

PRACTICE ADVISORY*

THE CONVICTION FINALITY REQUIREMENT IN LIGHT OF *MATTER OF J.M. ACOSTA*: THE LAW CIRCUIT-BY-CIRCUIT AND PRACTICE STRATEGIES BEFORE THE AGENCY AND FEDERAL COURTS

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EXECUTIVE SUMMARY

This practice advisory addresses the question of whether and to what extent a criminal “conviction” arising out of a “formal judgment of guilt” must be final before it can trigger the “conviction”-based provisions of the Immigration and Nationality Act (“INA”). INA § 101(a)(48)(A). Specifically, may the government order a noncitizen removed based on a criminal conviction arising from a formal judgment of guilt before the noncitizen has had the opportunity to exhaust or waive direct appellate review of that conviction?¹

While the federal courts and the agency long recognized a conviction finality requirement prior to 1996, finality came into question after Congress adopted a statutory definition of “conviction” with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in 1996, with some federal courts continuing to honor the finality requirement, others finding it had been abrogated by IIRIRA, and both the Board of Immigration Appeals (“BIA”) and Department of Homeland Security (“DHS”) taking inconsistent positions on the issue. Most recently, in August 2018, the BIA issued *Matter of J.M. Acosta*, 27 I&N Dec. 420, 431-32 (BIA 2018), holding that a conviction based on a formal judgment of guilt must be final before it constitutes a “conviction” for immigration purposes, but that a rebuttable presumption of finality attaches once the time period for direct appeal passes.

This practice advisory, which updates IDP’s prior 2009 advisory on the conviction finality requirement entitled “Conviction Finality Requirement: The Impact of *Matter of Cardenas-Abreu*” (issued on May 11, 2009), examines *Matter of J.M. Acosta*, the current law in the federal circuit courts with respect to conviction finality, and legal strategies for practitioners in light of current law. It may be useful to practitioners representing noncitizens in removal proceedings, in affirmative applications for immigration benefits, in criminal proceedings and providing counsel pursuant to *Padilla v. Kentucky*, and to federal defenders representing noncitizens in illegal reentry proceedings where prior criminal justice system contacts are at issue.

¹ This advisory addresses conviction finality only with respect to *formal judgments of guilt* where a *direct appeal* is pending. We do not address the question of whether conviction finality is required with respect to *withheld adjudications*, which fall under the second prong of the conviction definition in INA § 101(a)(48)(A). This advisory also does not address the question of whether collateral appeals—as opposed to direct appeals challenging the merits of a conviction—affect finality.

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A. BACKGROUND: HISTORY OF THE CONVICTION FINALITY REQUIREMENT

1. Pre-1996: The BIA and Federal Courts Require Conviction Finality

Prior to 1996, the INA did not provide a statutory definition of “conviction” for immigration purposes. The traditional rule, as set forth by the federal courts and BIA, was that a conviction must be sufficiently “final” before it may sustain an order of removal. *See Pino v. Landon*, 349 U.S. 901 (1955) (per curiam), rev’g *Pino v. Nicolls*, 215 F.2d 237, 241 (1st Cir. 1954); *see also Marino v. INS*, 537 F.2d 686 (2d Cir. 1976); *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975); *Will v. INS*, 447 F.2d 529 (7th Cir. 1971); *Morales–Alvarado v. INS*, 655 F.2d 172, 175 (9th Cir. 1981). Courts usually understood conviction finality to mean, at a minimum, that direct appellate review was exhausted or waived.

The BIA similarly recognized that “[i]t is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.” *Matter of Ozkok*, 19 I&N Dec. 546, 552 n.7 (BIA 1988); *see also Matter of Thomas*, 21 I. & N. Dec. 20, 21 n.1 (BIA 1995) (same). In *Matter of Ozkok*, the BIA adopted a definition of “conviction” that included two categories of adjudications that constituted a conviction for immigration purposes: where a court has adjudicated the noncitizen guilty or “has entered a formal judgment of guilty,” or where adjudication of guilt has been withheld and the following three elements are present:

- (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.*

19 I&N Dec. at 551-52 (emphasis added). The BIA further stated that neither category of disposition is a conviction for immigration purposes until direct appellate review has been exhausted or waived, because the disposition is not sufficiently final. *Id.* at 552 n.7.

2. IIRIRA Introduces a Statutory Definition of “Conviction,” INA § 101(a)(48)(A)

In 1996, Congress passed IIRIRA, which amended the INA to include a statutory definition of “conviction” for the first time. *See IIRIRA* § 322(a), amending INA § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48)(A). As a result, the INA now defines “conviction” as follows:

[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 guilty 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.

INA § 101(a)(48)(A). Thus the INA definition contains two distinct categories of dispositions. The first prong refers to dispositions involving a “formal judgment of guilt ... entered by a court.” The second prong refers to dispositions where “adjudication of guilt has been withheld,” but where (i) there is a sufficient finding or admission that warrants a finding of guilt and (ii) the judge has ordered some form of punishment, penalty or restraint. INA § 101(a)(48)(A)(i)-(ii).

With respect to formal judgments of guilt, the INA definition is almost identical to the BIA’s definition in *Matter of Ozkok*. With respect to withheld adjudications, the INA definition closely tracks the definition in *Ozkok*, but notably omits *Ozkok*’s third prong. The Congressional Conference Committee Report accompanying IIRIRA explains that this is because, in codifying a definition of “conviction,” Congress intended to create a simpler and more universal rule for the treatment of state dispositions where adjudication has been “suspended” or “deferred.” Congress explained:

This section deliberately broadens the scope of the definition of “conviction” beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok* As the Board noted in *Ozkok*, there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered “convicted” have escaped the immigration consequences normally attendant upon a conviction. *Ozkok*, while making it more difficult for alien criminals to escape such consequences, does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the alien’s future good behavior. For example, the third prong of *Ozkok* requires that a judgment or adjudication of guilt may be entered if the alien violates a term or condition of probation, without the need for any further proceedings regarding guilt or innocence on the original charge. *In some States, adjudication may be “deferred” upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien’s guilt or innocence. In such cases, the third prong of the Ozkok definition prevents the original finding or confession of guilt to be considered a “conviction” for deportation purposes. This new provision, by removing the third prong of Ozkok, clarifies Congressional intent that even in cases where adjudication is “deferred,” the original*

finding or confession of guilt is sufficient to establish a “conviction” for purposes of the immigration laws.

H.R. Conf. Rep. No. 104–828, at 224 (1996), 1996 WL 563320 at *496–97 (emphasis added). As the Committee Report states, Congress intended to broaden the *Ozkok* definition with respect to withheld adjudications under state procedures for “ameliorating the effects of a conviction,” for example, where a judgment of guilt may be suspended or “conditioned upon the alien’s future good behavior.” *Id.* The new definition, in cases of suspended or deferred adjudications, considers the original finding or admission of guilt to be a conviction for immigration purposes.

Following IIRIRA, however, the government began arguing in certain cases that the new statutory definition of “conviction” eliminated the traditional conviction finality requirement, even for cases under the formal judgment of guilt first prong, because the statutory definition does not explicitly state that finality is still required.

3. Post-IIRIRA Circuit Court Cases on Whether Conviction Finality Is Required for Adjudications Arising from Formal Judgments of Guilt

Federal courts have issued different decisions on whether the traditional conviction finality requirement survives IIRIRA with respect to the first prong of the conviction definition—cases where there has been a “formal judgment of guilt” (rather than a withheld or deferred adjudication).² The Third Circuit held in *Orabi v. Att’y Gen.* that, based on the language of section 101(a)(48)(A), conviction finality continues to be required for formal judgments of guilt. 738 F.3d 535, 540-43 (3d Cir. 2014). But, though arguably in *dicta* in certain cases, the Fifth, Seventh, Ninth, and Tenth Circuits have issued decisions with language finding that IIRIRA eliminated the conviction finality requirement. *See, e.g., Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 290-91 (5th Cir. 2007); *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (per curiam); *Planes v. Holder*, 652 F.3d 991, 994-97 (9th Cir. 2011); *United States v. Saenz-Gomez*, 472 F.3d 791, 792-93 (10th Cir. 2007). The remaining circuits have not squarely addressed finality in the context of a conviction based on a formal adjudication of guilt where a direct appeal is pending. The Second Circuit, for example, has issued decisions discussing finality, but in a recent unpublished opinion discussed those decisions and then held that they do not resolve the question of conviction finality in the Second Circuit. *See Mohamed v. Sessions*, 727 F. App’x 32, 34 (2d Cir. 2018).

B. BIA DECISION IN MATTER OF J.M. ACOSTA

In August 2018, the BIA issued *Matter of J.M. Acosta*, in which it held that the traditional conviction finality requirement with respect to formal judgments of guilt survives IIRIRA. 27

² As noted above, this practice advisory focuses exclusively on conviction finality for formal judgments of guilt and does not address finality with respect to withheld adjudications. Similarly, this advisory does not examine finality with respect to appeals raising collateral attacks only—such as an appeal challenging the sentence imposed but not the merits of the conviction. Most courts have found that finality is not required for withheld adjudications falling within the second prong of the conviction definition and that collateral appeals do not disturb conviction finality, but those decisions are outside the scope of this advisory.

I&N Dec. 420 (BIA 2018). The BIA concluded that section 101(a)(48)(A) is ambiguous with respect to whether all direct appeals must be exhausted or waived for a conviction to be final for immigration purposes. *Id.* at 427. The BIA relied in part on the circuit courts' varying interpretations of the statute. *Id.* at 427, 429. The BIA determined, however, that Congress did not intend to abandon the longstanding conviction finality requirement in enacting IIRIRA, because a "proper regard for fundamental fairness leads us to expect that Congress would be clear if its intent was to eliminate the long-standing finality requirement regarding the right to appeal a conviction." *Id.* at 427. Because Congress was silent on this matter, the BIA concluded that Congress intended to retain the well-established principle. *Id.* The BIA held that a conviction does not have a "sufficient degree of finality" for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived. *Id.* at 432. Further, the BIA found no meaningful distinction between a late-reinstated appeal and other direct appeals under New York law, once the state court has accepted the late-reinstated appeal. *Id.* at 427; *see also Abreu v. Holder*, 378 F. App'x 59 (2d Cir. 2010) (summary order).

The not so good news, however, is that *Matter of J.M. Acosta* sets forth, for the first time, a rebuttable presumption that a conviction is final: if DHS establishes that the time for a direct appeal of the conviction has passed, there is a presumption that the conviction is final for immigration purposes. 27 I&N Dec. at 432. This presumption can be rebutted, and the offense can be found not to be a "conviction" under section 101(a)(48)(A), by evidence that (a) an appeal was filed within the deadline (including evidence that an extension of time to appeal or permissive filing was granted) and (b) the appeal relates to guilt or innocence or a substantive defect in the criminal proceedings. *Id.* The BIA's discussion of this presumption of finality is brief: it does not provide a legal basis for the imposition of a presumption or explain why a presumption is appropriate in this context.

Finally, the BIA notes that appeals and collateral attacks that are not related to the merits of the conviction do not eliminate the finality of a conviction for immigration purposes. *Id.* at 433. Collateral attacks that do not affect finality include appeals relating only to the sentence imposed, a reduction of a charge, or ameliorating a conviction for rehabilitation purposes or to alleviate immigration hardships. *Id.*

C. CURRENT STATE OF THE LAW, CIRCUIT BY CIRCUIT

The manner and extent to which *Matter of J.M. Acosta*'s holding on conviction finality is applied in a particular jurisdiction may depend on circuit court precedent. This Section breaks down the decisional law on conviction finality in each federal circuit and assesses how those decisions interact with or are affected by *Matter of J.M. Acosta* for removal proceedings and federal court challenges in each circuit.

In circuits that arguably have decided the finality question prior to *Matter of J.M. Acosta* by finding the language of INA § 101(a)(48)(A) unambiguous, (*see Sections C.1 and C.3* below), the federal courts may not defer to the BIA's decision in *Matter of J.M. Acosta*, choosing instead to adhere to their own precedents construing the "conviction" definition. *See National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to

Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”). In the remaining circuits, courts may join decisions like the Third Circuit’s decision in *Orabi* finding that INA § 101(a)(48)(A) unambiguously retains a finality requirement for formal judgments of guilt; may find the BIA’s decision in *Matter of J.M. Acosta* persuasive; or may defer to the BIA’s decision under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1. Conviction Finality Required Under Circuit Court Precedent: Third Circuit

The Third Circuit held, post-IIRIRA, that conviction finality is required for formal judgments of guilt, based on a plain reading of the definition of “conviction” at INA § 101(a)(48)(A). See *Orabi*, 738 F.3d at 540-43. In *Orabi*, the government sought to deport a lawful permanent resident on the sole basis of a conviction pending direct appeal. *Id.* at 538. The Third Circuit held that *Orabi*’s conviction could not serve as a basis for removal while his direct appeal was pending. *Id.* at 540-43. The court concluded that the principle that “a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived,” as stated in *Matter of Ozkok*, is “alive and well” in the Third Circuit. *Id.* at 543 (quoting *Ozkok*, 19 I&N Dec. at 552 n.7).

The court noted that while IIRIRA “explicitly eliminated the finality requirement for deferred adjudications,” *Orabi*, 738 F.3d at 541, “nothing in IIRIRA or the legislative history suggests that Congress intended the phrase ‘formal judgment of guilt’ to be interpreted any differently from how it always had been interpreted prior to the enactment of the statute.” *Id.* (quoting *Planes*, 686 F.3d at 1039-40 (Reinhardt, J., dissenting from denial of rehearing *en banc*)).

Because the Third Circuit found that the statutory text of section 101(a)(48)(A) unambiguously requires conviction finality, without deferring to the agency, *Orabi* remains binding precedent in the Third Circuit, *Matter of J.M. Acosta* notwithstanding. That is, the agency may only invoke *Brand X* to apply its statutory interpretation over circuit court disagreement if the circuit court has found the statutory language ambiguous and has analyzed it under the principles of *Chevron*. *Brand X*, 545 U.S. at 982. Since *Matter of J.M. Acosta* issued, the Third Circuit already has continued to apply *Orabi*. See *Martin v. Att’y Gen.*, 729 F. App’x 210, 212 (3d Cir. 2018) (“[I]n this circuit, a conviction is not considered final for immigration purposes until direct appellate review has been exhausted or waived.”).

2. Conviction Finality Now Required Under the BIA’s *Matter of J.M. Acosta*: First, Second, Fourth, Sixth, Eighth, and Eleventh Circuits

The First, Second, Fourth, Sixth, Eighth, and Eleventh Circuits have not decided the question of whether conviction finality survives IIRIRA with respect to the first prong of the conviction definition, where there has been a “formal judgment of guilt.” INA § 101(a)(48)(A). In these circuits, conviction finality for formal judgments of guilt should now be required under *Matter of J.M. Acosta*, 27 I&N Dec. 420 (BIA 2018). Below, we highlight key cases in these circuits decided prior to *Matter of J.M. Acosta*.

First Circuit: Post-IIRIRA, the First Circuit has addressed conviction finality only with respect to withheld adjudications falling within the second prong of the conviction definition, where no direct appeal is pending. See *Griffiths v. INS*, 243 F.3d 45, 54 (1st Cir. 2001). However, with respect to formal judgments of guilt falling within the first prong of section 101(a)(48)(A), *Griffiths* suggests, without holding, that the long-standing finality requirement survives IIRIRA. *Id.* at 53-54.

In *Griffiths*, the First Circuit held that the petitioner's Massachusetts "guilty filed" disposition was a sufficient finding of guilt for the second prong of section 101(a)(48)(A), but it remanded the case for the BIA to determine whether there had been any "punishment, penalty, or restraint" imposed on account of that guilty finding. *Id.* at 54-55. The court deferred to the BIA's interpretation that withheld adjudications under the second prong of section 101(a)(48)(A) do not require finality. *Id.* at 49-51, 53-54. Notably, the First Circuit highlighted that *Griffiths*' adjudication was not a "formal judgment of guilt" under the first prong of section 101(a)(48)(A) and strongly suggested that convictions under the first prong require finality. *Id.* at 52-53. The court stated that the government "was not taking the position it could deport someone adjudicated guilty while their appeal or appeal period was pending," noting that "[s]uch guilty adjudications would fall under the first prong." *Id.* at 54. The court further noted the "substantial practical differences between the situation faced by a defendant currently exercising a direct appellate right" and that of a defendant with a "guilty-filed" adjudication, where the case will "lay dormant" unless later brought off the file, and where the defendant "has waived any right to immediate review or control over the prospect of review." *Id.*

Since *Griffiths*, the First Circuit has not addressed conviction finality directly. Given the lack of precedent, *Matter of J.M. Acosta*'s finality requirement should be applied in the First Circuit. Under *J.M. Acosta*, where a conviction arises from a formal judgment of guilt, direct appellate review must be exhausted or waived before the conviction may sustain a removal order.

Second Circuit: The Second Circuit recently found that the question of conviction finality with respect to formal judgments of guilt is unresolved in the Second Circuit. See *Mohamed v. Sessions*, 727 F. App'x 32, 34 (2d Cir. 2018) (summary order). In *Mohamed*, the court remanded to the BIA to consider the "quite unsettled" issue of finality. *Id.* The court noted that the statement on finality in *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324, 332 (2d Cir. 2007), was *dicta* and had not resolved the issue. In *Puello*, no appeal was at issue; rather, the Second Circuit addressed the effective date of a conviction under the INA. *Id.* In *dicta*, the court in *Puello* noted that IIRIRA "eliminate[d] the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the statute." *Id.* *Puello* sometimes has been cited by other courts as deciding the finality question in the Second Circuit, but the Second Circuit has repeatedly stated that *Puello* did no such thing. See, e.g., *Abreu*, 378 F. App'x at 62 (remanding to the BIA to address whether IIRIRA's conviction definition is ambiguous with respect to finality). Moreover, other decisions have assumed, without holding, that the finality requirement continues post-IIRIRA. See, e.g., *Adams v.*

Holder, 692 F.3d 91, 94 (2d Cir. 2012); *Walcott v. Chertoff*, 517 F.3d 149, 154 (2d Cir. 2008) (stating that petitioner’s conviction was not final until direct appellate review was exhausted).

Given the lack of clear precedent in the Second Circuit and the court’s previous invitations to the BIA to clarify the conviction finality question, *Matter of J.M. Acosta*’s holding that finality is required should be applied in the Second Circuit.

Sixth Circuit: The Sixth Circuit has not decided the question of conviction finality with respect to formal judgments of guilt under the first prong of section 101(a)(48)(A). However, the court in *dicta* has strongly suggested that the finality requirement survives IIRIRA for this category of convictions. See *United States v. Garcia-Echaverria*, 374 F.3d 440, 445 (6th Cir. 2004).

In *Garcia-Echaverria*, the Sixth Circuit concluded that the defendant’s criminal appeal in state court, pending when he was removed, related only to collateral attacks and therefore did not disturb conviction finality for removal purposes. *Id.* at 445-46. In *dicta*, the court assumed that the conviction finality requirement survives IIRIRA. The court stated that “[t]o support an order of deportation, a conviction must be final,” *id.* at 445 (citing *Pino v. Landon*, 349 U.S. 901 (1955)), and “[f]inality requires the defendant to have exhausted or waived his rights to direct appeal.” *Id.* at 445 (citing *Aguilera–Enriquez v. INS*, 516 F.2d 565, 570-71 (6th Cir. 1975)). Because the court found the pending appeal to be collateral rather than direct, the appeal did not undermine finality for immigration purposes. *Id.* at 445.

Post-IIRIRA, no other Sixth Circuit case has directly addressed conviction finality in the context of a direct appeal of a formal judgment of guilt. Given the lack of clear precedent in the Sixth Circuit, the BIA’s holding in *Matter of J.M. Acosta* that finality is required should be applied in this circuit.

Fourth, Eighth, and Eleventh Circuits: Post-IIRIRA, the Fourth, Eighth, and Eleventh Circuits have not addressed the issue of conviction finality with respect to formal judgments of guilt where a direct appeal is pending. In these jurisdictions, *Matter of J.M. Acosta*’s holding that finality is required should be applied.

3. Government May Argue Conviction Finality Not Required Under Circuit Court Precedent Preceding *Matter of J.M. Acosta*: Fifth, Seventh, Ninth, and Tenth Circuits

Prior to *Matter of J.M. Acosta*, the Fifth, Seventh, Ninth, and Tenth Circuits issued decisions with language finding—though arguably in *dicta*—that, based on the language of INA § 101(a)(48)(A), the definition of “conviction” introduced by IIRIRA eliminated the conviction finality requirement with respect to formal judgments of guilt under the first prong of the definition, even where a direct appeal is pending. See, e.g., *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 290-91 (5th Cir. 2007); *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (per curiam); *Planes v. Holder*, 652 F.3d 991, 994-97 (9th Cir. 2011); *United States v. Saenz–Gomez*, 472 F.3d 791, 793-94 (10th Cir. 2007). While the facts before the circuit court in some of these decisions did not involve a pending direct appeal of a formal judgment of guilt, the court stated

in each that IIRIRA did away with the finality requirement for all convictions. *See, e.g., Garcia-Maldonado*, 491 F.3d at 287 (no pending appeal of conviction); *Montenegro*, 355 F.3d at 1037-38 (collateral appeals only); *Planes*, 652 F.3d at 994-97 (sentencing appeal only); *Saenz-Gomez*, 472 F.3d at 793-94 (sentencing enhancement; no direct appeal pending).

Because these circuits have found the statutory language to be unambiguous, courts in these circuits may decide that they need not defer to the BIA’s interpretation of section 101(a)(48)(A) in *Matter of J.M. Acosta*. Below we highlight key cases in these circuits. In Section E below, we suggest arguments for persuading courts in these circuits to reconsider their position on finality, particularly in light of the BIA’s clear holding in *Matter of J.M. Acosta*.

Fifth Circuit: In arguably *dicta*, the Fifth Circuit has stated that conviction finality is not required for formal judgments of guilt, even if on appeal, based on circuit precedent interpreting the plain language of section 101(a)(48)(A). *Garcia-Maldonado*, 491 F.3d at 290-91. In *Garcia-Maldonado*, the Fifth Circuit held that the petitioner’s conviction was valid for immigration purposes and made him removable, “regardless of whether it was on appeal at the time of the IJ and BIA determinations.” *Id.* Before the Fifth Circuit, *Garcia-Maldonado* sought remand for an evidentiary hearing on the status of his appeal of his conviction. *Id.* After briefing closed in the circuit court, his conviction was affirmed, and his appeal no longer was pending. *Id.* at 287. The Fifth Circuit did not address the status of the appeal but held that the conviction, even if on appeal, remained effective for immigration purposes. *Id.* at 290. The court relied on its decision in *Discipio v. Ashcroft*,³ which held that a conviction that is vacated “for any purpose” remains a conviction for immigration purposes.⁴ *Garcia-Maldonado*, 491 F.3d at 290.

A subsequent, unpublished Fifth Circuit case relied on *Garcia-Maldonado* to find that a conviction is valid for immigration purposes even when a direct appeal is pending. *See Louison-Pierre v. Holder*, 321 F. App’x 388, 389 (5th Cir. 2009). Note that an earlier case, *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999), is often cited to demonstrate the Fifth Circuit’s rejection of conviction finality. *Moosa*, however, dealt only with a deferred adjudication and noted that the conviction finality issue was moot, because proceedings had been dismissed following deferred adjudication and appeal was no longer possible.⁵ *Id.* at 1009 n.8.

Seventh Circuit: The Seventh Circuit has stated—arguably in *dicta*—that a formal judgment of guilt is a conviction for immigration purposes, even if appeals are pending, based on the text of IIRIRA’s conviction definition. *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (per curiam). In *Montenegro*, the petitioner argued that he was denied due process because the immigration judge ordered him removed while appeal of his conviction was pending,

³ 369 F.3d 472 (5th Cir. 2004), *vacated on denial of reh’g en banc*, 417 F.3d 448 (5th Cir. 2005).

⁴ The Fifth Circuit’s position on vacated convictions is inconsistent with holdings of other circuits and the BIA. *See, e.g., Matter of Pickering*, 23 I&N Dec. 621, 624-25 (BIA 2003), *rev’d on other grounds*, 465 F.3d 263, 269 (6th Cir. 2006).

⁵ In *dicta*, the court in *Moosa* stated that “[t]here is no indication that the finality requirement . . . survives the new definition of “conviction” found in IIRIRA § 322(a),” citing legislative history demonstrating Congress’s intent to eliminate the *third prong* of the *Ozkok* test relating to deferred adjudications. *Id.* at 1009.

including an appeal from the denial of his state post-conviction petition and a writ of certiorari to the U.S. Supreme Court. *Id.* at 1035, 1037-38. The Seventh Circuit disagreed and stated that IIRIRA “treats an alien as ‘convicted’ once a court enters a formal judgment of guilt” and “eliminated the finality requirement for a conviction, set forth in *Pino*.” *Id.* at 1038. On this basis, the court held that Montenegro’s conviction made him removable. *Id.* at 1037-38.

Montenegro’s conclusion regarding conviction finality is arguably *dicta*. First, the conviction finality issue was moot: the court noted that Montenegro’s criminal appeals were denied by the time the Seventh Circuit considered the case. *Id.* at 1037-38. Second, the appeals at issue were arguably collateral and not direct appeals, a distinction that the court did not address.

Ninth Circuit: Based on the text of the statute, the Ninth Circuit has found, over a strong seven-judge dissent to the denial of a petition for rehearing, that IIRIRA eliminated the traditional conviction finality requirement for both prongs of section 101(a)(48)(A), such that a conviction exists for immigration purposes as soon as the trial court enters judgment of guilt, even if direct appeal has not been exhausted or waived. *Planes v. Holder*, 652 F.3d 991, 994-97 (9th Cir. 2011), *petition for reh’g denied*, 686 F.3d 1033 (9th Cir. 2012) (Reinhardt, J., dissenting).

Planes’ finding on finality is arguably *dicta* because it was decided in the context of a sentencing appeal only—the petitioner had not appealed his conviction. In *Planes*, the petitioner argued that his conviction was not final for removal purposes because the district court was still considering resentencing pursuant to remand on his sentencing appeal. 652 F.3d at 993-94. The Ninth Circuit found that the text of the first prong of the conviction definition was clear and concluded that “a ‘conviction’ for purposes of § 1101(a)(48)(A) exists once the district court enters judgment, notwithstanding the availability of an appeal as of right.” *Id.* at 995. Importantly, the court recognized that the possible resentencing at issue in the district court could not affect the conviction itself, implicitly acknowledging that the appeal at issue was a collateral and not direct appeal. *Id.* at 997.

Following the panel’s decision in *Planes*, the Ninth Circuit denied a petition for rehearing *en banc*. See *Planes v. Holder*, 686 F.3d 1033 (9th Cir. 2012). Seven judges dissented from the denial of the petition. *Id.* at 1037 (Reinhardt, J., dissenting). The dissent strongly disagreed with the panel’s “inexplicable” decision to permit non-citizens to “be deported immediately after a trial court enters a judgment of guilt against them in a criminal case, before they have had the opportunity to obtain appellate review of their convictions.” *Id.* at 1036-37. Nevertheless, courts have relied on *Planes* to find that finality is no longer required in the Ninth Circuit post-IIRIRA. See *Zuniga-Perez v. Holder*, 458 F. App’x 655, 656 (9th Cir. 2011) (unpublished) (finding finality not required for a formal judgment of guilt even where direct appeal is pending).

Tenth Circuit: The Tenth Circuit has concluded—again, arguably in *dicta*—that conviction finality is not required under either prong of section 101(a)(48)(A), based on the plain language of the statute. See *United States v. Saenz-Gomez*, 472 F.3d 791, 792-93 (10th Cir. 2007); *United States v. Adame-Orozco*, 607 F.3d 647, 653 (10th Cir. 2010); *Waugh v. Holder*, 642 F.3d 1279 (10th Cir. 2011).

In the context of a sentencing enhancement case, a noncitizen defendant argued that the district court improperly enhanced his sentence for his federal illegal reentry conviction based on his having a “conviction prior to removal”; he argued that because he had not exhausted direct appeal of the state conviction prior to removal, that conviction was not final and thus not a “conviction” at the time of removal. *Saenz-Gomez*, 472 F.3d at 792-93. The Tenth Circuit disagreed and found that the plain language of section 101(a)(48)(A) does not contain a finality requirement. *Id.* at 793. The court’s statements regarding finality are arguably *dicta* because there was no pending appeal at issue—Saenz-Gomez’s state criminal conviction had been affirmed long before the Tenth Circuit considered the case. *Id.* at 793.

Although *Saenz-Gomez* was decided in the context of a criminal sentencing enhancement, the Tenth Circuit has cited to it in immigration decisions involving conviction finality, though no case cleanly presented the question of whether IIRIRA abrogated the finality requirement. *Adame-Orozco* involved a collateral appeal of a prior conviction, rather than a direct appeal. 607 F.3d at 653. The court’s language in that case is arguably *dicta* with respect to cases involving direct appellate review. *Id.* Similarly, in *Waugh v. Holder*, the appeal at issue had been characterized by the IJ and the BIA as a collateral rather than direct appeal. 642 F.3d at 1284 (stating that a noncitizen is deportable based on a conviction as soon as the trial court enters judgment of guilt, even if the defendant pursues appeal).

D. PRACTICE TIPS BY JURISDICTION

1. Circuits That Find Conviction Finality Is Required Based on the Unambiguous Language of the Statute

In immigration proceedings under the jurisdiction of the Third Circuit, argue that a conviction must be final—meaning exhaustion or waiver of direct appellate review—before that offense is a conviction for immigration purposes. *See Orabi*, 738 F.3d at 540-43.

If the government seeks application of the *Matter of J.M. Acosta* “finality presumption” before the agency, argue that the imposition of a finality presumption is in conflict with *Orabi*, which applies the finality requirement without any presumption. Argue that *Orabi* is binding precedent in the Third Circuit and that the agency may not invoke *Matter of J.M. Acosta* because the statutory language (INA § 101(a)(48)(A)) is unambiguous in the Third Circuit. In the alternative, make any available arguments or offer any available evidence to overcome the *Matter of J.M. Acosta* presumption of finality, as discussed in Section D.2 below. See additional arguments in Section E below.

2. Circuits with No Clear Precedent Regarding Conviction Finality

In immigration proceedings under the jurisdiction of the First, Second, Fourth, Sixth, Eighth, and Eleventh Circuits, where there is no clear circuit precedent on finality, argue that conviction finality should be required in cases where the trial court has entered a formal judgment of guilt falling within the first prong of section 101(a)(48)(A), citing to *Matter of J.M. Acosta* and the absence of binding circuit precedent to the contrary. This means that an

immigration court may not order a noncitizen removed based on a conviction before direct appellate review has been exhausted or waived.

In these circuits, challenge government arguments for application of the *Matter of J.M. Acosta* presumption of finality, arguing that such a presumption is not supported by the language of the statute, legislative history, or circuit court precedent. Argue that the court should apply relevant canons of statutory interpretation before deferring to the agency on this question under *Chevron*. See arguments discussed in Section E below.

In the alternative, where applicable, argue that a direct appeal of a conviction, under the law of the jurisdiction in which the criminal appeal was filed, necessarily goes to guilt or innocence or substantive defect, as required by *Matter of J.M. Acosta* to overcome its presumption of finality. For example, a New York immigrant can point out that, under the New York Criminal Procedure Law at issue in *Matter of J.M. Acosta*, an intermediate appellate court considering an appeal from a judgment or order of a criminal court is limited to considering “any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.” N.Y.C.P.L. § 470.15[1]. Alternatively, immigrants may submit evidence from their criminal appellate counsel that their particular criminal appeals go to guilt or innocence or substantive defect. For example, several immigrants in New York have overcome the *Matter of J.M. Acosta* presumption of finality by submitting a letter from criminal appellate counsel stating that “we expect to challenge Mr./Ms. XXX’s conviction on the merits, as our client has requested.” In plea cases, the letter may go on to say: “Such merit-based issues include, but are not limited to, issues involving the client’s right to due process of law and effective assistance of counsel under the Federal and New York State Constitutions, that go to the knowing and voluntary nature of the plea itself.”

3. Circuits Where the Government May Argue that Finality Is Not Required Under Circuit Law

In immigration proceedings under the jurisdiction of the Fifth, Seventh, Ninth, and Tenth Circuits, the government may argue, despite *Matter of J.M. Acosta*, that conviction finality is not required under circuit precedent based on the plain language of the statute. In these circuits, first argue that the circuit court’s statements on finality in the relevant decisions are *dicta* because the facts before the court did not present the conviction finality issue in the context of a pending direct appeal of a formal judgment of guilt. Argue that the immigration court instead should follow *Matter of J.M. Acosta* on the conviction finality requirement.

At the same time, argue against the *Matter of J.M. Acosta* presumption that the conviction is final or, alternatively, make any available arguments or offer any available evidence to overcome the *Matter of J.M. Acosta* presumption of finality, as discussed in Section D.2 above.

Also consider arguing that *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015), remains relevant to support at least a continuance in these jurisdictions. See 8 C.F.R. §§ 1003.29, 1240.6. In *Matter of Montiel*, the BIA granted a joint motion for administrative closure because of a pending direct appeal of the respondent’s criminal conviction, without deciding the question of

conviction finality. 26 I&N Dec. at 558. Before the IJ, request a continuance rather than administrative closure, which is no longer permitted under *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

Finally, challenge an adverse agency decision in federal circuit court, citing *Matter of J.M. Acosta* as persuasive authority, to try to persuade the circuit court to revisit its precedent on the finality requirement. See additional arguments in Section E below.

E. LEGAL ARGUMENTS IN SUPPORT OF THE FINALITY REQUIREMENT FOR AGENCY AND LATER FEDERAL COURT REVIEW

In light of *Matter of J.M. Acosta* and current circuit case law, practitioners representing clients with criminal convictions arising from formal adjudications of guilt may wish to consider the following arguments to persuade a court to require exhaustion of direct appellate review before considering the adjudication a “conviction” for immigration purposes. These arguments are also relevant to arguing against the presumption of finality that the BIA applied in *Matter of J.M. Acosta*.

First, argue that the text of INA § 101(a)(48)(A) and accompanying legislative history clearly establish that Congress did not intend to disturb the longstanding conviction finality rule with respect to formal judgments of guilt, where direct appellate review has not been exhausted or waived (*see Section E.1 below*). These arguments may need to be made in all circuits except the Third Circuit, which already requires conviction finality based on the text of section 101(a)(48)(A).

Second, if the court disagrees and finds that the text of the statute is ambiguous, argue that the court must apply relevant tools of statutory construction in order to discern Congress’s intent, before any deference to agency interpretation. *See Chevron*, 467 U.S. at 843 n.9 (stating in the context of *Chevron* step one: “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”); *see also Jasso Arangure v. Whitaker*, 911 F.3d 333, 333 (6th Cir. 2018) (finding that under *Chevron*, courts “must first exhaust the ‘traditional tools’ of statutory interpretation” at step 1, before concluding that the statute is ambiguous and before deferring to the agency’s construction (quoting *Chevron*, 467 U.S. at 843 n.9)); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (“Where, as here, the canons supply an answer, ‘Chevron leaves the stage.’ ”).⁶ These canons—including the criminal rule of lenity, the presumption against deportation, the federalism canon, and due process and constitutional avoidance—strongly support requiring conviction finality where there is a pending direct appeal of a formal judgment of guilt (*see Sections E.2, E.3, and E.4 below*). These arguments may be relevant in any circuit to argue in favor of the finality requirement and against the imposition of a presumption of finality. Where relevant, argue that *Matter of J.M. Acosta* is persuasive on the question of a conviction finality requirement, but not on the imposition of a presumption of finality.

⁶ *See also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64, 77 (2008) (noting that the majority rule in the courts is that “Canons Trump Deference”).

Finally, if the court moves on to *Chevron* step two to consider the reasonableness of the agency's interpretation, argue that the BIA's application of a presumption of finality is unreasonable, as this presumption has no statutory grounding whatsoever. Moreover, the presumption establishes a system that requires immigration judges and the BIA to evaluate the basis and merits of criminal appeals of primarily state and local court dispositions, necessarily involving legal and factual questions regarding which the BIA neither holds expertise nor has been delegated interpretive authority by Congress.

1. The Language of the Statute and Legislative History Indicate that Congress Did Not Intend to Disturb the Longstanding Conviction Finality Rule when Enacting IIRIRA.

Based on the text of INA § 101(a)(48)(A) and its legislative history, argue that Congress, in enacting IIRIRA, did not intend to eliminate the longstanding finality rule for convictions arising from formal adjudications of guilt. You may argue that the statutory language—as understood through its plain text, legislative history, and application of canons of statutory construction—unambiguously reflects Congressional intent to retain the finality requirement, as the BIA found in *Matter of J.M. Acosta*. Argue first that because the “conviction” term has both civil and criminal application, its meaning is reviewed outside of the *Chevron* framework (see Section E.2 below for further discussion). Alternatively, argue that if *Chevron* applies, the inquiry resolves at step one because Congressional intent is clear. In either case, argue that the court need not defer to agency interpretation.

Before enactment of IIRIRA, federal courts and the BIA uniformly recognized the longstanding principle that a conviction must be sufficiently final before it may sustain a removal order, meaning that direct appellate review must be exhausted or waived. See Section A.1 above. The BIA's definition of “conviction” in *Matter of Ozkok* recognized this well-established finality requirement. 19 I&N Dec. at 552 n.7.

In adopting a definition of “conviction” in IIRIRA, Congress adopted the BIA's definition in *Ozkok* almost verbatim but omitted certain language relating to withheld adjudications only. The Conference Committee Report of the House of Representatives makes explicit that the reason for omitting part of the *Ozkok* definition was to expand the conviction definition with respect to “suspended” and “deferred” adjudications under state procedures meant to “ameliorat[e] the effects of a conviction.” H.R. Conf. Rep. No. 104-828, at 224, 1996 WL 563320 at *496-97. The Report noted that immigration consequences for suspended and deferred adjudications differed depending on state law. *Id.* By omitting the third prong of the *Ozkok* definition, Congress intended to “giv[e] effect to the original finding or confession of guilt” in withheld adjudications, “to establish a ‘conviction’ for purposes of immigration laws.” *Id.*

The entirety of the legislative history accompanying section 101(a)(48)(A) addresses withheld adjudications only. Nothing in the Committee Report purports to alter *Ozkok*'s definition with respect to convictions arising out of formal judgments of guilt. Certainly, nothing suggests Congress's intent to alter the longstanding precedent requiring finality for convictions arising out of formal judgments of guilt. Instead, the Conference Report makes explicit that

Congress’s intent was to adopt the preexisting meaning of “conviction”—specifically referring to the BIA’s understanding in *Ozkok*—but to broaden the definition with respect to withheld adjudications only. This legislative history provides dispositive evidence that Congress did not intend to disturb the longstanding finality rule—adopted by both the agency and federal courts—for formal judgments of guilt under the first prong of the conviction definition.

Moreover, because Congress adopted the language of the conviction definition almost verbatim from *Ozkok*, it follows, pursuant to governing interpretive presumptions, that Congress intended to preserve the well-established finality requirement underlying *Ozkok*. This is because when Congress adopts language from decisional law, courts presume that Congress also intended to import the judicial and administrative interpretations of that language, unless there is clear indication to the contrary. See *Merill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006) (stating that when “judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.” (internal quotation marks omitted)); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (“[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law,” including “administrative or judicial interpretation” of the prior law or statute.); *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (“When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court’s own processes to give the words the same meaning in the absence of specific direction to the contrary.”). Neither the text of section 101(a)(48)(A) nor the legislative history contains any indication that Congress intended to do away with the longstanding finality rule with respect to formal adjudications of guilt. Rather, the text and the legislative history clearly demonstrate Congress’s intent to alter the preexisting judicial and administrative precedent regarding the meaning of “conviction” *only* with respect to certain withheld adjudications.

The BIA adopted the reasoning above in *Matter of J.M. Acosta*, as did the Third Circuit in *Orabi*.

If the court nevertheless finds the statute to be ambiguous with respect to finality, argue that the court must apply established rules of statutory construction to determine Congress’s intent, before the court reaches the question of whether and what deference is due to agency interpretation of this question. First, deference may not be due. See Section E.2 below. Second, as noted earlier, even within the *Chevron* framework, tools of statutory construction are applied in *Chevron* step one, before any deference to the agency. See *Chevron*, 467 U.S. at 843 n.9 and Sections E.2-E.5 below.

2. No Deference to the BIA; Application of the Criminal Rule of Lenity

No Deference to the Agency when Interpreting Criminal Statutes: The definition of “conviction” in section 101(a)(48)(A) applies to the entire INA, which provides for criminal prosecutions for illegal reentry in federal court pursuant to 8 U.S.C. § 1326(b). The definition also affects the sentencing guidelines connected with section 1326(b). Thus a circuit court’s

interpretation of section 101(a)(48)(A) in the immigration context also will determine how courts interpret “conviction” in federal criminal cases.

Argue that because section 101(a)(48)(A) has direct criminal law application, *Chevron* deference does not apply, and the court should interpret the statute without deferring to the BIA. *Nunez-Reyes v. Holder*, 646 F.3d 684, 712 (9th Cir. 2011) (Pregerson, J., dissenting) (“Deference to the BIA’s interpretation of . . . § 1101(a)(48)(A), however, is entirely inappropriate, because that term is used not only for purposes of immigration law, but also in the criminal law context.”). This is because federal courts, not agencies, are tasked with interpreting statutes that have criminal application. The BIA lacks administrative authority to interpret criminal statutes. *See id.*; *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring) (“The law in question, a criminal statute, is not administered by any agency but by the courts.”; reasoning that agency deference should play little role in interpreting criminal statutes, as applying agency deference before lenity would “replac[e] the doctrine of lenity with a doctrine of severity”).

Courts Should Apply the Rule of Lenity: Because section 101(a)(48)(A) directly applies in the criminal law context, courts should apply the criminal rule of lenity in interpreting the conviction definition if there is lingering ambiguity as to the statute’s meaning. *See Nunez-Reyes*, 646 F.3d at 712-13 (Pregerson, J., dissenting) (stating, “even if . . . we were to find that § 1101(a)(48)(A) is ambiguous, its application in the criminal law context requires us to resolve the ambiguity favorably to the alien, pursuant to the principle of lenity applicable with respect to the gravity of removal” (internal quotation marks omitted)); *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (stating that where a statute “has both criminal and noncriminal applications,” the rule of lenity applies).

Courts should apply the rule of lenity when “reasonable doubt persists about a statute’s intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.” *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quotation marks omitted). Importantly, the rule of lenity is a tool of statutory construction that must be applied before the court considers *Chevron* deference. *See Brand X*, 545 U.S. at 985 (noting that the prior circuit decision at issue had not reached *Chevron* deference, as it had “invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to reach its judgment”).

Under the rule of lenity, if the court finds the text of the statute to be ambiguous, the court should adopt the interpretation of section 101(a)(48)(A) that is more favorable to criminal defendants who would be subject to the statute. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (“The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”). Where a choice must be made between two different readings of a statute with criminal implications, “it is appropriate, before . . . choos[ing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *U.S. v. Bass*, 404 U.S. 336, 347 (1971); *see also Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); *United States v. Valle*, 807 F.3d 508, 523 (2d Cir. 2015) (“[W]here . . . the Government and the defense both posit plausible interpretations of a criminal statute, the rule of lenity requires us to adopt the defendant’s construction.”). Courts “will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation

can be based on no more than a guess as to what Congress intended.” *Ladner v. United States*, 358 U.S. 169, 178 (1958). Furthermore, “[a]mbiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen’s favor.” *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010).

Note that some circuits may take the position that the rule of lenity need not be applied before the court considers whether an agency’s construction of the statute is reasonable. *See, e.g., Yi v. Federal Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) (“Rather than apply a presumption of lenity to resolve the ambiguity, *Chevron* requires that we defer to the agency’s reasonable construction of the statute.”). In such circuits, argue that the criminal rule of lenity is a traditional tool of statutory construction that should be applied before agency deference, under *Chevron*, 467 U.S. at 843 n.9.⁷

3. Presumption Against Deportation

The Supreme Court has long recognized the “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.” *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). Accordingly, argue that any ambiguity in the text of section 101(a)(48)(A) must be resolved in favor of the noncitizen, and in favor of continued recognition of a conviction finality requirement for formal judgments of guilt. Note that the circuits differ on whether the principle of construing ambiguities in deportation statutes in favor of the noncitizen,⁸ as an interpretive rule, should be applied before or after agency deference. *See, e.g., Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 198–99 (2d Cir. 2007) (in context of an immigration statute, stating that “[w]e apply the rule of lenity [in favor of the noncitizen] 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.”). Nevertheless, argue that this presumption is a tool of statutory construction that should be applied before agency deference, under *Chevron*, 467 U.S. at 843 n.9.

Courts have recognized the severity of deportation as a penalty and have emphasized the importance of reading deportation statutes narrowly, in favor of the noncitizen. *See, e.g., Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975) (given the “stakes [of deportation] are considerable for the individual,” deportation provisions must be given the “narrowest of several possible meanings of the words used”); *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (post IIRIRA, stating “ ‘[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . we will not assume that Congress meant to trench on [a noncitizen’s] freedom beyond that which is required by the narrowest of several possible meanings of the words used’ ” (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))).

⁷ For additional arguments regarding the application of the rule of lenity in the immigration context, see Amicus Curiae Brief of National Association of Criminal Defense Lawyers, California Attorneys for Criminal Justice, and Immigrant Defense Project in Support of Petitioner, submitted in *Nunez-Reyes v. Holder*, No. 05-74350 (9th Cir.), dated Nov. 5, 2010, available at <https://immigrantdefenseproject.org/wp-content/uploads/2011/03/Nunez-Reyes-Amicus.pdf>.

⁸ Courts sometimes refer to this principle as the “immigration rule of lenity.”

4. Federalism Argument and Canon

Before deference to agency interpretation, federal courts must consider federalism implications, a key tenet of statutory interpretation. Argue that attaching federal immigration consequences—including removal from the United States—to state criminal convictions before an individual has had the opportunity to exhaust direct appellate review interferes with states’ sovereignty with respect to enforcement of their own criminal laws and therefore violates fundamental principles of federalism.

In our federal system, the right to direct appellate review of a state criminal conviction clearly falls within the authority of the states, which have sovereignty in enforcing state criminal laws and regulating criminal activities within the state. *See United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000) (“[T]he principle that [t]he Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.” (internal citation and quotation marks omitted)); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (stating that under our federal system, the “[s]tates possess primary authority for defining and enforcing the criminal law” (internal quotation marks omitted)); *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (“Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.”). Any federal immigration law that interferes with the exercise of such rights under state criminal law would violate fundamental federalism principles.

If a federal statute, including an immigration statute, is considered ambiguous and has a relationship between federal and state governments, the federalism canon is used to resolve the ambiguity. *See Philip L. Torrey, Principles of Federalism and Convictions for Immigration Purposes*, 36 *Immigr. & Nat’lity L. Rev.* 3, 9 (2016). Courts may only read a statute “to alter the usual constitutional balance between the States and the Federal Government” if Congress has made its intent to do so “unmistakably clear in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted). Section 101(a)(48)(A) does not include any statement to this effect and does not indicate Congress’s intent to intrude upon state power to enforce its criminal laws.⁹

5. Due Process Arguments and the Constitutional Avoidance Principle

Finally, argue that due process and the principle of constitutional avoidance support continued recognition of the finality rule. Individuals have the right to direct appeal of a criminal conviction in almost all states and in the federal system, by statute. That right is understood to be a guarantee to protect against wrongful convictions or substantive defects in criminal proceedings. Interpreting the INA conviction definition to allow removal of a noncitizen before he or she has had the opportunity to exhaust direct appeal interferes with the noncitizen’s right to direct appeal of the conviction.

⁹ For additional arguments relevant to the federalism canon of statutory interpretation in the immigration context, see Brief of Immigration Law Professors as Amicus Curiae in Support of Petitioner, submitted in *Marinelarena v. Sessions*, No. 14-72003 (9th Cir.) (pending en banc), dated June 29, 2018, available at <http://harvardimmigrationclinic.org/files/2018/11/132-Amicus-Brief.pdf>.

Such a rule, if adopted by the court, raises serious due process concerns. First, a rule that effectively frustrates or thwarts a person’s ability to pursue a direct appeal that is guaranteed by law may itself constitute a due process violation. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 & n.5 (1982) (explaining that the Due Process Clauses protect litigants who seek recourse in courts, and deprivation of that access may violate due process). Second, a rule that allows removal while a direct appeal is pending singles out noncitizens as a special class of individuals who have inferior rights to appeal a criminal conviction. Due process requires that appellate procedures, once established by law, be implemented in a non-discriminatory fashion. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (stating that a State cannot grant appellate review in a way that “discriminates against some convicted defendants on account of their poverty”; once appellate procedures are established, “the Due Process and Equal Protection Clauses protect . . . from invidious discriminations” in those proceedings); *Douglas v. People of State of Cal.*, 372 U.S. 353, 355-58 (1963) (finding California criminal appeal procedure unconstitutional because “the type of an appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel”).

For numerous reasons, removal can make it exceedingly difficult—or effectively impossible—for a noncitizen to pursue a criminal appeal from outside the United States. For example, defendants abroad—particularly those who are indigent—are likely to face serious difficulty obtaining timely notice of docket entries, meeting deadlines, complying with strict filing procedures, appearing for oral argument, or meeting the financial burden of litigation. In addition, even if the noncitizen wins her criminal appeal while abroad, it may be difficult or even impossible to reenter the United States or to reopen the immigration proceeding that resulted in removal. *See Nancy Morawetz, Convenient Facts: Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts, 88 N.Y.U. L. Rev. 1600, 1643 & n.226 (2013) (assessing U.S. Immigration & Customs Enforcement Policy Directive 11061.1 (Feb. 24, 2012)). Indeed, a noncitizen who wins her criminal appeal from abroad has no automatic right to reenter the United States.

On this basis, argue that the court should reject an interpretation of section 101(a)(48)(A) that would jeopardize established due process protections for individuals seeking to exercise their right to direct appeal.

Argue that the court, pursuant to the constitutional avoidance doctrine, should reject an interpretation of the conviction definition that would violate due process protections. Where a statute “is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court’s] duty is to adopt the latter.” *Jones v. United States*, 529 U.S. 848, 857 (2000) (internal citations and quotation marks omitted); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (applying constitutional avoidance canon and stating that where “construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”). The Supreme Court has applied the avoidance doctrine when interpreting IIRIRA. *See, e.g., INS v. St. Cyr*, 533 U.S. at 305 (rejecting an interpretation of IIRIRA that would raise constitutional concerns in the absence of “a clear and unambiguous statement of congressional intent” for the Government’s proposed constitutionally dubious

result); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (construing IIRIRA to avoid raising “serious constitutional problem” and infringing upon the “heart of the liberty that [the Due Process] Clause protects”).

E. ADDITIONAL RESOURCES

- For additional litigation resources relating to the finality of convictions, including links to key case decisions and amicus briefs, visit IDP’s website, at <https://www.immigrantdefenseproject.org/finality-of-convictions/>.
- For the latest legal developments or litigation support on the issues discussed in this advisory, contact the Immigrant Defense Project at (212) 725-6422.