PRACTICE ADVISORY:

New York Marihuana Decriminalization, Vacatur, and Expungement Legislation

August 28, 2019

Introduction

On July 29, 2019 New York Governor Andrew Cuomo signed into law two bills (S6579-A/A8420-A and S6614/A8432)[1] that decriminalize marihuana possession and provide relief to New Yorkers with some prior marihuana convictions. The new law goes into effect on August 28, 2019. The law changes the way marihuana possession is punished under NYPL §§ 221.05 and 221.10. The maximum fine imposed under NYPL § 221.05 is reduced from $100 to $50. In addition, the enhanced fine and possible jail time for those convicted of a prior Article 220 or 221 offense are eliminated. NYPL § 221.10 is reduced from a B misdemeanor to a violation. The specific prohibitions against possession of marihuana burning or open to public view are eliminated. It covers possession of more than one ounce of marihuana and is punishable only by a fine of up to $200.

The law includes an expungement provision, for both past and future convictions. This provision provides that convictions for NYPL §§ 221.05 and 221.10 shall on the effective date of this provision (August 28, 2019) be vacated and dismissed and the matter shall be considered terminated and deemed a nullity, having been rendered "legally invalid," and entitling the defendant to seek destruction of any records of the conviction.[2] NYCPL § 160.50(5), as added by Senate Bill S6579A § 7.

Lastly, the law includes a vacatur provision. This provision provides that convictions obtained prior to August 28, 2019 for NYPL §§ 221.05 and 221.10 may be vacated with a presumption that a conviction by plea was not knowing, voluntary, and intelligent if it has severe or ongoing consequences, including immigration consequences, and with a presumption that a conviction by verdict constitutes cruel and unusual punishment under the State constitution based on those consequences[3]. NYCPL § 440.10(1)(k), as added by Senate Bill S6579A § 3 and amended by Senate Bill S6614 § 1. The legislation further provides that, upon the granting of a motion under NYCPL § 440.10(1)(k), the court must vacate the judgment and dismiss the accusatory instrument. *See* NYCPL § 440.10(6), as amended by Senate Bill S6579A, § 4.

---

[1] IDP has a copy of the final bill text available here: www.immdefense.org/Final-Statute-Text-2019-MJ-Decrim

[2] In addition, certain Article 220 controlled substance or NYPL § 240.36 violations from before July 29, 1977 may be expunged if the sole controlled substance involved was marihuana.

[3] In addition, certain Article 220 controlled substance or NYPL § 240.36 violations from before July 29, 1977 may be similarly vacated if the sole controlled substance involved was marihuana.

This advisory covers: (1) how this law affects criminal grounds of inadmissibility, deportability, and drug trafficking aggravated felony; (2) how this law affects eligibility for Deferred Action for Childhood Arrivals (DACA); (3) how to use the new vacatur provision to alleviate immigration consequences; and (4) arguments that some legislative actions to expunge and vacate convictions are valid vacaturs under immigration law.

I. Effects on Criminal Grounds of Inadmissibility, Deportability, and Drug Trafficking Aggravated Felony

Significance of Changes to NYPL § 221.05 on Inadmissibility, Deportability, and Aggravated Felony Grounds

Despite the changes, NYPL § 221.05 remains a conviction that triggers the controlled substance offense ground of inadmissibility or deportability. A conviction of NYPL § 221.05 was and remains a controlled substance offense that makes a non-U.S. citizen inadmissible. *See* INA § 212(a)(2)(A)(i)(II).

A conviction of NYPL § 221.05 may also trigger the controlled substance offense ground of deportability under INA § 237(a)(2)(B)(i). However, to trigger deportability, the government must prove that the conviction does not fall within the exception for individuals convicted of a single, simple possession offense involving less than 30 grams of marihuana. *Id*. A conviction of NYPL § 221.05 will therefore only trigger deportability for individuals who are convicted or will be convicted of a separate offense involving possession of marihuana, or if the record of conviction establishes possession of more than 30 grams of marihuana. *See Matter of Davey*, 26 I&N Dec. 37 (BIA 2012) (calling for a circumstance-specific inquiry into determining whether marihuana possession conviction involved "possession for one's own use of thirty grams or less of mariuana").

The changes to NYPL § 221.05 do eliminate the recidivist provision of § 221.05, eliminating the risk that this conviction could be considered a drug trafficking aggravated felony under INA § 101(a)(43)(B). Previously, the recidivist provision enhanced the possible penalties for individuals convicted of a marihuana or other drug offense within the preceding three years. This provision created the risk that DHS would charge convictions of NYPL § 221.05 as drug trafficking aggravated felonies if the record of conviction established an admission or a finding of a prior marihuana or other controlled substance conviction. *See Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010).

Significance of Changes to NYPL § 221.10 on Inadmissibility and Deportability

Despite the changes, NYPL § 221.10 remains an offense that triggers the controlled substance offense ground of inadmissibility or deportability. A conviction of NYPL § 221.10 was and remains a controlled substance offense that triggers inadmissibility. *See* INA § 212(a)(2)(A)(i)(II). As described above, a conviction under NYPL § 221.10 only triggers the controlled substance offense ground of deportability under INA § 237(a)(2)(B)(i) if the record of conviction establishes that the offense does not fall within the exception for a single, simple possession offense involving more than 30 grams of marihuana. *See Matter of Davey*, 26 I&N Dec. 37 (BIA 2012) (calling for a circumstance-specific inquiry into determining whether

marihuana possession conviction involved "possession for one's own use of thirty grams or less of marijuana").[4]

II. Effects on Deferred Action for Childhood Arrivals (DACA)

Deferred Action for Childhood Arrivals (DACA) is a program instituted by the Obama administration in 2012 that provides two years of prosecutorial discretion (with an accompanying work authorization) to certain individuals who came to the United States as children and meet other criteria. There is ongoing litigation challenging the Trump administration's attempted rescission of DACA. As a result of several injunctions, currently, those who have been granted DACA before can apply to renew, while those who were have never been granted DACA can no longer apply.

Relevant to convictions of NYPL §§ 221.05 and 221.10, individuals are barred from DACA benefits if they have been convicted of one "significant misdemeanor" or three "non-significant misdemeanors." DHS DACA FAQs, available at: https://www.uscis.gov/archive/frequently-asked-questions. A "misdemeanor" is an offense punishable by between six days and one year in jail. *Id*. Significant misdemeanors include convictions "for which the individual was sentenced to time in custody of more than 90 days" and drug distribution or trafficking convictions. *Id*.

Prior to the change in law, NYPL § 221.05 convictions should not have been considered "misdemeanors" because NYPL § 221.05 was not punishable by jail time unless there was a finding of a prior marihuana or other controlled substance conviction that subjected the individual to a potential jail sentence of up to 15 days. If there was such a finding, USCIS could have considered it a non-significant misdemeanor or a drug distribution or trafficking significant misdemeanor. Convictions for NYPL § 221.10 were non-significant misdemeanors unless the sentence imposed was over 90 days,[5] in which case USCIS would have considered it a significant misdemeanor.

However, U.S. Citizenship and Immigration Services (USCIS) specifically addresses expunged convictions: "Expunged convictions . . . will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted." DHS DACA FAQs, available at: https://www.uscis.gov/archive/frequently-asked-questions. Because NYPL § 221.05 and NYPL § 221.10 convictions are expunged by operation of law, they should not be considered either non-significant misdemeanors or significant misdemeanors that can bar and individual from receiving DACA benefits. However, USCIS can still consider expunged convictions in discretion. Since there may be a delay in court records reflecting the expungement, practitioners can consider including a highlighted copy of the law as an exhibit and a cover letter that explains the new expungement provision.

---

[4] Note that though the minimum amount of marihuana necessary to trigger this charge changed from 25 grams to 1 ounce (28.35 grams), since the amount is still under 30 grams, the exception may apply.

[5] Prior to the change in law, NYPL § 221.10 was a class B misdemeanor carrying a maximum jail sentence of "three months." Because some three-month periods include more than 90 days, it is possible that a class B misdemeanor conviction with a sentence to the maximum jail time would qualify as a "significant misdemeanor" for purposes of DACA adjudication.

In addition, convictions for NYPL § 221.05 and NYPL § 221.10 obtained on or after August 28, 2019 are only punishable by a fine and not a jail sentence. As a result, neither are "misdemeanors" under the definition used in DACA adjudications. Clients with convictions after the law's effective date technically need not disclose them in their DACA applications, which only inquire about felony and misdemeanor charges. However, an applicant can choose to disclose them with an explanation that they are not "misdemeanors" under USCIS's definition to try to avoid a delay in adjudication or a wrongful denial.

III. Using the Vacatur Provision[6]

The new vacatur provision provides that certain marihuana convictions prior to the August 28, 2019 effective date may be vacated with a presumption that a conviction by plea was not knowing, voluntary, and intelligent if it has severe or ongoing consequences, including immigration consequences, and with a presumption that a conviction by verdict constitutes cruel and unusual punishment under the State constitution based on those consequences. NYCPL § 440.10(1)(k), as added by Senate Bill S6579A § 3 and amended by Senate Bill S6614 § 1.[7] The legislation further provides that, upon the granting of a motion under NYCPL § 440.10(1)(k), the court must vacate the judgment and dismiss the accusatory instrument. *See* NYCPL § 440.10(6), as amended by Senate Bill S6579A, § 4. The convictions which can be vacated using this provision include NYPL §§ 221.05 and 221.10.[8]

Section 440.10 of the New York Criminal Procedure Law is the mechanism by which an individual can seek to vacate a legally defective conviction in New York. In *Matter of Rodriguez-Ruiz,* the Board held vacaturs under NYCPL § 440.10 are effective for immigration purposes because vacated judgments are not convictions under INA § 101(a)(48)(A). *Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *see also Matter of Pickering*, 23 I&N Dec. 621, 622–23 (BIA 2003) (reaffirming the effectiveness of NYCPL § 440.10 vacaturs).

Vacatur under new NYCPL § 440.10(1)(k) should be recognized as a substantive vacatur, and overcome any hurdles raised by federal immigration authorities regarding the immigration impact of expungement. *See* NYCPL § 440.10(1)(k), as added by Senate Bill S6579A, § 3, as amended by Senate Bill S6614, § 1. The new subdivision NYCPL § 440.10(1)(k) creates a rebuttable presumption that a conviction by plea to a marihuana conviction under either NYPL §§ 221.05 or 221.10 before August 28, 2018, or a NYPL § 220 violation before July 27, 1977 that only involved marihuana, "the court shall presume that a conviction by plea for the aforementioned offenses was not knowing, voluntary, and intelligent if it has severe or ongoing consequences, including but not limited to potential or actual immigration consequences."

This required presumption reflects the reality that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on

---

[6] Because there are significant substantive similarities between the structures of and strategies for using NYCPL§ 440.10(1)(j) and NYCPL§ 440.10(1)(k), this section borrows heavily from the "One Day to Protect New Yorkers" Legislation Practice Advisory authored by Peter Markowitz, Professor of Law at the Benjamin N. Cardozo School of Law, where he directs the Kathryn O. Greenberg Immigration Justice Clinic, which discusses NYCPL§ 440.10(1)(j).

[7] See "Model CPL § 440 Motion to Vacate Judgement Using the Rebuttable Presumptions in § 440.10(1)(k)", available at: www.immdefense.org/model-440-101k-motion.

[8] Convictions for certain Article 220 controlled substance or NYPL § 240.36 violations from before July 29, 1977 may be vacated expunged if the sole controlled substance involved was marihuana.

noncitizen defendants who plead guilty to specified crimes" and that most noncitizens would not knowingly, voluntarily and intelligently subject themselves to automatic inadmissibility and likely deportation by plea to a violation or B misdemeanor. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). Because the defendant must establish the existence of "ongoing collateral consequences," which is evidence outside the record, a collateral appeal is the proper procedural mechanism. *See People v. Gravino*, 14 N.Y.3d 546, 558 (2010) (stating "matters not apparent from the face of the record… are therefore properly fleshed out by affidavit in support of a CPL 440.10 motion rather than raised on direct appeal"); NYCPL § 440.10(2)(b). This section further provides that courts "shall presume that a conviction by verdict for the aforementioned offenses constitutes cruel and unusual punishment under section five of article one of the state constitution, based on those consequences." NYCPL § 440.10(1)(k).

As a general matter, immigration courts are not required to, and will often decline to, continue removal proceedings to allow an individual to pursue post-conviction relief in state court. *Matter of L-A-B-R-*, 27 I&N Dec. 405, 417 (A.G. 2018) (stating "an alien's pending collateral attack on a criminal conviction is too 'tentative' and 'speculative' to support a continuance of removal proceedings.").[9] Accordingly, practitioners are advised to move swiftly in considering and, where appropriate, pursuing motions under § 440.10. In addition, movants under § 440.10 bear the burden of proof, NYCPL § 440.30(6), and at times it has been challenging to satisfy that burden particularly where, inter alia, convictions are old or where the only proof of the asserted violation is your client's own recollection. *See* NYCPL § 440.30(4)(d) (the court may deny a motion without a hearing if "[a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true."); *People v Chu-Joi*, 26 NY3d 1105, 1107 (2015) (a court does not have to credit evidence "that was self-serving and uncorroborated.").[10]

Accordingly, the statutory presumptions in § 440.10(1)(k) provide very promising opportunities for individuals who fall within its purview to overcome this burden. Practitioners pursuing relief under § 440.10 should think carefully about the strategic choices presented as to what claims to assert, as individuals generally are only entitled to a single motion under this section. *See generally,* NYCPL § 440.10(3)(c) (permitting denial of motion if "[u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so."). In particular, the issue of whether to assert an ineffective assistance of counsel claim should be carefully weighed since: on

[9] The Attorney General misstates the relevant holdings of the circuit opinions cited in *L-A-B-R-*. In the cases cited, courts did not hold that "a" collateral attack is too speculative, but rather that *the* collateral attacks specific to those cases were speculative. In one, the court found that "the record (specifically the plea agreement) belie[d] any claim of ineffective assistance" forming the basis of the post-conviction motion. *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1298 (10th Cir. 2011). In another, the court noted that "the IJ quoted the portion of the guilty plea transcript where [the respondent] admit[ted] to the judge that he waived any claim to ineffective assistance of counsel." *Palma-Martinez v. Lynch*, 785 F.3d 1147, 1150-1151 (7th Cir. 2015). Both cases evaluated the specific merits of the post-conviction motion at issue in finding relief was too "speculative," and not that all post-conviction motions are too speculative. The Second Circuit has not issued a decision on this precise question.

[10] Courts may forget to apply the second requirement, that there be "no reasonable possibility that such allegation is true," which can be remedied only via successful appeal. *See*, *e.g.*, *People v. Reynoso*, 88 A.D. 3d 1162, 1164 (3d Dept. 2011). When filing a motion, the best practice is to anticipate denial on this basis and address it in advance.

the one hand, the law is clear and favorable regarding failure to present immigration advice, *Padilla*, 559 U.S. 356 (2010), *but cf*. *People v. Baret*, 23 N.Y.3d 777 (2014) (holding that Padilla is not retroactive), and thus it has been a fruitful claim in many such motions; but, on the other hand, the statutory presumption does not operate on that claim and asserting ineffective assistance may impact the scope of attorney client privilege and invite the testimony of prior defense counsel as necessary to address the ineffectiveness claim. *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) (en banc) (finding an implicit waiver of attorney-client privilege only as to confidential information relevant to the specific ineffective assistance claims).

In addition, practitioners should carefully consider whether and what evidence to put forward in support of the motion or whether to rest exclusively or primarily on the statutory presumption. *See generally*, NYCPL § 440.30(1)(a) ("If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons." (emphasis added)); NYCPL § 440.30(4)(b) ("The court may deny [the motion] without conducting a hearing if . . . [t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one"). Practitioners should also consult additional resources on general considerations related to motions under NYCPL § 440.10.[11] As always, it is advantageous to have the prosecution support any such motion. But the new marihuana vacatur statute differs from the One Day for New Yorkers vacatur statute, § 440.10(1)(j), which has a limited remedy without the consent of the District Attorney: the court may only "[v]acate the judgment and order a new trial wherein the defendant enters a plea to the same offense." NYCPL § 440.10(9)(b). For § 440.10(1)(k) motions, the court must "must vacate the judgment and dismiss the accusatory instrument" for motions pursuant to NYCPL § 440.10(6). Prosecutors may view dismissal differently than repleading to the same offense with a lower possible sentence.

In terms of structuring the vacatur order itself, at minimum the order should reflect that the conviction was vacated pursuant to CPL § 440.10 in order to rely on the holding in *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), and to provide the proper statutory basis for the court's order. If filing a motion to reopen, the BIA places the burden of proof on respondents to establish the basis for thevacatur. *Matter of Chavez*, 24 I&N Dec. 272, 274 (BIA 2007) (finding "the burden of proving why the conviction was vacated is appropriately placed on the respondent as the party seeking reopening."). In that circumstance, it is more important that the vacatur order state the legal basis and statute or constitutional provision that was violated; if based on one of the presumptions, it could state "because the plea was not knowing, voluntary, and intelligent" or "constituted cruel and unusual punishment."[12] Consistent with the language from *Rodriguez-Ruiz*, the order can also state that the conviction "is in all respects vacated, on the legal merits." *Id*. at 1379.

---

[11] Immigrant Defense Project, *Post-Padilla Post-Conviction Relief in New York State Courts* (available at: https://immigrantdefenseproject.org/wp-content/uploads/2012/04/Model-Motion-Doc.-0.5-Guide-toAccompany-Motion.final_.pdf)

[12] In addition, while the presumption requires evidence of "ongoing collateral consequences," in order to avoid confusion or to provide DHS ammunition for a misapplication of *Pickering*, practitioners should attempt to keep the court's vacatur order (and the § 440.10 record generally) focused on the constitutional violation rather than the immigration consequences and hardship.

To the extent DHS seeks to attack the validity of a vacatur under § 440.10(1)(k), practitioners have multiple strong arguments available regarding the validity of the vacatur for immigration purposes. First, the new provision does nothing to alter the substantive grounds requiring vacatur under § 440.10, and thus does nothing to alter the binding BIA precedent respecting such vacaturs. The statutory presumptions merely reflect legislative intent relating to satisfaction of the substantive standards already set forth in § 440.10(1)(h). *See* § 440.10(1)(k). Accordingly, the BIA's holding in *Rodriguez-Ruiz* must control and thus the immigration courts are required under 28 U.S.C. § 1738 to give "full faith and credit" to the state court vacatur. 22 I&N Dec. at 1380. Further, the statutory recognition that immigration consequences are relevant to the legality of the underlying conviction does not transform the vacatur into a rehabilitative measure or undermine the merit-based nature of the challenge. *See Matter of Adamiak*, 23 I&N Dec. 878, 878, 880 (BIA 2006) (holding that a conviction vacated for failure of the trial court to advise the defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes because it constitutes a defect in the underlying proceedings).

IV. Emerging Argument that Some Legislative Actions Expunging and Vacating Past Convictions Should Be Recognized As Vacatures Under Immigration Law

Current Immigration Law Standard for Recognizing Vacaturs

Historically, a conviction expunged under state law was not a "conviction" for immigration purposes.[13] The BIA changed this long-standing approach after the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 added a codified definition of "conviction" to the INA. *See* INA § 101(a)(48)(A); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), *vacated on other grounds sub nom., Lujan-Armendariz v. INS*, 222 F.3d 728, 745-49 (9th Cir. 2000). In *Roldan*, the BIA held that "state rehabilitative actions," which include actions "setting aside, annulling, vacating, cancel[ing], expung[ing], dismiss[ing], [or] discharg[ing]… the conviction, proceedings, sentence, charge, or plea" meet the statutory definition of "conviction." *Id*. at 519-520. The BIA limited this new standard to "state rehabilitative statute[s] which purport[] to erase the record of guilt." *Id*. at 523. It did not address vacaturs based "on the merits, or on grounds relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings." *Id*.

In *Matter of Pickering*, the BIA addressed these vacaturs, and recognized that some judicial vacaturs are no longer "convictions" under immigration law. Specifically, the BIA held that "convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings" are not valid for immigration purposes. *Pickering*, 23 I&N Dec. at 624. However, reaffirming *Roldan*, the BIA also held that convictions "vacated because of post-conviction events, such as rehabilitation or immigration hardships" remain valid for immigration. *Id*. The

---

[13] *See In re V-*, No. 56033/701 (BIA 1943); *In re D-*, 7 I&N Dec. 670, 674 (BIA 1958) (expungement means "there has, as a matter of law, been no conviction for immigration purposes"). The Attorney General modified that standard for expunged "narcotics" offenses. *In re A F*, 8 I&N Dec. 429, 441 (BIA 1959). The BIA applied this standard until the 1996 amendments. *See In re Fructoso Luviano-Rodriguez*, 21 I&N Dec. 235, 237-238 (BIA 1996) ("For many years this Board has recognized that a criminal conviction that has been expunged… may not support an order of deportation.")

BIA characterized rehabilitative vacaturs as being "for reasons unrelated to the merits of the underlying criminal proceedings" and clarified that vacaturs entered "solely for immigration purposes" will also not be recognized. *Id*. at 624-625. The BIA has reaffirmed *Pickering* as the uniform standard in all circuits. *See Matter of Marquez Conde*, 27 I&N Dec. 251, 252 (BIA 2018) (stating "if a court vacates an alien's conviction because of a procedural or substantive defect, rather than for reasons solely related to rehabilitation or immigration hardships, the conviction is eliminated for immigration purposes.").[14]

Applying the *Pickering* Standard to State Legislative Action[15]

Some practitioners have begun to develop arguments that legislatures, not just courts, can vacate convictions "on the basis of a procedural or substantive defect in the underlying proceedings," arguably meeting the *Pickering* standard and therefore alleviating immigration consequences. A decision by a state legislature to decriminalize certain conduct and provide for the destruction of the records of previous convictions for that conduct arguably meets the *Pickering* standard because it is, in effect, a determination by the state legislature that the conduct is not criminal and never should have been criminal, making a conviction erroneous on substantive grounds at the time it was decided.

The *Pickering* standard distinguishes between "post-conviction events, such as rehabilitation or immigrationt hardships" and "procedural or substantive defect[s] in the underlying proceedings." *Id*. at 624. Courts must analyze state expungement and vacatur statutes under this standard to determine whether the purpose is rehabilitative and whether the basis relates to the underlying proceeding.

Courts and the BIA have analyzed statutes under the *Pickering* standard, considering whether application of the statute depends on "post-conviction events," and thus rehabilitative. Rehabilitative statutes generally have substantive requirements that make their rehabilitative purpose clear, such as requiring completion of a term of probation or sentence, waiting periods without further criminal convictions, or post-conviction evidence of rehabilitation. *See Matter of Roldan*, 22 I&N Dec. at 514 (Idaho Code § 19-2604(1), completing probation); *Murillo-Espinoza v INS*, 261 F.3d 771, 773 (9th Cir. 2001) (Ariz. Rev. Stat. § 13-907, completing probation or sentence); *Wellington v. Holder*, 623 F.3d 115, 121 (2d. Cir. 2010) (NY Correct. § 702, showing rehabilitation and public interest); *Gill v. Ashcroft*, 335 F.3d 574, 576

---

[14] Every Federal Circuit Court of Appeals, except the Fifth, affords *Chevron* deference to *Pickering*. *See Rumierz v. Gonzales*, 456 F.3d 31, 37 (1st Cir. 2006); *Saleh v. Gonzales*, 495 F.3d 17, 25 (2d Cir. 2007); *Pinho v. Gonzales*, 432 F.3d 193, 209 (3d Cir. 2005); *Phan v. Holder*, 667 F.3d 448, 452 (4th Cir. 2012); *Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006); *Ali v. Ashcroft*, 395 F.3d 722, 729 (7th Cir. 2005); *Andrade-Zamora v. Lynch*, 814 F.3d 945, 951 (8th Cir. 2016); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1129 (10th Cir. 2005); *Ali v. United States AG*, 443 F.3d 804, 810 (11th Cir. 2006). The BIA has overruled the Fifth Circuit based on the principles laid out in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005). *Marquez Conde*, 27 I&N Dec. at 255.

[15] These arguments were made in an *amicus curiae* brief filed in a Third Circuit appeal about how a Connecticut law decriminalizing some marihuana-related conduct and providing for the destruction of records of past convictions should be treated by immigration law. Brief of Amici Curiae the American Immigration Lawyers Association, the National Immigration Project of the National Lawyer's Guild, and Immigrant Defense Project in Support of Petitioner, *Khan v. Barr*, No. 19-1427 (3d Cir. 2019) (available at: https://www.aila.org/File/DownloadEmbeddedFile/80214) (last accessed August 28, 2019).

(7th Cir. 2003) (720 ILCS 570/410(f), completing probation); *Resendiz-Alcaraz v Ashcroft*, 383 F.3d 1262, 1268 (11th Cir 2004) (Mo. Rev. Stat. § 610.105, completing suspended sentence). All of the relevant statutes require the defendant to take affirmative steps and meet certain requirements, which are generally considered evidence of "rehabilitation." The state action is premised on evidence outside the original conviction, and thus based on "post-conviction events."

In contrast, state expungement statutes are not necessarily based on any "post-conviction event" but instead on legislative findings about the criminal legal system. Indeed, under the New York expungement statute, the legislative basis does not relate to "post-conviction events" because every conviction "shall be expunged promptly" for all defendants, without regard to personal circumstances and without requiring an application. NYCPL § 160.50(5)(a), as added by Senate Bill S6579A §§ 3, 4) (such convictions "shall be expunged promptly."). The statute does not consider "post-conviction events" and is not properly classified as a rehabilitative statute.

Next, considering whether an expungement and vacatur statute addresses the underlying proceedings depends on the justifications given by the legislature and the mechanism used to address any defects. The New York expungement statute Senate bill sponsor memo cites to ameliorative effects intended by the legislation, but also provides as a justification racial disparities in arrests for marihuana. Senate Bill S6579A, Sponsor memoranda. The sponsor memo clarifies that the bill "addresses the disparate racial and ethnic impact," because "possessing small amounts of marijuana is largely decriminalized for people who are white, and vastly more likely to be criminalized for people who are black or Latino." *Id*. This basis implicates protections under both the 4th Amendment and 14th Amendment.

The expungement mechanism also provides the basis for expungement: "the matter shall be considered terminated in favor of the accused and deemed a nullity, having been rendered by this paragraph legally invalid." NYCPL § 160.50(5)(a), as added by Senate Bill S6579A § 7. This standard addresses the underlying merits and uses language directly implicating a substantive basis, "legally invalid," and flipping the judgment from a conviction to being "in favor of the accused," which necessarily addresses the merits of the original proceedings. *Id*. In New York, while it is true that defendants will continue to be prosecuted for NYPL §§ 221.05, 221.10, the conviction will immediately be expunged and vacated as "legally invalid." Because every New York conviction under those statutes will no longer have any legal effect, practitioners can argue that even future expungement and vacaturs meet the *Pickering* standard.

Fairness and policy concerns also dictate that a legislative decision to render conduct non-criminal should be respected just as a judicial decision to do so would be, as both are determinations that a conviction is substantively defective. Treating determinations of substantive defect differently depending on which branch of government made them is illogical and would lead to absurd results. It would make individuals with effectively the same substantively-defective conviction differently-vulnerable to immigration consequences.[16] Immigration consequences would be determined by the fortuities of timing in the actions of a state court versus a state legislature (since action by one makes action by the other unnecessary).

[16] *Id*. at 11-17 (using the examples of marihuana possession, same-sex marriage, and same-sex sexual activity to illustrate how both legal decisions and legislative actions can lead to the same result of finding certain convictions substantively defective).

[17] Failure to give effect to a state's judgment that certain conduct should never have been criminal is disrespectful of a state's sovereign decision (when a state enacts a sweeping statute that affects everyone with certain convictions, they are not making a judgment that a certain offender has been rehabilitated, but rather that the offense itself should not be a crime).[18]

The Circuits that have addressed decriminalization expungement schemes have inadequately considered all relevant issues. The Second Circuit addressed Connecticut's marihuana decriminalization and expungement in an unpublished, *per curiam* decision. *Taylor v. Sessions*, 714 Fed Appx. 85, 87 (2d Cir. 2018). In it, the panel mischaracterized Connecticut's decriminalization and expungement as changing "the previous punishment schedule," and that decriminalization was merely "[t]he Connecticut legislature's decision that such possession of marihuana should no longer carry the penalties it once did." *Id*. at 86-87. The Ninth Circuit addressed California's Proposition 64, which allows individuals who have completed their sentences to have marihuana-related felony convictions "redesignated" as misdemeanors. The court agreed with the BIA that the conviction was reclassified for state policy purposes of rehabilitation and remained a felony conviction for immigration purposes. *Prado v. Barr*, 923 F.3d 1203 (9th Cir. 2019). The court held that partial expungement or reclassification cannot eliminate the immigration consequences of a conviction. *Id*. at 1208.

Future Marihuana Decriminalization/Legalization Legislation in New York and Beyond

It is likely that arguments about the immigration consequences of marihuana convictions that have been expunged and vacated by state legislatures will continue to develop and the direction of that development will depend on state legalization efforts. Efforts to fully decriminalize and legalize marihuana are ongoing in New York and other states. The arguments relying on absurd applications become stronger when the legislature not only immediately expunges and vacates all convictions, but also no longer allows for arrest and prosecution in the first instance.[19]

There are steps legislatures can take to increase the likelihood that state action to decriminalize marihuana will be fully recognized by immigration authorities under the *Pickering* standard, such that they would no longer have immigration consequences. These include:

(1) provide a clear legislative history that includes the judgment that past convictions are substantively defective, as the now-decriminalized conduct should never have been criminalized in the first place;

(2) make findings that the decriminalized conduct cannot constitutionally or otherwise lawfully be criminalized;

(3) fully decriminalize conduct in a manner recognized by immigration law, not just state law,[20] *see Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004); and

---

[17] *Id*. at 17-19.
[18] *Id*. at 19-20.
[19] Brief of Amici Curiae the American Immigration Lawyers Association, the National Immigration Project of the National Lawyer's Guild, and Immigrant Defense Project in Support of Petitioner, *Khan v. Barr*, No. 19-1427 (3d Cir. 2019) (available at: https://www.aila.org/File/DownloadEmbeddedFile/80214) (last accessed August 28, 2019).
[20] For example, a New York violation, though not considered a conviction under state law, is considered one under immigration law.

(4) if the legislative history includes discussion of a desire to ease collateral consequences (including immigration), make explicit that desire is not the sole reason for the decriminalization or legalization.