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March 18, 2019

The Honorable Senator Prozanski (Chair)
Senate Judiciary Committee, Members

Re: Testimony in Support of HB 3201

Dear Chair Prozanski and Members of the Committee:

My name is Katherine Brady, and I am a Senior Staff Attorney at the Immigrant Legal Resource Center, a national non-profit back-up center located in San Francisco, California. Each year we advise hundreds of California criminal defenders on the immigration consequences of California offenses. We also train and consult extensively with California prosecutors and criminal court judges, regarding the intersection between criminal and immigration law.

We have co-sponsored and helped to draft state legislation with the goal of ensuring that California laws impose the same benefits and consequences on all state residents, whether citizen or immigrant. I have testified to state legislators about the operation of immigration laws, and the immigration effect of our state laws.

In 2017, the California legislature passed a measure that is quite similar to HB 3201, in that it changed our post-plea diversion program (called deferred entry of judgment) to a pre-trial diversion program. See California AB 208, amending California Penal Code § 1000, effective January 1, 2018.

This amendment made two major changes to the diversion statute. First, it provided that a defendant could enter a plea of not guilty before being diverted. Second, it required the defendant to give up the right to a jury trial as a condition of entering diversion. HB 3201 makes the same changes, except that it requires the defendant to give up additional key defense rights, along with the right to jury trial.

Pre-trial diversion is needed because federal immigration law employs its own definition of "conviction." This definition includes every disposition where a guilty plea or judicial finding of guilt is made, and a judge has imposed any penalty, punishment, or restraint. 8 USC 1101(a)(48)(A). This is a conviction even if state law explicitly provides that once the court finds that diversion requirements are fulfilled, the defendant will have no conviction or arrest record for any purpose, or suffer any adverse legal consequence as a result of the process.

For a permanent resident, refugee, or any noncitizen, the state's statutory promise is entirely false. For example, any noncitizen who successfully completes post-plea diversion based on possessing a small amount of a controlled substance will, for immigration purposes, incur an extraordinarily damaging drug conviction. The conviction will cause *any* noncitizen to become deportable, inadmissible, and subject to

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mandatory immigration detention. In some cases the noncitizen will be unable even to apply for a waiver based on the fact that their deportation will cause "extraordinary" hardship to their dependent U.S. citizen relatives. It is one of the most damaging convictions possible for immigration purposes. This is true even though, under state law, it may not be a conviction at all.

This legal discrepancy caused two adverse outcomes in California. First, it destroyed thousands of families and fractured communities, especially communities of color, by causing unnecessary deportations based on first-time, minor offenses. Many immigrants wrongly relied on the promise of the state statute and successfully completed diversion, only to find themselves in removal proceedings. The Legislature never intended for deportation and banishment to be a consequence of successful diversion. Its intent was to provide state residents who fulfilled all requirements with a clean slate and no adverse consequences.

Second, it clogged our criminal court system. If immigrants received correct, constitutionally sufficient advice from defense counsel, and learned that participating in diversion led to deportation, they did not want to participate. I have consulted on many cases where, for example, a permanent resident with close U.S. citizen family came to understand that diversion would destroy their ability to remain here. They instructed their defense counsel to find any alternative: file multiple motions, engage in extended negotiations, and if necessary go to trial. Many of use would do the same if we faced that consequence. The result was that what ought to have been quick misdemeanor diversion cases became far more involved, consuming court time and resources. For example, in one of our largest cities, so many noncitizens opted to go to trial rather than accept post-plea diversion that prosecutors finally agreed to simply permit defendants to plead to accessory after the fact, rather than take post-plea diversion.

The situation changed as of January 2018, when California courts changed to pre-trial diversion. To the best of my knowledge, based on extensive contacts with public defenders across the state and also contact with many prosecutors, the change to pre-trial diversion has been without any major problems, and it has addressed these important concerns. The number of court appearances and hearings in a pre-trial diversion case is not greater than a post-plea case. Diversion now is a reasonable option for qualifying citizens and noncitizens alike.

For the reasons outlined above, I strongly urge you to pass HB 3201. Thank you for your consideration.

Sincerely,

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