because it contains 6,221 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). 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 using Microsoft Word 2016, is proportionately spaced, and has a typeface of 14 point.

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CERTIFCATE OF SERVICE

I hereby certify that on July 5, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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