



**Testimony for the Senate Judicial Proceedings Committee February 3, 2022
SB 265 – Probation Before Judgment – Probation Agreements – Probation
not Deportation**

FAVORABLE

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The ACLU of Maryland supports SB 265, which would allow a criminal defendant to accept probation before judgment (“PBJ”) in exchange for the court expressly withholding a finding of guilt, preventing dire immigration consequences of what constitutes a conviction for federal purposes while leaving the spirit and purpose of the PBJ statute intact. This bill addresses a critical intersection between immigration and criminal justice reform by eliminating unintended immigration consequences for non-citizens who agree to a PBJ.

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The current PBJ process in Maryland requires a defendant to plead guilty or be found guilty, and the court to sentence the defendant to probation. PBJ was originally designed to provide individuals with an alternative sentence: the opportunity to take responsibility for certain minor offenses, without suffering some of the lifelong consequences of a criminal conviction.

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However, this is not the case for non-U.S. citizens. A PBJ can still trigger severe consequences, including U.S. Immigration and Customs Enforcement (“ICE”) custody, deportation, and disqualification of defenses to deportation. This happens because a PBJ is a conviction, or an *admission of guilt*, under federal immigration law, even if it is not considered a conviction under Maryland law.

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A conviction under the Immigration and Nationality Act (“INA”) is found where:

1. (1) A judge or jury finds the person guilty, or the person enters a plea of guilty or no contest, or admits sufficient facts to warrant a finding of guilt; and
2. (2) The judge orders some sort of punishment.¹

So even without a formal judgment, a guilty plea and imposition of probation is enough to constitute a conviction under federal immigration law. Indeed, under Maryland’s current PBJ statute, the U.S. Court of Appeals for the Fourth Circuit has held that an adjudication constitutes a conviction, for purposes of a criminal

¹ 8 U.S.C. § 1101(a)(48)(A).

record² as well as federal sentencing.³ On the other hand, as proposed under SB 265, if a defendant does not plead guilty but the judge “finds facts justifying a finding of guilt,” the disposition does not constitute a conviction for federal immigration purposes.⁴ 4th Circuit case law is clear that a finding of guilt requires the *person* admitting facts sufficient to find guilt, not the *judge* finding sufficient facts.⁵

This bill’s simple change, to allow a court to “find facts justifying a finding of guilt,” would align Maryland with other states who have amended their PBJ statutes for this purpose, and whose statutes have been found to allow for non-convictions in the PBJ process.⁶ The PBJ would operate as was always intended: to prevent the collateral consequences of a criminal conviction.

Most importantly, this bill would protect non-U.S. citizens from the types of lifelong consequences that a PBJ was never intended to trigger without disrupting the outcome for other PBJ cases.

For the foregoing reasons, we urge a favorable report on SB 265.

² *Yanez-Popp v. INS*, 998 F. 2d 231 (4th Cir. 1993)

³ *U.S. v. Medina*, 718 F.3d 364 (4th Cir. 2013).

⁴ *Jacquez v. Sessions*, 859 F.2d 258 (4th Cir. 2017).

⁵ *Id.*, at n 4.

⁶ *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011).