

IN SUPPORT OF HB 559

To: House Judiciary Committee
From: Gabriela Quercia Kahrl on behalf of the UMD Carey Law Chacón
Center for Immigrant Justice
Date: February 11, 2022
Re: Written Testimony in Support of HB 559, favorable with amendment

We urge a favorable report, with amendment, on HB 559, because, without it, countless noncitizen Maryland residents will continue to face detention and deportation because they accepted probation in a Maryland court. Currently, if a non-citizen Maryland resident obtains a probation before judgment (“PBJ”), they can face loss of liberty, deportation, and permanent banishment from the United States. This is because both the Fourth Circuit and the Board of Immigration Appeals have held that a Maryland PBJ is a conviction under federal immigration law,¹ notwithstanding the Maryland General Assembly's intent to the contrary. *U.S. v. Medina*, 718 F.3d 364 (4th Cir. 2013)² *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).

The General Assembly did not intend for a PBJ to carry with it the same consequences as a conviction. When it enacted the probation before judgment statute, the General Assembly acknowledged in the very language of the statute that a PBJ should afford lenience in situations where “the best interest of the person and welfare of the state” dictate an

¹ The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. 8 U.S.C. 1101(a)(48)

² In *U.S. v. Medina*, 718 F.3d 364 (4th Cir. 2013), the court held that a diversionary disposition under the Maryland PBJ statute, in which the defendant pleads guilty and the court sentences the person but does not formally enter judgment against him, is a predicate conviction for purposes of sentence enhancement under the federal sentencing guidelines. The court held that the definition of conviction in the immigration statute, 8 USC 1101(a)(48)(A), “must control our reading” of the sentencing guideline language. 718 F.3d at 368. *Medina*'s diversionary disposition was a conviction because he “pled guilty to the charged offenses and was sentenced to some form of restraint on his liberty; namely, probation for a period of 18 months. *Id.*

outcome in a criminal matter that is not a conviction. Md. Crim. Proc. § 6-220 (b)(1)(i).³ The federal law thwarted this intent in 1996 when it enacted the “Illegal Immigration Reform and Immigrant Responsibility Act” (IIRIRA) which substantially broadened the definition of a conviction. The effect was that the Maryland PBJ, and other non-convictions like it, were then treated as convictions.

HB 559 protects the intent of the General Assembly “that a grant of probation before judgment, unless subsequently altered by a violation of that probation, should have the effect of wiping the criminal slate clean.” *Jones v. Baltimore City Police*, 326 Md. 606 (2008). HB 559 adds an **additional, alternative** process for imposing a PBJ. The defendant enters into a probation agreement with the court, which does not require the entry of a guilty plea. The defendant waives all trial rights and defenses and does not deny facts that would support a finding of guilt that are read into the record. The court then makes a “finding of facts sufficient to support a finding of guilt,” which gives the court jurisdiction to later find guilt and impose a sentence, if there is a violation of probation. The Fourth Circuit in *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011) held that Virginia Code § 18.2-251 is not a conviction under federal immigration law because, as in HB 559, the defendant does not admit guilt and the court does not enter of a judgement of guilt, but instead finds facts that would “justify a finding of guilt”, the court defers entry of a formal judgement, and places the defendant on probation. *Crespo*, 631 F.3d at 134. Virginia Code § 18.2-251 is applied in Virginia courts without any due process concerns.

HB 559, like the VA statute in *Crespo*, ensures that the defendant has **due process** under the law and is distinguishable from the “probation before conviction” disposition

³ “By this 1975 amendment [to the PBJ statute], the General Assembly expressed its unmistakable intent that the disposition of probation before judgment not be a conviction.” *Myers v. State*, 303 Md. At 645, 496 A.2d at 312.

discussed in *Bartlett v. State*, 208 A.d 843 (1972), where the Court of Special Appeals found that the court lacked the authority to impose sentence upon violation of probation because there had been no finding of guilt. *Bartlett*, 208 A.d at 846. HB 559 includes a full waiver of trial rights, proffer of facts from the State, and finding of fact sufficient to support a future finding of guilt, should that become necessary. In this way, HB 559 disposition is similar to a *nolo contendere* plea, where a Maryland court's authority to impose sentence without a formal finding of guilt is already recognized. Md. Rule 4-242 (e).

HB 559 does not disturb, erode, replace or remove the current method for obtaining a PBJ. The amendments to the bill ensure that the same defendants will be excluded from HB 559's PBJ, and the same consequences will attach to both versions of the PBJ. Practically, the two processes will appear and function virtually indistinguishably from one another, and the consequences of failing to abide by probation will remain the same. This bill does not provide additional benefits, but instead merely ensures that noncitizens will have equal treatment under the law; that, like citizens they may take responsibility for mistakes, without suffering lifelong consequences, like deportation. This bill merely ensures that a noncitizen is not deported for a one-time relatively minor mistake that would have a minimal effect on the life of a similarly-situated citizen.⁴

This bill fills an important gap in Maryland criminal law by ensuring that all people have equal access to probation. Currently, there is no existing Maryland law or

⁴ This bill will not make it easier for an immigrant to become a U.S. citizen, nor does it treat noncitizens more favorably than citizens. HB 354 categorically will not make it easier for an immigrant to become a citizen. A PBJ—even if not a conviction—would still affect eligibility for citizenship. To become a United States citizen, an applicant must demonstrate good moral character. The PBJ, like all other contact with the criminal legal system, would still have to be disclosed on a noncitizens' naturalization application. The PBJ would thus be taken into consideration when determining whether the noncitizen meets the good moral character requirement for citizenship.

disposition that can both hold the defendant accountable and provide a resolution of a criminal case without triggering federal immigration consequences. Under the Immigration and Nationality Act (“INA”), a PBJ, a plea of *nolo contendere*, an *Alford* plea, and a “Not Guilty Agreed Statement of Facts” (“NGASF”) plea all constitute a conviction.

A *nolo contendere* plea, an *Alford* plea, and an NGASF plea are all convictions for both Maryland state purposes and federal immigration purposes under the INA. The INA states in pertinent part that the term “conviction” is:

(...) 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.” See 8 U.S.C. 1101(a)(48)(A)(i).

A plea of *nolo contendere* is, by the explicit language of the statute, a conviction under federal immigration law. Similarly, even though there is no plea of guilt during a NGASF, it is still a conviction under federal immigration law because (1) there is an admission by the defendant as to facts sufficient to warrant a finding of guilt and (2) there is a formal finding of guilt at the conclusion of the NGASF. Even Maryland courts treat NGASF as a conviction, holding that a NGASF is the functional equivalent of guilty plea. *Sutton v. State*, 289 Md. 359, 366, 424 A.2d 755, 759 (1981). Similarly, an *Alford* plea qualifies as a conviction under federal immigration law because there is a formal finding of guilt, thus meeting the requirements for the definition of a “conviction” under the INA. *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004); *United States v. King*, 673 F.3d 274, 276 (4th Cir. 2012).

The Maryland General Assembly cannot wait for or rely on federal immigration reform. This issue is squarely in the jurisdiction of the Maryland General Assembly.

We are living in unprecedented times. Immigrants have suffered four long years under the

harsh, xenophobic, and racist policies of the prior administration and that suffering is not going to stop any time soon. President Trump issued over 400 executive actions which directly targeted immigration and immigrants of all backgrounds.⁵ Even though Joe Biden is president, immigrants are still currently under attack. Trump's changes to both the immigration policies and the agencies that enforce those policies will take years to fix.⁶

The Biden Administration issued the following statement: “As this administration has stated from the very outset, our capacity at the border will not transform overnight, due in large part to the damage done over the last four years to our asylum system and infrastructure.”⁷ The federal and immigration courts, filled with Trump appointees, are also preventing Biden's attempts to roll back harmful Trump-era policies. For example, in June 2021, the Supreme Court affirmed a lower Texas federal court’s ruling that ordered the Biden administration to re-start the Migrant Protection Protocols, a Trump administration policy known colloquially as “Remain in Mexico,” which placed thousands of asylum-seeking families and children in dire and dangerous conditions and isolated them from needed legal assistance.⁸ The immigration court backlog, which, at 1.6 million cases, numbers more than the population of Baltimore City and County combined, places immigrants in situations of limbo that may drag out for many years.⁹

⁵ Dany Bahar, *The road to fix America's broken immigration system begins abroad*, BROOKINGS, (Dec. 8, 2020), <https://www.brookings.edu/blog/up-front/2020/12/08/the-road-to-fix-americas-broken-immigration-system-begins-abroad>.

⁶ Sarah Stillman, *The Race to Dismantle Trump's Immigration Policies*, THE NEW YORKER, (Feb. 1, 2021), <https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies>.

⁷ Tanvi Misra, *Revealed: US Citizen newborns sent to Mexico under Trump-era border ban*, THE GUARDIAN, (Feb. 5, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/feb/05/us-citizen-newborns-mexico-migrant-women-border-ban>.

⁸ Jaclyn Diaz, *Supreme Court Orders The 'Remain in Mexico' Policy Reinstated for Asylum Seekers*, NPR (Aug. 25, 2021), <https://www.npr.org/2021/08/24/1030829693/supreme-court-remain-in-mexico>.

⁹ Priscilla Alvarez, *Immigration court backlog nearly equals size of Philadelphia's population, student finds*, CNN (Jan. 18, 2022), <https://www.cnn.com/2022/01/18/politics/immigration-court-backlog/index.html>.

This bill promotes racial justice. This bill is necessary to ensure racial equity in the consequences for such low-level first-time offenders. Detention and deportation disproportionately impact Black immigrants.¹⁰ Black immigrants continue to be detained in large numbers, exposing them to harm **including use of force and lack of access to medical care.**¹¹ Because communities of color are over-policed, charged, and prosecuted, Black and brown noncitizens are more likely to face adverse—and often severe—immigration consequences as a result of low-level crimes where a PBJ is warranted.

Conclusion

The proposed amendment to the Maryland PBJ statute provides an additional avenue of granting a PBJ so that all people, regardless of citizenship status, have meaningful access to it. This amendment would allow for the efficient and final resolution of the criminal cases and preserve the Maryland General Assembly's intent to render a PBJ a second chance for first-time low-level criminal offenders in Maryland. For the foregoing reasons, The Maryland Carey Law Chacón Center for Immigrant Justice urges a favorable report with amendments on HB 559.

¹⁰ Juliana Morgan-Trostle, Kexin Zheng & Carl Lipscombe, *The State of Black America*, (2018), <http://stateofblackimmigrants.com/wp-content/uploads/2018/09/sobi-fullreport-jan22.pdf>.

¹¹ Southern Poverty L. Ctr., (Aug. 26, 2020) https://www.splcenter.org/sites/default/files/8.26.20_crcl_letter.pdf.