

**IN SUPPORT OF**  
**HOUSE BILL 193**

To: House Judiciary Committee  
From: Gabriela Q. Kahrl, Kathyne Robinson, Kaska Watson  
on behalf of the UMD Carey Law Immigration Clinic<sup>1</sup>  
Date: February 3, 2023  
Re: Written Testimony in Support of HB 193

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We urge a favorable report on HB 193, a bill which amends the Maryland’s Probation Before Judgment statute so that it no longer triggers unintended, disproportionate consequences like detention, deportation, loss of lawful immigration status, and/or loss of professional opportunities, like security clearances, certain professional licenses, and military or other federal employment.

Currently, if a non-citizen Maryland resident obtains a probation before judgment (“PBJ”), that person 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,<sup>2</sup> notwithstanding the Maryland General Assembly's intent to the contrary. *U.S. v. Medina*, 718 F.3d 364 (4th Cir. 2013)<sup>3</sup> *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).

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<sup>1</sup> This written testimony is submitted on behalf of the Immigration Clinic at the University of Maryland Carey School of Law and not on behalf of the School of Law or University of Maryland, Baltimore.

<sup>2</sup> 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)

<sup>3</sup> 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.*”

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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 outcome in a criminal matter that is not a conviction. Md. Crim. Proc. § 6-220 (b)(1)(i).<sup>4</sup> 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 193 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 193 adds an **additional, alternative** process for imposing a PBJ. The defendant pleads not guilty and enters into a probation agreement with the court. The defendant waives trial and appellate rights and does not admit facts that would support a finding of guilt that are read into the record by the State. 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.

**HB 193 does not disturb, erode, replace or remove the current method for obtaining a 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

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<sup>4</sup> “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.

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ensures that noncitizens have the ability to 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.<sup>5</sup>

**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 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 under federal immigration law.

A *nolo contendere* plea, an *Alford* plea, and an NGASF plea are all convictions for 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

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<sup>5</sup> 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.

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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. It has been nearly 30 years since Congress was able to pass comprehensive immigration reform<sup>6</sup>. The last two attempts, made in 2007 by President George W. Bush and in 2013 by President Barack Obama, failed.<sup>7</sup> The Maryland General Assembly not only has the authority to resolve this issue, it is the only legislative body that realistically can address it.

**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.<sup>8</sup> Black immigrants continue to be detained in large numbers, exposing them to harm **including use of force and lack of access to medical care.**<sup>9</sup> 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.

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<sup>6</sup> Center for Immigration Studies, [Historical Overview of Immigration Policy \(cis.org\)](https://www.cis.org/immigration-policy-overview)

<sup>7</sup> Brookings Institution, *Can Biden pass immigration reform? History says it will be tough*, [Can Biden pass immigration reform? History says it will be tough \(brookings.edu\)](https://www.brookings.edu/research/can-biden-pass-immigration-reform-history-says-it-will-be-tough/)

<sup>8</sup> 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>.

<sup>9</sup> Southern Poverty L. Ctr., (Aug. 26, 2020) [https://www.splcenter.org/sites/default/files/8.26.20\\_crcl\\_letter.pdf](https://www.splcenter.org/sites/default/files/8.26.20_crcl_letter.pdf).

### **Conclusion**

The proposed amendment to the Maryland PBJ statute provides an additional avenue of granting a PBJ so that all people 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 Immigration Clinic urges a favorable report on HB 193.