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THE EFFECT OF EXPUNGEMENT ON REMOVABILITY OF NON-CITIZENS

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Michael Yimesgen**

For most of the twentieth century, a non-citizen was generally not subject to removal on the basis of a criminal conviction which had been expunged by the state that rendered the conviction. During that time, the definition of a "conviction" for purposes of immigration law was borrowed from the law of the state which rendered the criminal conviction. In the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 Congress sought to provide a more uniform definition of the term "conviction" sufficient to justify an order of removal under the immigration law. The IIRIRA does not mention expungement, however.

This Article argues that the Board of Immigration Appeals (BIA) and courts have misconstrued the IIRIRA. In 1999 the BIA first dealt with the effect of a state expungement under the statute. This Article argues that the BIA's decision in Matter of Roldan *improperly reversed more than a half-century of precedent by refusing to give effect to a state expungement of a non-citizen's conviction unless expressly provided by federal statute. Judicial decisions have since accepted this rule.*

Part I of this Article reviews state expungement statutes. Part II summarizes cases prior to the IIRIRA. Part III explains the IIRIRA and Matter of Roldan. *Part IV addresses recent cases concerning the effect of a state expungement on removability, arguing that these cases have either misconstrued the IIRIRA or improperly applied the* Chevron *doctrine. Part V compares the current state of the law with immigration laws abroad, arguing that the exceptional result reached by United States courts is further evidence that* Matter of Roldan *and its progeny are mistaken.*

Since the suicide attacks of September 11, 2001, public anxiety about terrorism and homeland security has eclipsed some of the civil liberties of non-citizens. The current focus on specific anti-terrorist measures, however, should not overshadow other threats to the liberties of non-citizens. A recurring issue under

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United States immigration law involves the removability[1] of non-citizens convicted of a crime whose conviction has been expunged by state or federal authority. For over fifty years the issue was largely settled by a presumption that expungement barred such removability. In 1999, however, the Board of Immigration Appeals (BIA) overturned precedent by interpreting the definition of a "conviction" under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[2] to void the effect of an expungement, even though the Act did not expressly address the consequences of expungement. The new interpretation, set forth in *In re Roldan-Santoyo,*[3] has affected subsequent administrative and judicial decisions. In view of the serious consequences of removal for non-citizens, the new line of decisions merits careful examination. Legislative and decisional reform may be advisable.

This Article reviews the issue of expungement[4] as a basis for cancellation of removal on criminal grounds. Part I presents an overview of state expungement statutes. Part II summarizes BIA cases before *Roldan.* Part III discusses the significance of the IIRIRA, its legislative history, and the BIA's initial interpretation of it. Part IV critiques the *Roldan* line of judicial decisions, with a particular focus on a recent Ninth Circuit Court of Appeals decision, *Ramirez-Castro v. I.N.S.*[5] Part V offers several comparative insights, and Part VI provides a brief conclusion that urges a return to the pre-1999 practice.

1. Before 1996, immigration law distinguished between deportation of non-citizen residents in the United States and exclusion of non-citizens from entry (now called admission) into the United States. The Illegal Immigration Reform and Immigrant Responsibility Act [hereinafter IIRIRA] combines the two procedures into one "removal" proceeding. Relief from removal is generally referred to as "cancellation." This article uses both sets of terms, "deportation" and "deportability" (pre-IIRIRA) and "removal" and "removability" (post-IIRIRA), depending on the historical circumstances.

2. 8 U.S.C. § 1101 (a)(48)(A) (1996).

3. *In re* Roldan-Santoyo, 22 I. & N. Dec. 512 (BIA 1999), to be discussed in section III (b) of the text.

4. The term "expungement," unless otherwise specified, refers to the process by which valid nolo contendere pleas, findings of guilt or admissions of guilt are later vacated, reversed, sealed, purged, or destroyed by state expungement or rehabilitative statutes.

5. 287 F.3d 1172 (9th Cir. 2002).

I. EXPUNGEMENT

The first instances of expungement of criminal records involved acts of clemency under the English Crown.[6] In the United States, procedures for erasing or setting aside juvenile offender convictions existed as early as 1950.[7] Subsequently, commentators and professional groups advocated expungement "as an integral part of [a] correctional philosophy [of rehabilitation]"[8] and met with success when, inspired by the 1956 National Conference on Parole, state legislatures began to enact expungement laws.[9]

The goal of expungement legislation has been to facilitate a convicted person's reentry into society. Specifically, statutes have had one or more of the following purposes: to eliminate discrimination against convicts who have fulfilled their sentence terms and have been deemed rehabilitated, to reduce the potential for continuing public sanction, and to reward rehabilitated convicts.[10] Within its plain meaning,[11] expungement might be expected to help accomplish these ends by sealing or physically destroying an offender's record and thereby shielding it from public scrutiny.[12]

6. Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1073 (1997) (citing Isabel Brawer Stark, Comment, *Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response*, 5 SETON HALL L. REV. 864, 865 (1974)).

7. Mark A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 740 n.27 (1981) (citing the Federal Youth Corrections Act of 1950 as an example).

8. *Id.*

9. *Id.* at 742 (crediting the National Conference on Parole for the concept of adult expungement in the United States). *See also id.* at 734 n.3 (illustrating that California's expungement statute, originally enacted in 1909, is one of the few state statutes that predates the National Conference on Parole); *id.* at 741 (finding that the National Council on Crime and Delinquency also urged the passage of state acts that would "annul a record of conviction for certain purposes" (quoting *Annulment of a Conviction of a Crime: A Model Act*, 8 CRIME & DELINQUENCY 97, 100 (1962)) (internal quotations omitted)); *id.* at 741 (summarizing the Model Penal Code's Proposed Official Draft of 1962, which allowed the vacation of convictions if the convict "has fully satisfied the sentence and has since led a law-abiding life for at least [five] years" (internal quotations omitted)).

10. *Id.* at 737–38.

11. BLACK'S LAW DICTIONARY 582 (6th ed. 1990) (defining expunge as "[t]o destroy; blot out; obliterate . . . [t]he act of physically destroying information—including criminal records—in files, computers, or other depositories").

12. Franklin & Johnsen, *supra* note 7, at 742 (finding that the goal of modern expungement statutes was to aid rehabilitation by preventing public knowledge of the offender's record). *See also* Barry M. Portnoy, Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 306–11 (1970) (illustrating the economic reasons why expungement statutes, in the interest of productivity, initially focused on the availability of criminal

Generally, however, expungement statutes do not actually void a successful petitioner's criminal record.[13] Instead, they authorize any of three forms of amelioration: suspension of a sentence conditioned upon completion of probation,[14] deferral of sentencing with no imposition of sentence upon a showing of good behavior,[15] or dismissal or vacation of a conviction upon the completion of probation and the lapse of a statutorily prescribed period of time.[16]

So-called hybrid expungement statutes, such as that of California,[17] authorize courts to grant an expungement if a person has met all the terms of probation, if the court directs an early discharge from probation, or if granting an expungement is otherwise in the interests of justice. Generally, state expungement statutes require petitioners to show that they have been rehabilitated since their conviction and limit the number of times expungement is available to an individual petitioner.[18] Relief is usually unavailable for convictions of serious felonies and sex offenses, especially if the victim is a minor.[19]

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records, which adversely affected a convicted person's ability to gain employment and fulfill the terms of parole).

13. *See, e.g.*, ARK. CODE ANN. § 16-90-901 (Michie 1987), *amended by* 2003 ARK. ADV. LEGIS. SERV. H.B. 2246 (Michie) (stating that expungement means "sealing" the record and not physically destroying it and restricting the availability of expungement relief for sexual offenses against minors); COLO. REV. STAT. ANN. § 24-72-308 (West 2002), *amended by* 2003 COLO. LEGIS. SERV. Ch. 43, S.B. 03-109 (West) (describing the process by which a criminal record is "sealed" rather than physically destroyed). For a general discussion of expungement statutes, see Peter D. Pettler & Dale Hilmen, Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W. L. REV. 121 (1967).

14. *E.g.*, ALASKA STAT. § 12.55.085 (Michie 2002) (giving courts broad discretion to suspend a sentence and discharge a person from probation upon a showing of good conduct); LA. CODE CRIM. PROC. ANN. art. 893 (West 2002).

15. *E.g.*, IOWA CODE ANN. § 907.3 (West 2002), *amended by* 2003 IOWA LEGIS. SERV. S.F. 422 (West); LA. CODE CRIM. PROC. ANN. art. 893.

16. *E.g.*, WASH. REV. CODE ANN. § 9.94A.640 (West 2002) (allowing a convicted person to petition the court to vacate a conviction if all the obligations of sentencing have been met and the statutory time period has passed); KAN. STAT. ANN. § 21-4619 (2002) (requiring between three to five years to pass, depending on the crime, and the satisfaction of all the terms of sentencing or probation before a petition for expungement is considered).

17. CAL. PENAL CODE § 1203.4 (West 2002), as interpreted in *Ramirez-Castro v. INS*, 287 F.3d 1172, 1175 (9th Cir. 2002).

18. Mayfield, *supra* note 6, at 1060 (citing S.C. CODE ANN. § 22-5-910 (Law. Co-op. 2002) as an example of "one-time-only" expungement relief).

19. *E.g.*, ARK. CODE ANN. § 16-90-901 (excluding sex offenses from expungement relief); OKLA. STAT. ANN. tit. 22, § 18 (West 2002), *amended by* 2003 OKLA. SESS. LAW SERV. Ch.3, H.B. 1816 (West) (limiting expungement relief to misdemeanor convictions); KAN. STAT. ANN. § 21-4619 (2002) (denying expungement relief for sexually motivated crimes, child abuse, murder, and manslaughter).

Although most states have enacted *general* or *hybrid* expungement statutes,[20] Congress has not.[21] Consequently, until its decision in *Matter of Roldan,*[22] the BIA had relied on state expungement statutes as a source of relief from deportation orders. In other contexts, federal courts (and some state courts) have relied on their inherent powers to order expungements.[23]

II. PRE-IIRIRA DECISIONS OF THE BOARD OF IMMIGRATION APPEALS

In re Ringalda,[24] a 1943 U.S. District Court decision, was the first to extend expungement relief to non-citizens in deportation proceedings. The same year, in *Matter of V,* the BIA ruled that an expunged conviction cannot "serve as the basis for an order of deportation."[25] Later, in *Matter of O T,*[26] the BIA confirmed that "no change appears to be warranted in the present view of the [immigration] Service" because there is "substantial doubt as to the propriety of holding that, as far as immigration proceedings are concerned, the person remains one who has been convicted of a crime [after a state has granted an expungement]."[27] In considering a conflict between California Supreme Court decisions that did not extend the ameliorative effect of the state's expungement statute[28] and federal appeals court decisions that did so, the BIA

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20. Some states that qualify the availability of expungement make it available only when the person is acquitted, a nolle prosequi is entered, or criminal charges are dismissed. *E.g.*, DEL. CODE ANN. tit. 11, § 4372 (2002). *See also* IND. CODE ANN. § 35-38-5-1 (West 2002) (limiting expungement to arrests with no subsequent charges or to charges dropped because of mistaken identity or probable cause). *See contra* WYO. STAT. ANN. § 7-13-307 (Michie 2002) (expressly proscribing courts' authority to expunge convictions).

21. James W. Diehm, *Federal Expungement: A Concept in Need of a Definition,* 66 ST. JOHN'S L. REV., 73, 80 (1992) (observing that "on the federal level Congress has not provided a *general* expungement statute") (emphasis added).

22. 22 I. & N. Dec. 512 (BIA 1999).

23. *See* Diehm, *supra* note 21, at 81. *See also* United States v. Smith, 940 F.2d 395 (9th Cir. 1991) (overturning a district court's invocation of its inherent power to grant an expungement but conceding that other federal courts have exercised such powers in order to prevent extremely harsh and unusual consequences of a conviction).

24. *In re* Ringnalda, 48 F. Supp. 975, 978 (S.D. Cal. 1943).

25. *In re* V, No. 56033/701 (BIA 1943).

26. *In re* O T, 4 I. & N. Dec. 265 (BIA 1951).

27. *Id.* at 268.

28. *In re* Phillips, 109 P.2d 344 (Cal. 1941) (finding that expungement alone will not affect an attorney's disbarment because it is the product of a judicial decree disciplining an attorney as an officer of the court rather than a legislative act); Meyer v. Bd. of Med. Examiners et al., 206 P.2d 1085 (Cal. 1949) (extending the *Phillips* rationale to medical board

decided that expungement of a petty theft conviction barred the deportation of a non-citizen.[29]

Eight years after *Matter of O T*, the BIA decided *Matter of A F*, which again addressed the effect of California's expungement statute on a non-citizen's deportability. This time, however, the underlying offense involved narcotics, and the court also had to determine whether a non-citizen merely *eligible* for expungement should be treated as if an underlying conviction had actually been expunged.[30]

In *Matter of A F*, the BIA referred the case to the Attorney General of the United States to resolve possible conflicts between the BIA's rule in *Matter of V* and recent amendments to the Immigration and Naturalization Act (INA) whose purpose was to strengthen the grounds for deportation against non-citizens convicted of narcotics offenses.[31] The Attorney General opined that the amendments had been intended to eliminate both the effect of pardons on offenses involving narcotics trafficking and sentencing as a prerequisite for determining a conviction.[32] Coupled with the presumed seriousness of the underlying crime in the case, the Attorney General concluded that Congress had intended to disregard the effect of expungement

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disciplinary proceedings and concluding that such disciplinary, licensing proceedings are not penalties or disabilities subject to the state's expungement statute).

Both *Meyer* and *Phillips* relied upon California's Business and Professions Code that gave statutory authority to suspend licenses if the licensee commits a crime of moral turpitude even if there is a subsequent expungement. *See, e.g.*, CAL. BUS. & PROF. CODE, § 6102(c) (West 2002).

29. The federal cases cited by the court found that, even if a crime is one of moral turpitude, the record of a conviction, if expunged, may not be relied upon as a ground for deportation. *See, e.g.*, *In re* Ringnalda, 48 F. Supp. 975 (S.D. Cal. 1943); *In re* Paoli, 49 F. Supp. 128 (N.D. Cal. 1943).

30. *In re* A F, 8 I. & N. Dec. 429 (BIA 1959) (concerning a non-citizen who had resided in the U.S. since 1925 and who was convicted of selling, furnishing, and giving away marijuana in violation of § 11500 of the California Health and Safety Code).

31. *Id.* at 444–45 (discussing the impact of the amendments on the BIA's expungement rule in the instance of narcotics convictions).

32.

> Congress has progressively strengthened the deportation laws dealing with aliens involved in [narcotics] traffic. [Therefore], the deportation statute was amended to eliminate the requirement that in addition to a conviction there must be a *sentence*. At the same time the statute was extended to convictions for violation of State as well as Federal statutes. And, since the 1956 amendment an alien may no longer escape deportability by proffering a *pardon*. In the face of this clear national policy, I do not believe that the term convicted may be regarded as flexible enough to permit an alien to take advantage of a technical expungent [sic] which is the product of a state procedure wherein the merits of the conviction and its validity have no place.

Id. at 445–46 (emphasis added) (internal quotations omitted).

as a basis of relief from deportation after a narcotics conviction.[33] Of particular importance to the jurisprudence that would emerge after the IIRIRA, the Attorney General also inferred from legislative history a preference for a uniform federal definition of a conviction.[34]

In accepting the Attorney General's advice, *Matter of A F* thus established a narrow narcotics exception to the BIA's practice of providing relief from deportation to non-citizens whose conviction of a crime had been expunged. It should be noted that, after the passage of the Federal First Offender Act of 1970,[35] the BIA would overrule the narcotics exception it had created in *Matter of A F.*[36]

Despite the Attorney General's reasoning in *Matter of A F* that a uniform federal definition of conviction was preferable, he did not ignore state expungement statutes.[37] Thus, the principle established in *Matter of O T*, that state expungement statutes apply in the absence of a federal provision, still controlled except for narcotics convictions.[38] *Matter of A F* also makes clear that congressional amendments are to be interpreted within reasonable parameters and with textual integrity.[39] These canons of construction normally discipline administrative discretion to the benefit of removable non-citizens. Later, the United States Supreme Court would elaborate another canon of statutory construction of even more direct benefit to non-citizens: any ambiguities in the INA were to be resolved in favor of non-citizens, especially if a contrary interpretation would result in deportation.[40]

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33. *Id.* at 438–41, 445–46.

34. *Id.* at 446 (citing Berman v. United States, 302 U.S. 211, 212–13 (1937), which concerned criminal mail fraud charges and the role of sentencing in determining a conviction).

35. Federal First Offender Act, 18 U.S.C. § 3607 (1970) [hereinafter First Offender Act].

36. Garberding v. INS, 30 F.3d 1187 (9th Cir. 1994); *In re* Flavio Eduardo Manrique, 21 I. & N. Dec. 58 (BIA 1995).

37. *In re A F*, 8 I. & N. Dec. at 442 (citing a ruling by the Attorney General that "*while one cannot close one's eyes to the state's statutes and what transpired in the state's proceedings*, we are inclined to the belief that perhaps here Congress intended to do its own defining rather than leave the matter to the variable state statutes" (emphasis added)).

38. *In re O T*, 4 I. & N. Dec. at 267 (finding unpersuasive the state Supreme Court's non-immigration decisions that had given no effect to state expungement of convictions).

39. *In re A F*, 8 I. & N. Dec. at 444–46 (refusing to recognize state expungements of certain narcotic offenses in response to explicit language in congressional amendments that nullified the effect of pardons and the requirement of sentencing).

40. INS v. Errico, 385 U.S. 214, 225 (1966) (deciding to resolve doubts in favor of a non-citizen "because deportation is a drastic measure and at times the equivalent of banishment or exile"). *Accord* INS v. St. Cyr, 533 U.S. 289 (2001); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (finding "ordinary canons of statutory construction compelling, *even without regard to the longstanding principle of construing any lingering ambiguities in deportation*

In addition to the expungement statutes at issue in *Matter of O T* and *Matter of A F*, states had begun to develop different procedures to defer adjudicating guilt, thereby making it more difficult to determine the finality of a conviction.[41] Unfortunately, federal immigration law had not responded with a uniform definition of a conviction that could reconcile the new and varying state standards for deferring an adjudication of guilt. Neither *Matter of O T* nor *Matter of A F* addressed state procedures for deferring adjudication. Instead, those decisions considered only the effect of state expungement statutes on deportation issues. Not until 1988 did the BIA craft a definition of conviction that would help ensure the deportability of non-citizens who had committed similar crimes, regardless of varying state procedures for adjudicating guilt and deferring such adjudication.[42]

In *Matter of Ozkok*, the BIA recognized that its practice of applying various state standards for determining a conviction resulted in an uneven application of immigration law.[43] The existing standard for determining a conviction had three requirements: a finding of guilt by a court of law; a fine, incarceration, or suspension of an imposed sentence; and an acknowledgment, by the state, of the putative "conviction" for at least some purposes.[44] Accordingly, for example, a non-citizen could avoid deportation despite a finding of guilt if a sentence had been deferred and the sentencing state did not consider the deferred sentence to be a conviction. On the other hand, a non-citizen who "pleaded nolo contendere to the same charge and against whom a formal judgment was entered . . . but whose sentence was deferred with no other penalty imposed

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statutes in favor of the alien" in deciding to broaden the availability of relief for those who may not be able to prove that they will "more likely than not" face persecution if removed) (emphasis added)).

41. *See* Pino v. Landon, 349 U.S. 901, 901 (1955) (per curiam) (ruling on a Massachusetts procedure for revoking a sentence and putting a case on file: "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 § 241 of the Immigration and Nationality Act."). *See also In re* Ozkok, 19 I. & N. Dec. 546, 550 (BIA 1988) (citing varied state procedures for deferring a judgment of guilt).

42. *In re Ozkok*, 19 I. & N. Dec. at 548–50 ("The question of what state action constitutes a conviction with sufficient finality for purposes of the immigration laws is one with which the Board has wrestled for many years . . . procedures vary from state to state and include provisions for annulling or setting aside the conviction, permitting withdrawal of the plea, sealing the records after completion of a sentence or probation, and deferring adjudication of guilt with dismissal of proceedings following a probationary period.").

43. *Id.* at 550 (stating that "we must acknowledge that the standard which we have applied to the many variations in state procedure may permit anomalous and unfair results in determining which aliens are considered convicted for immigration purposes").

44. *Id.* at 549.

[might be deported] so long as the state also considered him convicted for some purpose."[45] In trying to cure the deficiency, *Matter of Ozkok* acknowledged the applicability of both federal and state authority[46] in determining a non-citizen's deportability, given the need for some measure of uniformity, on one hand, and the state's role in the underlying conviction, on the other. In particular, the BIA relied upon the United States Supreme Court's decision in *Pino v. Landon*,[47] which conditioned the finality of a conviction for immigration purposes on state rather than federal adjudicatory procedures.

Matter of Ozkok also took into account dictum in *Dickerson v. New Banner Institute, Inc.*[48] to the effect that a conviction under the Federal Gun Control Act[49] is a question of federal and not state law. In *Dickerson*, the United States Supreme Court determined that a state expungement, by potentially frustrating a congressional goal of keeping guns out of the hands of dangerous criminals, could not support relief from a conviction under the Gun Control Act.[50] Ironically, Congress later superseded *Dickerson* by explicitly deferring to state definitions of a conviction in instituting disabilities under the 1986 Firearm Owners' Protection Act.[51] Generally, however, courts may still find the dictum in *Dickerson* to be persuasive, even when Congress has not expressly indicated that federal law or policy should trump the normal state-based standard for determining a conviction.[52]

Matter of Ozkok thus struck a balance among *Pino*, which required sufficient finality under state law to establish a conviction for deportation purposes; *Dickerson*, which emphasized the need for uniformity under federal law in instances of firearm violations;[53] and

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45. *Id.* at 551.

46. *See In re Ozkok*, 19 I. & N. Dec. at 546; *supra* note 42 and accompanying text.

47. Pino v. Landon, 349 U.S. 901 (1955) (per curiam) (finding that a Massachusetts procedure for adjudicating guilt did not reach sufficient finality for purposes of immigration law).

48. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 (1983).

49. Federal Gun Control Act, 18 U.S.C. § 922(g)(1), (h)(1) (1968) [hereinafter Gun Control Act].

50. *Dickerson*, 460 U.S. at 112.

51. Firearm Owners' Protection Act, 18 U.S.C. § 921(a)(20) (1986) (forbidding the institution of federal firearm disabilities once a state has granted an expungement, unless the expungement statute expressly qualifies its effect on subsequent fitness to own or possess a firearm) [hereinafter Firearm Act].

52. *See In re Roldan-Santoyo*, 22 I. & N. Dec. at 522 ("[W]hen Congress has intended for state law to control in defining when a conviction exists for a federal purpose, it has expressly said so.").

53. *See In re Ozkok*, 19 I. & N. Dec. at 550–51 (acknowledging that *Dickerson*, despite Congress's reversal of its holding, identified varying state procedures and definitions of

prior BIA cases such as *Matter of A F* and *Matter of O T*, which largely gave effect to state expungement statutes to provide relief from deportation. The BIA's balancing produced the following three-pronged rule for determining a conviction:

> 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 guilty;
>
> 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
>
> A judgment or adjudication of guilt may be entered if the person violates the terms of 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.[54]

Despite this expression of the BIA's preference for a uniform federal definition of a conviction, however, the BIA continued to rely on varying state procedures for deferring adjudication of guilt and ameliorating the consequences of a conviction.[55] *Matter of Ozkok* did not speak to these issues. As we shall see in the next section of this article, Congress later acknowledged this shortcoming of the *Ozkok* rule, but did not overrule the established practice of relying on state expungement to bar deportation of a non-citizen.

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what constituted a conviction). *See also id.* at 550 ("[K]eeping with the opinions of [*Pino, Dickerson,* and *Matter of A F*], the Board has attempted over the years to reconcile its definition of a final conviction with the evolving criminal procedures created by various states.").

54. *Id.* at 551–52.

55. *See, e.g., In re Roldan-Santoyo,* 22 I. & N. Dec. at 517 (observing that "despite [the Board's] quest for a definition that would achieve uniform results, *in states providing for deferral or withholding of adjudication of guilt, we were still obliged under the Ozkok definition to examine the individual state's statute to determine the nature of any proceedings that may be convened,* if the alien did not conform with the conditions of his probation. Therefore, how the state sets up its ameliorative statute still determined to some extent whether aliens who had committed the same criminal misconduct were considered 'convicted' for immigration purposes" (emphasis added)).

III. THE IIRIRA AND *MATTER OF ROLDAN*

A. *The IIRIRA and its Legislative History*

The IIRIRA specifically incorporated the first two prongs of *Ozkok* in its definition of a conviction.[56] In *Matter of Roldan,*[57] the BIA came to a questionable interpretation concerning the IIRIRA's deletion of the third prong of the *Ozkok* rule. That prong conditioned the finding of a conviction solely on whether state procedures would allow the entry of an automatic judgment when a convict had violated probation. *Matter of Roldan,* however, implied that that prong also nullified the benefit of an expungement of a conviction that served as a basis for removal. Such an inference is, however, mistaken because Congress never addressed, recognized, or attempted to reverse the long-established precedent of the BIA and the courts that had barred removal whenever a conviction had been *expunged.* Instead, the IIRIRA provides only that a non-citizen is considered convicted for purposes of determining removability once there is a formal judgment or finding of guilt, an admission of sufficient facts to establish guilt, and an imposition of some form of punishment or restraint on liberty.[58]

The legislative history of the IIRIRA explains the limited focus, scope, and aim of the new definition of a conviction. In particular, an explanatory report to the IIRIRA illustrates why the new definition "deliberately broadens the scope of 'conviction' beyond that adopted by the [BIA] in *Matter of Ozkok.*"[59] The report not only emphasizes the BIA's concern in *Matter of Ozkok* regarding the "myriad of [state] provisions for ameliorating the effects of a conviction,"[60] but concludes that *Matter of Ozkok* "does not go far enough to address situations where a *judgment of guilt or imposition of sentence is suspended, conditioned on the alien's future good behavior.*"[61]

56. *See* 8 U.S.C. § 1101(a)(48)(A) ("'[C]onviction' 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 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 the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."). *See also* H.R. REP. No. 104-828, at 322 (1996) (citing *Ozkok* as the guiding principle behind the new definition, but also expressing Congress's disapproval of the third prong of the *Ozkok* rule, which Congress deleted from the new definition of conviction).

57. See text accompanying note 3.

58. 8 U.S.C. § 1101(a)(48)(A).

59. H.R. REP. NO. 104-828, at 224 (1996) (Joint Explanatory Statement).

60. *Id.*

61. *Id.* (emphasis added).

In instances where adjudication is "deferred," the report continues, "The third prong of *Ozkok* denies consideration of the original finding or confession of guilt as a conviction for removal purposes."[62] The last sentence of this portion of the explanatory report is especially insightful in stating that "this [new definition of conviction], 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 immigration laws.*"[63]

To be sure, the explanatory report's disapproval of a definition of conviction that disregards an original finding of guilt might support an interpretation of the IIRIRA that would reject the nullifying effect of an expungement on a conviction that served as a basis for removal. Such a broad interpretation would be strained, however.[64] While the IIRIRA expressly sought to cure the shortcomings of *Matter of Ozkok*'s definition of a conviction,[65] it did not address, let alone overturn, the long-standing rule that an expungement would nullify a conviction that had served as a basis for a "show cause" order of removability.[66] In rejecting the third-prong of the *Ozkok* rule, Congress was concerned solely with deferred adjudications and suspensions of sentencing rather than with expungements.[67] Not surprisingly, the Congressional list of specific

62. *Id.*

63. *Id.* (emphasis added). *See also In re Roldan-Santoyo*, 22 I. & N. Dec. at 521–22 (relying, questionably, on scattered quotes such as "original finding or confession of guilt" to support an interpretation of the new definition of a conviction that would nullify the effect of state expungement statutes).

64. As long as an arrest and conviction are valid and there is no new evidence regarding a convicted person's innocence, an expungement is granted because the convicted person exhibits rehabilitation and has met all the terms of probation and not because the court determines that the person is no longer guilty of having committed an offense.

65. H.R. REP. No. 104-828, at 224.

66. *Matter of Ozkok*, 19 I. & N. Dec. at 552 (confirming that, despite a new definition of conviction, the Board would continue to invalidate removal orders premised on an expunged conviction); Lujan-Armendariz v. INS, 222 F.3d 728, 742 n. 23 (9th Cir. 2000) (stating that "[w]hile Congress specifically commented on the need to eliminate the BIA's bifurcated rule regarding deferred adjudications, *it did not mention the rule, cited with approval by the BIA in Ozkok, that expunged convictions cannot serve as the basis for deportation*" (emphasis added)). *See In re Flavio Eduardo Manrique*, 21 I. & N. Dec. at 64 (extending the Board's validation of expungement as a means to avoid removal to first time drug convictions expunged under state law but which would have qualified for relief under the Federal First Offender Act); Matter of Werk, 16 I. & N. Dec. 234, 235 (BIA 1977) (responding to the 1970 Federal First Offender Act as the first BIA decision to recognize the validity of state expungements for simple, first-time drug convictions); *In re* Fructoso Luviano-Rodriguez, 21 I. & N. Dec. 235, 237 (BIA 1996) (finding that an expunged firearms conviction will not support a finding of deportability).

67. *Lujan-Armendariz*, 222 F.3d at 742 (finding that the impetus for Congress's new definition of conviction were state laws regarding deferred or withheld adjudication and

cases that would henceforth be overruled or superseded by the IIRIRA does not include any cases on the issue of expungement.[68] In view of *Matter of Roldan*, it is highly unlikely that Congress intended to reverse the BIA's long history of giving effect to expungement relief without listing a single BIA decision that the IIRIRA superseded or overruled. The next section deals with the decision in greater detail.

B. Matter of Roldan

In 1999, three years after the enactment of the IIRIRA, the BIA decided *Matter of Roldan*.[69] The case involved a Mexican citizen, Mauro Roldan-Santoyo, who had resided in the United States since 1982 and had acquired permanent residency in 1988.[70] In 1993, the petitioner pled guilty to possession of more than three ounces of marijuana, which is a felony in his home state, Idaho.[71] Because this was Roldan-Santoyo's first controlled substance offense, an Idaho court sentenced him to a fine and three years' probation.[72] In 1994, threatened with deportation, Roldan-Santoyo petitioned an Idaho state court for an expungement of his offense, based on his compliance with the terms of probation.[73] When the state of Idaho did not contest his motion, the court vacated his guilty plea pursuant to Idaho's expungement statute.[74] The court then

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not expungement statutes). *See also In re* Punu, 22 I. & N. Dec. 224, 227 (BIA 1998) (holding that "it is clear [from the explanatory note] that Congress deliberately modified the definition of conviction to include deferred adjudications").

68. H.R. REP. NO. 104-828, at 224 (listing two BIA cases that were superseded by the IIRIRA: *In re* Castro, 19 I. & N. Dec. 692 (BIA 1988) and *In re* Esposito, 21 I. & N. Dec. 1 (BIA 1995), both of which concerned the issue of sentencing and the role it played in determining the finality of a conviction).

69. 22 I. & N. Dec. 512 (1999).

70. *Id.*

71. *Id.* at 13–14.

72. *In re Roldan-Santoyo*, 22 I. & N. Dec. at 514 (outlining the terms of Roldan-Santoyo's probation, which included "restrictions forbidding [the use of] alcohol or [association] with any individuals not approved by the probation officer. The respondent was also subject to search of his residence, vehicles, and person at his probation officer's request").

73. *Id.*

74. *Id. See also* IDAHO CODE § 19-2604(1) (Michie 2002) (stating that "[i]f sentence has been imposed but suspended, or if sentence has been withheld, upon application of the defendant and upon satisfactory showing that the defendant has at all times complied with the terms and conditions upon which he was placed on probation, the court may . . . if it be compatible with the public interest, terminate the sentence or set aside the plea of guilty or conviction of the defendant, and finally dismiss the case and discharge the defendant").

discharged the petitioner from probation and ordered that underlying charges be dismissed to the effect that the "*defendant shall not be considered a convicted felon under federal or state laws.*"[75]

Despite the state court's order, the immigration judge ruled that the petitioner remained convicted for immigration purposes. The BIA affirmed this order. Purporting to rely on the IIRIRA's explanatory report, the BIA held that the Idaho court's expungement of the petitioner's conviction, under the new definition of a conviction, was irrelevant.[76] In support of this radical departure from its own long-standing policy, the BIA cited statements in the explanatory report that highlighted the importance of an original finding of guilt. The BIA emphasized that variance among state laws and procedures for ameliorating the effects of a conviction posed a threat to a uniform application of immigration law. The BIA therefore applied what it called *Dickerson*'s "long-standing" rule of the previous decade that the definition of a conviction, including any amelioration of it, is a question of federal, not state law.[77]

The BIA's jarringly new analysis raised important issues. First, its selective use of an explanatory report as legislative history may have missed essential points in the report.[78] For example, the BIA relied on a portion of the explanatory report to the effect that "the original finding or confession of guilt is sufficient to establish a conviction for purposes of immigration laws."[79] The report itself explains, however, that the new definition was concerned solely with deferral of an adjudication of guilt.[80] In *Matter of Punu,* by

75. *Lujan-Armendariz,* 222 F.3d at 733 (consolidating the appeals of petitioners Roldan-Santoyo and Lujan-Armendariz) (quoting the state court's order) (emphasis added).

76. *In re Roldan-Santoyo,* 22 I. & N. Dec. at 523.

77. *Id.* at 516. In *Dickerson,* 460 U.S. at 111–12, the United States Supreme Court held that "[w]hether one has been 'convicted' within the language of the gun control statutes is necessarily . . . a question of federal, not state law, despite the fact that the predicate offense and its punishment are defined by the law of the State."

78. *In re Roldan-Santoyo,* 22 I. & N. Dec. at 518 (focusing on words such as "ameliorative statutes," and "original findings" "of guilt" instead of analyzing the statute as a whole). A dissenting opinion in *Matter of Roldan* counseled that "[r]ather than *quoting selectively* from the legislative history of [the IIRIRA] to determine its intended scope, it is both appropriate and necessary to rely on the *entire* legislative history underlying the statute." *Id.* at 530. (Gustavo C. Villageliu, Board Member, dissenting and concurring) (emphasis added).

79. H.R. REP. No. 104-828, at 224. *See also In re Roldan-Santoyo,* 22 I. & N. Dec. at 518 (concluding that "it is clear that Congress intends that an alien be considered convicted, based on an initial finding or admission of guilt").

80. *Lujan-Armendariz,* 222 F.3d at 742 n.23 (addressing the explanatory report for the IIRIRA in dicta and finding that it "*did not mention the rule, cited with approval by the BIA in Ozkok, that expunged convictions cannot serve as the basis for deportation.* Thus, it appears that Congress was concerned primarily, as the BIA had been, with the question whether aliens could be deported during the period that followed a determination of guilt but *preceded* the expungement of the offense" (emphasis added)).

contrast, the BIA had already acknowledged that the issue of deferred adjudications was the impetus for the IIRIRA's crude definition of a conviction.[81]

In addition, the BIA's strained reading of the IIRIRA seems to contradict the canon of construction that statutes should be interpreted and read as a whole in order to achieve the result intended by Congress.[82] As the strongly worded dissent in *Matter of Roldan* indicates, neither the IIRIRA's explanatory report nor the act's express statutory definition of a conviction support the decision.[83]

A second question mark hanging over *Matter of Roldan* involves the consistency of its *Dickerson* (uniformity) rationale with the Firearm Act that superseded *Dickerson*.[84] The Firearm Act, though premised in a principle of national uniformity, is a clear indication that Congress recognized state procedures such as expungement to be significant qualifications on federal determinations of a state conviction.[85] Such recourse to state law makes good sense insofar as "Congress has not [yet] provided a general expungement statute."[86] From this perspective, it is highly questionable whether a non-citizen should be removed from the United States, perhaps forever, simply to vindicate the principle of legislative uniformity, in the absence of any express language within the IIRIRA requiring that result.

Third, *Matter of Roldan*'s reliance on the new principle of federal uniformity unfortunately subordinated the hallowed principle of precedent, in this instance, going back over fifty years. Moreover, the BIA's reading of the IIRIRA is valid only if state-deferred adjudications and state expungement statutes are lumped together as a single qualification of conviction. The two types of relief, however, are like apples and oranges. Expungement statutes are different

81. *In re* Punu, 22 I. & N. Dec. 224, 227 (concluding that "it is clear that Congress deliberately modified the definition of conviction to include deferred adjudications").

82. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). *See also* Wash. Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 123 S. Ct. 1017, 1025 n.7 (2003) (cautioning that interpretations of congressional legislation should not violate "the cardinal rule that a statute is to be read *as a whole*") (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (emphasis added)).

83. *In re* Roldan-Santoyo, 22 I. & N. Dec. 512, 537-41 (Rosenberg, Board Member, dissenting).

84. 18 U.S.C. § 921(a)(20) (forbidding the institution of firearm disabilities on an expunged conviction).

85. Firearm Owners' Protection Act, 18 U.S.C.§ 921(a)(20) (leaving the definition of a conviction to be determined by state law and invalidating the use of expunged convictions to institute firearm ownership disabilities).

86. *See* Diehm, *supra* note 21, at 80.

from deferred adjudications because they do not simply delay the pronouncement or finding of guilt but definitively reward and facilitate the rehabilitation of a once-guilty individual.[87] Expungement, therefore, serves the important purpose of criminal justice that is defeated by federal second-guessing in the name of federal uniformity. Deferring adjudication of guilt, on the other hand, simply represents an initial step that may lead to formal expungement.[88] In such instances the state has not certified or attested to the convicted person's rehabilitation and has not taken any steps to protect the conviction and the convicted person.

Given the importance of determining finality (or not) of convictions, the risk of uneven or anomalous results arising from varying state laws is therefore more acute in the instance of a deferral statute. Expungement, on the other hand, provides a bright line of finality by, in effect, sealing or obliterating the record of a conviction or finding of guilt or by vacating and reversing it.[89] A person's status is both clear and "final" under a state expungement statute. Although expungement statutes differ in many respects,[90] they all

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87. *See Lujan-Armendariz*, 222 F.3d at 736 n.13 (distinguishing between an expungement order and a deferral of adjudication). *See also* Franklin & Johnsen, *supra* note 7, at 737–38 (finding that expungement statutes seek either to reward a convicted person's rehabilitation or otherwise to facilitate it by eliminating discrimination or continued punishment via public opinion); *id.* at 742 (illustrating that the original goal of expungement was to aid rehabilitation by preventing public knowledge of an offender's record).

88. *In re A F*, 8 I. & N. Dec. at 439 (distinguishing between eligibility for and actual attainment of expungement: "there is [nothing] repugnant about the fact that an alien can be deported prior to the expungement of the conviction and cannot be deported if the conviction has been expunged before deportation takes place").

89. *See, e.g.*, WASH. REV. CODE § 9.94A.640 (demonstrating the effect of a successful expungement: "the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, *an offender whose conviction has been vacated may state that the offender has never been convicted of that crime*." (emphasis added)); CAL. PENAL CODE § 1203.4 (West 2003) (illustrating that a successful expungement petition enables the petitioner to "withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty," it mandates "the court [to set] aside the verdict of guilty"). *See also* Mayfield, *supra* note 6, at 1057 ("The concept of expunging criminal records is referred to by different names, but entails the destruction or sealing of a criminal record when the offender completes certain requirements.").

90. *See* Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdeeds and An Employee's Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 21–22 (1992) ("[T]here is no uniform terminology in the world of expungement statutes ... A majority of jurisdictions use either the term 'sealing' or 'expungement.'"). *See also* Franklin & Johnsen, *supra* note 7, at 742 (explaining that "expungement procedures vary, but in general, conviction and related criminal records concerning the convict are collected, sealed, segregated, open only to limited inspection, obliterated, or actually physically destroyed").

require a "uniform" showing of rehabilitation and exclude serious offenses from eligibility.[91] Criticism of expungement statutes centers not on the varying *legal processes* by which state courts reverse or remove a prior conviction but on whether, *in practical terms*, expungement adequately protects a successful petitioner who has reentered a society that may demand access to the convicted person's criminal record.[92]

Another question mark looming over *Matter of Roldan* relates to its congruence with *Dickerson*, upon which it relies, as a basis for preferring a federal standard. *Dickerson* involved a federal firearm statute with sanctions much less significant than removal from the country. In addition, the BIA failed fully to appreciate that, in enacting the Firearm Act,[93] Congress had rejected the *Dickerson* dictum. *Matter of Roldan* only noted this important point in passing rather than relying on it, even though, since *Dickerson* and until 1999, both the BIA and federal courts had interpreted pertinent federal acts to incorporate state expungement relief.[94] These cases

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91. Mayfield, *supra* note 6, at 1057–59 ("The prerequisites for successfully petitioning a court for expungement vary by jurisdiction; however, they *generally require the petitioner to demonstrate rehabilitation*," and "[o]ften these statutes *prohibit courts from expunging serious crimes*." (emphasis added)).

92. *See* Pettler & Hilmen, *supra* note 13, at 134 (arguing that once a state certifies a person's "[fitness] to resume his [or her] former position in society on an equal footing with the rest of its members . . . disclosure of criminal records results in the deprivation of [that] equality"); Portnoy, *supra* note 12, at 306–12 (outlining the practical difficulties facing a person whose conviction has been expunged); Franklin & Johnsen, *supra* note 7, at 749–69 (finding that expungement statutes that prevent access to a criminal record may have various costs such as fostering dishonesty and the curtailment of legal and constitutional rights such as the right to information); Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378, 378 (1970) (claiming that sealing of records may actually do more harm than good by the "hoax it plays upon ex-offenders and the general public"); Snow, *supra* note 90, at 3 (explaining that there exists a "tension between an employer's need to know about an applicant's background and an applicant's right to keep relevant information confidential").

93. This observation is inferred from Congress's enactment of the *Firearm Act*, 18 U.S.C. § 921 (2002) (authorizing state definitions of a "conviction" to control its provisions and expressly invalidating the use of expunged convictions to institute firearm disabilities) as well as *In re* Punu, 22 I. & N. Dec. 224, 227 (concluding that "it is clear that Congress deliberately modified the definition of conviction to include deferred adjudications"). *See also In re* Flavio Eduardo Manrique, 21 I. & N. Dec. 58, 62–64 (adopting an interpretation of the Federal First Offender Act that relied upon Congressional intent to alleviate the consequences of a narcotics conviction through expungement relief).

94. *In re* Devison, 22 I. & N. Dec. 1362, 1368 (BIA 2000) ("Applying the [Federal Juvenile Delinquency Act] as a benchmark, we find that a youthful offender adjudication under Article 720 of the New York Criminal Procedure Law corresponds to a determination of juvenile delinquency under the FJDA."); *In re Flavio Eduardo Manrique*, 21 I. & N. Dec. at 64 ("[A]n[y] alien who has been accorded rehabilitative treatment pursuant to a state statute will not be removed if he establishes that he would have been eligible for [relief] under the provisions of [the Federal First Offender Act] had he been prosecuted under federal law.").

demonstrate that the BIA ordinarily seeks to avoid reversing otherwise long-standing rules and practices when Congress does not so require.[95]

Lastly, *Matter of Roldan* also ignored *Pino*'s accommodation of a state interpretation of the term "conviction," relying instead on the *Dickerson* dictum, even though that decision did not involve immigration law. Additionally, the BIA misconstrued its prior holding in *Matter of Ozkok* and that decision's reliance on *Dickerson*. *Matter of Ozkok* did not argue that the policy of federal uniformity should result in the exclusion of state law on the effect of expungement. Instead, *Matter of Ozkok* simply struck a balance between state and federal laws because of what was increasingly seen to be a necessary recourse to state statutes and provisions for shaping the outcome of federal removal cases.[96]

IV. JUDICIAL RESPONSES TO *MATTER OF ROLDAN*

A. *Lujan-Armendariz*

Two years after the BIA decided *Matter of Roldan*, the Ninth Circuit Court of Appeals reviewed that decision on appeal. In *Lujan-Armendariz v. I.N.S.*,[97] the Court ruled that Roldan-Santoyo's expunged, first-time state narcotics conviction could not be the predicate for a removal order because the underlying offense would have been eligible for amelioration under the First Offender Act as well.[98] On its face, the First Offender Act applied its ameliorative provision for all purposes, which, according to *Lujan-Armendariz*,

95. *In re Devison*, 22 I. & N. Dec. at 1369 ("Presumably, Congress was aware of our long-established policy and of the [Federal Juvenile Delinquency Act's] provisions that maintain a distinction between juvenile delinquencies and criminal convictions. There is no record of an effort or intention on the part of Congress to include acts of juvenile delinquency in this new definition of the term 'conviction.'").

96. *See generally* Nathalie A. Bleuzé, *Matter of Roldan: Expungement of Conviction and the Role of States in Immigration Matters*, 72 U. COLO. L. REV. 817, 840–849 (2001) (arguing that *Matter of Roldan* was erroneously decided because of the increased state participation in immigration matters, increased costs of immigration borne by states' law enforcement and judiciary, increased federal reliance on state laws in order to determine removability of non-citizens, and the disproportionate effect that the Board's new rule invalidating expungement was having on a family unit that is disrupted by the removal of a contributing member).

97. *Lujan-Armendariz*, 222 F.3d at 728 (considering on appeal the consolidated BIA decisions regarding non-citizens Roldan-Santoyo and Lujan-Armendariz).

98. *Id.* at 735.

included removal proceedings.[99] *Lujan-Armendariz* thereby confirmed the compulsion of a federal rehabilitation scheme to nullify an order of removal based solely on a criminal conviction that had been expunged.[100]

The decision also held that the IIRIRA's definition of conviction did not repeal the First Offender Act's protection against removal because the IIRIRA did not address the effect of expungements at all.[101] The court found the BIA's argument to the contrary "highly

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99. *Id.* (finding that "[the Federal First Offender Act] is a limited federal rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt in drug cases ... [u]nder the Act, the finding of guilt is expunged and *no legal consequences may be imposed* as a result of the defendants having committed the offense. The Act's ameliorative provisions apply for *all* purposes" (emphasis added)). *See also* First Offender Act, 18 U.S.C.A. § 3607(c) (entitled "Expungement of Record of Disposition," and providing that "[a] person concerning whom [an expungement order has been] entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose").

100. Since *Lujan-Armendariz*, only two other federal circuits have directly addressed and adopted the Board's new rule regarding the effect on removability of expungement statutes: *Herrera-Inirio v. INS*, 208 F.3d 299, 304 (1st Cir. 2000) (holding that a Puerto Rican court's order of exoneration does not provide cancellation of removal) and *Gill v. Ashcroft*, 335 F.3d 574, 578-79 (7th Cir. 2003) (finding that the *Lujan-Armendariz* analysis whether the First Offender Act was repealed by the IIRIRA "makes no difference, for state offenders such as [petitioner] ... that law applies only to persons prosecuted in federal courts ... The holding of *Lujan-Armendariz*, which elevates an abandoned [BIA] practice [of formulating an adjudicative definition of a conviction] over a statutory text [(the IIRIRA's new definition)], is untenable, and we decline to follow it"). Other circuits have not directly addressed the issue. *See* Vasquez-Velezmoro v. INS, 281 F.3d 693, 697 (8th Cir. 2002) (observing that whether the IIRIRA's definition of conviction repeals the First Offender Act "is an unsettled question" before going on to dismiss the petitioner's equal protection argument because petitioner's situation is not sufficiently similar to one who is eligible for the act's first offender (expungement) relief); United States v. Campbell, 167 F.3d 94, 97 (2d Cir. 1999) (analyzing the effect of a vacated conviction on sentencing guidelines under the *Dickerson* preference for a federal instead of state standard for a non-citizen who had illegally reentered the country). *See also In re* Salazar-Regino, 23 I. & N. Dec. 223, 245 (BIA 2002) (Rosenberg, Board Member, dissenting) ("Other circuit courts have acknowledged the Ninth Circuit's decision [in *Lujan-Armendariz*], *but appear not to have adopted its ruling for case-specific reasons.*" (emphasis added)). The following cases were cited by Board Member Rosenberg: *Fernandez-Bernal v. Attorney General of the U.S.*, 257 F.3d 1304 (11th Cir. 2001) (finding that while *Matter of Roldan* was questionable, the petitioner would not have been eligible for relief under the First Offender Act); *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001) (observing that *Lujan-Armendariz*'s rejection of *Roldan* weakened the BIA's interpretation of the IIRIRA); *Mugalli v. Ashcroft*, 258 F.3d 52, 61 n.12 (2d Cir. 2001) (distinguishing *Lujan-Armendariz* because of the lack of analogous federal ameliorative legislation).

101. *E.g.*, *Lujan-Armendariz*, 222 F.3d at 745 (finding that "there is no irreconcilable conflict between the [First Offender Act and the IIRIRA], and therefore no basis for finding an implied repeal. We need only construe the later- enacted immigration law as subject to the minor exception required by the provisions of the earlier-enacted First Offender Act").

unpersuasive,"[102] observing that "[the IIRIRA itself] did not mention the [existing] rule . . . *that expunged convictions cannot serve as the basis for removal.*"[103] Instead, the Court found that Congress's primary concern in legislating the new definition of conviction was to establish the removability of non-citizens "during the period that followed a determination of guilt but *preceded the expungement of the offense.*"[104] More importantly, the court also noted that Congress did not "[attempt] to alter the *longstanding [BIA] rule* that convictions that are subsequently overruled, vacated, or otherwise erased *no longer have any effect for immigration or most other purposes.*"[105] *Lujan-Armendariz* thus questioned the rationale of *Matter of Roldan* and its invalidation of long-standing BIA precedent.

After *Lujan-Armendariz,* the BIA itself seems to have abandoned the uniformity argument it had so rigorously defended in *Matter of Roldan.* In *Matter of Salazar-Regino,* for example, the BIA announced that it would selectively confer the *Lujan-Armendariz* benefit for first-time narcotics offenses only on those non-citizens whose criminal records had been expunged within the jurisdiction of the Ninth Circuit.[106]

B. Murrillo-Espinoza

Murrillo-Espinoza concerned a Mexican citizen, Juan Manuel Murrillo-Espinoza, who had been admitted to the United States as a permanent resident in 1961.[107] Thirty-four years later he was convicted in Arizona on one count of theft and placed on three years probation with six months incarceration in county jail.[108] The INS subsequently commenced proceedings, during which Murrillo-Espinoza admitted his removability. After the immigration judge ordered his removal, Murillo-Espinoza appealed the order to the BIA[109] and also obtained a state court order vacating his judgment

102. *Id.* at 742.

103. *Id.* at n.23 (emphasis added).

104. *Id.* (emphasis added).

105. *Id.* (emphasis added).

106. *In re* Salazar-Regino, 23 I. & N. Dec. 223, 233 (BIA 2002) ("Accordingly, we decline to give the holding in *Lujan-Armendariz v. INS* nationwide application and will continue to apply the rule set forth in *Matter of Roldan* to cases arising outside the jurisdiction of the Ninth Circuit.").

107. Murrilo-Espinoza v. INS, 261 F.3d 771, 772–73 (9th Cir. 2001).

108. *Id.* at 772.

109. *Id.* at 772–73.

of guilt and dismissing the theft charge. As in *Matter of Roldan*, however, the BIA refused to give effect to the expungement of his conviction.

Unlike *Lujan-Armendariz*, *Murrillo-Espinoza* did not involve the First Offender Act with its explicit provision for expungement of a first narcotics conviction. *Murrillo-Espinoza* therefore presented the court with an opportunity to determine the merits of the BIA's new rule ignoring the effect of a state expungement of a non-narcotic conviction, which *Lujan-Armendariz* had characterized as a "highly unpersuasive" interpretation of the IIRIRA.[110] Initially, *Murrillo-Espinoza* seemed to concur, finding that the new interpretation was not "the only plausible one [possible],"[111] but the decision did not overturn the *Roldan* rule. Instead, the court, in a short opinion, relied on the *Chevron* doctrine, which it had found no occasion to apply in *Lujan-Armendariz*, to uphold the BIA's new rule.[112]

Murillo-Espinoza failed to discuss whether the IIRIRA's definition of a conviction actually addressed the issue of expungement (as it did not). Nor did the opinion determine whether the BIA's interpretation reflected a clear intent of Congress, even though *Chevron* requires a court to ask "how clear"[113] a statute is in order to warrant administrative fiat.[114] The opinion also overlooked the rule that "a consistent administrative construction of [a] statute must be followed by . . . courts unless there are *compelling* indications [from Congress] that it is wrong."[115] Applying this requirement to immigration cases, the United States Supreme Court instead found that "an [immigration] agency interpretation that conflicts with earlier

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110. *Lujan-Armendariz*, 222 F.3d at 742.

111. *Murillo-Espinoza*, 261 F.3d at 774.

112. *See generally* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843–45 (1984) (holding that an agency's interpretation of a statute must be accorded deference where Congress has left a gap for it to fill or where it makes a reasonable interpretation of a provision that is ambiguous or uncertain). *See also* United States v. Mead Corp., 533 U.S. 218, 227 (2001) (ruling that *Chevron* deference is mandated only when Congress delegates to an agency the authority to issue interpretations that carry the force of law).

113. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 (1989) (predicting future conflicts as to judicial determinations of how the *Chevron* doctrine's initial requirement of ambiguity is met).

114. *Id.* at 517 (finding that "the quest for 'genuine' legislative intent is probably a wild-goose chase anyway. In the vast majority of cases . . . Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all").

115. Haig v. Agee, 453 U.S. 280, 291 (1981) (emphasis added). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (finding that congressional acquiescence may reinforce the exercise of presidential powers) (Jackson, J., concurring).

interpretations is entitled to considerably less deference."[116] Even more fundamental is whether the *Chevron* doctrine applies at all to changes in immigration law instituted by the BIA's interpretation of Congressional amendments. After all, two recent United States Supreme Court decisions addressing the civil liberties of non-citizen detainees under the immigration service's interpretation of the IIRIRA did not rely on the *Chevron* doctrine.[117]

Instead, *Murillo-Espinoza* might have more carefully considered whether the BIA's interpretation conformed with "a body of experience and informed judgment" upon which courts ordinarily should rely.[118] At a minimum, in light of the BIA's sharp departure from precedent, the court should have considered the policy consequences of withholding cancellation of removal. Such a consideration is, after all, a valid tool of statutory construction that courts are encouraged to employ before addressing an administrative agency's action under federal legislation.[119] In essence, the serious consequences of removal and the ambiguities in the IIRIRA should have persuaded the *Murillo-Espinoza* court to resolve the issue of expungement in favor of the petitioner.[120] *Murrillo-Espinoza*'s application of the *Chevron* doctrine as a basis for applying *Matter of Roldan* is therefore highly questionable.

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116. *Cardoza-Fonseca*, 480 U.S. at 447 n.30 (1987).

117. INS v. St. Cyr, 533 U.S. 289; Zadvydas v. Davis, 533 U.S. 678 (2001). *See also* Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 309 (2002) (observing, "there is the curious fact that—just one week after Mead was decided—both *St. Cyr* and *Zadvydas* considered policy that was embodied in regulation without invoking *Chevron*. The *Zadvydas* decision *did not even mention the Chevron doctrine, while St. Cyr simply dropped a footnote rejecting the INS's argument that Chevron deference should apply*" (emphasis added)).

118. *See* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (delineating the so-called *Skidmore* deference where a court may choose, but is not required, to defer to an agency interpretation). *See also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 536 (2003) (summarizing the standards for agency deference under *Skidmore* and *Mead*). *See also supra* note 112 and accompanying text.

119. Scalia, *supra* note 112, at 515 (arguing that "the traditional tools of statutory construction include not merely text and legislative history but also . . . consideration of policy consequences. Indeed, that tool is so traditional that it has been enshrined in Latin: Ratio est legis anima; mutata legis ratione mutatur et lex").

120. *St. Cyr*, 533 U.S. at 320; *Cardoza-Fonseca*, 480 U.S. at 449.

C. Ramirez-Castro

1. The Facts—Ramirez-Castro v. I.N.S. involved a Honduran citizen, José Roberto Ramirez-Castro, who had resided in the U.S. since 1978 and had acquired permanent residency in 1989.[121] In 1991, a California court convicted him of carrying a concealed weapon, a misdemeanor under California law, and imposed a sentence of 65 days in prison.[122] It might be noted that Ramirez-Castro's concealed weapons charge was not prosecuted under the Firearm Act.

Subsequently, the INS issued a removal order against him based on the firearm conviction. Ramirez-Castro appealed this decision to the BIA.[123] Pending an appeal hearing, the California court expunged the petitioner's conviction. As in *Matter of Roldan*, however, the BIA ignored the state's rehabilitation law and upheld Ramirez-Castro's removal order, finding again that the expungement of a conviction was irrelevant in a petition for cancellation of removal.[124] The petitioner then sought relief in the Ninth Circuit Court of Appeals, which remanded the case for reconsideration by the BIA. After the BIA reiterated its construction of the IIRIRA, the petitioner again went before the Ninth Circuit Court of Appeals.[125] The Ninth Circuit Court of Appeals upheld the BIA's interpretation of the IIRIRA's definition of conviction.[126]

2. Deference to the BIA Despite Lujan-Armendariz—The *Ramirez-Castro* court interpreted both *Lujan-Armendariz*, which gave effect to an expungement in a removal proceeding, and Murillo-Espinoza, which did not. Relying on *Murillo-Espinoza*, the court held that, in the absence of some "other yet, unrecognized, exception," the *Chevron* doctrine requires deference to the BIA's interpretation of the IIRIRA.[127]

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121. *Ramirez-Castro*, 287 F.3d at 1173.

122. *Id.*

123. *Id.*

124. *Id.* at 1173.

125. *Id.*

126. Since *Ramirez-Castro*, the Ninth Circuit has extended its adoption of the BIA's new rule to a non-citizen's ability to demonstrate good moral character on the basis of an expungement of a conviction. De La Torre-Salazar v. INS, 36 Fed.Appx. 252, 253 (9th Cir. 2002) ("Under IIRIRA, however, this expungement does not affect the consequences of the conviction for purposes of the deportation laws . . . Thus, the conviction made de la Torre statutorily ineligible to demonstrate good moral character for purposes of obtaining a suspension of deportation." (citing *Ramirez-Castro* and *Murillo-Espinoza*)).

127. *Ramirez-Castro*, 287 F.3d at 1174–75.

Addressing *Lujan-Armendariz*, the *Ramirez-Castro* court noted that the petitioner's firearm conviction did not fall under any specific federal statutory exception.[128] The court ruled that neither the IIRIRA's definition of a conviction nor any other source of law required the BIA to distinguish between expunged misdemeanor and felony convictions. Moreover, the court determined that the mere existence of limited qualifications in California's expungement statute supported the BIA's refusal to give effect to expungement even though the qualifications had nothing directly to do with immigration or other federal law.[129]

The court's conditioning of relief on explicit statutory authority[130] is puzzling. Unlike *Ramirez-Castro*, *Lujan-Armendariz* relied on a federal statute not because the court thought it always had to find such a statute to justify cancellation of removal, but simply because the applicable statute so provided. Nowhere did *Lujan-Armendariz* seek to limit all expungement relief in removal cases to federal statutory acknowledgement of such relief. Indeed, the First Offender Act at issue in *Lujan-Armendariz* does not contain any express language about immigration proceedings. Nor does it expressly give effect to state expungement statutes.[131] *Lujan-Armendariz* established that the First Offender Act was intended to ameliorate the effect of simple drug-related convictions at a time of growing anxiety about the prevalence of drug use. Congress's response was to provide specific statutory relief for otherwise law-abiding first offenders of drug laws.[132]

This policy of ameliorating the harsh consequences of a first-time conviction should also have informed the same court's decision in *Ramirez-Castro*, even in the absence of a federal statute to that effect.[133] It is significant that in *Ramirez-Castro* and

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128. *Id.* at 1175.

129. *Id.*

130. *Id.* at 1174 (requiring the petitioner to demonstrate that his expungement fell under the *Lujan-Armendariz* exception in order to prevail in his appeal to the court).

131. Two decisions have construed the act to apply to deportation proceedings: *Garberding*, 30 F.3d at 1190–91 (concluding that the underlying offense and not the state expungement statute's similarity to the Federal First Offender Act is dispositive in determining a convicted non-citizen's eligibility for relief under that Act) and *In re Flavio Eduardo Manrique*, 21 I. & N. Dec. at 62 (reversing its precedent to reflect the Ninth Circuit's decision in *Garberding*).

132. *See Lujan-Armendariz*, 222 F.3d at 735.

133. In the *Dillingham v. INS* decision, the *Lujan-Armendariz* court gave immigration effect to a *foreign* expungement of a first-time narcotics conviction. Dillingham v. INS, 267 F.3d 996 (9th Cir. 2001) (finding that a British expungement statute is analogous to relief under the First Offender Act, and is, therefore, subject to the *Lujan-Armendariz* exception to the BIA's new rule).

Lujan-Armendariz, long-time residents faced the possibility of being forced to leave their homes, possibly forever, because of a single criminal conviction. The stark contrast of outcomes for the respective non-citizens in the two cases is difficult to justify.

The court's new requirement of an explicit statutory provision for amelioration from a conviction is all the more puzzling when one considers that, even before the enactment of the First Offender Act, the BIA had generally given effect to expungement statutes except in a narrow (and subsequently superseded) area when the underlying offense involved a narcotics violation.[134] The court-fashioned requirement of a specific statutory exception is fundamentally unfair both because there is no federal expungement statute and because the First Offender Act is one of only two federal statutes with adult expungement provisions.[135]

3. The Refusal to Distinguish a Felony from a Misdemeanor—*Ramirez-Castro*'s ruling that the BIA need not treat expunged felonies differently from expunged misdemeanors[136] also disregards provisions in the Firearm Act that distinguish between misdemeanors and felonies[137] and require that a state expungement statute be taken into account.[138] Although that legislation did not directly apply in *Ramirez-Castro*, it is unfortunate that the court failed to explain why the same distinction between felony and misdemeanor convictions should not be controlling in a state firearms case.

California's expungement statute, which was at issue in *Ramirez-Castro*, has two parts. The first part deals generally with convictions[139] whereas the second applies only to misdemeanors.[140] The second part of the statute bears on the case because an expunged

134. *In re A F*, 8 I. & N. Dec. at 444–46 (finding express indications that Congress intended to nullify the deportation relief that expungement might have on deportability of narcotics offenders).

135. The other federal legislation addressing expungement of adult convictions is the Firearm Owners' Protection Act, 18 U.S.C. § 921. *See also* Diehm, *supra* note 21, at 80 n.26 (listing the two federal statutes that provide adult expungement provisions and observing that there is no all-encompassing federal expungement statute).

136. 287 F.3d at 1175.

137. 18 U.S.C. § 921(a)(20) (demonstrating that "crime punishable by imprisonment for a term exceeding one year does not include . . . any State offense classified by the laws of the State as a *misdemeanor* and punishable by a term of imprisonment of two years or less" (emphasis added) (internal quotations omitted)).

138. 18 U.S.C. § 921(a)(20) (stating that "[a] conviction which has been expunged . . . shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms").

139. CAL. PENAL CODE § 1203.4.

140. CAL. PENAL CODE ANN. § 1203.4a (West 2002).

misdemeanor conviction does not impair a convicted person's subsequent ability to own or possess a firearm.[141] Of course, merely because state laws treat expunged misdemeanors differently from expunged felonies, federal agencies need not do the same. But, California's statutory distinction is entirely compatible with specific portions of the IIRIRA and the Firearm Act. In fact, the IIRIRA utilizes the Firearm Act to supply the definition of "aggravated felony."[142] The IIRIRA also relies on the Firearm Act's listing of the types of firearm convictions that may determine removability.[143] Despite this reliance on the Firearm Act, the IIRIRA does not qualify the Act's provision for state-based expungement relief. Normally, a petitioner's expunged conviction, and the classification of his underlying offense as a misdemeanor, would relieve the petitioner from federal firearm disabilities.[144]

It is instructive, at this point, to step back and consider *Ramirez-Castro* in the larger picture of federal regulation of firearms. Although the Firearm Act would trust the petitioner to possess, transport, or sell a firearm despite conviction, *Ramirez-Castro* would insist on removal because of it. Surely Congress did not intend to make that kind of distinction, even if a distinction between citizens and non-citizens is appropriate in immigration law. Such a result would seem to run afoul of rules of statutory construction, that courts should either refer to prior related statutes - *in pari materia* - or, if the statutes are unrelated, to those provisions that apply to similar persons in order to facilitate a reasonable interpretation of congressional intent.[145] It is unfortunate that *Ramirez-Castro* does

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141. *Id.* § 1203.4a (applying expungement relief to misdemeanor convictions for which probation was not granted after the lapse of one year from the date of a judgment).

142. 8 U.S.C. § 1101(a)(43)(c) (defining aggravated firearm felony as an "illicit trafficking in firearms . . . as defined in [the Firearm Owners' Protection Act]").

143. 8 U.S.C. § 1227(a)(2)(c) (1996) (finding deportable, any non-citizen who is convicted "under any law" for selling, purchasing, owning, carrying, possessing or conspiring to do any of the preceding with regard to "a firearm or destructive device as defined in [the Firearm Owners' Protection Act]").

144. 18 U.S.C. § 921(a)(20) (stating that a *"conviction which has been expunged . . . shall not be considered a conviction for purposes of this chapter,* unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms" (emphasis added)); 18 U.S.C. § 922(g)(1) (allowing for the imposition of federal firearm disabilities on anyone "convicted in any court of, a crime punishable by imprisonment *for a term exceeding one year*" (emphasis added)); 18 U.S.C. § 921(a)(20)(B) (defining "crime punishable by imprisonment for a term exceeding one year *does not include—any state offense classified by the laws of the state as a misdemeanor* and punishable by a term of imprisonment of two years or less" (internal quotations omitted) (emphasis added)).

145. "Statutes are in pari materia when they are related to the same persons or things or to the same class of persons or things; therefore, if possible, they must be construed to-

not attempt to identify a policy basis for differentiating between the expungement-supportive provisions of the First Offender Act and the Firearm Act, on one hand, and, on the other hand, the controlling rationale, drawn from *Matter of Roldan*, for nullifying the immigration-related effect of a state's expungement of its own conviction of a non-citizen.[146]

4. *Discretionary Waivers and Expungement—Ramirez-Castro*, fueled by *Chevron*, compounded the BIA's questionable interpretation of the IIRIRA by minimizing the task of legislative construction. Several express provisions of the IIRIRA had already eliminated discretionary waiver relief to documented permanent residents facing removal,[147] thereby leaving a convicted non-citizen without a remedy or voice to oppose something as liberty-threatening as removal once he or she has been convicted of a crime.[148]

To avoid unfair and harsh results, however, the United States Supreme Court later ruled, in *I.N.S. v. St. Cyr*, that the IIRIRA's express restrictions on discretionary waivers could not be applied retroactively because there was no clear indication that Congress intended such a result.[149] In contrast to the *St. Cyr* decision, both

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gether as one statute." Patrice Wade, *Court: College Must Remit to State Employees' Retirement System*, 5 LAW. J. 2, 12 (June 13, 2003). *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (finding common purpose and similar language of two acts requires an identical interpretation); Overstreet v. No. Shore Corp., 318 U.S. 125, 131–32 (1943) (resolving ambiguities by using language in statutes that apply to similar persons as the statute in question). *See also* Aharon Barak, Foreword, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 76 (2002) ("An interpreter may derive the objective purpose of a statute not only from the statute itself, but also from closely related statutes addressing the same issue [in pari materia].").

146. Even though the IIRIRA is the more recent, and, arguably, the more general of the three statutes, where there is no clear congressional intention, a specific statute will not be nullified by a more general one. In addition, two or more statutes that are capable of coexistence should each be regarded as effective. *See* J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l., Inc., 534 U.S. 124, 138 (2001); Morton v. Mancari, 417 U.S. 535, 551 (1974).

147. Discretionary waivers had given a non-citizen an opportunity to challenge deportation before an administrative judge. Typically, family and community members were able to make appearances and even testify on behalf of the non-citizen so that the BIA would no longer seek deportation measures. The IIRIRA eliminated discretionary waivers for legal permanent residents convicted on or after April 1, 1997. 8 U.S.C. § 1229(b) (1996).

148. The harsh effect of the IIRIRA's proscription on the availability of discretionary waivers is highlighted by removal orders despite strong family attachments. *E.g.*, *In re* Salazar-Regino, 23 I. & N. Dec. 223, 223 (deciding to remove Estella Salazar-Regino, a lawful permanent resident for over 20 years, on the basis of her expunged marijuana conviction despite her familial attachment to the United States). Without expungement or discretionary waiver relief, immigration law disregards a non-citizen's linguistic, familial and communal attachments to this country; evidence of their rehabilitation; probation officers' recommendations; the seriousness of the crime; and the circumstances of its commission.

149. *St. Cyr*, 533 U.S. 289 (preserving discretionary waiver relief if the convicted legal permanent resident committed an offense prior to the IIRIRA's enactment). *See also*

the BIA's interpretation of the IIRIRA in *Matter of Roldan* and the Ninth Circuit's approval of it in *Ramirez-Castro* are unnecessarily harsh. In the language of *St. Cyr*, it is difficult to identify a "clearly expressed statement"[150] that Congress intended to give no effect to a state expunged conviction during a non-citizen's removal proceeding.

5. The Role of States and Legislated Qualifications to Expungement— *Ramirez-Castro* observed that California's expungement statute does not prevent a decision by the Department of Motor Vehicles to revoke or suspend a convicted person's driving privileges.[151] The court concluded that this qualification supported "[the BIA's reasonable conclusion] that a conviction expunged under that provision [similarly] remains a conviction for purposes of federal law."[152]

This conclusion is puzzling in that the mere existence of a qualification on the ameliorative effect of expungement elsewhere in California's statutes is of little relevance. What does a vehicle code have to do with immigration law? At the very least, the *Ramirez-Castro* court should have attempted to explicate this relationship. It would seem that the serious consequences of removal from the United States should be of much greater judicial concern than the relatively minor disabilities that may arise from a continuing record of conviction under the vehicle code.[153]

The special disabilities in the vehicle code make good sense because expungement may justifiably serve to restore a driver to pre-conviction status, as with an act of clemency, without recertifying, however, that he or she has become a skilled driver.[154] Nor should expungement foreclose the state from ascertaining an individual's

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Executive Office for Immigration Review, Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52,627 (Aug. 13, 2002) (proposing a new rule consistent with *St. Cyr* that allows legal permanent residents to file for relief if pertinent crimes were committed prior to 1997).

150. *St. Cyr*, 533 U.S. at 314.

151. *Ramirez-Castro*, 287 F.3d at 1175. *See also* CAL. VEH. CODE § 13555 (West 2002).

152. *Ramirez-Castro*, 287 F.3d at 1175.

153. *Id.* (indicating that some state expungement statutes might preempt a federal removal statute that expressly invalidated the effect of state statutes. "Assuming that some state expungement statutes could eliminate completely the immigration consequences of a state conviction, [California's] is not such a statute."). *But see id.* at n.6 (citing *Murillo-Espinoza*, 261 F.3d at 774, as support for the contradictory proposition "that Congress intended to establish a uniform federal rule that precluded the recognition of subsequent state rehabilitative expungements of convictions").

154. As the court properly notes, an expungement "does not affect any revocation or suspension of [driving privileges]." CAL. VEH. CODE § 13555 (West 2002).

ability to pay for any damages lingering after a conviction.[155] Vehicular disabilities also respond to "the desirability of private automobile insurance as well as state supervision of an activity engaged in by a substantial population."[156] Moreover, unlike removal from the country, the vehicle code's limitation on the effect of expungement is not apt to be permanent and is usually discretionary, depending on the seriousness of the vehicular offense.[157] Because the vehicle code as a whole is geared toward encouraging safety, suspensions from driving may be lifted after a driver meets certain rehabilitative terms.[158] *Ramirez-Castro* fails to demonstrate why temporary, justifiable disabilities under a state vehicle code can buttress permanent removal under federal immigration law. The court's logic is very unclear.

In addition, *Ramirez-Castro* offers no explanation why it paid so little deference to the authority of the convicting state to cleanse a convicted person's record for all purposes, if it so chooses. States are not only burdened with a major portion of the cost of law enforcement and prosecution but also the consequences of a non-citizen's removal from school, place of employment, and family.[159] Clearly, a state sentencing court is apt to be familiar with each particular case, individual, and circumstance.[160] States should therefore be presumed to have authority to determine the effect of expungement in their own schemes of criminal justice, even when a federal process—removal of a non-citizen—is at issue.

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155. CAL. VEH. CODE § 13361 (West 2002) ("[I]n any case under this section the department [of motor vehicles] is authorized to require proof of ability to respond in damages as defined in § 16430.").

156. Pettler & Hilmen, *supra* note 13, at 128.

157. CAL. VEH. CODE § 13361 (using discretionary language—"[t]he department may suspend the privilege of any person to operate a motor vehicle"). *See also* CAL. VEH. CODE § 13556 (outlining that the duration of suspension unless specified otherwise shall not exceed 12 months and a discretionary suspension "may be ended at the election of the department"). *See* Ellis v. D.M.V., 125 P.2d 521, 522 (Cal. App. 1942) (illustrating that a suspension is not permanent and that proof of ability to respond in damages can enable the reinstatement of a suspended license).

158. CAL. VEH. CODE § 13556.

159. Bleuzé, *supra* note 96, at 841–47 (finding that the BIA's new rule increases the costs borne by the states, which must arrest, prosecute, and incarcerate convicted non-citizens, accommodate non-citizens who may utilize every procedural safeguard to avoid removal, account for families crippled by the removal of a contributing member, and account for jobs left open by a removed non-citizen or the family, which might well follow him or her to the destination of removal).

160. *Id.* at 846 (arguing that the INA relies on state statutes to define removable crimes and Congress has increasingly "[delegated] authority to the states in immigration-related matters, including direct enforcement of immigration law").

The federal government is unquestionably entrusted with the authority to deny admission to dangerous or habitual criminal persons and to remove them if necessary. Similarly, citizens have vested states with powers to impose constraints on ex-convicts even after they have fulfilled the terms of their sentences. For instance, many states have enacted Megan's Law statutes,[161] which record and furnish information on the residence of convicted and released sex-offenders. As with a non-citizen facing removal despite an expunged conviction, a paroled or rehabilitated sex-offender is still subject to disabilities ranging from abrogation of the offender's privacy to public ostracism, despite the time that he or she has served. Indeed, Megan's Law statutes encourage a level of public ostracism and intrusiveness that expungement statutes sought to avoid by striking a balance between the public's safety and a convicted person's right to earn a living and maintain privacy.[162]

The consequences of Megan's Law statutes are simply not comparable to removal of non-citizens. Sex offender statutes, which are part of the criminal justice system, have limits beyond which courts will not recognize or apply disabilities.[163] Moreover, the restraints they impose on the liberty of a rehabilitated sex offender do not normally affect employment or mobility.[164] The consequences of removal, however, are far more drastic. In addition, Megan's Law statutes normally apply only to convictions

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161. These statutes are a direct consequence of the abduction and murder of Megan Kanka, a 7-year-old New Jersey native, by Jesse Timmendequas, a 36-year-old who was twice convicted for child molestation. *See* William Glaberson, *Killer in 'Megan' Case Is Sentenced to Death*, N.Y. TIMES, June 21, 1997, at A1 ("Jesse K. Timmendequas, whose rape and murder of a 7-year-old neighbor girl provoked the passage of 'Megan's Laws' to protect children from sex offenders, was sentenced to death today by a New Jersey jury."). *See also* WASH. REV. CODE ANN. § 4.24.550 (West 2002), *amended by* 2003 Wash. Legis. Serv. Ch. 217, H.B. 5410 (West) (authorizing public agencies to release information about sex or kidnapping offenders "when the agency determines that disclosure of the information is relevant and necessary to protect the public and counteract the danger created by the particular offender"). The United States Supreme Court recently upheld the constitutionality of Connecticut's and Alaska's "Megan's Law" sex offender registry statutes. Connecticut Dep't of Pub. Safety v. Doe, 123 S. Ct. 1160 (2003); Smith v. Doe, 123 S. Ct. 1140 (2003).

162. Franklin & Johnsen, *supra* note 7, at 736–38; Snow, *supra* note 90, at 4–20.

163. *Smith v. Doe*, 123 S. Ct. at 1149-52 (subjecting Alaska's "Megan's Law" statute to *ex post facto* analysis and making sure that the statute does not impose any lingering physical or employment restraints before ruling on the statute's constitutionality). *See also* WASH. REV. CODE ANN. § 4.24.550 (authorizing the release of a criminal record only if "disclosure of the information is relevant and necessary to protect the public and counteract the danger created by the particular offender").

164. *Smith v. Doe*, 123 S. Ct. at 1151 (observing that "[Alaska's statute] imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint" (citing Hudson v. United States., 522 U.S. 93, 104 (1997)).

based on serious criminal conduct that would preclude expungement in any event. Removal, on the other hand, can be premised on a record of misdemeanor and minor felony convictions.

Ultimately, *Ramirez-Castro* seems to interpret California's statutory scheme as weakening rather than bolstering the effect of expungement. To the contrary, had the *Ramirez-Castro* court examined California's Business and Professions Code and that state's Evidence Code, it would have found that California legislators and courts have sought to *bolster* the effect of an expungement.[165] For example, courts have upheld provisions in California's Evidence Code that allow collateral attacks on a witness's credibility predicated upon a *felony* conviction, but only if the conviction has not been expunged under § 1203.4.[166] Courts have also determined that the effect of an expungement is abrogated for purposes of denying or revoking a business license only "where a high degree of professional skill and fidelity to the public are required on the part of the licensee."[167] Nevertheless, "[once an] affirmative showing of rehabilitation [is] made by the applicant . . . he may be restored to his former position as a licensee."[168] Moreover, the Business and Professions Code generally qualifies expungement only in the instance of felony convictions.[169] This limitation, and the bolstering effect of the two statutes on California's expungement statute, further weakens any skepticism that the *Ramirez-Castro* decision may have had about a distinction, presumably under California law, between misdemeanor and felony convictions.[170]

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165. CAL. EVID. CODE § 788(c) (West 2002) ("For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a *felony unless*: . . . [t]he accusatory pleading against the witness has been dismissed under [§]1203.4. . . ." (emphasis added)); CAL. BUS. & PROF. CODE § 493 (West 2002) (authorizing the suspension or revocation of business licenses only if the "licensee has been convicted of a crime *substantially* related to the qualifications, functions, and duties of the license in question" (emphasis added)).

166. Able Cycle Engines, Inc. v. Allstate Ins. Co., 84 A.D.2d 140, 146–47 (N.Y. App. Div. 1981) (resolving the conflict between a New York expungement statute that permits collateral attack of a witness's credibility and California's § 1203.4 that does not).

167. Ready v. Grady, 243 Cal. App. 2d 113, 116–17 (1st Dist. 1966).

168. *Id.*

169. CAL. BUS. & PROF. CODE § 6102(a) (listing grounds for an attorney's disbarment: "[u]pon the receipt of the certified copy of the record of conviction, if it appears therefrom that the crime of which the attorney was convicted . . . is a felony under the laws of California, the United States, or any state or territory thereof, the Supreme Court shall suspend the attorney until the time for appeal has elapsed").

170. *Ramirez-Castro*, 287 F.3d at 1175. *See supra* notes 153 and 157 and accompanying text.

V. COMPARATIVE INSIGHTS

Although the United States Supreme Court has stated that Congress's "[immigration] power to admit or exclude aliens is a sovereign prerogative,"[171] the Court has cautioned that plenary powers, rooted in the elusive concept of sovereignty, are nevertheless "subject to important constitutional limitations [and] considerations of *public policy and justice which control, more or less, the conduct of all civilized nations.*"[172] The Court's reference to "all civilized nations" to guide interpretations of immigration policy invites inquiry into the international customary law or general practice concerning the effect of expungement on removability of non-citizens.

The immigration laws of other developed nations do not base deportation solely on the commission of a crime but, instead, take account of rehabilitative provisions of their positive law, often premised in international human rights instruments. Canadian immigration law, for example, bars removal orders predicated upon a conviction for which a pardon is granted under that country's Criminal Records Act.[173] Although Canadian law does not use the term "expungement," the Criminal Records Act's pardon procedure appears to bear on a non-citizen's conviction in the same way as state expungement statutes in the United States. The Act includes various qualifications on a pardon that Canadian courts have refused to extend in immigration proceedings.[174]

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171. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953).

172. *Zadvydas*, 533 U.S. at 695 (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889) (emphasis added)). *See also* James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L. L. 804, 819 (1983) ("Sovereignty cannot be either the basis or the source of the law of nations. Rather, the term refers simply to the institutionalized independence of states, subject to international law. Beyond that, the concept, as applied to issues of migration, is undefined and undefinable." (internal quotations omitted)).

173. Criminal Records Act, R.S.C. 1985, ch. C-47, § .5 (2002) (Can.) (stating that a pardon, which is granted by the parole board, removes any disqualifications arising by reason of a conviction). *See also* Smith v. Canada, [1998] 152 F.C. 242 (concluding that Canada's immigration policy does not allow further disadvantage "that arises from a pardoned conviction" despite the court's acknowledgement that the ameliorative provisions of the statute do not treat the person as if his or her conviction had never existed).

174. Canadian courts have addressed the same issues regarding qualifications of expungement as in United States jurisprudence. *E.g.*, *Smith v. Canada*, 152 F.C. at ¶¶ 29–31 (finding that pardons have a few exceptions or qualifications in Canada's criminal code but none that would support a deportation order). *Ramirez-Castro*, 287 F.3d at 1175, by contrast, found that vehicle code qualifications in California's expungement statute supported the

The United Kingdom also has a federal comprehensive rehabilitative act that provides for expungement of convictions once a person has met certain conditions. Under the Rehabilitation of Offenders Act of 1974,[175] a conviction is said to be "spent"[176] rather than "expunged," thereby removing disabilities "for all purposes on law."[177] The U.K. and other European states also protect convicted non-citizens under Article 8 of the European Convention on Human Rights (ECHR), which establishes a "[r]ight to respect for his private and family life."[178]

Nasri v. France,[179] a decision by the European Court of Human Rights, is particularly instructive on the current disparities between U.S. and European immigration law.[180] In *Nasri*, the French Ministry of the Interior had attempted to deport a deaf and mute Algerian national on the basis of convictions for theft, theft with violence, assaulting a public official, receipt of stolen goods, and gang rape.[181] The Court ruled, however, that a deportation to Algeria would violate Article 8 of the ECHR and otherwise would not

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BIA's reasonable conclusion "that a conviction expunged under [§ 1203.4] remains a conviction for purposes of federal law."

175. Rehabilitation of Offenders Act, 1974, c.53 (Eng.).

176. *See* Police Act, 1997, c.50, part V § 112(3)(b) (Eng.).

177. *Dillingham*, 267 F.3d 996, 1001 (9th Cir. 2001) (summarizing the British expungement statute).

178. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221 (stating that "[e]*veryone has the right to respect for his private and family life*, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and *is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*" (emphasis added)).

179. Nasri v. France, 21 Eur. Ct. H.R. 458 (1995).

180. *See also* Boujlifa v. France, 30 Eur. Ct. H.R. 419, 430–33 (2000) (recognizing the need for "a fair balance" between the goals served by a removal order and "the seriousness of the interference with the applicant's right to respect for his private and family life"); *id.* at 434 (finding that the seriousness of an offense, any indication of recidivism, and severity of sentences against the alien "are crucial factors in assessing the proportionality of the removal order to the aim pursued"). *See also* Djeroud v. France, 14 Eur. Ct. H.R. 68, 78 (1992) ("[I]n the opinion [of the former European Commission of Human Rights] a State must take into account the consequences which may flow from the removal of an alien from his place of residence. This is all the more necessary when the person concerned does not speak the language of his country of origin and has no family or other social links with that country."); Regina v. Sterling, [2002] Crim. App. R. 1181, 2002 WL 1039575 (C.A. Eng.) (finding that Article 8 corresponds to existing British immigration laws, which require courts to execute removal orders only after "full inquiry into all the circumstances [and the effect] upon others who are not before the court and who are innocent persons. This court and all other courts would have no wish to break up families or impose hardship on innocent people.").

181. *Nasri*, (1996) 21 Euro. Ct. H.R., at 460–61.

be proportionate to the legitimate aim of maintaining public order.[182]

After considering the applicant's schooling, the Court concluded that he had no skills of literacy or signing.[183] The court also compared psychiatric reports that described Mr. Nasri as non-dangerous with police reports that claimed "he inspires terror in many inhabitants of [the city] ... and takes advantage of his handicap and of the favorable provisions of the administrative and justice systems. He is a real danger to public order."[184] Conceding that it is left to the member states "to maintain public order" consistent with their immigration policies, the Court nevertheless found that deportation must be necessary or "justified by a pressing social need."[185] In the applicant's case, the court emphasized that the most serious crime, gang rape, had been committed ten years earlier and that the applicant had little or no family or other social links in Algeria.[186] The court concluded that "only in exceptional circumstances may the deportation of an alien in cases where he has no family or other social links with the country to which he is sent be regarded as proportionate to the aim pursued by the government."[187]

This brief look at the ECHR's governance of deportation issues in Europe suggests the possibility of a broader framework under the International Covenant on Civil and Political Rights (ICCPR).[188] Although the ICCPR does not address specific issues of deportation[,] or relief from it, the instrument does provide minimum standards to protect deportable non-citizens. For example, non-citizens facing deportation are entitled to argue against their expulsion, and states are barred from arbitrary interference with a non-citizen's family or home. The ICCPR also ensures the protection of the family, as the fundamental unit of society.[189] The

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182. *Id.* at 458.

183. *Id.* at 466.

184. *Id.* at 462–65.

185. *Id.* at 470.

186. *Id.*

187. *Id.*

188. *See also* Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia's Internal Security Act,* 26 FORDHAM INT'L L.J. 1345, 1373 n.95 (2003) (illustrating that the ECHR conforms to the ICCPR); *Accord,* Mohamed M. El Zeidy, *The ECHR and States of Emergency: Article 15—A Domestic Power of Derogation From Human Rights Obligations,* 4 SAN DIEGO INT'L L.J. 277, 279 (2003).

189. International Covenant on Civil and Political Rights, art. 13, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force 1976). The United States ratified the ICCPR on June 8, 1992. Article 13 of the ICCPR states that "an alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision

latter provision in particular argues against removal of a family member based solely on a conviction when that conviction has been expunged.[190]

These comparative insights call into question *Matter of Roldan*'s refusal to offset the effect of an expunged criminal record with an equitable consideration of a non-citizen's tenure as a U.S. resident, his or her familial ties in the U.S., or any cultural or linguistic difficulties associated with a removal order. Centuries ago, before the evolution of modern civil liberty protections, Lord Coke commented, "peona mori potest, culpa perennis erit"[191]—although punishment can terminate, guilt endures forever. The BIA's new rule goes much further by practically ensuring that not only guilt but punishment will endure forever.

CONCLUSION

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) defined the term "conviction" as a basis for removal of a non-citizen. The salient purpose of the new definition was to substitute a uniform federal standard for a myriad of state definitions. Congress did not, however, address the issue of what effect should be given to an expungement or amelioration of a conviction under either state or federal law. Then, three years later in *Matter of Roldan*, the Board of Immigration Appeals surprisingly construed the IIRIRA to render expungement irrelevant, reversing

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reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." *Id.* at art. 13. Under article 17, "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." *Id.* at art. 17. The ICCPR also states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *Id.* at art. 23.

190. *See* Nancy Morawitz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Reforms*, 113 HARV. L. REV. 1936, 1950–52 (2000) (illustrating the dire implications of immigration laws that require mandatory deportation: "[families] may have built a business in the United States or may be unable to begin a new career in a new country," once the breadwinner or patriarch is deported. "Even if they are able to leave and immigrate to the native country of the deported family member, they would in effect experience deportation as well—they would be removed from the country that they consider their home and sent to another country to which they may have only attenuated connections or no connections at all.").

191. Portnoy, *supra* note 12, at 306 (quoting Brown v. Crashaw, 80 Eng. Rep. 1028 (K.B. 1614)).

a half-century of precedent. Several judicial decisions have since ratified this aberrant decision, primarily on the basis of the *Chevron* doctrine, instructing courts to defer substantially to an administrative agency's interpretation of a statute such as the IIRIRA.

A blanket refusal in removal proceedings to give effect to an expungement of a non-citizen's conviction, unless a federal statute specifically provides for it, is unsound. The ruling in *Matter of Roldan,* which has now been unfortunately (and erroneously) sheltered from judicial scrutiny by the *Chevron* doctrine, should be abandoned. But that may be easier said than done. Although the drafting of federal expungement legislation to overturn *Matter of Roldan* might appear simple, it "is a labyrinth of complex legal issues and difficult value judgments."[192] Alternatively, Congress could provide for grants of discretionary waivers of removal to any non-citizen whose offense has been expunged under either state or federal law.[193] In doing so, Congress would be following its course in the Firearm Owners' Protection Act.[194]

In the absence of new legislation to overturn *Matter of Roldan,* the BIA and the federal courts should take it upon themselves to restore the long-standing rule that a state's expungement of its own criminal conviction should, with limited exceptions,[195] provide relief from removal. No compelling statutory or policy basis supports the aberrant rule in *Matter of Roldan.* Nor is an uncritical judicial deference to the BIA decision, as in the *Murrillo-Espinoza* and *Ramirez-Castro* decisions, persuasive. Even if reasonable minds may differ on the wisdom of the new anti-expungement rule, the *Chevron* doctrine does not require judicial acceptance of it. Federal agencies and courts should be careful to protect the civil liberties of non-citizens, even in the face of terrorism and abuse of the precious privilege of immigration itself.

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192. Diehm, *supra* note 21, at 101.

193. *See* Restoration of Fairness in Immigration Act, H.R. 3894, 107th Cong. § 201(d)(i) (2002) (giving the United States Attorney General discretion to waive any conviction that has not resulted in incarceration for more than one year).

194. *See id.* at § 201(e)(1) (recommending that the IIRIRA's definition of a conviction expressly exclude one that has been "expunged, deferred, annulled, invalidated, [or] withheld").

195. Such exceptions can include limitations on the number of times expungement may be utilized and the magnitude of eligible offenses.