No. 16-1558

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIJAYA PRAKASH BOGGALA,
Petitioner,
v.

LORETTA E. LYNCH, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW OF A
FINAL ADMINISTRATIVE REMOVAL ORDER

BRIEF OF *AMICI CURIAE* THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTH CAROLINA JUSTICE CENTER, AND PROF. KACI BISHOP OF UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* National Immigration Project of the National Lawyers Guild, North Carolina Justice Center, and Professor Kaci Bishop state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which are nonprofit organizations.

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION AND STATEMENT OF AMICI

Under Federal Rule of Appellate Procedure 29(b), the National Immigration Project of the National Lawyers Guild (National Immigration Project), North Carolina Justice Center (Justice Center), and Professor Kaci Bishop of University of North Carolina (UNC) School of Law respectfully submit this brief to assist the Court in determining whether Mr. Boggala's North Carolina deferred prosecution under N.C. Gen. Stat. § 15A-1341(al) qualifies as a conviction under immigration law. The question is both one of first impression and one of great significance for noncitizens facing removal.

The Board of Immigration Appeals ("Board") wrongly found that Mr. Boggala's deferred prosecution disposition was a conviction for the purposes of immigration law, which therefore could be used as a basis for deportability. Specifically, the Board affirmed that Mr. Boggala's disposition qualified as a conviction because of a boilerplate "admission of responsibility" contained in the deferred prosecution form and repeated in the transcript. R.4. In neither instance, however, was the "admission of responsibility" accompanied by actual, specific facts.

The Board erred for three reasons. First, a North Carolina deferred prosecution does not qualify as a conviction under either prong of 8 U.S.C. § 1101(a)(48)(A) because the statute does not require a guilty plea, finding of

guilt, or admission of sufficient facts to warrant a finding of guilt. Second, the plain language of the federal statute establishes that the boilerplate language "admission of responsibility" on the deferred prosecution form is insufficient to satisfy the legal standard "admitted to sufficient facts to warrant a finding of guilt." Third, there is clearly no conviction in this particular case because the record contains *no* specific facts that were actually stipulated to; thus the government did not meet its burden of establishing the existence of a guilty finding, plea or admission of sufficient facts to warrant a finding of guilt.

Amici have a direct interest in assuring that the rules governing classification of criminal convictions for immigration purposes are fair and predictable and give noncitizen defendants the benefit of their plea bargains. The National Immigration Project is a non-profit membership organization working to defend immigrants' rights and to secure a fair administration of immigration laws. For thirty years, the National Immigration Project has provided legal training to the bar and the bench on immigration consequences of criminal conduct and defenses to removal. Founded in 1996, the Justice Center, works through litigation, public policy advocacy, research and community education to protect and expand the rights of workers, consumers, immigrants, and low-income families across North Carolina. The Justice Center's work includes a special focus on representation of North Carolina's

low-income immigrants, many of whom cannot receive legal assistance from LSC-funded programs. Kaci Bishop is a Clinical Associate Professor of Law at the University of North Carolina School of Law. She teaches the law school's immigration clinic, where students represent on a pro bono basis noncitizens who are seeking immigration status and relief, including those facing deportation.

STATEMENT OF ISSUES PRESENTED IN AMICI BRIEFING

1. Whether a deferred prosecution under N.C. Gen. Stat. § 15A-1341(al) qualifies as a conviction under 8 U.S.C. § 1101(a)(48)(A), where the state statute does not require a guilty plea, finding of guilt, or admission of sufficient facts to warrant a finding of guilt.

2. Whether tiny boiler-plate language suggesting the possibility of a defendant's "admission of responsibility" on a multi-part, dense, two-page North Carolina court form satisfies the legal conclusion that a defendant has "admitted sufficient facts to warrant a finding of guilty."

3. Whether the government met its burden of establishing that Mr. Boggala "admitted to sufficient facts to warrant a finding of guilt" where there are no specific facts stipulated to in the record.

ARGUMENT

I. A Deferred Prosecution Is not a Conviction Under Immigration Law Because the North Carolina Statute Does not Require a Guilty Plea, Finding of Guilt, or Admission of Sufficient Facts to Warrant a Finding of Guilt.

A North Carolina deferred prosecution simply fails to meet the definition of a conviction under 8 U.S.C. § 1101(a)(48)(A). The plain language of the federal statute, as well as case law interpreting it, confirm that a North Carolina deferred prosecution does not come within the statute's circumscribed reach. North Carolina deferred prosecutions differ markedly from other dispositions both this Court and the Board have found to qualify as a conviction.

The plain language of § 1101(a)(48)(A) establishes that a North Carolina deferred prosecution does not come within its reach. The statute specifically defines a "conviction" as:

> 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)(A). Courts have conceptualized this statute as including

two separate prongs under which a disposition may constitute a conviction. *See Crespo v. Holder*, 631 F.3d 130, 134 (4th Cir. 2011). The first prong covers proceedings in which a court has entered a "formal judgment of guilt." *Id.* The second prong covers deferred adjudications if two additional strict criteria are met: "(i) [a] sufficient finding of support for a conclusion of guilt, and (ii) the imposition of some form of punishment." *Id.*

In North Carolina, a "deferred prosecution" occurs when the state agrees to cease prosecution on the defendant's successful completion of certain conditions. *See generally* N.C. Gen. Stat. § 15A-1341(al). The court does not enter judgment against the defendant, and the deferred prosecution is generally not considered a conviction under state law. As the government concedes, *see* R. 62, a deferred prosecution does not result in an adjudication of guilt. Therefore, under the first prong of the statutory test, a North Carolina deferred prosecution does not qualify as a conviction.

Under the second prong, the analysis is different, but the result the same. Section 15A-1341(al) of the N.C. Gen. Stat sets forth the requirements for a deferred prosecution. It provides "that a person who has been *charged* with a Class H or I felony, or a misdemeanor, may be placed on probation on motion of the defendant and the prosecutor if the court finds each of the following facts:

(1) Prosecution has been deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(2) Each known victim of the crime has been notified of the motion for probation by subpoena or certified mail and has been given an opportunity to be heard.

(3) The defendant has not been convicted of any felony or of any misdemeanor involving moral turpitude.

(4) The defendant has not previously been placed on probation and so states under oath.

(5) The defendant is unlikely to commit another offense other than a Class 3 misdemeanor."

N.C. Gen. Stat. § 15A-1341(al) (emphasis added). Notably, this procedure requires neither a finding of guilt, nor a plea of guilty or nolo contendere, nor an admission of facts sufficient to warrant a finding of guilt. *See id*. Because this necessary element is lacking, a North Carolina deferred prosecution does not come within the second prong of Section 1101(a)(48)(A) either.[1]

Extant case law – addressing whether other states' deferred prosecution

[1] For comparison, a North Carolina "conditional discharge," which also allows the defendant to complete probation in exchange for a deferral of proceedings, *requires an up-front guilty plea*. *See* N.C. Gen. Stat. § 15A-1341(a4). And should the defendant violate a condition of the conditional discharge, "the court may enter an adjudication of guilt." N.C. Gen. Stat § 15A-1341(a6). The North Carolina Legislature added this provision in 2014, *see* N.C. Sess. Laws 2014-119, showing that where it intends that the defendant be found guilty or admit to guilt prior to the deferral of proceedings, it so specifies so in the statute. Notably, when adding this provision, the Legislature did not alter the pre-plea deferred prosecution scheme at issue here.

schemes result in a conviction for the purposes of Section 1101(a)(48)(A) – only confirms the above statutory analysis. A North Carolina deferred prosecution stands in stark contrast to other dispositions the Board and the courts have found to qualify as a conviction under prong two. For example in *Matter of Punu*, the Board analyzed the Texas deferred adjudication statute. 22 I&N Dec. 224 (BIA 1998). In finding that the Texas statute qualified as a conviction under prong two, the Board noted that the Texas court "may, *after receiving a plea of guilty or plea of nolo contendere*, *hearing the evidence, and finding that it substantiates the defendant's guilt*, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation." *Id*. at 228 (citing to Tex. Crim. P. Code art. 42.12, § 5(a)) (emphasis added). Thus, the Texas statutory scheme requires both a plea of guilty and evidence of guilt before a court can defer the adjudication and place the defendant on probation. *See also Moosa v. INS,* 171 F.3d 994, 1006 (5th Cir.1999) (finding that Texas deferred adjudication is the equivalent of a conviction for the purposes of immigration law because it requires a guilty plea and punishment).

Similarly, this Court found that a Maryland probation before judgement qualified as a conviction under prong two of 8 U.S.C. § 1101(a)(48)(A). *See United States v. Medina*, 718 F.3d 364, 366, 368 (4th Cir. 2013). Like Texas, Maryland law also requires that the defendant "plead[] guilty or nolo

contendere or is found guilty" before the court may stay entering the judgment and defer further proceedings. Md. § 6-220 (Probation before judgment). The Court reasoned that because there was both a plea of guilty and a sentence of probation, the Maryland disposition qualified as a conviction. *See also Phan v. Holder*, 667 F.3d 448 (4th Cir. 2012) (finding that petitioner was convicted under INA § 101(a)(48)(A) even if the judgment was "set aside" because he was found guilty by a jury and he was sentenced to eighteen months supervised probation).

In contrast, North Carolina's statutory scheme encompasses two diversionary dispositions—one pre-plea and one post-plea. The North Carolina deferred prosecution is a pre-plea disposition and – as shown above and unlike the Texas and Maryland dispositions – it requires neither a plea of guilty nor evidence of guilt before the state ceases prosecution. *See* N.C. Gen. Stat. § 15A-1341(al). Thus, it is analogous to pre-trial diversion, which the Board has found *not to qualify* as a conviction under Section 1101(a)(48)(A). *See, e.g., Matter of Grullon*, 20 I&N Dec. 12, 13-14 (BIA 1989) (finding that Florida pre-trial intervention program was not a conviction because it does not require a finding of guilt or guilty plea). *Accord Iqbal v. Bryson*, 604 F.Supp.2d 82 (E.D. Va. 2009) (distinguishing the Texas deferred adjudication program from the New York pretrial diversion agreement to conclude that petitioner's 1996

charges did not result in a conviction). As explained in note 1, *supra*, the North Carolina Legislature recently amended this scheme and could have, but did not, alter the fact that its pre-plea deferment scheme did not require the defendant be found guilty or admit to guilt prior to the deferral of proceedings. A North Carolina deferred prosecution is, and is legislatively intended to be, like the pre-trial diversion programs the Board has found do not result in convictions under Section 1101(a)(48)(A).

Missing the requisite guilty plea, finding or admission of sufficient facts, a North Carolina deferred prosecution does not come within prong one or two of Section 1101(a)(48)(A).

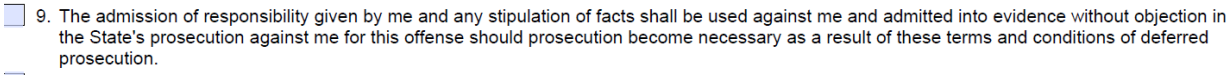
II. Even Where the North Carolina Trial Court Uses a Boilerplate Form that Includes a Checked Box for an Admission of Responsibility, the North Carolina Deferred Prosecution is not a Conviction Under Immigration Law

Some North Carolina courts, when allowing a deferred prosecution to proceed, use a boilerplate form, AOC-CR-610.[2] The form is a dense document, with eleven different boxes to check under "Conditions of Agreement to Defer

[2] AOC-CR-610 is available at http://www.nccourts.org/forms/documents/1025.pdf.

Prosecution," among several other sections. Like virtually all of the form, the eleven conditions are written in nine point Arial font.[3]

Condition or box 9 of the form's fine print looks like this:


9. The admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State's prosecution against me for this offense should prosecution become necessary as a result of these terms and conditions of deferred prosecution.

Higher up on this same page of the form there is a box that asks the writer to fill in a file number, an "offense description," date, and the North Carolina General Statute at issue. On the second page of the form (and in equally tiny print), the defendant is required to swear under oath to various propositions, one of which says "I have reviewed a copy of this Motion/Agreement and Order to Defer Prosecution and all of the conditions of my probation and I agree to them, and request the Court to approve the agreement." And he is required to sign the form under oath. Without much elaboration, the government below argued that box nine's supposed "admission of responsibility and stipulation of facts" constitutes an "admission of sufficient facts to warrant a finding of guilt." R.62.

This construct is unsound under the rules of statutory interpretation, and under any fair system of justice. This form can by no means show that a North Carolina deferred prosecution is a conviction under Section 1101(a)(48)(A).

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[3] Printing the form from the website in note 3 will allow the Court to see how crowded, dense, and tiny the fine print is.

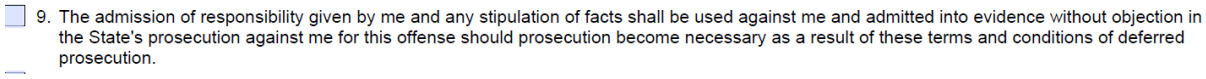
As a matter of statutory interpretation, the Board has not defined the term "admitted to sufficient facts to warrant a finding of guilt." 8 U.S.C. § 1101(a)(48)(A)(i). Nor has the Board found in any published case that a disposition constituted a conviction on that basis. But the phrase's plain language demonstrates that an "admission of responsibility" does not qualify as "admit[ting] to sufficient facts."

When interpreting statutes, this Court "start(s) with the plain language." *Crespo*, 631 F.3d at 133. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). In interpreting the plain language of a statute, this Court gives the terms their "ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import." *Crespo*, 631 F.3d at 133. Ordinarily, an "admission of sufficient facts" means "an admission to facts to warrant a finding of guilt." *See* Black's Law Dictionary 32 (6th ed. 1991). *See also United States v. Roberts*, 39 F.3d 10, 13 (1st Cir. 1994) ("admission of guilt" under the guidelines satisfied where "the prosecutor gives a recitation of what the government would prove, *and* the defendant expressly accepts the government's version of events (possibly with qualifications), *and* the judge then determines that the admitted facts if proved would constitute the offense). Thus, the phrase has a distinct legal meaning.

The Supreme Court has repeatedly confirmed that "to make a finding of

guilt," the factfinder must determine "that [the defendant] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (citing *United States v. Gaudin,* 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993); *In re Winship,* 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged")). Thus, a plain-language reading of the phrase "admitted to sufficient facts to warrant a finding of guilt" means that a defendant admitted facts sufficient to satisfy every element of the crime of which is he is charged.

By contrast, what does a noncitizen's signature on a form with the below box checked mean?


9. The admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State's prosecution against me for this offense should prosecution become necessary as a result of these terms and conditions of deferred prosecution.

The purpose of the form itself is to *defer a prosecution*. The sole purpose of the box thus is obviously for the accused to know that admissions of responsibility or stipulation of "any" facts made during this process may be used against him or her in the event the prosecution becomes necessary. But checking this box by itself does not explain anything about the responsibility or any facts stipulated by the accused as part of this process. It certainly does not establish an admission of sufficient facts to warrant a finding of guilt of every

element of the crime for which he is charged. Perhaps, an addendum to the form stating the specific facts to which the accused admits would. But without more, the content of any purported admissions or stipulations alluded to in this boilerplate language remains a mystery.

Understandably, federal circuit courts disregard state boilerplate language in determining the immigration consequences of a criminal offense because it does not elucidate the specific criteria required to determine whether a conviction exists or the particular elements of an offense. *See Hamdan v. INS*, 98 F.3d 183, 189 (5th Cir. 1996) ("This use of archaic boilerplate, unnecessarily included in many Louisiana indictment forms, regardless of whether the crime involves a use of force or arms, is virtually irrelevant to whether the charge was brought under any particular section of the simple kidnapping statute."); *United States v. Holloway*, 630 F.3d 252, 260 (1st Cir. 2011) (finding that court may not rely on the boilerplate "did assault and beat" charging language to decide that a violation of the Massachusetts statute is a crime of violence because it does not identify which particular battery offense served as the offense of conviction).

As a matter of plain English, the North Carolina form utterly fails to establish what facts or responsibility – if any – the accused is taking. The mere checking of box nine on this form then fails to establish that a North Carolina

defendant has "admitted sufficient facts to warrant a finding of guilty." 8 U.S.C. § 1101(a)(48)(A)(i).

Moreover, the Board has developed a body of case law in an analogous area of law offering a sound process for determining when a state adjudication fairly shows the noncitizen "admitted to sufficient facts to warrant a finding of guilty." A noncitizen who "*admits having committed, or who admits committing acts which constitute the essential elements of*" a crime involving moral turpitude or controlled substance offense is inadmissible. *See* 8 U.S.C. § 1182(a)(2)(A)(i) (emphasis added). In that context, the Board has formulated certain rules as prerequisites to ensure the reliability and validity of an admission of guilt or an admission of commission of acts:

> (1) It must be clear that the conduct in question constitutes a crime or misdemeanor under the law where it is alleged to have occurred.
>
> (2) The alien must be advised in a clear manner of the essential elements of the alleged crime or misdemeanor.
>
> (3) The alien must clearly admit conduct constituting the essential elements of the crime or misdemeanor and that he committed such offense. By the latter is meant that he must admit the legal conclusion that he is guilty of the crime or misdemeanor.
>
> (4) It must appear that the crime or misdemeanor admitted actually involves moral turpitude, although it is not required that the alien himself concede the element of moral turpitude.
>
> (5) The admissions must be free and voluntary.

Matter of G-M-, 7 I&N Dec. 40 (AG 1955). The third and fifth requirements are particularly noteworthy. With their inclusion, the Board cemented the importance of ensuring that the noncitizen specifically admit conduct constituting the essential elements of the crime and that those admissions be free and voluntary before any legal consequences may attach. These requirements provide useful guidance in this as yet untilled but analogous area of the law.

Regarding the requirement of showing an admission to the essential elements, the North Carolina form simply does not require that. First, there is nothing in the deferred prosecution statute, case law, or Form itself that even establishes that a defendant would need to admit to facts sufficient to warrant a finding of guilt or to satisfy every element of the charged crime. In fact, there is no statutory basis whatsoever for the "admission of responsibility and stipulation of facts" language in the boilerplate form.

Regarding the safeguards of requiring that an admission be made freely and voluntarily before any legal consequences attach, the form also flunks the test. The mere signature of a noncitizen on this densely-packed form, with cryptic language inked in tiny print, far from establishes the inferences the government now seeks to draw—that specific factual assertions were freely and

voluntarily made. The ambiguous form itself does not establish what the noncitizen would have understood by signing it, at least as regards the factual admissions and inferences which the government now seeks to attach, and the consequences of such "admissions."

In sum, a noncitizen's mere check of box nine on the boilerplate North Carolina form far from satisfies the precise legal standard under 8 U.S.C. § 1101(a)(48)(A) ("admitted to sufficient facts to warrant a finding of guilty").

III. The Government Failed to Establish that There was a Guilty Finding, Plea or Admission of Sufficient Facts in Mr. Boggala's Particular Case.

The Court should find no conviction in this particular case because the government did not establish that there was a finding of guilt, plea of guilt or admission of sufficient facts.

The government must demonstrate by clear and convincing evidence that a noncitizen is deportable. *See* 8 U.S.C § 1229a(c)(3)(A). Here, that would include proving that Mr. Boggala has a "conviction" as defined under 8 U.S.C. § 1101(a)(48)(A). As discussed above, the North Carolina deferred prosecution statute does not require a finding of guilt, a plea of guilty, or admission of sufficient facts. N.C. Gen. Stat. § 15A-1341(al). Likewise, there is no evidence in the record indicating the existence of a formal judgment of guilt, a plea of

guilty or nolo contendere, or a finding of guilt by a judge or a jury.

What does exist is the checked box on the deferred prosecution order referring to a boilerplate "admission of responsibility" and "any stipulation of facts," and a contemporaneous transcript. *See* R.818, 821-829. Throughout this transcript, the trial court rotely tracked the language of the boilerplate order. Parroting the top of the form, the court asked the defendant's name and age and whether the defendant understood that he is before the court on a motion to defer prosecution for the offense of solicitation of a child by computer to commit a sexual act. R.824. Next, the court marched through the seven boxes on the form including the admission of responsibility, which represents a single paragraph in the transcript. R.824-26. Specifically the court asked, "Sir, you are admitting responsibility and stipulating to the facts to be used against you and admitted into evidence without objection in the state's prosecution against you for this offense should prosecution become necessary as a result of these terms, that is, if you do not complete the terms of the agreement. Do you understand?" To which the defendant replied, "Yes." R.826. The remainder of the transcript tracked the second page of the boilerplate order including the defendant's oath and the court's findings. R.827-29. Significantly, the court made no finding of guilt or of any admission warranting a finding of guilt.

Based on this form and transcript, the Board found that Mr. Boggala admitted *sufficient facts to warrant a finding of guilt* because during his colloquy with the superior court, "the respondent admitted 'responsibility and stipulate[d] to the facts to be used against [him] and admitted into evidence without objection in the state's prosecution.'" *See* R.4. But this is plainly wrong.

As explained in Section II, *supra*, the plain-language reading of the phrase "admitted to sufficient facts to warrant a finding of guilt" means that a defendant admitted facts sufficient to satisfy every element of the crime of which is he is charged. Both the state and federal case law confirm that a bare "admission," without any factual basis, can never be sufficient to sustain a finding of guilt.

The North Carolina statute provides that a judge "may not accept a plea of guilty or no contest without first determining that there is a factual basis for that plea." N.C. Gen. Stat. § 15A-1022(c). In interpreting the provision, the North Carolina Supreme Court held that "[a] defendant's bare admission of guilt, or plea of no contest, always contained in such transcripts, does not provide the 'factual basis' contemplated by G.S. 15A-1022(c)." *State v. Sinclair*, 270 S.E.2d 418, 421 (N.C. 1980). Consequently,

the court found that the transcript of plea form,[4] which merely refers to the statutory charge, was insufficient to provide a factual basis. *See id*. In other words, there must be facts on the record and not a mere recitation of the statutory provision charged to warrant a finding of guilt under North Carolina law.

Federal law has similar requirements. *See Santobello v. New York*, 404 U.S. 257, 261 (1971) (noting under Fed. R. Crim. P. 11, before a federal court can enter judgment, it must develop the factual basis for the plea "on the record" by, for example, "having the accused describe the conduct that gave rise to the charge"); *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991) (finding that Fed. R. Crim. P. 11(f) "ensures that the court make clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime") (citing *United States v. Fountain,* 777 F.2d 351, 355 (7th Cir.1985), *cert. denied,* 475 U.S. 1029 (1986)). *See also United States v. Carr*, 271 F.3d 172 (4th Cir. 2001) (finding factual basis insufficient to support guilty plea to arson where colloquy did not establish interstate commerce element).

Here, while the box is checked on the deferred prosecution order referring to a boilerplate "admission of responsibility" and "any stipulation

[4] This form is available at http://www.nccourts.org/forms/Documents/839.pdf.

of facts," and the defendant orally agreed to that boilerplate language, there is nothing further in the record indicating that an admission or stipulation of specific facts actually occurred, much less whether it was sufficient to warrant a finding of guilt. In the colloquy, the court did not convey the elements of the offense to Mr. Boggala. Nor did the court ask the respondent about his conduct on the particular occasion in question. Nor did the prosecutor or defense counsel provide a statement of facts that Mr. Boggala adopted. Nor did Mr. Boggala make a written stipulation to specific facts in the record. Nor was any testimony presented as to the allegations. In other words, the court did not solicit or obtain any sort of factual basis that would satisfy each element of the charged offense. Further, the court did not make any determination on the record of a factual basis for a finding of guilt.

The mere checking of box 9 on the North Carolina boilerplate order, and oral assent to that language, without more, fails to establish which facts Mr. Boggala admitted, and whether they would satisfy every element of the crime of which is he is charged. Moreover, a bare admission without an adequate factual basis is insufficient for a finding of guilt under both state and federal law. Thus, the boilerplate order and rote and limited colloquy do not satisfy the legal conclusion that Mr. Boggola "admitted sufficient facts to warrant a finding of guilty." *See*, *e.g.*, *Iqbal*, 604 F.Supp. 2d at 826-27 (finding the

boilerplate language in the respondent's pretrial diversion agreement, which stated: "[u]pon your accepting responsibility for your behavior and by your signature on this Agreement, it appearing, after an investigation of the offense, and your background, that the interest of the United States and your own interest and the interest of justice will be served by the following procedure...." insufficient to warrant a finding of guilt).

Consequently, the government did not meet its burden of demonstrating by clear and convincing evidence that Mr. Boggala was convicted under Section 1101(a)(48)(A).

CONCLUSION

For the foregoing reasons, the Court should find that a North Carolina deferred prosecution under N.C. Gen. Stat. § 15A-1341(al) does not qualify as conviction under immigration law, and that, in particular, Mr. Boggala's does not.

Respectfully submitted,

/s/ Sejal Zota

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because it contains 4682 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Calisto MT 14-point font.

DATED: August 25, 2016

/s/ Sejal Zota
Sejal Zota
National Immigration Project of
the National Lawyers Guild

CERTIFICATE OF SERVICE

When All Case Participants are Registered
for the Appellate CM/ECF System

U.S. Court of Appeals Docket No. 16-1558

I, Sejal Zota, certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on August 25, 2016.

I certify that all participants in the case are registered CM/ECF users and that service was accomplished through the CM/ECF system.

Date: August 25, 2016

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