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COMMENT

FINALITY OF A CONVICTION: A NONCITIZEN'S RIGHT TO PROCEDURAL DUE PROCESS

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I. BACKGROUND

Immigration law is overseen by Congress, deriving its authority directly from the Constitution itself.[1] The Supreme Court of the United States has constantly reiterated that "[o]ver no conceivable subject . . . is the legislative power of Congress more complete."[2] This power is best exemplified through the plenary power doctrine, under which Congress effectively limits judicial scrutiny over immigration laws.[3] Scholars and courts alike have come to understand the concept of "plenary" as a power that is accorded

1. U.S. CONST. art. I, § 8, cl. 4; s*ee also* Arizona v. United States, 567 U.S. 387, 394–95 (2012) ("This authority rests, in part, on the National Government's constitutional power to 'establish [a] uniform Rule of Naturalization,' U.S. Const., art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations." (quoting Toll v. Moreno, 458 U.S. 1, 10 (1982))).

2. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)) [hereinafter Legomsky, *Immigration Law*]. *But see* Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 262 (2004) ("The United States Constitution does not actually give Congress plenary power over immigration; it instead gives the Congress the power to establish a 'uniform Rule of Naturalization.'").

3. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 458 (2009) (introducing the plenary power doctrine and related issues).

"unusually great deference, at or approaching non-reviewability."[4] Consequently, since its inception in the late nineteenth century,[5] the plenary power doctrine "has effectively insulated federal immigration statutes from constitutional review."[6]

Congress's power to regulate immigration is codified in the Immigration and Nationality Act of 1952 (INA).[7] Among the subjects codified within the INA are "several classes of deportable noncitizens, including those convicted of aggravated felonies, crimes of moral turpitude, controlled substance violations, and crimes of violence."[8] Ordinarily, when a noncitizen has been convicted of a crime outlined by the INA, he or she will be deemed removable.[9] Following this determination, the Department of Homeland Security (DHS)[10] will initiate removal proceedings[11] by serving the noncitizen with a "notice to appear," outlining the reasons for removal,

4. Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616 (2000) [hereinafter Legomsky, *Fear and Loathing*].

5. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606–07 (1889) ("The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.").

6. Legomsky, *Fear and Loathing*, *supra* note 4, at 1615.

7. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–537 (2012)); *see also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1637 (2010) ("[T]he Immigration and Nationality Act governs the admission of noncitizens to the United States, their expulsion from the United States, and a host of miscellaneous decisions.") [hereinafter Legomsky, *Restructuring Immigration Adjudication*].

8. Ashwin Gokhale, Note, *Finality of Conviction, the Right to Appeal, and Deportation Under* Montenegro v. Ashcroft*: The Case of the Dog That Did Not Bark*, 40 U.S.F. L. REV. 241, 244 (2005) (citing 8 U.S.C. § 1227(a)(2) (2000)).

9. *See* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 7, at 1642.

10. Following the attacks of September 11, 2001, the United States Government underwent a complete reorganization, which involved changing the way immigration services were divided and handled. *See generally* Muzaffar Chishti & Claire Bergeron, *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape*, MIGRATION POL'Y INST. (Sept. 8, 2011), http://www.migrationpolicy.org/article/post-911-policies-dramatically-alter-us-immigration-landscape [https://perma.cc/L2GX-JPKH] (summarizing the changes). For instance, the Immigration and Naturalization Service (INS), the immigration branch that handled all immigration services, ceased to exist and was replaced by the new Department of Homeland Security (DHS), which split the responsibilities of the naturalization services and immigration enforcement between the United States Citizenship and Immigration Services (USCIS) and United States Immigration Customs Enforcement (ICE), respectively. 6 U.S.C. § 291 (2012); *see also* Chishti & Bergeron, *supra* (explaining the new immigration and screening policies).

11. "Removal proceedings are the forum for determining whether noncitizens should be removed from the United States, either upon seeking admission (formerly called exclusion hearings) or after admission (formerly called deportation [proceedings])." Legomsky, *Restructuring Immigration Adjudication*, *supra* note 7, at 1641.

so as to place the noncitizen under formal notice.[12] An immigration judge will then conduct an evidentiary hearing,[13] which will be subject to appellate review by the Board of Immigration Appeals (B.I.A.).[14] The filing of the appeal automatically stays execution of the immigration judge's decision.[15] In some instances, however, an immigration judge's decision may be subject to judicial review in federal court.[16] In interpreting an immigration statute, federal courts will generally accord deference to the B.I.A.'s interpretation, so long as it is a reasonable construction of the statute.[17]

II. THE PRE-IIRIRA DEFINITION OF A "CONVICTION"

A. *Judicially-Constructed Definition of a "Conviction"*

Before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[18] finality of a conviction for immigration purposes was continually redefined by case law, ultimately resulting in divergent results for noncitizens dependent on their location.[19] The finality

12. Immigration and Nationality Act § 239(a)(1), 8 U.S.C. § 1229(a)(1) (2012).

13. *Id.*

14. 8 C.F.R. § 208.14(c)(1).

15. *Id.* § 1003.1(b)(3).

16. *See* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 461 (2006) ("Although general provisions for judicial review did not appear in federal immigration statutes until 1961, federal courts nonetheless had long assumed jurisdiction in immigration cases because of the simple fact that physical restraint was inherently involved in the removal of an unwilling noncitizen." (footnotes omitted)). *But see* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 7, at 1643–44 ("The three main classes of cases for which judicial review is *barred* are expedited removal orders, most discretionary determinations, and most cases in which the noncitizens are removable on crime-related grounds." (emphasis added) (footnote omitted)).

17. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984) (announcing the principle that courts will not replace their own reading of a statute for an agency's reasonable interpretation of an ambiguous statute, unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute" (footnote omitted)); s*ee also* The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513 (1989) ("Leading cases support the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis . . . ." (quoting Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977))).

18. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (codified as amended at Immigration and Nationality Act § 101(a)(48(A), 8 U.S.C. § 1101(a)(48)(A) (2012)) (codifying the definition of a "conviction" for immigration purposes).

19. *See* Gokhale, *supra* note 8, at 245 ("Before passage of IIRIRA, the definition of what constituted a 'conviction' for immigration purposes was an ever-evolving judicial construct." (citing *In re* Ozkok, 19 I. & N. Dec. 546, 548–49 (B.I.A. 1988))).

rule was first formulated by the Supreme Court in *Pino v. Landon*.[20] In establishing a finality rule, the Court reversed the judgment of the First Circuit in *Pino v. Nicholls*.[21] In *Nicholls*, the First Circuit considered whether a noncitizen could be deported, even though his sentence was revoked after termination of probation and his case was placed "on file instead of finally disposing of it by dismissing it."[22] The court held that an alien who had been found guilty, sentenced, and placed on probation following suspension of his sentence had been "convicted" of a crime involving moral turpitude because "[p]lacing the case on file was not the equivalent to a revocation."[23]

Subsequently, in 1957, the B.I.A. refrained from making any decisions based on the Supreme Court's decision in *Pino* as to what constituted "finality" of a conviction.[24] The Board did find, however, that an imposition of punishment or fine after a finding of guilt was a "conviction" under the Act,[25] as opposed to a deferred adjudication as exemplified in *Nicholls*.[26] In its discussion, the Board outlined four separate situations considered convictions under New York law: (1) "[t]he court imposes a punishment of fine or imprisonment";[27] (2) "[t]he court imposes punishment of fine or imprisonment, but suspends payment of fine or the service of the imprisonment";[28] (3) the court does not order any punishment and stays the imposition of sentence;[29] and (4) "[t]he court postpones for a long period further consideration of the case."[30] In its analysis, the Board found with *certainty* only that: a category (1) situation was

20. Pino v. Landon, 349 U.S. 901, 901 (1955) (per curiam) ("On 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 Immigration and Nationality Act.").

21. Pino v. Nicholls, 215 F.2d 237 (1st Cir. 1954), *rev'd sub nom.* Pino v. Landon, 349 U.S. 901 (1955).

22. *Id.* at 242.

23. *Id.* at 244–45.

24. *See In re* O-, 7 I. & N. Dec. 539, 544 (B.I.A. 1957) (acknowledging the "short and summary" nature of the Court's order, the Board stated that it did not presume to know what factors influenced the Court's decision).

25. *See id.* at 542 ("A person so found guilty and sentenced would normally be considered as having been convicted for all purposes.").

26. *See generally Nicholls*, 215 F.2d at 237.

27. *In re O-*, 7 I. & N. Dec. at 540.

28. *Id.* at 541 ("The court has the power to place the defendant on probation, it may or may not be a discretionary one. This is a suspension of the *execution* of sentence." (emphasis added)).

29. *Id.* at 542 ("The court has the power to place the defendant on probation, it may or may not be a discretionary one. This is the *imposition* of the sentence." (emphasis added)).

30. *Id.* ("The case is still pending actually or theoretically for the imposition of sentence . . . .").

a conviction for immigration purposes,[31] and a situation in category (4) "does *not* achieve the finality necessary to support an order of deportation under" INA section 241(a)(4).[32] Although the Board, applying New York law, also concluded that situations in categories (2) and (3)—those with an element of deferred adjudication—could be characterized as convictions for immigration purposes, it acknowledged that they could *not* be "considered convictions for all purposes" as with category (1).[33] In effect, the Board distinguished the current situation from that in *Pino*, all while declining to "draw conclusions" from its "short and summary" decision.[34]

As a result of the Supreme Court's decision in *Pino*, most circuit courts that addressed whether a "conviction" was sufficiently final for immigration purposes held that "finality" required a sentence and the exhaustion of a direct appeal as of right.[35] The B.I.A., in *In re Ozkok*,[36] in an attempt to alleviate the "anomalous and unfair results" caused by "the many variations in state procedure[s]" in determining who was considered "convicted" for

31. *Id.* ("Clearly, a conviction described in category (1) must serve as a conviction for the purpose of section 241(a)(4).").

32. *Id.* at 543 (emphasis added) ("[W]e believe it implied that an order in category (4) does not achieve the finality necessary to support an order of deportation under this section.").

33. *Id.* at 542–43 ("The sentence in neither category (2) nor (3) is considered a 'final' conviction and neither sentence is a conviction for all purposes although both are convictions for some purposes."). The Board evidently wrestled with the idea that categories two and three, situations in which imposition of a sentence is deferred, could reach as far as to define immigration law, and the consequences that follow such a label. *Id.* (refusing to classify them as convictions for "all purposes"). It nonetheless reasoned that the two categories represented "convictions" based on New York law at the time, highlighting the conflicting applications of the law depending on the jurisdiction of the conviction. *Id.* ("If, then, we are to give any effect to the express language of the law and legislative intent behind it . . . we must find that *in New York* convictions in categories (2) and (3) satisfy the requirements of section 241(a)(4) of the [A]ct . . . ." (emphasis added)).

34. *Id.* at 544.

35. *See* Morales-Alvarado v. INS, 655 F.2d 172, 175 (9th Cir. 1981) (concluding a conviction is final for immigration purposes when a court has convicted the noncitizen and that noncitizen has exhausted all direct appeals, despite thereafter seeking discretionary review from the State's highest court); Hernandez-Almanza v. INS, 547 F.2d 100, 103 (9th Cir. 1976) (establishing finality of a conviction for immigration purposes when the petitioner failed to pursue a direct appeal, even if a collateral attack on the conviction is brought thereafter); Aguilera-Enriquez v. INS, 516 F.2d 565, 570 (6th Cir. 1975) (noting no disruption of finality of a conviction for immigration purposes from a motion to withdraw a guilty plea once sentencing is imposed because the plea itself waived all direct appeals to which the noncitizen was entitled (citing Pino v. Landon, 349 U.S. 901 (1955))); Will v. INS, 447 F.2d 529, 532 (7th Cir. 1971) (acknowledging the pendency of a direct appeal as sufficient to nullify the finality of a conviction for immigration purposes (citing Pino v. Landon, 349 U.S. 901 (1955))).

36. *In re* Ozkok, 19 I. & N. Dec. 546 (B.I.A. 1988).

immigration purposes, decided to outline what constituted a "conviction" under immigration law.[37] The Board indicated that a "conviction" for immigration purposes would exist when all of the following elements were 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 (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); 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*.[38]

In formulating this framework, the Board created a two-part test for purposes of finding a "conviction" in the immigration context.[39] The first part of the test applied to formal judgments of guilt. Under this prong, a person is found to be "convicted" for immigration purposes when "the court has adjudicated [the person] guilty or has entered a formal judgment of guilt"; no further inquiry was necessary.[40] The second part of the test applied to deferred adjudications—a type of probation which gives a criminal defendant an opportunity to *avoid* being given a formal judgment of guilt, so long as they comply with conditions imposed during the duration of the probationary period.[41] Under this second prong, "where an adjudication of guilt has been withheld," a conviction for immigration

37. *Id.* at 550. The concern was that noncitizens would be treated differently depending on the state's remedial measures for conviction purposes. *Id.* at 551.

38. *Id.* at 551–52 (emphasis added).

39. *See* Gokhale, *supra* note 8, at 248 (interpreting the Board's definition as a "two-part test").

40. *In re Ozkok*, 19 I. & N. Dec. at 551.

41. *See* Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 358–59 (2012) ("Under current rules, a noncitizen may be deported on the basis of a conviction pending on direct appeal, judicially expunged, or treated as a deferred adjudication or suspended sentence under state law.").

purposes would only lie when all three elements, as outlined above, were met; further inquiry was necessary.[42]

Furthermore, the most notable aspect of the second prong and its three elements was the footnote added at the end of the third element, which incorporated the finality requirement.[43] Under *Ozkok*, "finality" of a conviction required the courts to allow a criminal defendant to exhaust or waive all of their appeals before becoming sufficiently final to support the imposition of a "conviction" and the consequences that followed.[44] *Ozkok*'s definition of a "conviction" for immigration purposes stood unquestioned until 1996 with the enactment of IIRIRA.[45]

III. THE ENACTMENT OF IIRIRA

A. *Purpose*

In 1996, Congress passed IIRIRA[46] in conjunction with the Antiterrorism and Effective Death Penalty Act (AEDPA),[47] both of which amended the INA. Together, IIRIRA and AEDPA made significant changes to deportation and removal procedures already in place.[48]

42. *In re Ozkok*, 19 I. & N. Dec. at 551–52 ("[F]urther examination of the specific procedure used and the state authority under which the court acted will be necessary.").

43. *See id.* at 552 n.7 ("It is well established that a conviction does not attain a sufficient degree of *finality* for immigration purposes until [a] direct appellate review of the conviction has been *exhausted or waived*." (emphasis added) (citations omitted)).

44. *Id.*

45. *In re* Punu, 22 I. & N. Dec. 224, 225 (B.I.A. 1998) (deeming a noncitizen deportable and defining deferred adjudication as a "conviction" for immigration purposes pursuant to "the new definition of the term 'conviction[]' . . . enacted by section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (citing Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 322, 110 Stat. 3009–546, 3009–628)).

46. Illegal Immigration Reform and Immigrant Responsibility Act, of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546.

47. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214.

48. *See* Dawn Marie Johnson, Comment, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 481 (2001) ("Both § 440(e) of the AEDPA and § 321 of the Immigration Reform Act of 1996 . . . expanded the definition of 'aggravated felony.'"). This is important because noncitizens classified as "aggravated felons" are barred from seeking most types of relief from removal. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 712 (8th ed. 2016) ("[A]n aggravated felony conviction renders a noncitizen deportable, and also ineligible for asylum, cancellation of removal, and voluntary departure. Noncitizens . . . are also barred for life from re-entering the United States, unless they obtain consent to apply for readmission.").

IIRIRA's main goal was to reduce illegal immigration and, in an attempt to accomplish that goal, it managed to:

> (1) merge[] the former exclusion and deportation proceedings into a single form of "removal" proceedings; (2) expand[] the authority to remove criminal aliens without hearings before immigration judges; (3) curtail[] eligibility for waivers and certain forms of discretionary relief from removal; and (4) curtail[] the jurisdiction of the courts of appeals to review decisions made on discretionary waivers and relief.[49]

In imposing such strong measures, IIRIRA essentially mandated detention during removal proceedings even if the noncitizen was not a danger to the community or a flight risk, limited judicial discretion, and expanded the list of crimes that led to deportation.[50] IIRIRA's mandate resulted in the deportation of more aliens due to criminal activities than in the years preceding the enactment of the 1996 statute.[51] Furthermore, consistent with its overall purpose as outlined above, IIRIRA widened "the scope of what is considered a 'conviction' for immigration purposes."[52]

B. *Definition of a "Conviction" Under IIRIRA*

IIRIRA codified *Ozkok*'s definition of a conviction for immigration purposes virtually verbatim:

> 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 guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

49. Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 927 (2006) (footnotes omitted).

50. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1937–38 (2000).

51. *See* Johnson, *supra* note 48, at 481–83 (explaining how the "expanded definition" of aggravated felony for immigration purposes increased the number of aliens eligible for deportation).

52. Gokhale, *supra* note 8, at 249. In widening the definition of a conviction, IIRIRA exposed noncitizens not only to the possibility of removal, but also made it more difficult, and in some situations impossible, for the noncitizen to qualify not only for relief from removal but for readmission as well. *See* Johnson, *supra* note 48, at 482–83 (discussing the consequences of aggravated felony convictions).

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[53]

In codifying the definition of a "conviction" for immigration purposes, IIRIRA adopted the first element of *Ozkok*'s definition word-for-word.[54] It omitted the parenthetical from the second element, and left out the third element entirely, which allowed for a judgment of guilt if the noncitizen violated the terms of his deferred adjudication "*without availability of further proceedings* regarding the person's guilt or innocence of the original charge."[55] Furthermore, and most notably, in omitting the third element completely, IIRIRA's definition of a conviction also left out footnote 7 which carried the language of "finality."[56]

C. *Legislative History*

Legislative history surrounding the enactment of section 101(a)(48)(A) of the Act, indicates that Congress purposely intended to "broaden[] the scope of the definition of 'conviction' beyond that adopted by the Board of Immigration Appeals in *Ozkok*."[57] The House Conference Report expressed that Congress's main concern in enacting section 101(a)(48)(A) of

53. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 322, 110 Stat. 3009–628 (codified as amended at Immigration and Nationality Act § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2012)).

54. *Compare In re* Ozkok, 19 I. & N. Dec. 546, 550 (B.I.A. 1988), *with* Illegal Immigration Reform and Immigrant Responsibility Act, 110 Stat. 3009–628 (codified as amended at Immigration and Nationality Act § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2012)).

55. *Compare In re Ozkok*, 19 I. & N. Dec. at 550 (emphasis added), *with* Illegal Immigration Reform and Immigration Responsibility Act, 110 Stat. 3009–628.

56. *Compare In re Ozkok*, 19 I. & N. Dec. at 552 n.7 ("It is well established that conviction does not attain a sufficient degree of *finality* for immigration purposes until *direct appellate review* of the conviction has been *exhausted or waived*." (emphasis added)), *with* Illegal Immigration Reform and Immigrant Responsibility Act, 110 Stat. 3009–628, 8 U.S.C. § 1101(a)(48)(A) (2012) (codifying the definition of the term "conviction" without any reference to "finality" language). This omission, and the Congressional silence surrounding it, is the cause of the current circuit splits. *Compare* Planes v. Holder, 652 F.3d 991, 996 (9th Cir. 2011) ("Accordingly, we conclude that the first definition of 'conviction' in § 1101(a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived."), *with* Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 543 (3d Cir. 2014) ("We are therefore convinced that the principle announced and held in *Ozkok*—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'— . . . 'is alive and well' in this Circuit and is correctly applied to Orabi as this Circuit's precedent." (quoting *In re Ozkok*, 19 I. & N. Dec. at 552 n.7)).

57. H.R. REP. NO. 104-828, at 223–24 (1996) (Conf. Rep.) (citing *In re Ozkok*, 19 I. & N. Dec. at 546).

the Act concerned "aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted'" yet "have escaped the immigration consequences normally attendant upon a conviction."[58] The Report explains that although *Ozkok* had made it more difficult for those guilty of criminal behavior to escape consequences, it had not gone "far enough to address situations where a judgment of guilt or imposition of sentence is *suspended*, conditioned upon the alien's future good behavior."[59] The Report targets *Ozkok*'s third element specifically.[60]

Two purposes are outlined for the enactment of section 101(a)(48)(A) of the Act in the Report. The first purpose, accomplished through the elimination of 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."[61] The second purpose, achieved through the addition of a definition, clarifies that "any court-ordered sentence is considered to be 'actually imposed,' including where the court has suspended the imposition of a sentence."[62] Thus, the Report's focus lies in convictions that involve deferred adjudication—situations in which a sentence is postponed. It follows that the omission of the third prong of *Ozkok* purports to be an intention on the part of Congress to clarify that deferred adjudication should also be considered a conviction, consistent with the overall purpose of IIRIRA.[63] However, legislative history is silent on Congress's omission of footnote 7 regarding the language of finality.[64]

Congressional silence as to the existence of finality of a conviction for immigration purposes has led to a split between the circuit courts.[65] Although most circuits have not affirmatively denied or accepted the

58. *Id.* at 224.

59. *Id.* (emphasis added).

60. *See id.* ("For example, the third [element] 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.").

61. *Id.*

62. *Id.*

63. *See* Grant, *supra* note 49, at 926 (highlighting IIRIRA's goal in reducing illegal immigration to the United States).

64. *See generally* H.R. REP. NO. 104-828.

65. *Compare* United States v. Garcia-Echaverria, 374 F.3d 440, 445 (6th Cir. 2004) ("To support an order of deportation, a conviction must be final. Finality requires the defendant to have exhausted or waived his rights to direct appeal." (citations omitted)), *with* Moosa v. INS, 171 F.3d 994, 1009 (5th Cir. 1999) ("Congress has made the policy choice to eliminate the finality requirement, and we will not second-guess such policy choices properly made by the legislative branch." (citations omitted)).

principle of finality, two circuit courts have made their stance clear. The Ninth Circuit has concluded that the finality requirement, which was initially outlined in *Ozkok*, has been eliminated completely through the enactment of section 101(a)(48)(A) of the Act,[66] while the Third Circuit has held that finality of a conviction for immigration purposes is still required after the enactment of 101(a)(48)(A), at least for those situations in which a "formal judgment of guilt" is subject to a direct appeal.[67]

IV. DISAGREEMENT BETWEEN THE NINTH AND THIRD CIRCUITS

A. *The Ninth Circuit: No Finality Rule*

Under Ninth Circuit law, a formal judgment of guilt constitutes a "conviction" pursuant to section 101(a)(48)(A) of the Act, *regardless* of whether "all direct appeals [have been] exhausted or waived."[68] In *Planes v. Holder*,[69] Michael Angelo Planes, a lawful permanent resident of the United States, pled guilty and was convicted of possessing fifteen or more access devices,[70] classified as a crime of moral turpitude.[71] He later "appealed the *sentence imposed* for [his conviction], but did not appeal the conviction itself."[72] The Ninth Circuit thereafter remanded the petitioner's challenge

66. Planes v. Holder, 652 F.3d 991, 996 (9th Cir. 2011) ("Accordingly, we conclude that the first definition of 'conviction' in [8 U.S.C.] § 1101(a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived.").

67. Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 540 (3d Cir. 2014) ("We do not agree that the IIRIRA eliminated a direct appeal from the finality rule in its definition of conviction.").

68. *Planes*, 652 F.3d at 996.

69. Planes v. Holder, 652 F.3d 991, 996 (9th Cir. 2011), *reh'g denied*, 686 F.3d 1033 (9th Cir. 2012).

70. "Access device" is defined as:

> [A]ny card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds.

18 U.S.C. § 1029(e)(1) (2012).

71. *See* 8 U.S.C. § 1227(a)(2)(A)(i) (2012) (describing the effect of a crime of moral turpitude conviction for immigration purposes). However, the INA does not provide a definition for "crimes involving moral turpitude." *See* Derrick Moore, *Crimes Involving Moral Turpitude: Why the Void-For-Vagueness Argument Is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 814 (2008) ("The phrase 'crimes involving moral turpitude' has been described as 'vague,' 'nebulous,' 'most unfortunate,' and even 'bewildering.'" (citations omitted)).

72. *Planes*, 652 F.3d at 993.

to the district court; Planes, however, was later deemed removable pursuant to his conviction and placed in removal proceedings, even though the district court had not yet ruled on the issue regarding the sentence of his conviction.[73]

Planes appealed to the B.I.A., arguing that his conviction was not sufficiently final "because he had not yet been resentenced"[74] by the district court, thus he was not yet subject to removal. The Board disagreed; it held that Planes was considered "convicted" under 101(a)(48)(A) of the Act, even though the district court was "entertaining arguments as to whether his sentence could be modified."[75] The Ninth Circuit agreed with the Board and dismissed Planes' petition for review.[76] In doing so, the Ninth Circuit found that, despite the decisions cited by *Planes*,[77] section 101(a)(48)(A) of the Act made it clear that his conviction was final for immigration purposes.[78]

Nonetheless, the dissent in the *Planes* denial of rehearing argued both that the majority "overstepped its authority and decided the petition for review on a ground not relied upon by the B.I.A.,"[79] and, further, that it disregarded Congress's intent in holding that IIRIRA eliminated the finality rule.[80] The dissent also noted that Congress only eliminated the finality rule with regard to deferred adjudications.[81] A concurring judge disagreed,

73. *Id.* at 993–94.

74. *Id.* at 994.

75. *Id.*

76. *See id.* at 995 ("[A] 'conviction' for purposes of [8 U.S.C.] § 1101(a)(48)(A) exists once the district court enters the judgment, *notwithstanding* the availability of an appeal as of right." (emphasis added) (footnote omitted)).

77. *See* Pino v. Landon, 349 U.S. 901, 901 (1955) (indicating the need for "finality" before an order of deportation may be upheld under the INA); Morales-Alvarado v. INS, 655 F.2d 172, 174–75 (9th Cir. 1981) (interpreting *Pino* to mean that a criminal conviction requires the exhaustion of all appeals as a matter of right); Hernandez-Almanza v. INS, 547 F.2d 100, 103 (9th Cir. 1976) ("The finality of a conviction for purposes of deportation is determined by a federal standard—the exhaustion or waiver of direct appeals.").

78. *Planes*, 652 F.3d at 995 (dismissing the applicability of cases cited by Planes, "because they were decided before the enactment of [section 101(a)(48)(A)] which supplants our prior judicially-created standards").

79. Planes v. Holder, 686 F.3d 1033, 1038 (9th Cir. 2012) (Reinhardt, J., dissenting) ("Nowhere, not even in passing, is the finality rule ever mentioned by the agency. Nor was the issue briefed before the B.I.A., or the panel, by either party.").

80. *Id.* at 1039 ("[T]he rule had long been that a conviction is not final for immigration purposes until the defendant has exhausted or waived his direct appeal as of right.").

81. *Id.* at 1040 ("[C]onvictions as to which there is no entitlement to an immediate direct appeal.").

relying on the plain language of section 101(a)(48)(A) of the Act and on various other circuit courts[82] for the determination that the finality requirement had been eliminated.[83]

B. *The Third Circuit: Finality Survives IIRIRA*

Three years after the Ninth Circuit's decision in *Planes*, the Third Circuit held that the principle of finality established by *Ozkok*, "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'– – . . . 'is alive and well.'"[84] Omar Abd Gomaa Orabi, a lawful permanent resident of the United States, was convicted of conspiracy to commit fraud in connection with access devices, as well as other related offenses, and sentenced to imprisonment of seventy months.[85] In December 2011, Orabi appealed both his sentence and conviction to the district court, which remained pending during the instant case.[86] Despite Orabi's pending appeal, he was found removable and placed in removal proceedings based on his aggravated felony charge.[87] Orabi appealed to the Board, arguing his conviction lacked a sufficient degree of finality based on his pending district court appeal; nonetheless, the Board, as in *Planes*, used what it believed was a new definition of a conviction under 101(a)(48)(A) of the Act and dismissed Orabi's appeal, holding the "conviction remained final for immigration purposes."[88]

82. *See* Moosa v. INS, 171 F.3d 994, 1001–02 (5th Cir. 1999) (concluding requirement of finality had been eliminated by IIRIRA's statutory language); Puello v. Bureau of Citizenship & Immigration Servs., 511 F.3d 324, 332 (2d Cir. 2007) (noting the elimination of the requirement that all direct appeals be exhausted or waived before a conviction is considered final pursuant to the statute enacted by IIRIRA); Montenegro v. Ashcroft, 355 F.3d 1035, 1037–38 (7th Cir. 2004) (holding the finality requirement is eliminated based on the enactment of IIRIRA).

83. *See Planes*, 686 F.3d at 1040 (Ikuta, J., concurring) ("[T]he panel decided the issue before it in a manner consistent with the plain language of the statute and with all other circuits that have ruled on the issue.").

84. Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 543 (3d Cir. 2014) (citing *In re* Ozkok, 19 I. & N. Dec. 546, 552 n.7 (B.I.A. 1988)).

85. *See id.* at 537 (including offenses such as possession of counterfeit access devices, forged checks, and aggravated identity theft).

86. *See id.* (noting Orabi's seventy-month sentence remained in place despite the district court's amendment to its judgment and recalculation of his sentence in November 2011).

87. *Id.*

88. *Id.* at 538.

In *Orabi*, the government extended three arguments in support of the finality of Orabi's conviction.[89] The second argument paralleled the argument the Ninth Circuit discussed in *Planes*, which focused on the issue of appealing the *sentence* and not the conviction itself.[90] The Third Circuit, however, quickly dismissed this argument because the issue of whether Orabi had appealed his sentence—or the conviction itself—had not been determinative when the Board decided Orabi's conviction was sufficiently final to support a finding of guilt.[91]

In addressing the third argument, which focused on the finality requirement, the Third Circuit referred to the legislative history surrounding the enactment of section 101(a)(48)(A) of the Act, emphasizing that in codifying the definition of a conviction, Congress's intent focused on *deferred adjudications*, not on formal judgments of guilt.[92] The court further stressed the absence of congressional intent to change the interpretation of a formal judgment of guilt based on IIRIRA's verbatim enactment of *Ozkok*'s first prong,[93] and held that "the finality requirement in immigration removal cases remained undisturbed."[94] Consequently, Orabi's pending appeal precluded the finding of a "conviction" for immigration purposes and the consequences following that determination.[95]

89. *See id.* at 539 (arguing (1) Orabi had withdrawn his appeal; (2) finality of a conviction for immigration purposes existed because Orabi's appeal was not a direct appeal as of right since it attacked only "his sentence and *not the finding of his guilt*;" and (3) the court should look to other circuits and the B.I.A., which supported the adoption of the position "that a conviction is final for immigration purposes *regardless* of whether a direct appeal is pending." (emphasis added)).

90. *Compare* Planes v. Holder, 652 F.3d 991, 993 (9th Cir. 2011) ("Planes subsequently appealed the *sentence imposed* for the § 1029(a)(3) offense, but did not appeal the conviction itself." (emphasis added)), *with Orabi*, 738 F.3d at 539 ("Orabi's conviction was final regardless of whether his appeal was withdrawn because his appeal *only challenged his sentence* and not the finding of his guilt . . . ." (emphasis added)).

91. *See Orabi*, 738 F.3d at 539 ("Because the B.I.A. did not reach its decision based on this ground, we may not affirm the judgment on this ground." (citing Sec. and Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947))).

92. *See id.* at 540 ("Understandably, Section 322 . . . addressed only adjudications that were 'deferred' . . . and instances in which the subject alien has violated a term or condition of probation." (citing H.R. REP. NO. 104–828, at 223–24 (1996) (Conf. Rep.))).

93. *See id.* at 540–41 ("The elimination of the finality provision for *deferred adjudications*, along with the failure to make any change in the language regarding direct appeals as of right . . . demonstrates Congress' intent to *retain* the finality rule for the latter category of appeals." (emphasis added) (quoting Planes v. Holder, 686 F.3d 1033, 1039–40 (9th Cir. 2012) (Reinhardt, J., dissenting))).

94. *Id.* at 540.

95. *Id.* 541–42 ("Given that Orabi's appeal was one *of right* and that *no deferred adjudication is at issue here*, we hold that the IIRIRA's elimination of the finality requirement in the case of *deferred*

V. FURTHER CIRCUIT SPLITS: DISCRETIONARY AND COLLATERAL ATTACKS

A. *The First Circuit: Deferred Adjudication*

In *Griffiths v. INS*,[96] the First Circuit agreed with the Board's decision that the noncitizen's deferred adjudication constituted a conviction for immigration purposes.[97] *Griffiths* involved the conviction of a lawful permanent resident for a firearms offense through a procedure known as "guilty-filed"—an arrangement characterized as a deferred adjudication.[98] In January of 1991, Alwyn Colin Griffiths was convicted and sentenced to probation for one year with a six-month suspended imprisonment term.[99] In April of 1993, the criminal court found him guilty and placed his charge "on file," but did not impose additional punishment.[100] By this time, Griffiths had completed his probation term and two years had passed since his initial conviction.[101] After an unsuccessful attempt to terminate his deportation proceedings in 1993, Griffiths appealed his conviction to the Board, arguing that "guilty-filed" could not support the imposition of a conviction because it lacked finality, basing his determination on *Ozkok*'s definition of a conviction "which governed at the time."[102] While Griffith's appeal to the B.I.A. was pending, Congress enacted IIRIRA in 1996, and in May of 2000, the Board dismissed Griffiths' appeal, relying both on the newly enacted statutory definition of a "conviction" and on *In re Punu*[103] which had been decided two years earlier.[104]

adjudications does not disturb the longstanding finality rule for direct appeals recognized in Ozkok . . . .").

96. Griffiths v. INS, 243 F.3d 45 (1st Cir. 2001).

97. *See id.* at 54 (deferring to the B.I.A.'s reasonable interpretation of cases "wholly consistent with the plain language" of the statute and "reflect[ing] a reasonable understanding of the purposes of its enactment").

98. *See id.* at 51 (discussing the guilty-filed procedure under Massachusetts law, which "suspends the adjudicative process, including the defendant's right to appeal, until such a time as the court reactivates or makes some further disposition of the case" (quoting White v. INS, 17 F.3d 475, 479 (1st Cir. 1994))).

99. *Id.* at 48.

100. *Id.*

101. *Id.*

102. *Id.*

103. *In re* Punu, 22 I. & N. Dec. 224 (B.I.A. 1998).

104. *Id.* Furthermore, "that the statutory definition of a 'conviction' broadened the scope of 'conviction' for immigration purposes to encompass some deferred adjudications, *even where* the right to further appellate review of the issue of guilt or innocence on such deferred adjudications remained available." *Griffiths*, 243 F.3d at 49 (emphasis added); *see also In re Punu*, 22 I. & N. Dec. at 227

In *Punu*, Mark Gerald Punu, a lawful permanent resident, entered a plea of nolo contendere in August of 1993 to an attempted murder charge—an aggravated felony—and was placed on an eight-year probation period scheduled to end in August of 2001.[105] During Punu's probation period, Congress enacted IIRIRA, allowing INS to find him deportable pursuant to the aggravated felony charge, thereby subjecting Punu to removal proceedings.[106] Punu urged several arguments for the proposition that his deferred adjudication did not qualify as a "conviction" for immigration purposes.[107] The Board disagreed, most notably basing its decision on the legislative history surrounding section 101(a)(48)(A) which focused on Congressional intent to convict those "who have clearly been guilty of criminal behavior and . . . have escaped the immigration consequences normally attendant upon a conviction" due in large part to differing state provisions enacted to mitigate "the effects of a conviction."[108]

In *Griffiths*, the First Circuit deferred to the Board's interpretation of section 101(a)(48)(A) in *Punu* for the proposition that a deferred adjudication no longer requires finality and is considered a "conviction" for immigration purposes.[109] However, in *Griffiths*, the First Circuit found the record was inconclusive as to whether Griffiths had been properly convicted under section 101(a)(48)(A), and thus remanded the case to the Board to

(highlighting the House Conference Reports with respect to section 101(a)(48)(A) of the Act, the court found deliberate congressional intent to modify the definition of a conviction to include deferred adjudications (first citing H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.); and then citing H.R. REP. NO. 104-879, at 295 (1996) (Conf. Rep.))).

105. *See In re Punu*, 22 I. & N. Dec. at 224–25, 228.

106. *See id.* at 225 ("In finding the respondent deportable, the Immigration Judge held that his deferred adjudication constituted a conviction for an aggravated felony under the new definition of the term 'conviction,' which was enacted by section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . ." (citations omitted)).

107. *See id.* ("[A]ll direct appeals of his adjudication have not been exhausted; the statute does not specifically reference deferred adjudications; the Texas deferred adjudication statute provides for dismissal of charges upon completion of probation; and the new definition of conviction is inapplicable, as his deferred adjudication was entered prior to its enactment.").

108. *See id.* at 227 ("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." (citing H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.))); s*ee also Griffiths*, 243 F.3d at 50 ("The BIA attempted to create uniformity in the treatment of various state methods of disposing of criminal cases by creating a controlling definition of 'conviction' for immigration purposes in *Matter of Ozkok*, 19 I. & N. Dec. 564 (B.I.A. 1988) . . . .").

109. *See Griffiths*, 243 F.3d at 53 ("Thus[,] under the B.I.A.'s construction of the statutory definition, finality is no longer a requirement in cases where the adjudication of guilt has been withheld." (footnote omitted)).

determine whether Griffiths' completed probation was considered punishment to fulfill the second prong of the statutory definition.[110]

The First Circuit's holding in *Griffiths* is limited to *deferred adjudications*—part of the second prong of section 101(a)(48)(A)—as is *Punu*'s holding.[111] The court acknowledged that in deferring to the Board's interpretation of *Punu* it made no determinations regarding formal judgments of guilt, codified in the first prong.[112] The court also recognized the government's focus on the second prong of section 101(a)(48)(A) of the Act and its reluctance to find a conviction when an appeal was pending under the first prong of the statute.[113] Thus, the Ninth, Third, and First Circuits are in agreement with regard to the second prong of section 101(a)(48)(A) of the Act and its consequences.[114]

B. *The Second Circuit: Inconsistency Regarding Finality*

The Second Circuit, in *Puello v. Bureau of Citizenship & Immigration Servs.*,[115] focuses on Manuel Puello's application for citizenship which was denied as a result of an aggravated felony.[116] Only in passing did the Second Circuit

110. *See id.* at 56 ("[W]e conclude that the Board did not properly determine that the petitioner was convicted for immigration purposes under the statutory definition supplied by INA § 101(a)(48)(A).").

111. *See id.* at 51 ("Implicit in [*Punu*'s] holding is a conclusion that the 'finality' requirement no longer applied to deferred adjudications under the new definition, as the concurrence makes explicit." (citing *In re Punu*, 22 I. & N. Dec. at 234 (Grant, J., concurring))).

112. *See id.* at 53 n.3 ("The Board did not address the meaning of the first prong of INA § 101(a)(48)(A), governing cases where there is a 'formal judgment of guilt,' in its decision construing the statute[.]" (citing *In re Punu*, 22 I. & N. Dec. at 234 n.1 (Grant, J., concurring))).

113. *See id.* at 54 ("The INS was careful at oral argument to say that it was not taking the position it could deport someone adjudicated guilty while their appeal or appeal period was pending. Such guilty adjudications would fall under the first prong."). The court, here, is making an important distinction. It makes no determinative findings as to the consequences of a pending appeal when there has been a formal judgment of guilt—it does not decide whether an appeal warrants finality as established by *Ozkok*—and further highlights the unwillingness of the government to maintain a position as to that particular situation. It does, however, find that where an adjudication of guilt has been withheld, there is no requirement of finality.

114. *See* Planes v. Holder, 652 F.3d 991, 997 (9th Cir. 2011) ("[F]inality is not required under the deferred-adjudication portion of § 1101(a)(48)(A)." (citing *Griffiths*, 243 F.3d at 50–51)); *see also* Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 542–43 (3d Cir. 2014) ("Both the statutory language and the legislative history reflect a determination that a distinct mode of treatment for deferred adjudications is appropriate in this context." (quoting *Griffiths*, 243 F.3d at 54)).

115. Puello v. Bureau of Citizenship & Immigration Servs., 511 F.3d 324 (2d Cir. 2007).

116. *See id.* at 326 ("Because Puello's conviction was for an aggravated felony, as defined by 8 U.S.C. § 1101(a)(43)(B), he was therefore 'precluded from establishing good moral character since his conviction occurred subsequent to November 29, 1990.'").

address the finality requirement.[117] However, both the Ninth and the Third Circuits have debated whether the discussion of the Second Circuit is dicta.[118] Subsequent to its decision in *Puello*, the Second Circuit issued an unpublished decision alluding to the survival of the finality rule.[119]

In *Abreu v. Holder*,[120] the Second Circuit examined the Board's decision in *In re Cardenas Abreu*.[121] Both cases involved a lawful permanent resident previously placed into removal proceedings based on an aggravated felony conviction.[122] Roberto Cardenas Abreu did not file an appeal within the thirty-day period, and an order of removal was instituted by an immigration judge in July of 2008.[123] However, in October of 2008, Abreu filed a motion to reopen his removal proceedings with the DHS, pursuant to a late appeal granted by the state, arguing that his conviction lacked finality.[124] The DHS denied the motion to reopen, and Abreu appealed to the Board of Immigration Appeals.[125]

The Board conceded that the enactment of IIRIRA did nothing to disrupt the finality rule.[126] In fact, it further noted that "a forceful argument can be made that Congress intended to preserve the long-standing requirement of finality for direct appeals as of right in immigration law."[127] However,

117. *See id.* 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." (citations omitted)).

118. *Compare Orabi*, 738 F.3d at 542 (describing the discussion as dicta), *and* Planes v. Holder, 686 F.3d 1033, 1040 (9th Cir. 2012) (Reinhardt, J., dissenting) (qualifying the language in *Puello* regarding the finality rule as dicta, "as later recognized by the Second Circuit itself"), *with id.* at 1034 n.1 (Ikuta, J., concurring) (emphasizing the discussion in *Puello* which has been reiterated in two subsequent unpublished opinions and with which "no Second Circuit opinion has disagreed").

119. *See* Abreu v. Holder, 378 F. App'x 59, 61 (2d Cir. 2010) ("Assuming *arguendo* that the finality requirement remains in effect after the passage of the IIRIRA, an appeal reinstated pursuant to N.Y. Crim. Proc. Law § 460.30 is equivalent to any other direct appeal for the purposes of finality.").

120. Abreu v. Holder, 378 F. App'x 59 (2d Cir. 2010).

121. *In re* Cardenas Abreu, 24 I. & N. Dec. 795 (B.I.A. 2009) (en banc).

122. *See id.* at 796 ("The respondent was placed in removal proceedings and was charged under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2006), as an alien convicted of an aggravated felony.").

123. *Id.*

124. *See id.* ("Over opposition from the State, the court granted the respondent's motion on September 26, 2008, reinstating the time for filing an appeal.").

125. *See id.* ("The Department of Homeland Security ('DHS') opposed the motion to reopen, arguing that the respondent's conviction remained final and valid for immigration purposes.").

126. *See id.* at 798 ("The legislative history of the IIRIRA accompanying the adoption of the definition of a 'conviction' gave no indication of an intent to disturb this principle that an alien must waive or exhaust his direct appeal rights to have a final conviction." (citing *In re* Punu 22 I. & N. Dec. 224 (B.I.A. 1998))).

127. *Id.*

the Board avoided further discussion of the finality requirement by determining that Abreu's late-reinstated appeal with the State was not a direct appeal, and thus fell within the second prong of 101(a)(48)(A) of the Act.[128] Thus, in qualifying Abreu's late-reinstated appeal as a deferred adjudication, the court found that his conviction was final for immigration purposes.[129]

The Second Circuit, in *Abreu v. Holder*, vacated and remanded the case, noting that the Board could not avoid the issue of finality.[130] In doing so, the court highlighted the government's inconsistency regarding the issue of finality.[131] The Second Circuit thus recognized the possibility that an appeal could preclude a finding of finality of a conviction for immigration purposes in demanding that the Board address the issue as opposed to affirming its decision.[132]

C. *The Fifth Circuit: Finality Eliminated for Deferred Adjudications*

In *Moosa v. INS*,[133] the Fifth Circuit held that section 101(a)(48)(A) eliminated the finality requirement for *deferred adjudications*.[134] In April of 1989, Wazirali Moosa applied to adjust his status to permanent residency, but later that year was indicted in Texas for a second-degree felony to which he pled guilty.[135] He was placed on an eight-year probation, and in 1992,

128. *See id.* at 798–99 ("Congress's treatment of *deferred adjudication proceedings* in the IIRIRA informs our approach to late-reinstated appeals because both procedures present an added measure of delay and uncertainty regarding the consequences of criminal convictions in immigration proceedings." (emphasis added)).

129. *See id.* at 799–800 ("Congress eliminated the additional part of the *Ozkok* rule that exempted criminal aliens with a deferred adjudication from the immigration consequences of a conviction if they retained a right to pursue further proceedings to contest their guilt at an unknown time in the future.").

130. *See* Abreu v. Holder, 378 F. App'x 59, 62 (2d Cir. 2010) ("In these circumstances, we think a remand is appropriate for the B.I.A. to address, in the first instance, whether the IIRIRA's definition of conviction is ambiguous with respect to the finality requirement.").

131. *See id.* at 61 ("[T]he government takes inconsistent positions, arguing at one point that the statutory definition of conviction is unambiguous . . . while arguing elsewhere that the question of finality is not before our Court . . . .").

132. *See id.* at 62 (noting the propriety of addressing the issue of finality, but urging the Board to "determine on remand whether a conviction is sufficiently final to warrant removal when a petitioner has a direct appeal pending.").

133. Moosa v. INS, 171 F.3d 994 (5th Cir. 1999).

134. *See id.* at 1006 ("Moosa's deferred adjudication meets each prong of the new definition of 'conviction.' Accordingly, his deferred adjudication was a conviction for purposes of the immigration laws." (citing 8 U.S.C. § 1101(a)(48)(A) (2012))).

135. *Id.* at 998.

INS determined that he was not eligible to adjust status based on his conviction.[136] In agreeing with that determination, the court acknowledged that IIRIRA deliberately omitted the finality requirement as it related to deferred adjudications.[137]

Moosa contended that allowing the elimination of the finality requirement would lead to inadequate results.[138] The court disagreed, finding that Moosa's contention was not at issue—because there was no appeal pending—and further, that even if the elimination of the finality rule were to lead to inadequate results as applied to deferred adjudications, that decision is better addressed by the Legislative Branch.[139]

The Third Circuit read *Moosa* narrowly and concluded the decision eliminated the finality rule only "as to deferred adjudications, not as to direct appeals," consistent with the Third Circuit's general stance. The Ninth Circuit, however, decided to interpret *Moosa* more broadly, arguing that *Moosa* stood for the proposition that the enactment of IIRIRA had changed

136. *See id.* at 1000 ("Permanent residence may *not* be granted [to] aliens 'convicted' of a felony." (emphasis added) (citing 8 U.S.C. § 1255a(b)(1)(C)(ii))).

137. *See id.* at 1009 ("There is no indication that the finality requirement imposed by *Pino*, and this court, prior to 1996, survives the new definition of 'conviction' found in IIRIRA § 322(a). . . . More important[ly], the Conference Report specifically cites deferred adjudications as being covered by the new definition." (citing H.R. REP. NO. 104-828, at 223–24 (1996) (Conf. Rep.))).

138. *See id.* ("Moosa maintains that taking away the finality requirement would lead to absurd results, such as an alien being deported when his conviction is on appeal, but the conviction later being reversed.").

139. *See id.* ("Congress has made the policy choice to eliminate the finality requirement, and we will not second-guess such policy choices properly made by the legislative branch."). This determination is a clear example of the plenary power doctrine:

> The doctrine can be visualized in either of two ways: (1) the statute is upheld on the merits because the substantive power of Congress is so great that the statute is assumed to be constitutional; or (2) the courts have *unusually limited power* to review the constitutionality of immigration statutes (or none at all). Under either theory, the practical result is that Congress has a virtual blank check to formulate the immigration policies it thinks best. Over the past century, Congress has cashed this check many times.

Legomsky, *Fear and Loathing*, *supra* note 4, at 1616–17 (emphasis added) (footnotes omitted). Whether or not Legomsky is correct in that Congress has a "virtual blank check," the check is cashed by both Congress and the courts, for it allows avoidance of issues without the expectation of an explanation from either. *See* Marc Edward Jácome, *Deportation in the United States: A Historical Analysis and Recommendations*, 12 MICH. J. PUB. AFF. 22, 30 (2015) (recommending the elimination of the plenary power doctrine as it "has allowed Congress and the executive branch to wield unchecked powers in excluding noncitizens from the United States"); *see also* Legomsky, *Immigration Law*, *supra* note 2 at 255 ("In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.").

the definition of a conviction for immigration purposes established in *Ozkok* and thus had eliminated the finality requirement both for deferred adjudications—consistent with legislative history—and direct appeals as of right.[140]

In the Ninth Circuit's opinion, the omission of footnote 7 in *Ozkok* from the definition of a "conviction" codified in section 101(a)(48)(A) of the Act meant that the finality rule was eliminated from all convictions.[141] However, the Ninth Circuit seemed to purposely overlook that the Fifth Circuit in *Moosa* specifically stated that footnote 7 "superimposed" a finality requirement "on the[] three requirements" of *Ozkok* which related to deferred adjudications.[142]

D. *The Sixth Circuit: Collateral Attack*

In *United States v. Garcia-Echaverria*,[143] a lawful permanent resident, was convicted and sentenced to five years imprisonment pursuant to a drug conviction in January of 1997.[144] Marco Garcia-Echaverria was removed two years later in September of 1999 based on the drug conviction while a collateral attack was pending in state court.[145] After being removed, Garcia-Echaverria was arrested in August of 2001 for speeding.[146] Garcia-Echaverria's order of deportation was then reinstated,[147] and the district

140. *Compare* Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 543 (3d Cir. 2014) (announcing the principle from *Ozkok* "'is alive and well' in this Circuit and is correctly applied to Orabi as this Circuit's precedent" (quoting *In re* Ozkok, 19 I. & N. Dec. 546, 552 n.7 (1988))), *and* Planes v. Holder, 686 F.3d 1033, 1039 (9th Cir. 2012) (Reinhardt, J., dissenting) ("The Fifth Circuit in *Moosa* . . . held only that the finality rule had been eliminated as to *deferred adjudications* . . . *Moosa* unquestionably did *not* deal with direct appeals as of right."), *with id.* at 1035 (Ikuta, J., concurring) ("In *Moosa*, the Fifth Circuit considered whether Congress intended to retain the 'finality requirement' that the B.I.A. had 'superimposed' on the definition of 'conviction' . . . and concluded that the finality requirement had been eliminated by the new statutory language of IIRIRA." (quoting *Moosa*, 171 F.3d at 1000)).

141. *Planes*, 686 F.3d at 1036.

142. *Moosa*, 171 F.3d at 1000.

143. United States v. Garcia-Echaverria, 374 F.3d 440 (6th Cir. 2004).

144. *Id.* at 443.

145. *See id.* ("[T]he Clerk of the Court of Appeals for Kentucky wrote a letter to the U.S. Attorney's Office, [stating] that the appeal docketed on May 30, 2000 . . . [was] 'a collateral attack on a judgment of conviction . . . not a direct appeal from a judgment of conviction.'" (citation omitted)).

146. *See id.* at 444 (noting Garcia-Echaverria's traffic stop, which led to an arrest after the "[o]fficers of the Highway Patrol notified the INS").

147. *See id.* ("[I]nforming Garcia-Echaverria . . . that his prior order of deportation had been reinstated."); *see also* Immigration and Nationality Act § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2012) (giving the Attorney General authority to deport a previously removed noncitizen through a reinstatement of

court found that his conviction was final regardless of the pending collateral attack in state court.[148]

The Sixth Circuit conceded that a conviction requires finality.[149] Nonetheless, it found that Garcia-Echaverria did not have a direct appeal pending when he was initially deported, but rather that his post-conviction motions were collateral attacks.[150] It further concluded that his "time for filing a direct appeal had expired in 1997."[151] Thus, relying on state court records, the Sixth Circuit held that "Garcia-Echaverria's conviction was final for removal purposes."[152]

The Ninth Circuit, in a footnote, recognized that "the Sixth Circuit retained its exhaustion-or-waiver requirement," but highlighted that it "did so without analyzing the effect or import of [section 101(a)(48)(A) of the Act]."[153] In contrast, the Third Circuit emphasized that *Garcia-Echaverria* involved a collateral attack and not a direct appeal as of right.[154]

E. *The Seventh Circuit: Interpreted Differently by the Ninth and Third Circuits*

In *Montenegro v. Aschroft*,[155] Marcelino Montenegro was convicted of an aggravated felony in April of 1996, for which he was sentenced to twenty

removal, and allowing the reinstatement of a removal order if "the Attorney General finds that an alien has reentered the United States illegally after having been removed").

148. *See Garcia-Echaverria*, 374 F.3d at 445 (acknowledging the district court's jurisdiction over the instant case pursuant to 18 U.S.C. § 3231); *see also* Shoba S. Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 8 (2014) ("Individuals who receive a reinstatement order may challenge its legality in a federal court of appeals through a legal vehicle called a 'petition for review.'").

149. *See Garcia-Echaverria*, 374 F.3d at 445 ("To support an order of deportation, a conviction must be final. Finality requires the defendant to have exhausted or waived his rights to direct appeal." (citations omitted)).

150. *See id.* ("[A] motion to vacate, set aside, or correct sentence is a collateral attack and need normally to be filed within three years of final judgment.").

151. *See id.* at 445–46 ("At the time Garcia-Echaverria was convicted, a direct appeal from a criminal conviction was required to have been filed within ten days of final judgment." (citations omitted)).

152. *See id.* at 446 ("The Kentucky court records as a whole indicate that the appeal pending when Garcia-Echaverria was removed pertained to collateral attacks upon his conviction.").

153. Planes v. Holder, 652 F.3d 991, 999 n.7 (9th Cir. 2011) (citing *Garcia-Echaverria*, 374 F.3d at 440).

154. *See* Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 542 (3d Cir. 2014) ("[W]e do not retain jurisdiction for immigration purposes in our Court when a collateral appeal is taken from a criminal judgment adverse to a petitioner *because it is not a direct appeal*." (citations omitted)).

155. Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. 2004) (per curiam).

years in prison and subsequently found removable.[156] Montenegro was in the process of appealing his criminal conviction when INS initiated removal proceedings.[157] An immigration judge ordered Montenegro removed and revoked his lawful permanent resident status after delaying the proceedings for two years.[158]

Montenegro attacked the finality of his conviction, arguing that he had been denied due process.[159] The Seventh Circuit, however, disagreed, holding the finality requirement had been eliminated through IIRIRA's enactment.[160] In doing so, the court applied IIRIRA retroactively to Montenegro's April 1996 conviction,[161] and concluded it was final for immigration purposes.[162]

The Ninth Circuit seemingly interprets *Montenegro* as broadly as it did *Moosa*, and highlights the proposition in the case which states that "IIRIRA . . . *treats an alien 'convicted' once a court enters a formal judgment of*

156. *Id.* at 36.

157. *Id.* Removal proceedings were initiated pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), "which provides for the removal of an alien convicted of an 'aggravated felony.'" *Id.*

158. *See id.* ("The [immigration judge] delayed the proceedings until October 1998 . . . ."). This is important because IIRIRA was enacted in September of 1996 and its provisions went into effect on April 1, 1997. IIRIRA's provisions, as previously discussed, were most detrimental to noncitizens, like Montenegro, whose convictions were classified as "aggravated felonies." Johnson, *supra* note 48, at 483 ("Since the INA's definitions of 'aggravated felony' and 'conviction' were expanded by the AEDPA and the IIRIRA, more LPRs are subject to removal today than before the acts became effective in 1997.").

159. *See Montenegro*, 355 F.3d at 1037 ("At the time the [immigration judge] ordered Montenegro removed, he had two petitions still pending—a writ of certiorari in the United States Supreme Court and an appeal from the denial of his post-conviction petition in the Illinois Appellate Court—both of which were later denied.").

160. *See id.* ("There is no indication that the finality requirement imposed by *Pino*, and this court, prior to 1996, survives the new definition of 'conviction' found in IIRIRA § 322(a)." (quoting Moosa v. INS, 171 F.3d 994, 1009 (5th Cir. 1999))).

161. *See id.* ("The amendments made by subsection (a) [including the definition of 'conviction'] shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act." (quoting Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322(c), 110 Stat. 3009–546, 629)). Had Montenegro's conviction been adjudicated prior to the enactment and promulgation of IIRIRA, he would have had some avenue of relief if the statutory requirements were met. *See* Johnson, *supra* note 48, 27 J. LEGIS. 477, 481 ("[P]rior to 1996, an LPR could obtain relief from deportation even if convicted of an aggravated felony, as long as he or she had served at least five years in prison to atone for the criminal activity and had other favorable extenuating circumstances.").

162. *See Montenegro*, 355 F.3d at 10370–38 ("IIRIRA, however, treats an alien as 'convicted' once a court enters a *formal judgment of guilt*." (emphasis added)).

guilt."[163] In contrast, and not surprisingly, the Third Circuit interpreted *Montenegro* more narrowly, also as it did *Moosa*, by noting that the appeals pending did *not* involve a direct appeal.[164] Thus, the Third Circuit did not find the finality rule as applied to direct appeals under *Montenegro* was eliminated by the enactment of IIRIRA,[165] but rather interpreted *Montenegro* as holding that IIRIRA eliminated the finality rule as applied to noncitizens who have *exhausted or waived all direct appeal*s to which they are entitled to, even if their convictions may be open to collateral appeals or discretionary review within the agency.[166]

F. *The Tenth Circuit: In Agreement with the Ninth Circuit*

The first time the Tenth Circuit addressed the issue of finality was in *United States v. Saenz-Gomez*.[167] Javier Saenz-Gomez was indicted for "possession with intent to distribute heroin and conspiracy to distribute" the same, to which he pled not guilty.[168] He was nonetheless found guilty and sentenced "to a twelve-year term of imprisonment," which was suspended pursuant to a five-year probation period.[169] "On May 2, 2003, before defense counsel filed a notice of appeal,"[170] Saenz-Gomez was deported pursuant to an expedited removal order.[171] Eighteen days later,

163. Planes v. Holder, 686 F.3d 1033, 1035 (9th Cir. 2012) (Ikuta, J., concurring). *But see id.* at 1039 n.4 (Reinhardt, J., dissenting) (emphasizing the *Montenegro* decision as one that "involved a petition for certiorari to the Supreme Court and a collateral attack on a conviction, neither of which is a direct appeal as of right and neither of which affected the finality of a conviction for immigration purposes even under pre-IIRIRA case law.").

164. *See* Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 542 (3d Cir. 2014) (noting the *Montenegro* decision involved "a collateral appeal and a petition of certiorari *rather than* a direct appeal" (citing *Montenegro*, 355 F.3d at 1035) (emphasis added)); *see also Planes*, 686 F.3d at 1049 n.4 (Reinhardt, J., dissenting) (standing for the same proposition).

165. *See* Gokhale, *supra* note 8, at 252 ("The government's brief filed in opposition to Montenegro's appeal of his removal order argued that Montenegro would be considered convicted for immigration purposes *regardless* of whether the finality rule survived the enactment of IIRIRA." (footnote omitted) (emphasis added)).

166. *See Orabi*, 738 F.3d at 542 (describing *Montenegro* as a situation that involved a collateral appeal); *see also* Gokhale, *supra* note 8, at 252 ("According to the Seventh Circuit's own precedent, the fact that survival of the finality rule was not relevant to the disposition of the case made the discussion of the finality rule dicta, weakening its value as precedent." (footnote omitted)).

167. United States v. Saenz-Gomez, 472 F.3d 791 (10th Cir. 2007).

168. *Id.* at 791–92.

169. *Id.* at 792.

170. *Id.*

171. *Id.*; *see also* Johnson, *supra* note 48, at 477 ("[T]he IIRIRA increased the INS's authority to expedite removals of 'aggravated felons' . . . by giving the Attorney General authority under INA § 238

defense counsel filed a timely notice of appeal, and about a year later, Saenz-Gomez was again removed based on illegal reentry.[172] In September of 2005, Saenz-Gomez was indicted and pled guilty to "illegal reentry to the United States after deportation following a conviction for an aggravated felony."[173] A twelve-level sentencing enhancement was added based on the fact that he "was previously deported 'after a conviction for a felony drug trafficking offense.'"[174] Saenz-Gomez contested the twelve-level enhancement as being improper, arguing that because he was not allowed to directly appeal his state conviction prior to being deported, his state conviction was not final.[175]

The Tenth Circuit disagreed, noting the lack of ambiguity in the current statute.[176] The court emphasized the plain language of section 101(a)(48)(A), which, the court explained, made it clear that a conviction is "*a formal judgment of guilt of the alien entered by a court*."[177] The Tenth Circuit, in affirming Saenz-Gomez's conviction, noted the plain language of the statute made it clear that it was Congress's intent to omit the finality requirement;[178] hence, Saenz-Gomez's conviction was final for immigration purposes.[179]

The Tenth Circuit again addressed the issue of finality four years later in *Waugh v. Holder*.[180] In that case, a lawful permanent resident was found removable based on a state court conviction that amounted to an aggravated felony for immigration purposes.[181] Before his removal proceedings were

to begin removal proceedings and to attempt to complete all appeals thereof before the alien has been released from custody." (footnotes omitted)).

172. *Saenz-Gomez*, 472 F.3d at 792.

173. *Id.*

174. *See id.* ("Twelve levels were added, pursuant to U.S.S.G. § 2L1.2(b)(1)(B), because Saenz-Gomez was previously deported 'after a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less.'").

175. *See id.* at 792–93 ("Specifically, he contends that for a conviction to serve as the basis for deportation, that conviction must be final and a conviction is not final for immigration purposes before direct appeal has been exhausted or waived.").

176. *See id.* at 794 ("[I]t is a well[-]established law of statutory construction that, absent ambiguity or irrational result, the literal language of the statute controls." (citations omitted)).

177. *Id.* (emphasis added) (citations omitted).

178. *See id.* ("[T]he definition of a conviction found in 8 U.S.C. § 1101(a)(48)(A) 'says nothing about the finality requirement.'").

179. *Id.* ("Because the plain language of 8 U.S.C. § 1101(a)(48)(A) is clear and does not lead to an irrational result, the statutory language controls and the written judgment filed against Saenz-Gomez is a conviction for purposes of Section 1326(b) and U.S.S.G. 2L1.2.").

180. Waugh v. Holder, 642 F.3d 1279 (10th Cir. 2011).

181. *Id.* at 1280.

finalized, the Supreme Court decided *Padilla v. Kentucky*,[182] holding that the Sixth Amendment, as applied to a noncitizen defendant, "includes the right to be advised of the risk of removal resulting from a guilty plea."[183] In light of *Padilla*'s holding, the petitioner moved to withdraw his guilty plea and terminate his removal proceedings.[184] The immigration judge denied both requests, noting the petitioner's Sixth Amendment challenge to his state court conviction was a collateral attack, and thus his conviction was sufficiently final for immigration purposes.[185] The petitioner appealed the immigration judge's decision to the B.I.A., who denied his request on similar grounds.[186]

The Tenth Circuit, in denying the petition for review, initially emphasized the court's limited jurisdiction over the petitioner's claims.[187] Furthermore, the court held that section 101(a)(48)(A) was enacted "specifically to supplant a prior B.I.A. interpretation that required deportation to wait until direct appellate review (*though never collateral review*) of the conviction was exhausted or waived."[188] Thus, for a noncitizen to be found deportable under the Tenth Circuit's interpretation, all that is required is "a formal judgment of guilt [be] entered by a trial court."[189]

In interpreting *Saenz-Gomez*, the Ninth Circuit—consistent with its own view of the finality rule—understood the Tenth Circuit's decision as standing for the proposition that the enactment of section 101(a)(48)(A) eliminated the finality requirement.[190] In contrast, the Third Circuit—also consistent with its view of what constitutes a "conviction" under IIRIRA—

182. Padilla v. Kentucky, 559 U.S. 356 (2010).

183. *Waugh*, 642 F.3d at 1280 (citing *Padilla*, 559 U.S. at 373).

184. *Id.*

185. *See id.* at 1281 ("The IJ further held that, until it was vacated or overturned by the state court, petitioner's conviction constituted a valid conviction to which the IJ had to give full faith and credit.").

186. *See id.* ("Like the IJ, the B.I.A. held that petitioner's arguments were in the nature of a collateral attack on his conviction and could not be entertained by the IJ or the B.I.A..").

187. *See id.* at 1283 ("[P]etitioner ignores a fundamental limitation: neither the IJ nor the B.I.A. has authority to adjudicate the constitutionality of an underlying criminal conviction." (citing Trench v. INS, 783 F.2d 181, 184 (10th Cir. 1986))).

188. *Id.* at 1284 (emphasis added) (citing United States v. Adame-Orozco, 607 F.3d 647, 653 (10th Cir. 2010)) (referring to the parallel statute contained at 8 U.S.C. § 1101(a)(48)(A) (2012)).

189. *Id.* (quoting United States v. Adame-Orozco, 607 F.3d 647, 653 (10th Cir. 2010)).

190. *See* Planes v. Holder, 686 F.3d 1033, 1034 (9th Cir. 2012) (Ikuta, J., concurring) ("[T]he Tenth Circuit explained in no uncertain terms that Congress defined 'conviction' in [8 U.S.C.] § 1101(a)(48)(A) 'specifically to supplant a prior B.I.A. interpretation that had required deportation to wait until direct appellate review (though never collateral review) of the conviction was exhausted or waived.'" (citations omitted)).

attempted to construe *Saenz-Gomez*'s holding more narrowly by highlighting that the appeal was denied "where his *collateral attack* was pending."[191] Thus, the Third Circuit stayed consistent with its belief that finality of a conviction is required when the appeal involves a direct appeal as of right as opposed to a collateral appeal. The Third Circuit did concede, however, that the Tenth Circuit's decision in *Saenz-Gomez* "purports to hold that a petitioner is not entitled to a direct appeal as of right prior to being deported."[192]

VI. CIRCUIT COURT OVERVIEW

The split between the Ninth and Third Circuits over whether the finality rule has been eliminated as a result of the enactment of section 101(a)(48)(A) of the Act is prominent.[193] Where other circuit courts stand is less certain. Most do agree, however, on two key points: (1) the finality rule does not reach appeals based on collateral attacks,[194] and (2) a deferred adjudication constitutes a conviction for immigration purposes, regardless of whether all appeals have been exhausted or waived.[195]

191. Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 542 (3d Cir. 2014) (emphasis added).

192. *Id.* (citing *Planes*, 686 F.3d at 1039 n.4 (Reinhardt, J., dissenting)).

193. *Compare* Planes v. Holder, 652 F.3d 991, 996 (9th Cir. 2011) ("Accordingly, we conclude that the first definition of 'conviction' in [8 U.S.C.] § 1101(a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived."), *with Orabi*, 738 F.3d at 543 ("We are therefore convinced that the principle announced and held in *Ozkok*—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'— . . . 'is alive and well' in this Circuit and is correctly applied to Orabi as this Circuit's precedent." (quoting *In re* Ozkok, 19 I. & N. Dec. 546, 552 n.7 (1988))).

194. See Abreu v. Holder, 378 F. App'x 59, 60 (2d Cir. 2010) (quoting Marino v. INS, 537 F.2d 686, 691 (2d Cir. 1976), for the proposition that "'an alien is not deemed to have been "convicted" of a crime under the [INA]' until 'direct appellate review of the conviction (as contrasted with collateral attack) has been exhausted or waived'"); *see also Adame-Orozco*, 607 F.3d at 653 ("[W]hile the alien may have the right to pursue appellate or collateral relief for an aggravated felony conviction under various provisions of state and federal law, the government need not wait until all these avenues are exhausted before deporting him."); United States v. Garcia-Echaverria, 374 F.3d 440, 446 (6th Cir. 2004) (noting the pending appeal "pertained to [a] collateral attack[]" and, consequently, the conviction was considered "final for removal purposes").

195. *See Orabi*, 738 F.3d at 541 ("[T]he statute explicitly eliminated the finality requirement for *deferred adjudications*." (citations omitted)); Moosa v. INS, 171 F.3d 994, 998 (5th Cir. 1999) (noting legislative history surrounding the enactment of section 101(a)(48)(A) specifically included deferred adjudications within its definition of a conviction); Griffiths v. INS, 243 F.3d 45, 51 (1st Cir. 2001) ("Implicit in this holding is a conclusion that the 'finality' requirement no longer applied to deferred adjudications under the new definition . . . ." (citations omitted)); *In re* Punu, 22 I. & N. Dec. 224, 224 (B.I.A. 1998) (highlighting congressional intent to exclude the finality requirement under the third

VII. THE EFFECT OF FINALITY OR LACK THEREOF

A. *Convicted Noncitizens*

As noted earlier, IIRIRA in conjunction with the AEDPA expanded the list of crimes that qualified as aggravated felonies under the INA.[196] Additionally, Congress made both statutes retroactive, broadening not only the scope of both statutes, but also their reach.[197] Thus, a lawful permanent resident whose conviction was not considered an aggravated felony prior to the enactment of the IIRIRA and the AEDPA was considered an aggravated felon if his or her prior conviction fell within the newly broadened list.[198] Furthermore, noncitizens who have challenged this retroactive application of the statutes through ex post facto[199] claims have consistently been dismissed by the courts,[200] because immigration law is considered civil

element in *Ozkok* for purposes of deferred adjudications). This reasoning mostly attributed to Congress's clear intent to include deferred adjudications within the definition of a conviction. *See* H.R. REP. NO. 104–828, at 224 (1996) ("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." (emphasis added)).

196. Johnson, *supra* note 48, at 477. The discussion in this article is meant to cover the consequences of a conviction for all noncitizen who have been determined "convicted" within the meaning of IIRIRA; however, it often centers on the consequences for those noncitizens labeled "aggravated felons," because the impact for them is the most sweeping and severe. *See* Bruce Robert Marley, Comment, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855, 859 (1998) ("Because an aggravated felony offense is generally dependent on a 'conviction' and 'term of imprisonment,' concomitant with the expansion of 'aggravated felony,' IIRIRA mutates established judicial constructions of the terms 'conviction' and 'term of imprisonment,' thereby imposing upon the greatest possible number of immigrants the designation of aggravated felon." (citations omitted)).

197. *See* Alfarache v. Cravener, 203 F.3d 381, 381 (5th Cir. 2000) (per curiam) (stating AEDPA's limits on discretionary relief were permissibly retroactive and did not violate equal protection or due process, and further, AEDPA's expanded definition of "aggravated felony" applied to pre-AEDPA convictions); *see also* Andrew Moore, *Criminal Deportation, Post-Conviction Relief and The Lost Cause of Uniformity,* 22 GEO. IMMIGR. L.J. 665, 673 (2008) (noting expansion was purposeful in retroactivity).

198. *See* Marley, *supra* note 196, at 862 ("[L]awful permanent residents with a petty prior offense that has been retroactively recharacterized as an aggravated felony are treated in exactly the same manner as illegal aliens who enter the United States in 1998 specifically to commit a terrorist act.").

199. *See* U.S. CONST. art. I, § 9, cl. 3 ("No bill of attainder or ex post facto Law shall be passed.").

200. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952) (finding inapplicable the ex post facto clause in deportation proceedings); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954) ("And whatever might have been said at an earlier date for applying the *ex post facto* [c]lause, it has been the unbroken rule of this Court that it has no application to deportation." (emphasis added)).

rather than criminal and as such deportation is not viewed as punishment,[201] but instead as a collateral consequence.[202]

B. *Due Process Considerations*

In considering whether the Executive and Legislative branches should continue to view deportation as a consequence of a proceeding rather than as retribution, Justice Brewer's dissent in *Fong Yue Ting v. United States*[203] is noteworthy:

> [D]eportation is punishment. Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel . . . .
>
> But punishment implies a trial: 'No person shall be deprived of life, liberty, or property without due process of law.' Due process requires that a man be heard before he is condemned, and both heard and condemned in the due and orderly procedure of a trial, as recognized by the common law from time immemorial.[204]

As Justice Brewer so clearly notes, it is undeniable that lawful permanent residents are owed *procedural* due process[205] at a minimum during

201. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("[Deportation] is not a banishment . . . [i]t is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government . . . has determined that his continuing to reside here shall depend."). *But see Harisiades*, 342 U.S. at 600 (Douglas, J., dissenting) (calling deportation punishment through banishment and a deprivation of "all that makes life worth while").

202. *See* Marley, *supra* note 196, at 890 ("[D]eportation, nonetheless, is considered simply a collateral administrative matter, or, at best, a civil proceeding." (footnote omitted)).

203. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

204. *Id.* at 740–41.

205. Due process is defined as a full and fair hearing that includes:

> [T]he right to be informed of rights and charges, the right to counsel at no cost to the government, the right to a translator for aliens with little or no understanding of English, and the right to examine the evidence against an alien and opportunity to rebut, including the right to cross-examine an adverse witness.

Bradley J. Wyatt, Note, *Even Aliens are Entitled to Due Process: Extending* Mathews v. Eldridge *Balancing to Board of Immigration Appeals Procedural Reforms*, 12 WM. & MARY BILL RTS. J. 605, 614–15 (2004) (footnotes omitted).

deportation proceedings.[206] The view that deportation is not punishment, however, greatly diminishes both the substantive and procedural rights of noncitizens.[207] Additionally, in determining whether a noncitizen has been provided with due process, the Supreme Court has limited the judiciary "to determining whether the procedures [used] meet the *essential standard of fairness* under the Due Process Clause."[208] Therefore, although noncitizens are granted limited[209] procedural safeguards through the exercise of the

206. *See* Legomsky, *Immigration Law*, *supra* note 2, at 259 ("The one partial exception to the absolute character of Congress's power over immigration concerns *procedural* due process. Despite a leading early decision to the contrary, it is now accepted that aliens undergoing deportation proceedings are entitled to *procedural* due process." (emphasis added) (footnotes omitted)).

207. *See id.* at 260 ("[I]mmigration is an area in which the normal rules of constitutional law simply do not apply."). Foundational aspects of due process may be lacking. For example:

> [P]oor immigrants have no right to appointed counsel (despite the notorious complexity of immigration law); immigrants have no protection against retroactive changes in the law (they can plead guilty to minor offenses based upon the correct advice of counsel that they will not be deported and the next day Congress can change the rules); immigrants have no right to have their proceedings in any particular venue (instead the government can whisk immigrants away into detention thousands of miles away from their home where they lack access to the counsel, evidence, and witnesses they need to prevail in their removal proceeding); and immigrants can be deported for the most minor offenses, such as turnstile jumping or shoplifting candy (without any constitutional limit on the disproportionate punishment).

Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1302 (2011) (footnotes omitted); *see also* Wyatt, *supra* note 205, at 610 ("Courts have long held that aliens are entitled to due process protection in immigration proceedings. The extent of that due process protection, however, has been *extremely narrow*." (emphasis added) (footnotes omitted)).

208. Landon v. Plasencia, 459 U.S. 21, 34–35 (1982) (emphasis added). The Supreme Court's decision applied a due process balancing test to deportation proceedings and, thus,

> In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

Wyatt, *supra* note 205, at 616 (quoting *Landon*, 459 U.S. at 34).

209. *See* Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 853 (2013) ("[D]espite recognizing that aliens are entitled to due process in removal proceedings, the Supreme Court has consistently regarded the Executive's power as virtually unlimited with respect to the substantive bases upon which removal may be effectuated." (citing T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 11 (1990))). *But see* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1007 (2002) ("[D]ue process places significant constraints on the government's power to detain individuals pursuant to immigration authority.").

Fifth Amendment's Due Process Clause, they are nonetheless owed a full and fair hearing in which to contest removability.[210]

C. *Relief from Removal*

As noted earlier, the enactment of IIRIRA, not only greatly expanded the list of crimes that qualified as aggravated felonies, but also substantially reduced relief from removal for noncitizens categorized as aggravated felons[211] and insulated discretionary claims for relief from judicial review.[212] Among the relief IIRIRA eliminated or curtailed for noncitizens convicted of aggravated felonies are "212(c) relief,"[213] the "212(h)

210. *See* Wyatt, *supra* note 205, at 622 ("Certainly, the B.I.A. is endowed with great power to administer the immigration laws of this country, and with that power comes the responsibility to administer them fairly—fundamental *fairness* is the touchstone of due process." (citing Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973))).

211. As stated previously, the focus of this comment is not solely on noncitizens who have been labeled aggravated felons. However, it is important to highlight the consequences of IIRIRA's expansive scope in characterizing noncitizens as "aggravated felons" for petty offenses, as they result in lack of procedural due process in judicial proceedings, and limitations on relief from removal, regardless of a noncitizen's stake in this country. *See* Marley, *supra* note 196, at 881 ("Legislation that treats petty offenders who are long-term residents of the United States in essentially the same manner as it treats illegal aliens who commit serious crimes is inherently unfair and inequitable."); *see also* Won Kidane, *The Challenges of Representing Detained Noncitizens in Expedited Removal Proceedings from the Perspective of the Dickinson School of Law Immigration Clinic*, 17 WIDENER L.J. 391, 394 (2008) ("For purposes of immigration law . . . pulling someone else's hair during a night club fistfight might qualify as an aggravated felony barring almost all forms of relief."). Certainly, "immigrants who commit serious crimes should be deported, regardless of the consequences." Marley, *supra* note 196, at 881.

212. *See* Grant, *supra* note 49, at 928 (highlighting enactment of IIRIRA which "eliminated certain forms of relief, created new forms with more circumscribed eligibility criteria, and restricted appellate review"); *see also* Marley, *supra* note 196, at 860 ("The 1996 legislation essentially denied any form of relief from deportation for all aggravated felons, and just as significant, severely restricted or eliminated judicial review over most denials of discretionary relief or final orders of deportation.").

213. Section 212(c) of the Act "granted the Attorney General discretion to waive the inadmissibility of certain qualifying lawful permanent residents." Patrick Glen, Judulang v. Holder *and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1, 1 (2012) (citing Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (amended 1996)); *see also* Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 45 (2007) ("Prior to 1996, more than half of the applications under § 212(c) received relief from deportation." (citing Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 296 n.5 (2001))). However, this provision was repealed with the enactment of IIRIRA. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 304(b), 110 Stat. 3009–597 (1996). Note, however, that the Supreme Court later decided, in Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289 (2001), that "212(c) relief remains available . . . notwithstanding its repeal, in circumstances where the alien pled guilty to an offense prior to the repeal, and would have been eligible for 212(c) relief at the time of his or her plea." Glen, *supra*, at 1 (citing *St. Cyr*, 533 U.S. at 326).

waiver,"[214] voluntary departure,[215] asylum,[216] and withholding of removal.[217] The consequences of a conviction post-IIRIRA are therefore drastic in measure.[218] Eliminating the requirement of finality from the definition of a "conviction" for immigration purposes further precludes a noncitizen from adequately litigating their claim. Without the appropriate relief available and with no ability to stay in the country to properly appeal a potentially erroneous claim, a noncitizen is essentially deprived of his or her procedural due process rights.[219]

D. *Finality and Due Process*

The Supreme Court has long held that a rule that precludes a person from pursuing an appeal may itself be a violation of due process.[220] Moreover, it has also long been held that noncitizens are entitled to the protection of

214. Illegal Immigration Reform and Immigrant Responsibility Act, § 348, 110 Stat. 3009–639. 212(h) relief similarly provided the Attorney General with discretion "to waive certain criminal grounds to exclusion, specifically marijuana possession; importantly, it did not specifically include aggravated felonies as a bar to the waiver." Marley, *supra* note 196, at 876 (footnote omitted) (citing Immigration and Nationality Act § 212(h), 8 U.S.C. § 1182(h) (1994) (amended 1996)). By eliminating the 212(h) waiver, not only did Congress further limit relief for noncitizens, it also insulated judicial review "by providing that 'no court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver.'" *Id.* at 877 (quoting Illegal Immigration Reform and Immigrant Responsibility Act, § 348, 110 Stat. 3009–639).

215. Illegal Immigration Reform and Immigrant Responsibility Act, § 604, 110 Stat. 3009–596. Voluntary departure is a procedure that allows a noncitizen to leave the United States without the consequences of a final order of deportation. *See* T. ALEXANDER ALEINIKOFF ET. AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 750 (8th ed. 2016) (noting the "negative consequences of a formal removal order include inadmissibility for ten years," and may include "a felony prosecution" if a noncitizen reenters the United States unlawfully").

216. Illegal Immigration Reform and Immigrant Responsibility Act, § 604, 110 Stat. 3009–690–91; *see* Marley, *supra* note 196, at 878 (noting IIRIRA requires asylum applications "be filed within one year," thus, this form of relief is likely not applicable to lawful permanent residents).

217. Illegal Immigration Reform and Immigrant Responsibility Act, § 305, 110 Stat. 3009–597–607; Marley, *supra* note 196, at 878–79 (noting "[w]ithholding was disallowed to an alien who" had "a final judgment of a particularly serious crime"; thus, this disqualified noncitizens convicted of an aggravated felony as they "were considered to have committed a 'particularly serious crime'" (citing 8 U.S.C. § 1253(h) (1996))).

218. Johnson, *supra* note 48, at 488–89 (arguing in favor of greater relief to ameliorate some of AEDPA and IIRIRA's "harsh consequences").

219. *See* Gokhale, *supra* note 8, at 268 (emphasizing the necessity of "an opportunity to appeal a criminal conviction at trial," in order to comply with the due process owed to noncitizens).

220. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to *redress grievances*." (emphasis added)).

the Fifth and Fourteenth Amendments while in this country, and specifically in immigration proceedings, where their ability to stay in this country is at risk.[221] As noted above, the consequences of a "conviction" are grave[222] even for those noncitizens whom the courts have agreed are owed additional procedural safeguards due to their stake in this country.[223] However, even though there is considerable agreement that some noncitizens have rights under the Constitution and, further, that *all* noncitizens are guaranteed some constitutional and procedural protections regardless of their status,[224] courts have consistently excused lack of substantive and procedural due process by shielding themselves behind Congress's plenary power doctrine.[225]

If a noncitizen is not given a full and fair opportunity to contest their underlying conviction, they immediately become subject to deportation,[226] with little to no avenues for relief.[227] Moreover, the act of deportation greatly decreases not only their opportunity and right to be heard in

221. *See* Wyatt, *supra* note 205, at 610 ("Courts have long held that aliens are entitled to due process protection in immigration proceedings."); *see also* Cole, *supra* note 209, at 370 ("The Fifth and Fourteenth Amendment due process and equal protection guarantees extend to all 'persons.'").

222. *See* Vazquez, *supra* note 213, at 41 (discussing the authority exercised by federal criminal court judges "to order deportation of a noncitizen defendant during a criminal court proceeding, thereby bypassing immigration court and expediting the removal of the noncitizen defendant from the United States" (citing Immigration and Nationality Technical Corrects Act of 1994, Pub. L. No. 103–416, § 224, 108 Stat. 4305, 4322–24 (codified as 8 U.S.C. § 1228(c)))).

223. *See Developments in the Law: Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1674–75 (2013) ("[T]he law distinguishes LPRs from other noncitizens, often granting privileges to the former that it denies the latter.").

224. Cole, *supra* note 209, at 381 ("[T]he Constitution extends fundamental protections of due process, political freedoms, and equal protection to all persons subject to our laws, without regard to citizenship.").

225. *See* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). In fact, Congressional power over immigration laws are what have created restrictive and deportation-driven legislation such as IIRIRA and AEDEPA that often overstep and violate a noncitizen's due process rights. *See* Wyatt, *supra* note 205, at 621 (discussing IIRIRA's effect on a person's due process rights); *see also* Robert Pauw, *Plenary Power: An Outmoded Doctrine That Should Not Limit IIRIRA Reform*, 51 EMORY L.J. 1095, 1096 (2002) ("[I]n many respects the injustices caused by IIRIRA are not constrained by constitutional considerations.").

226. *See* Kidane, *supra* note 211, at 393 ("When immigrants are accused of criminal conduct, the penalty that awaits them is not limited to incarceration for a certain period of time or a fine under the applicable criminal laws; it often includes deportation.").

227. *Id.* at 394 ("An aggravated felony . . . excludes a noncitizen from almost all forms of relief including adjustment of status, cancellation of removal, voluntary departure, and even asylum from persecution." (footnotes omitted)).

court,[228] but also completely deprives, many times people who have been living in this country for long periods of time, of their ability to continue their lives in the United States.[229]

Reading in a finality requirement into section 101(a)(48)(A) of the Act as was done pre-IIRIRA would guarantee noncitizens the right to have a full and fair hearing before they are deprived of their liberty, their property, and, ultimately, the life they have built after many years in this country.[230]

VIII. CONCLUSION

Most circuits are in agreement that as for collateral appeals to a conviction and situations in which adjudication of guilt has been deferred, noncitizens do not need to exhaust all appeals to be subject to deportation. However, the Third and Ninth Circuits disagree as to whether noncitizens are entitled to the exhaustion of all appeals when they are direct appeals as of right.[231] The Ninth Circuit, in not reading in a finality requirement to the definition of a conviction under IIRIRA, denies a noncitizen the full extent of their

228. Gokhale, *supra* note 8, at 267 ("[R]emoval renders an appeal completely ineffective in jurisdictions that will dismiss an appeal as moot when a defendant is deported."); *see also* Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 115 (1999) ("[A]liens subject to deportation are deprived of many of the constitutional protections available to those prosecuted under our criminal laws.").

229. Richard Gonzales, *Immigrant Felons and Deportation: One Grandmother's Case*, NPR (Apr. 9, 2016, 9:25 AM), http://www.npr.org/2016/04/09/473503408/immigrant-felons-and-deportation-one-grandmothers-case-for-pardon [https://perma.cc/D3PH-EXUY] (detailing the story of Maria Sanchez, "a 63-year-old widow, grandmother of three and a legal permanent resident" who had been living in the United States for over forty years, but became subject to deportation due to a 1998 aggravated felony charge for growing and planting "four small plants . . . [of] cannabis in rubbing alcohol as a tincture for her arthritis"); *see also* Wyatt, *supra* note 205, at 618 ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945))).

230. Gokhale, *supra* note 8, at 270–71 (2005) (advocating for the "finality rule" as a way to avoid constitutional problems and guarantee protections for noncitizens).

231. *Compare* Planes v. Holder, 652 F.3d 991, 996 (9th Cir. 2011) ("Accordingly, we conclude that the first definition of 'conviction' in [8 U.S.C.] § 1101(a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived."), *with* Orabi v. Att'y Gen. of U.S., 738 F.3d 535, 543 (3d Cir. 2014) ("We are therefore convinced that the principle announced and held in *Ozkok*—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'— . . . 'is alive and well' in this Circuit and is correctly applied to Orabi as this Circuit's precedent." (quoting *In re* Ozkok, 19 I. & N. Dec. 546, 552 n.7 (1988))).

procedural due process rights granted by the Constitution, regardless of their status, because of their stake in this country.

When a noncitizen becomes subject to deportation, often after living many years in the United States, they stand to have much to lose—family, friends, businesses, and property. Although our country has a duty to protect our people from threats and to enforce laws implemented to safeguard our freedom, it also has a duty to protect those that are subject to its laws and within its jurisdiction. The right to defend our freedom cannot come at a cost to someone else's freedom, not without a full and fair hearing.

Furthermore, it is important to highlight that the term "aggravated felon," although it carries a negative connotation, does not describe murderers exclusively nor predominantly.[232] It is a term used for noncitizens who commit crimes that range from a petty offense to more serious crimes, including a 63-year-old grandmother looking for relief from arthritis pain.[233] At a minimum, Maria Sanchez, after forty years in this country, has earned the right to fight for her freedom, for her family, for her livelihood.

In finding that the finality rule survives the enactment of IIRIRA and is a part of the definition of a conviction within the meaning of section 101(a)(48)(A) of the Act, Congress and the courts would effectively establish procedural safeguards for noncitizens facing deportation, and who are attempting to exercise their constitutional rights while facing the threat of deportation.

232. Marley, *supra* note 196, at 862 ("[L]awful permanent residents with a petty prior offense that has been retroactively recharacterized as an aggravated felony are treated in exactly the same manner as illegal aliens who enter the United States in 1998 specifically to commit a terrorist act.").

233. *See* Gonzales, *supra* note 229 (detailing the story of Maria Sanchez).