09-2349-AG

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERTO CARDENAS ABREU,

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER
OF THE BOARD OF IMMIGRATION APPEALS
Agency No. A046 046 300

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

I. STATEMENT OF JURISDICTION

In this immigration case, Roberto Cardenas Abreu ("Petitioner") seeks review of a May 4, 2009, published *en banc* decision of the Board of Immigration Appeals ("Board" or "BIA"). Joint Appendix ("J.A.") 2-30; *Matter of Cardenas Abreu*, 24 I. & N. Dec. 795 (BIA 2009) (*en banc*). In that decision, the Board dismissed Petitioner's appeal of an immigration judge's decision denying his motion to reopen his removal proceedings, and held that Petitioner was

"convicted" for immigration purposes notwithstanding his pending late-filed appeal in New York state court. J.A. 2-9, 217. The jurisdiction of the Board arises under 8 C.F.R. §§ 1003.1(b)(3) and 1240.15 (2009), which provide the Board with appellate jurisdiction over decisions of immigration judges in removal proceedings.

Petitioner timely filed a petition for review with this Court on June 3, 2009, within thirty days of the Board's final order. *See* Immigration and Nationality Act ("INA") § 242(b)(1), 8 U.S.C. § 1252(b)(1) (2006). Venue is proper in this Court, as the proceedings before the immigration judge were completed in Napanoch, New York, which is within this Circuit. *See* INA § 242(b)(2), 8 U.S.C. § 1252(b)(2). This Court has jurisdiction to review the Board's decision under section 242 of the INA, 8 U.S.C. § 1252, which provides the courts of appeals with jurisdiction to review final orders of removal.

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Board properly exercised its broad discretion in dismissing Petitioner's appeal of the denial of his motion to reopen, where he failed to establish that he was no longer convicted of a removable offense for immigration law purposes, and thus failed to elicit any facts or evidence to justify the reopening or termination of his removal proceedings.

III. STATEMENT OF THE CASE

Petitioner is a native and citizen of the Dominican Republic. JA 258, 270. He was admitted to the United States as a lawful permanent resident on June 26, 1996. *Id.* On October 11, 2007, Petitioner was convicted of first degree burglary in the Supreme Court of New York, County of Queens, in violation of section 140.30 of the New York Penal Law.[1] JA 256, 270. For this conviction, Petitioner was sentenced to a determinate term of six years' imprisonment and five years' post-release supervision. JA 256, 266. Petitioner did not file an appeal of his conviction. *See* JA 270. Subsequently, on January 14, 2008, Petitioner was served with a Notice to Appear ("NTA") charging him with removability pursuant to section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony, to wit, a violation of a law pertaining to a theft offense or burglary, as defined by section 101(a)(43)(G) of the INA, 8 U.S.C. § 1101(a)(43)(G). JA 270-71.

Petitioner appeared before an immigration judge on July 22, 2008, admitted the factual allegations against him, and conceded that he is removable as charged. JA 266, 270. Before the immigration judge, Petitioner did not seek any relief from

[1] This conviction seems to have been pursuant to a plea deal, although the record is not clear on this point. *See* JA 177, 238, 242.

removal, or any other benefit or protection under the INA. *See* JA 254. Accordingly, Petitioner was ordered removed to the Dominican Republic, on the previously conceded charge of removal, at the conclusion of his July 22, 2008 hearing. *Id.* Petitioner did not file an appeal with the Board regarding the immigration judge's July 22, 2008 order.

On August 15, 2008, following the entry of the removal order, Petitioner filed a motion to file a late appeal in New York state court, pursuant to section 460.30 of the New York Criminal Procedure Law. *See* JA 230-31, 232-33. This motion was opposed by the Queens County District Attorney's Office. *See* JA 241-43. Nonetheless, Petitioner's motion was granted by the New York Supreme Court, County of Queens, on September 26, 2008. JA 249-51.

Petitioner then filed a motion to reopen his removal proceedings with the immigration judge in October 2008. JA 218-24. The Department of Homeland Security ("DHS") submitted an opposition to this motion dated October 30, 2008. *See* JA 132-40. On October 30, 2008, the immigration judge denied this motion. JA 217.

Petitioner filed a Notice of Appeal with the Board on November 20, 2008. JA 146-48. The Board, sitting *en banc*, dismissed Petitioner's appeal in a published, precedential decision, issued on May 4, 2009. JA 2-30; *Matter of*

Cardenas Abreu, 24 I. & N. Dec. 795. The instant petition for review followed.

IV. STATEMENT OF THE FACTS

A. Background and Petitioner's Proceedings Before the Immigration Judge and State Court

Petitioner was admitted to the United States as a lawful permanent resident on June 26, 1996. JA 258, 270. Petitioner was subsequently convicted of first degree burglary, in violation of section 140.30 of the New York Penal Law, in the Supreme Court of New York, County of Queens on October 11, 2007. *See* JA 256, 270. Petitioner did not file an appeal of this conviction within the thirty-day period permitted for the filing of a direct appeal. *See* N.Y. Crim. Pro. Law § 460.10. Petitioner was, however, placed into removal proceedings by the filing of a NTA with the immigration court. *See* JA 270-71. He conceded his removability and, as he sought no relief, benefit, or protection under the INA, was ordered removed to the Dominican Republic on that conceded charge of removability. JA 254.

After entry of the removal order by the immigration judge, Petitioner filed a motion with the New York state appellate court on August 15, 2008, seeking leave to file a late appeal of his criminal conviction. *See* JA 230-31. This motion was brought pursuant to section 460.30 of the New York Criminal Procedure Law,

which provides, in relevant part:

> Upon motion to an intermediate appellate court of a defendant who desires to take an appeal to such court from a judgment, sentence or order of a criminal court but has failed to file a notice of appeal, an application for leave to appeal, or, as the case may be, an affidavit of errors, with such criminal court within the prescribed period . . . such intermediate appellate court . . . may order that the time for the taking of such appeal or applying for leave to appeal be extended to a date not more than thirty days subsequent to the determination of such motion, upon the ground that the failure to so file or make application in timely fashion resulted from (a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant. Such motion must be made with due diligence after the time for the taking of such appeal has expired, and in any case not more than one year thereafter.

In an affidavit accompanying his motion, Petitioner alleged that he did want to file an appeal within thirty days with the state appellate court, that he believed his counsel had so filed the appeal, and that the fact that no appeal was filed was the result of improper conduct on the part of his former counsel. *See* JA 232-33.

Petitioner's motion for leave to file a late appeal was opposed by the Queens County District Attorney's Office. *See* JA 241-43. That office opposed Petitioner's motion on the ground that it contained no "sworn and credible allegations of fact or documentary proof" to establish that his failure to file a

timely appeal was on account of either of the enumerated bases in section 460.30 of the New York Criminal Procedure Law. JA 242-43. Since he failed to carry his burden of establishing conduct justifying leave to file a late appeal, the District Attorney's office maintained that Petitioner did not qualify for an enlargement of the time to file an appeal. *Id.*

Petitioner filed a response to this opposition on September 16, 2008, but this response simply recounted his underlying assertions that he had asked his prior counsel to file an appeal and that counsel failed to so file. *See* JA 245-47. Nonetheless, Petitioner's motion was granted by the appellate division of the New York Supreme Court, Queens County, on September 26, 2008. *See* JA 249-51. Along with granting leave to file a late appeal, that court also held that Petitioner's motion constituted a timely filed appeal. JA 249. As of the filing of this brief, and to the knowledge of undersigned counsel, Petitioner's appeal has not been adjudicated by the New York state court.[2]

B. Petitioner's Motion to Reopen and the Immigration Judge's October 30, 2008 Decision

Following the state court's order granting his motion to file a late appeal, Petitioner filed a motion to reopen his removal proceedings with the immigration

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[2] This knowledge is based on a prior conversation with counsel for Petitioner, Ms. Sunita Patel, who is representing him in the instant petition.

judge. JA 218-24. In this motion, Petitioner noted that he had been granted leave to file a late appeal of his state criminal conviction. JA 218. Because this motion was granted and his appeal was then pending, Petitioner contended, his conviction no longer had the requisite degree of finality to constitute a conviction under section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A). JA 221-22. This fact constituted new evidence within the meaning of the reopening regulations, and thus the state court's action, according to Petitioner, justified reopening his proceedings.

DHS submitted an opposition to this motion on October 30, 2008. *See* JA 132-40. DHS argued that Petitioner has a conviction for immigration purposes, as there has been a formal judgment of his guilt entered by a court. JA 133; *see* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). While acknowledging that finality had been a requirement for a conviction to constitute a conviction for immigration law purposes, *see* JA 134-35, DHS pointed to the 1996 enactment of section 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), in which Congress did not adopt a finality requirement in the definition of "conviction." JA 135-36. The fact, DHS wrote, that finality is no longer required for a conviction to constitute a conviction for immigration law purposes is supported by the legislative history of section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), as well as the reasoning of

those courts of appeals that have addressed the issue of whether finality is required under the statutory definition of "conviction." JA (136-38) (*citing*, *inter alia*, *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324, 331-32 (2d Cir. 2007)). DHS argued that, under the clear language of the statute, all that was necessary was a "formal" judgment of guilt rather than a "final" judgment. JA 139. A formal judgment requires only that the judgment be signed and docketed. *Id.* In Petitioner's case, his judgment was formal, having been signed and docketed, and thus his conviction suffices as such under section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A).

The immigration judge denied Petitioner's motion on October 30, 2008. JA 217. The immigration judge held that Petitioner remained convicted for immigration law purposes, despite having been granted leave to file a late appeal of his state court conviction. *Id.* Specifically, the immigration judge noted that a conviction under section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), "does not require exhaustion or waiver of direct appeal rights." *Id.* (*citing*, *inter alia*, *Puello*, 511 F.3d at 332). Thus, the immigration judge held that Petitioner's conviction remained a conviction under the relevant section of the INA, and accordingly denied the motion to reopen. *Id.*

C. The Board's May 4, 2009 Decision

Petitioner filed his brief in support of his administrative appeal on November 20, 2008. JA 150-62. Petitioner argued that, as Congress did not explicitly indicate an intent to remove the "finality" requirement for a conviction to constitute an "immigration law" conviction, section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), required finality before a conviction could render an alien removable. *See* JA 156-60. The Supreme Court had previously so held, *see Pino v. Landon*, 349 U.S. 901 (1955), and Petitioner contended that the immigration judge's decision to the contrary, as well as the circuit court decisions cited by the immigration judge in support of his order, impermissibly ignored this finality requirement. JA 160-61. As finality is required for a conviction under section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), and as Petitioner's conviction was then pending on appeal and not, according to him, final, he contended that his motion to reopen should be granted. JA 154-55, 160-62.

The Board issued an *en banc*, precedential opinion in Petitioner's case on May 4, 2009, dismissing his appeal. *Matter of Cardenas Abreu*, 24 I. & N. Dec. 795; JA 2-30. In 1996, the Board wrote, Congress, for the first time, included a definition of "conviction" in the INA as part of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *Matter of*

Cardenas Abreu, 24 I. & N. Dec. at 796; JA 3. That provision, codified as section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), provides that:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where–
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilt or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Id.; JA 3.

The Board noted congressional intent to address convictions in the context of deferred adjudications, and to establish a federal definition of "conviction" that would not be dependent on the "vagaries" of state law. *Matter of Cardenas Abreu*, 24 I. & N. Dec. at 797, 802; JA 4, 9. To that end, section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), provides that a deferred adjudication does constitute a conviction under the Act so long as the other statutory requirements are met. *Id.* at 797-98; JA 4-5. The Board also noted that, although "finality" of the conviction had been an implicit requirement prior to the 1996 enactment of IIRIRA, Petitioner's case could be adjudicated without reference to finality issues, as his case involved a late-filed or reinstated appeal, rather than a direct appeal. *Id.* at 798; JA 5.

To this end, the Board analogized late-filed appeals to deferred adjudications, as both inject uncertainty and delay into immigration proceedings. *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 799-800; JA 6-7. The New York procedure at issue, according to the Board, was a case in point: although it requires the filing of a motion within one year and thirty days of the underlying conviction, whether and when that motion may be granted is dependent on numerous other factors, and there is no ultimate time limit on when the motion must be granted and thus, by extension, when the movant may finally be granted leave to appeal. *Id.* at 800-801; JA 7-8. For these reasons, the Board concluded that late-filed appeals in the context of the New York statute were not sufficiently analogous to direct appeals. *Id.* at 801; JA 8.

The concerns over the uncertainty and potential delay inherent in New York's late-filed appeal regime are, the Board wrote, "amplified in the context of a motion to reopen, which is a disfavored process that imposes a heavy burden on the moving party to show that reopening is warranted." *Id.*; JA 8 (*citing INS v. Doherty*, 502 U.S. 314, 323 (1992); *INS v. Abudu*, 485 U.S. 94, 107, 111 (1988)). Delay and unpredictability were the exact results in Petitioner's case. His removal proceedings were instituted months after the time for filing a direct appeal in his criminal case had expired, and he was ordered removed after proceedings before

an immigration judge. Only then did he file a motion with the state court for leave to file a late appeal, followed by the motion to reopen his removal proceedings after the state court granted his motion. *Id.* at 801-802; JA 8-9.

In any event, the Board held that his conviction was final pursuant to section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), that his late-filed appeal did not undermine that finality, and that his conviction remained a "valid predicate for the charge of removability." *Matter of Cardenas Abreu*, 24 I. & N. Dec. at 802; JA 9. Accordingly, his appeal was dismissed. *Id.*; JA 9. Board Member Grant concurred in the majority's decision, but wrote separately solely to opine that the "finality" requirement still applies, post-1996, in cases involving unexhausted and non-waived direct appeals. *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 802-803 (Grant, Board Member, concurring); JA 9-10. Board Member Pauley, joined by Board Member Cole, also filed a concurrence, writing separately to assert that, upon a review of the unambiguous statutory language, legislative history of IIRIRA, regulations, and circuit court case law, it was clear that there is no finality requirement under section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), any prior, pre-1996 practice to the contrary notwithstanding. *Matter of Cardenas Abreu*, 24 I. & N. Dec. at 803-11 (Pauley, Board Member, concurring); JA 10-18.

Six Board Members dissented from the majority's opinion. *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 811-23 (Greer, Board Member, dissenting); JA 18-30. The dissent would have held that a late-filed appeal under New York state law rendered the underlying conviction non-final for immigration purposes. *Id*. at 811; JA 18. The dissent asserted that the finality requirement survived the 1996 amendments and codification of the definition of "conviction," because Congress did not expressly decline to include a finality requirement, did not expressly disclaim prior administrative and circuit court precedent, and included finality requirements in other portions of the Act. *See id.* at 812-12; JA 19-28. As the finality requirement was preserved in section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), and because, according to the dissent, New York's statute providing for late-filed appeals preserved the direct appeal rights of the convicted, a conviction could not trigger immigration consequences after the acceptance of the motion for leave to file a late appeal and during the pendency of that appeal before the state court. *Id.* at 821-23; JA 28-30. Accordingly, the dissent would have sustained the appeal and terminated Petitioner's removal proceedings. *Id.* at 823; JA 30.

V. SUMMARY OF THE ARGUMENT

The Board properly exercised its broad discretion in upholding the

immigration judge's denial of Petitioner's motion to reopen. The resolution of that motion turned on whether Petitioner remained convicted for immigration law purposes, despite the fact that he was granted leave to file, and did file, a late appeal in New York state court. As the Board correctly determined, however, this late-filed appeal does not undermine the validity of Petitioner's conviction for immigration law purposes, as the statutory definition of conviction is unambiguous and concerned only with the initial formal judgment of guilt entered against the alien. Such a formal judgment of guilt is undisputed in this case, and thus there are no grounds for concluding that Petitioner is not still convicted for immigration law purposes despite his late-filed appeal. Even if the statutory language is ambiguous, however, the Board's decision represents a permissible interpretation of the immigration statute, and is entitled to deference on review. In any event, whether the statutory language is unambiguous on its face, or the Board's interpretation is a permissible construction of ambiguous language, the end result is the same: the Board properly exercised its broad discretion in upholding the denial of Petitioner's motion to reopen, as Petitioner remains convicted for immigration law purposes and there are otherwise no grounds on which the motion should have been granted or proceedings terminated.

VI. ARGUMENT

A. Standard of Review

A party seeking to reopen his removal proceedings "bears a heavy burden," *Ajdin v. BCIS*, 427 F.3d 261, 263 (2d Cir. 2006) (*citing Abudu*, 485 U.S. at 110), and the Attorney General has broad discretion to grant or deny such motions. *See Shou Yung Guo v. Gonzales*, 463 F.3d 109, 113 (2d Cir. 2006) (*citing Doherty*, 502 U.S. at 323). Indeed, the Board has "discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. § 1003.2(a); *see* 8 C.F.R. § 1003.23(b)(3). "This court reviews the BIA's decision to affirm an [immigration judge's] denial of a motion to reopen for abuse of discretion." *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) (internal citation and quotation marks omitted). The Board "abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Id.* (internal citation and quotation marks omitted); *see United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007) (a court abuses its discretion when its decision "cannot be located within the range of permissible decisions") (internal citation omitted); *Brice v. Dep't of Justice*, 806 F.2d 415, 419 (2d Cir. 1986) (holding that the Board abuses its discretion if its decision is "arbitrary, irrational

or contrary to law").

The Board's legal conclusions are reviewed *de novo*, "with the caveat that the BIA's interpretations of ambiguous provisions of the INA are owed substantial deference unless 'arbitrary, capricious, or manifestly contrary to the statute.'" *Perez Suriel de Batista v. Gonzales*, 494 F.3d 67, 69 (2d Cir. 2007) (*per curiam*) (*quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)); *see National Cable & Telecommunications Assn. v. Brand X Internet Serv.*, 545 U.S. 967, 980-82 (2005). Precedential decisions of the Board, such as the decision at issue in this case, "are eligible for *Chevron* deference insofar as they represent the agency's authoritative interpretations of statutes." *Yuen Jin v. Mukasey*, 538 F.3d 143, 150 (2d Cir. 2008) (*quoting Maiwand v. Gonzales*, 501 F.3d 101, 104 (2d Cir. 2007)). Additionally, the Board's interpretation "of its own regulations is entitled to 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id*. (*quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

B. Statutory and Regulatory Framework Regarding Motions to Reopen

The agency's authority to consider motions to reopen is located at section 240(c)(7) of the INA, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. §§ 1003.2(a) & (c), 1003.23(b). By regulation, a motion to reopen must "state the new facts that will

be proven at a hearing . . . if the motion is granted and shall be supported by affidavits or other evidentiary material." 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3). Further, "[a] motion to reopen . . . shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing[.]" *Id.* Additionally, in order to prevail on a motion to reopen, the alien must establish *prima facie* eligibility for the relief sought. *See* 8 C.F.R. § 1003.2(c).

Motions to reopen, like petitions for rehearing and motions for re-trial based on new evidence, are disfavored because of the threat they pose to the finality of decision. *See Doherty*, 502 U.S. at 323. "'This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'" *Xiao Ji Chen v. U.S. Dept. of Justice*, 471 F.3d 315, 320 n.1 (2d Cir. 2006) (*quoting Doherty*, 502 U.S. at 323). Indeed, the Supreme Court has cautioned that granting motions to reopen "too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a *prima facie* case." *Abudu*, 485 U.S. at 108; *see Iavorski v. INS*, 232 F.3d 124, 131 (2d Cir. 2000) (Congress sought to "eliminat[e] the prior practice under which an alien could ignore a deportation or voluntary departure

order, and years later, attempt to reopen the proceedings without any adverse consequences."). Accordingly, there is a strong public interest in concluding litigation, avoiding endless delay of removal by aliens, and avoiding the wasted time and efforts of immigration adjudicators. *See, e.g., Abudu*, 485 U.S. at 107-08 ("[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest of giving the [litigants] a fair opportunity to develop and present their respective cases.").

The reopening regulations are framed negatively; that is to say, the Board should not reopen absent certain affirmative showings on the part of the movant. *See INS v. Jong Ha Wang*, 450 U.S. 139, 143-44 n.5 (1981). Accordingly, the Supreme Court has held that the Board may deny a motion to reopen on "at least three independent grounds." *Abudu*, 485 U.S. at 104. First, the Board "may hold that the movant has not established a *prima facie* case for the underlying substantive relief sought." *Id.* Second, the Board "may hold that the movant has not introduced previously unavailable, material evidence." *Id*. Third, the Board "may determine that, even if these 'threshold' concerns are met, the movant would not be entitled to the discretionary grant of relief." *Id.* at 105; *see* 8 C.F.R. § 1003.2(a) ("[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief"); 8 C.F.R.

§ 1003.23(b)(3). Accordingly, the regulation regarding motions to reopen provides the Board with broad discretion to determine when proceedings warrant reopening. *Id.* at 105-06.

C. The History of "Conviction" Under Immigration Law

Prior to the 1996 enactment of IIRIRA, there was no statutory definition of "conviction" in the INA. *See Puello*, 511 F.3d at 331. Until 1988, assessments of whether a conviction existed for immigration purposes were governed by a Supreme Court memorandum opinion, and a 1957 interpretation of that opinion by the Board. *See Pino v. Landon*, 349 U.S. 901; *Matter of O-*, 7 I. & N. Dec. 539 (BIA 1957). In *Pino*, the Supreme Court reversed a finding of deportability made by the First Circuit, holding that "[o]n the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation . . . of the [INA]." *Pino*, 349 U.S. at 901. In *Matter of O-*, the Board held that a conviction would exist for immigration purposes if "a finding of guilt was made, a fine or sentence to imprisonment was imposed or either the execution or imposition of a sentence was suspended." *Matter of Ozkok*, 19 I. & N. Dec. 546, 549 (BIA 1988) (*citing Matter of O-*, *supra*). Further, in the context of a state court postponement of sentencing or other imposition of punishment, the Board held that it would be necessary to assess the finality of the conviction

pursuant to *Pino*. *Id.* (*citing Matter of O-*, *supra*).

Two years after its decision in *Matter of O-*, the Board clarified the test it would utilize in order to determine whether a conviction existed for immigration purposes. *See Matter of L-R-*, 8 I. & N. Dec. 269 (BIA 1959). In that case, the Board held that a conviction exists for immigration purposes when:

> (1) there has been a judicial finding of guilt, (2) the court takes action which removes the case from the category of those which are (actually, or in theory) pending for consideration by the court–the court orders the defendant fined, or incarcerated or the court suspends sentence, or the court suspends the imposition of sentence, (3) the action of the court is considered a conviction by the State for at least some purpose[.]

Id. at 270. In applying this definition over the years, the Board was necessarily beholden to various state law definitions concerning when a conviction existed and when a conviction ceased to exist, giving rise to "confusion and disuniform results, particularly in the context of the varied approaches states took to ameliorating convictions, such as vacaturs after rehabilitation and deferred adjudications." *Puello*, 511 F.3d at 331 (*citing Saleh v. Gonzales*, 495 F.3d 17, 23 (2d Cir. 2007)); *Matter of Ozkok*, 19 I. & N. Dec. at 550-51.

To remedy this state of affairs, the Board, in 1988, revised its standard in order to establish a uniform definition as to when a conviction exists for immigration purposes. *Matter of Ozkok*, 19 I. & N. Dec. 546. In *Matter of Ozkok*,

the Board established a two-prong test for gauging whether a particular state law conviction constitutes a conviction for immigration purposes. *Id.* at 551-52. Under the first prong, an individual will stand convicted for immigration purposes "if the court has adjudicated him guilty or has entered a formal judgment of guilt." *Id.* at 551. Under the second prong, addressing circumstances "[w]here adjudication of guilt has been withheld," a conviction exists for immigration purposes where:

> (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty; (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed . . .; and (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.

Id. at 551-52.

The Board's decision in *Matter of Ozkok* was the prevailing definition of "conviction" until the enactment of IIRIRA in 1996 which, for the first time, included a statutory definition of "conviction." *See* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). As this Court has noted, however, in drafting this provision Congress relied heavily on the Board's decision in *Matter of Ozkok*, but ultimately expanded the definition of "conviction." *See Puello*, 511 F.3d at 332; *Saleh*, 495

F.3d at 23. The statute retained the first prong, requiring a "formal judgment of guilt of the alien entered by a court," *see* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A); *Puello*, 511 F.3d at 332, but, regarding the second prong and situations where an adjudication of guilt has been withheld, eliminated the third requirement of *Matter of Ozkok*, making clear that the "'original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws.'" *Puello*, 511 F.3d at 332 (*citing* H.R. Conf. Rep. No. 104-828, at 224 (1996)); *see* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). Additionally, the language of the statutory definition indicated the elimination of "the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the statute." *Id.* (citations omitted). Consistent with a reading of the statutory language, this Court noted the two primary motivating factors behind the enactment of this definition: a desire "to focus the conviction inquiry on the 'original determination of guilt' and to 'implement a uniform federal approach' to convictions." *Saleh*, 495 F.3d at 23 (*quoting Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 521-22 (BIA 1999)).

D. The Board Properly Exercised Its Discretion in Denying Petitioner's Motion to Reopen

The central issue for resolution by this Court is whether the Board properly

exercised its discretion in upholding the immigration judge's denial of Petitioner's motion to reopen. *See Kulhawik*, 571 F.3d at 298. The resolution of this issue, however, necessarily entails an inquiry into the Board's legal conclusion that Petitioner still stands "convicted" for immigration law purposes. *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 797-802; JA 4-9. Accordingly, prior to reaching the issue of whether the Board's decision was a proper exercise of its discretion, this Court must review the Board's legal holding that a late-filed appeal under New York state law does not undermine the validity of the underlying conviction for purposes of determining whether a conviction exists for immigration law purposes pursuant to section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A). *See id.* at 802; JA 9.

As the Board's decision is a published precedential opinion, it is entitled to substantial deference under the *Chevron* framework. *Yuen Jin*, 538 F.3d at 150. Under step one of the *Chevron* inquiry, the Court must determine whether Congress has spoken directly to the issue raised. *Chevron*, 467 U.S. at 842; *see Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007); *Shi Liang Lin v. Gonzales*, 494 F.3d 296, 304 (2d Cir. 2007) (*en banc*). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*,

467 U.S. at 842-43. To ascertain the intent of Congress, this Court begins first with the statutory language itself and, if that language is unambiguous, "no further inquiry is necessary." *Cohen*, 498 F.3d at 116 (*citing Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 93 (2007)); *see Puello*, 511 F.3d at 327. If the statutory text remains ambiguous, this Court may resort to "canons of statutory construction" and "legislative history" to determine whether there are any "interpretive clues" which elucidate the clear intent of Congress. *Id.* (internal quotation marks and citations omitted); *Puello*, 511 F.3d at 327 ("If the meaning of a statute is ambiguous, the court may resort to legislative history to determine the statute's meaning."); *see also Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587-90 (2004) (analyzing legislative history at *Chevron* step one); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (same); *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-50 (1990) (same).

Only if the unambiguous intent of Congress cannot be gleaned from the statutory language, canons of statutory construction, and legislative history, will this Court proceed to step two of the *Chevron* framework. *Cohen*, 498 F.3d at 116; *Shin Liang Lin*, 494 F.3d at 304. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S.

at 843. So long as the agency's interpretation of the statute is "reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecommunications Assn.*, 545 U.S. at 980 (*citing Chevron*, 467 U.S. at 843-44 & n.11).

In the instant case, the Board's holding comports with the unambiguous statutory language and intent of Congress to create an immigration law definition of "conviction" which encompasses all "formal judgments of guilt" without reference to the finality of the conviction. Accordingly, the legal issue in this case may be resolved at step one of the *Chevron* framework and, as the Board's decision comports with the statute, its decision upholding the denial of Petitioner's motion to reopen was a proper exercise of its discretion. Nonetheless, even if ambiguity can be deemed to remain in the statutory language after step one of *Chevron*, the Board's decision is a permissible construction of the statute and should be accorded controlling weight. As the Board's decision represents a permissible construction under step two of *Chevron*, its decision denying reopening was, again, a proper exercise of its discretion.

1. The Board's decision comports with the unambiguous statutory definition of "conviction"

The statutory definition of "conviction" contemplates two different classes of convictions: 1) where a court enters a formal adjudication of guilty, and 2) where adjudication of guilt has been withheld. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A); *see Puello*, 511 F.3d at 329-30. It is undisputed that in this case only the first class of conviction is at issue. Thus, the determination of whether the statutory definition of "conviction" encompasses Petitioner's conviction, despite his late-filed appeal, turns on the language of the first prong of section 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). Under the statute, Petitioner is convicted for immigration purposes if a "formal judgment of guilt of the alien [has been] entered by a court[.]" INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

Beginning with the statutory language, this Court has already offered an explication of the meaning behind the first prong of the statutory definition of conviction. *See Puello*, 511 F.3d at 328-29. In the *Puello* decision, this Court noted that "formal judgment" must be understood within the context of its common meaning, "which denotes a document signed by the judge and entered on the docket[.]" *Id.* at 328. In essence, the notion of a formal judgment centers "on the action the court must take to formalize the judgment." *Id.* Further, regarding

the language "entered by a court," this Court held that this denotes the "entry on the docket of the" formal judgment of guilt. *Id.* at 329. Thus, to constitute a conviction under the INA, an alien must be adjudged guilty, and that judgment must be formally entered on the court's docket. There is no ambiguity in the use of terms in this context, and no ambiguity in the reach of the statutory definition of conviction under the first prong of the statute–it extends to all formal judgments of guilt entered by a court, and makes no reference to the availability of further proceedings, *i.e.*, appeals, following this initial entry of judgment.

Although the statutory language contains no ambiguity, even a brief foray into the legislative history and regulations offers further support for the contention that this case may be resolved at *Chevron* step one. As this Court noted in *Puello*, the intent of Congress was to expand the then prevailing definition of conviction. *See Puello*, 511 F.3d at 332; H.R. Conf. Rept. 104-828, at 224 (1996) ("This section [the statutory definition of conviction] deliberately broadens the scope of the definition of 'conviction' beyond that adopted by the [BIA] in *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988)."). The Conference Report is concerned mostly with explaining its decision to drop the third prong of the *Ozkok* definition within the statutory enactment of the conviction definition, *see* H.R. Conf. Rept. 104-828, at 224 (1996), yet in its language it is clear that the point of relevance for

divining whether a conviction exists for immigration purposes is at the initial moment when guilt is established: "the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws." *Id.* at 224. Thus, it is made crystal clear by this language that the initial formal judgment of guilt, entered by a court, is sufficient to establish a conviction under section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A).

Additionally, the "completeness" of the statutory definition of conviction is bolstered by the fact that the regulations pertaining to removal proceedings under section 240 of the INA, 8 U.S.C. § 1229a, contain no provision pertaining to the definition of conviction under section 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). *See* 8 C.F.R. § 1240.1, *et seq*. If the statute itself was ambiguous in its terms, the regulations would be where further elucidation would be found. In fact, in the context of expedited removal proceedings of convicted aggravated felons under section 238 of the INA, 8 U.S.C. § 1228, the regulations contain just such an elucidation of when a conviction can support the institution of proceedings under that statutory provision. Only if an alien is convicted as per section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), *and* that conviction has become final, may the initial Notice of Intent to Issue a Final Administrative Deportation Order be served. *See* 8 C.F.R. § 1238.1(b)(1)(iii). The explicit contemplation of further

proceedings in 8 C.F.R. § 1238.1(b)(1)(iii), above and beyond the conviction contemplated by section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), lends further support to the contention that the statutory definition of conviction unambiguously encompasses all formal judgments of guilt, without reference to whether the alien may file a subsequent late appeal.[3] *See also* INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (list of documents necessary to establish a conviction omits any reference to post-conviction documents).

The Board's legal conclusion in the instant case, that Petitioner's late-filed appeal did not undermine the validity of his conviction for immigration law purposes, thus comports with the unambiguous statutory language. *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 802; JA 9. Petitioner was convicted by a formal judgment, entered by a court, and there has never been any contention to the contrary during the course of these proceedings. *See* JA 256-57. As such, Petitioner's conviction pursuant to state law and in state court meets all the prerequisites of the statutory definition of conviction under section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A). Petitioner's late-filed appeal does not

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[3] It is also worth noting explicit Congressional intent, reflected in the statute, that removal proceedings involving aggravated felons should be instituted and completed as soon as possible, *see* INA § 238(a)(3)(A), 8 U.S.C. § 1228(a)(3)(A), a policy that would be frustrated if a late-filed appeal were to undercut the finality of the underlying conviction.

impact this fact, and thus there were no grounds on which reopening and termination of proceedings would have been warranted as, unless or until his conviction is overturned on appeal, he remains convicted for immigration law purposes. Accordingly, the Board's decision upholding the denial of Petitioner's motion to reopen and comporting with the unambiguous statutory language, was a proper exercise of its broad discretion in adjudicating such motions. *See Kulhawik*, 571 F.3d at 298.

2. Assuming statutory ambiguity, the Board's interpretation of the statute is a reasonable and permissible construction

The instant case can and should be resolved at step one of the *Chevron* framework, as the Board's decision is clearly compelled by the unambiguous statutory language of section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A). Nonetheless, if this Court were to find ambiguity in the statutory definition of "conviction," the Board's interpretation of the statute, finding that a late-filed appeal does not undermine the finality of a formal conviction, is eminently reasonable and a permissible interpretation of the statute. Accordingly, that interpretation of the statute should be given controlling weight. *See National Cable & Telecommunications Assn.*, 545 U.S. at 980.

First, the Board's interpretation is consistent with the statutory language,

which indicates only that a conviction is "a formal judgment of guilt . . . entered by a court," and does not make reference to the availability of any appeals or proceedings following this initial entry of judgment. *See* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A); *see also* INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B); *cf. Puello*, 511 F.3d at 332 ("IIRIRA did, however, eliminate the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the statute."). In the absence of statutory language indicating that a subsequent late-filed appeal may undermine the validity of the underlying conviction for immigration purposes, the Board's interpretation finding that such a late-filed appeal *does not* undermine the validity of the conviction is eminently reasonable and deserving of dispositive deference on review.

Second, the Board's interpretation is consistent with the general thrust of congressional intent in finally codifying a definition of "conviction" within the INA. As noted previously, the intent of Congress was to broaden the then prevailing definition of "conviction." *See* H.R. Conf. Rept. 104-828, at 224. Specifically, Congress wanted to eliminate the Board's undue reliance on the vagaries of state law pertaining to convictions and to focus the relevant inquiry on "the original finding . . . of guilt[.]" H.R. Conf. Rept. 104-828, at 224; *see Saleh*, 495 F.3d at 23 (the two primary motivating factors behind the enactment of the

conviction definition were a desire "to focus the conviction inquiry on the 'original determination of guilt' and to 'implement a uniform federal approach' to convictions.") (*quoting Matter of Roldan-Santoyo*, 22 I. & N. Dec. at 521-22). The Board's interpretation of the statute accomplishes both of these aims, focusing on Petitioner's initial conviction in state court, and determining that he is still convicted for immigration law purposes, *i.e.*, federally, despite his late-filed *state* appeal. Thus, the Board's interpretation is permissible and reasonable when viewed in the light of congressional intent.

Third, the Board's interpretation of "conviction" is reasonable in the context of the statute and regulations read as a whole. As previously noted, there are no regulatory provisions pertaining to removal proceedings that contemplate an initial conviction being undermined by a late-filed appeal in state court. *See* 8 C.F.R. § 1240.1, *et seq*. The absence of such a limitation in either the statute or regulations, especially when coupled with clear congressional intent, indicates that a conviction exists upon the initial entry of the alien's formal judgment of guilt, notwithstanding the potential for subsequent proceedings in his case. Moreover, the use of additional language to clarify when a convicted alien may be subject to expedited removal, explicitly making such eligibility hinge on whether all appeals and further proceedings have been exhausted or waived, indicates that no such

limitation was contemplated within the general definition of conviction found at section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A). *See* 8 C.F.R. § 1238.1(b)(1)(iii) (to be subjected to expedited proceedings, an alien must have been convicted as per section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A), *and* such conviction must be final). The Board's interpretation of "conviction" reads both provisions in the most natural and logical way, while also presuming that the use of language was specific and that a distinction was made to turn on the use of language at 8 C.F.R. § 1238.1(b)(1)(iii) and the absence of such language in the statutory definition of conviction. The contrary reading, injecting into the statute the very language omitted therein, would render superfluous the explicit use of that language within the regulation, an untoward result. *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 128 S. Ct. 831, 840 (2008) (applying rule against superfluities to give effect to all relevant language enacted in a statute). In any event, as the Supreme Court has cautioned, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). To inject unused language into the statute would clearly run afoul of this general admonition.

Finally, the Board's interpretation of the statute is reasonable in light of the

treatment of deferred adjudications under the statutory definition, and the analogous circumstances and concerns to which late-filed appeals may give rise. *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 799-802; JA 6-9. The statutory definition of conviction focuses on the initial finding of guilt even in the deferred adjudication context, as Congress sought to eliminate the dependency of immigration law on the disparate treatment certain states offered to convicted aliens. *See, e.g.*, H.R. Conf. Rept. 104-828, at 224. Most importantly, by eliminating the need to review the possibility of further proceedings in any given alien's case within the state court proceeding, the newly enacted definition sought to remove delay and uncertainty from immigration proceedings once an initial conviction is established under the statutory definition. *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 799-800; JA 6-7.

The Board reasonably and permissibly concluded, in light of the statutory scheme and congressional intent, that New York's late-filed appeal procedure presented similar concerns as to those presented by disparate state deferred adjudications, which Congress clearly sought to remedy in "federalizing" the definition of conviction in the INA. Although the New York state statute provides that a motion to file a late appeal must be submitted within one year of the expiration of the alien's direct appeal rights, *i.e.*, within one year and thirty days of

the date of the alien's conviction, there is no time limit concerning when this motion must be adjudicated by the state court, and any decision ultimately reached may be appealed by the non-prevailing party. *See* N.Y. Crim. Pro. L. §§ 460.30(1) & (6). Thus, as the Board noted, although there is a time limit on the *request* itself, there is no time limit on the *resolution* of the motion by the state court system. *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 800-01; JA 7-8. Moreover, if the motion is granted, the alien is then provided with an additional thirty days in which to file the appeal. *See* N.Y. Crim. Pro. L. § 460.30(1).

This procedure does, as the Board noted, introduce a level of unconscionable delay and uncertainty into removal proceedings, as is amply demonstrated in the instant case. The DHS waited nearly three months after the entry of Petitioner's conviction, and two months after his appellate rights expired, before serving him with a NTA. *See* JA 256, 270-71. Petitioner was then in proceedings before an immigration judge for a period of nearly seven months, culminating in the entry of the removal order against him. *See* JA 254. Only after the completion of his proceedings before the immigration judge and after being ordered removed did Petitioner finally file a state court motion for leave to file a late-appeal, *see* JA 169-70, and only in October 2008, after his motion was granted by the state court, did Petitioner file a motion to reopen. *See* JA 218-24. The

uncertainty in this case is clear, as DHS waited a sufficient period of time before instituting proceedings, and carried those proceedings through to their conclusion with no indication that further proceedings in the state court would be forthcoming.[4] To allow a late-filed appeal to undermine these proceedings would be to inject that same uncertainty and delay into removal proceedings which Congress sought to eliminate by codifying the instant definition of conviction, and which is of even greater concern in the context of a motion to reopen. *See Doherty*, 502 U.S. at 323; *Abudu*, 485 U.S. at 107-08 ("[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest of giving the [litigants] a fair opportunity to develop and present their respective cases."). Thus, the Board's analogy and holding in this regard was a permissible interpretation of the statute.[5]

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[4] There is also no indication that Petitioner sought a continuance of proceedings before the immigration judge in order to pursue a motion to submit a late-filed appeal.

[5] Moreover, an alien who ultimately succeeds on his late-filed appeal may have the opportunity to file a motion to reopen and establish that the conviction was vacated for non-immigration purposes. *See Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003); *see also Matter of Marroquin*, 23 I. & N. Dec. 705, 713 (A.G. 2005); *Matter of Onyido*, 22 I. & N. Dec. 552, 555 (BIA 1999). To permit a late-filed or reinstated appeal to undercut the validity of a conviction for immigration purposes would circumvent this procedure and the congressional intent it embodies.

Accordingly, even if this Court were to determine that the statutory definition of conviction is ambiguous, the Board's interpretation of that provision is permissible and reasonable, and thus entitled to controlling weight on review before this Court. *See National Cable & Telecommunications Assn.*, 545 U.S. at 980. Under that interpretation, Petitioner's late-filed appeal does not impact his underlying conviction for purposes of his removal order, and thus there were no grounds on which reopening would have been warranted in his case. Thus, the Board's decision upholding the denial of his motion to reopen was a proper exercise of its discretion. *See Kulhawik*, 571 F.3d at 298.

3. The contentions of Petitioner and Amici Curiae

Contrary to the foregoing, Petitioner and amici curiae argue that the Board's decision cannot be upheld.[6] This contention is premised on a profound misunderstanding of what the Board did in this case, and what level of deference the resulting interpretation is entitled to. Amici contend that the Board's decision

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[6] Amici Curiae are the New York State Defenders Association and the Immigrant Defense Project. The abbreviation "Petr.'s Br." refers to the brief filed by Petitioner, while the abbreviation "Amici Br." refers to the brief filed by amici curiae.

To the extent that Amici rely on non-record evidence in making their arguments, *see* Amici Br. at 9-10 n. 5-7, 13-14 n.9-13, 19-20 n.16-18, n.19, this Court should decline to consider their assertions, as this petition must be decided solely on the administrative record. *See* INA § 242(b)(4)(A), 8 U.S.C. § 1252(b)(4)(A); *Lin v. U.S. Dept. of Justice*, 473 F.3d 48, 51 (2d Cir. 2007).

is not entitled to deference because it represents an interpretation of a state criminal statute, a position at least implicitly also held by Petitioner. *See* Amici Br. at 6; Petr.'s Br. at 8 ("This Court reviews *de novo* the BIA's interpretation of state criminal statutes."). This misunderstands the Board's decision, which did not *interpret* the relevant New York state statutes, but rather interpreted the definition of conviction contained in the INA and then applied that definition to Petitioner's circumstances. *See generally Matter of Cardenas Abreu*, 24 I. & N. Dec. at 797-802; JA 4-9. As the Board's decision is solely concerned with the proper interpretation of the definition of conviction contained in the INA, a statute that it is charged with administering, its resulting interpretation of that definition is entitled to *Chevron* deference.

Petitioner and Amici accordingly fail to undertake the proper inquiry in their briefs before this Court. Nowhere in those briefs do they address the statutory language itself and the step one *Chevron* inquiry concerning whether there is ambiguity in the language. *See* Petr.'s Br. at 10-36; Amici Br. at 5-30. Nowhere in those briefs do they explain why, even assuming statutory ambiguity in the INA definition of conviction, the Board's interpretation is not a permissible construction of the statute, *i.e.,* the INA. *See id.* The arguments contained in the briefs are overwhelmingly concerned with state law issues, which are irrelevant to

the ultimate disposition of the instant petition. *See* Petr.'s Br. at 10-27; Amici Br. at 5-23. The only legal issue before this Court is whether the Board properly interpreted the statutory definition of conviction contained at section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A). As Petitioner and Amici do not meaningfully engage this issue, and in fact make no arguments pertaining to the questions of *Chevron* deference which govern the outcome of this proceeding, the petition should be denied on grounds of waiver. *See Santoso v. Holder*, 580 F.3d 110 (2d Cir. 2009) (citation omitted); *Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.").

In any event, the issues that are raised by Petitioner and Amici fail to establish any error in the Board's interpretation of section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A). Petitioner argues: 1) that his removal order cannot be sustained in light of the acceptance of his late-filed appeal (Petr.'s Br. at 10-27); 2) finality remains a requirement for a state law conviction to constitute a conviction under the INA (Petr.'s Br. at 27-35); and 3) the statutory definition of "conviction" should be interpreted using the rule of lenity (Petr.'s Br. at 35-36). These arguments lack merit.

Petitioner's first argument is made up of several discrete arguments. He

contends that an accepted late-filed appeal is legally indistinguishable from a timely filed appeal, *see* Petr.'s Br. at 10-13, but this contention has no relevance to whether his late-filed appeal undermines his conviction *under the INA*. However New York wishes to treat its elements of criminal procedure is its business, but the issue before this Court is the federal immigration law definition of conviction, and the interpretation of the INA does not turn on the legal similarities or dissimilarities of various state law statutes. *See*, *e.g.*, *Matter of Ozkok*, 19 I. & N. Dec. at 551 n.6 (whether a conviction exists for immigration purposes "is a question of federal law and should not depend on the vagaries of state law."). Petitioner also contends that the New York provision permitting a late-filed appeal is not sufficiently similar to a deferred adjudication. *See* Petr.'s Br. at 13-15; Amici Br. at 5-11. He is correct insofar as a deferred adjudication has a different purpose than the statute providing for a late-filed appeal, as that provision is not necessarily ameliorative in nature. Nonetheless, that was not the Board's point. The Board's analogy was based on the delay and uncertainty raised by the procedures, which certainly does exist in this case.[7] *See Matter of Cardenas*

[7] Amici contend that there is no relevant delay in practice. *See* Amici Br. at 12-15. This misses the point of uncertainty as contemplated by the Board, as the relevant inquiry is whether DHS may justifiably rely on a conviction after the time period for appealing has expired without worrying that at some distant point in time, that conviction may be rendered insufficient for removal purposes simply

Abreu, 24 I. & N. Dec. at 799-802; JA 6-9. DHS waited three months before instituting proceedings against Petitioner, and two months after the time for filing an appeal in New York state court expired; removal proceedings concluded after a period of seven months, with a finding of removability; only several weeks after the removal order did Petitioner file the motion to submit a late-filed appeal, and only several weeks after that was his motion granted and a motion to reopen filed with the immigration judge. *See generally* JA 169-70, 218-24, 254, 256, 270-71. The uncertainty and delay are clear, as DHS had no idea that nearly a year after instituting proceedings, Petitioner's conviction would be appealed. The Board's analogy is apt, and Petitioner has failed to establish any flaws in its reasoning in this regard.

Petitioner also argues that the Board erred in relying on its prior decision in *Matter of Polanco*, 20 I. & N. Dec. 894 (BIA 1994), as that case is factually and legally distinguishable. *See* Petr.'s Br. at 15-21. To the extent that the Board analogized the cases based on the uncertainty and delay inherent in both

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upon the acceptance of a late-filed appeal. Again, delay and uncertainty are palpable in this case, as Petitioner's motion was accepted nearly eleven months after the institution of removal proceedings, and over two months after issuance of the removal order. This is the delay and uncertainty contemplated by the Board, and all time considerations must be weighed in the context of the institution of removal proceedings, not solely in relation to when a motion may be filed in state court and how long the state court may take to adjudicate that motion.

procedures, its reliance was proper and supported by the uncertainty and delay brought into this case by Petitioner's late-filed appeal. Accordingly, for the same reasons noted above to support the Board's analogy to deferred adjudications, Petitioner's contention fails. To the extent that Petitioner seeks to mark a distinction between simply submitting a motion to accept a late-filed appeal, and actually having that motion granted, his contention lacks merit and would inject even greater uncertainty into the process than currently prevails. *See* Petr.'s Br. at 17-18; Amici Br. at 11-12. His contention seems to be that until a motion is granted, there is no basis for concluding that a conviction does not exist for immigration purposes, but as soon as a motion is granted, such a conviction no longer exists. *See id.* This is exactly the type of dependence on state law and state procedure that Congress sought to forestall by federalizing the definition of conviction. Moreover, to adopt such an interpretation would unreasonably require DHS to forego instituting proceedings against an alien, in New York only, until the time for filing a late appeal had expired.

Petitioner further argues that policy considerations argue against the Board's interpretation. *See* Petr.'s Br. at 21-27. Petitioner argues that efficiency is served by his interpretation, rendering his conviction invalid for immigration purposes, *see* Petr.'s Br. at 21-22, but it is unclear how this could be. Until his

conviction is reversed–and there has been no showing regarding the merits of his claims on appeal–it is not colorable to argue that terminating a removal order rendered after a full proceeding before the immigration judge and Board over a span of two years serves efficiency. If his conviction is upheld, the proceedings would have to be redone, and this certainly does not serve principles of efficiency. The better policy is to allow the conviction to stand until vacated, which has not happened in this case. The possibility that Petitioner's appeal may be dismissed if removed is speculative, as he does not argue there is any bright-line rule in New York state courts adopting such a result. *See* Petr.'s Br. at 22-23; Amici Br. at 16-17. Any hardship that may result from his having to prosecute his appeal from the Dominican Republic is also an insufficient ground to read a limitation into the unambiguous language of the statutory definition of conviction. *See* Petr.'s Br. at 22. Finally, Petitioner has not been removed, nor is there any indication that removal is imminent or contemplated prior to the completion of his six-year sentence, and his conviction still stands, making any argument that he would not be able to reopen his proceedings *if removed* and *if successful* on his appeal extraordinarily speculative. *See* Petr.'s Br. at 23; Amici Br. at 17-18. In any event, whether Petitioner would or would not be able to reopen his proceedings at some distant time is not a relevant consideration in the interpretation of section

101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A).

Petitioner's final contention in this first argument is that the Board's interpretation raises issues pertaining to possible infringements of his constitutional rights. *See* Petr.'s Br. at 23-27. Petitioner argues that the Board's interpretation may infringe his constitutional right to appellate review in state court, his right to counsel during that appeal, and his right to effective counsel. *See id.* The Board's decision solely interprets the definition of conviction under the INA, and did not address these issues raised by Petitioner.[8] This assertion is bolstered by a review of Petitioner's current proceedings, where he is proceeding on his appeal before a state court, with counsel, in order to vindicate the alleged prior acts of an ineffective counsel. He is exercising all those constitutional rights that the Board's decision has allegedly infringed. As the Board's decision does not have any adverse constitutional implications, as demonstrated clearly by Petitioner's own exercise of his asserted constitutional rights, his contentions on this point are without merit.

Second, Petitioner's and Amici's contention that finality has survived the enactment of the statutory definition of "conviction" is premature, and not before

[8] Nor can the Board's decision fairly be read to otherwise impact an alien defendant's access to counsel or his processing through the New York state court system. *See* Amici Br. at 18-23.

this Court. *See* Petr.'s Br. at 27-35; Amici Br. at 23-30. The Board declined to reach the issue, or address as part of its holding, whether finality survived the enactment of the new definition of "conviction" as an implicit requirement within section 101(a)(48)(A) of the INA, 8 U.S.C. § 1101(a)(48)(A). *See Matter of Cardenas Abreu*, 24 I. & N. Dec. at 797-99; JA 4-6. Thus, without a Board decision directly on this point in the first instance, this Court should decline to render a definitive holding regarding this issue in the instant case.[9] *See Negusie v. Holder*, 129 S. Ct. 1159, 1167-68 (2009); *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (*per curiam*); *INS v. Ventura*, 537 U.S. 12, 16-18 (2002) (*per curiam*). The sole issue before this Court is whether a state conviction was "a formal judgment of guilt" when the removal order was entered and therefore constitutes a conviction under the INA despite a late-filed appeal, granted after issuance of the removal order–this issue, as more fully addressed in the foregoing, can be resolved simply by recourse to the statutory language, and no issue of finality need be raised or addressed in this context.

Finally, the rule of lenity is not relevant to the disposition of the instant petition. It is not clear whether the rule of lenity applies in the immigration

[9] This Court has noted in dicta that finality is no longer a requirement for a conviction to constitute such under the INA. *See Puello*, 511 F.3d at 332.

context because the notion of a rule of lenity has its foundation in criminal law. *See United States v. Bass*, 404 U.S. 336, 347-48 (1971). The rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). It applies to non-criminal statutory provisions only where they have "criminal applications." In the criminal context, the rule of lenity does not prevent an agency from resolving statutory ambiguity through a valid regulation. If the rule exists in the immigration context, it is a rule of "last resort," to be used only after the traditional means of interpreting authoritative texts have failed to dispel any ambiguities. Otherwise, it would supplant the application of *Chevron* in the immigration context. Yet courts have held that it is well-established that *Chevron* deference is appropriate when confronting ambiguities in the immigration statute, and the Ninth Circuit has explicitly rejected arguments that intervening case law has resulted in the rule of lenity trumping *Chevron* as the method of reviewing agency decisions. *See Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005).

This Court has previously addressed the rule of lenity in *Ruiz-Almanzar v. Gonzales*, 485 F.3d 193 (2d Cir. 2007). The Court concluded that

> this doctrine is one "of last resort, to be used only after the traditional means of interpreting authoritative texts have failed to dispel any ambiguities." *United States v. Hescorp, Heavy Equip. Sales Corp.*,

> 801 F.2d 70, 77 (2d Cir. 1986). It cannot be the case, as Ruiz-Almanzar suggests, that the doctrine of lenity must be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration context. Yet it is well-established that *Chevron* deference is appropriate when we confront ambiguities in the immigration statutes. *See*, *e.g.*, *Aguirre-Aguirre*, 526 U.S. at 424, 119 S. Ct. 1439 ("It is clear that principles of *Chevron* deference are applicable to [the immigration] statutory scheme); *Gill v. INS*, 420 F.3d 82, 89 (2d Cir. 2005) ("Because the BIA has expertise applying and construing immigration law, we afford *Chevron* deference to its construction of undefined statutory terms such as 'moral turpitude.'"). We apply the rule of lenity only when none of the other canons of statutory construction is capable of resolving the statute's meaning and the BIA has not offered a reasonable interpretation of the statute. That is not the case here and thus we need not construe the statute in favor of Ruiz-Almanzar under the rule of lenity. Therefore, even were the statute ambiguous, we would defer to the BIA's permissible construction of it[.]

485 F.3d at 198-99. As such, the rule "only comes into play when a court after looking at all aids to legislative meaning can do no more than 'guess as to what Congress intended.'" *United States v. Cullen*, 499 F.3d 157, 164 (2d Cir. 2007) (*quoting Muscarello v. United States*, 524 U.S. 125, 138 (1998)). In the instant case, whether resolved at step one or step two of the *Chevron* framework, the statutory language is clear, especially when coupled with the legislative history: the only relevant inquiry is whether there is a formal judgment of guilt entered by a court. As the statutory language is unambiguous and not remotely susceptible to the interpretation Petitioner implicitly advances, recourse to the rule of lenity, if it

applies at all, is unnecessary. *See Puello*, 511 F.3d at 334 ("Because we have already determined that the plain meaning of the statute precludes Puello's interpretation, we need not resort to the rule of lenity.").

VII. CONCLUSION

For all the foregoing reasons, the Court should deny the instant petition for review.

Respectfully submitted,

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Dated: November 20, 2009

STATEMENT REGARDING ORAL ARGUMENT

Respondent respectfully requests oral argument in this case, as the petition involves questions of exceptional importance regarding the Board's construction of the Immigration and Nationality Act, and submits that oral argument may aid the Court in its decision-making process.

/s/ Patrick J. Glen
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Counsel for Respondent

CERTIFICATE OF COMPLIANCE PURSUANT TO LOCAL RULE 32(a)(1)(E)

Counsel for Respondent hereby certifies that the accompanying .pdf version of the foregoing "Brief for Respondent," which was submitted in this case as an email attachment to agencycases@ca2.uscourts.gov, was automatically scanned with Trend Micro OfficeScan and no viruses were detected.

/s/ Patrick J. Glen
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 20, 2009, two copies of the foregoing "Brief for Respondent" were served on counsel for Petitioner, via first-class mail, postage prepaid, and addressed to:

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