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In the  
**Court of Appeals of Maryland**

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September Term, 2019

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No. 74

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STATE OF MARYLAND,  
*Petitioner,*  
v.  
KENNARD CARTER,  
*Respondent.*

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On Writ of Certiorari to the  
Court of Special Appeals of Maryland

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**Brief of the Maryland Criminal Defense Attorneys' Association as  
Amicus Curiae in Support of the Respondent  
(Filed with All Parties' Consent)**

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**TABLE OF CONTENTS**

Table of Contents..... i

Table of Authorities..... ii

Statement of Interest..... 1

Argument..... 1

I. The MTA’s Unconstitutional Seizures Are Not Necessary. .... 1

    A. The State Cannot Create Necessity by Purposefully Designing Its  
        System to Result in Illegal Seizures. .... 2

    B. The State Has Significantly Less-Invasive Alternatives..... 3

II. Fare Sweeps Disproportionately Violate the Rights of Lower-Income and  
    Minority Populations..... 6

Conclusion..... 11

Certification of Word Count and Compliance With Rule 8-112..... 12

Rule 1-313 Certification ..... 12

## TABLE OF AUTHORITIES

### Cases

<i>Azizova v. Suleymanov</i> , 243 Md. App. 340 (2019) .....	10
<i>Collins v. State</i> , 452 Md. 614 (2017).....	10
<i>Kentucky v. King</i> , 563 U.S. 452 (2011).....	2
<i>Edwards v. California</i> , 314 U.S. 160 (1941).....	8
<i>Motor Vehicle Administration v. Seenath</i> , 448 Md. 145 (2016) .....	8
<i>Nardone v. United States</i> , 308 U.S. 338 (1938) .....	2
<i>Sloane v. United States</i> , 47 F.2d 889 (10th Cir. 1931).....	2
<i>United States v. Leake</i> , 95 F.3d 409 (6th Cir. 1996) .....	2
<i>Utah v. Strieff</i> , 136 S. Ct. 2056 (2016).....	10

### Other Authorities

Allison Bruff, Comment, <i>Ripe for Rejection: A Methodology for States’ Departure from Utah v. Strieff and its Poisonous Fruit</i> , 86 Miss. L. J. 833 (2017).....	10
Department of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2016 (2018), <i>available at</i> <a href="https://tinyurl.com/y9pwr4x">https://tinyurl.com/y9pwr4x</a> .....	10
Faiz Siddiqui, <i>If You Ride MARC, Be Prepared to Show Your Ticket Before Boarding</i> , The Washington Post (Mar 1, 2016), <i>available at</i> <a href="https://tinyurl.com/yb83llwx">https://tinyurl.com/yb83llwx</a> . .....	5
Federal Transit Administration, A Toolkit for Self-Service, Barrier-Free Fare Collection (2002), <i>available at</i> <a href="https://tinyurl.com/yak7wywq">https://tinyurl.com/yak7wywq</a> .....	3, 4
Hon. Mary Ellen Barbera, Statement on Equal Justice under Law (Jun. 9, 2020), <i>available at</i> <a href="https://tinyurl.com/ycsrf2w8v">https://tinyurl.com/ycsrf2w8v</a> .....	9, 10
Letter from Lawrence J. Hogan, Jr. to Hon. Bill Ferguson (May 7, 2020), <i>available at</i> <a href="https://tinyurl.com/y9z57stx">https://tinyurl.com/y9z57stx</a> .....	9

MARC Train Service, Rider Guide, <i>available at</i> <a href="https://tinyurl.com/ycfqnd52">https://tinyurl.com/ycfqnd52</a> (last visited June 10, 2020).....	4
Maryland Department of Transportation, Connecting Our Future: A Regional Transit Plan for Central Maryland, <i>available at</i> <a href="https://rtp.mta.maryland.gov">https://rtp.mta.maryland.gov</a> (last visited June 10, 2020).....	7, 8
Maryland Stadium Authority, 2018 Annual Review (2018), <i>available at</i> <a href="https://tinyurl.com/ya6eq4x4">https://tinyurl.com/ya6eq4x4</a> . ....	3
Maryland Transit Administration, 2017-2020 Title VI Implementation Program (2017), <i>available at</i> <a href="https://tinyurl.com/y79fwens">https://tinyurl.com/y79fwens</a> .....	6, 7, 8
Maryland Transit Administration, MTA Media Guide, <i>available at</i> <a href="https://perma.cc/Q69S-NVNC">https://perma.cc/Q69S-NVNC</a> .....	7
Maryland Transit Administration Police, Fare Enforcement Procedure, <i>available at</i> <a href="https://www.mta.maryland.gov/police">https://www.mta.maryland.gov/police</a> (last visited June 10, 2020).....	7
Motor Vehicle Administration, Maryland Demographics (2015), <i>available at</i> <a href="https://tinyurl.com/y8xsgn9c">https://tinyurl.com/y8xsgn9c</a> .....	8
<i>MTA Conducts Fare Compliance Sweeps on Light Rail</i> , WBALTV 11 (Jun. 9, 2015), <i>available at</i> <a href="https://tinyurl.com/yapmk4pm">https://tinyurl.com/yapmk4pm</a> .....	4
Police Shootings Database, The Washington Post, <i>available at</i> <a href="https://tinyurl.com/ycksgxqq">https://tinyurl.com/ycksgxqq</a> .....	11
Press Release, APTA 2017 Rail Safety & Security Excellence Awards Announced (Jun. 14, 2017), <i>available at</i> <a href="https://tinyurl.com/yd9ytel9">https://tinyurl.com/yd9ytel9</a> .....	5
Press Release, Attorney General Frosh Applauds Passage of Bill Prohibiting Fee-Based Driver’s License Suspensions (Mar. 20, 2020), <i>available at</i> <a href="https://tinyurl.com/ydxrenkv">https://tinyurl.com/ydxrenkv</a> .....	9
Press Release, MDOT MTA Wins National Award for Rail Safety and Security (Jun. 13, 2017), <i>available at</i> <a href="https://tinyurl.com/y8u48jj8">https://tinyurl.com/y8u48jj8</a> .....	6
U.S. Census Bureau, Quick Facts, Maryland, <i>available at</i> <a href="https://tinyurl.com/yaazbyew">https://tinyurl.com/yaazbyew</a> .....	7

## STATEMENT OF INTEREST

The mission of the Maryland Criminal Defense Attorneys' Association ("MCDA") includes research, education, and advocacy relating to criminal defense practice, the proper administration of justice, and the protection of individual rights. MCDA respectfully submits this *amicus curiae* brief to address the troubling Fourth Amendment implications of using police to check tickets on a public transit system that serves low-income and minority communities. The parties have consented to MCDA filing this brief.

## ARGUMENT

To ensure no one sneaks a free ride worth \$1.90, the State of Maryland sends armed police onto Light Rail trains to detain everyone on board and, after issuing citations to any would-be turnstile-jumpers, check to see if they are wanted for anything else so the police can arrest them. On other State-run transit lines that are frequented by wealthy white Marylanders, this practice is unheard of. The Court of Special Appeals rightly recognized the injustice in this system and held that it violates the Fourth Amendment. This Court should affirm that judgment.

### **I. THE MTA'S UNCONSTITUTIONAL SEIZURES ARE NOT NECESSARY.**

The State claims that using armed police officers to seize entire cars'-worth of people is necessary to ensure that riders pay their fares, but there are two key reasons why that argument is wrong. First, the State chose to design the Light Rail as an open-fare system; it should not be able to invoke that voluntary design decision as a justification for trampling the Fourth Amendment rights of its citizens. Second, even in

an open-transit system, there are less constitutionally problematic alternatives to using police seizures to check for fare payment.

**A. The State Cannot Create Necessity by Purposefully Designing Its System to Result in Illegal Seizures.**

In arguing that fare sweeps are a necessity, the State ignores that it was *the State* that designed the Light Rail’s ticket system in the first place. The Fourth Amendment prohibits the government from conducting indiscriminate, suspicionless seizures; the State should not be allowed to achieve that same prohibited result by creating a system whose obvious, foreseeable consequence is suspicionless detentions, and then point to that system as justification for the detentions that result.<sup>1</sup>

A simple hypothetical scenario illustrates the sweeping power the State claims for itself. Suppose the Maryland Stadium Authority decided to stop employing ticket-takers at Orioles games, and simply let people walk into the stadium and take a seat. Most fans would still pay for admission but, undoubtedly, some would stop buying tickets because they knew they could get away with it. This would eat into the tens of millions of dollars

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<sup>1</sup> *Cf., e.g., Kentucky v. King*, 563 U.S. 452, 461 (2011) (noting cases holding that police may not create exigency used to justify search under exigent-circumstances exception); *Nardone v. United States*, 308 U.S. 338, 340 (1938) (noting, in wiretap context, that “[t]o forbid the direct use of methods . . . but to put no curb on their full indirect use would only invite the very methods deemed ‘inconsistent with ethical standards and destructive of personal liberty’”); *United States v. Leake*, 95 F.3d 409, 411 (6th Cir. 1996) (noting that exclusionary rule ensures that “the government cannot achieve indirectly what it is forbidden to accomplish directly”); *Sloane v. United States*, 47 F.2d 889, 890 (10th Cir. 1931) (noting that federal officer “must not be permitted to do indirectly that which he cannot do directly, and thus circumvent the provisions of the Fourth Amendment”).

in annual revenue the Stadium Authority makes from game attendance,<sup>2</sup> and the State would cite protecting this revenue as a compelling interest. But imagine if the State’s solution were to flood Camden Yards with armed police who would block the exits and prevent everyone from leaving while officers checked for tickets.

It is difficult to imagine this policy could withstand scrutiny. The State would be hard-pressed to explain how the Fourth Amendment allows it to detain 20,000 spectators who are not suspected of doing anything wrong. And it strains belief to think that anyone would conclude either that the policy was narrowly tailored to catch ticket dodgers or that this was its real purpose. But this scenario is not really hypothetical because it is exactly what the MTA police are doing more than 400,000 times a year, based on the same contorted logic: they’re just doing it one Light Rail car at a time instead. (App. 12.)

**B. The State Has Significantly Less-Invasive Alternatives.**

Despite the State’s protestations, the decision to adopt an open-transit system plainly does *not* require the use of armed police to detain entire train cars of people. Civilian employees can easily check tickets while the train is moving, and most jurisdictions that have open-transit systems use civilians rather than police to verify fares. According to a white paper sponsored by the Federal Transit Administration, more than 70% of “self-service fare collection” systems use “agency staff (*i.e.*, non-police) to perform inspections[.]” Fed. Transit Admin., A Toolkit for Self-Service, Barrier-Free

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<sup>2</sup> In the fiscal year that ended in June 2018, the Stadium Authority received more than \$10 million in admissions taxes, and more than \$40 million in “[r]eceipts from Camden Yards.” *See* Md. Stadium Authority, 2018 Annual Review at 13-14 (2018), available at <https://tinyurl.com/ya6eq4x4>.

Fare Collection at 3-28 (2002), *available at* <https://tinyurl.com/yak7wywq>. “Using agency staff typically costs less than using police . . . . Using agency staff also appears to offer a greater level of control over the inspection process and more stability within the unit, which results in greater consistency in the treatment of passengers.” *Id.*<sup>3</sup>

The State’s own evidence confirms that inspections by non-police employees are a viable—and seemingly more effective—alternative to inspections by police. Civilians conducted only about 43% of Light Rail fare inspections in 2019, but they caught almost twice as many evaders as the MTA police.<sup>4</sup> (*See* App. 12.) Perhaps that is why the Maryland Transit Authority uses other options on its other open-fare systems, such as Maryland Area Regional Commuter (“MARC”) trains, which, as shown below, serve more affluent customers along the Baltimore–Washington corridor. On MARC trains, the conductor walks through the aisle *while the train is moving* and asks passengers to show their tickets. Passengers who do not purchase a ticket before boarding may buy one from the conductor. MARC Train Serv., Rider Guide at 16, 21, 23, 26, *available at* <https://tinyurl.com/ycfqnd52> (last visited June 10, 2020). Thus, the State does not use

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<sup>3</sup> *See also id.* at 4-21 (“The use of police is relatively low; most agencies use a contracted or staff non-police security force. Most agencies have non-security staff on site, and, in some cases, such staff complement the security or police presence. In most cases, this involves the sporadic availability of agency staff with other duties (e.g., maintenance staff and vehicle operators).”).

<sup>4</sup> Not only is fare evasion on the Light Rail lower than the national average, the MTA has recognized that it is sometimes necessary to “educate” customers “about proper use of the light rail system,” suggesting that one reason passengers do not pay fares is unfamiliarity with the system. *MTA Conducts Fare Compliance Sweeps on Light Rail*, WBALTV 11 (Jun. 9, 2015), *available at* <https://tinyurl.com/yapmk4pm>.

police to detain entire trainloads of people. MARC has apparently also used civilian employees to check tickets as passengers are boarding<sup>5</sup>—another alternative that does not involve the use of police to detain an entire train full of passengers.

If civilian inspectors are both cheaper and more effective than the police, and if the MARC system operates efficiently by using the conductor to check fares, then why does the MTA choose to use the police on its Light Rail system? The Court need not guess, because Officer Russell testified at trial that fare inspections are “an apparatus to be able to check people for warrants”—“a roundabout way” to check for warrants as part of MTA’s more general law-enforcement goals. (Petitioner’s Br. 36.) The State discounts Officer Russell’s testimony because he is a “low-ranking officer.” (Petitioner’s Br. 37.) But the MTA itself has publicly touted its Fare Evasion Program as a way to reduce serious crime, belying the notion that fare sweeps are primarily intended to deter fare evasion.

In 2017, the American Public Transportation Association gave the MTA its “Gold Award for Security,” noting that the “MTA Police Force has increased the issuance of citations for fare evasion since 2014 by 109 percent. *The highly visible activity of fare evasion enforcement contributed to a reduction in serious crime by 43 percent.*” Press Release, APTA 2017 Rail Safety & Security Excellence Awards Announced (Jun. 14, 2017), *available at* <https://tinyurl.com/yd9ytl9> (emphasis added). The MTA did not

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<sup>5</sup> See Faiz Siddiqui, *If You Ride MARC, Be Prepared to Show Your Ticket Before Boarding*, Wash. Post (Mar 1, 2016), *available at* <https://tinyurl.com/yb83llwx>.

dispute this characterization but embraced it, issuing its own press release noting the connection between the Fare Evasion Program and its general efforts to reduce crime and improve safety. Press Release, MDOT MTA Wins National Award for Rail Safety and Security (Jun. 13, 2017), *available at* <https://tinyurl.com/y8u48jj8>. Acting MTA Administrator Kevin Quinn explicitly drew a connection between the fare sweeps and the “dramatic improvements we’ve made to provide safe, efficient and reliable transit,” and MTA Police Chief John E. Gavrilis referred to the Fare Evasion Prevention Program’s “goal of fighting crime and enforcing the law[.]” *Id.*

It is no mystery why the State uses armed police officers to detain Light Rail commuters when it would be more effective to conduct civilian fare checks: it believes that doing so advances generalized law-enforcement purposes. The State cannot rig the system by shunning commonsense fare-collection methods in favor of police interdiction, and then claim that its own decision-making allows it to ignore the Fourth Amendment.

## **II. FARE SWEEPS DISPROPORTIONATELY VIOLATE THE RIGHTS OF LOWER-INCOME AND MINORITY POPULATIONS.**

By designing a system that allows MTA police to detain Light Rail passengers at will, the State infringes the Fourth Amendment rights of anyone who relies on public transit—a burden that falls disproportionately on lower-income and minority communities. Sixty-five percent of Light Rail riders are minorities, and forty-five percent are low-income individuals. Md. Transit Admin., 2017-2020 Title VI Implementation Program (“Title VI Report”) at 80, 82 (2017), *available at* <https://tinyurl.com/y79fwens>. The average income of a Light Rail passenger is between \$50,000 and \$65,000 a year—

significantly less than the \$80,000 median household income in Maryland—and 22% of Light Rail passengers make less than \$10,000 a year. Title VI Report at 82; Md. Transit Admin., MTA Media Guide (“Media Guide”) at 17 (2019), *available at* <https://perma.cc/Q69S-NVNC> (listing average incomes of MTA passengers); U.S. Census Bureau, Quick Facts, Maryland, *available at* <https://tinyurl.com/yaazbyew> (last visited June 10, 2020) (noting median annual household income of \$81,868).

Light Rail riders also make starkly less than many other MTA passengers, who are not subjected to daily fare sweeps. For instance, only 8% of MARC passengers are considered low-income, and more than half make six figures. Title VI Report at 82. (MARC riders are also 55% white. *Id.* at 81.) In fact, a Light Rail rider is almost as likely to make less than \$10,000 a year as a MARC rider is to make more than \$150,000. *See id.* at 82. And only Light Rail passengers can expect to be routinely detained by police on their commute.

This Court should not allow the State to create a two-tiered privacy right where people who are not fortunate enough to have access to private transportation are subject to routine, unwarranted police detention. The State contends that “[i]f one dislikes that fares on the Light Rail . . . are the subject of sporadic fare inspections while onboard, one may choose another mode of transportation: no one is forced to take the Light Rail.” (Petitioner’s Br. 50.) That position, adopted for litigation, does not actually reflect the State of Maryland’s policy. Nor should it. In a draft 2020 strategic plan, the Maryland Department of Transportation announced a simple objective: “Be Equitable,” by “[p]rovid[ing] equitable transit access to jobs, services, and other destinations in a just

and fair manner[.]” Md. Dep’t of Transp., *Connecting Our Future: A Regional Transit Plan for Central Maryland* (“2020 Plan”) at 34, *available at* <https://rtp.mta.maryland.gov> (last visited June 10, 2020). For thousands of Marylanders, there is nothing optional about public transit. “Access to transit is particularly important for low-income households and households without a car.”<sup>6</sup> *Id.* at 34. Twenty-one percent of Light Rail riders (and twenty-five percent of riders with limited English proficiency) would not have made their trip at all if the Light Rail had not been available. Title VI Report at 85, 50. These people, like everyone, need to work, go to the doctor, take their children to school, buy groceries, or just get out of the house.<sup>7</sup> Their right to do so should not be conditioned on surrendering Fourth Amendment protections that wealthy commuters are allowed to keep.<sup>8</sup>

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<sup>6</sup> More than a million Marylanders do not have a driver’s license. In January 2015, Maryland’s population was estimated at 5.7 million, of whom only 4.1 million were licensed drivers. Motor Vehicle Admin., *Maryland Demographics* at 18 (2015), *available at* <https://tinyurl.com/y8xsgn9c>.

<sup>7</sup> Not to mention go to court. Any defense lawyer could attest that when people’s cars break down or licenses get suspended, courts rightly expect that defendants will keep their court dates, and take public transit if necessary.

<sup>8</sup> While the Fourteenth Amendment guarantees the fundamental right to “remove from one place to another,” *Edwards v. California*, 314 U.S. 160, 169 (1941) (Douglas, J., concurring), this Court has repeatedly noted that the ability to drive a car is a privilege, not a right, *e.g.*, *Motor Vehicle Admin. v. Seenath*, 448 Md. 145, 183 (2016) (“Driving on the roads of this State is not a right, but a privilege.”) (quoting *State v. Sullivan*, 407 Md. 493, 501 (2009)) (modifications omitted). Reliable access to public transit is therefore essential to promote important rights, and the State must not place unreasonable conditions on that access. This also distinguishes programs that burden the ability to *drive* from fare sweeps.

Indeed, not long after it filed its brief in this Court, the Maryland Office of the Attorney General took a very different view of the challenges low-income Marylanders face getting around. In a statement supporting a bill to make it harder to suspend drivers' licenses, the Attorney General noted that “[w]e should not penalize Marylanders for being poor—limiting their ability to get to work, to doctor’s appointments, or pick children up from school.” Press Release, Attorney General Frosh Applauds Passage of Bill Prohibiting Fee-Based Driver’s License Suspensions (Mar. 20, 2020), *available at* <https://tinyurl.com/ydxrenkv>. Forcing people to choose between effective public transportation and an effective Fourth Amendment is exactly the kind of penalty for being poor that the Attorney General and the General Assembly<sup>9</sup> recognize has no place in Maryland.

The State also points out that the Light Rail’s fare inspection procedures have been in operation for 28 years. (Petitioner’s Br. 53, 64.) That longevity should not be mistaken for solid constitutional footing. On the contrary, the lessons of the past three decades show that it is essential to confront *longstanding* inequalities woven into the fabric of the justice system. As Chief Judge Barbera put it only days ago, “we have begun to address some of the systemic inequities that affect the poor and people of color more often and with greater detriment,” but “we will do better in Maryland because we must, until we achieve what a true democracy requires: equality for all people.” Hon. Mary

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<sup>9</sup> The Legislature passed the bill, which will take effect later this year without Governor Hogan’s signature. *See* Letter from Lawrence J. Hogan, Jr. to Hon. Bill Ferguson (May 7, 2020) at 6, *available at* <https://tinyurl.com/y9z57stx>.

Ellen Barbera, Statement on Equal Justice under Law (Jun. 9, 2020), *available at* <https://tinyurl.com/ycsrf2w8v>. To do so, we “must, individually and collectively, contribute in any way we can to overcome the bias that divides and imperils our civil society[.]”<sup>10</sup> *Id.* We cannot achieve this goal until the State jettisons old practices that demonstrably deny some communities “their rightful equality.” *Id.*

The pernicious effects of checking for outstanding warrants whenever police issue citations for minor violations are now much better understood than they were 28 years ago. Justice Sotomayor has explained that “[o]utstanding warrants are surprisingly common.” *Utah v. Strieff*, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting). In late 2016, there were 66,139 outstanding warrants in Maryland, of which 47,920 were for misdemeanors. Dep’t of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2016 at Table 5a (2018), *available at* <https://tinyurl.com/y9pwr4x>. Administrative backlogs lead to a proliferation of warrants, and a proliferation of warrants creates a powerful incentive to turn routine police encounters into “fishing expeditions or investigatory stops without reasonable suspicion.” Allison Bruff, Comment, *Ripe for Rejection: A Methodology for States’ Departure from Utah v. Strieff and its Poisonous Fruit*, 86 Miss. L. J. 833, 848-49, 860 (2017).

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<sup>10</sup> Compared to 28 years ago, courts are now recognizing the role that such bias plays in the justice system. *See, e.g., Collins v. State*, 452 Md. 614, 629 n.8 (2017) (describing risks of implicit racial bias among jurors during voir dire); *Azizova v. Suleymanov*, 243 Md. App. 340, 353 n.2 (2019) (Battaglia, J.) (describing risks of implicit gender bias in child custody cases).

And, as tragic news stories that seem too numerous to count constantly remind us, there is no such thing as mundane contact with law enforcement. In the past five years, more than 5,400 people have died in police shootings, blacks at more than twice the rate of whites. *See* Police Shootings Database, Wash. Post, *available at* <https://tinyurl.com/ycksgxqq>. The growing awareness of these issues is progress, and it should cause the State to reexamine whether it is truly necessary to send armed police onto Light Rail trains to catch ticket dodgers. Instead, the State continues to defend an unconstitutional system. Marylanders and this Court ought to be able to expect more of the State.

### **CONCLUSION**

The Court should affirm the judgment of the Court of Special Appeals.

June 15, 2020

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## CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,060 words, excluding the parts of the brief exempted from the word count by Rule 8-503. This brief is typeset in 13-point Times New Roman font.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

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## RULE 1-313 CERTIFICATION

Pursuant to Md. Rule 1-313, I hereby certify that although I do not maintain an office for the practice of law in this State, I am admitted to practice law in Maryland.

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## CERTIFICATE OF SERVICE

I certify that on June 15, 2020, I electronically filed the foregoing using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including counsel for Petitioner, and Respondent, and that I emailed electronic copies to Jer Welter, counsel for Petitioner, at [jwelter@oag.state.md.us](mailto:jwelter@oag.state.md.us), and Renee Hutchins, counsel for Respondent, at [renee.hutchins@udc.edu](mailto:renee.hutchins@udc.edu). Counsel for both parties have consented to electronic service of this brief in lieu of paper copies.

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