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IN THE APPELLATE COURT OF MARYLAND

No. 1013
September Term, 2022

BARBARA CLAIR, ASSIGNEE OF DONNA KEMP,

Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE),

Appellee.

On Appeal from the Circuit Court for Montgomery County
(The Honorable Ronald Rubin, Presiding)

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER AND HOUSING INITIATIVE PARTNERSHIP, INC., IN SUPPORT OF APPELLANTS

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Statements of Interest

The **Public Justice Center** (PJC) is a Maryland-based non-profit civil rights and anti-poverty legal organization established in 1985. Adopting a racial equity lens, the PJC uses impact litigation, public education, and legislative advocacy to accomplish law reform for its clients. The PJC's Appellate Advocacy Project expands and improves representation of indigent and disadvantaged persons and civil rights issues before the Maryland and federal trial and appellate courts. The organization has a longstanding commitment to protecting the rights of low-income homeowners and mortgage holders. *See*, *e.g.*, *Wheeling v. Selene Finance LP*, 473 Md. 356 (2021); *Goshen Run Homeowners Assoc., Inc. v. Cisneros*, 467 Md. 74, 110 (2020); *Wells Fargo Home Mortg., Inc. v. Neal*, 922 A.2d 538 (Md. 2007) (amicus); *Sweeney v. Savings First Mortg.*, 897 A.2d 1037 (Md. 2005) (amicus). In this case, the PJC has an interest in protecting its client community from the deleterious effects of junk fees.

The **Housing Initiative Partnership, Inc.** (HIP) develops innovative affordable housing, revitalizes neighborhoods, and equips people to achieve their housing and financial goals. HIP's vision is that every person lives in high-quality affordable housing in a thriving community. With offices in Hyattsville in Prince George's County, Maryland, and Germantown and Gaithersburg in Montgomery County, Maryland, HIP is committed to promoting homeownership in Maryland by working to eliminate racial and systemic inequalities that contribute to housing disparities. In this case, HIP has an interest in ensuring that Maryland homeowners, such as the clients it serves, have recourse against mortgagors and mortgage investors whose servicers charge junk fees.

Introduction

Junk fees jeopardize the rights and economic security of Maryland homeowners, among others. These costs, which lenders and servicers add without express authorization—or even despite explicit law prohibiting them—are hidden from consumers when they enter into a contract, including a mortgage. Examples of junk fees identified by the Consumer Financial Protection Bureau ("CFPB") include "'service charges' on ticket prices; 'resort fees' that increase the cost of hotel stays; and mystery fees on phone and cable bills." Eric Mogilnicki & Uttara Dukkipati, *Bureau Criticizes "Junk Fees," Seeks Additional Information*, 2022-FEB Bus. L. Today 17 (2022) (internal citation omitted). Junk fees also include putative "convenience fees imposed by mortgage servicers." Donielle Tigay Stutland, *State AGs Urge CFPB to Prohibit Mortgage Servicers From Charging Convenience Fees*, Wolters Kluwer Banking and Finance Law Daily, 2022 WL 1089832 (Apr. 12, 2022). Such fees lack salience. Put another way, generally, consumers are unaware of such fees when they sign a mortgage. Since "junk fees are almost always financed as part of the loan principal . . . unsuspecting borrowers cannot tell the difference [between junk fees and legitimate costs due]," and therefore, borrowers "are forced to pay outrageous fees for worthless services, as well as interest on those fees, in monthly payments over a course of years – sometimes over a lifetime." Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 Fla. L. Rev. 807, 901 (2003).

Junk fees impose costs of hundreds, sometimes thousands, of dollars. *Compare Smith v. Westminster Mgmt., LLC*, No. 2508, 2023 WL 2344304 (Md. App. Ct. Mar. 3, 2023), *with* Doug Donovan, *Kushner apartments charge improper fees, tenants allege in lawsuit*, Balt. Sun (Sept. 27, 2017) (reporting on a housing management company's routine practice of charging tenants "in excess of 5 percent of the amount of rent due for a rental period for which a rent payment was delinquent" and "charg[ing] late fees even when tenants paid their rent on time") (internal quotation marks omitted). Thus, safeguarding consumers' ability to challenge junk fees is critical.

Here, the circuit court's misapplication of the *Merrill* Doctrine and the Housing and Economic Recovery Act ("HERA") Penalty Bar deprives consumers of recourse against junk fees subject to this action: property inspection fees that state law prohibits lenders and servicers from imposing upon borrowers. Derived from the Supreme Court's 1947 decision in *Federal Crop Insurance Corporation v. Merrill*, the *Merrill* Doctrine stands for the proposition "that the rules of law whereby private insurance companies are rendered liable for the acts of their agents are not bodily applicable to a Government agency like the Corporation, unless Congress so provided." 332 U.S. 380, 383 n.1 (1947); *see also Paslowski v. Standard Mortg. Corp. of Georgia*, 129 F.Supp.2d 793, 800 (W.D. Pa. 2000) (summarizing *Merrill* as "the doctrine that the government cannot be estopped or bound by the unauthorized acts or conduct of its agents or its employees"). Similarly, HERA prohibits imposition of penalties or fines against the Federal Housing Finance Agency ("FHFA"). *See* 12 U.S.C. § 4617(j)(3). As explained in Appellants' opening brief, legally, neither doctrine applies to the instant case.

Practical considerations reinforce this conclusion. A court's examination of such considerations does not constitute judicial policymaking. Rather, such review allows a court to abide by "the 'cardinal rule[] of statutory construction . . . that whenever possible an interpretation should be given to the statutory language which will not lead to oppressive, absurd or unjust consequences.'" *Nationstar Mortgage LLC v. Kemp*, 476 Md. 149, 160 (2021) (quoting *B.F. Saul Co. v. West End Park North, Inc.*, 250 Md. 707, 722 (1968)). Review here is essential to avoid calamitous results.

Examining Maryland's consumer protection law alongside the practical problems posed by junk fees demonstrates that affirmance of the circuit court's decision will lead to oppressive, absurd, and unjust consequences. First, the disproportionate impact of junk fees on marginalized communities highlights the need for judicial recourse against lenders and mortgage assignees whose servicers impose illegal fees. Second, the approach of other jurisdictions, including the federal government, underscores the importance of holding all lenders and assignees liable for illicit fees charged by their servicers. Thus, operation of the *Merrill* Doctrine or HERA Penalty Bar in this case runs contrary to the doctrines' purposes, as it subjects consumers—potentially millions of them—to illegal fees with no remedy. *See* Consumer Financial Protection Bureau, Mortgage Servicing COVID-19 Pandemic Response Metrics 6 (May 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-covid-19-pandemic-response-metrics_report_2022-05.pdf (finding that the loan portfolios of the 16 large servicers surveyed "include[ed] nearly 17.6 million (84%) federally backed loans," including those backed by Fannie Mae).

Argument

I. The junk fees disproportionately harm people of color and low-income people of all races

Homeownership plays a central role in promoting economic and social stability. Indeed,

> It is undeniable that homeownership in the United States has been "one of the important ways in which Americans have traditionally acquired financial capital, . . . tax advantages, the accumulation of equity, and the increased value of real property [to] enable homeowners to build economic assets . . . . These assets can be used to educate one's children, to take advantage of business opportunities, to meet financial emergencies, and to provide for retirement."

Keeanga-Yamahtta Taylor, *Race for Profit* 259 (2019) (quoting U.S. Commission on Civil Rights, *Understanding Fair Housing*, 1 (1973)). The history of exploiting the housing market to extract wealth from Black communities is well documented. *See id* at 261 ("There has not been an instance in the last 100 years when the housing market has operated fairly, without racial discrimination."). Unfortunately, this history demonstrates that lenders and other for-profit entities manage to twist even policies passed to protect Black homeowners to effectuate abuse and dispossession. *See id.* at 18 (observing that though the federal Fair Housing Act aimed to eradicate housing discrimination, "[racism's] cumulative effect had already marked Black neighborhoods in such ways that still made them distinguishable and vulnerable to new forms of financial manipulation"). Viewed in this context, imposition of junk fees is simply among the latest gambits devised to extort wealth from low-income and minority communities. The additional barriers faced by low-income and minority homebuyers have drawn the attention of

policymakers. *See* Brian Deese, Neale Mahoney, & Tim Wu, *The President's Initiative on Junk Fees and Related Pricing Practices* (Oct. 26, 2022), available at https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/ (discussing how junk fees "disproportionately impact lower income households and people of color").

Disclosure requirements fail to adequately protect consumers. Social science literature highlights that these requirements fail to inform mortgagees of the terms of their loans. Inadequacies can include "the physical layout of disclosure forms," as well as "verbal behaviors on the part of salespeople." Jessica M. Choplin & Debra Pogrund Stark, *Whispering sweet nothings: a review of verbal behaviors that undermine the effectiveness of government-mandated home-loan disclosures*, 4 Cognitive Research: Principles and Implications 1, 2-3 (2019), available at https://doi.org/10.1186/s41235-019-0154-7. Indeed, the layout of disclosure forms often confounds consumers. *Id.* at 5. The volume of information conveyed on the forms often overwhelms consumers, leading them to skim the forms, thereby heightening consumers' misunderstanding of key terms. *Id.* at 5 (internal citation omitted). Moreover, "[v]erbal behaviors by salespeople . . . such as violating conversational norms, introducing confirmation biases, and talking to consumers can direct consumers' attention away from critical information as they review disclosure forms," compounding consumers' confusion. *Id.* at 7.

Here, the fees at issue are not just misleading—they are also usurious. "The Usury Law defines 'usury' as 'the charging of interest by a lender in an amount which is greater than that allowed by this subtitle [Interest and Usury]." *Kemp*, 476 Md. at 158-59 (citing

Md. Code Ann., Com. Law ("CL") § 12-101(m)). "Prohibitions against excessive interest, or more properly usury, have been found in almost all societies since antiquity." Charles R. Geisst, *Beggar Thy Neighbor: A History of Usury and Debt* 2 (2013). Historically, "[w]hether loans were made in cash or in kind, unscrupulous lenders were said to be practicing a beggar-thy-neighbor policy by ensuring that the borrowers were disadvantaged to the point of losing their collateral or in extreme cases even losing their freedom or families." *Id.* Contemporary consideration of usury typically centers on "interest and unfair lending practices." *Id.* at 11. In Maryland, "the General Assembly has legislated on the subject [of usury] since colonial times." *Kemp*, 476 Md. at 158 (citing *Scott v. Leary*, 34 Md. 389 (1871) for a summary of the development of Maryland Usury Law since 1704)).

Today, consistent with this history, Maryland's Usury Law prohibits a lender from "impos[ing] a lender's inspection fee in connection with a loan secured by residential real property," Md. Code Ann., CL § 12-121(b), subject to limited enumerated exceptions, *see id.* (c). The Maryland Supreme Court recognized the fees at issue in this case as usurious. *See Kemp*, 476 Md. at 193 (holding that the fees at issue in this case violated Maryland's prohibition on usury).

Such recognition is both appropriate and timely. Like many states, Maryland is still recovering from the 2008 housing crisis. This has led to an influx of out-of-stage hedge funds buying mortgages and foreclosing on people's homes. *See* Meredith Cohn, *Consumer advocates warn of another potential mortgage crisis in Maryland, call for legislative reform*, Balt. Sun (Nov. 29, 2018) (reporting that Maryland "homeowners who

run into financial trouble are finding that the [hedge] funds have bought their mortgages and are often unwilling to modify their loans – and sometimes charge fees they don't understand," resulting in "some lenders mov[ing] quickly to foreclose, taking homes from families and wealth from communities").

The COVID-19 pandemic aggravated these problems. Nationally, "the pandemic exacerbated" housing instability faced by minority groups, "particularly for those with low or moderate incomes," with Black and Hispanic respondents facing the slowest recovery. Yung Chun, et al., *Racial and Ethnic Disparities in Housing Instability During the COVID-19 Pandemic*, 1 J. Econ. Race Pol'y 1, 11 (2022). As homeowners and renters struggled, investors capitalized. *See* Giacomo Bologna, *Outside investors are buying up homes in Baltimore's low-income and Black neighborhoods*, Balt. Sun (Oct. 28, 2022). This has resulted in investors purchasing "three out of every five homes sold since 2019" in "predominantly Black neighborhoods," leading to an increase in median home sales prices to investors from $42,000 in 2019 to $72,000 in 2022. *Id.* This trend presents several problems, as "large landlords," like investors, "are more likely to evict tenants," and the transfer of property to out-of-state investors means that "Black residents will miss out on a generational opportunity to build wealth – wealth that will instead be extracted by management companies and pocketed by anonymous investors." *Id.*

Homeowners of all races who cannot afford to pay usurious fees face loss of home and later eviction. Eviction imposes significant costs on the individual and the community. These include increased homelessness, rates of hospitalization, and reported

mental-health issues;[1] higher rates of mortality pertaining to substance use;[2] adverse birth outcomes;[3] and long-term depressive symptoms for youth, which can extend into adulthood,[4] among other harmful effects. *See also* Matthew Desmond, *Evicted: Poverty and Profit in the American City* 299-300 (2016) (identifying the adverse impacts of eviction, including "[l]osing your home and possessions and often your job; being stamped with an eviction and being denied government housing assistance; relocating to housing in poor and dangerous neighborhoods; and suffering from increased material hardship, homelessness, depression, and illness." In sum, "[e]viction does not simply

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[1] *See* Robert Collinson, et al., *Eviction and Poverty in American Cities*, National Bureau of Economic Research (Aug. 2022), available at https://www.nber.org/system/files/working_papers/w26139/w26139.pd, 2-3 (analyzing eviction data from New York City, NY, and Cook County, IL, and finding that "eviction causes spikes in homelessness and increases in residential mobility," and "worsens financial health and credit access beyond the initial period of increased housing instability and homelessness," including "increase[ing] the number of hospital year following court filing" and "increas[ing] visits for mental health-related conditions during the same period").

[2] *See* Ashley C. Bradford & David Branford, *The effect of evictions on accidental drug and alcohol mortality*, 55 Health & Social Care in the Community 9 (2022), available at https://onlinelibrary.wiley.com/doi/10.1111/1475-6773.13256.

[3] *See* Emily W. Harville, Maeve E. Wallace, and Katherine P. Theall, *Eviction as a social determinant of pregnancy health*, 30 Health and Social Care e5579 (2022), available at https://onlinelibrary.wiley.com/doi/abs/10.1111/hsc.13983 (analyzing 2,950,965 births across 45 states and finding that "living in the highest quartile of eviction was associated with a 12-13% increased odds of low birthweight" and that "[t]he association between eviction rate and low birthweight/preterm birth was strongest for black women").

[4] *See* Morgan K. Hoke & Courtney E. Boen, *The health impacts of eviction: Evidence from the national longitudinal study of adolescent adult health*, 273 Social Science & Medicine, 113742 (Mar. 2021), available at https://www.sciencedirect.com/science/article/abs/pii/S0277953621000745 (concluding "that the recent surges in evictions in the U.S. serve as a potent threat to population health during the emerging adult period, with especially devastating consequences for low-income individuals and communities of color").

drop poor families into a dark valley, a trying yet relatively brief detour on life's journey. It fundamentally redirects their way, casting them onto a different, and much more difficult, path. Eviction is a *cause*, not just a condition, of poverty." *Id.* (emphasis in original).

Marylanders keenly suffer these effects. A recent settlement highlights the pervasiveness and perversity of unlawful housing fees in Maryland. *See* Ryan Dickstein, *$3.25 million settlement reached between Maryland, property company formerly chaired by Jared Kushner*, WMAR (Sept. 23, 2022). As the United States Supreme Court emphasized in *Shelley v. Kraemer*, "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." 334 U.S. 1, 22 (1948). Yet junk fees do just that. Thus, this Court should allow claims against such abuses to proceed by declining to expand and apply the *Merrill* Doctrine and HERA Penalty Bar to Fannie Mae's unlawful usury, thereby effectuating the General Assembly's intent that the courthouse doors remain open to victims of predatory practices.

II. Recourse for victims of junk fees is consistent with the approach of the federal government, Maryland, and sister states

The CFPB seeks to eliminate junk fees. Such fees, the CFPB recognizes, imperil the fiscal health of households and the marketplace as a whole. "Junk fees drain tens of billions of dollars per year from Americans' budgets, and when markets become dependent on these back-end fees, it makes it harder for families to realize the benefits of competition." CFPB, *The hidden cost of junk fees*, Consumerfinance.gov (Feb. 2, 2022), https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees/. In furtherance

of this goal, CFPB recently issued an advisory opinion interpreting Section 808 of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, to prohibit the collection of "any fee . . . unless the fee amount is in the consumer's contract or affirmatively permitted by law." *CFPB Moves to Reduce Junk Fees Charged by Debt Collectors*, CFPB (June 29, 2020), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/. The guidance also clarifies that "[w]here no law expressly authorizes a fee, it is not 'permitted by law,' even if no law expressly prohibits it." *Id.*

This decision coheres with the Biden Administration's recent call to "all agencies to reduce or eliminate hidden fees, charges, and add-ons for everything from banking services to cable and internet bills to airline and concert tickets," as these fees "weaken market competition, raise costs for consumers and businesses, and hit the most vulnerable Americans the hardest." Deese et al., *supra*. Permitting mortgage "junk fee[s] is unjustified, banning the practice outright can reduce firms' incentives to engage in 'exploitative innovation' – developing new junk fees rather than improving the actual quality of the product." *Id.*

Junk fees in the mortgage context analogous to those at issue in this case have attracted the attention of law enforcement officers across the nation. On April 11, 2022, the attorneys general of several states—including Maryland—sent a letter to Rohit Chopra, the Director of CFPB, underscoring the perniciousness of "convenience fees imposed by mortgage servicers." Letter from State Attorneys General to Director Rohit Chopra re: Request for Information Regarding Fees Imposed by Providers of Consumer

Financial Products or Services, Docket No. CFPB-2022-0003 (Apr. 11, 2022) 1, available at http://ag.hawaii.gov/wp-content/uploads/2022/04/State-Attorneys-General-Multistate-Comment-Letter-to-CFPB_convenience-fees_4.11.22_final.pdf. Such fees "are particularly insidious," the attorneys general emphasize, "because, unlike most marketplaces, homeowners have no choice in their mortgage servicer." *Id.* Further, the sale of mortgage servicing rights on secondary markets means "that some servicers have attempted to impose convenience fees even when the fees are not authorized by the original mortgage loan documents and therefore may be unlawful in certain jurisdictions." *Id.* at 2; *see also id.* n.1 (underscoring that "the option of refinancing" is "illusory," as "the consumer still has no control over which company will ultimately service their loan"). Other concerns raised by mortgage junk fees include lack of uniformity, lack of alternative methods of payment to avoid fees, and convenience fees exceeding the servicer's actual payment processing costs, resulting in "mortgage servicers . . . essentially getting compensated twice for accepting a payment." *Id.* at 2-3. Thus, the attorneys general "urge CFPB to consider prohibiting mortgage servicers from imposing convenience fees on consumers," or, "[a]lternatively, . . . to prohibit servicers from charging convenience fees that exceed the actual cost of processing the consumer's payment and require servicers to fully document the costs supporting the imposition of these fees." *Id.* at 3.

These initiatives do not solely protect consumers. Rather, the prohibition and prosecution of unlawful debt collection also safeguards the interests of honest businesses. Congress barred "abusive, deceptive, and unfair debt collection practices." 15 U.S.C. §

1692(a); *see also id.* § 46(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."). It did so expressly "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Thus, these provisions promote economic competition by preventing dishonest lenders or servicers from gaining an unfair advantage in the marketplace.

States and territories adopt a similar approach. The Supreme Court of Washington's analysis is illustrative. In construing the state's Consumer Protection Act (CPA), *see* Wash Rev. Code § 19.86 *et seq.* (2023), that court stressed, "Washington businesses engaging in unfair and deceptive practices that indirectly affect others do not advance the purpose of fair and honest competition. Honest businesses could be placed at a competitive *disadvantage* competing against a business that generates revenue from unlawful acts that violate the statute [the Washington CPA]." *Thornell v. Seattle Service Bureau, Inc.*, 184 Wash. 2d 793, 800 (2015) (emphasis in original). This rationale, the court concluded, called for broad construction of the CPA's protections. Other jurisdictions employ similar reasoning. *See Karlin v. IVF America, Inc.*, 93 N.Y. 2d 282, 287 (1999) (emphasizing that "to ensure an honest marketplace, the [New York] General Business Law prohibits all deceptive practices"); *Ai v. Frank Huff Agency, Ltd.*, 607 P.2d 1304, 1311 (Haw. 1980) ("HRS s 480-2, as its federal counterpart in the FTC Act, was constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive practices for the protection of both consumers and *honest businessmen*.") (emphasis added); *Government of Guam v. Kim*, No. CVA14-023, 2015

WL 1956531, at *15 (Guam Apr. 28, 2015) ("Honest companies would be more willing to enter contracts in a jurisdiction where fraud and deceptive practices are discouraged, and where they have legal protections if they are a victim to fraud."). The legislative history of Maryland's Consumer Protection Act evidences a similar intent. *See* Md. Fisc. Note, 2020 Sess. H.B. 93 (2020) (reporting recommendation of the Maryland Financial Consumer Protection Commission that "if a retailer of a manufactured home provides information regarding financing the purchase of the home, the retailer . . . must do so in a *fair and honest manner* in compliance with the Maryland Consumer Protection Act") (emphasis added). Therefore, declining to apply the Merrill Doctrine and HERA Penalty Bar here aligns with the approach of other states, and the purpose of Maryland's General Assembly, as it ensures broad protection for vulnerable consumers and law-abiding businesses.

Here, allowing the Appellants' claims against Fannie Mae's usury practices to proceed to trial by refusing to expand the *Merrill* Doctrine and HERA Penalty Bar aligns with the policy of the federal government and several state governments, including Maryland. *See Kemp*, 476 Md. at 193 (emphasizing that "[t]here appears to be no dispute that Ms. Kemp's mortgage loan is a consumer transaction within the purview of the statute" and "[t]he prohibition on charging inspection fees in CL § 12-121 applies to an assignee of a mortgage loan, such as Fannie Mae, and a servicer, such as Nationstar"); *see also* Md. Code Ann., CL § 12-114 (providing remedies for violations of Maryland's usury law). Unless victims can hold marketplace giants, like Fannie Mae, accountable for junk fees charged by their mortgage servicers, such behavior will remain difficult to

detect, punish, or deter, encouraging rampant consumer exploitation. Such a result is oppressive, absurd, and unjust—and avoidable. To prevent such an outcome, and give effect to legislative intent, this Court should clarify that the doctrines invoked by Appellee do not apply to the instant case.

Conclusion

For the reasons set forth above, *Amici Curiae* respectfully urge the Court to reverse the circuit court's grant of summary judgment and remand for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,829 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Hayley Hahn
Hayley Hahn

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 20-201(g), on April 19, 2023, the foregoing Brief of *Amici Curiae* was served via the MDEC File and Serve Module, and that, pursuant to Rule 8-502(c), two copies each were mailed, postage prepaid, first-class, to:

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